

A Study on the Relationship Between a Conclusion of a Bilateral NCA and Governmental Assurances

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1. Introduction

Transfers of Trigger Lists¹ (hereinafter referred to as 'TLs') between cooperating countries can occur in processes of nuclear cooperation. As TLs can be directly diverted for making nuclear weapons, supplying countries has requested formal governmental assurances for peaceful uses of nuclear energy from receiving countries.

If a supplying country requests the governmental assurance to a receiving country whenever transferring TLs, it could be difficult to make efficient cooperation in administrative perspectives. In response to reducing the administrative burdens, one country usually concludes a bilateral Nuclear Cooperation Agreement (NCA) with the other country to substitute the formal assurance between the countries' governments. In general, bilateral NCAs include intergovernmental assurance for peaceful uses on TLs (GTGA) to be transferred as specified in the Nuclear Suppliers Group Guideline. When the NCA is concluded, a commitment of an intergovernmental guarantee on all provisions of the NCA will be made [1].

In spite of a conclusion of the bilateral NCA, additional GTGAs are being requested in many cases. These requests are made by the determinations of supplying countries. The requests may be reasonable in the non-proliferation perspective, but may create excessive administrative burdens, ultimately further strained nuclear cooperation in the global community. Moreover, if the additional GTGAs are customarily made without legal justification, the requests may be potential barriers to nuclear cooperation and peaceful use of nuclear power. In the case of the ROK, it is known that in the practical process of nuclear cooperation with the UAE, a number of additional GTGAs have been requested to the UAE, despite of the conclusion of the bilateral NCA including the GTGA.

This paper reviews the ROK's cases where additional GTGA are required even through bilateral NCA has been concluded. In order to determine a rationale requesting additional GTGAs to transfer TLs, this paper ~~also~~ examines a legal validity based on analysis of whether the existing NCAs ROK has concluded with the cooperating countries would meet national laws and regulations. Through these analyses, this paper provides

some options that can minimize administrative burdens without risk of further nuclear proliferation and then strengthen nuclear cooperation.

2. Review of Laws and NCAs in ROK

2.1 Domestic Laws and Regulations

Korean national laws and regulations require the governmental assurance of a receiving country for peaceful uses of TLs to be transferred, which is relevant to only non-nuclear weapons countries, as a condition of supply. The article 18 of the Notice on Trade of Strategic Items (hereinafter referred to as 'Notice') specifies the following terms for a transfer of TLs to receiving countries [2]:

- 1) *The ROK Government (ROKG) should secure the governmental assurance from the receiving country that TLs to be transferred are used only for peaceful purposes;*
- 2) *The government of the receiving country should commit the application of effective physical protection measures to prevent illegal uses and handling of nuclear material and facilities;*
- 3) *The government of the receiving country should commit the application of IAEA Safeguards in connection with the Treaty on the Non-Proliferation of Nuclear Weapons; and*
- 4) *The government of the receiving country should secure the same assurances as required by the ROKG for the original transfer to retransfer TLs to the third party, or ROKG should secure the prior consent right for the retransfer from the receiving country.*

In this reason, the ROKG requests the GTGAs including 1) the assurance for peaceful uses of nuclear energy, 2) the application of IAEA Safeguards and physical protection on TLs to be transferred and 3) securing prior consent right for their re-transfers from the receiving country. These conditions include the provisions recommended in the NSG Guideline. If the receiving country does not provide the ROKG with GTGAs or meet the requested terms, the ROKG can reject the proposed export.

2.2 The Conclusion of the Bilateral NCA and GTGAs

¹ Trigger Lists: Lists of the 'especially designed or prepared' (EDP) equipment, components, materials, subsystems and facilities for processing, use and production of special fissionable material.

The ROK typically concludes the bilateral NCA when nuclear cooperation is begun or expected [3]. The ROK entities can make nuclear cooperation with those of a partner country, including bilateral transfers of TLs, even if the ROKG doesn't conclude the NCA with the government of the partner country. A conclusion of the NCA can, however, provide amicable environment for nuclear cooperation including smooth transfer of TLs in an administrative manner. Amicable environment includes not only implementation of nuclear cooperation specified in the NCA but also simplification of administrative procedures such as requests for formal governmental assurances whenever TLs are transferred.

If provisions of a NCA have consistency with the relevant laws and regulations of the ROK, the NCA can give functions for amical environment. As a conclusion of the NCA between the two countries means particularly guarantees of compliance with the provisions, the NCA which is consistent with the ROK's laws and regulations can substitute for governmental assurances to meet the legal terms stipulated in the Notice. Therefore, by using the NCA as a guarantee, amical environment can be fully realized.

As of end of 2019, the ROK concludes the bilateral NCA with 28 countries. All the NCAs include the terms required by the national laws and regulations to transfer TLs such as 1) assurances from the government of the receiving country for peaceful uses of nuclear energy, 2) application of IAEA Safeguards and physical protection, 3) securing prior consent right for their re-transfers to the third country, although there are differences in ways and details of implementing the provisions of the NCAs. In this context, the NCAs the ROK has concluded with partner countries can contribute to building amicable environment for nuclear cooperation by reducing administrative burdens such as additional GTGAs.

3. Review of Regulatory Practices in ROK

The ROK has requested the additional GTGAs from the government of the receiving country when it transfers TLs to the country, even though already concluding the NCA with the country. The reasons to request the additional GTGAs can be analyzed as follows.

3.1 Inconsistency Between Strategic Items Defined in the National Laws and Regulations and Nuclear Items Subject to the NCA

If nuclear items to be transferred are not subject to a NCA or a NCA doesn't meet the terms required by the national laws and regulations, ROKG can request additional GTGAs to supplement the uncovered items or terms.

For example, if the NCA doesn't include the provision for application of the subsequent amendments

or modifications of the NSG Guidelines as a reference to define nuclear items subject to the NCA, there can be differences between nuclear items subject to the NCA and the strategic items defined in the national laws and regulations, which reflects the latest version of the Guidelines. In case of a NCA that doesn't refer the NSG Guidelines, nuclear items defined separately in the NCA can be also different from the strategic items specified in the national laws and regulations. Additional GTGAs to intended transfers of nuclear items which are not covered by the NCA, as a condition of supply, can be requested in the two cases above.

The ROK-Saudi nuclear cooperation agreement concluded in 2011 defines nuclear items subject to the NCA by indicating the NSG guideline, but not including revisions of the guideline [4]. Therefore, if the newly added items in the guideline are transferred after concluding the NCA, there would be justification for requesting additional GTGAs.

In case that NCAs which had been concluded before the Convention on Physical Protection of Nuclear Material was being entered into force in 1980, ROKG should request additional GTGAs from the government of the receiving country due to non-application of physical protection required by the national laws and regulations.

3.2 Recognition of NCA's Role

A NCA provides not only a basic framework for nuclear cooperation between the two countries, but also legal-binding commitments between the two governments, including assurances for peaceful uses of nuclear energy on all the cooperative activities that will occur in the future [3, 5]. The degree to which each regulatory body considers a conclusion of a NCA as a basis of substituting for governmental assurance varies by country. The ROKG, however, requests additional GTGAs from the government of the receiving country whenever TLs are transferred to the country in many cases, even if it concluded the NCA with the government. It can undermine the meaning of the conclusion of the NCA.

In this context, the ROKG needs to confirm the scope and validity of the governmental assurances in the NCA, and has to improve completeness of the NCA, in order that it would not request additional GTGAs. Through these efforts, the NCA can play a role of governmental assurances in the process of nuclear cooperation with partner countries.

3.3 Absence of detailed Management Procedures

Additional GTGAs can be requested if a NCA doesn't include detailed management procedures to guarantee nuclear nonproliferation of TLs to be transferred. In case of concluding a NCA without

specified procedures for managing TLs to be transferred such as nuclear material accounting and notifications and acknowledgements being subject to the NCA, additional GTGAs can be requested to appropriately address concerns of nuclear proliferation raised from the absence of the detailed procedure. It may understand that requesting the additional GTGAs reconfirm intergovernmental assurances by the conclusion of the NCA.

However, repetitive requests on the partner country with active nuclear cooperation including transfers of TLs, can give negative impacts such as delay of nuclear export. In this regard, the NCA between ROK and US specifies the detailed management procedures for transfers as follows, to prevent the occurrence of additional GTGAs [6].

.... Information, nuclear material, moderator material, equipment, and components transferred from the territory of one Party to the territory of the other Party, whether directly or indirectly, shall become subject to this Agreement upon their entry into the territorial jurisdiction of the receiving Party, provided that the supplying Party has notified the receiving Party in writing of the intended transfer and the receiving Party has acknowledged in writing the receipt of such notification... (Article 2. Scope of Cooperation).

Also, ROKG has gradually increased conclusion of administrative arrangements specified in detailed management procedures with the government of the partner country to perform efficient nuclear cooperation without nuclear proliferation as the supplying country.

4. Conclusions

If administrative burdens between the two governments are increased due to additional GTGAs, it can give negative impacts for nuclear cooperation to them. However, the efforts for nuclear non-proliferation should not be weakened to reduce the burdens.

In order to simultaneously meet both aspects mentioned above, the NCA should include functions to fully reflect relevant laws and regulations of the two countries. Furthermore, the three reasons for requesting additional GTGAs this paper analyzed should be appropriately addressed. That is, the NCA should not only include functions of detailed management procedures for securing nuclear nonproliferation, but also all the terms required by relevant laws and regulations of the two countries. In addition, the recognition to utilize the NCA as the governmental assurance should be heightened.

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