

CRS Report for Congress

The U.S.-North Korea Nuclear Accord of October 1994: Background, Status, and Requirements of U.S. Nonproliferation Law

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Updated April 11, 1997



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SUMMARY

Congress plays a critical role in the ability of the Clinton Administration to carry out an October 21, 1994, executive agreement between the United States and the Democratic People's Republic of Korea (DPRK) that defused a confrontation over the latter's suspected nuclear weapons program. Under the U.S.-DPRK Agreed Framework, North Korea pledged to freeze its existing nuclear program and eventually to allow the International Atomic Energy Agency (IAEA) to carry out inspections designed to account for all of its nuclear material, after which its graphite-moderated reactors and related facilities are to be dismantled. The United States, in return, agreed to lead in arranging for the replacement of North Korea's existing nuclear reactors with two 1,000 megawatt light-water power reactors (LWRs) that would be less useful for obtaining weapons grade material. Other provisions include the progressive normalization of U.S.-DPRK political and economic relations and the initiation of a North-South dialogue.

Notwithstanding periodic deadlocks in what is a sequentially staged process, the nuclear-related parts of the agreement have moved forward. As provided for in the Agreed Framework, the United States took the lead in setting up an international consortium, the Korean Peninsula Energy Development Organization (KEDO), to carry out the LWR project. A supply contract and five of 14 required protocols have been negotiated. Construction activity could begin as early as April 1997. Whether this actually happens will likely depend as much on the state of North-South relations as any other issue, since South Korea is responsible for a major share of construction funding.

Congress, which generally has been highly skeptical of the Agreed Framework, has two principal sources of influence. First, U.S. contributions towards the cost of providing interim heavy oil supplies and KEDO's administrative overhead are dependent on the willingness of Congress to appropriate the necessary funds -- about \$30 million per year. Second, Congress has statutory authority to disapprove or attach conditions to any nuclear cooperation agreement with North Korea via a joint resolution, subject to normal veto and override procedures. Such an agreement is likely to be required because the South Korean prime contractor depends on a U.S. company, Combustion Engineering, Inc., for some critical components.

The viability of the nuclear accord and the achievement of its underlying objectives of ending the nuclear proliferation threat and promoting the peaceful resolution of Korean Peninsula issues are threatened by Pyongyang's continued refusal to enter into a dialogue with Seoul, and uncertainties about its willingness to accept IAEA inspections of suspicious undeclared nuclear sites. North Korea's policies towards the South in particular are likely to be major determinants of whether South Korea and Japan will play the roles that are expected of them in underwriting most of the estimated \$5-6 billion cost of constructing the LWRs.

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INTRODUCTION

Under the U.S.-DPRK Agreed Framework, North Korea has frozen its existing nuclear program and pledged eventually to allow the International Atomic Energy Agency (IAEA) to carry out inspections designed to account for all of its nuclear material, after which the preexisting facilities are to be dismantled. The United States, in return, agreed to play a leading role in arranging for the replacement of North Korea's existing 5 megawatt (mw) graphite-moderated research reactor, and two larger nuclear power reactors that were under construction, with two 1,000 mw light water power reactors (LWRs) that would be less useful for obtaining weapons grade material. The United States also agreed to arrange for interim energy supplies consisting of heavy oil for electrical power production until the completion of the first LWR. Other provisions call for movement towards the full normalization of U.S.-DPRK political and economic relations, the implementation of a 1992 agreement between North Korea and South Korea that bars each from possessing nuclear weapons, and the opening of a North-South dialogue.

The obligations of the parties to the Agreed Framework are phased in a way that provided mutual reassurances and prevents one-sided gains in the event of a breakdown. If it works as intended, the agreement will end the threat posed by North Korea's nuclear program, provide a framework for improved North-South relations, help to moderate Pyongyang's behavior, and draw it out of its isolation. Meanwhile, the freezing of the existing program keeps North Korea from gaining access to potentially large amounts of fissionable material. Many, however, are wary of any agreement with North Korea's secretive, authoritarian leaders. Critics note that North Korea still gains certain economic and other benefits while it remains in violation of its obligations under the Nuclear Non-Proliferation Treaty (NPT). Moreover, they note, the sequencing of actions under the agreement also has the effect of allowing the construction of the first LWR to be well under way before North Korea finally has to submit to inspections that are intended to reveal whether it has already diverted plutonium for nuclear weapons use.¹

¹U.S. intelligence and IAEA officials strongly suspect that North Korea secretly reprocessed plutonium from fuel rods withdrawn from the 5 MW reactor following a partial reloading of the fuel rods around 1989 and 1990, and failed to give a full accounting of all the nuclear material in its possession when it entered into a safeguards and inspection agreement with the IAEA in January 1992. In early 1993, when the
(continued...)

Members of Congress have raised a number of concerns about the U.S.-North Korea agreement, and has expressed them in legislative initiatives such as House and Senate Joint Resolutions, appropriations bills, and committee report language.² Many Members have expressed concern about the lack of specificity about exactly when North Korea will allow IAEA inspectors to look at waste sites and other facilities to determine whether it has diverted any material that could be used in nuclear weapons, and about the fact that the agreement does not explicitly address a number of long-standing U.S. security concerns, such as North Korea's threatening military posture and its sales of ballistic missiles and other weapons of mass destruction.

Some Members of Congress and outside analysts worry that after the construction is well underway, at a cost of billions of dollars, North Korea may balk at intrusive IAEA inspections and seek to negotiate away the requirement of full disclosure from a position of strength. The Administration has sought to assure Congress that any such North Korean maneuver would be firmly rebuffed, and would not serve Pyongyang's interests, but U.S. officials also have acknowledged that they cannot predict whether North Korea will fully carry out the agreement.³ The agreement is silent about what will happen if diversions of plutonium are discovered. Presumably North Korea would have to turn over any such material to the IAEA before it could be in compliance with its NPT obligations. Any breakdown in the accord, for whatever reason, would be costly in several respects and could lead to new confrontation.

Other important congressional concerns include whether the United States could be held legally liable for a nuclear accident in connection with the LWR project (apparently not, but questions remain about whether North Korea can afford the necessary nuclear liability insurance and other financing uncertainties), and the fact that no agreement to date actually obligates North Korea to pay for necessary power grid improvements. The latter situation has

¹(...continued)

IAEA sought to carry out "special" inspections of two undeclared nuclear waste material sites as a means of ascertaining whether any material had been diverted, North Korea announced its withdrawal from the NPT and set in motion the train of events that led to the October 1994 agreement. For more details see North Korea: U.S. Policy and Negotiations to Halt Its Nuclear Weapons Program; An Annotated Chronology and Analysis. CRS Report for Congress No. 94-905 F, November 18, 1994 [by Richard P. Cronin, with the assistance of Violet Moore.] p. 3-5.

²These include H. J. Res. 83 (Bereuter), adopted by the House on September 18, 1995 by voice vote under suspension of rules, and S. J. Res. 29 (Murkowski), which passed the Senate on Nov. 9, 1995, by voice vote, and an amendment, Senate Amendment 5089 (Murkowski) to H.R. 3540.

³See in particular testimony by Ambassador At Large Robert L. Gallucci and Edward L. Warner III, Assistant Secretary of Defense for Strategy and Requirements, along with written responses to Questions for the Record, Subcommittees on Asia and the Pacific and International Economic Policy and Trade, House International Relations Committee, on February 23, 1995. Committee Print, U.S. Govt. Print. Off., Washington, DC, 1995. (p. 10-11, 18, 33-35, 116-117.

raised concerns that North Korea will renew past demands for foreign funding of these improvements. These and other concerns were the subject of a General Accounting Office study requested by Senator Frank Murkowski, Chairman of the Committee on Energy and Natural Resources.⁴

Congress has also been concerned that while the agreement includes clear timetables for actions relating to the LWR project, it does not explicitly link the nuclear aspects of the accord to other actions also called for in the agreement, most notably for a dialogue between North and South Korea. Notably, it does not directly address U.S. concerns about North Korea's exports of ballistic missiles and chemical weapons to Iraq, Iran, and other radical regimes.

In regard to the North-South issue, the Administration has responded with the observation that ultimately the project cannot go forward without such a dialogue, due to the central role of South Korea in carrying it out.⁵ Thus far, however, the North has succeeded in fulfilling its minimum obligations related to the nuclear freeze and the LWR project while maintaining its traditional hostile posture towards Seoul. As for the pursuit of other U.S. security objectives, the Administration maintains that it has made progress on these issues in separate talks outside of the framework of the nuclear accord, and that the agreement has improved the climate for addressing them.

These broader political and regional policy issues have been addressed in several other CRS reports, including: CRS Report 95-853, *The U.S.-North Korea "Agreed Framework" to End North Korea's Nuclear Program*, by Zachary S. Davis and Warren Donnelly; and CRS Issue Brief 91141, *North Korea's Nuclear Weapons Program: U.S. Policy Options*, by Larry A. Niksch.

This report focuses primarily on the narrower issue of the nuclear agreement, its relationship to existing legislation governing nuclear exports and nuclear cooperation, and the role of Congress in affecting the ability of the Administration to carry out the agreement. It contains six major sections subsequent to this introduction: (1) a background section outlining the basic provisions of the Agreed Framework and details of the Korean Peninsula Economic Cooperation Organization (KEDO), an international consortium for carrying them out; (2) a status report on actions taken to date by the United States, KEDO, and North Korea, towards the initiation of the project; (3) a summary and explanation of the basic statutes governing U.S. nuclear exports or retransfers of previously exported materials or technology, including a discussion of the role and prerogatives of Congress; (4) a recapitulation of actions by Congress to date related to U.S. obligations under the Agreed

⁴GAO, Nuclear Nonproliferation: Implications of the U.S./North Korean Agreement on Nuclear Issues. Report to the Chairman, Committee on Energy and Natural Resources, U.S. Senate. October 1996 (GAO/RCED/NSIAD-97-8)

⁵Testimony by Ambassador At Large Robert L. Gallucci before the Subcommittees on Asia and the Pacific and International Economic Policy and Trade, House International Relations Committee, on February 23, 1995, op. cit.

Framework; (5) a brief description of unresolved issues and future milestones; and (6) conclusions.

BACKGROUND TO THE OCTOBER 21, 1994, AGREED FRAMEWORK

In negotiating the Agreed Framework the United States undertook primary responsibility for its implementation, though in effect it acted on behalf of the international community as represented by the UN Security Council, the IAEA, U.S. allies, and other concerned countries. On the eve of concluding the agreement, President Clinton sent a letter to the North Korean leader, President Kim Jong Il, promising to use the "full powers" of his office to carry out the agreement unilaterally, if need be, "subject to the approval of the U.S. Congress."

Among other consequences, the agreement ended a stalemate in the UN Security Council over how to respond to North Korea's recalcitrance. The United States had sought to have economic sanctions imposed in response to North Korea's refusal to accept special inspections of suspicious waste sites at its Yongbyon nuclear facility by the IAEA and its precipitate action in withdrawing fuel rods from its 5 MW research reactor without the required IAEA supervision. As of early June, 1994, economic sanctions appeared likely after China reportedly told North Korea it would abstain and not block a UN Security Council resolution.⁶



North Korean nuclear sites.

Source: GAO (GAO/RCED/NSIAD-97-8).

The push for sanctions became moot, however, after North Korea invited former President Jimmy Carter to

⁶Reports differ over whether China directly threatened to abstain or more indirectly implied that the North Korea's failure to cooperate more with the IAEA might lead to an abstention. Lena H. Sun, North Korea Presents China with Dilemma. *Washington Post*, June 17, 1994: A20; Jim Mann, China Helped Bring About N. Korea's Change of Heart. *Los Angeles Times*, June 29, 1994: 1, 14; and Threat by China Led North Korea to Call on Carter to Mediate. *Nucleonics Week*, June 30, 1994: 8-9. Reportedly, the weakening of China's well-known opposition to sanctions reflected both exasperation with North Korea's irresponsible behavior and a possible quid-pro-quo for President Clinton's May 29, 1994 decision to extend Most-Favored-Nation status to China and delink future decisions from human rights considerations.

make an unofficial visit to Pyongyang. The visit occurred in an atmosphere of high tension and press speculation about the possibility of a military confrontation. In talks between President Carter and President Kim Il Sung, North Korea's veteran leader offered to freeze his country's nuclear program in return for the resumption of high level talks on Korean Peninsula issues. The Clinton Administration accepted the offer, and, after some slippage caused by the unexpected death of Kim Il Sung in July 1994, negotiations led by U.S. Ambassador-at-Large Robert Gallucci, eventually led to the October 21 Agreed Framework.⁷

MAIN NUCLEAR-RELATED ELEMENTS OF THE AGREED FRAMEWORK

The four-page agreement addresses a range of Korean peninsula issues, but the nuclear-related elements are the most specific and sequentially linked.⁸ The U.S. and North Korea also signed a classified annex, spelling out some of the provisions in greater detail. U.S. officials have assured Congress that nothing in the classified annex contradicts what is contained in the public document. The essential nuclear-related provisions of the Agreed Framework are as follows:

- The United States, representing an international consortium, will make arrangements for provision of an LWR project with a generating capacity of approximately 2,000 mw (e) by a target date of 2003.
- The United States will offset the energy forgone due to the freeze on the DPRK's nuclear program with alternative energy in the form of heavy oil for heating and electricity until completion of the first reactor.
- The DPRK will freeze the operation its 5 mw graphite-moderated research reactor and related facilities and the construction of two other graphite-moderated reactors, and will eventually dismantle these reactors and facilities. The IAEA will monitor the freeze.
- Dismantlement of existing reactors and reprocessing equipment will begin when the first reactor is finished and will be completed when the second reactor is finished.
- The United States and the DPRK will cooperate to find a method to store and dispose of the spent fuel from the 5 mw reactor.

⁷See North Korea: U.S. Policy and Negotiations to Halt Its Nuclear Weapons Program; An Annotated Chronology and Analysis. CRS Report for Congress No. 94-905 F, November 18, 1994 [by Richard P. Cronin, with the assistance of Violet Moore.] p. 11-16.

⁸For more details on the political and economic provisions of the agreement see CRS Issue Brief 91141.

- The DPRK will remain a party to the NPT and allow IAEA inspections. Ad Hoc and routine inspections of sites not included in the freeze begin when a supply contract for the LWRs is signed. Prior to that time, North Korea will allow the IAEA to conduct inspections to "verify the continuity of safeguards" at these sites, i.e., to insure against the removal of material.
- "When a significant portion of the LWR project is completed, but before delivery of key nuclear components," North Korea "will come into full compliance with its safeguards agreement with the IAEA." It requires North Korea to take "all steps that may be deemed necessary by the IAEA, following consultations with the Agency with regard to the verifying the accuracy and completeness" of its inventory of nuclear material as reported earlier to the IAEA.⁹

FORMATION OF THE KOREAN PENINSULA ENERGY DEVELOPMENT ORGANIZATION (KEDO)

As provided for in the Agreed Framework, the United States, South Korea, and Japan, on March 9, 1995, signed an Agreement on the Establishment of the Korean Peninsula Energy Development Organization (KEDO). This consortium, headquartered in New York and headed by a former U.S. diplomat, Ambassador Stephen Bosworth, is charged with carrying out the agreement. Subsequently, Argentina, Australia, Canada, Chile, Finland, Indonesia, and New Zealand also have joined KEDO. The European Union (EU) agreed in December 1996 to join KEDO, and offered to contribute \$13 million initially and about \$20 million per year for the next five years. The United States, Japan, and South Korea have agreed to allow the EU to become the fourth member of the governing board, but without the veto possessed by the three founding members.¹⁰ Other countries also have made contributions to KEDO's administrative and heavy oil costs.

While U.S. contributions are estimated to cost about \$20-30 million annually, mainly in the form of heavy oil shipments and KEDO administrative

⁹This provision addressed the problem of North Korea's previous refusal to allow special inspections of nuclear waste sites aimed at ascertaining whether it had secretly extracted plutonium from spent fuel rods. Some analysts view the "consultation" clause as possibly opening the door to negotiations as to what North Korea will have to do to satisfy the IAEA. To date, however, the IAEA has been uncompromising about the necessity to obtain a full accounting of North Korea's nuclear material and continues to regard North Korea as not in compliance with its NPT obligations.

¹⁰Yonhap (Seoul), in English. Dec. 24, 1996. Foreign Broadcast Information Service (FBIS), Daily Report, East Asia [FBIS-EAS-96-248.] (Yonhap is a semi-official news service), and statement of Charles Kartman, Acting Assistant Secretary of State for East Asian and Pacific Affairs, before the Subcommittee on Asia and the Pacific, House Committee on International Relations, February 26, 1997.

costs, the bulk of the funding will come from other countries. Subsequent to the original U.S.-DPRK agreement, South Korea reportedly consented to pay about 60 percent of the cost, and Japan indicated that it would pay up to 20 percent. Japan has also advanced \$19 million to a KEDO "collateral fund" to bridge a funding gap caused by delays in the availability of U.S. appropriations and higher-than-expected heavy oil prices.

CURRENT STATUS

Whether the LWR project is ever completed depends on North Korea's behavior and adherence to its obligations under the Agreed Framework, as well as the willingness of South Korea and Japan to cover most of the construction costs. A critical issue in the delivery of the key reactor components will be whether the DPRK allows the necessary inspections by the IAEA to account for all of the nuclear material in its possession.

To date, North Korea has essentially kept its obligations regarding the freezing of its nuclear program and negotiating the required protocols, despite periodic foot-dragging and the often dogged attachment to unrealistic demands. North Korean officials balked for a number of months at accepting a South Korean company as the prime contractor, but eventually recognized that without a leading role on the part of South Korea the project would never be carried out. Protracted negotiations also took place over issues such as financial responsibility for the site survey and site preparation, and the construction of roads and other infrastructure integral to the project -- a responsibility that KEDO eventually accepted.

North Korea has been far less forthcoming regarding its other obligations under the Agreed Framework, especially the requirement for engaging in a dialogue with South Korea. However, while it has thus far refused direct bilateral talks with Seoul, Pyongyang has not publicly declared that it does not intend to comply with those specific requirements of the agreement.

Although many analysts profess skepticism about the final outcome of the project, particularly owing to suspicions about North Korea's real intentions and even the viability of the Kim Jong Il regime, a number of concrete steps have taken place already. Ground-breaking could take place as early as June 1997, assuming the absence of new complications and the availability of funding.

Actions to date include:

- freezing of graphite reactor construction and reprocessing activities;
- canning of about 60 percent of the spent fuel. (These operations were suspended at the half-way point in early November 1996, but were resumed in early 1997 and are expected to be completed this year.)
- establishment of KEDO on March 9, 1995

- execution of an LWR Supply Agreement between KEDO and DPRK, December 15, 1995.
- selection of Korean Electric Power Corporation (KEPCO) as the prime contractor, March 1996, per the supply contract's stipulation of a Korean Standard Nuclear Power Plant (KSNP) model.¹¹ The KSNP is based on American technology. The construction is expected to be carried out by a consortium led by Hyundai Engineering and Construction Company, but numerous other South Korean companies, and possibly American, Japanese, and European companies, will also participate.
- selection of Duke Power Company to serve as the Technical Support Consultant (TSC), and to satisfy North Korean insistence on U.S. participation.
- negotiation of five of fourteen envisioned protocols to guide implementation, including: (1) juridical status, privileges and immunities and consular protection in regard to foreign nationals involved in the project; (2) transportation and site access; (3) communications arrangements signed July 11, 1996; (4) site takeover; and (5) North Korean supplies of goods, facilities and services (January 8, 1996).

These five protocols have been deemed by all parties as fulfilling the necessary steps for construction to begin. The seventh and last KEDO site survey team arrived at North Korea's Sinpo area, on the northeastern seaboard (see map on p. 4), via Beijing in on March 1, along with equipment and other machinery related to drilling, geological, and topographic testing, and surveying operations. The team consisting of 29 experts from South Korea, the United States, and Japan, will take 5 months to evaluate the geological safety of the Sinpo site and take necessary measurements to establish the site boundaries.¹² In early April a multinational team of about 50 KEDO officials and construction engineers arrived by ship for working level negotiations on the site takeover. The team was the first to utilize a protocol providing a sea-route to the site.¹³

In light of the dramatic defection of Hwang Jang Yop, a high-ranking North Korean official to the South Korean Embassy in Beijing, on February 12, 1997, the site survey team's departure was delayed by one week to secure written assurances from Pyongyang that it would strictly comply with the protocol regarding the treatment of South Korean team members.¹⁴ Initially Pyongyang

¹¹Korean Peninsula Energy Development Organization, Annual Report, 1995. p. 13.

¹²Seoul KBS-1 Radio Network in Korean, March 1, 1997. Foreign Broadcast Information Service (FBIS-EAS-97-041.)

¹³Seoul KBS-1 Radio in Korean, April 9, 1997 (FBIS-EAS-97-099) and Digital Chosun Ilbo WWW (Internet, FBIS-EAS-97-094)

¹⁴*Korean Times* (KoreaLink News page), Feb. 21, 1997.

had characterized the defection as a kidnapping, and had threatened retaliation. Three days later a North Korean defector living in Seoul was shot and fatally wounded under circumstances pointing to an assassination attempt by North Korean agents.¹⁵ Shortly thereafter, however, North Korea indicated acceptance of the possibility that the defection was genuine.

Contrary to some expectations, North Korea went ahead with its scheduled participation in a three-way meeting involving U.S., South Korean, and North Korean officials held in New York on March 5. During the meeting, U.S. and South Korean officials outlined proposals for four party peace negotiations to replace the current Korean Armistice with a permanent peace accord. In addition to the United States and the two Koreas, China -- which fought on North Korea's side in the 1950-1953 Korean War -- would also be a party to the negotiations on achieving a stable permanent peace. Because North Korea had previously twice postponed the three-way meeting, some analysts had expected that it would use the Huang defection as an excuse for again putting off direct talks involving South Korean officials. The way to gaining North Korea's participation apparently was smoothed in part by the decisions of the United States and South Korea to contribute respectively \$10 million and \$6 million in "humanitarian" food shipments.¹⁶

STATUTES GOVERNING THE TRANSFER OF CRITICAL NUCLEAR COMPONENTS

An important but little noticed aspect of the Agreed Framework is the necessity of meeting U.S. statutory requirements concerning the export or transfer of American nuclear technology and reactor components, especially the need for a formal agreement on nuclear cooperation. Although the supply contract concluded between KEDO and the DPRK in December 1995 designated a South Korean company as the prime contractor, the design for the reactor (which has become the standard reactor type in South Korea) came from an American company, Combustion Engineering, Inc., under the terms of a nuclear cooperation agreement between the United States and South Korea. Under U.S. law, the transfer of U.S.-origin design information that has been licensed to the South Korean company requires the consent of the U.S. Government.

Because the Korean prime contractor still depends on Combustion Engineering for some key components such as coolant pumps, it also appears that exports of components from the United States will be required. As mandated by the Atomic Energy Act of 1954, the Administration would have to negotiate an agreement on nuclear cooperation with North Korea before any

¹⁵Andrew W. Pollack, Korean Shooting is Casting Cloud on Signs of Thaw. *New York Times*, Feb. 17, 1997: 1, 6.

¹⁶Kevin Sullivan, Seoul to Sent \$6 Million in Aid to N. Korea Despite Defector Impasse. *Washington Post*, Feb. 20, 1997: A31, and Laurie Goodstein, North, South Korea Hold "Positive" Talks. *Washington Post*, March 6, 1997: A26.

technology or components can be exported by the American parent company. All such agreements must be submitted to Congress, which can approve, disapprove or attach conditions.

Under the Agreed Framework North Korea undertook "as necessary," to enter into an agreement on nuclear cooperation with the United States. As of early March 1997, however, the State Department appeared to have made no move to follow up on this likely requirement, though the Department in response to a GAO study has acknowledged its readiness to do so at the appropriate time -- i.e., if and when it is determined that controlled U.S. components will be required.¹⁷

The several relevant provisions of U.S. nonproliferation law are detailed below.

NECESSITY OF AN AGREEMENT ON NUCLEAR COOPERATION UNDER SECTION 123 OF THE ATOMIC ENERGY ACT

The Atomic Energy Act (AEA) of 1954 [P.L. 83-703], as amended by the Nuclear Nonproliferation Act (NNPA) of 1978 [P.L. 95-242] governs direct nuclear cooperation between the United States and a foreign country.¹⁸ The AEA establishes criteria that must be satisfied as a condition for nuclear cooperation.

Foremost among the criteria is the requirement under Sec. 123 of the AEA that a bilateral agreement for nuclear cooperation be in force between the U.S. and a foreign government.¹⁹ At present there is no cooperation agreement between the United States and North Korea. Direct transfers of certain controlled U.S. nuclear technology cannot take place until such an agreement was in effect.

Congressional Role and Prerogatives

Section 123 of the AEA requires the President to submit agreements for cooperation, accompanied by a Nuclear Proliferation Assessment Statement prepared by the Arms Control and Disarmament Agency, to the Senate Foreign Relations Committee and the House International Relations Committee. For most agreements, Congress has sixty days of continuous session to consider the agreement, preceded by a thirty day consultation period. Congress can

¹⁷GAO, Nuclear Nonproliferation: Implications of the U.S./North Korean Agreement on Nuclear Issues. Report to the Chairman, Committee on Energy and Natural Resources, U.S. Senate. October 1996 (GAO/RCED/NSIAD-97-8). Appendix V, p. 59.

¹⁸ The Nuclear Nonproliferation Act of 1978 tightened the restrictions on nuclear exports in the Atomic Energy Act of 1954.

¹⁹ Agreements for cooperation are negotiated by the State Department, then reviewed by the Department of Energy, the Nuclear Regulatory Commission, the Arms Control and Disarmament Agency and the President before being sent to Congress.

disapprove the resolution by joint resolution (subject to normal Presidential veto and override provisions), add conditions, or allow it to take effect by not acting.

At present, because of its refusal to allow the IAEA to carry out the required inspections of its facilities, North Korea cannot satisfy the criteria for nuclear cooperation agreements as stipulated in the AEA. Section 123 (a)(2) requires that "IAEA safeguards be maintained with respect to all nuclear materials in all peaceful nuclear activities within the territory" of any non-nuclear weapon state as a condition for U.S. supply of nuclear technology. The unresolved issue of North Korea's plutonium inventory could present a problem for meeting this requirement if Pyongyang is still not in compliance with its NPT and IAEA obligations. The sequence of reciprocal actions outlined in the Agreed Framework requires North Korea to come into full compliance before any sensitive components are exported.

Restrictive Authority to Waive Sec. 123

The President may exempt a proposed agreement from the requirements of Section 123 "if he determines that inclusion of any such requirement would be seriously prejudicial to the achievement of United States non-proliferation objectives or otherwise jeopardize the common defense and security," but the waiver must be submitted to Congress with a determination explaining how the proposed agreement will promote, and not constitute an unreasonable risk to, the common defense and security. Upon receiving an agreement that does not satisfy the criteria of the AEA, Congress has sixty days of continuous session to take action. However, in contrast to the joint resolution of disapproval required for Congress to block agreements that satisfy the requirements of the Atomic Energy Act, agreements that do not satisfy the AEA are subject to a joint resolution of approval. Whereas non-controversial agreements can enter into force if Congress takes no action, agreements that do not comply with the AEA cannot enter into force without a joint resolution of approval.

ADDITIONAL EXPORT REQUIREMENTS

Apart from the requirement for a nuclear cooperation agreement under section 123, the AEA also specifies licensing procedures and other criteria that govern the export of nuclear and dual-use technology and components. Some of these requirements are more restrictive than the criteria that must be satisfied in a nuclear cooperation agreement.

Sections 126, 127, and 128 of the AEA

Export licensing requirements for nuclear technology are contained in Sections 126, 127, and 128 of the AEA, as amended by the NNPA. The Nuclear Regulatory Commission (NRC) issues such licenses after consultations with the Departments of State, Energy, Defense, Commerce, and the Arms Control and Disarmament Agency. The criteria in Sections 126, 127, and 128 include: IAEA safeguards on the export; no use of the export for nuclear weapons; adequate physical security; no retransfer without prior U.S. consent; and no reprocessing

of U.S.-origin materials without prior consent. Like Section 123 discussed above, Section 128 requires full-scope safeguards on all nuclear activities in any non-nuclear weapons state as a condition of export. The President can waive the criteria and authorize an export license that does not satisfy Sections 126, 127, and 128 provided that the license is submitted to Congress and Congress does not adopt a resolution of disapproval (AEA, Section 128b(1)).

Section 129 of the AEA

Because of North Korea's past activities, the Administration's ability to carry out the Agreed Framework is also affected by a provision of the AEA that specifies actions which require a termination of nuclear exports. Section 129 on "Conduct Resulting in Termination of Nuclear Exports" provides that "No nuclear materials and equipment or sensitive nuclear technology shall be exported to (1) any non-nuclear weapon state that is found by the President to have, at any time after the effective date of this section:

- (A) detonated a nuclear explosive device; or
- (B) terminated or abrogated IAEA safeguards; or
- (C) materially violated an IAEA safeguards agreement; or
- (D) engaged in activities involving source or special nuclear material and having direct significance for the manufacture or acquisition of nuclear explosive devices, and has failed to take steps which, in the President's judgement, represent sufficient progress toward terminating such activities."

Points B, C, and D could be relevant in the case of North Korea, depending on the nature of the cooperation.²⁰ The Department of State has already indicated that it will seek a waiver of section 129 if major equipment needs to be transferred by a U.S. company pursuant to a U.S.-North Korea agreement on nuclear cooperation.²¹

This requirement is additive to the requirement under section 123 for a nuclear cooperation agreement. The President has authority to waive this section -- but not the requirement for a nuclear cooperation agreement -- if he determines and reports to Congress "that cessation of such exports would be seriously prejudicial to the achievement of United States nonproliferation objectives or otherwise jeopardize the common defense and security." Before the section 129 waiver can take effect, Congress has 60 days of continuous session in which it can vote to override the determination by a concurrent resolution.

²⁰ The President can waive the restrictions.

²¹GAO, Nuclear Nonproliferation: Implications of the U.S./North Korean Agreement on Nuclear Issues. Report to the Chairman, Committee on Energy and Natural Resources, U.S. Senate. October 1996 (GAO/RCED/NSIAD-97-8). Appendix V, p. 59-60.

CONTROLS ON THE EXPORT OF DUAL-USE TECHNOLOGY

Section 309(c) of the NNPA directs the Department of Commerce to control exports of dual-use equipment that could have nuclear applications. Under the authority of the Export Administration Act of 1979, as amended, the Commerce Department maintains a Commodity Control List (CCL) as well as a list of controlled countries. The nuclear portion of the CCL is called the Nuclear Referral List.²² North Korea is a controlled country with respect to nuclear technology. Thus, North Korea's status as a controlled country could bar the United States from contributing controlled items to a reactor project in North Korea unless the President waives the restriction or North Korea is removed from the controlled country list. However, it is possible for the United States to provide uncontrolled items such as safety equipment for the storage of spent fuel rods or non-nuclear power generating equipment if such assistance is not barred by other laws.

CONGRESSIONAL ACTIONS TO DATE

Apart from several hearings and action and passage by the House and Senate of Joint Resolutions containing expressions of congressional concerns, providing policy guidance, and seeking to constrain the use of reprogrammed funds, Congress provided appropriations more or less at the levels requested by the Administration for FY1996 and FY1997. In FY 1995 the Administration paid for the initial shipment of heavy oil by reprogramming about \$5 million in Department of Defense funds, an action that drew considerable criticism from Members of Congress.

For FY 1996 Congress provided \$22 million for KEDO, restricted to administrative and heavy oil costs (H.R. 1868/P.L. 104-99.)²³

For FY 1997 Congress approved \$25 million in funding for KEDO administrative costs and the supply of heavy oil, subject to certain conditions. This funding was contained in H.R. 3540, the Foreign Operations Appropriation Bill, as incorporated into H.R. 3610, the Omnibus Appropriations Act (P.L. 104-208.)²⁴

²² The Export Administration Act expired in September 1994 after the 103rd Congress failed to pass new export control legislation. Authority for maintaining export controls is authorized by the International Emergency Economic Powers Act [P.L. 95-223].

²³See Appropriations for FY 1996: Foreign Operations. CRS Report for Congress No. 95-623 F, updated May 8, 1996 [by Larry Nowels.] Summary and p. 21.

²⁴See Foreign Operations Appropriations for FY 1997: Funding and Policy Issues. CRS Report for Congress No. 96-445 F, updated October 1, 1996 [by Larry Nowels.] Summary and p. 27.

In both years Congress initially earmarked funding that was substantially less than the Administration requested and/or added conditions that the Administration found unacceptable. For instance, the Senate version of the FY 1996 Foreign Operations Appropriation would have required the achievement of specific improvements in North-South relations before the funding would be available, a requirement that the Administration argued would lead to the collapse of the Agreed Framework. In both years the final amounts and conditions were reached only after considerable informal negotiations between the Administration and the congressional conferees.

In addition to direct funding for KEDO, Congress has provided two increments of funding for the Energy Department's support of the encasing of spent fuel rods from North Korea's 5 MW reactor. This includes \$7.7 million in 1996 and \$7.9 million in 1997. The Energy Department has requested \$4.9 million for these activities for FY 1998.²⁵

UNRESOLVED ISSUES AND FUTURE MILESTONES

Apart from the problem of ongoing tensions on the Korean peninsula, continued progress towards completion of the LWR project requires the resolution of a number of practical issues. The failure to achieve any one of them could indefinitely or permanently derail the project.

FUNDING ISSUES RELATING TO INTERIM ENERGY SUPPLIES AND KEDO ADMINISTRATIVE COSTS

KEDO has experienced a significant shortfall in funding and had a deficit of \$14.4 million as of July 31, 1996.²⁶ According to information provided by U.S. officials speaking on background, this financing deficit has grown substantially since then. Reportedly, the shortfall has arisen as a result of lower than hoped-for international contributions and higher than anticipated oil prices.

Even with the contribution of \$23 million from the EU and the \$25 million appropriated by Congress for FY 1997, KEDO will remain in debt. Although the shortfall might be covered by the recruitment of more participants or by persuading current members to increase their contributions, KEDO thus far has faced an uphill battle to attract international contributions. This effort will also face competition from a request by the United Nations' World Food Program for \$41 million in emergency food aid to North Korea. Practically speaking, both requirements will compete for contributions from the same potential donor pool. Although last year's oil shipments have been completed, funding for next annual increment of 500,000 tons could prove a stumbling block.

²⁵FY 1998 Congressional Budget Request: Atomic Energy Defense Activities. Vol. 1, Feb. 1997. p. 430-431.

²⁶KEDO Annual Report, op. cit., p. 18.

The Japanese government recently has hardened its attitude towards North Korea following revelations that in the 1970s North Korean agents may have abducted several Japanese citizens, including a 13-year-old girl, for participation in a spy training program. As a result, Tokyo has thus far turned a cold shoulder to the food aid appeal and has indicated it will hold up consideration of the issue until April 1997.²⁷

Japanese Foreign Ministry officials reportedly were encouraged at evidence that North Korea was acting more rationally, as evidenced by participation in the three-way joint briefing in New York on March 5, but as of early April, Prime Minister Hashimoto indicated that Japan was still unwilling to provide food aid until it received better answers from Pyongyang regarding the alleged kidnapping of Japanese citizens and more transparency from North Korea about the extent of its food shortages.²⁸ This same attitude could influence its stance on additional contributions to KEDO.²⁹

UNCERTAINTIES ABOUT FUNDING FOR THE CAPITAL COSTS OF THE LWR PROJECT

The construction project faces even greater uncertainties. The total cost of the project remains unclear, especially the cost of dismantling the existing heavy water reactors and associated facilities. Nor is it clear who will pay for a power grid that must be constructed to distribute the electrical output, a project estimated by the State Department to cost up to \$750 million.³⁰ KEDO has refused North Korea's demand that it accept responsibility for this part of the project, but Pyongyang at present appears to lack the resources to undertake the project itself. In addition, while South Korea and Japan have, in principle agreed to fund about 80 percent of the project, no country or organization has yet agreed to cover the balance.

²⁷ Sullivan, Kevin. Seoul to Send \$6 million in Aid to N. Korea Despite Defector Impasse. *Washington Post*, Feb. 20, 1997: A31.

²⁸ *Tokyo Kyodo* in English, April 4, 1997. Foreign Broadcast Information Service (FBIS-EAS-97-066)

²⁹ In fact, senior members of the Prime Minister's ruling Liberal Democratic Party (LDP) reportedly have suggested that both humanitarian food aid and funding for KEDO should be made dependent on the establishment of diplomatic relations between Japan and North Korea, a problematical process at best judging from past negotiating breakdowns. *Mainichi Shimbun* (Tokyo), morning edition, March 19, 1997 (Foreign Broadcast Information Service, FBIS-EAS-97-078.) In the past, North Korean demands for World War II reparations have been a major stumbling block to diplomatic normalization. The conditions reportedly suggested by the LDP leaders could imply an effort to use Pyongyang's need for food as a means of getting it to shelve the reparation demands.

³⁰ GAO, Nuclear Nonproliferation: Implications of the U.S./North Korean Agreement on Nuclear Issues, October 1996, op. cit., p. 12.

In theory, construction could begin on a "pay-as-you-go" basis, but either South Korea or Japan could insist that the issue be resolved before construction funds were committed. In late March, 1997, the South Korean press reported that KEDO did not have sufficient funds to initiate ground-breaking, and that the United States and Japan were putting pressure on South Korea to shoulder the cost of preliminary construction activities.³¹

The EU could be one possible source of additional funds, but according to some reports the EU has sought to condition its participation in KEDO on getting a share of the contracts for engineering and major components. Thus far, the EU has only contributed to heavy oil and administrative costs. Should support be sought for construction funding, the EU might indeed insist on participation by European companies. U.S. officials have sought to dispel the idea that the EU might exact a price for contributing to the project, but have left open the possibility that any KEDO members could expect some special consideration within the boundaries of a transparent bidding process.³² Apart from possible technical problems that could arise, accommodating such a demand could cause major friction among three founding members of the KEDO governing board and jeopardize South Korean or Japanese support.

Due to the high level of tension between North and South Korea in recent months, the funding issue is a highly sensitive one for the government of President Kim Young Sam. The issue has been further complicated by the impending Presidential election in South Korea in December 1997. Although President Kim cannot succeed himself, his Administration has suffered a number of political reverses in recent months and the ruling New Korea Party (NKP) is in disarray. Some South Korean officials have suggested privately that it will be very difficult for the President to ask the Korean parliament for the \$300-400 million that will be necessary to cover the first year's construction. South Korean officials have also expressed concern that the United States has limited its own financial participation largely to the costs of providing interim energy supplies, and does not intend to share in the construction cost.³³

As of mid-April 1997, uncertainties about construction funding were not an immediate obstacle to carrying out the project. Before any construction can take

³¹Seoul *Yonhap* (Internet Version), March 27, 1997. (FBIS-EAS-97-086)

³²In testimony before the House Subcommittee on Asia and the Pacific on February 26, 1997, Acting Assistant Secretary of State for East Asian and Pacific Affairs, Charles Kartman, did not respond directly to a question from Chairman Bereuter, as to whether the Europeans had "sought a share of construction and other contracts as a price for their participation in KEDO," but noted that "its only fair to say that members of KEDO will be looked at with special care. But the bidding process is going to be a transparent one, and the EU members are not going to get some sort of an advantage over Korean or American companies."

³³Drawn from background interviews with South Korean officials in Seoul in late October 1996. See South Korea-U.S. Political and Security Relations: Findings of a Research Trip. CRS Report for Congress, Dec. 17, 1996. No. 97-24 F [by Richard P. Cronin.]

place, the site survey must be completed, the parties must agree on the boundaries for the site and the names for the two reactors, and North Korea must formally hand over the site. This process could take at least several more weeks.³⁴

POSSIBLE COMPLICATIONS IN NEGOTIATING AN AGREEMENT ON NUCLEAR COOPERATION

Negotiating an agreement on nuclear cooperation with North Korea could be a complicated process, in part due to Pyongyang's failure to satisfy several provisions of the NPT (i.e, its non-compliance with its obligations to the IAEA and suspicious activities.) Negotiation of a cooperation agreement could encounter many obstacles, but should begin soon after it becomes clear that U.S. exports will be required. Manufacture of the components would require about three years.³⁵

Presumably, vendors would not want to make a major investment in producing components without assurance that the exports will ultimately take place and funding is secured. In all likelihood, however, North Korea will wait until the last possible moment before agreeing to allow the required IAEA inspections -- if it consents to them at all. This means that there likely will be a prolonged period of uncertainty between the identification of a definite requirement for U.S. components -- which could occur at any time in the next few months -- and the time, about three years hence, when an agreement is negotiated and construction has advanced to the point where the U.S. components are needed.

POSSIBILITY OF FURTHER POLITICAL AND DIPLOMATIC COMPLICATIONS

In the near term, the fate of the LWR project could depend as much on the state of North-South relations as on any other factor. Up to now, North Korea has interacted primarily with the United States and KEDO in negotiations on the supply contract and related protocols, while maintaining a running war of words with South Korea. Adroit and resourceful diplomacy by the United States and KEDO has kept the nuclear-related parts of the agreement more or less on track, despite repeated strains in North-South relations. Within a few months, however, South Korea must commit significant funds towards the construction of the first LWR, or the project will stall.

During the past six months North-South relations have been extremely tense, starting with the September 1996 grounding of a North Korean submarine in South Korean waters and the apparent assassination of a South Korean diplomat by North Korean agents in Vladivostok, Russia.

³⁴Based on telephone conversation with a KEDO official, April 11, 1997.

³⁵GAO, Nuclear Proliferation, October 1996, op. cit., Appendix V, p. 59.

Meanwhile, President Kim Young Sam's government in South Korea has experienced mounting domestic political problems, and may be reluctant to provoke new controversy among the public and within the Korean parliament by requesting appropriations to finance the construction of a LWR in North Korea.³⁶ The Kim Young Sam government's problems include labor strife and a serious political-financial scandal involving the bankruptcy of a major steel company. Apparently the Hanbo Iron & Steel Company, which declared bankruptcy in early 1997, had obtained high level political intervention to borrow 16 times its own capital to build a state-of-the-art steelmaking facility. Because of the implications for the stability of several major banks, the Ministry of Finance has intervened and taken responsibility for a bailout.³⁷

Following the Hanbo collapse, President Kim apologized to the nation in a televised speech, replaced the appointed prime minister with a well-respected former mayor of Seoul, and ordered his second son -- frequently the subject of rumors of involvement in corrupt activities -- to stay away from governmental affairs. In public opinion polls conducted in February 1997, the South Korean public was evenly divided on whether Kim's response was sincere, while more than half thought steps to deal with the Hanbo scandal and labor strife were inadequate.³⁸

On the face of it, the growing evidence of a possible power struggle in North Korea and the deepening political troubles of South Korean President Kim Young Sam would appear to offer ample scope for future disruptions of the LWR project. On the other hand, U.S. officials and some non-governmental analysts see North Korea's difficulties as offering hope that it will moderate its policies and follow through with its commitments under the Agreed Framework, including the requirement to engage in dialogue with South Korea -- if only as the price of badly needed food aid and other economic benefits.

U.S. officials regard the March 5, 1997, joint briefing in New York as a breakthrough in its effort to promote a face-to-face dialogue between Seoul and Pyongyang by getting North Korea to participate in a three-way "joint briefing" on a broader proposal for four-party talks on achieving a lasting peace on the Korean peninsula. The four-party talks proposal, agreed upon last April during a summit meeting between President Clinton and South Korean President Kim Young Sam, were conceived as a means of getting North Korea into a direct dialogue with the South and undercutting its efforts to engage the United States in separate talks on replacing the armistice with a peace agreement.

³⁶Charles S. Lee, Rock the House; Hanbo Steel's Collapse Rattles Korea, Inc. *Far Eastern Economic Review*, Feb. 2, 1997: 53; Andrew Pollack, Koreans Divided on Leader's Apology. *New York Times*, Feb. 27, 1997: A10.

³⁷Charles S. Lee, Rock the House. *Far Eastern Economic Review*, Feb. 13, 1997: 53.

³⁸Andrew Pollack, Koreans Divided on Leader's Apology. *New York Times*, Feb. 27, 1997: A10.

U.S. officials described the March 5 meeting "cordial, serious, and sincere" and "a good start." At the meeting, the South Korean representative announced the cancellation of an annual military exercise. It is widely thought that North Korea's severe food shortages and its desire to obtain additional international food aid played a major role in finally getting Pyongyang to the table, even though a direct linkage was not made.³⁹ U.S. officials have expressed optimism that North Korea realizes that it needs to break out of its isolation, and may be willing to pay a price in terms of moderating its behavior and reducing the level of hostility towards the South. Along with China, South Korea remains the most likely source of large scale food shipments. As for President Kim Young Sam, a successful effort to engage with the North and lower the level of confrontation could go a long way toward improving his political standing and the prospects for the ruling New Korea Party in the upcoming elections.

CONCLUSIONS

As reflected in its formal name, the U.S.-North Korea nuclear accord was conceived by American negotiators as a framework -- not just for defusing a potential diplomatic and military confrontation over North Korea's nuclear program but also as a means to bring Pyongyang out of its isolation on a step-by-step basis, to promote North-South reconciliation, and to provide an avenue for a U.S.-North Korea dialogue about other pressing U.S. concerns, such as North Korea's exports of missiles and chemical weapons to radical states. To date the nuclear parts of the Agreed Framework have continued to move ahead even as the other aspects of the agreement have stalled.

Although North Korea has grown progressively weaker since the signing of the Agreed Framework, it still retains a million man army poised along the DMZ and the ability to devastate Seoul with artillery and rockets, and may have enough plutonium to construct one or two nuclear weapons. Its internal decisionmaking processes remain opaque. As a result, analysts dispute whether North Korea poses less of a threat to U.S., South Korean, and Japanese security interests than it did in October 1994. Some, apparently including Administration policymakers, see North Korea's options as becoming progressively more circumscribed. Critics of the Agreed Framework worry that Pyongyang could still seek to use its military power as leverage if an impasse is reached at some stage of the step-by-step Agreed Framework process.

While North Korea has failed to fulfill the spirit if not the letter of its non-nuclear commitments under the accord, it has also not received important benefits that it hoped to gain, including the removal of U.S. economic sanctions and movement towards full diplomatic relations with the United States. Pyongyang evidently has tried hard to use the agreement to create divisions

³⁹ Trotta, Liz. Meeting of Koreas 'Cordial,' With Permanent Peace a Goal. *Washington Times*, March 6, 1997: A11; and Goodstein, Laurie. North, South Korea Hold 'Positive' Talks. *Washington Post*, March 6, 1997: A26.

between the United States and South Korea, while simultaneously seeking to expand its relationship with Washington. The extent to which it has succeeded is a matter of intense debate in both the United States and South Korea. Certainly, U.S.-South Korean relations have been seriously tested as a result of somewhat different priorities on the part of the two governments.

With regard to the fate of the LWR project, it can be argued that North Korea has gone about as far as it can go in rejecting dialogue with the South. Since South Korea will be responsible for the largest part of the construction funding, the project will be in jeopardy unless there is a breakthrough of some kind in the near future. Especially in view of his current political difficulties, President Kim Young Sam needs some evidence of better behavior by the North in order to seek construction funding from the South Korean parliament. The food shortages in the North, which some describe as of "Ethiopian proportions," and evidence of serious internal divisions among the ruling elite, may give the North Korean regime additional incentives to moderate its policies.

Assuming construction begins, the second "moment of truth" will arise when North Korea has to accept intrusive inspection of the two suspicious waste sites and other facilities by the IAEA. This in all likelihood is still several years down the road. Without these inspections KEDO cannot deliver critical nuclear components and the United States cannot enter into a nuclear cooperation agreement with North Korea. In any event, Congress retains significant leverage over the ability of the U.S. Government to carry out its part of the agreement, both in the near term, in the form of appropriations requested for FY 1998, and in the longer term, in regard to its statutory right to accept or reject a bilateral nuclear cooperation agreement.

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