

Still Trading with the Enemy: U.S. Trade Laws Concerning North Korea

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I. Introduction

In June 1950, President Harry S. Truman imposed a trade embargo on North Korea just days after it invaded South Korea, invoking the Trading with the Enemy Act of 1917. In the past half century, small modifications have been made to ease the embargo in response to various negotiations, but substantive trade restrictions still continue due mostly to American designation of the Democratic People's Republic of Korea ("DPRK" or "North Korea") as a communist state, a state sponsor of terrorism, and an arms proliferator.

The terrorist attacks of September 11, 2001, have reconfigured the U.S. perception of North Korea and other "rogue" states. U.S. President George W. Bush spotlighted North Korea in 2003 as part of the "axis of evil," along with Iraq and Iran, for its history of sponsoring acts of terror and nuclear weapons aspirations. After the United States occupied Iraq, North Korea admitted in October 2002 that it was pursuing a nuclear weapons program. Coming just one year after 9/11, the statements of North Korea focused American attention, first, on how North Korea might inflict direct harm, whether by missile attack or arms transfers to terrorists,

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and later on North Korean Leader Kim, Jōng-il's role in regional insecurity and domestic human rights abuses.

Negotiations to resolve the issue of North Korean nuclear weapons development proceed haltingly in a multilateral forum via the Six-Party Talks. Where trade fits into this picture is no simple matter. North Korea would like further U.S. sanctions lifted, and this may potentially be part of the bargain should North Korea agree to permanently give up nuclear weapons development. However, an investigation of the past and current status of U.S. trade laws with respect to North Korea raises a host of questions: Do the laws, as they stand, help or harm political relations with North Korea? Should the United States ease or tighten trade laws with the DPRK? How does the United States use its trade laws as leverage in political negotiations with the DPRK? Has past trade liberalization helped? Would future trade liberalization be beneficial, or would further trade restrictions be more effective in improving political relations?

To explore some of the answers to these questions, I first review the history of U.S. laws and agreements affecting trade, such as the Trading with the Enemy Act, and the partial sanctions lift in 1999. Next, I outline the current U.S. legal restrictions in place affecting trade with the DPRK, emphasizing U.S. export administration regulations and the block on international financial assistance. Finally, I discuss the potential impact on trade as posed by the North Korea Human Rights Act recently passed in the United States. I conclude that current U.S. trade laws with respect to North Korea do more than restrict trade. They restrict flexible, creative options to negotiate on urgent, outstanding political issues between North Korea and the United States.

II. The Past: History of Laws and Agreements Affecting DPRK-US Trade

A. The Trading with the Enemy Act of 1917

Under the U.S. Constitution, the Executive Branch has the power to conduct foreign affairs, which includes authority to invoke or lift sanctions under the Trading with the Enemy Act ("TWEA").¹ The TWEA was introduced in 1917 to control enemy assets during World War I. During the Depression and World War II, the TWEA was amended so that the President could impose sanctions upon declaring national emergency and have broader control over enemy assets located in the United States. President Harry Truman classified the DPRK as an enemy after the People's Republic of China (PRC) joined the Korean War in its defense, and on December 19, 1950, the Foreign Assets Control Regulations ("FACR") entered into force not only to freeze DPRK and PRC assets but also to forbid all commercial and financial transactions with both countries.

The Office of Foreign Assets Control (OFAC) of the U.S. Treasury Department administers the Foreign Assets Control Regulations as authorized under the TWEA. This is the office in charge of sanctions programs not only against countries like Iran, Syria, Sudan and Cuba, but also designated international terrorists, terrorist organizations, drug traffickers, and other designated foreign persons who engage in arms proliferation.² Since their application in 1950, the Foreign Assets Control Regulations prohibit the following transactions with North Korea unless the OFAC gives special license:

- all transfers of credit and all payments between or through banks with respect to property or person subject to U.S. jurisdiction;
- all transactions in foreign exchange by any person in the United States;
- exportation or withdrawal from the United States of any gold or silver coin or bullion, currency, or securities;
- all transfers of property or evidences of indebtedness or evidences of ownership of property by any person subject to U.S. jurisdiction;
- all transfers outside the United States of property interests located in or otherwise subject to U.S. jurisdiction;
- any transfer of securities of which the registered owner is a national of the embargoed country;
- importation into the United States of any DPRK-origin article; and

¹ Trading with the Enemy Act, Pub. L. 65-91, as amended, 50 U.S.C. App. 5(b), 31 C.F.R. § 510.201 *et seq*

² U.S. Department of the Treasury, Office of Foreign Assets Control, *North Korea What You Need To Know About Sanctions*, Aug. 18, 2000, at <http://www.treas.gov/offices/enforcement/ofac/sanctions/t11korea.pdf>

- any transaction that purposefully evades or attempts to evade the above prohibitions.³

Over the years, the FACR were modified to allow more exchange. In 1989, travel restrictions were lifted to allow more scholarly, cultural and sports exchanges with North Korea, while import and export of informational materials were also permitted.⁴ Regulations were also changed to allow critical humanitarian assistance in the wake of the natural flood and famine disasters of the mid-1990s in North Korea.⁵

More revisions were made after 1994 when the United States and North Korea negotiated the Agreed Framework to freeze North Korea's graphite-moderated nuclear reactors in exchange for the construction of two light water reactors. Article II(1) stipulated that "Within three months of the date of this Document [October 21, 1994], both sides will reduce barriers to trade and investment, including restrictions on telecommunications services and financial transactions." However, the United States eased restrictions little beyond what was necessary for construction of the light water reactors. Hence, activities permitted extended to telecommunications, establishment of a news bureau, importation of magnesium, and energy sector projects related to the construction of light water reactors.⁶

Other U.S. governmental agencies that administer trade controls over transactions with North Korea are the Department of State and the Bureau of Industry and Security (formerly Bureau of Export Administration) of the Department of Commerce. Their roles are covered later

B. The 1999 Sanctions Lift

³ 31 C.F.R. §§ 500.201, 500.202 and 500.204 (1998).

⁴ 31 C.F.R. § 500.332 (2004).

⁵ 31 C.F.R. §§ 500.572, 500.573 (2004).

⁶ 31 C.F.R. §§ 500.571, 500.582, 500.583, 500.584 (2004).

On September 17, 1999, the United States agreed to lift sanctions against North Korea in exchange for the suspension of long-range ballistic missile testing. This agreement came after North Korea test-fired a *Taepodong I* missile over Japan in 1998, which the North Koreans insisted was a failed satellite launch. Motivation for the sanctions lift arose primarily from the Perry Report, a report compiled by former Secretary of Defense Dr. William Perry who essentially recommended step-by-step, reciprocal actions in moving toward normalization of relations.⁷ Under the Perry Report, the first step in this series of reciprocities was the easing of sanctions. Thus, in exchange for a missile moratorium, the White House Office of the Press Secretary announced easing of restrictions on the following activities.

- the importation of most North Korean-origin goods and raw materials;
- the export and re-export of most non-sensitive goods and services of U.S. companies and their foreign subsidiaries, such as most consumer goods, most financial services, non-sensitive inputs for investment in non-sensitive industrial sectors;
- investment in such sectors as agriculture, mining, petroleum, timber, cement, transportation, infrastructure (roads, ports, airports), travel/tourism,
- remittances from U.S. nationals to North Koreans;
- the transport of approved (i.e., non-sensitive) cargo to and from North Korea by commercial U.S. ships and aircraft ... ;
- commercial flights between the U.S. and North Korea. ...⁸

The actual, changed regulations issued by the Departments of Treasury, Commerce and Transportation are published in the June 19, 2000 Federal Register.⁹

The above-listed activities with North Korea still need authorization from the Treasury Department's Office of Foreign Assets Control. Furthermore, the restrictions left in place are considerable. The following controls remain given North Korea's designation as a Communist and terrorist-sponsoring state:

- the export of United States Munitions List goods or technology;

⁷ *Review of United States Policy Toward North Korea. Findings and Recommendations*, Oct. 12, 1999, at http://www.state.gov/www/regions/eap/991012_northkorea_rpt.html

⁸ White House Office of the Press Secretary, *Fact Sheet. Easing Sanctions Against North Korea*, Sept. 17, 1999, available at <http://www.fas.org/news/dprk/1999/990917-dprk-wh2.htm>.

⁹ 65 Fed. Reg. 118 (2000).

- the export of dual-use goods or technology on the Commerce Control List without a license;
- any assistance under the Foreign Assistance Act, the Agricultural Trade and Development Act, the Peace Corps Act, and the Export-Import Bank Act;
- support for loans to North Korea by international financial institutions;
- the transfers of spoils of war;
- the duty free treatment of exports to the United States;
- financial transactions between U.S. persons and the North Korean government unless authorized by regulation by the Secretary of the Treasury; and
- claiming foreign tax credits on corporate or individual income in North Korea.¹⁰

Although the Perry Report aimed to harness broad, bipartisan support for its recommended policy toward the DPRK, President Bill Clinton's decision to lift trade sanctions had members of Congress in an uproar. For instance, U.S. Representative Christopher Cox (Republican-California) termed the action "a one-sided love affair with the regime in North Korea."¹¹ The same year, Representative Benjamin Gilman (Republican-New York), introduced a bipartisan bill, the North Korea Threat Reduction Act of 1999, which mandated, among other things, that trade sanctions remain in place until North Korea verifiably ended its missile program. Representative Gilman staunchly opposed the sanctions lift, stating that "this approach does not have support in Congress and would not be sustainable into the next administration."¹² Although debate was rampant over what the sanctions lift signified, the Independent Task Force Report on "U.S. Policy toward North Korea: A Second Look," sponsored by the U.S. Council on Foreign Relations, may have phrased it best:

The restrictions under the TWEA could be selectively lifted by executive action to increase the scope of transactions in a way that encourages private

¹⁰ *Fact Sheet Easing Sanctions Against North Korea*, *supra* note 8.

¹¹ Associated Press, "House GOP Pushing N Korea Policy," Washington (Northeast Asia Peace and Security Network Daily Report, Oct 14, 1999).

¹² U.S. House of Representative International Relations Committee Press Release, Sept 17, 1999.

sector contact with North Korea without U.S. Government trade guarantees, insurance or other assistance for investment. The move would signal to Pyongyang *the potential benefits of trade and investment without providing any immediate economic assistance*.¹³

Thus, the sanctions lift was more symbolic than substantive. By examining what restrictions still stood, as opposed to what restrictions had been lifted, it quickly became apparent that neither the DPRK nor investors would accrue immediate profit from the sanctions lift alone (never mind other disincentives such as North Korea's underdeveloped physical, financial and legal infrastructure with respect to foreign investment projects). Under the 1999 sanctions lift, North Korea did *not* get duty free treatment of goods, technology transfers, international loan assistance either from the United States or international financial institutions, and insurance, guarantees or loans as provided by the Overseas Promotion of Investment Corporation (OPIC) to U.S. companies. We see next how restrictive the continuing laws and regulations are with respect to trading with North Korea.

III. The Present: Current Restrictions

For the United States, the 21st century is one in which the "war on terror" has replaced the Cold War. For North Korea, the implications remain the same, primarily because of its arms proliferation objectives and designation as a terrorist-sponsoring regime by the U.S. Secretary of State in 1988 for various acts, such as the kidnapping of Japanese citizens, the bombing of a Korean Airlines airplane, and the Rangoon bombing of a South Korean presidential entourage. Nonetheless, North Korea's communist status and human rights record also remain major factors in the way the U.S. trade laws treat it.

This section examines how U.S. trade laws and regulations, particularly the Export Administration Regulations and International Financial Institutions Act, are

¹³ Independent Task Force Report, *U.S. Policy Toward North Korea: A Second Look*, July 1999, at http://www.cfr.org/pub3205/morton_1_abramowitz_james_t_laney_michael_j_green/us_policy_toward_north_Korea_a_second_look.php [Emphasis added.]

designed to deal with North Korea's status as arms proliferator, terrorist-sponsoring state and communist state.

A. Export Administration Regulations

As authorized under the Export Administration Act of 1979, the Bureau of Industry and Security of the U.S. Department of Commerce issues and implements Export Administration Regulations ("EAR"). The Export Administration Act of 1979 has lapsed because Congress has not yet reauthorized it. Therefore, the EARs currently continue by Executive Order of the U.S. President as empowered under the International Emergency Economic Powers Act.¹⁴ Previously called the Bureau of Export Administration, the BIS was renamed to emphasize its role in anti-terrorism after 9/11, and manages export controls which are in the interests of national security, foreign policy, nonproliferation and prevention of national short supply. With respect to North Korea, the BIS must ensure that exports to North Korea comply with the Commerce Control List (CCL). Items on the CCL include products, equipment and computers that are controlled for anti-terrorism and non-proliferation purposes.¹⁵ In North Korea's case, such items include encryption products, aircraft parts, certain telecommunications equipment, and high-end computers. Many of these items are dual-use goods: they can be used for military, as well as civilian, purposes. Those items not specified in the CCL, generally categorized as "EAR99," do not require a license for export or reexport to North Korea.¹⁶ However, if a dual-use good listed in the CCL may potentially contribute to the military capability of North Korea, the BIS is likely to turn down an export license.

While the Export Administration Act regulates the export of dual-use commodities, the Arms Export Control Act covers the export of defense products

¹⁴ 50 U.S.C. § 1702, *see also* White House, *Executive Order. Continuation of Export Control Regulations*, Aug 17, 2001, at <http://www.whitehouse.gov/news/releases/2001/08/20010817.html>.

¹⁵ The CCL also contains items from the *Militarily Critical Technologies List* of the U.S. Department of Defense.

¹⁶ 15 C.F.R. § 774.1 (2004).

and services.¹⁷ The Department of State, Center for Defense Trade Controls, oversees export of military-use items through the International Traffic in Arms Regulations (ITAR) and the U.S. Munitions List. Items on the Munitions List cannot be exported without license and, in the case of North Korea, exporters seeking licenses to export munitions to North Korea are unlikely to get it.

Both the Commerce Control List and the U.S. Munitions List also exist in multilateral format, known as the Wassenaar Arrangement. Created in 1996 to replace the COCOM, the Wassenaar Arrangement has 33 founding member countries and basically prohibits them from transferring armaments and sensitive dual-use goods.¹⁸ In similar manner to the United States, the Wassenaar Arrangement includes two control lists: (1) the List of Dual-Use Goods and Technologies which divides items into a Sensitive List and a Very Sensitive List, and (2) the Munitions List. Member states are obliged to notify the others of licenses denied (within two months) or issued (twice a year on an aggregate basis) to non-participating states.¹⁹

The Wassenaar Arrangement has especially been troublesome for the Gaesong Industrial Park project because many items that South Korean companies need to take there fall into dual-use categories, thus requiring the South Korean government to notify other member countries of such transfers on an itemized basis.²⁰ Because the Wassenaar Arrangement is respectively codified on a national level in member countries like South Korea, it is likely to be a challenging and frustrating process for those who want to conduct business in North Korea. The Wassenaar Arrangement reflects the EARs of the United States, which are to prevent the transfer of dual-use goods to other countries. North Korea is categorized within the group of most restricted countries. This places the South Korean government in a difficult position. Although it may have a national policy in place to encourage investments in North Korea, national laws also require it to report any movement of dual-use goods into North Korea, even if the end-use is clearly for

¹⁷ Arms Export Control Act, 22 U.S.C. § 2778

¹⁸ *Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies, Guidelines & Procedures*, including the Initial Elements (as amended and updated in Dec. 2003 and July 2004), WA Secretariat, Vienna, July 2004, at http://www.wassenaar.org/2003Plenary/initial_elements2003.htm [hereinafter "Wassenaar Arrangement"].

¹⁹ Article V, *Initial Elements*, Wassenaar Arrangement.

²⁰ *Notification Intent*, Wassenaar Arrangement

civilian purposes. Therefore, although it may appear that U.S. laws unduly restrict South Korea trade and political relations with North Korea, domestic South Korean laws and Seoul's own political relations with Washington, D.C. also play an important role. That said, it would nonetheless be inconsistent with U.S. law and neither in the interests of the United States or South Korea to have dual-use goods transfer to North Korea if the North Korean end-users are likely to convert the goods for military purposes.

B. Foreign Assistance Act and International Financial Institutions Act

North Korea's communist state and track record of terrorism result in almost no financial assistance from the United States or international financial institutions. The Foreign Assistance Act of 1961 ("FAA") prohibits direct assistance, either in terms of bilateral monetary assistance or OPIC insurance, guarantees and loans, to any government engaging in "a consistent pattern of gross violations of internationally recognized human rights, including torture or cruel, inhuman, or degrading treatment or punishment."²¹ The FAA also bans aid to "any communist country," except for that going toward school, hospitals and libraries founded and operated by U.S. citizens.²² Additionally, the FAA prohibits aid to governments that support international terrorism.²³ The only way around the prohibitions regarding human rights is if the USAID Administrator determines that North Korea is found not to be a "gross violator" of human rights, taking "into account the extent to which the government has permitted unimpeded investigations of alleged human rights violations by appropriate international organization, and the extent to which multilateral and security assistance is already restricted to that

²¹ Section 116 of the Foreign Assistance Act of 1961 ("FAA"), as amended, 22 U.S.C. 2151n, 22 U.S.C. 2199(j).

²² Section 620(f) of the FAA; 22 U.S.C. 2370(f).

²³ Section 620A of the FAA; 22 U.S.C. 2371.

country by the President or Congress for human rights reasons.”²⁴ Meanwhile, the U.S. President may waive the fact that North Korea is a communist state by “finding that such assistance is vital to U.S. national security, that the country is not controlled by the international communist conspiracy, and that the assistance will promote the country’s independence from international communism.”²⁵ Additionally, the U.S. President may “remove a country for a designated period if he determines that it is in the national interest to do so; one factor to be considered is whether the country is ‘fostering the establishment of a generally democratic system, with respect for internationally recognized human rights.’”²⁶ Thus, we see that domestic laws concerning bilateral assistance to North Korea is highly conditional upon North Korea’s international human rights record and whether the U.S. President finds it in the national security or interest of the United States to lift aid prohibitions, believing that the communist ideology is eroding and that such action will help continue it.

Meanwhile, under the International Financial Institutions Act (“IFI Act”), U.S. Executive Directors of international financial institutions like the World Bank, Asian Development Bank and the International Monetary Fund, must oppose any loans and financial or technical assistance to any country in which the government engages in “a pattern of gross violations of internationally recognized human rights,” or “provides refuge to individuals committing acts of international terrorism by hijacking aircraft”²⁷ Furthermore, the directors can only support aid designed to serve the basic human needs of the citizens of country in question²⁸ Another law, the Gramm Amendment of the Bretton Woods Act, requires the Secretary of Treasury to order the U.S. Executive Director of the IMF to “actively oppose any facility involving use of Fund credit by any Communist dictatorship” unless the Treasury Department otherwise proves to relevant congressional committees that the Fund drawing would meet certain economic conditions.²⁹

²⁴ U.S. Treasury Department, Office of Foreign Assets Control, *North Korea Sanctions*, available at <http://www.nautilus.org/library/security/references/sanctions.html> (last visited Sept. 28, 2004).

²⁵ *Id.*

²⁶ *Id.*

²⁷ Section 7001 of the International Financial Institutions Act, 22 U.S.C. § 262d.

²⁸ *Id.*

²⁹ The conditions are that the Fund drawing “(1) provides the basis for correcting the balance of payments difficulties and restoring a sustainable balance of payments position;

From time to time, North Korea has inquired about joining the Asian Development Bank, World Bank and about acquiring IMF assistance. However, under the IFI Act, only humanitarian assistance is supported and U.S. executive directors of international lending institutions cannot approve any loan or other financial or technical assistance to North Korea given its history of international terrorism and human rights abuse record. For North Korea to gain admission into or assistance from the international banks, it must first make amends on the issue of state-sponsored terrorism of past and improve its human rights record.

On the issue of international bank membership, North Korea has three strikes against it: communism, past terrorist acts, and poor international human rights standards. The FAA forbids almost all non-humanitarian foreign aid to any Communist state,³⁰ while the Export-Import Bank Act of 1945 was amended in 1986 to deny credit, insurance or guarantees to Marxist-Leninist states.³¹ North Korea is respectively cited in both laws as Communist and Marxist-Leninist. Also, the Trade Agreement Extension Act of 1951 suspends Most-Favored-Nation status (now called Normal Trade Relations status) for almost all communist states, including North Korea, which subjects it to the highest U.S. tariff rates.³²

With respect to state-sponsored terrorism, U.S. Secretary of State George Shultz designated North Korea as a supporter of international terrorism in 1988 after the bombing of KAL 007 in 1987. Under the Export Administration Act of 1979, North Korea is also denied assistance from international financial institutions for sponsoring terrorism.³³ In the late 1990s, North Korea approached the World Bank, ADB and IMF about membership. Faced with rejection as mandated by U.S. laws, the DPRK government wanted its terrorist designation withdrawn. South Korea

(2) would reduce the severe constraints on labor and capital mobility or other highly inefficient labor and capital supply rigidities and advances market-oriented forces in that country; and (3) is in the best economic interest of the majority of the people in that country. "Gramm Amendment," section 43 of the Bretton Woods Agreement Act, as amended, 22 U.S.C. § 286aa.

³⁰ Section 620(f) of P.L. 87-195 (22 U.S.C. § 2370(f)).

³¹ Section 2(b)(2) of P.L. 79-173 (12 U.S.C. § 635(b)(2)).

³² Section 402 of the Trade Act of 1974, also known as the "Jackson-Vanick Amendment" (19 U.S.C. § 2432).

³³ Section 6(j) of 96-72; 50 U.S.C. App. 2405. See also sec. 620A of the Foreign Assistance Act of 1961 and sec. 40 of the Arms Export Control Act.

encouraged North Korea's application, but Japan would not unless the issue of Japanese citizens kidnapped by North Korean agents in the 1970s was resolved. Given this pending matter and American sensitivity to terrorism after 9/11, North Korea is still on the list of terrorist-supporting states and not likely to be removed anytime soon without further action on the part of the North Korean government, not only on this point but with respect to human rights also.

Concerning observance of international human rights standards, North Korea is rated low by the U.S. Department of State and by international organizations like Amnesty International and Freedom House.³⁴ North Korea will have to improve its human rights record significantly if it wants financial assistance either bilaterally from the United States under the FAA or from international financial institutions under the IFI Act. As evident, the lack of available U.S. bilateral or international financial assistance is closely related to North Korea's human rights record. Next, we examine how the North Korea Human Rights Act of 2004 might impact this relationship even further.

IV. The Future: Sustained Restrictions

Previously known as the North Korea Freedom Act, the North Korea Human Rights Act ("NKHRA" or "Act") was modified and passed by the U.S. House of Representatives and amended and passed by the Senate on September 28, 2004. It was returned to the House of Representatives for final approval since the Senate revised portions of the Act.³⁵ Under findings that the North Korean government is " 'a dictatorship under the absolute rule of Kim Jong Il' that ... commit[s] numerous, serious human rights abuses," suppresses religious freedom, jails an estimated 200,000 political prisoners and subjects them to various abuses, fails to distribute adequate food supplies to its population, punishes North Korean

³⁴ For example, see U.S. State Department, *Country Report on Human Rights Practices Democratic People's Republic of Korea*, Feb. 25, 2004, at <http://www.state.gov/g/drl/rls/hrrpt/2003/27775.htm>.

³⁵ H.R.4011.ENR, 108th Cong., 2d Sess. (2004) [hereinafter "North Korea Human Rights Act"].

refugees, and has abducted South Korean and Japanese citizens, among other human rights offenses, the purposes of the NKHRA are:

- (1) to promote respect for and protection of fundamental human rights in North Korea;
- (2) to promote a more durable humanitarian solution to the plight of North Korean refugees,
- (3) to promote increased monitoring, access, and transparency in the provision of humanitarian assistance inside North Korea;
- (4) to promote the free flow of information into and out of North Korea; and
- (5) to promote progress toward the peaceful reunification of the Korean peninsula under a democratic system of government.³⁶

Within the NKHRA, Congress states that “the human rights of North Koreans should remain a key element in future negotiations between the United States, North Korea, and other concerned parties in Northeast Asia.”³⁷ The NKHRA is designed to achieve a number of objectives, including but not limited to the following:

- Financial support for human rights and democracy programs promoting human rights, democracy, rule of law, and the development of a market economy in North Korea (with an annual budget of US\$2 million for 2005-2008)
- Radio broadcasting to North Korea, including Radio Free Asia and Voice of America
- Actions to promote freedom of information in North Korea, including increase of radio sources (with an annual budget of US\$2 million for 2005-2008)
- Appointment of a special envoy of human rights in North Korea within the U.S. State Department
- Report on U.S. humanitarian assistance, especially improvements in transparency, monitoring and access
- Report on U.S. policy toward North Korean refugees and defectors, with the goal of allowing North Koreans eligibility for refugee status or asylum in the United States
- Assistance to organizations or individuals who support or provide humanitarian assistance to North Korean refugees, defectors, migrants and orphans, as well as women who are victims of

³⁶ North Korea Human Rights Act, Sec. 4.

³⁷ North Korea Human Rights Act, Sec. 101

trafficking (with an annual budget of US\$20 million for 2005-2008)

- Involvement of the United Nations High Commissioner for Refugees

Given the pro-human rights and pro-democratic values espoused in the Act, both the House and the Senate had little reservation about passing the Act. However, the Act should be examined beyond its face value for both its short and long-term implications.

Two issues are problematic. First, the statement that the Act would “promote progress toward the peaceful reunification of the Korean peninsula under a democratic system of government” practically amounts to supporting regime change. DPRK Leader Kim Jong-Il is unlikely to change his governance patterns to accommodate every stipulation listed in the Act. The language and tone of the NKHRA are that the North Korean government must conform to every human rights standard within it in order to receive any benefits from the United States. If not, the United States will continue to fund programs promoting human rights, rule of law, and democracy either until the DPRK government provides this for its people or until it caves altogether. The message, although grounded in good intentions for the general North Korean population, is ultimately counterproductive given the immediate urgency of negotiating on the issue of regional nuclear security. This is not to say that human rights concerns within North Korea are not urgent as well, but that if the Act has the effect of isolating North Korea further, addressing human rights in North Korea in any practical manner may in fact become more difficult.

Second, Congress states in the Act that “the human rights of North Koreans should remain a key element in future negotiations between the United States, North Korea, and other concerned parties in Northeast Asia.” This limits options of negotiating on other urgent security matters like nuclear nonproliferation. In effect, the Act attempts to tie human rights to negotiations on North Korea’s nuclear weapons development. Sec. 202 of the Act is the relevant provision. First, it stipulates that humanitarian assistance should be contingent on assurances of transparency, monitoring and access, and that no humanitarian assistance be provided by the U.S. government unless relevant congressional committees have first been notified that (1) the aid will be distributed according to international standards, (2) the aid be provided on a “needs basis” and “not used as a political

reward or tool of coercion,” (3) the aid reaches intended recipients, and (4) humanitarian access will be allowed to all vulnerable groups in North Korea wherever they are located. This provision is in step with what many in Congress have wanted for years. However, the next subsection is the more problematic in terms of negotiations and trade.

Sec. 202(b)(2) requires that no department, agency or entity of the U.S. government can provide non-humanitarian assistance to the North Korean government without certifying to relevant congressional committees that North Korea has made “substantial progress” toward:

- (1) Respect for the basic human rights of the people of North Korea, including freedom of religion,
- (2) providing for family reunification between North Koreans and their descendants and relatives in the United States;
- (3) fully disclosing all information regarding citizens of Japan and the Republic of Korea abducted by the Government of North Korea;
- (4) allowing such abductees, along with their families, complete and genuine freedom to leave North Korea and return to the abductees’ original home countries;
- (5) reforming the North Korea prison and labor camp system, and subjecting such reforms to independent international monitoring; and
- (6) decriminalizing political expression and activity.³⁸

In other words, the Act restricts what the United States can bring to the bargaining table in resolving the nuclear issue with North Korea. Trade incentives, such as assistance from international financial institutions, will be further contingent on human rights improvement in North Korea. Although the Act’s requirements are consistent with existing IFI-assistance laws, it is more specific and therefore more difficult for North Korea to receive IFI and other forms of financial, legal and technical assistance, when these could not only induce North Korea to give up its nuclear programs but also be the very vehicles to promote human rights, democracy, transparency, rule of law, and a market economy in North Korea.

³⁸ North Korea Human Rights Act, Sec 202(b)(2).

V. Concluding Remarks

The relationship between the United States and North Korea is defined largely in political terms. Current trade laws of the United States concerning North Korea are a byproduct and reflection of political relations between the two countries. Given the historical animosity between the two countries, U.S. trade laws are designed to punish or withhold privileges from North Korea, whether by way of prohibiting military-purpose commodities or dual-use goods on a selective basis, or by blocking U.S. and international financial assistance.

For the United States, the attacks of 9/11 began a new “war on terror.” Historically, trade laws concerning North Korea were the outcome of Cold War dynamics. As the Cold War dissipated, the mid-1990s showed some easing of trade sanctions with North Korea despite the continuing difficulty of US-DPRK relations. However, 9/11 brought renewed attention to North Korea for its history of sponsoring terror and arms proliferation. Prior to 9/11, North Korea had three strikes against it: communism, terrorism, and weapons proliferation. After 9/11, North Korea still has three strikes against it, except in different order: weapons proliferation, a terrorist record, and communism, the last of which equates to no democracy or human rights in the eyes of the United States. Under current circumstances, U.S. trade-related laws concerning North Korea are highly unlikely to change, and in fact the North Korean Human Rights Act further tightens conditions on trade. As was then in 1950, and now in 2004, the United States is still “trading with the enemy.”