

FOIA MARKER

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Folder Title:

North Korea [7]

Staff Office-Individual:

Legal Advisor-Derosa, Mary

Original OA/ID Number:

3500

Row:	Section:	Shelf:	Position:	Stack:
39	5	11	1	V

Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. email	James Baker to Daniel Poneman re US-ROK Letters (1 page)	09/21/1994	P1/b(1)
002. cable	re Letter of Assurance from ROK (4 pages)	09/17/1994	P1/b(1)
003a. memo	information, Steven Aoki to Samuel Berger re Deputies Meeting (3 pages)	07/27/1994	P1/b(1)
003b. paper	re North Korea (7 pages)	07/00/1994	P1/b(1)
003c. memo	DCI North Korea Task Force to Steve Aoki re North Korea (15 pages)	07/20/1994	P1/b(1)
003d. paper	re Conventional Energy (9 pages)	08/00/1994	P1/b(1)

COLLECTION:

Clinton Presidential Records
National Security Council
Mary Derosa (Legal Advisor)
OA/Box Number: 3500

FOLDER TITLE:

North Korea [7]

2009-0528-F

kc1450

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

Freedom of Information Act - [5 U.S.C. 552(b)]

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C. Closed in accordance with restrictions contained in donor's deed of gift.

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

RR. Document will be reviewed upon request.

File
Please
Korea

Baker, James E.

From: Baker, James E.
To: Sens, Andrew D.; Reed, James W.
Cc: /R, Record at A1; Aoki, Steven; Kreczko, Alan J.
Subject: US-ROK Letters [UNCLASSIFIED]
Date: Thursday, September 15, 1994 1:02PM

Andy,

1. No problem with U.S. letter to ROK since it commits us to nothing.
2. Re: ROK letter to us, if the question is whether this exchange of letters in fact binds ROK to pay, policy makers should understand that the ROK would have two outs under the terms of these letters:

First, undertaking is subject to complete resolution of the nuclear issue, e.g., satisfaction of IAEA requirements and full implementation of the Joint Declaration on Denuclearization of the Korean Peninsula.

Second, ROKs funding is tied to the construction of reactors of similar design to reactors in South Korea. This, at a minimum, would expose ROK from obligation to pay for substandard reactors (e.g. a Russian model.) Moreover, if these are of such a design and construction that only South Korea in fact can provide the reactors then, in effect, ROK's financial guarantee is tied to ROK also constructing the reactors.

We have not seen the draft framework agreement/U.S. letter to the DPRK and therefore are not in a position to address what effect it has on the letters.

DRAFT ROK ASSURANCE

I am pleased to confirm that the Republic of Korea will cooperate fully in efforts to arrange for the financing and construction in North Korea of light-water nuclear power reactors of similar design to reactors currently operating or under construction in South Korea. In particular, the Republic of Korea guarantees that it will provide not less than (____%) of all funding necessary to construct such light-water reactors in North Korea with a total design capacity of approximately 2,000 MW(e) and will authorize full participation by South Korean firms in the project. Such funds will be made available to the organization overseeing the project (or its designee).

The assurances in this letter are subject to the same conditions as described in the «framework agreement/U.S. letter to the DPRK of September____, 1994.»

DRAFT ROK ASSURANCE

I am pleased to confirm that the Republic of Korea will cooperate fully in efforts to arrange for the financing and construction in North Korea of light-water nuclear power reactors of similar design to reactors currently operating or under construction in South Korea. In particular, the Republic of Korea guarantees that it will provide not less than (____%) of all funding necessary to construct such light-water reactors in North Korea with a total design capacity of approximately 2,000 MW(e) and will authorize full participation by South Korean firms in the project. Such funds will be made available to the organization overseeing the project (or its designee).

The assurances in this letter are subject to the same conditions as described in the «framework agreement/U.S. letter to the DPRK of September____, 1994.»

2/2

Letter from U.S. to ROK

In order to promote a broad and thorough resolution to the North Korean nuclear issue, the United States has informed North Korea in Geneva that we are prepared to provide a letter of assurance with respect to the financing and construction of a light-water reactor project in North Korea. This assurance would be contingent on a complete resolution of the nuclear issue, including satisfaction of the IAEA's requirements to address questions arising from North Korea's past nuclear activities (such as special inspections as required by the IAEA). Such a resolution would also require full implementation of the Joint Declaration on the Denuclearization of the Korean Peninsula.

Based on consultations between our two governments, the United States has proposed to North Korea that the Republic of Korea play a central role in financing and constructing the proposed light-water reactor project. We have explained that this proposal is the only technically, politically, and financially viable option. We also believe that the role played by the Republic of Korea in such a project would provide an opportunity for improving inter-Korean relations.

The provision of a light-water reactor project to North Korea will be central to the resolution of the North Korean nuclear issue when the U.S.-DPRK talks resume on September 23. That project will only come into being if the United States offers the assurances that we discussed with North Korea in the August session in Geneva. The United States will do its utmost to insure the success of the project. In view of the central role of the Republic of Korea in the proposed light-water reactor project, however, your written commitment on the Republic of Korea's participation in the financing and construction of the project is essential to our efforts to remove the North Korean nuclear threat. As you well know, no light-water reactor technology or equipment can be transferred to North Korea without full implementation of its full-scope safeguards obligations so as to address its past, present, and future nuclear activities.

It will be important that there be progress in North-South talks as we make progress in our talks with North Korea. We must continue our close consultations and draw on the strength of our forty-year alliance as we seek to resolve this issue of vital importance to our alliance, the region, and the world.

WASHFAX RECEIPT
DEPARTMENT OF STATE**B**

S/S #

C

94 SEP 15 11:12

MESSAGE NO. 010342 CLASSIFICATION ~~Secret~~ No. Pages 2
FROM: Carotenuto S/AL 647-1868 6313
(Officer name) (Office symbol) (Extension) (Room number)

MESSAGE DESCRIPTION Repeat of Ltr of Assurance from
Gallucci in Adm

<u>TO: (Agency)</u>	<u>DELIVER TO:</u>	<u>Extension</u>	<u>Room No.</u>
<u>NSC</u>	<u>Elisa Harris</u>	<u>395-3440</u>	<u>380</u>
<u>NSC</u>	<u>Andrew Sens</u>	<u>"</u>	<u>"</u>

OR: CLEARANCE ☐ INFORMATION ☐ PER REQUEST ☐ COMMENT ☐

REMARKS: Clearance requested ASAP. I have been
waiting NSC clearance since yesterday. Instructions
need to be sent back to Gallucci

S/S Officer: QUNCLASSIFIED UPON REMOVAL
OF CLASSIFIED ATTACHMENTSInitials: Q Date: 03/24/15

2009-0528-F

Withdrawal/Redaction Marker

Clinton Library

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001. email	James Baker to Daniel Poneman re US-ROK Letters (1 page)	09/21/1994	P1/b(1)
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COLLECTION:

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National Security Council
Mary Derosa (Legal Advisor)
OA/Box Number: 3500

FOLDER TITLE:

North Korea [7]

2009-0528-F
kc1450

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Freedom of Information Act - [5 U.S.C. 552(b)]

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C. Closed in accordance with restrictions contained in donor's deed of gift.
PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).
RR. Document will be reviewed upon request.

URGENT

NATIONAL SECURITY COUNCIL EXECUTIVE SECRETARIAT STAFFING DOCUMENT

TIME STAMP

SYSTEM LOG NUMBER: 7510

ACTION OFFICER: AOKI

DUE: 19 SEP

- ☒ Prepare Memo For Lake/Berger
☐ Prepare Memo For Podesta
☐ Prepare Memo _____

- ☐ Appropriate Action
☐ Prepare Memo For Itoh
to _____

CONCURRENCES/COMMENTS*

PHONE* to action officer at ext. _____

Concur	FYI		Concur	FYI		Concur	FYI	
☐	☒	Andreasen	☐	☐	Gottemoeller	☐	☐	Ross
☐	☐	Andricos	☐	☐	Hahn	☐	☐	Rossin
☐	☐	Aoki	☐	☐	Halperin	☒	☐	Roth
☐	☐	Atkins	☐	☐	Harris	☐	☐	Satterfield
☐	☐	Beers	☐	☐	Indyk	☐	☐	Schifter
☐	☒	Bell	☐	☐	Jenson-Moran	☐	☐	Schwartz
☐	☐	Beyrle	☐	☐	Jones	☐	☐	Seaton
☐	☐	Blakeman	☐	☐	Kerrick	☐	☐	Simon
☐	☐	Bradley	☐	☐	Kraczko	☐	☐	Sonenshins
☐	☐	Breeland	☒	☐	Kristoff	☐	☐	Spalter
☐	☐	Burns	☐	☐	Kyle	☐	☐	Steinberg
☐	☐	Clarke	☐	☐	Laipson	☐	☐	Stephens
☐	☐	Claussen	☐	☐	Leary	☐	☐	Suettinger
☐	☐	Danvers	☐	☐	LeBourgeois	☐	☐	Tenet
☐	☐	Darragh	☐	☐	Mislock	☐	☐	Van Tassel
☐	☐	DeShazer	☐	☐	Mitchell	☐	☐	Vershbow
☐	☐	Fauver	☐	☐	Murase	☐	☐	Wales
☐	☐	Feinberg	☒	☐	Poneman	☐	☐	Walsh
☐	☐	Forsythe	☐	☐	Punke	☐	☐	Whyman
☐	☐	Fried	☐	☐	Reed	☐	☐	Witowsky
☐	☐	Froman	☐	☐	Rice	☐	☒	<u>GRAY</u>
☐	☐	Genton	☐	☐	Rocha	☐	☐	

INFORMATION

☐ Itoh

☒ Sens

☒ Soderberg

☐ Exec Sec Desk

☐ Lake

☒ Berger

☒ Wolin

☒ Records Mgmt

COMMENTS

Prepare response by early next week

URGENT

Logged By EB

Return to Records Mgmt.
379 OEOB

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002. cable	re Letter of Assurance from ROK (4 pages)	09/17/1994	P1/b(1)

COLLECTION:

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Mary Derosa (Legal Advisor)
OA/Box Number: 3500

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Poneman, Daniel B.

Wednesday, September 21, 1994

8:00		
8:30	Sr. Staff Mtg	
9:00	CIA BRIEFING - BELINDA...	
9:30		
10:00	IWG on Nonproliferation and Export Controls - Room 324	
10:30		
11:00	Mtg with President - Cabinet...	
11:30		
12:00		
12:30		
1:00		
1:30		
2:00		
2:30		
3:00		
3:30		
4:00		
4:30		
5:00	LEAVE FOR DULLES...	
5:30		
6:00	6:15 FLT 915 TO GENEVA	

5:53PM Tuesday, September 20, 1994

Withdrawal/Redaction Marker

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
003a. memo	information, Steven Aoki to Samuel Berger re Deputies Meeting (3 pages)	07/27/1994	P1/b(1)

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I

NATIONAL SECURITY COUNCIL DEPUTIES' COMMITTEE MEETING

DATE: JULY 29, 1994
LOCATION: SITUATION ROOM
TIME: 9:00 - 10:30 a.m.

LIGHT WATER REACTORS IN KOREA

Agenda

- I. Introduction NSC
II. Light Water Reactors State
III. Interim Energy Replacement State
IV. Spent Fuel Removal Energy
V. Discussion All Participants
VI. Conclusion NSC

DECLASSIFIED E.O. 13526
White House Guidelines,
September 11, 2006
By MA NARA, Date 03/24/15
2009-0528-F

~~SECRET~~

Declassify on: OADR

~~SECRET~~

11

Withdrawal/Redaction Marker

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
003b. paper	re North Korea (7 pages)	07/00/1994	P1/b(1)

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LWR SCENARIOS: U.S. LEGAL REQUIREMENTS

NOTE: Set forth below are the basic legal requirements for U.S. participation under several possible scenarios for supply of a light-water reactor to the DPRK. The details of these legal requirements are described in Tab 2.

I. U.S.-ROK Joint Venture

Project Description: The ROK would provide the reactor, the construction services, and most of the financing. The U.S. would provide certain project management services and would deal with the DPRK. It would actively promote the project by seeking to arrange subcontract suppliers and additional financing. The U.S. would also guarantee that, in the event the reactor project is terminated, the President would use the full powers of his office to facilitate the provision of a replacement reactor to the DPRK. This "guarantee" would not legally commit the U.S. to provide a replacement reactor (see Tab 3).

- o Congressional Approval: No Congressional approval would be required since the U.S. would not be obligated to expend funds to provide a replacement reactor.
- o Agreement for Cooperation: An agreement for nuclear cooperation would not be required.
 - The Atomic Energy Act provides that the kind of activities that would be undertaken by the U.S. joint venture partner may take place pursuant to an agreement for cooperation. Congress might prefer negotiation of an agreement for cooperation due to the sensitivity of this case, but such an agreement would not be required.
 - An agreement for cooperation would be needed only if major component exports from the U.S. were to be made as part of our effort to facilitate provision of a replacement reactor.
- o Minor Components: If the U.S. joint venture partner were to provide minor components as part of the primary project, the DPRK would have to agree to safeguards, peaceful use, and no retransfer without U.S. consent. The same would be true if such exports were made from the U.S. as part of our effort to facilitate provision of a replacement reactor.

- o Technology: In order to engage in the North Korea project, the U.S. joint venture partner would have to obtain a **specific authorization** from the Department of Energy based on a finding that its activities "will not be inimical to the interest of the United States." Congress would have no statutory role in this process.
 - The nonproliferation steps agreed to by the DPRK as a condition of U.S. involvement could provide a basis for the findings needed to authorize such participation.
 - The U.S. firm's participation could be approved incrementally, with approval of broader activities being linked to DPRK nonproliferation actions.
 - In addition, we would have to determine whether the ROK would be using U.S. technology, in which case U.S. reexport restrictions might apply. Approval of such reexports should not be a problem if the DPRK is meeting its nonproliferation commitments.
- o Nuclear Trade Sanctions: A waiver of sanctions under section 129 of the Atomic Energy Act would **not** be needed as long as no U.S. components were to be transferred (though the appropriate evaluations could begin in case the U.S., as part of its commitment to facilitate construction of a replacement reactor, were to arrange for the export of major components by a U.S. firm).
- o Trading With the Enemy Act: The U.S. joint venture partner would have to obtain a license from the Treasury Department's Office of Foreign Assets Control (OFAC) for all of its transactions with the DPRK. Congress would have no statutory role in this licensing process. Consultations with OFAC would be advisable at the earliest opportunity.
- o Terrorism Controls: It would be prudent to consult with the Commerce Department to make sure that any exports anticipated by the U.S. joint venture partner pursuant to Commerce license could in fact be approved without delay.
- o Liability: Liability would pose a significant obstacle to U.S. contractors' involvement as joint venture partners.
 - Since the purpose of U.S. participation in the joint venture is primarily to make the proposal more palatable to the DPRK, the ROK should be asked to hold the U.S. joint venture partner harmless for liability incurred in connection with the project.
- o Environment: Environmental evaluations likely would not be required for U.S. participation in the joint venture since the U.S. would not be exporting major reactor components.

II. Russian Construction

Project Description: Russia would be responsible for providing the reactor and all necessary construction services. Japan (and possibly other countries in a consortium) would be responsible for providing financing. The U.S. would actively promote the project by seeking to arrange suppliers and financing. The U.S. would also guarantee that, in the event the reactor project is terminated, the President would use the full powers of his office to facilitate the provision of a replacement reactor to the DPRK. This "guarantee" would not legally commit the U.S. to provide a replacement reactor (see Tab 3).

- o Congressional Approval: No Congressional approval would be required since the U.S. would not be obligated to expend funds to provide a replacement reactor.
- o Agreement for Cooperation: Since the U.S. would not be obliged to provide the reactor or any major components, even under the "guarantee," an agreement for nuclear cooperation would not be required.
 - An agreement for cooperation would be needed only if major component exports from the U.S. were to be made as part of our effort to facilitate provision of a replacement reactor.
- o Minor Components: If the U.S. were to provide minor components either for use in the Russia project or in order to facilitate a replacement reactor, the DPRK would have to agree to safeguards, peaceful use, and no retransfer without U.S. consent.
- o Technology: We would have to determine whether Russia would be using U.S. technology, in which case U.S. reexport restrictions might apply.
- o Nuclear Trade Sanctions: A waiver of sanctions under section 129 of the Atomic Energy Act would not be required (though the appropriate evaluations could begin in case the U.S., as part of its commitment to facilitate construction of a replacement reactor, were to arrange for the export of major components by a U.S. firm).
- o Trading With the Enemy Act: No prior steps would be necessary, but it would be prudent to consult with OFAC and Commerce.
- o Terrorism Controls: No prior steps would be necessary, but it would be prudent to consult with the Commerce Department.

- o Liability: Liability would not pose a problem in the sense that the firms most concerned about such issues (U.S. and European firms) would not be involved. On the other hand, concern for the safety of Russian reactors operated by North Koreans could dry up financing. A Russian indemnification pledge might not be sufficient to relieve these concerns.
- o Environment: Environmental evaluations would not be required since the U.S. likely would not be exporting major reactor components.

III. European/Japanese Construction

Essentially the same factors apply as in Option II above. Western firms will be more likely to seek U.S. technology transfer or commodities than in the Russian case. Liability concerns on the part of European or Japanese firms.

IV. U.S. Performance Guarantee

Project Description: Under either the first or second scenario, in addition to the political assurances provided in connection with the U.S.-ROK joint venture or the Russian project, the U.S. Government could provide a legally binding guarantee that, in the event the reactor project is not completed on grounds for which the DPRK is not responsible, the U.S. would ensure availability of a replacement reactor. The notional guarantee letter at Tab 4 will be modified based on the level and type of risk that the USG decides to undertake.

- o Congressional Approval: Because the U.S. would be providing a performance guarantee involving future commitment of funds for which appropriations have not been made, Congressional approval would be required in order to satisfy the Anti-Deficiency Act.
 - The Congressional approval should read along the following lines: "The Congress hereby approves the entry into force of the agreement between the United States and the Democratic People's Republic of Korea, signed in Geneva on _____, and authorizes its implementation. There are authorized to be appropriated such funds as may be necessary for such implementation."
 - Under this approach, no budgetary impact would occur until funds were actually appropriated at a later time.
 - Because this approach could require subsequent appropriations, the U.S. could be placed in violation of its obligation to the DPRK if the guarantee were triggered and Congress did not appropriate the necessary funds.
 - In selling this package to Congress, we would stress that the contractors bear the risk of sub-standard performance and the lenders bear the risk of DPRK failure to repay the loan.
 - We would bear the risk of financing a replacement reactor, but we could seek to lower that risk by requiring that the primary supplier indemnify the U.S. in the event of its nonperformance (though such an assurance from Russia might not be worth much).
 - If we believed that Congress would not affirmatively approve the agreement with the DPRK, we might consult members informally concerning the possibility of using existing statutory exceptions that allow contracting notwithstanding the laws of contract.
 - These authorities have been interpreted to allow exemptions from the Anti-Deficiency Act.

- Congress might prefer that the Executive Branch stretch existing authorities rather than seek Congressional approval of the agreement.
- If the guarantee were ever triggered, we would have to identify the statutory or Constitutional authority to procure a reactor on behalf of the DPRK. Such authority might have to be granted by Congress for execution of this guarantee.
- o Agreement for Cooperation: Because the U.S. might have to supply the reactor or major reactor components in order to make good on its guarantee, the DPRK would have to accept as a condition of the guarantee that it would "enter into an agreement for nuclear cooperation in the event that the U.S. had to supply the reactor or major components thereof."
- A sample agreement for cooperation, tailored to the DPRK, would be attached to the guarantee letter in order to set the bounds of this condition. We would have to persuade the DPRK to accept some of the more demanding requirements of such an agreement.
- We could negotiate this agreement before the guarantee is triggered so that the Congressional review period of 90 continuous session days would not delay carrying out work under the guarantee. However, this approach could lead to contentious negotiations with the DPRK and contentious Congressional review of an agreement that ultimately may not be needed. Moreover, work would probably not be delayed anyway since the U.S. would take some time to get the project going.
- Congressional review might be avoided if the reactor were provided under an IAEA project agreement (which, pursuant to the U.S.-IAEA agreement for cooperation, would incorporate the same requirements as would be required of a U.S.-DPRK agreement for cooperation). The DPRK would have to rejoin the IAEA under this option.
- o Minor Components: If the U.S. had to provide minor components in order to make good on its guarantee, the DPRK would have to agree to safeguards, peaceful use, and no retransfer without U.S. consent. Safeguards and peaceful use will already be a condition of the guarantee, and the DPRK will have already consented to the concept of no retransfer in connection with the draft agreement for cooperation. Therefore, no additional action would be needed prior to the need to export the components.

- o Technology: If the U.S. had to provide additional technology or other assistance requiring Energy Department authorization in order to make good on its guarantee, the steps already agreed to by the DPRK as a condition of the guarantee would probably provide a sufficient basis for the findings needed to authorize such assistance.
- o Nuclear Trade Sanctions: The relevant departments and agencies could begin the preliminary evaluations needed to support a waiver of nuclear trade sanctions under section 129 of the Atomic Energy Act. Actual processing of the waiver would not be necessary until the guarantee was triggered (assuming such a waiver had not already been required in connection with U.S. participation in the primary supply project). In the meantime, we presumably would be developing a record of DPRK compliance with the conditions of the guarantee. The waiver would be subject to Congressional review for 60 days of continuous session.
- o Trading With the Enemy Act: Similarly, no specific steps would have to be taken under the Trading With the Enemy Act (TWEA) until actual transactions by U.S. persons with the DPRK were contemplated pursuant to the guarantee. (Under the U.S.-ROK joint venture option, some activities likely would have been licensed already, but the range of activities required under the guarantee might be broader.) In any case, it would be prudent to consult fully with OFAC and Commerce so that any eventual transactions could be approved efficiently.
- o Terrorism Controls: As with TWEA, no specific steps would have to be taken before the guarantee was triggered, but consultations with the Commerce Department would be prudent.
- o Liability: Liability could pose a significant obstacle to U.S. contractors' involvement in connection with the performance guarantee, particularly if the primary suppliers were no longer providing liability indemnification. The U.S. could begin to evaluate the steps that would be necessary to meet contractors' concerns with a project in North Korea.
- o Environment: Preliminary environmental evaluations should begin, to the extent possible, before the guarantee is triggered.

Drafted by: L/PM - Newell Highsmith

DISCUSSION OF U.S. LEGAL REQUIREMENTS

Congressional Approval of DPRK Agreement

- o Congress's role in approving an agreement with the DPRK would depend on whether or not the U.S. gave the DPRK a binding commitment to provide a replacement reactor in the event that the primary supply project were not completed.
- o A commitment to use the full powers of the President under the Constitution to facilitate the provision of a replacement reactor (Tab 3) would be wholly within the powers of the President and therefore would not require Congressional approval.
- o On the other hand, a legally binding performance guarantee (Tab 4) could require the U.S. to provide resources to ensure performance by the primary supplier, by a third country, or by a U.S. contractor.
 - The binding guarantee at Tab 4 entails considerable risks: the primary supplier may not perform adequately (particularly a Russian supplier); the U.S. may not be able to find a contractor willing to provide substitute performance in the DPRK; the price of substitute performance might be exorbitant; etc.
 - The text at Tab 4 can be modified based on the precise level and type of risk the USG decides to undertake.
- o A binding guarantee would raise serious issues under the Anti-Deficiency Act, which prohibits any government official from (1) making an "obligation exceeding an amount available in an appropriation or fund," or (2) involving the USG in "a contract or obligation for the payment of money before an appropriation is made unless authorized by law."
- o We do not currently have appropriated funds to cover such a performance guarantee, and Congress would not likely appropriate such funds at this time.
- o Therefore, any binding guarantee will have to be (1) approved by Congress in advance, or (2) expressly subject to the availability of appropriated funds (with an acknowledgement that the agreement does not indicate that Congress will provide such appropriations).
 - Since conditioning the U.S. guarantee on the availability of funds likely would not be acceptable to North Korea, we would want instead to seek Congressional approval of a signed agreement **before the agreement entered into force.**

- o The Congressional approval should read substantially as follows:

"The Congress hereby approves the entry into force of the agreement between the United States and the Democratic People's Republic of Korea, signed in Geneva on _____, and authorizes its implementation. There are authorized to be appropriated such funds as may be necessary for such implementation."

- By making clear that actual performance under the guarantee would require the appropriation of funds by Congress, **this approach would eliminate the need for budgetary scoring at this time.**
- If the U.S. had to perform under the guarantee and Congress failed to appropriate the funds, the U.S. would be in breach of its obligation to the DPRK (but Congress is often in a position to place the U.S. in breach of its international commitments).
- o In selling this package to Congress, we would want to stress that the contractors (Russian or U.S./ROK) would be at risk under their contracts if the reactor somehow failed to meet specifications.
 - The guarantee letter refers to reactors "designed" to provide 1000 MWe. This formulation is intended to protect the U.S. from guaranteeing that the reactors will fully meet specifications.
- o We would also want to stress that the lender (the ROK or Japan) would be at risk for nonpayment of the loan by North Korea.
- o Most important, we should seek to lower the risk even further through a government-to-government agreement or a contractual arrangement requiring that the U.S. be indemnified in the event of nonperformance by the primary supplier. (The ROK apparently has suggested the possibility of such an arrangement if it is the primary supplier.)
- o **Loan Guarantee:** One alternative to the performance guarantee would be to guarantee the availability of funding (i.e., stand behind the South Korean or Japanese pledge to loan sufficient funds to North Korea). Under this approach, the potential liability for the U.S. would be capped by the value of the loan.
 - However, a loan guarantee might not satisfy North Korea in that it protects them only against financial impediments to project completion, not political impediments.

- In addition, this approach would require a current appropriation to meet the risk pursuant to the Credit Reform Act.
- o Several existing statutory exceptions permit USG contracting actions notwithstanding the Anti-Deficiency Act.
 - Public Law 85-804 (50 USC 1431) provides that the President may authorize any agency engaged in national defense functions to enter into contracts and to make advance payments "without regard to the provisions of law relating to" government contracting whenever the President deems that such action would facilitate the national defense.
 - Section 162 of the Atomic Energy Act (42 USC 2202) provides that "the President may, in advance, exempt any specific action of the [Department of Energy] in a particular matter from the provisions of law relating to contracts whenever he determines that such action is essential in the interest of the common defense and security."
 - Section 633(a) of the Foreign Assistance Act (22 USC 2393(a)) provides that, "whenever the President determines it to be in furtherance of the purposes of [the FAA], the functions authorized under this Act may be performed without regard to such provisions of law regulating . . . contracts and the expenditure of funds of the United States Government as the President may specify."
- o The first two of these authorities were intended primarily to facilitate defense-related procurement (though they are not, by their terms, so limited). Guaranteeing the DPRK reactor project would not readily fit into this mold because it would not facilitate a U.S. procurement.
- o The third statutory exception was intended to facilitate overseas procurement in connection with foreign assistance activities. It has typically been exercised to exempt all FAA actions from specified laws, not to facilitate particular transactions. It could not easily be stretched to cover a performance guarantee for a DPRK reactor project.

- o Congress might view the unorthodox use of these exceptions as an effort to undermine Congress's Constitutional role with respect to both the approval of treaties and the appropriation of funds. It might retaliate by prohibiting the use of funds for the DPRK project.
- o On the other hand, given the likely difficulties in obtaining affirmative Congressional approval of an agreement with the DPRK, we might conclude that these authorities would provide a solution to an Executive-Congress stalemate.
 - Such an approach should be accompanied by informal consultations with Congress to ensure that there is general agreement that this approach is preferable to submitting the agreement with the DPRK for approval.

Atomic Energy Act: Agreement for Cooperation

- o The U.S. cannot transfer an LWR, major reactor components, or nuclear fuel to the DPRK until it has entered into an agreement for nuclear cooperation pursuant to section 123 of the Atomic Energy Act. (Major components are pressure vessels, primary coolant pumps, fuel charging or discharging machines, and control rods.)
 - In addition, a waiver of nuclear trade sanctions under section 129 of the Atomic Energy Act would be required, as well as issuance of the necessary licenses from the Nuclear Regulatory Commission, the Treasury Department (under the Trading With the Enemy Act), and the Commerce Department (terrorism controls). These requirements are discussed in subsequent sections.
- o In order to enter into an agreement under section 123, the DPRK will have to agree to the following:
 - A guarantee that it will maintain IAEA safeguards in perpetuity on items subject to the agreement.
 - A requirement, as a condition of continued U.S. nuclear supply, that it will maintain full-scope IAEA safeguards.
 - A provision permitting the United States to apply fall-back safeguards (i.e., U.S. inspections) in the DPRK in the event IAEA safeguards cannot be effectively applied.
 - A peaceful use guarantee (i.e., the DPRK will not use items subject to the agreement for any nuclear explosive device, for research on or development of any such device, or for any other military purpose).

- A U.S. right to cease cooperation and **require the return** of items subject to the agreement if the DPRK detonates a nuclear explosive device or terminates or abrogates a safeguards agreement with the IAEA.
- A guarantee that it will maintain adequate **physical security** with respect to items subject to the agreement.
- A U.S. right of prior **consent** before the DPRK may **retransfer** to a third country items subject to the agreement.
- A guarantee that it will not **reprocess, enrich, or alter in form or content** nuclear material subject to the agreement (section 123 requires only U.S. consent, but we presumably would want a prohibition in this case).
- A U.S. right to approve in advance **storage facilities** for separated plutonium, uranium 233, and highly enriched uranium subject to the agreement (though it is not anticipated that the DPRK would possess such materials).
- A prohibition on the transfer of **sensitive nuclear technology and restricted data** under the agreement.
- A guarantee that all key conditions and controls will remain in force in **perpetuity** with respect to items subject to the agreement, even if the agreement expires or is terminated.
- o This agreement would have to be submitted to Congress for a review period of 90 continuous session days. Congress could disapprove the agreement during that time by joint resolution (which the President could veto, requiring a 2/3 majority for override).
- Congress has never disapproved a nuclear cooperation agreement, but in the case of the U.S.-China agreement, it imposed stringent conditions on the commencement of exports pursuant to the agreement (which have never been met).
- In this case, the LWR agreement will already impose stringent nonproliferation conditions on the DPRK, which might satisfy Congress's concerns. **However, Congress likely would reject the agreement if the DPRK had not yet allowed special inspections to take place.**
- o An agreement for cooperation does not commit the United States to any specific exports or other activities, but rather establishes a framework of conditions and controls to govern subsequent transactions, if any.

- We might mollify Congressional concerns by proposing an agreement for cooperation with the DPRK that would permit only this one reactor project (i.e., any additional cooperation would require amendment of the agreement, which Congress would again review for 90 continuous session days).
- o Even with an agreement in force, significant exports made pursuant to it require a license from the U.S. Nuclear Regulatory Commission.
- o IAEA Project and Supply Agreement: The U.S. could supply a reactor to the DPRK through the IAEA, subject to the U.S.-IAEA agreement for cooperation.
- This approach would not require an agreement for cooperation between the U.S. and the DPRK (though the DPRK would have to agree to the same kind of requirements in its project agreement with the IAEA and the U.S.).
- Congress would not have a role in approving a project agreement (as would be the case with an agreement for cooperation).
- The DPRK would have to rejoin the IAEA to become eligible for such a project.

Atomic Energy Act: Export of Minor Components

- o An agreement for nuclear cooperation is not needed for exports of minor reactor components (basically, all nuclear reactor components other than pressure vessels, primary coolant pumps, fuel charging or discharging machines, and control rods).
- For export of a minor component, section 109(b) of the Atomic Energy Act requires guarantees from the recipient government that (1) safeguards will be applied to the item, (2) the item will be used exclusively for peaceful purposes, and (3) the item will not be retransferred without U.S. consent.

Atomic Energy Act: Technology Transfers

- o An agreement for nuclear cooperation is not needed for a transfer of nuclear technology to the DPRK. (Technology would include everything from a reactor design to reactor safety knowhow. It would include any transfer of information or knowhow, including during consultations, seminars, exchanges, studies, evaluations, etc. It does not include "public information" -- i.e., information available

to the public in books, periodicals, electronic media, public libraries, open meetings, etc.)

- o The basic requirement for a transfer of nuclear technology to the DPRK would be issuance of a specific authorization by the Department of Energy based on a finding that the transfer "will not be inimical to the interest of the United States." This finding would require the concurrence of State and consultation with Defense, ACDA, Commerce, and the Nuclear Regulatory Commission.
 - Neither an agreement for cooperation nor full-scope safeguards is strictly required, though effective full-scope safeguards is typically an important factor in the finding of noninimicality.
- o If another country were supplying the reactor, we would have to determine whether the reactor incorporated U.S. technology, in which case reexport controls might apply. The U.S. does not typically obtain reexport consent rights in connection with nuclear technology transfers, but it has done so in a few cases.
 - Moreover, if a U.S. firm had a licensing arrangement with the ROK requiring its consent for the retransfer, it could not provide that consent without obtaining authorization from the Energy Department.

Atomic Energy Act: Nuclear Trade Sanctions

- o The U.S. could not transfer an LWR, major reactor components, nuclear fuel, or minor reactor components unless the President waived the prohibition in section 129 on such trade.
- o Section 129 prohibits such nuclear trade on two grounds that are applicable to the DPRK: (1) where a nonnuclear-weapon state has materially violated an IAEA safeguards agreement; and (2) where a nonnuclear-weapon state has "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 judgment, represent sufficient progress toward terminating such activities."
 - The stringent nonproliferation commitments in the LWR agreement could form the basis for a determination by the President that the DPRK had taken sufficient steps to terminate its proliferant activities, thereby avoiding sanctions under the second provision cited above.

- o Either provision could be waived if the President determined that cessation of nuclear trade "would be seriously prejudicial to the achievement of United States nonproliferation objectives or otherwise jeopardize the common defense and security."
- This waiver determination would have to be submitted to Congress for 60 days of continuous session before it took effect.
- Congress could disapprove the waiver during that time by joint resolution or other enactment (which the President could veto, requiring a 2/3 majority for override).

Trading With the Enemy Act

- o The President has exercised his authority under TWEA to ban all trade and financial transactions with North Korea absent a license from the Treasury Department's Office of Foreign Asset Controls (OFAC). (For exports of Commerce-controlled items, OFAC defers to Commerce's decision on issuing an export license.)
- o OFAC could issue the required license, or the President could relax the ban. Neither action would require Congressional consent or consultation.

EAA Terrorism Controls

- o The DPRK was designated a "terrorist country" in 1988 for purposes of the terrorism controls in the Export Administration Act. It therefore is subject to an outright ban on exports of munitions list items, as well as a requirement of an individual validated licenses for many other items.
- o If the Secretary of State determined that a controlled item "could make a significant contribution to the military potential of such country, including its military logistics capability, or could enhance the ability of such country to support acts of international terrorism," a 30-day prior notification to Congress would be required before the issuance of a license.
- o The criteria for removing a country from the terrorist list are demanding and would be difficult to meet in the case of the DPRK (e.g., a Presidential certification that there has been a fundamental change in the leadership and policies of the country, that the country is no longer supporting acts of terrorism, and that the government has provided assurances that it will not support terrorist acts in the future).

Liability for Accidents

- o U.S. firms will be concerned about potential liability for third party claims arising from discharges of radioactive materials resulting from an accident. (They have been somewhat reluctant to participate in efforts to improve the safety of Russian reactors for that reason.)
- o In particular, these firms are concerned that their participation in a project might provide the basis for a suit in U.S. courts by foreign plaintiffs (the "Bhopal scenario").
- o Accordingly, if U.S. firms were to participate, there would probably have to be arrangements to ensure that such firms were not exposed to unlimited liability.
- o The most practical approach would be to create an ad hoc liability structure for this one transaction.
- o One option might be for a U.S. firm in a joint venture with South Korean firms to seek an indemnification agreement from those firms.
- o Alternatively, we could follow the model used last year with Russia and Ukraine in connection with the provision of safety assistance to their civil reactors. A bilateral agreement would require the recipient State or some other state (1) to provide for the defense of third party claims for nuclear damage in any court, (2) to indemnify the provider of assistance for any judgments that might be assessed, and (3) to bring no such claims on its own behalf or on behalf of others.
 - In the case of the DPRK project, such undertakings might have to come from the ROK, as the DPRK would not be regarded as a credible guarantor for the large sums potentially involved.
- o There are two international instruments governing nuclear liability -- the OECD's Paris Convention of 1960 and the IAEA's Vienna Convention of 1963. The DPRK, the ROK, Japan, Russia, China and the U.S. are not party to either major convention. Accordingly, under present circumstances, a claim for damage resulting from a reactor accident in the DPRK might be brought against any participant in the DPRK reactor project in any court or forum that would hear the case.
- o One solution would be for all States participating in the project to join the international system.

Environmental Requirements

- o The National Environmental Policy Act (NEPA) would not apply to this **overseas** project.
- o Instead, E.O. 12114 covers major Federal actions with environmental effects abroad.
- o The "Federal action" in this case would be the government approvals necessary for U.S. participation in the reactor project.
 - However, the procedures adopted to implement E.O. 12114 in the nuclear field **exempt** the kinds of government approvals that would be needed in this case other than approvals for export of a reactor or major reactor components.
- o If the USG were approving the **export of a reactor or major reactor components**, the appropriate environmental documentation likely would be required.
 - However, this requirement would not apply if the approval action were taken either (1) by the President, or (2) at the direction of the President or a Cabinet officer when the national security is involved.
- o If the Department of Energy were approving the **participation of U.S. firms** in the North Korean reactor project, environmental documentation likely would not be required.
 - The procedures adopted to implement E.O. 12114 focus on the provision of a "physical project" and exempt actions taken under section 57 of the Atomic Energy Act, which includes DOE approval of nuclear-related activities overseas.

Drafted by: L/PM - Newell Highsmith

POLITICAL COMMITMENT

This letter would offer only a political commitment from President Clinton. It would not require Congressional approval and would not violate the Anti-Deficiency Act.

I wish to confirm to you that I will use the full powers of my office in accordance with the U.S. Constitution to facilitate arrangements for the construction within North Korea by [Russia/South Korea/United States] of a light-water nuclear power reactor facility designed to provide approximately 1000 MWe. This effort will include arranging for financing by [Japan][South Korea][a consortium consisting of Japan, South Korea, etc.]. In addition, in the event that this reactor project is not completed for reasons beyond the control of North Korea, I will use the full powers of my office in accordance with the U.S. Constitution to facilitate the supply to North Korea of a light-water reactor facility designed to provide approximately 1000 MWe, including if necessary the provision of such a facility from the United States.

I provide these assurances on the understanding that: (1) the DPRK will remain a party to the Treaty on the Non-Proliferation of Nuclear Weapons and will comply fully with that Treaty; (2) the DPRK will comply fully with its obligations under the DPRK-IAEA safeguards agreement; (3) the DPRK will comply fully with the terms of the Joint Declaration on the Denuclearization of the Korean Peninsula; (4) the DPRK will transfer all spent fuel from its 5MW nuclear reactor to _____ within ____ months of the entry into force of this agreement; (5) the DPRK will not refuel its 5MW reactor at any time; (6) the DPRK will cease all further construction on the reactor(s) at _____ and the radiochemical laboratory at _____ and will not construct any reactors or laboratories of these types in the future.

BINDING GUARANTEE

This letter would legally bind the U.S. to provide a replacement reactor, if necessary. We would need to seek Congressional approval in order to satisfy the Anti-Deficiency Act. An entry-into-force provision would allow for referral to Congress. U.S. supply of the reactor pursuant to the guarantee would be conditioned on conclusion of an agreement for nuclear cooperation.

I wish to confirm to you that the United States will exert its utmost efforts to facilitate arrangements for the construction within North Korea by [Russia/South Korea/United States] of a light-water nuclear power reactor facility designed to provide approximately 1000 MWe. This effort will include arranging for financing by [Japan][South Korea][a consortium consisting of Japan, South Korea, etc.]. The United States guarantees that, in the event that this reactor project is not completed for reasons beyond the control of North Korea, the United States will take those steps necessary to ensure the availability to North Korea of a light-water reactor facility designed to provide approximately 1000 MWe on terms similar to those of the original reactor project.

This offer and guarantee is subject to the following conditions: (1) the DPRK shall remain a party to the Treaty on the Non-Proliferation of Nuclear Weapons and shall comply fully with that Treaty; (2) the DPRK shall comply fully with its obligations under the DPRK-IAEA safeguards agreement; (3) the DPRK shall comply fully with the terms of the Joint Declaration on the Denuclearization of the Korean Peninsula; (4) the DPRK shall transfer all spent fuel from its 5MW nuclear reactor to _____ within _____ months of the entry into force of this agreement; (5) the DPRK shall not refuel its 5MW reactor at any time; (6) the DPRK shall cease all further construction on the reactor(s) at _____ and the radiochemical laboratory at _____ and shall not construct any reactors or laboratories of these types in the future. In addition, in the event that the U.S. must supply a light-water reactor or major components thereof pursuant to this letter, such supply shall be conditioned on the DPRK agreeing to enter into an agreement for nuclear cooperation in substantially the form attached hereto.

If you agree to these terms, I propose that this letter and your favorable response shall constitute an agreement between our countries, which shall enter into force upon further notification between us that we have completed our respective domestic approval processes.

Withdrawal/Redaction Marker

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
003c. memo	DCI North Korea Task Force to Steve Aoki re North Korea (15 pages)	07/20/1994	P1/b(1)

COLLECTION:

Clinton Presidential Records
National Security Council
Mary Derosa (Legal Advisor)
OA/Box Number: 3500

FOLDER TITLE:

North Korea [7]

2009-0528-F
kc1450

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
- P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
- P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA]
- P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

- b(1) National security classified information [(b)(1) of the FOIA]
- b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
- b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
- b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
- b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
- b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
- b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

III

Withdrawal/Redaction Marker

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
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003d. paper	re Conventional Energy (9 pages)	08/00/1994	P1/b(1)
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b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

GUARANTEE LETTER

- o Attached are four options for guarantee letters.
 - **Option 1** would establish a political obligation rather than a legal obligation. It might be offered to back up a U.S.-ROK joint venture fully funded by the ROK.
 - **Option 2** would establish a legal obligation, but the guarantee of project performance would not include provision of a replacement reactor. It, too, probably would not be sufficient except in connection with a U.S.-ROK joint venture fully funded by the ROK.
 - **Options 3 and 4** would establish legally binding guarantees that would have to be submitted for Congressional approval due to Anti-Deficiency Act requirements. (In making good on such a guarantee, the U.S. could not export a reactor from the U.S. except in accordance with U.S. law. See paper on legal requirements for U.S. supply.)
- o Most of this paper will discuss the obstacles to options 3 and 4, which attempt to meet the DPRK's request for a legally binding U.S. guarantee that the DPRK will receive a light-water reactor (LWR).
- o U.S. performance of such a "guarantee" could involve (1) securing the contractor's performance through diplomatic means, (2) securing the performance of another party through diplomatic means, or (3) providing resources to ensure performance by the contractor, another party, or a U.S. contractor. The first two alternatives are within the President's existing powers. Only the third alternative raises issues of Anti-Deficiency Act compliance and Congressional approval.

Anti-Deficiency Act:

- o A substitute U.S. reactors would likely cost over \$3 billion. The U.S. might be faced with such an outlay after having already expended funds on the first project in an effort to secure performance by the primary supplier.
- o Congress would not likely appropriate funds to cover such a guarantee.
- o The Anti-Deficiency Act prohibits any government official from (1) making an "obligation exceeding an amount available in an appropriation or fund," or (2) involving the USG in "a contract or obligation for the payment of money before an appropriation is made unless authorized by law."

Privileged Attorney-Client Communication

- o Therefore, any binding guarantee will have to be approved by Congress in advance or will have to be expressly subject to the availability of appropriated funds.
 - The preferred option for Anti-Deficiency Act purposes would be a clause concerning availability of funds.
 - However, since such a clause likely would not be acceptable to North Korea, we would want instead to seek Congressional approval of a signed agreement before the agreement entered into force.
 - Even for this approach, an estimate of the cost of guaranteeing performance might be required, and Congress and the Congressional Budget Office might seek a significant **budgetary offset**.
 - The Congressional approval might read as follows (in order of preference for Anti-Deficiency Act purposes):

ALTERNATIVE: "The Congress hereby approves the agreement between the United States and the Democratic People's Republic of Korea, signed in Geneva on _____, and authorizes its implementation notwithstanding any provisions of law relating to contracts."

ALTERNATIVE: "The Congress hereby approves the agreement between the United States and the Democratic People's Republic of Korea, signed in Geneva on _____, and authorizes its implementation. There are authorized to be appropriated such funds as may be necessary for such implementation."

ALTERNATIVE: "The Congress hereby approves the agreement between the United States and the Democratic People's Republic of Korea, signed in Geneva on _____, and authorizes its implementation."
- o Since the lender (the ROK or Japan) would be at risk for nonpayment of the loan by North Korea, the U.S. risk would be limited to nonperformance of the reactor supply contract, and that risk might be relatively small if U.S. and/or ROK firms were responsible for the contract.
 - That risk might be lowered even further by an indemnification agreement with the U.S./ROK contractor in the event of the contractor's nonperformance.

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- o Loan Guarantee: Guaranteeing North Korean repayment of its loan would be a less exotic commercial arrangement, and the potential liability for the U.S. would be capped by the value of the loan.
- However, a loan guarantee might not satisfy North Korea in that it protects them only against financial impediments to project completion, not political impediments. In addition, it would shift the risk of DPRK nonpayment from the lender to the U.S., and that risk may exceed the risk of nonperformance.

Binding Guarantee Without Congressional Approval

- o We continue to explore statutory exceptions that might allow us to make a binding guarantee without Congressional approval, notwithstanding the Anti-Deficiency Act.
- Public Law 85-804 (50 USC 1431) provides that the President may authorize any agency engaged in national defense functions to enter into contracts and to make advance payments "without regard to the provisions of law relating to" government contracting whenever the President deems that such action would facilitate the national defense.
- Section 162 of the Atomic Energy Act (42 USC 2202) provides that "the President may, in advance, exempt any specific action of the [Department of Energy] in a particular matter from the provisions of law relating to contracts whenever he determines that such action is essential in the interest of the common defense and security."
- Section 633(a) of the Foreign Assistance Act (22 USC 2393(a)) provides that, "whenever the President determines it to be in furtherance of the purposes of [the FAA], the functions authorized under this Act may be performed without regard to such provisions of law regulating . . . contracts and the expenditure of funds of the United States Government as the President may specify."
- [Would an indemnification agreement with the ROK eliminate the need for appropriated funds under the Anti-Deficiency Act?]

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- o The third statutory exception -- under the Foreign Assistance Act -- was intended to free overseas procurement from contract law provisions better suited to domestic procurement.
 - This exception was intended to facilitate overseas procurement in connection with foreign assistance activities. It could not easily be stretched to cover a performance guarantee for a DPRK reactor project.
 - In addition, this exception has typically been exercised to exempt all FAA actions from specified laws, not to facilitate particular transactions (as would be the case with the DPRK reactor project).
- o The other two statutory exceptions -- national defense and Atomic Energy Act -- were intended primarily to facilitate defense-related procurement. (For example, the national defense exception has been used to justify indemnification clauses for contractors in U.S. nuclear weapons programs without regard to the availability of appropriated funds.)
 - Guaranteeing the DPRK reactor project would not readily fit into this mold because it would not facilitate a U.S. procurement.
 - Nonetheless, since these exceptions are not expressly limited to U.S. procurement contracts, an argument could be made that the USG can enter into a contract as guarantor where the completion of that contract would "facilitate the national defense" or "is essential in the interest of the common defense and security."
- o Using one of these statutory exceptions might prompt Congress to retaliate by curtailing the availability of that exception.
- o Congress might also view the unorthodox use of these exceptions as an effort to undermine Congress's Constitutional role with respect to both the approval of international agreements and the appropriation of funds. The result might be more confrontational than simply submitting the guarantee letter for Congressional approval.

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Determining Compliance with Reciprocal Commitments

- o The U.S. and North Korea will have highly subjective determinations to make as to the other party's compliance with its commitments under the agreement.
 - For example, North Korea might cite delays in reactor construction to argue that the U.S. has not met its guarantee obligation, thereby releasing North Korea from its nonproliferation commitments under the agreement.
 - Conversely, the U.S. and North Korea could have a dispute as to whether North Korea has met its obligation to comply with the NPT and IAEA safeguards, particularly in view of the history of disagreement over the scope of IAEA safeguards.
- o The North Korean safeguards obligation and the U.S. guarantee are not readily susceptible to objective compliance criteria (though verification is easier with some other obligations, such as spent fuel transfer, no reprocessing, no refueling, and no reactor or reprocessing construction).

Signing the Guarantee

- o With each of these guarantee options, we have the issue of who should sign the letter.
- o A letter from Clinton to Kim would certainly be most satisfactory to the DPRK, but EAP has noted political difficulties with Clinton sending a letter to the head of a terrorist state with which we do not maintain diplomatic relations.

Limiting Scope of Guarantee

- o The letters refer to reactors "designed" to provide 1000 MWe. This formulation is intended to protect the U.S. from guaranteeing that the reactors (particularly if they are Russian) will fully meet specifications. If the DPRK chooses Russian reactors, the DPRK should bear the risk of poor Russian quality.

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[NOTE: None of these options are precisely modeled on the guarantee letter signed by President Carter in connection with the Camp David peace accords. The Carter letter was treated as a legally binding "sole" executive agreement and was reported to Congress as such under the Case Act. It was not submitted to the Senate for advice and consent or subject to other

Congressional approval. In consultations with Congress, we apparently took the position that the U.S. was legally bound by the commitments to (1) consult in the event of a violation of the peace accords, (2) conduct aerial monitoring, and (3) use utmost efforts to obtain from the Security Council the establishment of the multinational force. However, the key commitment for our purposes -- that "the President will be prepared to take those steps necessary to ensure the establishment and maintenance of an acceptable alternative multinational force" -- may have been treated more equivocally. Some historic documents suggest that it was deemed not to be an obligation of the United States to provide the force, only an obligation of the President to "be prepared" to do so. The caveat at the beginning of the letter "subject to United States Constitutional processes" also was relied upon to explain why Congressional approval was not required. In the end, U.S. participation in the MFO was authorized by statute. L has serious reservations as to whether the language "will be prepared to" would be adequate in this case to convert the performance guarantee into a "best efforts" pledge not requiring the approval of Congress.]

Attachments: Options 1-4

Drafted: L/PM - Newell Highsmith

SELOESN 2795

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OPTION 1

[OPTION 1 would represent only a political commitment from President Clinton. It would not require Congressional approval and would not violate the Anti-Deficiency Act.

Advantage: We would not have to go to Congress.

Disadvantage: We would have to admit to the DPRK that it is not legally binding. This Administration might renege on its pledge, or it might end before the reactor facility is completed.]

TEXT

I wish to confirm to you that I **will exert my utmost efforts** to facilitate arrangements for the construction within North Korea by [Russia/South Korea/United States] of a light-water nuclear power reactor facility designed to provide approximately 1000 MWe. This effort will include arranging for financing by [Japan][South Korea][a consortium consisting of Japan, South Korea, etc.]. I **guarantee** that, in the event that this reactor project is terminated on grounds for which North Korea is not responsible, I **will use the full powers of my office** to ensure the supply to North Korea of a light-water reactor facility designed to provide approximately 1000 MWe, including if necessary the provision of such a facility from the United States.

I provide these assurances on the understanding that: (1) the DPRK will remain a party to the Treaty on the Non-Proliferation of Nuclear Weapons and will comply fully with that Treaty; (2) the DPRK will comply fully with its obligations under the DPRK-IAEA safeguards agreement; (3) the DPRK will comply fully with the terms of the Joint Declaration on the Denuclearization of the Korean Peninsula; (4) the DPRK will transfer all spent fuel from its 5MW nuclear reactor to _____ within ____ months of the entry into force of this agreement; (5) the DPRK will not refuel its 5MW reactor at any time; (6) the DPRK will cease all further construction on the reactor(s) at _____ and the radiochemical laboratory at _____ and will not construct any reactors or laboratories of these types in the future.

OPTION 2

[OPTION 2 would be treated as a "sole" executive agreement. It would not require Congressional approval or violate the Anti-Deficiency Act. The obligations to exert utmost efforts to arrange a reactor project and to "seek to ensure" the provision of a replacement reactor would be legally binding, but would be within the existing authority of the President. This formulation would not bind the U.S. to provide or pay for a replacement reactor, thereby avoiding Anti-Deficiency Act problems. To meet its obligations, the U.S. could be required to issue any necessary export licenses, negotiate an agreement for nuclear cooperation, etc., but not provide funding.

Advantage: We would not have to go to Congress.

Disadvantage: We would have to admit to the DPRK that the "guarantee" portion of the agreement does not bind the U.S. to provide a reactor, but only to seek to arrange for a reactor to be provided.]

TEXT

I wish to confirm to you that **the United States** will exert its utmost efforts to facilitate arrangements for the construction within North Korea by [Russia/South Korea/United States] of a light-water nuclear power reactor facility designed to provide approximately 1000 MWe. This effort will include arranging for financing by [Japan][South Korea][a consortium consisting of Japan, South Korea, etc.]. In the event that this reactor project is terminated on grounds for which North Korea is not responsible, **the United States shall seek** to ensure the supply to North Korea of a light-water reactor facility designed to provide approximately 1000 MWe, including if necessary the provision of such a facility **from** the United States.

This offer and guarantee is subject to the following conditions: (1) the DPRK shall remain a party to the Treaty on the Non-Proliferation of Nuclear Weapons and shall comply fully with that Treaty; (2) the DPRK shall comply fully with its obligations under the DPRK-IAEA safeguards agreement; (3) the DPRK shall comply fully with the terms of the Joint Declaration on the Denuclearization of the Korean Peninsula; (4) the DPRK shall transfer all spent fuel from its 5MW nuclear reactor to _____ within ____ months of the entry into force of this agreement; (5) the DPRK shall not refuel its 5MW reactor at any time; (6) the DPRK shall cease all further construction on the reactor(s) at _____ and the radiochemical laboratory at _____ and shall not construct any reactors or laboratories of these types in the future.

OPTION 3

[OPTION 3 would legally bind the U.S. to provide a replacement reactor, if necessary. We would need to seek Congressional approval in order not to run afoul of the Anti-Deficiency Act. An entry-into-force provision would allow for referral to Congress. U.S. supply of the reactor pursuant to the guarantee would be conditioned on conclusion of an agreement for nuclear cooperation.

Advantage: Comes closest to meeting the demands of the DPRK.

Disadvantage: Subject to the whims of Congress.]

TEXT

I wish to confirm to you that the United States will exert its utmost efforts to facilitate arrangements for the construction within North Korea by [Russia/South Korea/United States] of a light-water nuclear power reactor facility designed to provide approximately 1000 MWe. This effort will include arranging for financing by [Japan][South Korea][a consortium consisting of Japan, South Korea, etc.]. **The United States guarantees** that, in the event that this reactor project is terminated on grounds for which North Korea is not responsible, the United States will take those steps necessary to ensure the supply to North Korea of a light-water reactor facility designed to provide approximately 1000 MWe, including if necessary the provision of such a facility **by** the United States.

This offer and guarantee is subject to the following conditions: (1) the DPRK shall remain a party to the Treaty on the Non-Proliferation of Nuclear Weapons and shall comply fully with that Treaty; (2) the DPRK shall comply fully with its obligations under the DPRK-IAEA safeguards agreement; (3) the DPRK shall comply fully with the terms of the Joint Declaration on the Denuclearization of the Korean Peninsula; (4) the DPRK shall transfer all spent fuel from its 5MW nuclear reactor to _____ within ____ months of the entry into force of this agreement; (5) the DPRK shall not refuel its 5MW reactor at any time; (6) the DPRK shall cease all further construction on the reactor(s) at _____ and the radiochemical laboratory at _____ and shall not construct any reactors or laboratories of these types in the future. In addition, in the event that the U.S. must supply a light-water reactor or major components thereof pursuant to this letter, such supply shall be conditioned on the DPRK agreeing to enter into an agreement for nuclear cooperation in substantially the form attached hereto.

This offer and guarantee shall enter into force upon further notification from the United States that we have completed our domestic approval process.

OPTION 4

[OPTION 4 is different from Option 3 only in that it requires a response from the DPRK.

Advantage: Legally binds the DPRK as well.

Disadvantage: We would have to ensure that the DPRK's response did not attempt to modify the terms of the agreement.]

TEXT

I wish to confirm to you that the United States will exert its utmost efforts to facilitate arrangements for the construction within North Korea by [Russia/South Korea/United States] of a light-water nuclear power reactor facility designed to provide approximately 1000 MWe. This effort will include arranging for financing by [Japan][South Korea][a consortium consisting of Japan, South Korea, etc.]. The United States guarantees that, in the event that this reactor project is terminated on grounds for which North Korea is not responsible, the United States will take those steps necessary to ensure the supply to North Korea of a light-water reactor facility designed to provide approximately 1000 MWe, including if necessary the provision of such a facility by the United States.

This offer and guarantee is subject to the following conditions: (1) the DPRK shall remain a party to the Treaty on the Non-Proliferation of Nuclear Weapons and shall comply fully with that Treaty; (2) the DPRK shall comply fully with its obligations under the DPRK-IAEA safeguards agreement; (3) the DPRK shall comply fully with the terms of the Joint Declaration on the Denuclearization of the Korean Peninsula; (4) the DPRK shall transfer all spent fuel from its 5MW nuclear reactor to _____ within ____ months of the entry into force of this agreement; (5) the DPRK shall not refuel its 5MW reactor at any time; (6) the DPRK shall cease all further construction on the reactor(s) at _____ and the radiochemical laboratory at _____ and shall not construct any reactors or laboratories of these types in the future. In addition, in the event that the U.S. must supply a light-water reactor or major components thereof pursuant to this letter, such supply shall be conditioned on the DPRK agreeing to enter into an agreement for nuclear cooperation in substantially the form attached hereto.

If you agree to these terms, I propose that this letter and your favorable response shall constitute an agreement between our countries, which shall enter into force upon further notification between us that we have completed our respective domestic approval processes.

LWR SCENARIOS: U.S. LEGAL REQUIREMENTS

NOTE: Set forth below are the legal requirements for U.S. participation under several possible scenarios for supply of a light-water reactor to the DPRK. The details of these legal requirements are described in the attachment.

I. U.S. Performance Guarantee

Project Description: The U.S. would not provide equipment, construction services, or financing. It would actively promote the project by seeking to arrange suppliers and financing. It would guarantee that, in the event the reactor project is terminated, the U.S. would ensure provision of the reactor.

- o Agreement for Cooperation: Because the U.S. might have to supply the reactor or major reactor components in order to make good on its guarantee, **the DPRK would have to accept as a condition of the guarantee that it would "enter into an agreement for nuclear cooperation in the event that the U.S. had to supply the reactor or major components thereof."**
 - A sample agreement for cooperation, tailored to the DPRK, should be attached to the guarantee letter in order to set the bounds of this condition. We will have to explain the agreement for cooperation, as some of its requirements will probably put off the DPRK initially.
 - We could negotiate the agreement before the guarantee is triggered so that the Congressional review period of 90 continuous session days would not delay carrying out work under the guarantee.
 - This approach could lead to contentious negotiations with the DPRK and contentious Congressional review of an agreement that ultimately may not be needed. Moreover, work would probably not be delayed anyway since the U.S. would take some time to get the project going.
 - Congressional review could be avoided if the reactor were provided under an IAEA project agreement (which, pursuant to the U.S.-IAEA agreement for cooperation, would incorporate the same requirements as would be required of a U.S.-DPRK agreement for cooperation). The DPRK would have to rejoin the IAEA under this option.
- o Minor Components: If the U.S. had to provide minor components in order to make good on its guarantee, the DPRK would have to agree to safeguards, peaceful use, and no retransfer without U.S. consent. Safeguards and peaceful use will already be a condition of the guarantee, and the

DPRK will have already consented to the concept of no retransfer in connection with the draft agreement for cooperation. Therefore, no action would be needed prior to the need to export the components.

- o Technology: If the U.S. had to provide technology or other assistance requiring Energy Department authorization in order to make good on its guarantee, the steps already agreed to by the DPRK as a condition of the guarantee would probably provide a sufficient basis for the findings needed to authorize such assistance.

-- In addition, we would have to determine whether the primary supplier would be using U.S. technology, in which case U.S. reexport restrictions might apply.
- o Nuclear Trade Sanctions: The relevant departments and agencies could begin the preliminary evaluations needed to support a waiver of nuclear trade sanctions under section 129 of the Atomic Energy Act. Actual processing of the waiver would not be necessary until the guarantee was triggered. In the meantime, we presumably would be developing a record of DPRK compliance with the conditions of the guarantee. (The waiver would be subject to Congressional review for 60 days of continuous session.)
- o Trading With the Enemy Act: Similarly, no specific steps would have to be taken under the Trading With the Enemy Act (TWEA) until actual transactions by U.S. persons with the DPRK were contemplated. However, it would be prudent to consult fully with Treasury's Office of Foreign Assets Control (OFAC) and Commerce so that any eventual transactions could be approved efficiently.
- o Terrorism Controls: As with TWEA, no specific steps would have to be taken before the guarantee was triggered, but consultations with the Commerce Department would be prudent.
- o Liability: Liability will pose a significant obstacle to U.S. contractors' involvement in the project. The U.S. should begin to evaluate the steps that would be necessary to meet contractors' concerns with a project in North Korea.
- o Environment: Preliminary environmental evaluations should begin, to the extent possible, before the guarantee is triggered.
- o Indemnification: If the ROK is the primary supplier of the reactor, we should consider obtaining an **indemnification pledge** so that the cost of any replacement reactor would be borne by the ROK. (Such indemnification is probably beyond the capability of the Russians.)

II. "Best Efforts" Guarantee

Project Description: The U.S. would not provide equipment, construction services, or financing. It would actively promote the project by seeking to arrange suppliers and financing. The "guarantee" would not legally commit the U.S. to provide a replacement reactor in the event the reactor project was terminated.

- The President could provide a political commitment to "use the full powers of his office" to ensure the supply of the LWR to the DPRK.
- Alternatively, the U.S. could provide a binding guarantee to "seek" to ensure the supply of the LWR, without undertaking to pay for a replacement.
- o Agreement for Cooperation: Since the U.S. would not be obliged to provide the reactor or any major components, even under the guarantee, an agreement for nuclear cooperation under section 123 of the Atomic Energy Act would not be required.
- o Minor Components: Similarly, no prior steps would be required for possible minor component exports under the guarantee.
- o Technology: The same would be true for possible transfers of nuclear technology (but we would still have to determine if U.S. technology was being used by the ROK or Russia).
- o Nuclear Trade Sanctions: No prior steps would be necessary, but it would be prudent to begin section 129 evaluations.
- o Trading With the Enemy Act: No prior steps would be necessary, but it would be prudent to consult with OFAC and Commerce.
- o Terrorism Controls: No prior steps would be necessary, but it would be prudent to consult with the Commerce Department.
- o Liability: Liability issues should be examined as early as possible.
- o Environment: Environmental evaluations should begin as early as possible.
- o Indemnification: An indemnification pledge from the primary supplier would be useful, but not as critical given the qualifications to this "guarantee."

III. U.S.-ROK Joint Venture

A. Venture Accompanied by Binding Guarantee

Project Description: The ROK would provide the reactor, the construction services, and financing. The U.S. would provide certain project management services and would deal with the DPRK. It would also guarantee to the DPRK that, in the event the reactor project is terminated, the U.S. would ensure provision of the reactor.

- o Agreement for Cooperation: An agreement for nuclear cooperation would not be required.
 - The Atomic Energy Act provides that such activities may take place pursuant to an agreement for cooperation. Congress might expect negotiation of an agreement for cooperation due to the sensitivity of this case. However, an agreement for cooperation is not required.
 - However, the DPRK would have to accept as a condition of the guarantee that it would "enter into an agreement for nuclear cooperation in the event that the U.S. had to supply the reactor or major components thereof" under the guarantee.
- o Minor Components: If the U.S. were to provide minor components either as part of the primary project or in order to make good on its guarantee, the DPRK would have to agree to safeguards, peaceful use, and no retransfer without U.S. consent. As previously noted, the DPRK would have already agreed to these concepts in the guarantee letter.
- o Technology: The U.S. joint venture partner would have to obtain a **specific authorization** from the Department of Energy to engage in the North Korea project. Congress would have no statutory role in this process.
 - The steps agreed to by the DPRK as a condition of the guarantee might provide a sufficient basis for the findings needed to authorize such participation.
 - The U.S. firms participation could be approved incrementally, with broader activities being linked to DPRK nonproliferation actions.
 - In addition, we would have to determine if U.S. technology was being used by the ROK.
- o Nuclear Trade Sanctions: A waiver of sanctions under section 129 of the Atomic Energy Act would not be required (though the appropriate evaluations could begin in case nuclear exports from the U.S. were ultimately required under the guarantee).

- o Trading With the Enemy Act: The U.S. joint venture partner would have to obtain a **license from OFAC** for all of its transactions with the DPRK. Congress would have no statutory role in this licensing process. Consultations with OFAC would be advisable at the earliest opportunity.
- o Terrorism Controls: It would be prudent to consult with the Commerce Department to make sure that any exports anticipated by the U.S. joint venture partner pursuant to Commerce license could in fact be approved without delay.
- o Liability: Liability would pose a significant obstacle to U.S. contractors' involvement as joint venture partners.
 - Since the purpose of U.S. participation in the joint venture is primarily to make the proposal more palatable to the DPRK, **the ROK should be asked to hold the U.S. joint venture partner harmless for liability incurred in connection with the project.**
- o Environment: Environmental evaluations likely would not be required for U.S. participation in the joint venture (absent U.S. component exports).
- o Indemnification: The U.S. should obtain from the ROK an **indemnification pledge** so that the cost of any replacement reactor would be borne by the ROK. If the ROK wants this business, it should be willing to hold the U.S. harmless against the costs of its failure to perform.

B. Venture Accompanied by "Best Efforts" Guarantee

Project Description: The ROK would provide the reactor, the construction services, and financing. The U.S. would provide certain project management services and would deal with the DPRK. We would also guarantee that, in the event the reactor project is terminated, the U.S. would "seek" to ensure -- or use the full powers of the President to ensure -- the provision of the reactor to the DPRK. This "guarantee" would not legally commit the U.S. to provide a replacement reactor.

- o Agreement for Cooperation: An agreement for nuclear cooperation would not be required, nor would the DPRK have to accept in principle the terms of the agreement for nuclear cooperation.
- o Minor Components: If the U.S. were to provide minor components either as part of the primary project or in connection with its "guarantee," the DPRK would have to agree to safeguards, peaceful use, and no retransfer without U.S. consent.

- o Technology: As in the previous scenario, the U.S. joint venture partner would have to obtain a **specific authorization** from the Department of Energy (and we would have to determine if U.S. technology was being used by the ROK).
- o Nuclear Trade Sanctions: A waiver of nuclear trade sanctions under section 129 of the Atomic Energy Act would not be required (though the appropriate evaluations might begin in case we ultimately chose to export components under the "guarantee").
- o Trading With the Enemy Act: The U.S. joint venture partner would have to obtain a **license from OFAC**.
- o Terrorism Controls: No advance steps would be necessary in connection with U.S. terrorism controls, but again, it would be prudent to consult with the Commerce Department.
- o Liability: Liability would still pose a significant obstacle to U.S. contractors' involvement as joint venture partners.
 - Again, we should seek from the ROK a commitment to **hold the U.S. joint venture partner harmless** for liability incurred in connection with the project.
- o Environment: Environmental evaluations likely would not be required for U.S. participation in the joint venture (absent U.S. component exports).
- o Indemnification: The U.S. could obtain from the ROK a pledge to indemnify the U.S. in the event of nonperformance, but it would not be essential since the U.S. would not be legally bound to provide a replacement reactor.

IV. U.S. as General Contractor

Project Description: The legal issues under this approach would be roughly the same as under the U.S.-ROK joint venture scenario, assuming the general contractor would be a U.S. firm (the USG should not undertake such an effort itself). As in the joint venture scenario, this approach could be backed by a political commitment or a binding guarantee from the USG.

- o Agreement for Cooperation: The need for an agreement for cooperation (or an IAEA project agreement) might be greater since the U.S. firm would be directly responsible for completion of the project and might want the option of U.S. supply in the event that foreign equipment suppliers did not perform.

- o Indemnification: Under this approach, unlike the joint venture scenarios, a U.S. general contractor might not be able to obtain liability indemnification from its subcontractors -- even if ROK subcontractors would be performing most of the work.

V. Financial Guarantee

- o Project Description: The U.S. would not provide equipment, construction services, or financing. It would actively promote the project by seeking to arrange suppliers and financing. It would guarantee repayment of the loan (i.e., stand behind the DPRK if it fails to repay the lender -- most likely Japan or the ROK). This approach would address the financial risk involved in the project, but not the risk of nonperformance by the primary supplier.
- o Agreement for Cooperation: Unnecessary.
- o Minor Components: No steps necessary.
- o Technology: No steps necessary (but we would have to determine if U.S. technology was being used by the primary supplier).
- o Nuclear Trade Sanctions: No waiver necessary.
- o Trading With the Enemy Act: All necessary approvals would have to be obtained from OFAC and Commerce pursuant to TWEA.
- o Terrorism Controls: No steps necessary.
- o Environment: Environmental documentation likely would not be required.
- o Liability: Liability concerns would be virtually removed.
- o Indemnification: An indemnification pledge from the primary supplier would be advisable (particularly if the ROK were carrying out the project).

Drafted by: L/PM - Newell Highsmith

ATTACHMENT: U.S. LEGAL REQUIREMENTS

Atomic Energy Act: Agreement for Cooperation

- o The U.S. cannot transfer an LWR, major reactor components, or nuclear fuel to the DPRK until it has entered into an agreement for nuclear cooperation pursuant to section 123 of the Atomic Energy Act. (Major components are pressure vessels, primary coolant pumps, fuel charging or discharging machines, and control rods.)
 - In addition, a waiver of nuclear trade sanctions under section 129 of the Atomic Energy Act would be required, as well as the necessary licenses from the Nuclear Regulatory Commission, the Treasury Department (under the Trading With the Enemy Act), and the Commerce Department (terrorism controls). These requirements are discussed in subsequent sections.
- o In order to enter into an agreement under section 123, the DPRK will have to agree to the following:
 - A guarantee that it will maintain IAEA **safeguards** in perpetuity on items subject to the agreement.
 - A requirement, as a condition of continued U.S. nuclear supply, that it will maintain **full-scope IAEA safeguards**.
 - A provision permitting the United States to apply **fall-back safeguards** (i.e., U.S. inspections) in the DPRK in the event IAEA safeguards cannot be effectively applied.
 - A **peaceful use guarantee** (i.e., the DPRK will not use items subject to the agreement for any nuclear explosive device, for research on or development of any such device, or for any other military purpose.
 - A U.S. right to cease cooperation and **require the return** of items subject to the agreement if the DPRK detonates a nuclear explosive device or terminates or abrogates a safeguards agreement with the IAEA.
 - A guarantee that it will maintain adequate **physical security** with respect to items subject to the agreement.
 - A U.S. right of prior **consent** before the DPRK may **retransfer** to a third country items subject to the agreement.
 - A guarantee that it will not **reprocess, enrich, or alter in form or content** nuclear material subject to the agreement.

- A U.S. right to approve in advance storage facilities for separated plutonium, uranium 233, and highly enriched uranium subject to the agreement (though it is not anticipated that the DPRK would possess such materials).
- A prohibition on the transfer of sensitive nuclear technology and restricted data under the agreement.
- A guarantee that all key conditions and controls will remain in force in perpetuity with respect to items subject to the agreement, even if the agreement expires or is terminated.
- o This agreement would have to be submitted to Congress for a review period of 90 continuous session days. Congress could disapprove the agreement during that time by joint resolution (which the President could veto, requiring a 2/3 majority for override).
- Congress has never disapproved a nuclear cooperation agreement, but in the case of U.S.-China agreement, it imposed stringent conditions on the commencement of exports pursuant to the agreement (which have never been met).
- In this case, the LWR agreement will already impose stringent nonproliferation conditions on the DPRK, which might satisfy Congress's concerns. **However, Congress likely would reject the agreement if the DPRK had not yet allowed special inspections to take place.**
- o An agreement for cooperation does not commit the United States to any specific exports or other activities, but rather establishes a framework of conditions and controls to govern subsequent transactions, if any.
- We might mollify Congressional concerns by proposing an agreement for cooperation with the DPRK that would permit only this one reactor project (i.e., any additional cooperation would require amendment of the agreement, which Congress would again review for 90 continuous session days).
- o Even with an agreement in force, significant exports made pursuant to it require a license from the U.S. Nuclear Regulatory Commission.
- o IAEA Project and Supply Agreement: The U.S. could supply a reactor to the DPRK **through** the IAEA, subject to the U.S.-IAEA agreement for cooperation.

- This approach would not require an agreement for cooperation between the U.S. and the DPRK (though the DPRK would have to agree to the same requirements in its project agreement with the IAEA and the U.S.).
- Congress would not have a role in approving a project agreement (as would be the case with an agreement for cooperation).
- The DPRK would have to rejoin the IAEA to become eligible for such a project.

Atomic Energy Act: Export of Minor Components

- o An agreement for nuclear cooperation is not needed for exports of minor reactor components (basically, all nuclear reactor components other than pressure vessels, primary coolant pumps, fuel charging or discharging machines, and control rods).
 - For export of a minor component, section 109(b) of the Atomic Energy Act requires guarantees from the recipient government that (1) safeguards will be applied to the item, (2) the item will be used exclusively for peaceful purposes, and (3) the item will not be retransferred without U.S. consent.

Atomic Energy Act: Technology Transfers

- o An agreement for nuclear cooperation is not needed for a transfer of nuclear technology to the DPRK. (Technology would include everything from a reactor design to reactor safety knowhow. It would include any transfer of information or knowhow, including during consultations, seminars, exchanges, studies, evaluations, etc. It does not include "public information" -- i.e., information available to the public in books, periodicals, electronic media, public libraries, open meetings, etc.)
- o The basic requirement for a transfer of nuclear technology to the DPRK would be issuance of a specific authorization by the Department of Energy based on a finding that the transfer "will not be inimical to the interest of the United States." This finding would require the concurrence of State and consultation with Defense, ACDA, Commerce, and the Nuclear Regulatory Commission.
 - Neither an agreement for cooperation nor full-scope safeguards is strictly required, though effective full-scope safeguards is typically an important factor in the finding of noninimicality.

- o If another country were supplying the reactor, we would have to determine whether the reactor incorporated U.S. technology, in which case reexport controls might apply. The U.S. does not typically obtain reexport consent rights in connection with nuclear technology transfers, but it has done so in a few cases.

Atomic Energy Act: Nuclear Trade Sanctions

- o The U.S. could not transfer an LWR, major reactor components, nuclear fuel, or minor reactor components unless the President waived the prohibition in section 129 on such trade.
- o Section 129 prohibits such nuclear trade on two grounds that are applicable to the DPRK: (1) where a nonnuclear-weapon state has materially violated an IAEA safeguards agreement; and (2) where a nonnuclear-weapon state has "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 judgment, represent sufficient progress toward terminating such activities."
 - The stringent nonproliferation commitments in the LWR agreement could form the basis for a determination by the President that the DPRK had taken sufficient steps to terminate its proliferant activities, thereby avoiding sanctions under the second provision cited above.
- o Either provision could be waived if the President determined that cessation of nuclear trade "would be seriously prejudicial to the achievement of United States nonproliferation objectives or otherwise jeopardize the common defense and security."
 - This waiver determination would have to be submitted to Congress for 60 days of continuous session before it took effect.
 - Congress could disapprove the waiver during that time by joint resolution or other enactment (which the President could veto, requiring a 2/3 majority for override).

Trading With the Enemy Act

- o The President has exercised his authority under TWEA to ban all trade and financial transactions with North Korea absent a license from the Treasury Department's Office of Foreign Asset Controls (OFAC). (For exports of Commerce-controlled items, OFAC defers to Commerce's decision on issuing an export license.)

- o OFAC could issue the required license, or the President could relax the ban. Neither action would require Congressional consent or consultation.

EAA Terrorism Controls

- o The DPRK was designated a "terrorist country" in 1988 for purposes of the terrorism controls in the Export Administration Act. It therefore is subject to an outright ban on exports of munitions list items, as well as a requirement of an individual validated licenses for some other items.
- o Prior to the export of an item, the Secretary of State would have to determine whether the item "could make a significant contribution to the military potential of such country, including its military logistics capability, or could enhance the ability of such country to support acts of international terrorism."
 - If the item could not make such a contribution, Commerce could issue an individual validated license for its export.
 - If the item could make such a contribution, Commerce could still issue an individual validated license, but only after providing 30 days advance notice to Congress.
- o The criteria for removing a country from the terrorist list are demanding and would be difficult to meet in the case of the DPRK (e.g., a Presidential certification that there has been a fundamental change in the leadership and policies of the country, that the country is no longer supporting acts of terrorism, and that the government has provided assurances that it will not support terrorist acts in the future).

Liability for Accidents

- o U.S. firms have been somewhat reluctant to participate in efforts to improve the safety of Russian reactors due to their concern that they would be targeted in the event of a nuclear accident.
- o The same concern would likely exist in this case whether U.S. firms were involved in a Russian or South Korean reactor project. (Even with a U.S. reactor, there might be concerns that North Korean operators could not be relied upon to operate the reactor properly.)
- o Accordingly, if U.S. firms were to participate, there would probably have to be arrangements to ensure that such firms were not exposed to unlimited liability.

- One step might be for the DPRK to adhere to the Vienna Convention on Civil Liability for Nuclear Damage.
- A U.S. firm in a joint venture with South Korean firms might seek an **indemnification agreement** from those firms.

Environmental Requirements

- o The National Environmental Policy Act (NEPA) would not apply to this overseas project.
- o Instead, E.O. 12114 covers major Federal actions with environmental effects abroad.
- o The "Federal action" in this case would be the government approvals necessary for U.S. participation in the reactor project.
- o If the USG were approving the **export of reactor components**, the appropriate environmental documentation likely would be required.
 - This requirement would not apply if the approval action were taken either (1) by the President, or (2) at the direction of the President or a Cabinet officer when the national security is involved.
- o If the Department of Energy were approving the **participation of U.S. firms** in the North Korean reactor project, environmental documentation likely would not be required.
 - The procedures adopted to implement E.O. 12114 focus on the provision of a "physical project" and exempt actions taken under section 57 of the Atomic Energy Act, which includes DOE approval of nuclear-related activities overseas.

Drafted by: L/PM - Newell Highsmith

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LWR SUPPLY: FUNDING

- o Regardless of whether the reactors are supplied by Russia, ROK, U.S., or a combination of these countries, the LWR project in North Korea would be funded primarily by Japan. Russia and ROK might also participate to the extent they are involved in the project.
 - The U.S. might contribute funding, particularly to the extent appropriated funds are already available to the Executive Branch. (If we want to pledge funds not already appropriated, we will need the cooperation of Congress due to Anti-Deficiency Act constraints.)
 - Alternatively, the U.S. might simply perform the role of (1) coordinating contributions, (2) bringing the participating parties together to establish the necessary commercial contracts for funding, supply, and construction, and (3) monitoring the project.
- o Japanese funding would probably be in the form of an ODA (Overseas Development Assistance) loan. The following information would be needed from Japan to determine how to structure the funding of the reactor project:
 - Can Japan provide such assistance to DPRK (assuming establishment of diplomatic relations, which we understand to be a prerequisite)?
 - Does Japan need a definitive project cost before making the commitment? Does it need extensive details about the nature of the project?
 - Can Japan, under its domestic law, commit to provide such funding before the next round of meetings with the DPRK? Before the US-DPRK agreement is signed?
 - Can Japan commit to provide such funding as a party to the US-DPRK agreement (or a protocol thereto)? [Does Japan want the DPRK's nonproliferation commitments to flow to it in exchange for its loan? If so, does Japan feel it must participate in the negotiation of the agreement?]
 - Can Japan loan the needed sums without involving Japanese firms ("untied assistance")? Can Japan disburse such assistance directly to the Russian, ROK, or U.S. firm carrying out the work?
 - Can Japan make a no-interest loan? Can it accept repayment through barter? What conditions will it have

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to impose regarding commencement and timeliness of repayment? Can it wait until the project is complete, or does repayment have to begin as disbursements are made? [The North Korean offer to repay by barter could create domestic legal difficulties for Japan and any other contributors/participants in the project.]

- Are there any other restrictions on ODA loans that would affect this transaction?
- o [If North Korea insists that it repay the U.S., what authority does the USG have to act as the conduit to Japan for such payments?]

LWR SUPPLY: LEGAL REQUIREMENTS FOR U.S. SUPPLY

Atomic Energy Act: Agreement for Cooperation

- o The U.S. cannot transfer an LWR, major reactor components, or nuclear fuel to the DPRK until it has entered into an agreement for nuclear cooperation pursuant to section 123 of the Atomic Energy Act. (Major components are pressure vessels, primary coolant pumps, fuel charging or discharging machines, and control rods.) An agreement under section 123 must include, inter alia, the following:
 - A pledge to maintain full-scope safeguards.
 - A pledge not to use any item transferred under the agreement or any material produced through the use of such items for nuclear explosive purposes.
 - A right to require the return of any transferred item and any material produced through the use of such item if the recipient detonates a nuclear explosive device or terminates or abrogates an IAEA safeguards agreement.
 - A consent right over reprocessing, enrichment, or alteration of transferred nuclear material or nuclear material used in or produced through the use of any transferred item.
 - A U.S. right to carry out safeguards directly with respect to transferred items if the IAEA cannot or will not carry out such safeguards.
- o This agreement would have to be submitted to Congress for a review period of 90 continuous session days. Congress could disapprove the agreement during that time by joint resolution (which the President could veto, requiring a 2/3 majority for override).
 - Congress has never disapproved a nuclear cooperation agreement, but in the case of U.S.-China agreement, it imposed stringent conditions on the commencement of exports pursuant to the agreement (which have never been met).
 - The stringent nonproliferation conditions that the LWR agreement will impose on the DPRK might satisfy Congress's concerns. **However, Congress likely would reject the agreement if the DPRK had not yet allowed special inspections to take place.**
 - We might also meet Congressional concerns by proposing an agreement for cooperation with the DPRK that is limited to this one reactor project.

- However, we should bear in mind that China may question our sending nuclear equipment to the DPRK when we will not send it to China.

Atomic Energy Act: Export of Minor Components

- o An agreement for nuclear cooperation is not needed for exports of minor reactor components (basically, all nuclear reactor components other than pressure vessels, primary coolant pumps, fuel charging or discharging machines, and control rods).
 - For export of a minor component, section 109(b) of the Atomic Energy Act requires guarantees from the recipient government that (1) safeguards will be applied to the item, (2) the item will be used exclusively for peaceful purposes, and (3) the item will not be retransferred without U.S. consent.

Atomic Energy Act: Technology Transfers

- o An agreement for nuclear cooperation is not needed for a transfer of nuclear technology to the DPRK. (Technology would include everything from a reactor design to reactor safety knowhow. It would include any transfer of information or knowhow, including during consultations, seminars, exchanges, studies, evaluations, etc. It does not include "public information" -- i.e., information available to the public in books, periodicals, electronic media, public libraries, open meetings, etc.)
- o The basic requirement for a transfer of nuclear technology to the DPRK would be issuance of a specific authorization by the Department of Energy based on a finding that the transfer "will not be inimical to the interest of the United States." This finding would require the concurrence of State and consultation with Defense, ACDA, Commerce, and the Nuclear Regulatory Commission.
 - Neither an agreement for cooperation nor full-scope safeguards is strictly required, though effective full-scope safeguards is typically an important factor in the finding of noninimicality.

Atomic Energy Act: Nuclear Trade Sanctions

- o The U.S. could not transfer an LWR, major reactor components, nuclear fuel, or minor reactor components unless the President waived the prohibition in section 129 on such trade.
- o Section 129 prohibits such nuclear trade on two grounds that are applicable to the DPRK: (1) where a nonnuclear-weapon

state has materially violated an IAEA safeguards agreement; and (2) where a nonnuclear-weapon state has "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 judgment, represent sufficient progress toward terminating such activities."

- The stringent nonproliferation commitments in the LWR agreement could form the basis for a determination by the President that the DPRK had taken sufficient steps to terminate its proliferant activities, thereby avoiding sanctions under the second provision cited above.
- o Either provision could be waived if the President determined that cessation of nuclear trade "would be seriously prejudicial to the achievement of United States nonproliferation objectives or otherwise jeopardize the common defense and security."
- This waiver determination would have to be submitted to Congress for 60 days of continuous session before it took effect.
- Congress could disapprove the waiver during that time by joint resolution or other enactment (which the President could veto, requiring a 2/3 majority for override).

Trading With the Enemy Act

- o The President has exercised his authority under TWEA to ban all trade with North Korea absent a license from the Treasury Department's Office of Foreign Asset Controls (OFAC).
- o OFAC could issue the required license, or the President could relax the ban. Neither action would require Congressional consent or consultation.

EAA Terrorism Controls

- o The DPRK was designated a "terrorist country" in 1988 for purposes of the terrorism controls in the Export Administration Act. It therefore is subject to an outright ban on exports of some items (including munitions list items) and a requirement of individual validated licenses on other items.
- o Most of the items that would be transferred in a reactor project would be licensed by the Nuclear Regulatory Commission under the Atomic Energy Act, not the Department of Commerce under the EAA. It is unlikely that any items needed for the project would be on the banned list. Any

items on the list requiring an individual validated license could be approved by Commerce.

- o The criteria for removing a country from the terrorist list are demanding and likely could not be met by North Korea (e.g., a Presidential certification that there has been a fundamental change in the leadership and policies of the country, that the country is no longer supporting acts of terrorism, and that the government has provided assurances that it will not support terrorist acts in the future).

Liability for Accidents

- o U.S. firms have been somewhat reluctant to participate in efforts to improve the safety of Russian reactors due to their concern that they would be targeted in the event of a nuclear accident.
- o The same concern would likely exist in this case whether U.S. firms were assisting with a Russian reactor project or were constructing a U.S. reactor. (In the latter case, the concern would be that North Korean operators could not be relied upon to operate properly even a safe U.S. reactor.)
- o Accordingly, if U.S. firms were to participate, the DPRK would probably have to enter into appropriate arrangements to ensure that such firms are not exposed to unlimited liability. One way to accomplish this objective might be for the DPRK to adhere to the Vienna Convention on Civil Liability for Nuclear Damage.

LWR SUPPLY: GUARANTEE OF PROJECT COMPLETION

- o North Korea wants the U.S. to guarantee that North Korea will receive the LWRs it desires. Thus, for example, if Russia, the ROK, or a U.S. firm failed to complete construction of LWRs in North Korea, the U.S. would be obligated to (1) secure that party's performance, or (2) arrange for construction of substitute reactors by another country or by the U.S. itself.
- o Such a guarantee would have to be subject to the caveat that the U.S. could not carry out the guarantee by exporting a reactor itself except in accordance with U.S. law. (See section on legal requirements for U.S. supply.)
- o This kind of guarantee would present significant issues under the Anti-Deficiency Act.
 - It would be difficult to predict the cost of the guarantee, but substitute U.S. reactors would likely cost over \$3 billion. In addition, the U.S. might be called upon to stand behind its guarantee after having already expended funds on the first project (either directly or in an effort to secure performance by the builder).
 - Given the large potential liability, Congress would not likely appropriate funds to cover the guarantee.
 - Rather, we should seek legislation approving the guarantee to North Korea. Even for this approach, an estimate of the cost of guaranteeing performance would be submitted, and Congress and the Congressional Budget Office might require significant **budgetary offsets**.
- o Due to the Anti-Deficiency Act concerns, any meaningful guarantee will have to be approved by Congress in advance (by statute or treaty) or will have to be expressly subject to the availability of appropriated funds.
 - **The preferred option for Anti-Deficiency Act purposes would be the clause concerning availability of fund.**
 - However, since such a clause likely would not be acceptable to North Korea, we would want instead to seek Congressional approval soon after agreement is reached with North Korea and before the agreement enters into force.

- The Congressional approval might read as follows: "The Congress hereby approves the agreement between the United States and the Democratic People's Republic of Korea, signed in Geneva on _____, and authorizes its implementation. There are authorized to be appropriated such funds as may be necessary for such implementation."
- o There might also be a need to negotiate implementing legislation with Congress concerning, for example, loan guarantees or special repayment terms. It would be preferable if the agreement with the DPRK avoided provisions that might require such implementing legislation.
- o If the lender (presumably Japan) is at risk for nonpayment of the loan by North Korea, then the U.S. risk would be limited to nonperformance of the reactor supply and construction arrangement.
 - This risk could be relatively small if a U.S. firm is involved, but larger if the ROK or Russia is responsible for the reactor project.
- o Loan Guarantee: Another option would be to guarantee a loan to N. Korea rather than guaranteeing actual completion of the project.
 - This would be a less exotic commercial arrangement, and the potential liability for the U.S. would be capped by the value of the loan.
 - On the other hand, a loan guarantee might not satisfy North Korea in that it protects them only against financial impediments to project completion, not political impediments. In addition, it would shift the risk of nonpayment from the lender (Japan) to the U.S.; the risk of North Korea failing to repay the loan may well exceed the risk of nonperformance of the reactor project (even if Russia is the supplier).
 - It is possible that a loan guarantee could be made without the appropriation of funds or other Congressional action. The President has special authority to authorize the execution of contracts "without regard to other provisions of law relating to the making, performance, amendment, or modification of contracts, whenever he deems that such action would facilitate the national defense." (Pub. L. 85-804, 550 USC 1431.) This provision has been used to enter into commitments notwithstanding the Anti-Deficiency Act.

- o Determining Compliance with Reciprocal Commitments: The U.S. and North Korea will have highly subjective determinations to make as to the other party's compliance with its commitments under the agreement.
 - For example, North Korea might cite delays in reactor construction to argue that the U.S. has not met its guarantee obligation, thereby releasing North Korea from its nonproliferation commitments under the agreement (reprocessing, refueling, etc.).
 - Conversely, the U.S. and North Korea could have a dispute as to whether North Korea has met its obligation to comply with the NPT and IAEA safeguards, particularly in view of the history of disagreement over the scope of IAEA safeguards.
 - The North Korean safeguards obligation and the U.S. guarantee are not readily susceptible to objective compliance criteria (though verification is easier with some other obligations, such as spent fuel transfer, no reprocessing, no refueling, and no graphite-reactor construction).
- o Timing Issues: (1) We should attempt to identify in the agreement with North Korea the countries performing the project and, more important, the country/countries providing financing. We want these countries to be part of the formal arrangement, and their early involvement will help when we approach Congress. (2) We will need speedy Congressional approval of the guarantee agreement in order to bring the agreement into force before North Korea feels compelled to begin reprocessing the spent fuel from the pond.

Attachment: Draft U.S.-DPRK LWR Guarantee Agreement

DRAFT OUTLINE: LWR AGREEMENT WITH DPRK

[Preambular clauses.]

The Parties agree as follows:

ARTICLE I

[This article should set forth all of the commitments we expect the DPRK to satisfy if we are to guarantee the LWR project.]

1. The DPRK shall remain a party to the Treaty on the Non-Proliferation of Nuclear Weapons and shall comply fully with that Treaty.
2. The DPRK shall comply fully with its obligations under the DPRK-IAEA safeguards agreement.
3. The DPRK shall comply fully with the terms of the Joint Declaration on the Denuclearization of the Korean Peninsula.
4. The DPRK shall transfer all spent fuel from its 5MW nuclear reactor to _____ within ____ months of the entry into force of this agreement.
5. The DPRK shall not refuel its 5MW reactor at any time.
6. The DPRK shall cease all further construction on the reactor(s) at _____ and the radiochemical laboratory at _____ and shall not construct any reactors or laboratories of these types in the future.

ARTICLE II

[This article should describe the LWR project so that the parties have a common understanding of what is being guaranteed. This article could also identify the country that will carry out the project and the source(s) of funding. If these participants are parties to the agreement, the word "shall" may be used throughout.]

1. A light-water nuclear power reactor facility will be constructed in North Korea with a total capacity of approximately 1000MWe ("the reactor project"). The reactor project will[shall] be carried out by entities from [Russia][South Korea][the United States].
2. Funding for the reactor project will[shall] be provided by [Japan][Japan and South Korea][a consortium consisting of Japan, South Korea, etc.]("the Lender"). Such funding

will[shall] be in the form of a loan to North Korea. The — proceeds of the loan will[shall] be disbursed to the entities responsible for carrying out the reactor project in accordance with terms to be established between the Lender, North Korea, and the entities responsible for carrying out the reactor project. North Korea will[shall] repay the loan in accordance with terms to be established between the Lender and North Korea.

ARTICLE III

[This article should describe the U.S. commitment with respect to completion of the reactor project. The goals of paragraph 2 are to (1) prevent North Korea from triggering the guarantee by its own actions, and (2) ensure that the guarantee is triggered by project termination, not just failure to finish on time or failure to meet all project specifications.]

1. The United States shall facilitate arrangements for the construction within North Korea of the reactor project and for the disbursement of the proceeds of the loan by the Lender and the repayment of the loan by North Korea.

2. The United States guarantees that, in the event that the reactor project is terminated on grounds for which North Korea is not responsible, the United States shall take those steps necessary to ensure the supply to North Korea of light-water nuclear power reactor facilities with a total capacity approximately equivalent to that of the reactor project. This guarantee shall not apply in the event that the [Russian/South Korean] reactor is constructed but fails in some manner to meet fully the project specifications.

3. The United States's guarantee in paragraph 2 shall include, to the extent consistent with United States law, the obligation to export nuclear materials and equipment to North Korea in the event that such guarantee cannot be fulfilled by other means.

ARTICLE IV

[This article should allow for Congressional approval between signature and entry into force. In addition, its duration should be as long as possible.]

This agreement shall enter into force on the date upon which the Parties exchange diplomatic notes informing each other that they have complied with all applicable requirements of their domestic law for its entry into force, and it shall remain in force for thirty years or until material or equipment transferred as part of the reactor project and any nuclear material produced through the use thereof no longer remains in the DPRK.