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001. FOIA Marker	Folder Title: [Closed Folder Title] [partial] (1 page)	n.d.	P1/b(1)
002a. email	James Baker to Susan Rice and Pat Battenfield, re: Sudan Paper edits (2 pages)	02/20/1996	P1/b(1), P5
002b. memo	Susan Rice to Anthony Lake and Samuel Berger, re: [Sudan: Options] (1 page)	10/20/1995	P1/b(1), P5
002c. memo	Anthony Lake to the President, re: [Sudan: Options] (4 pages)	ca. 10/1995	P1/b(1), P5
002d. paper	Sudan: Discussion Draft (6 pages)	ca. 10/1995	P1/b(1), P5
002e. paper	Sudan: Discussion Draft (with annotations) (7 pages)	10/18/1995	P1/b(1), P5
002f. paper	Sudan: Discussion Draft (with annotations) (6 pages)	ca. 10/1995	P1/b(1), P5
002g. paper	Sudan: Discussion Draft (with annotations) (6 pages)	ca. 10/1995	P1/b(1), P5
002h. email	James Baker to Daniel Poneman, re: North Korea (1 page)	10/14/1994	P5 1471
002i. paper	Alternative Energy Capability Funding (5 pages)	ca. 10/1994	P5 1472
002j. memo	Suan Rice to Samuel Berger, re: Deputies Committee Meeting (7 pages)	10/14/1995	P1/b(1), P5
002k. agenda	Agenda for NSC Deputies Committee Meeting (1 page)	10/16/1995	P1/b(1)

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Alternative Energy Capability Funding

Question Presented

What legal authorities are available to provide 50,000 metric tons of fossil fuel (heavy oil or coal) on an immediate basis to North Korea, in the event such an undertaking were to become an element of an agreement between the United States and the DPRK. The cost of such an undertaking is estimated at $5-10 million.

This issue was first raised during the negotiations occurring the week of October 10. We further understand that this possible term of agreement has not been approved or endorsed by policy makers, but may be agreed to by negotiators ad referendum. This paper does not address the related question of legal authority to provide 500,000 metric tons of fossil fuel to the DPRK over the next ten years.

Conclusion

DOE, State and DOD have available legal authorities that could be used to fund an initial installment of fossil fuel, assuming the availability of appropriated funds. However, depending on which agency is ultimately designated to provide **long-term** assistance, should policy makers determine to do so, additional authorization and appropriations from Congress will be required. Therefore, we could not now legally commit to a package that included both elements. In addition, counsel for all three agencies remain concerned that use of their agency authorities in this context could be challenged on the Hill.

Summary of Authorities

a. DOE Funds:*

DOE has authority under the Atomic Energy Act (AEA), as amended, to acquire and dispose of personal personal property in the proper performance of functions set forth elsewhere in the Act in keeping with the purposes and policies which the Act prescribes. Specifically, under section 161(g), DOE has authority to acquire,

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* It appears that the broad restriction of section 620(t) of the FAA, which currently prohibits all assistance under this or any other act with respect to countries with whom the U.S. has severed diplomatic relations, can be interpreted as not applying to the country in question with which the U.S. has never established such relations. If this provision were applicable, it would be necessary to establish such relations before using Defense funds too provide assistance.

purchase and lease personal property and to sell, lease or grant that same personal property. In addition, under section 161(j), DOE has authority to "make such disposition as it may deem desirable of (1) radioactive materials, and (2) any other property, the special disposition of which is, in the opinion of the Commission [the Secretary], in the interest of the national security." The FY 1995 DOE appropriations contain $__ million/billion authorized for spending on these purposes.

Section 3, the "purpose" provision of the AEA, demonstrates that among the primary functions and purposes of the DOE under the AEA are peaceful international energy cooperation and nuclear nonproliferation. For example, section 3.c. states that it is the purpose of the AEA to provide for:

> a program for Government control of the possession, use and production of atomic energy and special nuclear material, whether they are owned by the Government or others, so directed as to make the maximum contribution to the common defense and security and the national welfare, and to provide continued assurance of the Government's ability to enter into and enforce agreements with nations or groups of nations for the control of special nuclear materials and atomic weapons."

Section 122 of the AEA further authorizes the Secretary of Energy "to give maximum effect to the policies contained in any international arrangement made after . . . . enactment [of the AEA (1954)]." The Act defines "international arrangement" inter alia as "any international agreement approved by the Congress."

The FY 1995 DOE appropriation contains $__ million that may be available for this nuclear nonproliferation purpose.

b. <u>State Funds</u>:

(1) Economic Support Funds (ESF) appropriated under the Foreign Operations Appropriations Act (Foreign Ops Act)) -- funds could only be made available pursuant to a special waiver authority (e.g., sec. 614 (largest annual ceiling), or sec. 451 of the FAA) waiving foreign aid prohibitions applicable to the country. These include prohibitions on direct and indirect assistance to the country using foreign operations appropriations, and on any assistance authorized by the FAA on account of a country being designated a terrorist or communist state/government [Note: This paper does not discuss the content of specific determinations required to be made by the President or Secretary of State under various sections of the FAA including section 614.] If insufficient funds are available in the ESF account, the FAA transfer authority (sec. 610 of the FAA) may be invoked by the President to transfer funds into that account. The majority of

ESF moneys are earmarked for other purposes (Israel, Egypt, Cyprus) leaving approximately $330 million "available." Section 614, however, may also be used to "unfence" earmarks.

Section 515 of the 1995 Appropriations Act requires 15 day prior notification for expenditures for programs not previously justified to the Congress. While Section 614 can be used to waive this requirement, the Administration would still be required to engage in prior consultation with the oversight committees. Significant political problems could be encountered on the Hill during informal and formal consultations, particularly with regard to the use of foreign operations funds, since the Congress imposed an explicit ban this year on the use of such funds for the country at issue.

(2) Nonproliferation and Disarmament Fund (NDF) -- $10M appropriated for FY 95 in the Foreign Ops Act, subject to a "notwithstanding" authority but also to the regular (15 day) notification procedures. The theory for using this fund is that the provision of alternative energy sources furthers disarmament and nonproliferation objectives of the initiative.

c. DOD Funds:

(1) Emergency and Extraordinary Expenses (EEE) authority -- 10 U.S.C. 127 -- authorizes use of O & M funds for "any emergency or extraordinary expense which cannot be anticipated or classified." Has been interpreted to provide for expenses where appropriations are not otherwise available for Haiti and Africa peacekeeping. Separate appropriations for certain branches of the armed services (e.g., from FY 95 O&M: for Army -- $14,437,000,000; Navy -- $4,301,000,000; for Air Force -- $8,762,000,000; for Defense-wide -- $23,768,000,000. However, the majority of Defense-wide funds are authorized for specific accounts and are not available.

(2) CINC Initiative Fund -- 10 U.S.C. 166(a) -- authorizes use of funds for "contingencies": $25M appropriated for this account for FY 95. Authorizes Chairman of the JCS to provide funds to an officer he designates for specified activities authorized by statute including: (2) contingencies. The statute cites as a priority "the provision of funds to be used for activities with respect to an area or areas not within the area of responsibility of a commander of a combatant command that would reduce the threat to, or otherwise increase, the national security of the United States." Not more than $7 million may be used to purchase items with a unit cost in excess of $15,000.

While this authority was considered, counsel (in particular Legal Counsel for the CJCS) are skeptical at best that the contingency considered here fall within the scope of the contingencies Congress intended to be covered by this authority. A decision to use this authority would require additional legal analysis.

d. Authorities for In-Stock Resources:

Section 552(c) Drawdown Authority of the FAA -- authorizes the President to drawdown the commodities and services in stock of any USG agency when an "unforeseen emergency requires the immediate provision of assistance under this chapter." The chapter authorizes assistance for "peacekeeping operations and other programs carried out in furtherance of the national security interests of the United States." One day prior notification required; $25M annual cap; most flexible of drawdown authorities, and thus there are numerous competing needs for it. This authority would have to be used in conjunction with the section 614 waiver authority. As a practical matter, this authority would only appear to be available in the event that the fossil fuel in question is soft coal, because DOD does not have heavy oil in stock.

International Nonproliferation Initiative Fund -- sec. 1505 of the FY 93 National Defense Authorization Act (P.L. 102-484), as amended by sec. 1501(B)(2) of the FY 95 National Defense Authorization Act (P.L. 103-337), authorizes assistance for:

> "efforts to improve international cooperative monitoring of nuclear, biological, chemical and missile proliferation through technical projects and improved information sharing."

The authority to provide assistance under this section in the form of funds may be exercised only to the extent and in the amounts provided in advance by appropriations act. While $20 million was authorized for FY 95 funds were not appropriated against this account for FY-95. However, assistance under this authority may still be provided in the form of "in-kind contributions" and therefore would be a source of authority for providing the initial installment of coal to North Korea.]

Section 5859(a) is subject to a 30-day advance notification requirement. These funds, unlike the foreign operations funds, are not subject to the country-specific aid prohibitions contained in the FAA. The theory for using these funds would be similar to that for using the NDF; i.e., the provision of fuel would constitute a technical project which was part of the effort to improve cooperative monitoring by reducing the country's nuclear capability. Nonetheless, in the judgment of some counsel, use of this authority could be viewed as a stretch as the illustrative list of activities envisioned under this statute are international cooperative activities, e.g., with UNSCOM and the IAEA. In the event an international organization were created to oversee and implement the framework agreement this concern may fall away.

Interagency Implementation Mechanisms:

a. The Economy Act:

In the absence of Congressional authority for a directed transfer, the interagency transfer of funds is governed by the Economy Act, 31 U.S.C. 1535-1536. In short, the Economy Act permits the obligation of an appropriation of one agency (the ordering agency) to pay for goods provided by or services performed by another agency so long as both agencies have the underlying authority to undertake the activity in question. In addition, the Economy Act requires that (1) amounts are available; (2) the head of the ordering agency decides the order is in the best interest of the U.S. Government; (3) the agency to fill the order is able to provide the ordered goods or services; and, (4) the head of the agency decides the ordered goods or services cannot be provided as conveniently or as cheaply by a commercial enterprise.

As applied by the Executive branch, in consultation with the Congress, an effective Economy Act argument requires the agency placing the order (i.e., the agency with the appropriated funds) to demonstrate that the good or service provided by another agency benefits the ordering agency and that it is more efficient for the other agency to provide the service than for the ordering agency to provide it themselves. This might be the case where two agencies are authorized to expend money on non-proliferation activities, but one agency may be better situated with respect to skills, liability risks, etc.

b. Section 632(a) and (b) of the FAA:

This section provides "Economy Act-like" authority with respect to the allocation and reimbursement among agencies of funds available under the FAA. Funds allocated under this authority must be obligated and expended "for the purposes for which authorized, in accordance with authority granted in this Act or under authority governing the activities of the agencies of the United States Government to which such funds are allocated or transferred." That is, this authority is only relevant if the receiving agency has the authority to expend the funds for the purpose for which they were authorized.

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