Case Number: 2009-0528-F-2

FOIA MARKER

This is not a textual record. This is used as an administrative marker by the Clinton Presidential Library Staff.

Folder Title:
North Korea [4]

Staff Office-Individual:
Legal Advisor-Derosa, Mary

Original OA/ID Number:
3500

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Withdrawal/Redaction Sheet
Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. cable	re Assurance Letters for US-DPRK Settlement (3 pages)	10/14/1994	P1/b(1)
002. cable	re US-DPRK Close to Ad Ref Agreement (6 pages)	10/14/1994	P1/b(1)
003. cable	re US-DPRK Ad Ref Agreed Framework Reached (7 pages)	10/17/1994	P1/b(1)
004. cable	re ROK FM Conveys Letter of Assurance (4 pages)	09/17/1994	P1/b(1)
005. cable	re US-DPRK Ad Ref Agreed Framework Reached (8 pages)	10/18/1994	P1/b(1)
006. cable	re Assurance Letters for US-DPRK Settlement (7 pages)	10/14/1994	P1/b(1)

COLLECTION:
Clinton Presidential Records
National Security Council
Mary Derosa (Legal Advisor)
OA/Box Number: 3500

FOLDER TITLE:
North Korea [4]

2009-0528-F
kc1446

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P3 Release would violate a Federal statute [(a)(3) of the PRA]
P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [a)(5) of the PRA]
P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.
PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).
RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

b(1) National security classified information [(b)(1) of the FOIA]
b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

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 $5-6 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 by policy makers, but has been agreed to by negotiators ad referendum. This paper does not address the related question of legal authority to provide additional fossil fuel to the DPRK in the coming year or 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, should policy makers determine to do so and depending on which agency is designated to do so, provision of **long-term** fossil fuel assistance to the DPRK will require additional authorization and appropriations from Congress. 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:[1]

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

[1] 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 deemed applicable, it would be necessary to establish such relations before using Defense funds to 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."

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."

DOE has identified $5 million in its 1995 appropriations that is available under AEA authority for this nuclear nonproliferation purpose. However, expending funds for this initiative without going through the Department's customary reprogramming notification procedures would, in DOE's view, trigger new statutory restrictions which would sharply curtail the Department's current ability to use appropriated funds. Under DOE's current informal notification procedures, DOE would send a letter to the appropriations and armed services committees and, ordinarily, await approval before proceeding with the reprogramming.

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.[2]

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). Section 614, however, may also be used to break 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, it is executive branch practice not to do so where the funds do not have to be disbursed urgently before the expiration of 15 days. Further, 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; Navy --

---

[2] Section 620(f) provides that no assistance shall be furnished under the Foreign Assistance Act to any Communist country and that this restriction may not be waived pursuant to any authority contained in the Act unless the President makes certain findings or removes the country from the list for such a period as he determines and reports to the Congress is in the "national interest of the United States." Where two authorities purport to permit or delimit the exercise of authority without regard to any other section of the Act, State practice has been to interpret the Act in a manner affording flexibility consistent with Congressional intent. In this instance, further analysis would be required to determine whether Sections 614 or 451 could be used without regard to the requirements of 620(f).

$4,301,000; for Air Force -- $8,762,000; for Defense-wide -- $23,768,000. 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, legal counsel for the CJCS are skeptical at best that the contingency considered here falls 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:

(1) 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.

(2) 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.

This authority 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 depending on whether this assistance was viewed as part of a larger non-proliferation "technical project" or not.

Interagency Implementation Mechanisms:

a. The Economy Act:

The allocation of funds among agencies 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."

Department of State
Office of the Legal Advisor

Fax Coversheet

From: Newell L. Highsmith
Main State - Room 6420

Ph# 202-647-1043 *Fax#* 202-736-7115

TO: NSC - Jamie Baker

Ph# *Fax#* 456-9110

comments:

including cover page, there is a total of 3 *pages being transmitted.*

DRAFT

TERRORISM-RELATED FUNDING PROHIBITIONS

Q: Do the prohibitions on aid to terrorist countries apply to DoD and DOE funding of aspects of the U.S.-DPRK LWR project?

A: No. The principal prohibitions on assistance for countries that support terrorism are found in the Foreign Assistance Act (FAA), the Export Administration Act (EAA), the Arms Export Control Act (AECA), and the Foreign Operations Appropriations Act (FOAA).

- The prohibitions preclude the provision of assistance under the FAA and the approval of exports and sales-related activities covered by the AECA and EAA to countries, whose government the Secretary of State has determined has repeatedly provided support for acts of international terrorism.

- None of these provisions preclude the use of DoD or DO~~D~~E funds for providing technical assistance such as that contemplated by the U.S.-DPRK LWR project to the DPRK.

[If asked for information on the specific prohibition most likely to be viewed as a possible bar on DOD or DOE funding.]

- Sec. 529 of the FOAA prohibits making available "funds appropriated for bilateral assistance under any heading of this Act and funds appropriated under any such heading in a provision of law enacted prior to enactment of this Act" for any country which the President determines otherwise supports international terrorism.

- This provision is interpreted only to preclude use of funds made available for bilateral assistance under headings of this Act and corresponding headings of predecessor acts. Even if this provision were interpreted to apply to acts other than those making appropriations for foreign operations, only funds specifically appropriated for bilateral assistance under appropriate headings in those other acts would arguably be subject to this prohibition.

- The funds being used by DoD pursuant to its emergency and extraordinary expense authority, as well as any DOE funds that may be used, are not funds appropriated for bilateral assistance.

- State Department funds appropriated under the FOAA for purposes other than international organizations and programs would, however, be subject to the sec. 529 restriction.

BACKGROUND:

- Sec. 620A of the FAA prohibits the provision of assistance under that Act, the Agricultural Trade Development and Assistance Act of 1954, the Peace Corp Act, or the Export-Import Bank Act of 1945 if the Secretary of State determines that the government of that country has repeatedly provided support for acts of international terrorism.

- The AECA (sec. 40) prohibits approvals of sales, financing and related activities and of export licenses with respect to defense articles for any country with respect to which the Secretary of State has made the above-mentioned determination. The EAA (sec. 6(j)) further requires prior notification before approving any Commerce-controlled items to a terrorist country which the Secretary of State determine could make a significant contribution to the military potential or terrorist capability of such a country.

- The FOAA contains several terrorism-related prohibitions: (i) sec. 563 prohibits providing funds made available under that Act to any country which provides lethal military equipment to a country determined to be a terrorist country; (ii) sec. 528 requires the Secretary of Treasury to instruct the Executive Directors to the international financial institutions to use the voice and vote of the U.S. to oppose any loans to countries determined to be terrorist countries; and, (iii) sec. 529 (discussed above).

- As noted above, DoD and DOE funds which are not appropriated for bilateral assistance are not affected by sec. 529. State Department funds appropriated under the FOAA for purposes other than international organizations and programs would, however, be subject to the sec. 529 restriction.

- This restriction might also apply to the State funds appropriated for the Nonproliferation and Disarmament Fund (NDF), which may be made available "notwithstanding any other provision of law," since the sec. 529 prohibition applies "notwithstanding any other provision of law." Although sec. 529(b) provides a waiver authority, it takes effect only after a 15 day notification provided in accordance with the regular notification procedures of the appropriations committees. This suggests that the Congress could put a "hold" on any such waiver.

- If it is determined that sec. 529 applies to the NDF, it would be necessary to use a special authority of the FAA (e.g., sec. 614 or sec. 451) to use any State Department funds (such as ESF, or NDF) for aspects of the LWR project which could be viewed as aid to the DPRK.

drafted: L/PM:CSchwab#5912

(b) The Secretary of Defense shall allocate the aides authorized by subsection (a) of this section among officers of the Armed Forces, in such numbers as he determines appropriate, on the basis of the duties of such officers.

(c) This section shall not apply with respect to the number of aides assigned to generals of the Army or admirals of the Fleet.

SEC. 821. Notwithstanding any provision of section 2004 of title 10, United States Code, an officer in any pay grade who was in a missing status (as defined in section 551(2) of title 37, United States Code) after August 4, 1964, and before May 8, 1975, may be selected for detail for legal training under that section 2004 on other than a competitive basis and, if selected for that training, is not counted in computing, for the purpose of subsection (a) of that section 2004, the number of officers who may commence that training in any single fiscal year. For the purposes of determining eligibility under that section 2004, the period of time during which an officer was in that missing status may be disregarded in computing the period he has served on active duty. 10 USC 2004 note.

SEC. 822. This Act may be cited as the "Department of Defense Appropriation Authorization Act, 1976". Short title.

Approved October 7, 1975.

S Rept 94-146
75 S203-3
94-334
75 S203-8
94-385
75 S203-10

H Rept 94-199
75 H203-5
94-413
75 H203-12
94 488
75- H-203-14

LEGISLATIVE HISTORY:

HOUSE REPORTS: No. 94-199 (Comm. on Armed Services) and Nos. 94-413 and 94-488 (Comm. of Conference).

SENATE REPORTS: No. 94-146 accompanying S. 920 (Comm. on Armed Services) and Nos. 94-334 and 94-385 (Comm. of Conference).

CONGRESSIONAL RECORD, Vol. 121 (1975):

May 15, 19, 20, considered and passed House.
May 22, June 2-5, S. 920 considered in Senate.
June 6, considered and passed Senate, amended, in lieu of S. 920.
July 30, House agreed to conference report.
Aug. 1, Senate rejected conference report.
Sept. 3, House disagreed to Senate amendments and asked for further conference with the Senate; Senate insisted upon its amendments and requested further conference with the House.
Sept. 24, House agreed to conference report.
Sept. 26, Senate agreed to conference report.

1004

NATIONAL SECRUTIY COUNCIL
WASHINGTON, D.C. 20506

OFFICE OF THE LEGAL ADVISER

ALAN KRECZKO
JAMES BAKER
Phone: 202/456-9111
FAX: 202/456-9110

Date: 10/17/94

FAX TRANSMITTAL COVER SHEET

TO	PHONE	FAX
Phil Hitch	703/695-5864	703/697-9481
Bob Nordhaus	202/586-5966	202/586-1499 586-6732
Carol Schwab	202/647-8900	202/736-7620
Jeff Kovar	202/748-3044	202/736-7559
Bob Damus	202/395-5044	202/395-7289
Bob Lester	202/647-8308	202/647-8557
Mike Lohr	703/697-1137	703/693-1619
Newell Highsmith	647-1043	736-7115

COMMENT: Please provide final agency clearance on the attached paper by 7:00 p.m. today. A PC may be scheduled as soon as tomorrow.

Page 1 of 6

Prin output? → in session

off site understanding.

Con DoD reprogram.

3 Cover shot.

purchase + transfer [illegible]
DoD need resolute analy
efficiency [illegible] transfers of
energy act.

NATIONAL SECURITY COUNCIL
WASHINGTON, D.C. 20506

OFFICE OF THE LEGAL ADVISER

FAX TRANSMITTAL COVER SHEET

DATE: 1/6/95	
TO: Newell Highsmith	FROM: J. Baker
PHONE NO.: 647-1043	PHONE NO.: (202)456-9111
FAX NO.: 736-7115	FAX NO.: (202)456-9110

COMMENTS:

Newell,

I sent you a draft earlier. This is the correct version.

J

NUMBER OF PAGES (including cover page):

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<u>Interagency Implementation Mechanisms</u>:

a. The Economy Act:

The allocation of funds among agencies 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."

File North Korea

cc: Aoki
Suettinger
Danvers
G. Adams

Talking Points for Defense Department's Role in Implementing the US-DPRK Agreed Framework by Purchasing Heavy Residual Fuel Oil

December 9, 1994

- Following several confrontations with North Korea over its non-compliance with the Nuclear Non-proliferation Treaty and International Atomic Energy Agency safeguards in 1993 and early 1994, the UN Security Council requested the United States open bilateral dialogue with the Democratic Peoples Republic of Korea (DPRK) to attempt to resolve the nuclear issue.

- On October 21, 1994, negotiators for the US and the DPRK signed an Agreed Framework in Geneva designed to halt and eventually dismantle the DPRK's nuclear weapons program to ensure in the long run a nuclear free Korean Peninsula. In exchange for dismantling its program, the DPRK will receive more proliferation-resistant light water reactor technology.

- The Agreed Framework was approved by President Clinton for the US, and Kim Chong-il, for the DPRK. The freeze and dismantlement of the DPRK nuclear program will be monitored by the IAEA.

- The agreement also creates a framework for dealing with past problems relating to discrepancies in the amount of plutonium declared by the DPRK to the IAEA under its safeguards agreement.

- It is important to note that there are trigger mechanisms built into the framework so that the U.S. can stop fulfilling its responsibilities at any time if the DPRK is not in compliance with the agreement.

- To implement the Agreed Framework, both the US and the DPRK are required to take immediate actions with specific milestones for follow-on actions throughout the 10-to-14 year duration of the framework.

- The most important immediate action for the DPRK was to freeze its nuclear program, under IAEA supervision, including the 5MW(e) experimental reactor, the 50MW(e) and the 200MW(e) under construction, radio-chemical lab used for reprocessing spent nuclear fuel into plutonium, and other associated facilities. The Director General of the IAEA reports good cooperation and compliance with the freeze by the DPRK.

- Immediate actions for the US include arranging financing and contracting for the construction of two 1000MW(e) Light Water Reactors in the DPRK, movement toward normalization of relations with North Korea, and supplying alternate energy to make up for the loss of power and thermal heat from the graphite-moderated reactors.

- As alternate energy for the loss of electrical power and thermal heat from the DPRK's reactors, the US agreed to arrange for shipments of heavy residual fuel oil in amounts equal to the thermal output of the three nuclear reactors, a total of 255MW(e) or 3.5% of North Korea's present electrical generation capacity.

- Within three months of signing the framework, the US agreed to supply an initial tranche of 50 thousand metric tons of heavy residual fuel oil to compensate for the DPRK freezing and not refueling its 5MW(e) experimental reactor. This fuel oil will be used for both electrical power generation and heating following delivery in Jan 95.

- The Department of Defense has agreed to arrange and pay for delivery of the first tranche under the authority of 10 US Code 127, Emergency and Extraordinary Expenses, both to meet the agreed ninety-day deadline and provide incentive for DPRK compliance with the nuclear non-proliferation incentives of the framework.

- Under the provisions of 10 U.S.C. 127, the Secretary of Defense and Secretaries of the Military Departments are authorized to use operations and maintenance funds up to a limit specified in the annual DoD Appropriations Act for "any emergency or extraordinary expense which cannot be anticipated or classified."

- While US economic sanctions under the Trading with the Enemies Act prohibit all trade with North Korea, including the sale of fuel, the provision of 50Kmt of heavy fuel oil is a specific exception and does not alter the on-going embargo.

- The advantage of heavy residual fuel oil (HFO), over crude and other refined petroleum products, is that there is very little high-fraction fuel, such as gasoline, diesel, and kerosene, which can be extracted. Commonly called 'Bunker C', heavy residual fuel oil can be used to fire boilers, but not as motor fuel for vehicles or military hardware.

- The first tranche of 50Kmt of HFO will be delivered to the idle, oil-fired power plant in Sonbong, North Korea, where it will be used to produce electricity for Namjin Province and thermal heat for the surrounding villages. The total cost to DoD will be approximately $4.7M including delivery. CALTEX's ROK subsidiary, Honam Oil Co., was the low bidder in an international solicitation to contract for the fuel.

- The second tranche agreed to in the framework is 100Kmt of HFO as alternate energy for both the 5 and 50MW(e) reactors. It is scheduled for delivery in October, 1995 and will be paid for by a multi-national consortium under the leadership of the US, Japan, and the Republic of Korea. Other countries have agreed to help fund the cost of this alternate energy as well as follow-on deliveries until the first LWR is on-line.

- The third tranche provided under the framework is 500Kmt of HFO to compensate for the total 255MW(e) electrical capacity of all three nuclear reactors under the freeze. First delivery will be in October 1996 and paid for by the consortium. Deliveries will continue annually until the first LWR is on-line providing electricity to the DPRK.

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OPTIONAL FORM 99 (7-90)

FAX TRANSMITTAL # of pages ►

To ALAN KRECZKO From JIM HERGEN

Dept. Agency NSC Phone #

Fax # 395-1039 Fax #

NSN 7540-01-317-7368 5099-101 GENERAL SERVICES ADMINISTRATION

United States Department of State

Washington, D. C. 20520

INFORMATION MEMORANDUM S/S

9324840

'93 OCT 27 3:15 PM

OCT 27 1993

UNCLASSIFIED

TO: P - Mr. Tarnoff

FROM: L - Conrad K. Harper

SUBJECT: Restrictions on Relations with North Korea

File

Your office has asked that we provide a summary of current restrictions on political and economic relations with the Democratic People's Republic of North Korea (DPRK). A list is at Tab 1.

U.S. restrictions on relations with the DPRK span a broad continuum, from refusal to engage in diplomatic relations to a sweeping trade embargo under the Trading With the Enemy Act ("TWEA"). Significantly, in addition to restrictions applicable to the DPRK by name, it is also subject to other, more general sanctions on account of its weapons proliferation and terrorist-related activities (e.g., it has been designated a "terrorist country" by the U.S. since 1988). Moreover, it is also potentially subject to a wide range of additional restrictions on security and other assistance (including International Financial Institution lending) for human rights reasons and because it remains a communist dictatorship.

While many of the current U.S. restrictions on the DPRK may, as a legal matter, be terminated or relaxed by the executive branch in the exercise of its own discretion without legislation or the need to consult Congress (e.g., the establishment of diplomatic relations, lifting of the 25-mile limit on travel by DPRK representatives to the UN, the trade embargo), the administration's freedom of movement is circumscribed by a complex web of potentially applicable legislation. Moreover, any such effort would receive the closest scrutiny--and possible resistance--from Congress. Congress' strong anti-DPRK bias is illustrated in section 710 of the pending State authorization legislation (proposed by Senator Robb out of concern about the DPRK's nuclear activities), which would, if enacted, diminish the President's authority to lift/relax the TWEA trade embargo (at Tab 2).

Attachments:

Tab 1 - Compilation of Political and Economic Restrictions on the DPRK

Tab 2 - Robb Proposal

Drafted:L/EAP:JGHergen
10/19/93, SELEAP 1921, x73044

Cleared:
EAP/K:LTurk, Acting
L:MMatheson
L:JMSBorek
H:AKirkpatrick

cc: L/HRR:DPStewart
L/EBC:TABorek
L/PM:ECummings
L/LEI:REHarris
L/PM/N:NHighsmith
L/SFP:TRamish
L/CA:CBrown
L/NEA:DAbramowitz
USAID/GC:GBisson

NORTH KOREA SANCTIONS

Category [Legal Citation]	Description	Repeal/Revise
1. **Diplomatic Relations.** [U.S. Constitution; Note: For a good, general overview of the law regarding state/government recognition, see sections 202-205 of the Restatement 3d, Foreign Relations Law of the U.S. (1986.)]	The U.S. does not currently maintain diplomatic relations with the DPRK.	The establishment of diplomatic relations is a constitutional prerogative of the Executive; no formal congressional approval is required.
2. **U.N. 25-mile Travel Limit.** [Section 162 of the Foreign Missions Act, 22 U.S.C. 4316; U.N. Headquarters Agreement; Immigration and Nationality Act]	Although the DPRK is a member of the United Nations, the U.S. lawfully restricts the travel of DPRK UN representatives to the HQ District, i.e., a 25-mile radius from Columbus Circle.	The 25-mile limit may be removed or relaxed by the Secretary (in consultation with the FBI and CIA) without the need for congressional approval or consultation.
3. **Trade Embargo.** [Trading With The Enemy Act ("TWEA"), Pub. L. 65-91, as amended, 50 U.S.C. App. 5(b); 31 C.F.R. 500.201 et seq.]	--Empowers President to prohibit/regulate a broad range of financial/property transactions. --Since 12/17/50, President has banned trade absent Treasury (Office of Foreign Asset Controls) license.	Executive may relax or terminate the ban at any time w/o congressional consent or consultation. [But note section 710 of the pending State authorization bill, which, if enacted in its current form, would prohibit any license for trade with the DPRK except pursuant to a presidential determination that the DPRK maintains its status as a member of the 1968 Nuclear Nonproliferation Treaty and is in full compliance with its obligations thereunder.]

4. **Exports.** [Export Administration Act of 1979 (Pub. L. 96-72, as amended, 50 U.S.C. App. 2404)("EAA"); 15 C.F.R. Part 700]	Authorizes the President to "prohibit or curtail the export of any goods or technology subject to the jurisdiction of the [U.S.]" absent a license from Commerce.	Executive branch may relax or terminate the ban without congressional consent or consultation.
5. **Shipping.** [Section 704 of the Defense Production Act of 1950 (Pub. L. 81-774, 50 U.S.C. App. 2154); 44 C.F.R. Part 403]	Prohibits owners, owners' agents, and officers from (i) taking to the DPRK any ship or aircraft documented or registered under the laws of the U.S.; and, (ii) from transporting in any such ship goods destined for the DPRK.	Executive may relax or terminate these restrictions without congressional consent or consultation.
6. **Most Favored Nation ("MFN").** [Title IV of the Trade Act of 1974 (Pub. L. 93-618, 19 U.S.C. 1431)]	As a country the products of which were not eligible for MFN treatment on or before 1/3/75, the DPRK is ineligible for MFN extension, absent...	(i) Presidential determination that the DPRK (as a "non-market country") allows its nationals to emigrate freely (the so-called "Jackson-Vanik" amendment); and, (ii) conclusion of a bilateral trade agreement containing specified provisions.
7. **Proliferation** [Sections 1701-1704 of the FY '91 National Defense Authorization Act (Pub. L. 101-510, 50 U.S.C. App. 2402 note); 15 C.F.R. Part 700; 22 C.F.R. 120.29 (ITAR), see 58 F. Reg. 39286 (7/22/93)]	-- Amended the Arms Export Control Act (22 U.S.C. 2778) and the Export Administration Act to require sanctions if the President	-- Sanctions are for a two-year period. -- President may waive upon a determination that such action is

	determines that a foreign person knowingly exports, transfers or otherwise engages in trade "of items that contribute to missile proliferation." -- U.S. imposed such sanctions on two DPRK entities in 1992.	"essential to the national security of the [U.S.]" and so certifies to Congress 20 days prior to issuing the waiver.
B. **Terrorism.** [Section 6(j) of the Export Administration Act of 1979, as amended by the Anti-Terrorism and Arms Export Amendments Act of 1989, Pub. L. 101-222, 103 Stat. 1892] [<u>Note</u>: Section 901 of the Internal Revenue Code, 26 U.S.C. 901(j) would also deny in the case of the DPRK certain tax credits for income and other taxes paid to that country.]	-- DPRK designated a "terrorist country" since 1/20/88 per State determination that it had repeatedly provided support for acts of international terrorism. -- Prohibits certain transactions with DPRK, including direct or indirect export of any munitions list items by USG or any US person (as well as to re-exports by non-U.S. persons). -- Exports of non-munitions list items must be licensed.	-- President may waive the prohibition for a particular transaction if he determines that it is "essential to the national security interests of the [U.S.]," and both consults with and submits a report to Congress 15 days prior to the transaction. -- There are two ways by which a country may get off the "terrorist list," i.e., (i) President certifies to Congress that "there has been a fundamental change in the leadership or policies of the terrorist country, that the government ...is not supporting acts of international terrorism, and that the government has provided assurances that it will not support acts of international terrorism in the future,"; or, (ii) President submits to Congress for review, 45 days prior to the

		effective date of the recision, a determination that the government has not supported international terrorism during the preceding 6-month period and has provided assurances that it will not support acts of international terrorism in the future.

THE FOLLOWING ARE POTENTIALLY APPLICABLE ALTHOUGH NO FORMAL DETERMINATION HAS YET BEEN MADE

9. **Foreign Assistance.** A. **Human Rights.** [Section 116 of the Foreign Assistance Act of 1961, as amended, 22 U.S.C. 2151n; also covers OPIC insurance, guarantees, or loans, 22 U.S.C. 2199 (i)]	Prohibits assistance to the government of "any country which engages in a consistent pattern of gross violations of internationally recognized human rights, including torture or cruel, inhuman, or degrading treatment or punishment..." etc.	"Gross violator" determination is made by the AID Administrator and the Assistant Secretary for HA, who must take into account the extent to which the government has permitted unimpeded investigations of alleged human rights violations by appropriate international organizations, and the extent to which multilateral and security assistance is already restricted to that country by the President or Congress for human rights reasons.
B. **Communist States.** [Section 620(f) of the FAA (22 U.S.C. 2370 (f))]	Prohibits assistance to "any communist country," including the DPRK, except for	--President may waive upon finding that such assistance is vital to U.S. national security,

[Note: There are also several other restrictions on assistance that might potentially become applicable to the DPRK that it is not necessary to address now, e.g., sec. 620A of the FAA, 22 U.S.C. 2371 (prohibits assistance to governments supporting int'l terrorism); sec. 620(t) of the FAA (break in diplomatic relations); secs. 523 and 529 of the FY 94 Foreign Ops. Appropriation bill; sec. 543 of the FY '93 FAA (Pub. L. 102-391).]	assistance to schools, libraries, and hospital centers for educational research which are outside the U.S. and are founded/operated by U.S. citizens.	that the country is not controlled by the international communist conspiracy, and that the assistance will promote the country's independence from international communism. -- President may also 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."
10. **Security Assistance.** [Section 502B of the FAA (22 U.S.C. 2304)]	-- Prohibits security assistance to any country "the government of which engages in a consistent pattern of gross violations of internationally recognized human rights." -- Also prohibits security assistance for the police, domestic intelligence, or similar law enforcement forces of such a country. Moreover, export licenses are prohibited even for crime control and detection instruments and equipment, subject to a presidential waiver in	Assistance may be provided only if the President finds such a "significant improvement in [the] human rights record" that it is in the national interest to lift the prohibition.

	"exceptional circumstances." Id., for IMET.	
11. **IFI Lending.** [Section 700] of the International Financial Institutions Act (22 U.S.C. 262d); see also sec. 528 of the FY '94 Foreign Ops Appropriation Act, which contains a similar provision.]	Requires the U.S. Executive Directors of IFI's (e.g., World Bank) to oppose any loan, extension of financial assistance, or technical assistance to any country the government of which 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." -- U.S. Executive Directors are only authorized to support assistance "directed specifically to programs which serve the basic human needs of the citizens of such country."	<u>Note</u>: 22 U.S.C. 262d(f) requires Treasury to consult "in a timely manner" with relevant congressional committees to inform them of "prospective changes in policy direction toward counties [sic] which have or recently have had poor human rights records." 22 U.S.C. 262d(c) requires Treasury to report quarterly on all loans considered by the IFI Boards, addressing <u>inter alia</u> whether the U.S. opposed, in each instance, assistance on human rights grounds, or changed its voting position for such reasons.
"Gramm Amendment," section 43 of the Bretton Woods Agreement Act, as amended, 22 U.S.C. 286aa.	Requires the Secretary of Treasury to direct the U.S. Executive Director of the IMF	The congressional committees may request that the Secretary of Treasury appear before them to

	"to actively oppose any facility involving use of Fund credit by any Communist dictatorship" unless Treasury certifies to the relevant congressional committees that certain economic criteria are met.	certify and document (or to document in writing) that the requisite conditions have been met. If the Secretary does not appear in response to Congress' invitation, the Executive Director "shall vote against such program."
Gonzalez Amendment, 22 U.S.C. 283r, 284j, 285o.	Requires Secretary of Treasury to instruct Executive Directors to the IBRD and ADB to vote against assistance to any country that has expropriated the property of U.S. nationals.	Unless President determines that (i) an arrangement for proper compensation has been made; (ii) the matter has been submitted to arbitration; or, (iii) good faith settlement negotiations are in progress.

both Turkey and the entire region is enhanced by the measures taken under this section.

SEC. 710. ADDITIONAL SANCTIONS AGAINST NORTH KOREA.

(a) IN GENERAL.—Notwithstanding any other provision of law, no license, instruction, rule, regulation, or order issued under section 5 of the Trading With the Enemy Act of 1917 (50 U.S.C. App. 5) may—

(1) authorize any transaction involving the commercial sale of any good or technology to North Korea; or

(2) authorize any transaction involving the provision of services for travel to North Korea which was not otherwise authorized as of January 2, 1989.

(b) WAIVER.—The President may waive the application of subsection (a) if the President determines that—

(1) North Korea continues to maintain its status as a party to the Treaty on Non-Proliferation of Nuclear Weapons, done on July 1, 1968; and

(2) North Korea is in full compliance with its obligations under the Treaty.

Love

LEGISLATION

Summary: The wide range of counter-terrorism legislation includes economic sanctions, aviation and maritime security measures, and anti-terrorism training, counter-terrorism research/development and rewards programs. Other laws make terrorist attacks against Americans overseas a crime punishable in U.S. federal courts.

A. Terrorism List: Sanctions

The Anti-Terrorism and Arms Export Amendments Act of 1989 (ATAEAA), (P.L. 101-222, 22 U.S.C.A. §§ 1732, 2364, 3371, 2753, 2776, 2778, 2780 and 50 U.S.C.A. § 2405) codified sanctions legislation passed piecemeal since the mid-1970's. The ATAEAA amended the earlier Export Administration Act's (EAA) export controls on dual use items and the previous Foreign Assistance Act and Arms Export Control Act prohibitions regarding foreign assistance and military equipment for terrorism-supporting countries.

1. Economic Sanctions

The Export Administration Act of 1979, (EAA) Section 6(j), (Public Law 96-72, 50 U.S.C. App. §2405 (6)(j) as revised by the ATAEAA in 1989) imposes a validated license requirement and requires advance Congressional notification for the export of goods or technology when the Secretary of State has determined: (A) that the recipient country "has repeatedly provided support for acts of international terrorism" and (B) such an export "could make a significant contribution to that county's military potential or ability to support acts of international terrorism." (This designation of states supporting terrorism subsequently became known as the "terrorist list.")

2. Suspension of Military Sales

The Arms Export Control Act, Section 40 (P.L. 90-629, 22 U.S.C.A. § 2780, as amended by the ATAEAA) prohibits direct or indirect exports of U.S. Munitions List items to terrorism list countries. Civil and criminal penalties also apply to U.S. persons overseas and foreign subsidiaries of U.S. firms for helping a terrorism-list country acquire munitions list items. The law contains a U.S. national security interest waiver provision.

3. Suspension of Foreign Assistance

-- The Foreign Assistance Act of 1961 (P.L. 87-195, 22 U.S.C.A. §2371, as amended by the ATAEAA) prohibits any assistance under the Foreign Assistance Act, the Agricultural Trade Development and Assistance Act, and the Peace Corps and Export-Import Bank Acts to countries designated as state supporters of terrorism.

-- The FY 1993 Foreign Operations Appropriations Act, Sec. 554, (P.L. 102-391) extends previous prohibitions against the use of U.S. bilateral aid funds for any country which the President determines (1) grants sanctuary from prosecution to any individual or group which has committed an act of international terrorism, or (2) otherwise supports international terrorism.

o Sec. 562(c)(1) applies the same prohibition to assistance through Non-Governmental Organizations.

B. Additional Sanctions Triggered by the EAA Sec. 6(j)

Since the enactment of the 1979 Export Administration Act, Congress has passed laws triggering additional sanctions against countries designated as terrorist supporting states under EAA Sec. 6(j).

1. The FY 1993 Foreign Assistance Appropriations Act, Sec. 553, (P.L. 102-391) extends previous legislation directing the U.S. representatives to the World Bank and other international financial institutions to vote against any loans or use of funds for EAA Sec. 6(j) terrorism list countries.

2. Internal Revenue Code (26 U.S.C. § 901 (j)) prohibits U.S. corporations or individuals from claiming foreign tax credits on income earned in EAA Sec. 6 (j) terrorism list countries.

3. Defense Department Authorization Act of 1987, Sec. 2327, (P.L. 99-500, 10 U.S.C. §2327) requires that bidders on Defense Department contracts of $100,000 or more must disclose if they or subcontractors are owned or controlled by a Sec. 6(j) country. Contracts are denied unless in the U.S. national security interest.

4. Section 40 of the State Department Basic Authorization Act, as amended by the Omnibus Diplomatic Security and Anti-terrorism Act of 1986, (P.L. 99-399, 22 U.S.C. § 2712) authorizes the Secretary of State to restrict the provision of certain services having a direct military, law enforcement or intelligence application, such as training, to governments of Sec. 6(j) countries.

C. General Authorities

Additional sanctions, such as bans on financial transactions or travel, can be imposed against countries which are considered to be state supporters of international terrorism.

1. The International Emergency Economics Powers Act (P.L. 95-223, 50 U.S.C.A. § 1701 et seq) authorizes the President to regulate or prohibit a wide range of financial transactions with a foreign country or its nationals if the President declares a national

emergency to deal with an "unusual and extraordinary threat..." to the United States." The current Export Administration Act controls are imposed under the IEPA authority because the EAA was not renewed in 1990 or 1992.

2. Trading with the Enemy Act (P.L. 65-91, 50 U.S.C.A App. §1 et seq) authority was used for the trade embargoes imposed against Cuba and North Korea before they were placed on the terrorism list. The embargoes were continued as part of the anti-terrorism sanctions against these countries.

D. Import Controls

1. The International Security and Development Cooperation Act of 1985 (P.L. 99-83 Sec. 505, 22 U.S.C.A. § 2349aa-9) gives the President discretionary authority to restrict or ban imports from any country which the U.S. determines supports or harbors terrorists. Congressional consultations are required before invoking the authority.

2. Section 504 of the Act (22 U.S.C.A. §2349aa-8) grants the President authority to ban all imports from and all exports to Libya.

3. The Trade Expansion Act of 1969 as amended, Sec. 232, (P.L. 87-794, 19 U.S.C. § 1862(c)) gives the President authority to ban imports if the Secretary of Commerce determines such imports are in such quantities or circumstances as to threaten or impair the national security. The statute has been used to ban Iranian and Libyan oil imports.

E. Credit, International Bank, Other Restrictions

1. The Export-Import Bank Act Sec. 2 (b) (1) as amended (P.L. 79-173, 59 Stat. 526) permits the denial of credit applications if the President determines "such action would clearly and importantly advance United States policy in such areas as international terrorism...."

2. The Trade Act of 1974, Section 502 (b), (P.L. 93-618, 19 U.S.C. § 2462 (b)(6)) requires the President to withhold General System of Preferences (GSP) designation as a beneficiary developing country entitled to duty free treatment for a country which "aids or abets" terrorism by granting sanctuary from prosecution to international terrorists, unless the President determines that such designation will be in the U.S. national economic interest.

3. The International Organizations Act, Sec. 286, (P.L. 95-435, 22 U.S.C. § 286e-11) requires the U.S. Executive Director to the International Monetary Fund to oppose financial or technical assistance to any country which assists or gives sanctuary to aircraft hijackers.

   o Section 262 (d)(a)(2) requires the U.S. to use its "voice and vote" against loans by the World Bank, the International Development Association and regional development banks for countries haboring aircraft hijackers.

4. The FY 1993 Foreign Operations Appropriations Act (P.L.102-391) Title I, "Contribution to the Enterprise of the Americas Multilateral Investment Fund" directs the Secretary of the Treasury to use the "voice and vote" of the United States to require that a recipient country does not harbor or sponsor international terrorists, and meets other conditions regarding human rights and narcotics control cooperation and a democratically elected government.

   o Sec. 594 (a) requires that to be eligible for debt reduction under the Enterprise for the Americas Initiative, a government must not have repeatedly provided support for acts of international terrorism and must meets the other conditions cited above.

F. Aviation and Maritime Security

1. The Federal Aviation Act, Section 1115 (P.L. 85-726, 49 U.S.C. § 1514) allows the President to suspend air transportation between the U.S. and any foreign state which acts "in a manner inconsistent" with the 1970 Hague anti-hijacking convention or provides support or sanctuary for terrorist hijackers. The President also is authorized to suspend air transportation between the U.S. and any country which maintains air service between itself and such a state.

2. International Security and Development Cooperation Act of 1985, Title V--International Terrorism and Foreign Airport Security Act Sec. 551, (P.L. 99-83, 49 U.S.C. App. § 1515) directs the Secretary of Transportation to inspect the security at foreign airports with air links to the U.S. Travel advisories are to be issued if the security is substandard and has not been sufficiently improved after 90 days notice to the airport authorities.

   o Sec. 551 (e)(2) (49 U.S.C. App. § 1515(e)(2)) also authorizes the revocation of U.S. landing rights for air carriers continuing to use such airports. The President may prohibit air service with any airport which is directly or indirectly served by aircraft flying to or from the cited airport.

Selective North Korea Sanctions

iplomatic Relations--The United States has never established iplomatic relations with the DPRK.

.N. 25-Mile Travel Limit--The U.S. has restricted the travel f DPRK UN representatives to the headquarters district, a 5-mile radius from Columbus Circle, under the Foreign Missions ct and the UN Headquarters Agreement.

rade Embargo--Under the Trading with the Enemy Act, the resident has banned trade and financial transactions absent a reasury license since 1950.

xport Controls--North Korea is also subject to COCOM and oreign-policy export controls under the Export Administration ct of 1979 absent a Commerce license, though these controls, ike those that follow, are of little practical consequence for he U.S. because of the comprehensive embargo.

hipping--The Defense Production Act of 1950 prohibits owners, heir agents and officers from taking to the DPRK any ship or ircraft documented or registered under U.S. laws, and from ransporting any goods destined to the DPRK.

ost Favored Nation (MFN)--Under the Trade Act of 1974, the PRK is not eligible for MFN because it was not previously ligible, because the President has not determined that (as a on-market country) it allows its nationals to emigrate freely Jackson-Vanik), and because there is no bilateral trade greement containing certain provisions. MFN had been ithdrawn from North Korea in 1951.

rms Trade--The International Traffic in Arms Regulations ITAR) provision stating that it was U.S. policy to ban exports f defense articles, and services to and imports from, North orea became effective in August 1955.

oreign Aid--The Foreign Assistance Act of 1961, which became ffective on August 1, 1962, prohibited aid to communist ountries. The DPRK was specifically identified in the law.

xport-Import Bank Programs--The 1986 Export-Import Bank Act rohibited guarantees, insurance, or credits for any purchases y Marxist-Leninist countries. North Korea was specifically dentified.

errorism--On January 20, 1988, North Korea was designated as a ountry supporting terrorism under section 6(j) of the Export dministration Act of 1979, and is thus subject to numerous tatutory sanctions (e.g. arms transfers, multilateral bank oans, tax credits, etc.)

ROUTING AND TRANSMITTAL SLIP

Date 10/9/92

Ф Korea
4/Korch (General)

TO: (Name, office symbol, room number, building, Agency/Post)	Initials	Date
1. L/EBC - J Dolan		
2. L/LEI - JE Baker		
3. L/PM - C Johnson		
4.		
5.		

	Action		File		Note and Return
	Approval		For Clearance		Per Conversation
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	Coordination		Justify		

REMARKS

FYI.

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FROM: (Name, org. symbol, Agency/Post)	Room No.—Bldg.
David Jones L/EAP	5522A
	Phone No. 73044

5041-102

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United States Department of State

Washington, D.C. 20520

UNCLASSIFIED October 9, 1991

To: EAP/K - George Frederick

From: L/EAP - David Jones

Subject: Legal Constraints on Trade With North Korea

The following responds to your request for a short summary on the legal constraints that inhibit "normal" trade between the United States and North Korea. As you will see, the constraints are both comprehensive and multilayered. Please feel free to contact my office if you require more detailed information. Also, please note that I have not included legal restrictions on providing financial support (e.g. OPIC, international financial institutions) or foreign assistance.

1. The Trade Embargo

Since the Korean War the USG has imposed a comprehensive embargo on North Korea. The essence of this embargo is that goods and technical data cannot (with narrow exceptions) be exported to North Korea without specific approval from both Treasury and Commerce. For policy reasons (which are coordinated with State) these Departments generally deny requests for export licenses. The principal legal authorities which undergird the embargo are:

- Trading With the Enemy Act: TWEA (P.L. 65-91, as amended, 50 U.S.C. app. 5(b))) authorizes the President to regulate or prohibit a broad range of financial and property transactions. Relying on this authority, the President has since December 17, 1950, banned virtually all trade with North Korea unless specifically authorized by the Secretary of the Treasury. (31 CFR §500.201 et seq.) The Executive Branch has legal authority to relax or lift this ban without new legislation.

- Export Administration Act of 1979: P.L. 96-72, as amended (50 U.S.C. app. 2404), authorizes the President to "prohibit or curtail the export of any goods or technology subject to the jurisdiction of the United States." This authority is exercised principally by the Commerce Department, pursuant to complex regulations published in 15 CFR that prohibit virtually all exports to North Korea (as a member of country group "Z") unless a "validated license" (i.e. a license authorizing the individual transaction) is issued by Commerce. Commerce regulations, like Treasury's, could be relaxed by Executive Branch decision.

2. Shipping Restrictions: Under a regulation issued pursuant to the Defense Production Act of 1950 (P.L. 81-774, 50 U.S.C. app. 2061 *et seq.*), owners, owners' agents, and officers are prohibited from taking to North Korea any ship or aircraft documented or registered under the laws of the United States, and from transporting in any such ship or aircraft goods destined for North Korea. 44 CFR part 403.

3. Most Favored Nation Treatment: As a "country, the products of which were not eligible for" MFN treatment on January 3, 1975, North Korea is ineligible for MFN unless it satisfies the provisions of Title IV of the Trade Act of 1974, P.L. 93-618. (19 U.S.C. 1431.) These condition extension of MFN on (1) a presidential determination that any non-market economy country being considered for MFN allow its citizens freedom of emigration (the "Jackson-Vanik amendment"), and (2) the conclusion of a bilateral trade agreement containing specified provisions. These statutory standards would appear to make extension of MFN to North Korea unlikely unless major changes take place in that country.

4. Proliferation Sanctions: Earlier this year the USG imposed sanctions on two North Korean entities that engaged in missile technology proliferation activities. The sanctions were required under the National Defense Authorization Act for Fiscal Year 1991 (P.L. 101-510, 50 U.S.C. app. 2402 note), which amended the Arms Export Control Act and the Export Administration Act to require sanctions "if the President determines that a foreign person . . . knowingly exports, transfers or otherwise engages in the trade" of items that contribute to missile proliferation. The sanctions imposed are: (a) a two year denial of export licenses; (b) a two year ban on USG contracts; (c) and a two year ban on imports of products into the U.S. These sanctions apply not only to the two entities, but also to all activities of the North Korean government that relate to missile development or production or that affect the development or production of electronics, space systems or equipment, or military aircraft. Sanctions may be waived if the President determines that such waiver is "essential to the national security of the United States" and so certifies to Congress 20 days before issuing the waiver.

5. Terrorism: North Korea has been designated a "terrorist country" since January 20, 1988, when the Secretary determined that North Korea had repeatedly provided support for acts of international terrorism. In consequence, section 6(j) of the Export Administration Act of 1979, as amended by the Anti-Terrorism and Arms Export Amendments Act of 1989, prohibits certain transactions with North Korea, including the export, directly or indirectly, of any munitions list items by

the USG or U.S. persons. The President may waive the prohibition with respect to a particular transaction if he determines that the transaction is "essential to the national security interests of the United States" and both consults with and submits a report to Congress 15 days prior to the transaction. In addition, validated licenses are generally required for the export of other goods or technology to North Kore. A country may be removed from the "terrorism list" only by one of two methods: (1) the President certifies to Congress, prior to the rescission, that "there has been a fundamental change in the leadership and policies of the government of the terrorist country, that the government of that country is not supporting acts of international terrorism, and that the government has provided assurances that it will not support acts of international terrorism in the future"; or (2) the President submits to Congress for review 45 days prior to the effective date of the rescission, a determination that the government has not supported international terrorism during the preceding 6-month period and has provided assurances that it will not support acts of international terrorism in the future.

SELEAP 1512, 10/7/92
Cleared: L/EBC - JDolan
L/LEI - JEBaker
L/PM - CJohnson

by [illegible]

- Comprehensive sanctions already exist on virtually all U.S. trade and investment with North Korea, including:

  -- a general trade embargo through Trading With the Enemy Act sanctions on financial and property transactions, and Export Administration Act of 1979 restrictions on trade in goods and technical data (licenses must be issued case-by-case and are generally only considered for humanitarian goods);

  -- a prohibition under the Defense Production Act of 1950 on U.S.-registered ships sailing to North Korea;

  -- no MFN treatment under the Trade Act of 1974;

  -- missile proliferation sanctions under the Defense Authorization Act of 1991;

  -- various sanctions based on North Korea's status as a designated "terrorist country."

- Comprehensive restrictions on assistance could also be triggered if bilateral or multilateral assistance were contemplated, including:

  -- various provisions under the Foreign Assistance Act restricting foreign assistance and security assistance to countries with egregious human rights records;

  -- provisions in the Internatinal Financial Institutions Act requiring the U.S. to oppose assistance in international financial institutions.

<u>Armistice</u>

The U.S. should not seek to assert that North Korean actions are evidence of an attempt to violate the 1953 Korean Armistice Agreement. Paragraph 13.d of the Armistice calls on both armies not to introduce into Korea "reinforcing combat aircraft, armored vehicles, weapons, and ammunition," unless they are replacing worn out or destroyed equipment "on the basis of piece-by-piece of the same effectiveness and the same type," but this provision has become inoperative through practice by both armies. The Neutral Nations Supervisory Commission, which is charged under paragraph 13.d with monitoring the movement of such materiel, is also no longer permitted effectively to carry out this task. Moreover, there may be a question whether development of a domestic weapon would be considered "introduction into Korea" under the paragraph 13.d.

Comprehensive sanctions already exist on virtually all U.S. trade and investment with North Korea, and there are very few areas in which these sanctions can be tightened. There is a general trade embargo on financial and property transactions, and on trade in goods and technical data. There are also missile proliferation sanctions, shipping restrictions and sanctions flowing from North Korea's designation as a "terrorist country." Some licenses are currently granted on a case-by-case basis for humanitarian goods, and some very minor exceptions from the embargo also exist for items such as baggage of persons travelling to North Korea.

Comprehensive restrictions are also in place if bilateral or multilateral assistance for North Korea were contemplated. These include restrictions on foreign and security assistance to countries with egregious human rights records and a statute requiring the U.S. to oppose assistance in international financial institutions to such countries.

Armistice

The U.S. should not seek to assert that North Korean actions are evidence of an attempt to violate the 1953 Korean Armistice Agreement. Paragraph 13.d of the Armistice calls on both armies not to introduce into Korea "reinforcing combat aircraft, armored vehicles, weapons, and ammunition," unless they are replacing worn out or destroyed equipment "on the basis of piece-by-piece of the same effectiveness and the same type," but this provision has become inoperative through practice by both armies. The Neutral Nations Supervisory Commission, which is charged under paragraph 13.d with monitoring the movement of such materiel, is also no longer permitted effectively to carry out this task. Moreover, there may be a question whether development of a domestic weapon would be considered "introduction into Korea" under paragraph 13.d.

NORTH KOREA (DEMOCRATIC PEOPLE'S REPUBLIC OF KOREA)

CURRENT SANCTIONS

- **Embargo on almost all exports to North Korea except for informational materials and goods identified to meet basic human needs.** (See June 28, 1950, Feb. 2, 1989 and April 24, 1989.)
- **No financial transactions allowed between North Korean and U.S. nationals except for costs directly related to the purchase and shipping of informational materials and humanitarian goods and non-commercial travel, and continuing freeze on all North Korean assets under U.S. jurisdiction.** (See Dec. 1950, Jan. 3, 1989, Feb. 2, 1989 and April 24, 1989.)
- **Arms embargoed.** (See Aug. 26, 1955.)
- **As a state sponsor of international terrorism, denied most trade, all aid and arms sales.** (See Jan. 20, 1988.)
- **As a communist country, denied MFN, trade preferences, foreign aid, and Export-Import Bank programs.** (See Sept. 1951, Aug. 1962, Jan. 1975 and Oct. 1986.)
- **Export of items on MTCR and U.S. Government contracts and certain imports prohibited.** (See March 6, 1992 and June 23, 1992.)

Background

In the aftermath of the Japanese victory in the Russo-Japanese war of 1905, the formerly independent Kingdom of Korea became a dependency of the Japanese Empire in 1910. Declarations made by all parties at the 1943 Cairo and 1945 Potsdam Conferences during World War II envisaged a free and independent post-war Korea.

At the time of the August 10, 1945, Japanese surrender offer, the U.S. Government decided that Japanese troops in Korea north of the 38th parallel should surrender to Soviet forces and those south of that line should surrender to American forces. After negotiations with the Soviet Union on Korean unification failed in 1946 and 1947, the U.N. proposed open elections, which took place in the South in May 1948. Four days after the elections in the South, the North Koreans completed the severance of all economic ties with the South by shutting off all electric power transmission. The Republic of Korea came into existence in August 1948. The United States recognized the new government on January 1, 1949. The last contingent of U.S. occupation forces left South Korea in June 1949.

On September 9, 1948, the Democratic People's Republic of Korea was established in the Soviet-occupied zone after a rigged election. This government was not recognized by the United Nations.

On June 25, 1950, North Korean forces launched a full-scale invasion of the South across the 38th parallel. By early September 1950, almost all of Korea was in communist hands. On September 25, U.N. forces, led by General Douglas MacArthur, landed at Inchon and moved north toward the Yalu River border with China. In October 1950, a large number of Chinese "volunteers" entered the war to fight alongside the decimated North Korean forces, pushing back U.N. forces. After a good deal of serious fighting, the front lines stabilized around the 38th parallel. An armistice was signed on July 27, 1953, after protracted negotiations. Intermittent, fruitless discussions on Korean unification have taken place since.[1]

The North's policy of confrontation and large military have been longstanding threats to South Korea's security. Pyongyang has on several occasions instigated international acts of terrorism against South Korean targets. On November 29, 1987, a Korean Air Lines plane exploded in mid-air, killing 115 persons. Investigations revealed the plane had been sabotaged by North Korean agents. In January 1988, North Korea was placed on the list of countries supporting international terrorism and informal contact between the United States and North Korea was once again terminated.[2] Later that year, however, the U.S. Government announced that it was taking certain positive steps in support of South Korea's initiative toward the North.

Successive administrations have underlined the U.S. commitment to South Korea's security and encouraged direct talks between North and South Korea to lessen tensions on the peninsula, particularly in the demilitarized zone. It was hoped that the largely symbolic steps begun by the Reagan administration in 1988 and implemented in the early part of the Bush administration would encourage North Korea to make progress in the South-North dialogue, put an end to anti-American propaganda, and bring about the return of the remains of American servicemen killed in the Korean War.[3]

These policy objectives remained active. Increasingly, however, U.S. concerns focused on North Korean missile proliferation, a nuclear facility and fuel reprocessing plants believed to be under construction at Yongbyon. North

Korea became a signatory to the Nuclear Non-Proliferation Treaty in 1985, but after six years of stonewalling, allowed safeguards inspections by the International Atomic Energy Agency in June 1992.[4]

JUNE 28, 1950 -- SANCTION: TRADE EMBARGO

Status: Active/Modified

Under the authority of the Export Control Act, the United States invoked a total embargo on exports to North Korea.[5]

Authority: Sec. 3 of the Export Control Act of 1949 [P.L. 11 - 81st Cong,; 63 Stat. 7].

See April 24, 1989, for modification.

DECEMBER 17, 1950 -- SANCTION: FOREIGN ASSETS CONTROL

Status: Active/Modified

Under the authority of Section 5(b) of the Trading With the Enemy Act, the Treasury Department issued foreign assets control regulations to block the assets in the United States of residents of North Korea and effectively to prohibit all trade and economics transactions with residents of North Korea. The almost total embargo on trade and payments to North Korea remains in effect under the International Emergency Economic Powers Act [P.L. 95-223].

North Korea remained in the Commerce Department's most restrictive export control country group, Group Z.

Authority: Sec. 5(b) of the Trading With the Enemy Act of 1917 [P.L. 65-91; 12 U.S.C. 95a]; Trade Agreements Extension Act of 1951 (65 Stat. 72); International Emergency Economic Powers Act [P.L. 95-223].

See January 3 and February 2, 1989, for modifications.

SEPTEMBER 1, 1951 -- SANCTION: DENIED MFN

Status: Active

The Trade Agreement Extension Act authorized the suspension/withdrawal of most-favored-nation (MFN) status from countries controlled by communists for their support of North Korea and China.

Authority: Presidential Proclamation 2935 and Trade Letter (16 F.R. 7635 and 7637) under sec. 5, Trade Agreements Extension Act of 1951 (65 Stat. 73); Tariff Schedules of the United States Annotated (General Headnote 3(d)).[6]

AUGUST 26, 1955 -- SANCTION: BANNED ARMS TRADE

Status: Active/Modified

The International Traffic in Arms Regulation (ITAR) stating that it was United States policy to ban exports of defense articles and services to, and imports from, certain countries and areas became effective. North Korea was one of the countries listed in the August 1955 ITAR and remained listed.[7] The Office of Defense Trade Controls (formerly Munitions Control) in the Department of State was responsible for the drafting and implementation of ITARs, which govern the export of defense articles and services.

Authority: initial -- Sec. 414 of the Mutual Security Act of 1954 [P.L. 83-665; 68 Stat. 848], 20 F.R. 6250; current -- Sec. 38 of the Arms Export Control Act [P.L. 90-629; 22 U.S.C. 2778] implemented at 22 CFR Part 126.1.

See April 4, 1988, for modification.

SEPTEMBER 4, 1961 -- SANCTION: PROHIBITED ALL AID TO COUNTRIES CONTROLLED BY COMMUNIST MOVEMENT

Status: Repealed

Section 620(b) of the Foreign Assistance Act of 1961 prohibited the extension of assistance to any country controlled by the international communist movement.

Authority: Sec. 620(b) of the Foreign Assistance Act of 1961 [P.L. 87-195].

See December 29, 1981, for repeal of sanction.

AUGUST 1, 1962 -- SANCTION: PROHIBITED FOREIGN AID

Status: Active

Section 620(f) was added to the Foreign Assistance Act of 1961, prohibiting aid to communist countries. The Democratic People's Republic of Korea was included among the communist countries listed in the legislation.

Authority: Sec. 620(f) of the Foreign Assistance Act of 1961, as amended [P.L. 87-195; 22 U.S.C. 2370]; as amended by Sec. 301(d)(3) of the Foreign Assistance Act of 1962 [P.L. 87-565].

JANUARY 3, 1975 -- SANCTION: DENIED TRADE PREFERENCES

Status: Active

Section 502(b)(1) of the Trade Act of 1974 barred any communist country that had been denied MFN status from receiving preferential treatment under the General System of Preferences. The withdrawal of MFN status in 1951 made North Korea subject to this sanction.

Authority: Sec. 502(b)(1) of the Trade Act of 1974 [P.L. 93-618; 19 U.S.C. 2462]; Tariff Schedules of the United States Annotated (General Headnote 3(e)(v)).[8]

DECEMBER 29, 1981 -- REPEALED: PROHIBITION ON ALL AID TO COUNTRIES CONTROLLED BY COMMUNIST MOVEMENT

Section 620(b) was repealed as it was considered redundant given the intent of Congress was contained in section 620(f) which prohibited aid to communist countries and identified the countries by name.

Authority: Sec. 734(a)(1) of the International Security and Development Cooperation Act of 1981 [P.L. 97-133].

See September 4, 1961, for original sanction.

OCTOBER 15, 1986 -- SANCTION: PROHIBITED EXPORT-IMPORT BANK PROGRAMS

Status: Active

Section 8 of the 1986 Export-Import Bank Act amended section 2(b)(2) of the Export-Import Bank Act of 1945 to prohibit Export-Import Bank guarantees, insurance, or credits for any purchases by Marxist-Leninist countries. In cases determined by the President to be in the national interest, the prohibition could be waived. North Korea was on the list of countries identified as being Marxist-Leninist.

Authority: Sec. 2(b)(2) of the Export-Import Bank Act of 1945, as amended [P.L. 79-173; 12 U.S.C. 635]; as amended and restated by Sec. 8 of the Export-Import Bank Act Amendments of 1986 [P.L. 99-472].

JANUARY 20, 1988 -- SANCTION: DENIED TRADE, AID, AND ARMS SALES

__Status__: Modified

In the aftermath of the November 29, 1987 destruction of a Korean Air Lines plane by a bomb planted by two North Korean agents, Secretary of State Shultz placed North Korea on the list of countries supporting international terrorism.[9] Trade, Beneficiary Developing Country status, sales of items on the Munitions Control List, foreign aid, and Export-Import Bank guarantees are denied to countries determined to be supporting international terrorism. In addition, U.S. Executive Directors of international financial institutions are directed to vote against any loan or other program for a country determined to be supporting international terrorism.

Authority: Sec. 6(j) of the Export Administration Act of 1979, as amended [P.L. 96-72; 50 U.S.C. app. 2405(j)(1)(a)]; Sec. 502(b)(6) of the Trade Act of 1974, as amended [P.L. 93-618]; Sec. 40(d) of the Arms Export Control Act, as amended [P.L. 90-629]; Sec. 620A of the Foreign Assistance Act of 1961, as amended [P.L. 87-195; 22 U.S.C. 2371]; Sec. 6 of the Bretton Woods Agreements Act Amendments of 1978, as amended [P.L.95-435; 22 U.S.C. 286e-11]; Sec. 555 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act of 1991 [P.L. 101-513); 15 CFR Part 785.1(b); 22 CFR Part 126.1; Department of State Public Notice 1048 (53 F.R. 3477).

See April 4, 1988, for modification of sanction.

APRIL 4, 1988 -- MODIFIED: ARMS TRADE BAN

The State Department announced revisions of the International Traffic in Arms Regulations (ITAR). One revision explicitly stated that the commercial export and sale of defense articles and defense services, destined for or originating in countries that the Secretary of State had determined as repeatedly providing support for acts of international terrorism, was prohibited. North Korea was identified as subject to this policy.[10]

Authority: Sec. 38 of the Arms Export Control Act [P.L. 90-629], later amended by Sec. 3(a) of the Anti-Terrorism and Arms Export Amendments Act of 1989 [P.L. 101-222; 103 Stat. 1896].

See January 20, 1988, for original sanction.

JANUARY 3, 1989 -- MODIFIED: FOREIGN ASSETS CONTROL

An amendment to the Foreign Assets Control Regulations eased some travel restrictions by allowing travel agents to apply for a license authorizing actions necessary for arranging noncommercial travel for U.S. individuals or groups involved in academics, sports, cultural and certain other areas. This change in regulations to facilitate unofficial, non-governmental exchanges with North Korea is consistent with current U.S. foreign policy under President Bush.

The steps taken in January, February and April 1989 implemented the policy initiative announced by the U.S. Government on October 31, 1988, to encourage a dialogue between North and South Korea and their respective allies.[11]

Authority: Sec. 5(b) of the Trading With the Enemy Act of 1917 [P.L. 65-91; 12 U.S.C. 95a]; 31 CFR Part 500.569, as amended (54 F.R. 21, 11185).

See December 17, 1950, for original sanction.

FEBRUARY 2, 1989 -- MODIFIED: FOREIGN ASSETS CONTROL

An amendment in the Trade Act of 1988, ending the authority of the President to prohibit or regulate the exportation or importation of any informational materials not controlled for national security reasons, terminated previous prohibitions contained in the Trading With the Enemy Act of 1917. New Foreign Assets Control Regulations came into effect allowing the exportation of informational materials to North Korea and all financial transactions directly related to the purchase and shipping of the materials.

Authority: Sec. 2502(a)(1) of the Omnibus Trade and Competitiveness Act [P.L. 100-418; 102 Stat. 1107] amended the Trading With the Enemy Act [P.L. 65-91; 50 U.S.C. App. 5(b)]; 31 CFR Part 500.206 (54 F.R. 5229).

See December 17, 1950, for original sanction.

APRIL 24, 1989 -- MODIFIED: TRADE EMBARGO

Part 785 of the Export Administration Regulations was amended to allow the export to North Korea of commercially-supplied goods intended to meet basic human needs. The Regulations stipulated shipments would be authorized under an individual validated license on a case-by-case basis. This was the last of several policy changes intended to support South Korea's initiative to improve relations with the North and to encourage North Korea to end its policy of confrontation and international terrorism.[12]

Authority: 15 CFR Part 785.1, as amended (54 F.R. 16360).

See June 28, 1950, for original sanction.

MARCH 6, 1992 -- SANCTION: PROHIBITED EXPORT OF MUNITIONS LIST ITEMS, U.S. GOVERNMENT CONTRACTS, AND IMPORTS

Status: Active

The Under Secretary of State for International Affairs determined on March 6, 1992, that North Korean government entities had engaged in missile technology proliferation activities with Iran. The finding required the imposition of sanctions denying: export licenses for items on the U.S. Munitions List, all U.S. Government contracts for two years, and the importation into the United States of any products made by the North Korean entities. In addition, the finding stated that because of North Korea's status as a nonmarket economy, sanctions had to be applied against all activities of the North Korean government related to the production or manufacturing of missiles, electronics, space systems or equipment, and military aircraft.

Authority: Sec. 73(a)(1) of the Arms Export Control Act, as amended [P.L. 90-629; 22 U.S.C. 2797b]; Sec. 11B(b)(1) of the Export Administration Act of 1979, as amended [P.L. 96-72; 50 U.S.C. app. 2410(b)(1)]; Department of State Public Notice 1602 (57 F.R. 11767).

JUNE 23, 1992 -- SANCTION: PROHIBITED EXPORT OF MUNITIONS LIST ITEMS, U.S. GOVERNMENT CONTRACTS, AND IMPORTS

Status: Active

The Under Secretary of State for International Affairs determined on March 6, 1992, that two North Korean government entities had engaged in missile technology proliferation activities with Syria. The finding required the imposition of sanctions denying: export licenses for items on the U.S. Munitions List, all U.S. Government contracts for two years, and the importation into the United States of any products made by the North Korean entities. In addition, the finding stated that because of North Korea's status as a nonmarket economy, sanctions had to be applied against all activities of the North Korean government related to the production or manufacturing of missiles, electronics, space systems or equipment, and military aircraft.

Authority: Sec. 73(a)(1) of the Arms Export Control Act, as amended [P.L. 90-629; 22 U.S.C. 2797b]; Sec. 11B(b)(1) of the Export Administration Act of 1979, as amended [P.L. 96-72; 50 U.S.C. app. 2410(b)(1)]; Department of State Public Notice 1647 (57 F.R. 29924).

SOURCES

[1] U.S. Army. Area Handbook. South Korea, 1975. p. 21-26; U.S. Department of State. Bureau of Public Affairs. Background Notes: [North] Korea, July 1989.

[2] U.S. Department of State. Bureau of Public Affairs. U.S. Condemns North Korean Terrorism. Statements by Ambassador Clayton C. McManaway, Deputy to the Ambassador at Large for Counterterrorism, and William Clark, Jr., Deputy Assistant Secretary for East Asian and Pacific Affairs, before the Subcommittee on Asian and Pacific Affairs of the House Foreign Affairs Committee, Washington, D.C., February 4, 1988. Current Policy No. 1042.

[3] Washington Post, November 1, 1988, p. A28.

[4] U.S. Congress. House. Committee on Foreign Affairs. Subcommittee on Asian and Pacific Affairs. Hearings on Arms Control in Asia and U.S. Interests in the Region, 101st Cong., 2nd Sess., January 31 and March 13. 1990. Washington, U.S. Govt. Print. Off., 1991; U.S. Department of Defense. Bureau of Public Affairs. Remarks by Paul D. Wolfowitz, Under Secretary of Defense for Policy, to the Foreign Press Club, Seoul, Korea. May 11, 1991; Washington Post, September 4, 1991, p. A22.

[5] 15 F.R. 4189.

[6] U.S. Foreign Trade Sanctions Imposed for Foreign Policy Reasons in Force as of April 10, 1988, by Vladimir N. Pregelj. [Washington] April 13, 1988. CRS Report 88-301 E. p. 3, 15.

[7] 49 F.R. 47702.

[8] U.S. Foreign Trade Sanctions Imposed for Foreign Policy Reasons in Force as of April 10, 1988, by Vladimir N. Pregelj. [Washington] April 13, 1988. CRS Report 88-301 E. p. 15.

[9] 134 Cong. Rec., S. 1895, March 4, 1988, S. Con. Res. 99, Condemning North Korea's Support for Terrorist Activities; 134 Cong. Rec. H. 480, February 24, 1988, H. Con. Res. 246, Condemning the Bombing by North Korean Agents of Korean Air Lines Flight 858.

[10] Department of State Bulletin, June 1988, p. 47.

[11] 54 F.R. 5230;U.S. President, 1989- (Bush). Written responses to questions submitted by the Yonhap News Agency of the Republic of Korea, February 16, 1989. Public Papers of the President. Book 1. Washington, G.P.O., 1990. p. 131 - 132.

[12] Department of State Bulletin, January 1989, p. 17.

Baker, James E.

From: Baker, James E.
To: Poneman, Daniel B.
Cc: /R, Record at A1; Kreczko, Alan J.; Aoki, Steven; Wolin, Neal S.
Subject: North Korea [UNCLASSIFIED]
Date: Friday, October 14, 1994 8:38PM

ATTORNEY-CLIENT PRIVILEGED

Dan:

Here is the final draft of the legal authorities paper regarding a possible initial installment of fossil fuel. A couple of points:

1. The initial draft has been reviewed and cleared by agency counsel from DOE, State, DOD, and JCS. I have marked it draft because no counsel has seen the final product.

2. NSC, DOD, and DOE counsel do not believe a Nunn-Lugar formula is legally available. Nunn-Lugar funds are authorized for the newly independent states and therefore those moneys can not be used for a purpose for which they were not authorized or appropriated. Arguing that they were authorized and appropriated for "Nonproliferation" purposes does not work. DOE/GC is still not aware of a Curtis proposal along these lines and they have now inquired.

3. As stated in the conclusion, the use of any authority cited here is subject to the availability of appropriated funds, i.e., this only answers the threshold question.

4. I find the most compelling (and arguable) authorities to be found at DOE if they have the funds and State using 614 with ESF. If a DOD authority is used the EEE fund as discussed appears the only realistic authority.

5. In the event an in-kind transfer remains on the table, e.g., coal, the paper suggests two different authorities for such a transfer.

6. In case there is any doubt, State and NSC lawyers agree that the Draft Conventional Energy Assurance that I saw today is a non-binding political undertaking. Even if authority and funds are available for the initial installment, we could NOT bind ourselves to the longer range assistance. Basically we are providing a political assurance that we will seek to obtain the authorities and funds necessary to carry all this out.

<<File Attachment: NKALT.DOC>>

757-2104
Code 9654

LEGAL 10/14/94 ID: OCT 14'94 13:56 No.003 P.01

OPTIONAL FORM 99 (7-90) 10-14

FAX TRANSMITTAL # of pages ▶ 1

To Jamie Baker	From Jeff Kovar
Dept./Agency NSC/L	Phone # 647-3044
Fax # 456-9110	Fax # 736-7559

NSN 7540-01-317-7368 5099-101 GENERAL SERVICES ADMINISTRATION

FAX TRANSMITTAL COVER SHEET

DATE:	
TO: Kovar	FROM: Baker
PHONE NO.:	PHONE NO.: (202) 456-9111
FAX NO.: 736-7559	FAX NO.: (202) 456-9110

COMMENTS:

Jami — I agree not legally binding. Word "will" is missing from last sentence after "Government." Phrase "implement the policies" seems unnecessarily weak — why not "carry out the actions"?

Jeff

NUMBER OF PAGES (including cover page):

ATTORNEY-CLIENT PRIVILEGED FOR OFFICIAL USE ONLY

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~~ authorization and appropriations from Congress will be required. Therefore, we could not now legally commit to a package that included both elements. In addition, ~~State and DOD~~ 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:*

SEE ALTERNATIVE LANGUAGE

~~If directly tied to the objective of nuclear non-proliferation, DOE has authority to acquire and purchase real property and to sell, lease or grant that same real property. In addition, DOE has authority to "without regard to . . . any other law, . . . make such disposition [of surplus materials] as it may deem desirable of . . . (2) any other property, the special disposition of which is, in the opinion of the Commission [the~~

* 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.

DRAFT

DOE FUNDS:

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

Section 3, the "purpose" provision of the AEA, clearly 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. provides 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 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 ~~make~~ made after ... enactment [of the AEA]." (1954).

The FY 1995 DOE appropriation contains $___________ million/~~billion~~ that may be available for this nuclear nonproliferation purpose.

~~Secretary], in the interest of the national security." AEA Sections 161(i) and (j). The FY 1995 DOE appropriations contain $__ million/billion authorized for spending on these purposes.~~

~~Sections 121 and 122 of the Atomic Energy Act authorize Energy to give broad effect to the policies contained in treaties made after 1954. Further, any provision of the Act that conflicts with the provisions of such a treaty "shall be deemed to be of no force or effect." Finally, use of this authority would be consistent with one of the purposes of the Act provided in Section 3.c. ". . . to make the maximum contributions to the common defense and security and 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."~~

b. State Funds:

(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. 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 fenced off and may not be used for other purposes. We understand that approximately $330 million is "available."

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) CINC Initiative Fund -- 10 U.S.C. 166(a) -- authorizes use of funds for "contingencies": $25M appropriated for this account

NATIONAL SECRUTIY COUNCIL
WASHINGTON, D.C. 20506

OFFICE OF THE LEGAL ADVISER

ALAN KRECZKO
JAMES BAKER
Phone: 202/456-9111
FAX: 202/456-9110

Date: 10/13/94

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620(8)

COMMENT:

Page 1 of

586-1499

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,

* 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.

620 (s)

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."

DoE has [illegible] 5.8

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

b. State Funds:

(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:

(1) 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.

(2) 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.]

[illegible]
~~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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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. cable	re Assurance Letters for US-DPRK Settlement (3 pages)	10/14/1994	P1/b(1)

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FOLDER TITLE:
North Korea [4]

2009-0528-F
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RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]
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RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

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003. cable	re US-DPRK Ad Ref Agreed Framework Reached (7 pages)	10/17/1994	P1/b(1)

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EMBASSY OF THE REPUBLIC OF KOREA
WASHINGTON, D. C.

KAM 94/241

The Embassy of the Republic of Korea presents its compliments to the Department of State of the United States of America and has the honor to refer to the participation of the Republic of Korea in Light-Water Reactor project for North Korea.

The Government of the Republic of Korea has reviewed the proposed Agreed Framework and Confidential Minute between the United States of America and North Korea (DPRK). The Republic of Korea will participate in the provision of Light-Water Reactor project to the DPRK, on the basis of the Agreed Framework and Confidential Minute, in the manner consistent with the letter from President Kim Young Sam to President William J. Clinton, dated September 19, 1994.

In this connection, the Government of the Republic of Korea has the honor to reemphasize its position that its contribution to the nuclear reactor project should be commensurate with its central role in the designing, manufacturing, and construction of two (2) Korean prototype reactors, within the framework of an international consortium.

The Embassy of the Republic of Korea avails itself of this opportunity to renew to the Department of State of the United States of America the assurances of its highest consideration.

October 20, 1994
Washington, D.C.

EMBASSY OF THE REPUBLIC OF KOREA

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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 $5-6 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 by policy makers, but has been agreed to by negotiators ad referendum. This paper does not address the related question of legal authority to provide additional fossil fuel to the DPRK in the coming year or 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, should policy makers determine to do so and depending on which agency is designated to do so, provision of **long-term** fossil fuel assistance to the DPRK will require additional authorization and appropriations from Congress. 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:[1]

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

[1] 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 deemed applicable, it would be necessary to establish such relations before using Defense funds to 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."

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."

DOE has identified $5 million in its 1995 appropriations that is available under AEA authority for this nuclear nonproliferation purpose. However, expending funds for this initiative without going through the Department's customary reprogramming notification procedures would, in DOE's view, trigger new statutory restrictions which would sharply curtail the Department's current ability to use appropriated funds. Under DOE's current informal notification procedures, DOE would send a letter to the appropriations and armed services committees and, ordinarily, await approval before proceeding with the reprogramming.

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.[2]

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). Section 614, however, may also be used to break 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, it is executive branch practice not to do so where the funds do not have to be disbursed urgently before the expiration of 15 days. Further, 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; Navy --

[2] Section 620(f) provides that no assistance shall be furnished under the Foreign Assistance Act to any Communist country and that this restriction may not be waived pursuant to any authority contained in the Act unless the President makes certain findings or removes the country from the list for such a period as he determines and reports to the Congress is in the "national interest of the United States." Where two authorities purport to permit or delimit the exercise of authority without regard to any other section of the Act, State practice has been to interpret the Act in a manner affording flexibility consistent with Congressional intent. In this instance, further analysis would be required to determine whether Sections 614 or 451 could be used without regard to the requirements of 620(f).

$4,301,000; for Air Force -- $8,762,000; for Defense-wide -- $23,768,000. 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, legal counsel for the CJCS are skeptical at best that the contingency considered here falls 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. <u>Authorities for In-Stock Resources</u>:

(1) 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.

(2) 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.

This authority 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 depending on whether this assistance was viewed as part of a larger non-proliferation "technical project" or not.

Interagency Implementation Mechanisms:

a. The Economy Act:

The allocation of funds among agencies 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."