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Time To Lift The Ban On Foreign Control Of US Reactors

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Law360, New York (August 18, 2017, 11:55 AM EDT) -- The Atomic Energy Act retains an outdated restriction that prohibits foreign ownership, control or domination (FOCD) of commercial reactor licenses. Foreign companies have been able to make substantial investments in U.S. commercial reactor assets, but because of the current restriction, they are effectively required to partner with a U.S. company that exercises “control” over the assets.

This distorts the marketplace, where a premium is often placed on having the “control” of assets. Foreign companies cannot have “control” of reactor licenses, and therefore, the value of reactor licenses is distorted.

In order to correct this market distortion, the Atomic Energy Act needs to be revised to eliminate the absolute prohibition against foreign control. Rather, the Atomic Energy Act should require the U.S. Nuclear Regulatory Commission to screen foreign involvement based upon its existing authority related to national security interests and public health and safety.

The “simple” fix is to amend Sections 103(d) and 104(d) of the Atomic Energy Act (42 U.S.C. 2133(d) and 2134(d)) as follows:

~~No license may be issued to an alien or any corporation or other entity if the Commission knows or has reason to believe it is owned, controlled, or dominated by an alien, a foreign corporation, or a foreign government.~~ In any event, no license may be issued to any person within the United States if, in the opinion of the Commission, the issuance of a license to such person would be inimical to the common defense and security or to the health and safety of the public.

By striking only the FOCD prohibition, the Atomic Energy Act would require the NRC to focus on whether or not issuance of the license would be “inimical” to U.S. interests. Thus, NRC would presumably make an “inimicality” finding to prohibit foreign companies from North Korea or Iran, for example, from obtaining control over a reactor license.

However, companies from allies such as Canada, Japan, the United Kingdom, France or South Korea could be free to acquire control of U.S. reactor licenses. This would be aligned with the current international marketplace, where nuclear components and services are marketed by numerous cross-border companies.

The FOCD restrictions adopted in 1954 were motivated by U.S. national security interests and concerns about nuclear proliferation or diversion of enriched material to a foreign country. These concerns are no longer valid with respect to U.S. allies that already possess nuclear technology and enriched material.

The purpose of the FOCD restriction was confirmed in a 1966 Atomic Energy Commission (AEC) decision in General Electric Company (GE) and Southwest Atomic Energy Associates (SAEA) (Southwest Experimental Fast Oxide Reactor (SEFOR)), 3 AEC 99 (1966). In this early case, the AEC maintained that "[i]n context with the other provisions of Section 104d, the [alien control] limitation should be given an orientation toward safeguarding the national defense and security." 3 AEC at 101.

The AEC was reviewing the participation and investment by a German government organization to develop reactor technology, and it found a way to allow the foreign investment. It opined that "[t]he ability to restrict or inhibit compliance with the security and other regulations of [the AEC], and the capacity to control the use of nuclear fuel and to dispose of special nuclear material generated in the reactor, would be of greatest significance." 3 AEC at 101. Even though German nationals would participate in the project, U.S. participants would exercise "control," so the FOCD prohibition would not be violated.

However, the FOCD prohibition is redundant. The NRC has long since confirmed that the "inimicality" provisions of Sections 103d and 104d by themselves authorize the NRC "to reject a license application that raises a clear proliferation threat, terrorist threat, or other threat to the common defense and security of the United States." Final Standard Review Plan on Foreign Ownership, Control, or Domination, 64 Fed. Reg. 52,355, 52,358 n.4 (Sept. 28, 1999).

Ironically, since 1990, there has been no FOCD restriction against foreign control over domestic uranium enrichment facilities. See Section 11(v) of the Atomic Energy Act (42 U.S.C. 2014(v)), Public Law 101-575 (104 Stat. 2834, 2835) (1990). If foreign companies can operate an enrichment facility subject to U.S. safety requirements, why would we prohibit foreign companies from operating reactors fully regulated by the NRC?

The FOCD restrictions are an unnecessary restraint on trade and are no longer appropriate in the context of the current global nuclear marketplace, where foreign vendors are important participants in the U.S. nuclear industry. In particular, U.S. allies already possess advanced nuclear technology and large quantities of enriched uranium/irradiated nuclear fuel. In fact, foreign vendors have invested in projects where they would supply new reactor technology in the United States.

Moreover, the only remaining U.S. nuclear reactor vendors are now foreign-owned in whole or part. There is no proliferation risk associated with participation in the U.S. industry by companies from U.S. allies, such as Canada, the United Kingdom, Japan, France, etc.

The nuclear industry marketplace is global. Nuclear fuel cycle activities are conducted as part of an effective worldwide market, and foreign vendors are active suppliers and service providers for the existing U.S. nuclear fleet. By participating in the U.S. market, foreign companies share their operating experience, international best practices for nuclear safety and lessons learned from overseas projects.

Thus, foreign involvement in the U.S. nuclear industry enhances safety and leads to more efficient plant performance. Whether domestic or foreign companies are involved, all aspects of NRC's safety programs and requirements continue to apply.

The current prohibition bars or discourages foreign investment in U.S. nuclear projects, but such investment promotes the national interest. The availability of foreign financial resources to support U.S. nuclear plants would facilitate development of important domestic infrastructure and the future growth of this country.

Large infrastructure projects like new nuclear plant projects benefit from and possibly require access to the global capital markets and global financing options. At the end of the day, foreign investment can enhance the value of U.S. nuclear assets and can improve liquidity. This would help maintain existing American jobs and create new American jobs.

The U.S. government has had positive experience with foreign companies involved in the defense industry handling classified information and subject to the National Industrial Security Program Operating Manual (NISPOM). The NISPOM states that "it is the policy of the U.S. Government to allow foreign investment consistent with the national security interests of the United States." DoD 5220.22M, Feb. 28, 2006 at 2-300.

The absolute prohibition against FOCD can be eliminated without any adverse impact to national security, because the NRC would review applicants and make an “inimicality” finding. Thus, U.S. security interests will remain fully protected. In addition, foreign investments would continue to be subject to review by the Committee on Foreign Investment in the United States (CFIUS Review).

Properly vetted foreign investment in U.S. nuclear reactors would promote the economic interests of the United States without any adverse impacts to security interests. Therefore, Congress should amend the Atomic Energy Act to eliminate the burdensome and unnecessary FOCD provision.

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