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Executive Secretary

4 Feb 82

Date

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NATIONAL SECURITY COUNCIL
WASHINGTON, D.C. 20506

Executive Registry
82-2336

February 3, 1982

MEMORANDUM FOR MS. NANCY BEARG DYKE
Assistant to the Vice President for
National Security Affairs

MR. L. PAUL BREMER III
Executive Secretary
Department of State

MR. DAVID PICKFORD
Executive Secretary
Department of the Treasury

LIEUTENANT COLONEL ROBERT T. MEEHAN
Assistant for Interagency Matters
Office of the Secretary of Defense

MR. F. HENRY HABICHT
Special Assistant to the Attorney General

MS. JEAN JONES
Director, Executive Secretariat
Department of Commerce

MR. WILLIAM VITALE
Executive Secretary
Department of Energy

MR. THOMAS B. CORMACK
Executive Secretary
Central Intelligence Agency

MR. DENNIS WHITFIELD
Executive Assistant to the United States
Trade Representative

MS. JACKIE TILLMAN
Executive Assistant to the United States
Representative to the United Nations

COLONEL CHARLES F. STEBBINS
Executive Assistant to the
Chairman, Joint Chiefs of Staff

SUBJECT: National Security Council Meeting, Thursday, February 4, 1982

B-223

Attached are the agenda and additional papers for the NSC meeting tomorrow, February 4, 1982, 3:30-5:30 p.m., the Cabinet Room.

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Michael O. Wheeler
Michael O. Wheeler
Staff Secretary

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AGENDA

National Security Council Meeting
3:30-5:30 p.m.
Thursday
February 4, 1982

I. LIBYA

A. Introduction of Issue on Next Steps - Bill Clark

B. Intelligence Update - Bill Casey

C. Background on Next Steps - Al Haig

D. Discussion of Next Steps

E. Decision on Next Steps

II. POLAND

A. Introduction of Issue on Scope of Sanctions - Bill Clark

B. Intelligence Update - Bill Casey

C. Background on Further Sanctions - Al Haig

D. Commerce Requirements - Mac Baldrige

E. Discussion of Scope and Further Sanctions

(Break up into NSPG in Oval Office)

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Summary of Commerce and State Department Papers on the Extraterritorial Extension of Export Controls

I. Subsidiaries

Commerce Position

Applying the controls to foreign subsidiaries would significantly increase our chances of delaying or blocking the pipeline. It would also blunt criticism by the press and the AFL-CIO. The application of controls to foreign subsidiaries is necessary if the USG is to stop compressor sales. It may be possible to get voluntary allied cooperation to prevent sales of relevant equipment. Voluntary compliance should be discussed before action is taken.

Our allies would object strongly to such an application of controls and the move would cause harm to U.S. businesses in several ways: (1) Subsidiaries of U.S. firms would lose around $200 million annually over the next 2-3 years in signed or projected contracts; (2) foreign businesses would have greater incentives to seek non-U.S. suppliers in an effort to avoid U.S. export controls; (3) U.S. corporations may find acquisition of West European firms less attractive, as host countries become reluctant to extent national treatment to U.S. subsidiaries; and (4) Dresser Industries' French subsidiary may be nationalized.

The Export Administration Act can be interpreted to authorize application of the controls to foreign subsidiaries. Such authority has been exercised only once, when it provided grounds for blocking delivery of foreign-manufactured Levi's uniforms for Moscow Olympics participants. Consideration of this issue should involve not only the likely diplomatic protests and the non-cooperation of foreign courts, but also the use by foreign governments of statutes that would bloc U.S. enforcement actions. As demonstrated in the 1965 Fruehauf case in France, a foreign government has the power to interfere with a claim of U.S. jurisdiction by having a receiver appointed to end "U.S. control" of a given subsidiary.

State Position

The French and others deny our legal right to regulate subsidiaries, viewing such regulation as an affront to their economic interests and sovereignty. France, the home of the only subsidiary (Dresser Industries, France) holding a substantial pipeline contract, has been especially sensitive about extraterritoriality. In the 1960s, French courts took over operation of a U.S. firm's subsidiary to prevent it from complying with the U.S. embargo against China.

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Even a successful extraterritorial application of U.S. controls in this case would affect only 21 of the 125 compressors needed for the pipeline.

Extraterritorial application of the controls would (1) render less likely allied cooperation in an effective sanctions program, (2) invite renewed French action to thwart our controls, (3) invite further heavy foreign regulation of U.S. investment around the world, and (4) place the affected subsidiary between conflicting U.S. and French policies, laws, and requirements.

II. Licensees

Commerce Position

No precedent exists for the application of controls to foreign-made products based on U.S. technology that was transferred before the date (in this case, December 30, 1981) on which the controls were announced. The allies argue that we should include only products based on U.S. technology transferred after December 30, 1981, and that covering earlier technology amounts to improper retroactive application of U.S. law.

There is a very high risk that an attempt to exert "retroactive" control would not be sustained if challenged in U.S. courts. Furthermore, foreign countries could block U.S. enforcement of such controls. Such an application of controls to licensees would, however, if successful, provide the USG with significant leverage to delay or block the pipeline.

State Position

The USG has authority to control products based on U.S. technology transferred after December 31, 1981. Regarding products based on technology transferred before that date, however, it is highly questionable whether we have such authority.

The purpose of such controls would be to reach all firms that use G.E. technology to manufacture pipeline equipment. The controls would cripple, among others, a certain British firm. According to information from G.E., however, the controls would not affect the ability of Rolls Royce, a competitor of that certain British firm, to manufacture a different type of turbine as a substitute.

Applying the controls to licensees would (1) ensure that the British would not cooperate in controlling Rolls Royce exports, and (2) harm U.S. trade, as foreign firms would minimize purchases of U.S. technology.

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