

Report

Implementing the DPRK Nuclear Deal: What US Law Requires

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On October 21, 1994, the United States and the Democratic People's Republic of Korea (DPRK) signed the "Agreed Framework," which provided that the DPRK would freeze operation of and eventually dismantle its completed reactor and reprocessing plant at Yongbyon, halt construction of two additional reactors, and eventually comply with its International Atomic Energy Agency (IAEA) safeguards obligations. In return, a multilateral consortium, the Korean Peninsula Energy Development Organization (KEDO), would provide fuel oil and two light-water reactors (LWRs) to North Korea to help meet its energy needs. Over the last six years, smooth implementation of the Agreed Framework has been a prerequisite to wider Western technical and economic cooperation with the DPRK. Even US congressional critics of the understanding have supported the fuel oil transfers for fear that blocking such support might create a crisis with Pyongyang.

With regard to the Agreed Framework's provision of two modern US-designed LWRs, though, more than political preferences must be satisfied. In addition, several US legal conditions must be met. These conditions

are currently a function of the requirements of the US Atomic Energy Act relating to atomic cooperation. Under this law, the United States must enter into a formal nuclear cooperative agreement with the DPRK prior to the shipment of key US nuclear components needed to complete the two reactors promised under the Agreed Framework.

It is still unclear what these US-designed nuclear components will be. A license request was made late in 1997 by ABB-Combustion Engineering for the two promised North Korean reactors, but it was subsequently withdrawn. At the time, however, the license request included the following:

reactor vessels, steam generators, pressurizers, reactor internals, reactor coolant pumps, reactor control rod systems, reactor instrumentation, monitoring and control equipment, reactor auxiliary equipment, emergency core cooling systems, fuel handling equipment, and various other components and software especially designed or prepared for use in a nuclear reactor or any of its components.²

Under the US Atomic Energy Act, the US manufacturer of these nuclear components would have to request a US nuclear export license either to export these items or to have them sold by a foreign licensee. When might this request be made? US officials hope that KEDO will complete the reactors' foundations and install the reactors' balance of plant equipment (e.g., their steam generators) within the next 42 months. Their aim here is to complete the first of the two reactors sometime in 2007 (nearly four years after the Agreed Framework's stated "target date" of 2003). To assure timely production and delivery of the key nuclear components, the license request would have to be filed well before 2004—probably sometime early in the next presidential administration.³

The US Atomic Energy Act, though, would prohibit approving such a license request unless the United States had first reached a formal nuclear cooperative agreement with the government of the DPRK. Although some have speculated that there might be technical ways to avoid this requirement,⁴ the US State Department has made it clear that it has no intention of doing so. As was noted by US State Department and Nuclear Regulatory Commission (NRC) officials in early 1998, the terms of both the Agreed Framework and the KEDO-DPRK "Agreement on Supply of a Light-Water Reactor Project" require a bilateral agreement for peaceful nuclear cooperation before any major US nuclear components can be exported to the DPRK.⁵ The US president could negotiate and sign such an agreement with the DPRK at any time. However, the agreement could not become law until it sat before Congress for 30 days of continuous session. In addition, during this period Congress could void the agreement by passing a joint resolution of disapproval.

Congress has never passed such a joint resolution. In 1984, it conditioned a US nuclear cooperative agreement with the People's Republic of China (PRC), preventing the agreement's implementation for more than 13 years. The first concern Congress had with the PRC agreement was that China's nuclear cooperation with Pakistan was undermining the aims of the Treaty on the Non-Proliferation of Nuclear Weapons (NPT). The second was that the PRC might divert US nuclear imports to military purposes. The third was the PRC's refusal to place the nuclear facilities and materials it acquired from the United States under International Atomic Energy Agency safeguards. Congress highlighted these specific concerns in large part because they were at odds with the legal

criteria for approving US nuclear exports spelled out in the Atomic Energy Act.⁶

Of course, even under the law, the president may try to reach a nuclear cooperative agreement with any nation, even a proliferating state. The Atomic Energy Act's criteria for approving US nuclear exports and congressional interest in upholding them, though, discourage the president from doing so. In the case of the DPRK, the criteria of concern are contained in Section 129 of the Atomic Energy Act. This section prohibits the US export of "nuclear materials and equipment or sensitive nuclear technology" to any non-nuclear weapon state that the president has found to have:

1. terminated or abrogated IAEA safeguards;
2. materially violated an IAEA safeguards agreement; or
3. engaged in activities involving source or special nuclear material and having direct significance for the manufacture or acquisition of nuclear explosive devices, and failed to take steps which, in the president's judgment, represent sufficient progress toward terminating such activities.

What makes these criteria particularly salient is that the White House has already gone a long way toward making all three determinations with regard to the DPRK. Indeed, the first two findings—that the DPRK terminated, abrogated, or materially violated IAEA safeguards—are presumed by the Agreed Framework that the president signed with the DPRK in 1994. According to provision IV (3) of the Agreed Framework, the DPRK is to "come into full compliance with its safeguards agreement with the IAEA" when a "significant portion of the LWR project is completed." This formal political understanding complements the president's earlier public declaration that the DPRK had violated its IAEA safeguards obligations and IAEA officials' statements that the DPRK is still not in full compliance.⁷

As for the third finding, concerning whether the DPRK has engaged in nuclear weapons manufacturing or acquisition activities, in February 2000, President Clinton reported to Congress that there was possible evidence that North Korea was pursuing a covert nuclear weapons program. The president made this formal finding in response to a congressional certification requirement incorporated into the omnibus appropriations bill of fiscal year 2001. Under section 576 of this bill, the first \$10 million of a total of \$35 million appropriated to support KEDO in the year 2000 could only be released if

the president certified that the DPRK is complying with the terms of the Agreed Framework. The legislation required that the president certify, among other things, that “North Korea is not seeking to develop or acquire the capability to enrich uranium, or any additional capability to reprocess spent nuclear fuel.” The law also allowed the president to waive the certifications requirements if he determined that it is “vital to the national security interest of the United States and provides written policy justifications to the appropriate congressional committees.”⁸

On February 15, 2000, President Clinton responded to the law by formally reporting to Congress that North Korea is complying with all provisions of the Agreed Framework. However, the president waived the legal requirement that he certify that North Korea is not seeking to develop or acquire the capability to enrich uranium or any additional capability to reprocess spent nuclear fuel—i.e., that North Korea is not pursuing a covert nuclear weapons program. The president’s justification: “The evidence is inconclusive whether North Korea is seeking” to develop or acquire such capabilities.⁹

Congress’s initial response to this waiver was one of astonishment. In a letter to the president dated April 11, 2000, the chairman of the House International Relations Committee and the ranking member of the House Commerce Committee emphasized that they were troubled by his decision to waive the required certification. As they explained:

You did not hesitate to certify the third requirement, that ‘North Korea is complying with all provisions of the Agreed Framework.’ If, as you explain, the ‘evidence is inconclusive whether North Korea is seeking to develop or acquire the ability to enrich uranium,’ then how can you certify that North Korea is complying with all aspects of the Agreed Framework?

They concluded their letter urging the president to reconsider his waiver and avoid using the waiver as a part of the certification required to release the balance of \$25 million in funds for KEDO.¹⁰ In answer to this note, White House officials notified the House International Relations Committee that in order to secure the remaining \$25 million, the president would, indeed, waive the required certification that “North Korea has terminated

its nuclear weapons program, including all efforts to acquire, develop, test, produce, or deploy such weapons.”

This news, in concert with the president’s February 15, 2000 certification waiver, prompted the House to act. Previously, in July of 1999, the House amended the International Relations Authorization Act by adopting the “North Korea Threat Reduction Act of 1999,” by a vote of 305-120. Under this amendment, the United States could not extend any nuclear cooperation to North Korea until the president had certified that Pyongyang had lived up to the provisions of the Agreed Framework and Congress had approved the president’s findings by a joint resolution.¹¹ These procedural requirements, which included both presidential certification and a House and Senate vote, went well beyond the 30-day review requirements of the Atomic Energy Act. In a House-Senate conference in December of 1999, the Senate agreed only to require the president to make the specified certifications. This later was signed into law.¹² After the president waived the certification requirements in February 2000, though, the sponsors of the “North Korea Threat Reduction Act” decided to reintroduce the requirement that the House and Senate vote to approve the president’s certifications. This amendment to the Threat Reduction Act, entitled the “Congressional Oversight of Nuclear Transfers to North Korea Act of 2000,” passed the House May 16, 2000, by an overwhelming bipartisan majority, 374-6. In floor debates on the amendments, its supporters from both the Republican and Democratic parties argued that implementing the nuclear provisions of the Agreed Framework risks increasing the nuclear capabilities of a clear violator of the NPT while undermining hard-won US nuclear nonproliferation laws.¹³

Given that the House has passed the bill twice already, it is likely that if the bill does not become law in 2000 it will be passed again for Senate consideration in 2001. More important, both the proposed bill and its predecessor, “The North Korea Threat Reduction Act of 1999” (which now is law), raise a near-term concern regarding the Agreed Framework’s implementation—compliance with IAEA safeguards. Under the Threat Reduction Act, no US nuclear cooperation with North Korea can proceed, until the president certifies that:

1. North Korea has come into full compliance with its safeguards agreement with the IAEA (INFCIRC/403), and has taken all steps that have been deemed necessary by the IAEA in this regard; and

2. North Korea has permitted the IAEA full access to all additional sites and all information (including historical records) deemed necessary by the IAEA to verify the accuracy and completeness of North Korea's initial report of May 4, 1992, to the IAEA on all nuclear sites and material in North Korea.¹⁴

How soon will the president need to make such a certification? According to administration officials, to keep the KEDO reactor project on schedule, NRC-licensed US exports will be needed in approximately 42 months. Such a license request, however, would probably take six months to a year to process. Assuming that the president did not want to risk losing NRC approval because he had not himself already made the proper certifications as required by the Threat Reduction Act, certification would be needed in approximately 30 months.

The question then is what would the IAEA require in order for the president to make the first two certifications? On this, opinions differ. When interviewed by US congressional staff, IAEA safeguards officials said that they would need at least two years in North Korea with full access to North Korea's nuclear records to have any hope of being able to find it in full compliance with its safeguards obligations. Their reasoning was simple. In the case of South Africa—a country that fully cooperated with the IAEA and wanted to afford full disclosure—it took the IAEA officials two years to account for past nuclear production. With North Korea—a nation that has violated its IAEA obligations and repeatedly blocked IAEA officials' access to facilities and records—at least as much time would be needed to determine past nuclear activities. Administration officials have not disputed these IAEA estimates. But some officials have indicated that given the political sensitivity of the North Korean case, they believe that the IAEA may be afforded as little as 90 days to make the appropriate determinations.¹⁵

Assuming the IAEA's own view of what is required prevails, IAEA inspectors would have to gain nearly total access to North Korea's nuclear files, holdings, and facilities within the next six to seven months (i.e., by mid-2001). Otherwise, KEDO would fail to get the US nuclear components it needs in time to meet its 2007 target date for the first reactor to go on line. More important, even in the latter case of a 90-day limit for the IAEA's work, keeping the KEDO reactor project on schedule would require the next president to make these

IAEA safeguard certifications no later than the second half of his first term in office.

Certainly, Congress senses just how important US power reactor exports are to the Agreed Framework's viability. Indeed, the immediacy of such exports was made clear as recently as May 18, 2000, when the House voted (again in a bipartisan fashion) 334-85 to prohibit the US government from indemnifying any US exporter from liability for nuclear accidents occurring in North Korea. This legislation came as an amendment to the Defense Authorization Act.¹⁶ It was offered in response to news reports that General Electric (GE) had asked the White House to indemnify its export of a steam turbine to KEDO against future liability for a possible North Korean accident. Without such indemnification, GE said it was unwilling to sell the \$30 million in steam turbines called for by the specific reactor design that the United States and KEDO have promised to supply North Korea. Indeed, even if GE licensed a foreign firm to make the export in its stead, GE could be sued in the case of a nuclear accident.¹⁷

Technically, Article XI(2) of the KEDO-DPRK Supply Agreement specifies that "the DPRK shall enter into an indemnity agreement with KEDO, and shall secure nuclear liability insurance or other financial security to protect KEDO, its contractors and subcontractors...." However, North Korea has neither a reliable legal system nor the insurance assets needed to sustain the billions of dollars of liability that a nuclear accident might easily involve. GE understandably, therefore, sought to obtain indemnification elsewhere.

This created an immediate problem. In June 1999, the US-designed turbines had to be exported and installed within the next 12 to 24 months to keep the KEDO reactor project on track. To resolve the problem, the Executive Branch proposed to use the authority of Public Law 85-804 (50 US Code 1431). This law was designed to allow the US Defense Department to indemnify firms taking part in nuclear cleanup operations at defense-related facilities. This authority had never been used to indemnify firms exporting goods to civilian nuclear projects abroad. In addition, the Executive Branch proposed extending this authority to GE without first notifying Congress.

This prompted the House to block the Executive with legislation. As the sponsors of the amendment to the Defense Authorization Act made clear, their legislation

was not aimed at killing the Agreed Framework, but rather to assure that US taxpayers did not get stuck with a multi-billion dollar liability without the benefit of congressional action. If the Executive felt it needed liability authority, they argued, it should request such legislation from Congress. Otherwise, it should let private insurance be the court of first resort. Certainly, if private industry were unwilling to insure the project because it was too risky, this would weigh in Congress's calculations. The House, however, has made it clear that the issue is too serious to the viability of the Agreed Framework for the Executive Branch to try to solve without appropriate congressional authority.¹⁸

It is still unclear what effect House passage of this amendment will have on the KEDO reactor project. The prime contractor on the project, the Korean Electric Power Company (KEPCO), sought an authorization to begin major construction work on the reactors from the South Korean government in 1999. The Korean government, however, initially delayed offering such authorization until it could resolve its dispute with the US government over project liability. South Korea wanted KEDO, Japan, the European Union (EU), and the United States to assume such liability. The EU, however, joined KEDO with the understanding that it would be free of such liability. The United States, meanwhile, did not want to assume liability and began negotiations with KEDO members to see if a liability agreement of some sort could be reached. As of September 2000, no such agreement has been reached.¹⁹

Clearly, House passage of a prohibition on the Executive assuming liability unilaterally caught the attention of both private US power reactor suppliers and KEDO member nations. This may or may not increase interest in reaching a liability agreement. Until a liability agreement is assured, GE is unlikely to sell KEDO the steam turbines it needs. This may lead to efforts to redesign the reactor to adapt it to other steam turbines. This, in turn, would change the specific reactor design KEDO promised North Korea. This might require renegotiation of the supply contract itself.

All of this suggests the importance of the various legal constraints on the project discussed in this report. Indeed, although they have received scant attention outside of Washington, their importance is likely to grow as construction of the reactors proceeds.

¹ This paper was adapted from a paper presented before a UNESCO-sponsored Landau Network forum, "Prompting International Scientific, Technological and Economic Cooperation in the Korean Peninsula: Enhancing Stability and International Dialogue," Instituto Diplomatico, the Italian Ministry of Foreign Affairs, Rome, Italy, June 1-2, 2000.

² Mark Hibbs, "Koreans Urge US to Take Shortcut to DPRK PWR Export," *Nucleonics Week*, February 26, 1998, p. 1; "Nuclear Regulatory Commission: Application for a License to Export a Utilization Facility," *US Federal Register*, Wednesday, January 28, 1998, p. 4306.

³ Although Section I(1) of the Agreed Framework specifies 2003 as the "target date" by which the two promised reactors should be operating in North Korea, KEDO and US officials have indicated that that date will slip to at least 2007. This 2003 target date, however, is the one that North Korean officials have repeatedly referred to in official statements where they note that if KEDO fails to meet the Agreed Framework's target date of 2003, North Korea will restart its nuclear program unless it is again compensated.

⁴ See, e.g., "ABB-CE Withdraws Request for Export to North Korea," *Fresh Fuel*, March 2, 1998, p. 1.

⁵ Farrell Kramer, "Co. Won't Sell Nuke Tech to No. Korea," Associated Press, March 10, 1998, and official correspondence on this point from the US Department of State to the US Nuclear Regulatory Commission and the Nonproliferation Policy Education Center dated February 17, 1998, available upon request.

⁶ For more details, see Henry Sokolski, "US-PRC Nuclear Cooperation," *Journal of Defense and Diplomacy*, September 5, 1985, pp. 7-8 and 62.

⁷ "White House Briefing by President Clinton on North Korea," Federal News Service, June 16, 1994.

⁸ US Public Law 106-113, Appendix B, "Korean Peninsula Energy Development Organization," Sec. 576, 113 Stat. 1501A-111.

⁹ US Department of State, "Memorandum of Justification in Connection with Presidential Certifications and Waivers Under Sections 576 (b) and (d) of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 2000, to Provide a U.S. Contribution to the Korean Peninsula Energy Development Organization," from Barbara Larkin, Assistant Secretary of State for Legislative Affairs to Benjamin A. Gilman, Chairman, House Committee on International Relations, February 15, 2000.

¹⁰ Letter to President Clinton from Congressmen Benjamin A. Gilman and Edward Markey, April 11, 2000.

¹¹ See the Amendment to H.R. 2415 offered by Mr. Gilman and Mr. Markey, Sec. 703 "Restrictions on Nuclear Cooperation with North Korea," July 14, 1999.

¹² "The North Korea Threat Reduction Act of 1999," Sections 821-23 of H.R. 3427, Public Law 103-113. Several of the same certification requirements were incorporated into the Omnibus Appropriations Act for FY 2000 for year 2000 funding of KEDO. See Sokolski, "US-PRC Nuclear Cooperation," pp. 7-8, and 62.

¹³ House International Relations Committee Press Release, "House Passes Gilman-Markey North Korea Oversight Bill," May 16, 2000. See, e.g., the floor debates on Amendment No. 3, Section 1205, "Prohibition on Assumption by United States Government of Liability for Nuclear Accidents in North Korea," offered by Mr. Cox, Mr. Markey, Mr. Spence, Mr. Gilman, Mr. Knollenberg, Mr. Bereuter, *The US Congressional Record*, May 19, 2000, pp. H3358-H3362.

¹⁴ Letter to President Clinton from Congressmen Benjamin A. Gilman and Edward Markey, April 11, 2000.

¹⁵ US congressional staff (names withheld), interviews by author, May 26, 2000.

¹⁶ Amendment No. 3, Section 1205. "Prohibition on Assumption by United States Government of Liability for Nuclear Accidents in North Korea," offered by Mr. Cox, Mr. Markey, Mr. Spence, Mr. Gilman, Mr. Knollenberg, Mr. Bereuter, reprinted along with the floor debate in *The US Congressional Record*, May 19, 2000, pp. H3358-H3362.

¹⁷ Jim Mann, "A Risky Policy on N. Korea," *Los Angeles Times*, April 12, 2000.

¹⁸ See the floor debates on Amendment No. 3, Section 1205, "Prohibition on Assumption by United States Government of Liability for Nuclear Accidents in North Korea, offered by Mr. Cox, Mr. Markey, Mr. Spence, Mr. Gilman, Mr. Knollenberg, Mr. Bereuter, *The US Congressional Record*, May 19, 2000, pp. H3358-H3362.

¹⁹ Mark Hibbs, "Dispute on Liability Holding Up Authorization for KEDO Project," *Nucleonics Week*, April 29, 1999, pp. 14-15; Letter to President Clinton from Congressmen Benjamin A. Gilman and Edward Markey, April 11, 2000; US congressional staff (names withheld), interviews by author, September 10, 2000.