

KOREA CHAIR PLATFORM

Decoding the U.S.-South Korea Civil Nuclear Cooperation Agreement: From Political Differences to Win-Win Compromises

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On June 15, the United States and South Korea signed a successor agreement to their 1974 civil nuclear cooperation accord.¹ Updating the existing agreement took over four years of challenging negotiations complicated by Seoul's demands for the right to enrich uranium and reprocess (or pyroprocess) spent nuclear fuel to which Washington objected. What began as nearly irreconcilable political differences resulted in win-win compromises that strike a balance between maintaining the U.S.' core nonproliferation policy and reflecting South Korea's industrial maturity and desire to advance its civil nuclear program while establishing pathways for an unprecedented level of cooperation between the two allies. The new agreement reflects the interdependence of the American and South Korean nuclear industries as an equal partnership—from a unilateral obligation to reciprocal consent rights and obligations—as well as a mature, strong bilateral relationship.

Politics to Mutual Benefits

South Koreans had perceived a political solution to entail an agreement between the two presidents during a summit that would grant Seoul advance consent for enrichment and pyroprocessing, whether that comes in the form of an acknowledgement of rights that might not be exercised in the near future or, preferably, a blanket consent. They believed it would be based

¹ The 1974 agreement was extended without changes for two years in 2014 in order to avoid a lapse in coordination.

upon a combination of key elements from the U.S.-Japan 123 and U.S.-India 123 agreements.²

The new agreement with Seoul resulted in no blanket consent for enrichment and pyroprocessing. Instead, it made reference to NPT parties' inalienable right to peaceful nuclear energy, contained similar components seen in Washington's deals with Tokyo and New Delhi, and deferred a U.S. decision on these matters until after technical, economical, and nonproliferation criteria were assessed. In the meantime, the new agreement establishes pathways that would help achieve South Korean president Park Geun-hye's goals of spent fuel management, assured fuel supply, and nuclear export competitiveness.

An American definition of a political solution, on the other hand, was generally perceived to be one in which the U.S. president instructs his negotiators to reach a compromise agreement without consenting to enrichment or reprocessing this time but that possibly leaves the door open to revisit contentious issues when certain technical, geopolitical, security, and nonproliferation conditions are met.³ In the end, Washington also achieved its core objectives and more.

Inalienable Rights, Sovereignty, Parity, and Predictability

While South Korea is an avid supporter of the international nonproliferation regime and corresponding obligations, Seoul had placed significant emphasis on its rights stipulated in Article IV of the Nuclear Non-Proliferation Treaty (NPT) from the onset of negotiations with the United States.

*NPT ARTICLE IV – “Nothing in this Treaty shall be interpreted as affecting the inalienable right of all the Parties to the Treaty to develop research, production and use of nuclear energy for peaceful purposes without discrimination and in conformity with Article I and II of this Treaty.”
(underline added for emphasis)*

South Korea's civil nuclear energy program has grown considerably since the 1974 U.S.-ROK nuclear cooperation agreement that turned the country into a major nuclear exporter, including providing the United States with key components instead of merely receiving American parts. Thus, a demand for NPT Article IV reflected Seoul's desire for greater balance⁴ in its relationship with the United States that was one-sided and for an updated pact that was outmoded. It also reflected Seoul's claims that Article IV grants sovereign and compliant NPT states with the right to enrich and reprocess and develop technologies to do so. Washington, however, does not share this view. Moreover, South Korean scientists believed that stringent U.S. nonproliferation controls prevented their country from managing its used nuclear fuel and that mentioning Article IV would allow the pursuit of its fuel cycle objectives.

² Duyeon Kim, “Beyond the Politics of the 123 Agreement,” *Carnegie Endowment for International Peace*, October 29, 2014.

³ Ibid.

⁴ The South Korean public discourse began with calls for “nuclear sovereignty,” which its English translation can be misunderstood to mean desires for weaponization capability, although outliers were in support of weapons. The term later evolved into “nuclear independence” to reflect more accurately Seoul's desires to be less dependent on American help for its civil nuclear energy program.



Reference to Inalienable Rights	
<p>Existing Agreement: <i>No reference.</i></p>	<p>New Agreement: <i>Yes.</i> <i>“Preamble – AFFIRMING the ① <u>inalienable right of NPT parties to develop research, production and use of nuclear energy for peaceful purposes without discrimination and in conformity with Articles I, II and III of the NPT.</u>” (underlined for emphasis, numbers correspond to explanation in text)</i> <i>*But avoids mentioning of enrichment or reprocessing.</i></p>
Reference to Sovereignty, Parity, Predictability, Reliability	
<p>Existing Agreement: <i>No reference to sovereignty.</i></p> <p><i>No reference to equality or reciprocity. ROK is a junior recipient and U.S. is a major supplier. One-sided agreement with only ROK obligations.</i></p> <p><i>No reference to long-term planning on a predictable and reliable basis.</i></p>	<p>New Agreement: <i>Yes to all.</i> <i>“Preamble – DESIRING, in this regard, to expand the existing cooperation between the Parties by entering into new arrangements for peaceful uses of nuclear energy ② <u>without prejudice to the sovereignty of each Party, and recognizing the need for ⑥ long-term planning on a predictable and reliable basis</u> and for an enduring ⑤ <u>strategic nuclear energy partnership, founded on the principles of ③ equality and ④ reciprocity,</u> as well as emphasizing their recognition that they have both attained an ③ <u>advanced level in the use of nuclear energy for electricity production and in the development of their nuclear industries;</u>”(underlined for emphasis, numbers correspond to explanation in text)</i></p>

The negotiations resulted in a win-win compromise for both governments. The new agreement makes reference to Article IV of the NPT in the non-binding preamble of the agreement as opposed to the legally-binding operative paragraphs or in either of the attached Agreed Minutes. This satisfies Seoul’s needs while not tying Washington’s hands. But the agreement does not mention enrichment or reprocessing, thereby avoiding the disputed issue of whether Article IV grants an NPT party the right to these technologies. It also makes explicit reference to the sovereignty of each NPT party (*See ② in Table*).

The agreement’s preamble is also the strongest, opening statement recognizing South Korea’s maturity and status in nuclear energy (*See ③ in Table*)—one that has graduated from a junior recipient to an equal partner (*See ③ in Table*)—while placing reciprocal obligations (*See ④ in Table*) on the U.S. to reflect parity in the relationship. This not only reflects Korea’s technical status today but Washington’s perception of Seoul as a first-tier ally even without providing advance consent to enrich uranium and reprocess used fuel at this time. The new agreement elevates the bilateral partnership to a “strategic” one (*See ⑤ in Table*) spanning political, economic, energy, and science and technology issues. It also reflects Seoul’s desire for predictability (*See ⑥ in Table*) and Washington’s desire for reliability (*See ⑥ in Table*) as the allies continue their Joint Fuel Cycle study. All of the above are supported by technical

arrangements in the operative paragraphs of the new agreement.⁵

1992 South-North Korea Joint Denuclearization Declaration

The U.S. administration set out to make reference in the new agreement to the 1992 South-North Korea Joint Denuclearization Declaration prohibiting enrichment and reprocessing in either country. However, negotiations resulted in excluding it in their new agreement.

Reference to 1992 South-North Korea Joint Denuclearization Declaration	
Existing Agreement: <i>No reference. N/A.</i>	New Agreement: <i>No reference.</i>

While such a reference would have been an important political message to the American nonproliferation community and U.S. Congress reassuring Seoul’s commitment to peaceful uses of nuclear energy, there were several reasons against it. First, not only was it politically important for Seoul to exclude the declaration, but South Korea believed it was inappropriate to include a political statement between the two Koreas in a legal trade agreement between the U.S. and South Korea. Second, for practical purposes, a reference to it would not affect Pyongyang’s nuclear development calculations. Finally, while Seoul has not renounced the joint declaration and remains committed to nonproliferation, it does not consider itself bound to a bilateral document that has already been violated by Pyongyang through repeated nuclear activities.

The clearest reassurance of Seoul’s commitment to peaceful nuclear energy is reflected by past presidential statements including that of current ROK president Park Geun-hye in her 2013 address to a joint session of Congress:

“A world without nuclear weapons’—President Obama’s vision—must start on the Korean Peninsula... It is an ideal test-bed for a future free of nuclear arms... Korea has been pursuing the peaceful use of nuclear energy. It is also firmly committed to the principle of non-proliferation.”⁶

“Gold Standard”

The U.S. administration has chosen a case-by-case approach despite arguments by some members of Congress and the nonproliferation community that all civil nuclear cooperation agreements should contain a legal commitment binding the cooperating partner not to engage in enrichment or reprocessing activities—the so-called gold standard. The U.S. administration believes that a blanket requirement would diminish U.S. influence in global nonproliferation norms⁷—particularly among emerging nuclear power programs—and competitiveness in the global nuclear market.

Reference to “Gold Standard”	
Existing Agreement: <i>No reference. N/A.</i>	New Agreement: <i>No reference. N/A</i>

⁵ For details on the technical arrangements, see: Fred McGoldrick, “The New Peaceful Nuclear Cooperation Agreement Between South Korea and the United States: From Dependence to Parity,” *Korea Economic Institute of America*, Special Studies Series: 6, August 2015.

⁶ Yonhap News, “Full text of Park’s speech at U.S. Congress,” May 8, 2013, <http://english.yonhapnews.co.kr/national/2013/05/08/4/0301000000AEN20130508010800315F.HTML>

⁷ “Prepared Statement of Assistant Secretary Thomas Countryman,” Hearing Before the Committee on Foreign Relations Section 123: Civil Nuclear Cooperation Agreements, January 30, 2014, <http://www.gpo.gov/fdsys/pkg/CHRG-113shrg93467/html/CHRG-113shrg93467.htm>

Washington did not require Seoul to accept the so-called gold standard during the negotiations because it is a key U.S. ally, a strong supporter of the nonproliferation regime, and has a major nuclear power program. While the gold standard was not a thorny issue between the two governments, it was a highly misunderstood, politically-contentious one for Korean observers.

The administration has, however, obliged the United Arab Emirates and Taiwan to legally forswear enrichment and reprocessing in their respective bilateral agreements. Washington has sought similar requirements in negotiations with Middle Eastern countries like Jordan and Saudi Arabia, although those talks have hit stalemates because of this demand. Washington's agreement with Vietnam contains a political statement in the non-binding preamble that Hanoi will rely on existing international markets for nuclear fuel services, not a legally-binding gold standard.

Advance Consent – Pyroprocessing, Enrichment, and Retransfers

The new agreement does not allow South Korea to enrich uranium or pyroprocess used nuclear fuel—Seoul's maximalist demand—but it also does not rule out the future possibility of Washington considering its consent. This is a victory for Seoul because Washington has not shut the door indefinitely. Instead, the new agreement contains pathways for a possible U.S. decision to grant advance consent to South Korea to enrich or pyroprocess U.S.-obligated nuclear material upon the completion of their ten-year Joint Fuel Cycle Study in 2021 after a better understanding of the economic and technical feasibility of these technologies as well as their nonproliferation implications. The final factor—nonproliferation implications—is “subjective in nature and gives the U.S. Secretary of State latitude to make a determination in accordance with his responsibilities under Section 131 of the Atomic Energy Act.”⁸ Thus, the new agreement establishes an off-ramp for Washington.

In the meantime, the new agreement also contains pathways to help achieve President Park Geun-hye's three objectives—spent fuel management, assured fuel supply, and export competitiveness.

⁸ Civil nuclear agreement package submitted by President Barak Obama to Congress, June 16, 2015, p.59.



Reference to Advance Consent for Pyroprocessing	
Existing Agreement: <i>None.</i>	New Agreement: <i>None. But creates pathway for future U.S. decision to grant advance consent (Agreed Minute Section 6 Paragraph 3).</i> <i>*Allows first-phase pyroprocessing and post-irradiation experiments to be conducted, but none of these separate plutonium from high-level wastes and they conform to U.S. laws.</i>
Reference to Advance Consent for Enrichment	
Existing Agreement: <i>None.</i>	New Agreement: <i>None. But creates pathway for future U.S. decision to grant advance consent (Agreed Minute Section 7).</i>
Reference to Advance Consent to Return Recovered Plutonium to Korea	
Existing Agreement: <i>None.</i>	New Agreement: <i>Yes. But the U.S. needs to approve and agree to physical protection measures in writing for shipment back to Korea (Agreed Minute Section 3 Paragraph 4.ii).</i>

The agreement does, however, provide advance consent for the ROK to send its used nuclear fuel to a third country for storage or reprocessing. Currently, Japan, Switzerland, the UAE, and TECRO (Taiwan) have been granted such blanket permission. This consent provides another option for Seoul to deal with its mounting used fuel and lack of storage space—which was its main argument for needing pyroprocessing⁹—although South Korea’s plans to use this option are presently unclear. Another key feature of the new agreement is Washington’s approval to return the recovered plutonium after reprocessing from Europe back to South Korea. This gives South Korea the same status as Japan and Switzerland. However, it may raise concerns in the U.S. nonproliferation community.

Advance Consent for Retransfers of Spent Fuel	
Existing Agreement: <i>None.</i>	New Agreement: <i>Yes.</i> <i>“AGREED MINUTE SECTION 3 PARAGRAPH 2—The Parties agree that irradiated nuclear material subject to Article 10 and Article 11 of the Agreement may be transferred (such transfers being hereinafter referred to as “retransfers”) by either Party for storage and reprocessing to France, the United Kingdom, and also to any other country or destination as may be agreed upon in writing by the Parties.”</i> <i>*Article 10 – “Storage and Retransfers”</i> <i>** Article 11 – “Enrichment, Reprocessing, and Other Alteration In Form or Content”</i>

⁹ Fred McGoldrick and Duyeon Kim, “Decision Time: U.S.-South Korea Peaceful Nuclear Cooperation Agreement,” *Korea Economic Institute Academic Paper Series*, March 13, 2013, http://www.keia.org/sites/default/files/publications/aps_march_2013_mcgoldrick-kim_-_final.pdf

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One key and unique feature of the new agreement is the establishment of a High Level Bilateral Commission, upon Seoul’s request, to be chaired by the U.S. deputy secretary of energy and ROK vice foreign minister that will regularly address these fuel cycle issues and others mutually agreed upon (Article 18). This mechanism, which is unprecedented for its status and scope in such agreements, ensures that the implementation of the new agreement and issues regarding new technologies remain priority issues in both governments. It will contain four working groups that deal with president Park’s three objectives and one of Washington’s core objectives:

High Level Bilateral Commission Working Groups (Article 18 Paragraph 2)		
ROK	Spent Fuel Management	Can address pyroprocessing among other options.
	Assured Fuel Supply	Can address enrichment issues, purchasing shares in overseas multilateral enrichment facility, etc.
	Export Cooperation	Addresses export competitiveness and retransfers of nuclear parts and components.
U.S.	Nuclear Security	Addresses security of nuclear materials and facilities.

The new agreement also creates a Joint Standing Committee (Article 19, page 17) that will continue the current practice of coordinating and facilitating government-to-government activities. It reports findings to the High Level Bilateral Commission.

Agreement Duration

Throughout the negotiations, the South Korean nuclear establishment was concerned that their country would be banned from pyroprocessing and enrichment for another 30 to 40 years if Seoul was not granted permission to conduct these activities under the new agreement. The public (media, political, and expert circles) soon caught wind of this concern and the new agreement’s duration became another sensitive issue in the Korean discourse.

Duration	
<p>Existing Agreement: <i>“ARTICLE XV—This Agreement shall enter into force on the date on which each Government shall have received from the other Government written notification that it has complied with all statutory and constitutional requirements for entry into force of such Agreement and shall remain in force for a period of <u>thirty (30) years.</u>” (underline for emphasis)</i></p>	<p>New Agreement: <i>“ARTICLE 21 PARAGRAPH 2—This Agreement shall remain in force for a period of <u>twenty (20) years</u> and shall thereafter <u>renew for an additional period of five (5) years unless either Party gives written notice to the other Party at least two years prior to the twentieth anniversary of entry into force of this Agreement that it does not want to renew the Agreement, in which case this Agreement shall terminate twenty (20) years after entry into force. Either Party may terminate this Agreement at any time by given one year’s advance written notice to the other Party.</u>” (underlined for emphasis)</i></p>



The new agreement resulted in a shortened duration of 20 years with an automatic renewal of five years if neither side desires to terminate the pact. This resolved one political issue—albeit a relatively small one.

Most nuclear cooperation agreements signed after 1978 roll over indefinitely unless stated otherwise or one side notifies its intent for termination.

Parity and Reciprocity

From the onset, the Park administration publicly voiced expectations for an advanced, mutually beneficial agreement. In other words, it wanted an agreement that was updated not only to meet Washington’s 1978 Nuclear Non-Proliferation Act that amended its Atomic Energy Act, but one that was reciprocal and reflected current realities of South Korea’s nuclear energy program as well as the global nuclear industry. President Park Geun-hye reportedly said in a meeting with visiting U.S. Secretary of State John Kerry in April 2013 that the allies should “approach [our discussions] to bring about an advanced and mutually beneficial [new] agreement.”¹⁰

The existing agreement—which is one-sided and outmoded—is replaced by a new pact that reflects South Korea’s advanced nuclear status and capabilities. It also contains reciprocal nonproliferation obligations by conforming to modern standards of international civil nuclear trade and the global nuclear export control regime, thereby upgrading the bilateral relationship.¹¹

Reciprocity	Nonproliferation Guarantees and Assurances	
	Existing Agreement: Obligations only on ROK.	New Agreement: Obligations on U.S. and ROK: <ul style="list-style-type: none"> • Safeguards (<i>Article 14</i>) • Peaceful, non-explosive assurances (<i>Article 13</i>). • Physical protection assurance (<i>Article 12</i>).
	Consent Rights: Enrichment, Reprocessing, and Alteration In Form or Content (<i>Article 11</i>)	
	Existing Agreement: <ul style="list-style-type: none"> • Enrichment: none. • Reprocessing: U.S. • Alteration in form or content of nuclear materials: U.S. 	New Agreement: <ul style="list-style-type: none"> • Enrichment: U.S. and ROK. • Reprocessing: U.S. and ROK. • Alteration in form or content of nuclear materials: U.S. and ROK.
Consent Rights: Retransfers and Storage of Weapons-Usable Materials (<i>Article 10</i>)		
Existing Agreement: <ul style="list-style-type: none"> • Retransfers of nuclear material and equipment to third countries: U.S. 	New Agreement: <ul style="list-style-type: none"> • Retransfers of nuclear material and equipment to third countries: U.S. and ROK. • Storage of weapons-usable materials: U.S. and ROK. 	

¹⁰ Kim Jin-myeong, “President Park and Secretary Kerry Confirm Differences on U.S.-ROK Nuclear Agreement,” *Chosun Ilbo*, April 13, 2013, http://news.chosun.com/site/data/html_dir/2013/04/13/2013041300208.html

¹¹ Fred McGoldrick, “The New Peaceful Nuclear Cooperation Agreement Between South Korea and the United States: From Dependence to Parity,” *Korea Economic Institute of America*, Special Studies Series: 6, August 2015.



Public Messaging

The major components of the new pact were agreed upon as early as the fall of 2014, but bilateral talks continued to finalize the fine print and coordinate their public announcements.¹² The allies had aimed to wrap up before year's end—to meet the U.S. Congress' review schedule and for the U.S. administration to submit it to Congress within the same time frame as it submitted its agreement with China to Congress—but the dicey Korean domestic atmosphere in South Korea at the time was such that the Park administration needed language that would help sell the new agreement to its public¹³ and showcase a major accomplishment.

Washington and Seoul concluded their official discussions by initialing the agreement in Seoul on April 22, thereby freezing the text. South Korea immediately disclosed a 12-page press release while the U.S., in line with practice and policy, waited until after government-to-government signature in June.¹⁴ The original goal was to sign the new civil nuclear cooperation agreement during the U.S.-Korea summit in June to showcase a key deliverable, but the presidential meeting was postponed to October over an outbreak of Middle East Respiratory Syndrome in South Korea.

Issues for Congress

The new U.S.-ROK civil nuclear cooperation agreement meets the requirements of Section 123 of the U.S. Atomic Energy Act. Congress does not need to approve it for its entry into force. Congress can still pass a resolution of disapproval, which is highly unlikely, or pass a resolution of approval with attached conditions. The new agreement is currently expected to enter into force without hiccups.

However, some issues may still arise during the Congressional review despite the new agreement conforming to the U.S. Atomic Energy Act:

¹² Duyeon Kim, “Beyond the Politics of the 123 Agreement,” *Carnegie Endowment for International Peace*, October 29, 2014.

¹³ “Public” in this context of the U.S.-ROK nuclear cooperation agreement is defined by the Korean media, political circles, nuclear establishment, and policy community.

¹⁴ For more on the process from initiating to signature, see: Duyeon Kim and Mark Hibbs, “What the New U.S.-South Korea Nuclear Cooperation Means,” *Carnegie Endowment for International Peace*, April 13, 2015.



<p>Nonproliferation Implications</p>	<ul style="list-style-type: none"> • Gold standard – why is it not contained in the agreement and how can the U.S. effectively prevent the spread of sensitive technologies around the world without it? • South Korean nuclear ambitions – does Seoul truly have no intentions to develop a nuclear weapon especially when the new agreement creates pathways toward enrichment and pyroprocessing? • 1992 North-South Korea declaration on denuclearization – why is it not referenced in the agreement? • North Korea – how will the new agreement impact efforts to denuclearize North Korea? • Advance consent for retransfers to Europe – would this only increase the stockpiles of plutonium around the world? • Pathway to enrichment and pyroprocessing – why does the high-level bilateral commission even allow an open door to potential enrichment and pyroprocessing?
<p>Role of Congress</p>	<ul style="list-style-type: none"> • Sen. Bob Corker: <i>“While Congress provides an important check on the administration to ensure that our national security interests are placed first and are being met with each agreement, I am concerned that we will be increasingly marginalized if we do not explore changes to the current process for Congressional approval... We should examine whether it is time to call on Congress to provide a resolution of approval on all agreements prior to them becoming law, except perhaps in the case where an agreement reaches the ‘gold standard’.”</i>¹⁵ • Rep. Brad Sherman, <i>“The current law puts Congress not in the driver seat, not as a coequal branch of government, not in the back seat, but in the trunk when it comes to deciding what our policy will be on nuclear cooperation agreements... if the President vetos the resolution [of disapproval], both houses have to override with a two thirds vote. I think that is an affront to the doctrines that underlie the first article of the U.S. Constitution. It is not meaningful review.”</i>¹⁶

Two resolutions of approval have been introduced. First, Senator Ben Cardin, Ranking Member of the Senate Foreign Relations Committee, submitted a resolution of approval (S.J. Res. 20) on June 16. Senator Bob Corker, a staunch advocate of the gold standard and stronger Congressional oversight, expectedly did not co-sponsor the senate resolution. There will be a Senate Foreign Relations committee hearing on October 1 to review the new agreement. Second, Ed Royce, Chairman of the U.S. House Foreign Affairs Committee, and Representative Eliot Engel also introduced a joint resolution (H.J. Res.63) in support of the new agreement on August

¹⁵ Senator Bob Corker, Opening Statement, “U.S. Senate Foreign Relations Committee Hearing Section 123: Civilian Nuclear Cooperation Agreements,” January 30, 2014. See full text here:

http://www.foreign.senate.gov/imo/media/doc/01-30-14_123_Agreement_Hearing_Opening_Statement.pdf

¹⁶ “The Future of International Civilian Nuclear Cooperation,” Hearing transcript, Committee on Foreign Affairs, House of Representatives, 113th Congress, 2nd Session, July 10, 2014.

<http://docs.house.gov/meetings/FA/FA00/20140710/102457/HHRG-113-FA00-Transcript-20140710.pdf>

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2. While it remains to be seen whether these two resolutions will be enacted, submission of both resolutions are currently positive signs for the fate of the new agreement.

As for South Korea, the proposed agreement does not require National Assembly approval.

Implementation

The new agreement has built-in mechanisms to ensure priority governmental attention in its implementation. But while the allies were able to reach win-win compromises on contentious issues this time, negotiations on enrichment and pyroprocessing are expected to continue throughout the duration of the Joint Fuel Cycle Study. Evaluating its results may pose another challenge that could have implications for future civil nuclear cooperation agreements with other countries. As for South Korea, the new agreement paves a way to meet its national objectives on nuclear energy and research, but Seoul will need to find and lay down the stepping stones in order to fully achieve these goals over the long term.

It is also important for the allies to stay focused on the larger merits of this new civil nuclear cooperation agreement, which has both strategic and political value. It helps enhance U.S.-ROK collaboration in third countries while ensuring the highest standards of nuclear nonproliferation, security, and safety around the world. It has the potential of becoming a model for nonproliferation controls and assurances that are essential elements of peaceful nuclear cooperation agreements. The new agreement can also enhance American and Korean influence as nuclear energy expands worldwide.

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