

MAY 12 1977

MEMORANDUM FOR THE HONORABLE JAMES R. SCHLESINGER
Assistant to the President

*all 5/13/77
@ 3:30 PM*

The following is a discussion of the several legal issues raised during our meeting on Wednesday, May 4, 1977.

1. The Defense Production Act of 1950, 50 U.S.C. App. 2093, provides authority, without regard to the limitations of existing law, for stockpile purchases and commitments for future purchases not extending beyond June 30, 1985. While this statute, by its terms, is scheduled to expire on September 30, 1977, 50 U.S.C. App. 2166(a) (1975 Supp.), the Defense Production Act has in fact been periodically renewed since its original enactment in 1950. The House has already voted to extend the Act until September 30, 1979 (123 Cong. Rec. H 3883, May 2, 1977).

The sole limitation is that appropriated funds must be available to make any purchase undertaken pursuant to the Act. 50 U.S.C. App. 2166(a) (1975 Supp.). However, with respect to arrangements which involve no immediate obligation of United States funds, but rather contemplate an option to purchase sometime in the future, no appropriation would be necessary until actual purchase. (A further possibility is that purchase rights might be assigned or allocated so that private rather than appropriated funds would be used.)

2. In addition to the authority conferred by the Defense Production Act, the President can enter certain arrangements without congressional approval under his power as Chief Executive and Commander-in-Chief. Attorney General Jackson concluded in an opinion rendered to President Roosevelt in 1940, 39 Op. A.G. 484, that the

President was authorized to acquire from Britain rights for the establishment of bases in exchange for certain obsolescent destroyers. Attorney General Jackson noted that there was statutory authority for disposal of the material and, as to the rights to bases, he pointed out that the acquisition of rights was "without express or implied promises on the part of the United States to be performed in the future. . . . The Executive agreement obtains an opportunity to establish naval and air bases . . . but it imposes no obligation upon the Congress to appropriate money to improve the opportunity. It is not necessary for the Senate to ratify an opportunity that entails no obligation." The same principle would appear to apply to other arrangements where no payment is made and no obligation assumed.

3. A separate issue is whether, assuming the power of the President to enter such an arrangement, it must be reported to Congress. Under the Case Act, 1 U.S.C. 112b, the Secretary of State must transmit to the Congress the text of "an international agreement other than a treaty, to which the United States is a party." The agreement must be transmitted to Congress as soon as practicable but no later than 60 days thereafter. The law also provides for secret transmittal where "immediate public disclosure . . . would, in the opinion of the President, be prejudicial to the national security of the United States."

A memorandum issued by the State Department Legal Adviser (March 12, 1976) lists five criteria for deciding what constitutes an international agreement:

1. Intention of the parties to be bound in international law;
2. Significance of the arrangement;
3. Requisite specificity, including objective criteria for determining enforceability;
4. The necessity for two or more parties to the arrangement;

5. Form.

As to item 1, the intention to be bound by international law, the Legal Adviser said:

Most instruments are silent as to governing law, but the intent is normally to seek guidance from rules of international law when questions arise with respect to interpretation or application. However, if the agreement specifies another legal system as entirely governing interpretation or application, we do not consider the arrangement to be a true international agreement. An example of the latter is a foreign military sales contract governed in its entirety by the law of the District of Columbia.

In discussing item 4, the necessity for two parties, the memorandum says:

While unilateral commitments on occasion may be legally binding and may be significant in international relations, they do not constitute international agreements. For example, a promise by the President to send money to Country Y to help earthquake victims, but without any obligation whatever on the part of Country Y, would be a gift and not an international agreement. It might be an important undertaking, but not all undertakings in international relations are in the form of treaties or executive agreements. There may be a difficult question whether a particular undertaking is truly unilateral in nature, or is part of a larger bilateral or multilateral set of undertakings. Parallel "unilateral" undertakings by two or more states may constitute an international agreement.

This State Department memorandum was furnished both to the House International Relations Committee and the Senate Foreign Relations Committee as an explanation of the State Department policy on reporting agreements under the Case Act and apparently was accepted by the Committees without modification. Thus, if only a unilateral offer, or a sales contract governed by domestic law is contemplated, it would not be reportable under the Case Act. This conclusion would not seem to violate the spirit of the Act which is designed to inform Congress of significant undertakings or obligations of the United States. Apart from the legal question, the issue of whether an agreement legally exempt from the Case Act should nonetheless be reported to Congress is a political decision.

4. In addition to statutory authorization for entering the arrangement, consideration of certain basic principles of contract law could prove important both with respect to the Case Act and in the event of a dispute with the other party at some time in the future. First, there is great advantage to having the material which is the subject of the arrangement physically in this country. While failure to reduce the agreement to writing would involve obvious practical problems, if the material is located here, the U.S. will have the effective power to safeguard its rights. With the material in the U.S., any dispute over its ownership and disposition can properly be made subject to the jurisdiction of U.S. courts. And regardless of when title to the material technically passes to the U.S. government, if the material is present in the U.S. it could be subject to mandatory emergency allocation controls, eminent domain and even seizure in appropriate cases.

Secondly, it would be useful to specify in the agreement that the law of one of the states of the U.S. shall apply. Such a stipulation would be one indication that the arrangement is a sales contract subject to domestic law rather than an international agreement for purposes of the Case Act. It might also provide a higher degree of certainty concerning such matters as interpretation and remedies than would be provided by international law.

Thirdly, if it is decided that in order to assure that the arrangement is binding on the other party, it should be treated as a commercial contract rather than a unilateral offer, it is possible that reliance by the U.S. on future availability of the material which is the object of the option (e.g., forbearance by the U.S. regarding imports from other countries) would constitute "consideration" and make the promise to sell binding. Also, steps taken by the U.S. to pay the cost of or to facilitate shipping and storage might constitute consideration. These questions would depend of course upon the particular facts.

Fourthly, it should be pointed out that if the other party to the arrangement retains title to the material while it is stored in the U.S., it is possible that the material could be subjected to taxation in the state where the material is located.

5. A final consideration discussed at our meeting was the possible obligations of the United States under the International Energy Program of the International Energy Agency. See TIAS 8278, and P.L. 94-163, December 22, 1975.

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