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February 2, 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
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MS. JEAN JONES
Director, Executive Secretariat
Department of Commerce

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 -- Poland (C)

The attached papers concern additional measures which might be taken with respect to the situation in Poland. They are circulated as background for the discussion which will take place on the first agenda item at the NSC meeting on Thursday, February 4, 1982, 3:30-5:30 p.m., the Cabinet Room. The first agenda item will be "Extraterritorial Application of the December 30 Decision."

Michael O. Wheeler

Michael O. Wheeler
Staff Secretary

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Executive Summary

We are approaching an important crossroads in response to the situation in Poland. Our response will have a critical impact on our relations with the Allies, the Soviets and the Poles. The Soviets consider a "friendly" Poland vital to their security interests and unless they accurately perceive the seriousness with which we view their actions, we will lose any chance for influence over the outcome of the Polish crisis and undermine our international credibility.

The situation in Poland is deteriorating. We foresee four general types of scenarios: 1) large scale bloodshed followed by a Soviet invasion; 2) short term maintenance of order by force but longer term instability; 3) an incremental but largely cosmetic restoration of human rights; 4) return to dialogue and reform;

The overall objective of the US is to maintain our capacity for world leadership by countering adverse trends in the world power balance. Our specific objectives for the Polish crisis are:

--To induce the Soviets and Poles to permit a restoration of important pre-December 13 gains in Poland.

--To drive home to Moscow that the price will be high in U.S.-Soviet relations if it stays on its present course. We should not be diverted by cosmetic adjustments of martial law.

--To gain allied support for strong action against Moscow, such as a selective embargo or a halt of the pipeline.

--To demonstrate to the American people that we are living up to our moral and political responsibilities.

The measures we have already taken have sent a strong political signal to Moscow and have imposed some cost. Our Allies are moving in the right direction, although slowly and unevenly. In considering options for next steps we must realize that:

--It is possible that nothing we do in the short-term may be enough, but over the longer-term united Western action can have an important impact.

--There is no compelling reason to hold back on tough measures. The time to exercise maximum leverage is now.

--The West's primary leverage is economic, but it is effective only if the Alliance is united.

--There is no hope of getting tough Allied action unless we are willing to take new tough steps ourselves.

--Our sanctions--and those of the Europeans--will have to be linked to Poland. Thus we will have to accept the principle of reversibility, while making clear that we continue to object to the pipeline.

--We are facing considerable domestic pressure to move forward with more energetic measures.

Beyond judicious use of the limited leverage inherent in the massive Polish debt to the West, our options are:

(1) To hold in abeyance new unilateral measures, while we continue to seek Allied agreement on specific actions. This would maximize the likelihood of united Western action. We would, however, be vulnerable to the charge that we are long on rhetoric and short on action.

(2) To take new intermediate steps against the USSR, possibly including a selective embargo on non-agricultural exports. This would have an economic impact on the Soviets with a minimal cost to us. This would not entail U.S. sacrifices sufficient to induce strong action by our Allies.

(3) To ban all exports to the USSR not covered by existing contracts, including or exempting grain. If grain were included and other exporters cooperated, this would impose substantial economic costs on the Soviets. Without such cooperation, it still increases our chances of strong Allied actions. In either case it could trigger the Farm Bill parity payment provision.

(4) To impose a total export embargo against the USSR. This would have the greatest economic impact on the Soviets with Allied support and could influence the course of events in Poland. U.S. farmers would be hurt and if the Allies did not join us, anti-European sentiments in the U.S. would grow.

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STRATEGY ON POLAND: POSSIBLE NEXT STEPS AGAINST THE U.S.S.R.

I. ANALYSIS OF THE SITUATION

We are approaching a crossroads over Poland, and our handling of the situation will have far-reaching implications for U.S. foreign policy, particularly the future of our relations with the Soviets, the Poles, and the Western Alliance. Unless we continue clearly to demonstrate our seriousness in this crisis, the Soviets may draw conclusions that could lead them to test our resolve at other critical points over the next three years.

The Soviet Stake in Poland:

The Soviets consider a "friendly" Poland absolutely critical to the U.S.S.R.'s vital security interests. Poland has historically been an avenue for invasion of Russia, and, since World War II, it has been the essential line of communication to Soviet ground forces in Germany. From the political perspective, maintenance of the status quo in Poland preserves the post-war division of Germany and ensures the continued existence of a "world socialist community".

Although the Soviets have historically been willing to tolerate some deviations from the Poles, the Soviet-instigated Polish crackdown demonstrated that Moscow remains prepared to risk bloodshed and increased international tension in order to retain control over events in Poland. This was true after Yalta; it is still true after Helsinki.

West European Dimension:

In defending what it sees as its critical interests in Poland, Moscow seeks to play upon divisions of the West. The Soviets see West Europeans as inclined to accept Soviet hegemony in Eastern Europe and less willing than the United States to forgo the benefits of "detente." These divisions in the West were one among many reasons why the U.S.S.R. rejected the option of a direct invasion--which would have united us and the allies--instead pressuring the Polish Government into brutal repression. This suggests that allied support for U.S. policy toward Poland can have an important impact on Soviet conduct.

The Outlook in Poland:

Moscow will continue to press the Polish martial law regime to crush Solidarity and restore the kind of orderly, if economically inefficient, Polish dictatorship the Soviets feel they can comfortably control. The martial law regime has achieved its initial objective of suppressing active resistance, but is perplexed as to where to go from there. Even regime spokesmen admit privately that the generals in charge have neither a policy for solving the country's problems nor the political talent to develop and implement one. Despite the decapitation of Solidarity, passive resistance continues and there are signs that it could become active. The economy was in shambles before December 13; it has steadily worsened since. Little or no progress has been made in rebuilding the shattered Polish Communist Party, and conflict continues between orthodox hardliners and more pragmatic elements within the leadership. The regime has been moving to fend off resistance and further Western sanctions by cosmetic adjustments of the martial law regime, but the generals know they have not yet begun to deal with Poland's overwhelming problems.

It is impossible to predict with any certainty what will occur in Poland in the next 12-18 months. There are a wide range of possible scenarios. But we believe these can be grouped within four broad categories:

(1) A Soviet invasion, most probably resulting from large scale bloodshed among the Poles. Such bloodshed could occur in a variety of ways: as a consequence of intensified repression, from increased food shortages, or from some other triggering of the pent-up bitterness and frustration now held in check by Polish security forces. Should the Soviets intervene, Western leverage for any amelioration of repression would largely vanish. But the likelihood of bringing the Allies along in the imposition of major, far reaching sanctions against the Soviets would greatly improve.

(2) Continuation, largely unchanged, of Martial Law. While economic deterioration would continue, the government might succeed in keeping the lid on by heavy reliance on its security organs. Despite its potential instability, such an outcome would represent a victory, albeit perhaps temporary, for the Soviets. This situation would be the most susceptible to Western leverage. But the instability inherent in martial law would make Polish leaders fearful of moving too far, too rapidly. The Soviets could be expected to keep heavy pressure on Jaruzelski not to make substantial compromises.

(3) An incremental and partial restoration of human rights. In an effort to undercut our efforts to gain allied support, the Polish Government might move to restore a sense of normalcy to Poland by taking highly publicized steps such as the release of a large number of prisoners and the opening of a limited dialogue with the Church and some elements of Solidarity. The central aspects of martial law - e.g. the high degree of control currently being exerted by Polish security organs - would continue. If carried out well by the Poles, this would be the most difficult scenario for the West to deal with. It would particularly complicate efforts to maintain a

unified Western position toward returning to business as usual with Moscow and Warsaw.

(4) A return to dialogue and reform, holding open the possibility for further political and social evolution. This would require that the Polish regime (with at least tacit Soviet acquiescence) see no viable long-term alternative to developing a relationship with the Church and the working class that preserves a significant number of the gains made since August 1980, and which guarantees the Soviets' basic interests. The security apparatus would undoubtedly remain active enough to assure the Soviets and the Polish establishment that control would not again be threatened. But, if this resulted in real latitude for trade unions and the Church, it would preserve the possibility of future peaceful change in Poland and other East European countries. The Soviets, however, could be expected to maintain their campaign of calculated pressure to limit the extent of the Polish Government concessions.

It is becoming clear that the Soviets now foresee a lengthy process with an uncertain outcome. Whatever the next year brings for Poland, the Soviets face inevitable long-term pressure for change throughout Eastern Europe. However, recent events in Poland suggest that the Soviets will continue to react to such pressures by taking whatever steps are necessary, including the use of force, to preserve their hegemony in Eastern Europe. Gromyko's categoric rejection of Secretary Haig's presentation on Poland at their Geneva meeting is further evidence of Soviet determination to implement this view of its security interests in Eastern Europe. Thus, Poland in the near term, and the entire region over time will remain a source of tension in East/West relations.

II. U.S. OBJECTIVES

Poland relates to so many fundamentals (the future of Eastern Europe, the Alliance, Soviet security, American political and moral leadership) that our objectives must be placed in the context of our overall foreign policy. Our overall objective is to maintain U.S. capacity for world leadership by halting and if possible reversing adverse trends in the world power balance over the last decade or more. But we recognize that we must navigate through a period of some vulnerability as we rebuild our strength.

Thus we seek to establish a sense that the U.S. is prepared to accept the responsibilities of political and moral leadership --without provoking confrontations with the U.S.S.R. which could carry unacceptable risks in the nuclear age. Since our response to the Polish crisis will inevitably be regarded as a critical test of our ability to meet this longer-term challenge, our policy must be both prudent and effective. In this sense, we face an historic juncture in Poland, and our actions will have profound consequences for the future across a broad front of basic U.S. interests.

This strategic objective and the analysis of the concrete situation set forth in Section I dictate the following specific objectives for the U.S. response to the Polish crisis:

-- Toward the situation within Poland, to secure the agreed Western objectives of lifting martial law, release of detainees, and restoration of a minimum of freedom (e.g. for trade union activity), without creating a public perception that we are responsible should there be a violent ending.

-- Toward the Soviet Union, to drive home that the U.S.S.R. will pay a heavy price in U.S.-Soviet relations if it continues on its present course in Poland, without seeming to threaten vital Soviet security interests to the point of direct confrontation.

-- Toward the Alliance, to exert strong pressures and leadership for concrete measures, without pushing so hard that we tear the Alliance apart (recognizing that a divided alliance deprives us of much of our ability to affect Soviet behavior).

-- Toward the American people, to demonstrate that we are living up to our moral and political responsibilities, without creating expectations that cannot be fulfilled given the present balance of forces, Poland's geographical situation, the State of the Alliance, our economy, etc.

III. ACTIONS AND IMPACT TO DATE

We must view the situation to date both in terms of our own actions and the overall situation facing the U.S.S.R. and Poland.

A. Specific Actions

The specific actions we and our Allies have taken to date represented a measured response which has imposed a cost on the USSR.

--The package of economic and political measures against the Soviet Union announced on December 29 was deliberately restrained in order to send a primarily political signal to Moscow of our readiness to impose more substantial costs if the repression was not brought to an early end. Specifically, we: (1) suspended Aeroflot service; (2) closed the Soviet Purchasing Commission; (3) suspended issuance of licenses for high-technology exports; (4) halted exports for the oil and gas industry;

(5) suspended talks on a new maritime agreement and imposed strict controls on Soviet access to U.S. ports; (6) refused to set a date for talks on a new long-term grains agreement; (7) decided not to renew three bilateral cooperation agreements that expire this year. We also have stepped up VOA broadcasting to the U.S.S.R. by the introduction of medium-wave frequencies.

--At the January 11 Ministerial and follow-up meeting on January 23, the Allies moved closer to getting on board with modest political actions versus the Soviets. A number of Allies, under EC-10 aegis, are prepared to limit selected imports of manufactured and luxury goods from the USSR (although not oil or other raw materials). The EC Foreign Ministers have decided to recommend to the OECD a more restrictive status for the USSR, effectively raising the interest rate for credits to that country. Several Allies are considering tightened travel controls on Soviet diplomats and nonrenewal of exchange agreements. On the most prominent economic issue, the Siberian Pipeline Project, the Italians have advocated "a pause" in negotiations, but French companies on January 23 signed a major contract with the Soivets for purchase of natural gas from the future pipeline. Meanwhile, the Allies have agreed to suspend rescheduling of the Polish debt, as well as to suspend all export credits to Poland.

B. IMPACT

This listing of specific actions misses the larger consequences for the Soviets. Prior to the December 13th repression, US-Soviet INF negotiations were moving ahead, it appeared that a beginning date for START might be announced at the Haig/Gromyko meeting, there were massive demonstrations in Europe primarily directed against U.S. nuclear deployments, and the Soviets' "Peace" offensive threatened to drive a wedge between the Allies. Since then, START has been postponed indefinitely and another burden added to INF, there have been significant demonstrations against the repression, the "peace movement" in Western Europe is, at least for the moment, less effective, and the Allies have been moving, albeit slowly and unevenly, in an anti-Soviet direction. Allied Ministers will be at our side condemning the Soviets when the CSCE meeting resumes.

In terms of Poland itself, before December 13th the West had provided Poland with some assistance in dealing with its massive economic problems. Now the future of Western aid is much more problematical, thus adding to the economic drain of the Polish crisis on the Soviet Union. It is clear that the Polish regime is already feeling pain as a result of this stance. We should, of course, do everything possible to maximize these economic and political costs to the Soviet Union.

Within Poland, even our modest response has given heart to those who wish to save as much of the achievements of the past year and a half as can be saved. The Polish Council of Bishops and leading Polish intellectuals recently denounced the regime in language that reads like an echo of the President's December 23 statement and the January 11 NATO declaration.

On the other hand, the Soviets have achieved their minimum objectives in Poland -- restoring order and Soviet control over the situation -- without having to resort to direct military intervention. Thus they have staved off, at least for the present, a strategic loss in Poland at the cost of exposing the bankruptcy of the Soviet-imposed system, as well as a potentially serious turn-down in East-West relations, and a new crisis in relations with the largest communist party in Western Europe.

IV. OPTIONS

The following general considerations will have to be taken into account as we review our options:

1. It is possible that nothing we can do in the short term will be enough to induce Moscow to back away from its determination to crush Polish renewal. However, over the longer term there is a chance that, by imposing real costs on Moscow, we can exert some leverage in inducing Soviet and Polish moderation.

2. There is no reason to hold tough economic measures in reserve pending direct Soviet military intervention. Once a Soviet decision to intervene is made, we will not be able to reverse it by imposing additional economic and political sanctions.

3. We will be under considerable domestic pressure to move forward with more energetic measures in the near future. If Lane Kirkland should follow through on his threat to create a de facto embargo through labor action (which he may not be able to do), the costs to the domestic economy would be as great as if we had instituted a de jure embargo, but we would have gained little or no leverage vis a vis our allies or the Soviets. The result would be a blow to our international credibility which could have far reaching implications.

4. The primary, although still marginal, leverage available to the West is economic, but the U.S. alone cannot do enough to produce an effective response (although leverage can be exercised unilaterally on the debt issue). If we cannot bring the Allies along, we may well not be able to achieve the objectives outlined above.

5. There is no hope of getting European agreement on tough and painful action, unless they believe we are making corresponding sacrifices ourselves. Specifically, they see a direct relationship between the kind of tough European sanctions we are asking for and our grain sales. Without a grain embargo, we have no hope of stopping or even suspending the pipeline or of gaining European agreement to other tough measures, such as a partial embargo. At the same time, while tough U.S. action is necessary to achieve comparable European measures, it still may not be sufficient. We may also have to express our willingness to share the costs of sanctions that penalize our Allies disproportionately.

6. We will have to wrestle with two thorny aspects of the question of reversibility--the sure growth of pressure to reverse and the adverse effects on our international credibility of doing so. Our sanctions are linked to Soviet behavior toward Poland and should be reversible, to give the U.S.S.R. an incentive to moderate its repression, but the sorry post-Afghanistan experience suggests that erosion is almost inevitable over time, whether or not the Soviets change the behavior which caused sanctions to be imposed. We and the Allies are certain to disagree on when the lifting of sanctions is justified, and these differences undoubtedly will be exacerbated by Soviet and Polish adjustments of the martial law regime designed to create an appearance of improvement. Moreover, erosion of sanctions over time could force us to consider a reversal of our policy without evidence of real improvement in Poland, thus acknowledging the defeat of our strategy.

7. It may not serve our interests to suggest that all sanctions should be reversible. This is particularly true of the pipeline, since we would continue to oppose the project (while working to develop energy alternatives) independent of the Polish situation. On balance, however, the Europeans will only agree to sanctions if they are linked explicitly to Poland, and we will have to accept the principle of reversibility if we are to obtain the cooperation of Europeans -- and Americans -- who will be asked to sacrifice. Thus, we have to be prepared to accept a reversible halt to the pipeline.

8. In political terms, reversing at some future point in time sanctions we impose will carry a heavy price, both domestically and internationally, if the objectives we attach to them now have not been met. If erosion of sanctions or domestic political pressure forced us to remove the sanctions without achieving our objectives, the implications for our credibility with Moscow and in our international relationships more generally would be immense and long-lasting. In economic terms, the cost of many possible sanctions is not reversible -- trade, major contracts and associated jobs lost and future US competitiveness diminished by casting a shadow across the image of the United States as a reliable trading partner. The economic effects feed back into and reinforce the domestic political cost already noted.

Polish Debt:

A possibility which should be considered whatever else we choose to do is to continue to refuse to reschedule Poland's 1982 debt.

The act of calling in Poland's debt would have highly negative consequences. The Soviets may have to choose between paying off the Polish debt or being open to the risk that other creditors (private and/or official) would then call a formal default on Poland's other loans and thereby undermine the credit position of the entire Eastern Bloc. However, an SSG paper (at TAB A) concludes that the Soviets in all likelihood would be affected only indirectly (through reduced availability of Western credit) by a Polish default and that the international monetary system would suffer a severe blow if the default spread to other Eastern European countries. The irreversible step of calling in Poland's debt or an overt threat to do so would also provoke a serious fissure in the Alliance. An overt threat carries the additional risks of panicking private creditors into precipitating default and encouraging the Allies to settle with the Polish Government as preferred creditors.

This suggests that the leverage we derive from Poland's massive foreign debt is both limited and difficult to use. Nevertheless, a Presidential reiteration of our established policy that Government-to-Government debt cannot be rescheduled until internal conditions in Poland warrant should be considered as an adjunct to the following specific options.

OPTION 1

Continue with our current efforts to gain Allied agreement to take specific actions against the U.S.S.R., while for the present holding in abeyance new unilateral U.S. steps. Our interim objective would be to bring the Allies as close as possible to the point we reached with our December 29 measures, while holding open our options for future U.S. actions either with or without the Allies. At the same time, we would use events such as the February 9 resumption of the Madrid meeting, on which we have already achieved a considerable degree of Allied unity, to keep public pressure on the Soviets.

Pros:

This course would build upon the degree of Allied unity already achieved, and thus maximize the likelihood of united Western action against the Soviets and the Polish military. It would avoid the political fire we would come under if we announced another series of "half-measures." It would not preclude our taking more severe steps at a later stage, if conditions in Poland warrant.

Cons:

This option would expose us to further charges that we are long on rhetoric but short on action. It might also lead to increased pressure or unilateral action by Kirkland. Depending on how long we delayed and on the course of events in Poland, this course could have profound consequences for our credibility with the Poles, the Soviets, the Allies and the American people.

OPTION 2:

Further intermediate measures against the U.S.S.R. There are numerous mixes of measures which could be adopted within this option, the effects of which can be tailored to fall at various points within the broad gap between Options 1 (no new actions) and 3 (a relatively sweeping action package). A list and brief discussion of a number of such measures is at Tab C. In order to make clear that U.S. policy is steadily building, these could be implemented almost immediately and accompanied by a Presidential reiteration of the existing policy to suspend Polish debt rescheduling. They include:

-- embargoing all industrial exports to the U.S.S.R. or at a minimum imposing more selective economic sanctions, such as a ban on chemical exports which focuses on the agricultural sector, including pesticides, fungicides, fertlizers and fertlizer ingredients (especially phosphates which alone could have a significant impact in the short to medium term on Soviet grain production), revoking already-issued licenses for exports such as International Harvester/Combine technology, suspending joint-venture fishing operations, etc.

-- declaring a state of national emergency and imposing an embargo on all non-strategic imports from the Soviet Union;

-- discouraging tourism to the USSR;

-- reducing Soviet commerical representation in the U.S. to a skeletal force;

-- suspending activities under existing bilateral exchange agreements, or even abrogation of all remaining agreements;

-- not setting date for grain consultations scheduled this spring. Up to now we have avoided violating any existing agreements with the USSR. This step and the one above would be a departure from this policy.

Pros:

An embargo on all industrial exports, particularly on chemicals, would impose significant costs on the Soviets, although it would not affect the item that accounts for two-thirds of our exports to the U.S.S.R., grain. The other measures would enhance the political impact of this step and would involve only minimal costs to us. Taken together, however, these steps would seem to foreshadow a full embargo, thus possibly increasing our leverage.

Cons:

Singling out industrial exports would be a departure from the President's position that all sectors should share equally the burden of any future economic sanctions against Moscow. At the same time this would not entail U.S. sacrifices sufficient to induce the Allies to curtail their own far more extensive exports to the U.S.S.R. Cuts in exchanges and commercial representation might be emulated by the Allies, but these steps could be criticized by the U.S. public as inadequate half-measures that fail to live up to our rhetorical condemnation of Soviet actions in Poland.

Option 3:

A ban on all exports to the USSR not covered by existing contracts either covering all items or exempting agricultural trade. Exempting agricultural trade would involve less domestic costs, but would make our action less credible to our Allies, who allege that the U.S. is only taking actions which don't hurt itself. Including agricultural trade, however, could trigger the legal obligation to compensate producers under the Farm Bill, which is not clear on this point.

Pros:

This would impose substantial ecomomic costs on the Soviets (particularly if agricultural trade were included) by grinding U.S. trade with the USSR slowly to a halt without forcing suppliers with signed contracts to abrogate legal obligations. It would be consistent with our early 1981 discussions with the Allies in NATO, and thus easier for them to accept. If followed by Allies this would give real meaning to their pledge not to undercut U.S. restrictions.

Cons:

It would not have an immediate impact because of the exemption for deliveries under existing contracts. If it included grains, they would be affected faster than industrial goods. It could encourage our allies to increase pressure on us to exempt existing contracts from our previously announced oil and gas sanctions. Though this step would have a real bite over time, it might not be seen as forceful enough by our domestic critics. It could trigger the obligation to compensate producers under Section 1204 of the Farm Bill.

OPTION 4:

Total export embargo against the Soviets. One bold action would be for the U.S. to embargo all exports, including grain, to the U.S.S.R. Under current legislation, in order to embargo grain without triggering USG parity price payments (30 billion dollars per year), there must be a total export embargo. (see Tab B).

Pros:

This would impose the greatest economic costs on the Soviets of any option available to us. By demonstrating our readiness to make substantial economic sacrifices (especially in grain sales), it could help induce the Europeans to take comparably tough measures against Moscow, such as suspension of the pipeline project or a partial but significant embargo on their own industrial trade with the Soviets. Taken together, the U.S. and Allies actions might be costly enough to the Soviets, if sustained over time, to influence them to ease the repression in Poland.

Cons:

A total export embargo may not be enough to bring the Europeans along, and if implemented unilaterally, could exacerbate severe strains in the Alliance. Even if the Europeans did take parallel action, the Western embargo could begin to erode quickly with the Europeans undercutting or circumventing the restrictions as they did after Afghanistan, and with U.S. farmers ending up sacrificing billion of dollars in grain sales without comparable sacrifices by the Europeans. This is certain to amplify already growing anti-European sentiments in the U.S., leading to demands for U.S. troop withdrawal and ulitmately weakening the Alliance to the point of irrevelancy. Moreover, to be fully effective, other grain exporting countries would have to join in. This may be possible with Australia, but unlikely with Canada and Argentina. Finally, a grain embargo could cost thousands of jobs in the U.S., and increase USG farm price support payments by 3 billion dollars per year.

Option 5

Actions to hit the Soviets in other regions. Recognizing that even the most serious U.S. and Allied sanctions may not succeed in changing Soviet behavior toward Poland, we should also give serious consideration to action in other regions to drive up the costs to Moscow of its international irresponsibility. These steps could be taken as an alternative to any of the actions set forth in options 1-4 or as a complement to them. In many cases, we have already made decisions to act against Soviet allies and proxies, and the actions we will be taking could be explicitly or implicitly linked to Poland either with the Soviets are publicly. We could also consider expanding the scope of action already decided upon as a direct response to the Polish crisis. In this connection, we would stress that our decisions reflect the overall determination of the Administration to counter Soviet use elsewhere of the kind of indirect military force which crushed the renewal movement in Poland. Possibilities include:

Actions Against Libya: The NSC is already scheduled on February 4 to consider new actions against Libya, including imposition of a U.S. oil boycott and termination of U.S. exports to Libya. We are also taking steps which could have the effect of making it illegal for American citizens to reside in Libya or work for the Libyan government. Since it is public knowledge that these steps were under consideration before the Polish crackdown, it would be difficult for us to portray them as directly related to the Polish crisis. We could also hold another naval exercise in the Gulf of Sidra which would be a departure from our established yearly pattern of such exercises, and thus could be portrayed as a response to Poland. Such an exercise would, however, risk another U.S.-Libyan military confrontation and would be viewed as provacative both in Europe and in the Arab world.

<u>Actions Against Soviet Forces in Afghanistan</u>: We have already decided to increase assistance to the Afghan resistance. While this action was taken in connection with the Polish crisis, implementation of the program with the Pakistanis will have to be related to the requirements of the Afghan insurgency and Soviet troop reinforcement in Afghanistan. Given the logistical problems involved, there will almost certainly be a lead time of several months before the impact of our increased assistance is felt by the Soviets. This might be reduced somewhat by greater use of air shipment of items already committed in the pipeline. We have also approved plans for wider distribution of arms, particularly to insurgents along the Soviet border and to training insurgents for attacks on specific Soviet targets in Kabul, but these, also will require lead time. While immediate shipments of arms can come from the pipeline, ultimately supplementary funding will be required. Our relationship with Pakistan, on whom we are dependent for the arms supply program, requires that we maintain the covert character of these activities. This, of course, makes it impossible for us to use increased assistance to the Afghan resistance as an element in our public response to the Polish crisis.

<u>Actions Against Cuba</u>: There are a number of steps which we could take against Cuba or the Soviet presence in that country, some of which are already in the works. In accordance with NSDD 21, we will be moving in mid-February to black list ships calling at Cuban ports and restrict U.S. tourism to Cuba. We are also considering new restrictions on personnel assigned to the Cuban U.N. mission. It is public knowledge that steps of this type have been under consideration for some time, making it difficult for us to link them explicitly to Poland. We could move further in the political field by closing the U.S. and Cuban Interests Sections in Washington and Havana. [redacted]

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Analysis

The major issue in choosing this option is the tension between a) the desirability of our choosing where to respond so as to maximize our strengths and Soviet vulnerabilities, and b) the disadvantages of diverting attention from Soviet actions in Poland. In consideration of this tension, two factors are:

--the visibility of the U.S. action: covert actions may not become visible and may not, therefore, divert moral indignation from the Soviet action to our own. At the same time, covert actions do not permit us to make a public display of our determination which could be helpful in bringing the Allies along or in satisfying domestic political demands for tough action.

--the Allied response to Poland: the reason we do not want to divert attention from Poland is so that the Allies will not find an excuse to do less in response to the Soviet action there. If the Allies ultimately do little, or if what they do is largely irreversible, we may be less constrained.

Pros:

These actions would have the advantage of not requiring direct NATO cooperation, which would be difficult to achieve in the case of a total export embargo or an effort to call in Poland's debt. This option might therefore pose fewer risks of creating profound fissures within NATO (depending on the severity and success of the actions we take), and would drive up Soviet costs without dismantling the framework of the U.S.-Soviet bilateral relationship. The anti-Soviet sentiment aroused by the Polish crisis could result in greater public understanding and support for actions against Cuba and Libya.

Cons:

These actions would entail considerable risk and costs, including the risk of a wider confrontation with Moscow and a backlash on the part of the U.S. public and Allied publics and governments. By taking action against Cuba and Libya, we would shift attention from Polish and Soviet repression to "U.S. military aggression." Such actions could be seen more as an attempt to exact retribution that to affect outcomes in Poland. Because these actions may be justifiable on other grounds and were, in some cases, publicly discussed before the Polish crackdown, they would be difficult to reverse and thus questionable as responses to the Polish crisis.

The disadvantages of this option would be compounded because we could not, as a legal matter, rely on an asserted linkage to Poland to justify our actions against other

Report of the SSG Working Group on Polish Debt

Background

When the group of fifteen creditor governments agreed to reschedule the interest and principal payments due during 1981 by Poland on its official debt, it was agreed that any one of the signatory governments could unilaterally (although after appropriate consultations) rescind its agreement to the rescheduling if "exceptional circumstances" occured. It was understood that this referred to foreign intervention (obviously with the Soviet Union in mind) or domestic repression of the Polish people. This is commonly referred to as the "Tank Clause". The legal effect of the invocation of the Clause by the creditor government would be to have the 1981 Polish debt service obligation to that government become due and payable immediately in accordance with the terms of the original loan contracts. That government would then legally be in a preferential position vis-a-vis the other creditor governments unless they also invoked the Clause.

One practical effect of these developments would be a de jure declaration of the present fact that Poland is in default on its debts. Under these circumstances, it is likely that some of the private banks would declare Poland in default of its private debt and attempt to seize Polish assets through court action (assuming that there are available assets to be seized), which they can do now, if they wish. Experience has shown that chances of success in doing so would be very small in foreign jurisdictions. Another effect would be for the Poles to stop payment to official or private entities declaring default. If the default were widespread, it would precipitate total cessation of interest payments to the West. There would be no effect on Poland's ability to borrow, since it cannot borrow now. Polish trade, however, would be hampered in the short run.

In sum, no action that could be taken after the invocation of the Tank Clause cannot be taken now by any public or private creditor. The use of the Tank Clause would thus have political effect only, with no attendant adverse effects on Poland or significant adverse effects on other Soviet Bloc countries.

Probable Implications

Obviously there are many imponderables with reference to the after-effects of a step such as the invocation of the Tank Clause. The major creditor governments agree that conditions exist for invoking the Clause. The same governments have stated that they oppose doing so at this time. Whether the USG should invoke the Clause must be assessed in the light of the following considerations:

(1) Is the implicit possibility of the USG unilaterally invoking the Clause at any time or the threat of doing so a more powerful weapon to influence events in Poland than actually invoking it?

The fact that we have not yet invoked the Clause keeps Poland and to some extent the USSR under pressure to continue to make some payments. It also provides leverage with our Western European allies, in such meetings as NATO, COCOM, G-5, etc. during the next few weeks in order to induce greater cooperation by them with our post-martial law sanctions.

(2) What would be the probable effects of invoking the Clause on the financial system of the Western world?

If default were to be declared against Poland, the impact on the Western financial system would be severe, but containable. Budget and financial effects in certain countries, especially West Germany, could be substantial. If technical default were to spread to other Eastern European countries, the costs to the Western financial system increase, with potentially long-term consequences.

(3) What would be the impact of invoking the Tank Clause on the Soviet Union?

All pressure to assist Poland to make at least token payments would be removed. The USSR would be unlikely to pay off the Polish debt because of its own financial considerations. Our invocation of the Clause would be declared by them a "political act."

(4) Are there other steps which could be taken which would permit us to exert similar or stronger leverage on Poland, the Soviet Union and some of our allies without effects on us and our allies as pernicious as those which might follow invocation of the Clause?

A refusal on our part to participate in a rescheduling of Poland's official 1982 debt at this time would have much the same effect in reducing the availability of Western credit to the Soviet Bloc while not forcing private bank action on default. This would give the appropriate signal to the financial markets, while making a ripple effect much less likely and permitting the banks to deal with the situation in a more orderly manner.

Recommendations

(1) That the USG not invoke the Tank Clause at the present time.

(2) That our ability to do so at any time be used as leverage with our allies and with the Soviet Bloc in various negotiations over the next few weeks.

(3) That we refrain from participating in negotiations on the rescheduling of the Polish official 1982 debt at this time.

IMPLEMENTATION OF A TOTAL EXPORT BAN

Under section 1204 of the Agriculture and Food Act of 1981, any controls on grain except as part of "a suspension or restriction of all" U.S. exports require compensation to producers through 100% parity or direct payments -- with an initial budgetary price tag of $30 billion or more.

-- The most certain legal ground for suspending all U.S. exports to the USSR would be for the President to declare a national emergency and use the resulting Presidential emergency powers under the International Emergency Economic Powers Act ("IEEPA"). Declaring an emergency would require the President to find that the Polish situation is an unusual and extra-ordinary threat to U.S. national security or foreign policy. The law requires prior consultation with Congress "in every possible instance," and a report to Congress explaining the President's action.

-- If required, IEEPA could also be used to authorize such additional measures as bans on Soviet imports; bans on financial transactions with the USSR; or even bans on expenditures for U.S. citizens' travel to the USSR.

-- Under the President's action, exports contracted for but not yet delivered could be stopped. This would halt the shipment of some 5 million tons of grain that the Soviets have purchased but which will not have been delivered. Since the bilateral Grain Agreement guarantees the Soviets 8 million tons and by the end of January they will have shipped only about 6 million tons, the embargo would violate the Agreement. However, since the agricultural exports would be banned only as part of a substantially complete embargo, compensation to farmers would not be required under the 1981 Farm Bill.

POSSIBLE ADDITIONAL MEASURES

-- US ports could be closed completely to Soviet commercial vessels. After the December sanctions some Soviet commercial ships were still allowed to call on US ports. In particular ships loading US grain were to be allowed in.

-- All Soviet commercial representatives (diplomatic and non-diplomatic) in the US will be instructed to leave. Soviet commercial organizations would close and the joint-venture fishing operation on the Pacific Coast would stop. Presently there are seventy-two non-diplomatic Soviet commercial representatives in the US operating the following seven organizations: Aeroflot, Amtorg, Intourist, Belarus, Sovfracht, US-USSR Marine Resources, and US-USSR Trade and Economic Council. There are also twenty-one

Soviet officials operating the Office of Trade Representative. We do not have domestic legal authority to compel the closing of some of the purely commercial organizations but the Soviets are likely to obey our directive for their personnel to depart. We would also take the initiative in closing the US Commercial Office in Moscow and withdrawing our diplomatically accredited staff.

-- We would refuse to issue visas to Soviet businessmen to the extent permitted by law. While our legal basis is restricted by the McGovern Amendment, the Soviets are not likely to challenge us and the domestic legislative mood might well facilitate a change in or elimination of that Amendment.

Initially we should limit the embargo to the movement of goods and services and not extend it to include the seizure of Soviet assets in the US. Such a step would be so extreme as to jeopardize diplomatic relations and to panic other foreign investors.

Implementation of any embargo would involve detailed regulations and a variety of subsidiary policy decisions regarding sanctity of existing contracts and retro-activity, extraterritoriality, regulation of financial transactions, etc. Accordingly, a full analysis should be undertaken as soon as possible.

POLAND: POSSIBLE MEASURES AGAINST THE USSR SHORT OF A TOTAL EXPORT BAN OR EMBARGO

A. Near-Term Measures

The following are possible measures which we could take against the Soviets in a matter of weeks, and which would have a greater political than economic impact. Of course, measures taken against the Poles can also impose costs on the Soviets.

1. Embargo on export of all industrial products. Under the Export Administration Act we could prohibit the export of all US manufactured commodities or technology. This would have an economic impact on the Soviets and add to our credibility in our efforts to gain similar sanctions from our Allies.

2. Embargo on chemical exports This step would hurt Soviet fertilizer production; the CIA has concluded that , among product areas embargoed by the US alone, suspension of chemical exports would have the most substantial effect on the Soviet economy. This combined with an import embargo would torpedo the twenty year $20 billion deal Occidental has with the Soviet Union.

3. Embargo on all imports from the Soviet Union. This step would require a declaration of national emergency by the President. It would cut off a source of hard currency that earned the Soviets $453 million in 1980 and $312 million through October in 1981. Imports consisted mainly of petroleum and products, agricultural chemicals, and metals. Our greatest dependency on the USSR for imports is in palladium and titanium . Alternative supplies could be arranged to replace these imports.

4. Revoke already issued licenses for export of high-technology items to the USSR, including the license for transfer of International Harvester combine technology. This step is parallel to the actions we hope the Allies will take in regard to their pipeline companies' contracts, but would be inconsistent with our earlier NATO agreement on the sanctity of contracts. Foreign firms could pick up the deal unless we had firm commitments from the Allies not to undercut us. Revoking the International Harvester license would cost the firm earnings of $300 million, and could send it into bankruptcy.

5. Suspend Soviet-American joint-venture fishing operations. There is at present one such joint venture on the Pacific Coast; its suspension would be a low-cost gesture and would

have a financial impact on the Soviets. However, the U.S. fishermen are having a difficult year already and suspension of this joint venture would hurt them. Soviet purchases under this arrangement were $4 million in 1980.

6. Not set dates for semi-annual grain consultations. Under the US-USSR Grains Agreement we are required to consult with the Soviets on further grain availability semi-annually and whenever either party requests consultations. Curbing Soviet grain purchases through refusing consultations might trigger law suits from farmers demanding compensation under the Farm Bill. However the Soviets have never requested consultations and are not likely to now. The semi-annual consultations are due to take place this spring. We should take no steps to set dates at this time. We should simply let the meeting slide until we receive a request from the Soviets to hold the consultations. This decision should not be publicly announced; a public announcement could trigger claims for compensation under the Farm Bill. By not setting dates we are able to put off an untimely meeting with the Soviets on grain sales.

7. Abrogate existing exchange agreements. Our December 29 announcement means that three of the eleven technical agreements will be allowed to lapse during the first half of 1982. The others are not up for renewal until much later. Abrogating them would send a tough signal, but would not seriously hurt the Soviets in a practical way. It would also violate our legal obligations, since the agreements have no provision for unilateral termination.

8. Suspend activities under existing scientific and technical agreements. Such activities were cut to the bone after Afghanistan, but full suspension would be feasible and would further underline our outrage over the Soviet role in Poland. The cost to the Soviets of such a step, on the other hand, would be relatively minor.

9. Seek U.N. condemnation of the Poles and Soviets. Security Council consideration of the Polish crisis, or General Assembly action under the Uniting for Peace Resolution, would not be possible except in the event of Soviet military intervention.

10. Further reduce Soviet commercial representation in the U.S. (See also Tab B)
Explusion would have primarily a political impact, but it would be appropriate for us to eliminate those commerical representatives whose economic activities have been curtailed by other sanctions. There are three Soviets here

with the shipping organization Sovfracht and some representatives at Amtorg who work on maritime and shipping affairs. Also, Aeroflot staff is still present in the U.S. and there is one representative who works with the fishing joint venture. Reciprocal cuts in diplomatically-accredited commercial representatives could be considered later. If the Soviets retaliate by expelling U.S. private commercial representatives, a loss of $10-15 million in investments and the loss of some export sales is likely.

11. Discourage tourism to the USSR. A public USG statement urging Americans not to visit the USSR could reduce Soviet hard-currency earnings and would tend to brand Moscow an international pariah. Such a move, however, could spur domestic and foreign criticism as an attempt to interfere with the free movement of persons.

12. Seek discussion of Polish and Soviet actions in the U.N. Human Rights Commission. Initial soundings indicate that it would not be difficult to get the Polish crackdown on to the UNHRC agenda. (This would not necessarily lead to further consideration by other U.N. bodies, which may not be feasible short of direct Soviet military intervention.)

13. Reciprocal cuts in diplomatic representation in Moscow and Washington. We and the Soviets presently have about the same numbers of diplomatic personnel in our respective Embassies. Large-scale staff cuts would hurt our Embassy more because of the closed nature of Soviet society, the Soviets' large U.N. presence in New York, and our Embassy's greater vulnerability to retaliation due to our reliance on Soviet employees for non-sensitive support functions. The Embassy could endure cuts in certain sections -- e.g., culture, science, commercial -- where activities have been reduced because of our other sanctions.

STRATEGY ON POLAND: POSSIBLE NEXT STEPS AGAINST THE U.S.S.R.

I. ANALYSIS OF THE SITUATION

We are approaching a crossroads over Poland, and our handling of the situation will have far-reaching implications for U.S. foreign policy, particularly the future of our relations with the Soviets, the Poles, and the Western Alliance. Unless we continue clearly to demonstrate our seriousness in this crisis, the Soviets may draw conclusions that could lead them to test our resolve at other critical points over the next three years.

The Soviet Stake in Poland:

The Soviets consider a "friendly" Poland absolutely critical to the U.S.S.R.'s vital security interests. Poland has historically been an avenue for invasion of Russia, and, since World War II, it has been the essential line of communication to Soviet ground forces in Germany. From the political perspective, maintenance of the status quo in Poland preserves the post-war division of Germany and ensures the continued existence of a "world socialist community".

Although the Soviets have historically been willing to tolerate some deviations from the Poles, the Soviet-instigated Polish crackdown demonstrated that Moscow remains prepared to risk bloodshed and increased international tension in order to retain control over events in Poland. This was true after Yalta; it is still true after Helsinki.

West European Dimension:

In defending what it sees as its critical interests in Poland, Moscow seeks to play upon divisions of the West. The Soviets see West Europeans as inclined to accept Soviet hegemony in Eastern Europe and less willing than the United States to forgo the benefits of "detente." These divisions in the West were one among many reasons why the U.S.S.R. rejected the option of a direct invasion--which would have united us and the allies--instead pressuring the Polish Government into brutal repression. This suggests that allied support for U.S. policy toward Poland can have an important impact on Soviet conduct.

The Outlook in Poland:

Moscow will continue to press the Polish martial law regime to crush Solidarity and restore the kind of orderly, if economically inefficient, Polish dictatorship the Soviets feel they can comfortably control. The martial law regime has achieved its initial objective of suppressing active resistance, but is perplexed as to where to go from there. Even regime spokesmen admit privately that the generals in charge have neither a policy for solving the country's problems nor the political talent to develop and implement one. Despite the decapitation of Solidarity, passive resistance continues and there are signs that it could become active. The economy was in shambles before December 13; it has steadily worsened since. Little or no progress has been made in rebuilding the shattered Polish Communist Party, and conflict continues between orthodox hardliners and more pragmatic elements within the leadership. The regime has been moving to fend off resistance and further Western sanctions by cosmetic adjustments of the martial law regime, but the generals know they have not yet begun to deal with Poland's overwhelming problems.

It is impossible to predict with any certainty what will occur in Poland in the next 12-18 months. There are a wide range of possible scenarios. But we believe these can be grouped within four broad categories:

(1) A Soviet invasion, most probably resulting from large scale bloodshed among the Poles. Such bloodshed could occur in a variety of ways: as a consequence of intensified repression, from increased food shortages, or from some other triggering of the pent-up bitterness and frustration now held in check by Polish security forces. Should the Soviets intervene, Western leverage for any amelioration of repression would largely vanish. But the likelihood of bringing the Allies along in the imposition of major, far reaching sanctions against the Soviets would greatly improve.

(2) Continuation, largely unchanged, of Martial Law. While economic deterioration would continue, the government might succeed in keeping the lid on by heavy reliance on its security organs. Despite its potential instability, such an outcome would represent a victory, albeit perhaps temporary, for the Soviets. This situation would be the most susceptible to Western leverage. But the instability inherent in martial law would make Polish leaders fearful of moving too far, too rapidly. The Soviets could be expected to keep heavy pressure on Jaruzelski not to make substantial compromises.

(3) An incremental and partial restoration of human rights. In an effort to undercut our efforts to gain allied support, the Polish Government might move to restore a sense of normalcy to Poland by taking highly publicized steps such as the release of a large number of prisoners and the opening of a limited dialogue with the Church and some elements of Solidarity. The central aspects of martial law - e.g. the high degree of control currently being exerted by Polish security organs - would continue. If carried out well by the Poles, this would be the most difficult scenario for the West to deal with. It would particularly complicate efforts to maintain a

unified Western position toward returning to business as usual with Moscow and Warsaw.

(4) A return to dialogue and reform, holding open the possibility for further political and social evolution. This would require that the Polish regime (with at least tacit Soviet acquiescence) see no viable long-term alternative to developing a relationship with the Church and the working class that preserves a significant number of the gains made since August 1980, and which guarantees the Soviets' basic interests. The security apparatus would undoubtedly remain active enough to assure the Soviets and the Polish establishment that control would not again be threatened. But, if this resulted in real latitude for trade unions and the Church, it would preserve the possibility of future peaceful change in Poland and other East European countries. The Soviets, however, could be expected to maintain their campaign of calculated pressure to limit the extent of the Polish Government concessions.

It is becoming clear that the Soviets now foresee a lengthy process with an uncertain outcome. Whatever the next year brings for Poland, the Soviets face inevitable long-term pressure for change throughout Eastern Europe. However, recent events in Poland suggest that the Soviets will continue to react to such pressures by taking whatever steps are necessary, including the use of force, to preserve their hegemony in Eastern Europe. Gromyko's categoric rejection of Secretary Haig's presentation on Poland at their Geneva meeting is further evidence of Soviet determination to implement this view of its security interests in Eastern Europe. Thus, Poland in the near term, and the entire region over time will remain a source of tension in East/West relations.

II. U.S. OBJECTIVES

Poland relates to so many fundamentals (the future of Eastern Europe, the Alliance, Soviet security, American political and moral leadership) that our objectives must be placed in the context of our overall foreign policy. Our overall objective is to maintain U.S. capacity for world leadership by halting and if possible reversing adverse trends in the world power balance over the last decade or more. But we recognize that we must navigate through a period of some vulnerability as we rebuild our strength.

Thus we seek to establish a sense that the U.S. is prepared to accept the responsibilities of political and moral leadership --without provoking confrontations with the U.S.S.R. which could carry unacceptable risks in the nuclear age. Since our response to the Polish crisis will inevitably be regarded as a critical test of our ability to meet this longer-term challenge, our policy must be both prudent and effective. In this sense, we face an historic juncture in Poland, and our actions will have profound consequences for the future across a broad front of basic U.S. interests.

This strategic objective and the analysis of the concrete situation set forth in Section I dictate the following specific objectives for the U.S. response to the Polish crisis:

-- Toward the situation within Poland, to secure the agreed Western objectives of lifting martial law, release of detainees, and restoration of a minimum of freedom (e.g. for trade union activity), without creating a public perception that we are responsible should there be a violent ending.

-- Toward the Soviet Union, to drive home that the U.S.S.R. will pay a heavy price in U.S.-Soviet relations if it continues on its present course in Poland, without seeming to threaten vital Soviet security interests to the point of direct confrontation.

-- Toward the Alliance, to exert strong pressures and leadership for concrete measures, without pushing so hard that we tear the Alliance apart (recognizing that a divided alliance deprives us of much of our ability to affect Soviet behavior).

-- Toward the American people, to demonstrate that we are living up to our moral and political responsibilities, without creating expectations that cannot be fulfilled given the present balance of forces, Poland's geographical situation, the State of the Alliance, our economy, etc.

III. ACTIONS AND IMPACT TO DATE

We must view the situation to date both in terms of our own actions and the overall situation facing the U.S.S.R. and Poland.

A. Specific Actions

The specific actions we and our Allies have taken to date represented a measured response which has imposed a cost on the USSR.

--The package of economic and political measures against the Soviet Union announced on December 29 was deliberately restrained in order to send a primarily political signal to Moscow of our readiness to impose more substantial costs if the repression was not brought to an early end. Specifically, we: (1) suspended Aeroflot service; (2) closed the Soviet Purchasing Commission; (3) suspended issuance of licenses for high-technology exports; (4) halted exports for the oil and gas industry;

(5) suspended talks on a new maritime agreement and imposed strict controls on Soviet access to U.S. ports; (6) refused to set a date for talks on a new long-term grains agreement; (7) decided not to renew three bilateral cooperation agreements that expire this year. We also have stepped up VOA broadcasting to the U.S.S.R. by the introduction of medium-wave frequencies.

--At the January 11 Ministerial and follow-up meeting on January 23, the Allies moved closer to getting on board with modest political actions versus the Soviets. A number of Allies, under EC-10 aegis, are prepared to limit selected imports of manufactured and luxury goods from the USSR (although not oil or other raw materials). The EC Foreign Ministers have decided to recommend to the OECD a more restrictive status for the USSR, effectively raising the interest rate for credits to that country. Several Allies are considering tightened travel controls on Soviet diplomats and nonrenewal of exchange agreements. On the most prominent economic issue, the Siberian Pipeline Project, the Italians have advocated "a pause" in negotiations, but French companies on January 23 signed a major contract with the Soivets for purchase of natural gas from the future pipeline. Meanwhile, the Allies have agreed to suspend rescheduling of the Polish debt, as well as to suspend all export credits to Poland.

B. <u>IMPACT</u>

This listing of specific actions misses the larger consequences for the Soviets. Prior to the December 13th repression, US-Soviet INF negotiations were moving ahead, it appeared that a beginning date for START might be announced at the Haig/Gromyko meeting, there were massive demonstrations in Europe primarily directed against U.S. nuclear deployments, and the Soviets' "Peace" offensive threatened to drive a wedge between the Allies. Since then, START has been postponed indefinitely and another burden added to INF, there have been significant demonstrations against the repression, the "peace movement" in Western Europe is, at least for the moment, less effective, and the Allies have been moving, albeit slowly and unevenly, in an anti-Soviet direction. Allied Ministers will be at our side condemning the Soviets when the CSCE meeting resumes.

In terms of Poland itself, before December 13th the West had provided Poland with some assistance in dealing with its massive economic problems. Now the future of Western aid is much more problematical, thus adding to the economic drain of the Polish crisis on the Soviet Union. It is clear that the Polish regime is already feeling pain as a result of this stance. We should, of course, do everything possible to maximize these economic and political costs to the Soviet Union.

Within Poland, even our modest response has given heart to those who wish to save as much of the achievements of the past year and a half as can be saved. The Polish Council of Bishops and leading Polish intellectuals recently denounced the regime in language that reads like an echo of the President's December 23 statement and the January 11 NATO declaration.

On the other hand, the Soviets have achieved their minimum objectives in Poland -- restoring order and Soviet control over the situation -- without having to resort to direct military intervention. Thus they have staved off, at least for the present, a strategic loss in Poland at the cost of exposing the bankruptcy of the Soviet-imposed system, as well as a potentially serious turn-down in East-West relations, and a new crisis in relations with the largest communist party in Western Europe.

IV. OPTIONS

The following general considerations will have to be taken into account as we review our options:

1. It is possible that nothing we can do in the short term will be enough to induce Moscow to back away from its determination to crush Polish renewal. However, over the longer term there is a chance that, by imposing real costs on Moscow, we can exert some leverage in inducing Soviet and Polish moderation.

2. There is no reason to hold tough economic measures in reserve pending direct Soviet military intervention. Once a Soviet decision to intervene is made, we will not be able to reverse it by imposing additional economic and political sanctions.

3. We will be under considerable domestic pressure to move forward with more energetic measures in the near future. If Lane Kirkland should follow through on his threat to create a de facto embargo through labor action (which he may not be able to do), the costs to the domestic economy would be as great as if we had instituted a de jure embargo, but we would have gained little or no leverage vis a vis our allies or the Soviets. The result would be a blow to our international credibility which could have far reaching implications.

4. The primary, although still marginal, leverage available to the West is economic, but the U.S. alone cannot do enough to produce an effective response (although leverage can be exercised unilaterally on the debt issue). If we cannot bring the Allies along, we may well not be able to achieve the objectives outlined above.

5. There is no hope of getting European agreement on tough and painful action, unless they believe we are making corresponding sacrifices ourselves. Specifically, they see a direct relationship between the kind of tough European sanctions we are asking for and our grain sales. Without a grain embargo, we have no hope of stopping or even suspending the pipeline or of gaining European agreement to other tough measures, such as a partial embargo. At the same time, while tough U.S. action is necessary to achieve comparable European measures, it still may not be sufficient. We may also have to express our willingness to share the costs of sanctions that penalize our Allies disproportionately.

6. We will have to wrestle with two thorny aspects of the question of reversibility--the sure growth of pressure to reverse and the adverse effects on our international credibility of doing so. Our sanctions are linked to Soviet behavior toward Poland and should be reversible, to give the U.S.S.R. an incentive to moderate its repression, but the sorry post-Afghanistan experience suggests that erosion is almost inevitable over time, whether or not the Soviets change the behavior which caused sanctions to be imposed. We and the Allies are certain to disagree on when the lifting of sanctions is justified, and these differences undoubtedly will be exacerbated by Soviet and Polish adjustments of the martial law regime designed to create an appearance of improvement. Moreover, erosion of sanctions over time could force us to consider a reversal of our policy without evidence of real improvement in Poland, thus acknowledging the defeat of our strategy.

7. It may not serve our interests to suggest that all sanctions should be reversible. This is particularly true of the pipeline, since we would continue to oppose the project (while working to develop energy alternatives) independent of the Polish situation. On balance, however, the Europeans will only agree to sanctions if they are linked explicitly to Poland, and we will have to accept the principle of reversibility if we are to obtain the cooperation of Europeans -- and Americans -- who will be asked to sacrifice. Thus, we have to be prepared to accept a reversible halt to the pipeline.

8. In political terms, reversing at some future point in time sanctions we impose will carry a heavy price, both domestically and internationally, if the objectives we attach to them now have not been met. If erosion of sanctions or domestic political pressure forced us to remove the sanctions without achieving our objectives, the implications for our credibility with Moscow and in our international relationships more generally would be immense and long-lasting. In economic terms, the cost of many possible sanctions is not reversible -- trade, major contracts and associated jobs lost and future US competitiveness diminished by casting a shadow across the image of the United States as a reliable trading partner. The economic effects feed back into and reinforce the domestic political cost already noted.

Polish Debt:

A possibility which should be considered whatever else we choose to do is to continue to refuse to reschedule Poland's 1982 debt.

The act of calling in Poland's debt would have highly negative consequences. The Soviets may have to choose between paying off the Polish debt or being open to the risk that other creditors (private and/or official) would then call a formal default on Poland's other loans and thereby undermine the credit position of the entire Eastern Bloc. However, an SSG paper (at TAB A) concludes that the Soviets in all likelihood would be affected only indirectly (through reduced availability of Western credit) by a Polish default and that the international monetary system would suffer a severe blow if the default spread to other Eastern European countries. The irreversible step of calling in Poland's debt or an overt threat to do so would also provoke a serious fissure in the Alliance. An overt threat carries the additional risks of panicking private creditors into precipitating default and encouraging the Allies to settle with the Polish Government as preferred creditors.

This suggests that the leverage we derive from Poland's massive foreign debt is both limited and difficult to use. Nevertheless, a Presidential reiteration of our established policy that Government-to-Government debt cannot be rescheduled until internal conditions in Poland warrant should be considered as an adjunct to the following specific options.

OPTION 1

Continue with our current efforts to gain Allied agreement to take specific actions against the U.S.S.R., while for the present holding in abeyance new unilateral U.S. steps. Our interim objective would be to bring the Allies as close as possible to the point we reached with our December 29 measures, while holding open our options for future U.S. actions either with or without the Allies. At the same time, we would use events such as the February 9 resumption of the Madrid meeting, on which we have already achieved a considerable degree of Allied unity, to keep public pressure on the Soviets.

Pros:

This course would build upon the degree of Allied unity already achieved, and thus maximize the likelihood of united Western action against the Soviets and the Polish military. It would avoid the political fire we would come under if we announced another series of "half-measures." It would not preclude our taking more severe steps at a later stage, if conditions in Poland warrant.

Cons:

This option would expose us to further charges that we are long on rhetoric but short on action. It might also lead to increased pressure or unilateral action by Kirkland. Depending on how long we delayed and on the course of events in Poland, this course could have profound consequences for our credibility with the Poles, the Soviets, the Allies and the American people.

OPTION 2:

Further intermediate measures against the U.S.S.R. There are numerous mixes of measures which could be adopted within this option, the effects of which can be tailored to fall at various points within the broad gap between Options 1 (no new actions) and 3 (a relatively sweeping action package). A list and brief discussion of a number of such measures is at Tab C. In order to make clear that U.S. policy is steadily building, these could be implemented almost immediately and accompanied by a Presidential reiteration of the existing policy to suspend Polish debt rescheduling. They include:

-- embargoing all industrial exports to the U.S.S.R. or at a minimum imposing more selective economic sanctions, such as a ban on chemical exports which focuses on the agricultural sector, including pesticides, fungicides, fertlizers and fertlizer ingredients (especially phosphates which alone could have a significant impact in the short to medium term on Soviet grain production), revoking already-issued licenses for exports such as International Harvester/Combine technology, suspending joint-venture fishing operations, etc.

-- declaring a state of national emergency and imposing an embargo on all non-strategic imports from the Soviet Union;

-- discouraging tourism to the USSR;

-- reducing Soviet commerical representation in the U.S. to a skeletal force;

-- suspending activities under existing bilateral exchange agreements, or even abrogation of all remaining agreements;

-- not setting date for grain consultations scheduled this spring. Up to now we have avoided violating any existing agreements with the USSR. This step and the one above would be a departure from this policy.

Pros:

An embargo on all industrial exports, particularly on chemicals, would impose significant costs on the Soviets, although it would not affect the item that accounts for two-thirds of our exports to the U.S.S.R., grain. The other measures would enhance the political impact of this step and would involve only minimal costs to us. Taken together, however, these steps would seem to foreshadow a full embargo, thus possibly increasing our leverage.

Cons:

Singling out industrial exports would be a departure from the President's position that all sectors should share equally the burden of any future economic sanctions against Moscow. At the same time this would not entail U.S. sacrifices sufficient to induce the Allies to curtail their own far more extensive exports to the U.S.S.R. Cuts in exchanges and commercial representation might be emulated by the Allies, but these steps could be criticized by the U.S. public as inadequate half-measures that fail to live up to our rhetorical condemnation of Soviet actions in Poland.

Option 3:

A ban on all exports to the USSR not covered by existing contracts either covering all items or exempting agricultural trade. Exempting agricultural trade would involve less domestic costs, but would make our action less credible to our Allies, who allege that the U.S. is only taking actions which don't hurt itself. Including agricultural trade, however, could trigger the legal obligation to compensate producers under the Farm Bill, which is not clear on this point.

Pros:

This would impose substantial ecomomic costs on the Soviets (particularly if agricultural trade were included) by grinding U.S. trade with the USSR slowly to a halt without forcing suppliers with signed contracts to abrogate legal obligations. It would be consistent with our early 1981 discussions with the Allies in NATO, and thus easier for them to accept. If followed by Allies this would give real meaning to their pledge not to undercut U.S. restrictions.

Cons:

It would not have an immediate impact because of the exemption for deliveries under existing contracts. If it included grains, they would be affected faster than industrial goods. It could encourage our allies to increase pressure on us to exempt existing contracts from our previously announced oil and gas sanctions. Though this step would have a real bite over time, it might not be seen as forceful enough by our domestic critics. It could trigger the obligation to compensate producers under Section 1204 of the Farm Bill.

OPTION 4:

Total export embargo against the Soviets. One bold action would be for the U.S. to embargo all exports, including grain, to the U.S.S.R. Under current legislation, in order to embargo grain without triggering USG parity price payments (30 billion dollars per year), there must be a total export embargo. (see Tab B).

Pros:

This would impose the greatest economic costs on the Soviets of any option available to us. By demonstrating our readiness to make substantial economic sacrifices (especially in grain sales), it could help induce the Europeans to take comparably tough measures against Moscow, such as suspension of the pipeline project or a partial but significant embargo on their own industrial trade with the Soviets. Taken together, the U.S. and Allies actions might be costly enough to the Soviets, if sustained over time, to influence them to ease the repression in Poland.

Cons:

A total export embargo may not be enough to bring the Europeans along, and if implemented unilaterally, could exacerbate severe strains in the Alliance. Even if the Europeans did take parallel action, the Western embargo could begin to erode quickly with the Europeans undercutting or circumventing the restrictions as they did after Afghanistan, and with U.S. farmers ending up sacrificing billion of dollars in grain sales without comparable sacrifices by the Europeans. This is certain to amplify already growing anti-European sentiments in the U.S., leading to demands for U.S. troop withdrawal and ulitmately weakening the Alliance to the point of irrevelancy. Moreover, to be fully effective, other grain exporting countries would have to join in. This may be possible with Australia, but unlikely with Canada and Argentina. Finally, a grain embargo could cost thousands of jobs in the U.S., and increase USG farm price support payments by 3 billion dollars per year.

Option 5

Actions to hit the Soviets in other regions. Recognizing that even the most serious U.S. and Allied sanctions may not succeed in changing Soviet behavior toward Poland, we should also give serious consideration to action in other regions to drive up the costs to Moscow of its international irresponsibility. These steps could be taken as an alternative to any of the actions set forth in options 1-4 or as a complement to them. In many cases, we have already made decisions to act against Soviet allies and proxies, and the actions we will be taking could be explicitly or implicitly linked to Poland either with the Soviets are publicly. We could also consider expanding the scope of action already decided upon as a direct response to the Polish crisis. In this connection, we would stress that our decisions reflect the overall determination of the Administration to counter Soviet use elsewhere of the kind of indirect military force which crushed the renewal movement in Poland.

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February 2, 1982

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

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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

MS. JEAN JONES
Director, Executive Secretariat
Department of Commerce

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 -- Poland (~~C~~)

The attached papers are circulated as additional background for the first agenda item at the NSC meeting on Thursday, February 4, 1982, 3:30-5:30 p.m., the Cabinet Room. The first agenda item will be "Extraterritorial Application of the December 30 Decision."

Michael O. Wheeler
Michael O. Wheeler
Staff Secretary

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AGENDA

1. Scope of Oil and Gas Equipment Sanctions
2. Further Sanctions Against the Soviet Union and Poland
3. Next Steps Toward Libya

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<u>Positions of Commerce Department and State Department on Application of U.S. Oil and Gas Equipment Export Controls to Foreign Subsidiaries and Licensees of U.S. Firms</u>

<u>Issue I</u>. Whether U.S. export controls on oil and gas equipment should be applied to foreign subsidiaries of U.S. firms.

A. Policy considerations

1. Commerce Department

The President announced sanctions on December 29, 1981 against the USSR that broadened oil and gas controls to include refining and transmission equipments. The controls prevent the export or reexport of U.S. origin commodities and technology to the USSR. Commerce Department specialists maintain that the broadened controls require additional extension to block or delay the construction of the West Siberian Pipeline. Among the proposed extensions are:

I. Barring of all "U.S. Persons" (controlled foreign subsidiaries of U.S. corporations) from exporting oil and gas equipments to the USSR regardless of U.S. context, . . .

* * *

By further extending the controls, the U.S. will have a significantly higher probability of delaying or blocking the pipeline; our allies are expected to object strongly, however. New controls would also blunt criticism by the press and the AFL-CIO. On the other hand, these extensions could cause long-term U.S. business losses as foreign customers turn in the future to non-U.S. suppliers of technology and components. Decisions need to be taken regarding the extension of the new controls.

* * *

Although authority exists to control subsidiaries, it has been used only once (Levi's uniforms for the Moscow Olympics). If this action is taken, the major contracts affected include Dresser Industries' French subsidiary ($30 million contract for the sale of 21 compressors) and Howmet Turbine Components

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Classified by Department of State
Review 1/28/02
RDS-1

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NLS F00-007 #2565
BY LOI, NARA DATE 6/6/06

Corporation's U.K. and French subsidiaries ($4 million contract under negotiation). This option provides the President significant leverage to delay or even block the pipeline. Allied reaction is expected to be strong but this step is necessary if we are 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.

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The extraterritorial application of oil and gas controls will have an immediate impact on a number of American firms. We estimate that subsidiaries of American firms would lose about $200 million annually over the next 2-3 years in signed or projected contracts for delivery of goods to the Soviet Union. This cost would be added to the impact of the December 30 controls, i.e., loss of perhaps $150-250 million annually in exports and reexports to USSR. Soviet orders for Western oil and gas equipment and pipe totalled about $7.4 billion in 1976-80.

In the longer term the cost could be substantially more. In Western Europe, Japan, and elsewhere potential purchasers of technology and equipment and manufacturing partners could be motivated to seek non-U.S. suppliers in an effort to avoid U.S. export controls.

* * *

American corporations may find acquisition of West European firms less attractive as host countries become reluctant to extend national treatment to U.S. subsidiaries. One company, Dresser, reportedly fears that its French subsidiary would be in greater danger of being nationalized if the U.S. attempts to prevent the latter from fulfilling its contract to supply compressors for the Yamal pipeline.

2. State Department:

First, Commerce proposes that foreign subsidiaries of U.S. firms be deemed to be U.S. persons and made subject to the U.S. oil and gas controls imposed on December 30, 1981. We are not sure that this measure would substantially increase the effectiveness of our controls; we are sure that it will raise the allies' ire.

* * *

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

Attempting to stop Dresser France from exporting compressors to the USSR would almost certainly invite renewed French action to thwart our controls.

Moreover, asserting jurisdiction over subsidiaries for export control purposes would invite further heavy foreign regulation of U.S. investment around the world. Our efforts to obtain national treatment for U.S. subsidiaries would be undercut, and foreign companies would have a powerful incentive to avoid U.S. partners because of the threat of export control restrictions.

* * *

Many governments view our claim to jurisdiction over subsidiaries as contrary to international law and as an affront to their sovereignty and economic independence. Even governments which tend to be much closer to our assessment of the Polish situation, such as the United Kingdom (which has domestic legislation which could block some U.S. embargo measures), would be much less likely to cooperate with us in an effective sanctions program were we to provoke a dispute through the extraterritorial application of our export controls to subsidiaries. Such a dispute over issues of national sovereignty and the allegiances of transnational companies would distract us from our efforts to reach agreement in dealing with the developments in Poland.

The Department of State believes that the benefits to be gained from the extraterritorial application of our controls to U.S. subsidiaries and licensees in the case of the gas pipeline are outweighed by the political costs of a major dispute with key allies over this issue. We would obtain virtually no additional leverage over the pipeline at the cost of considerable ill will. Rather than being seen as a sign of U.S. determination to deal effectively with the Soviet Union in light of the repression in Poland, this move would be seen as an affront to the sovereignty of the European countries involved. If we pressed our case, this could well lead to further efforts by the European governments involved to restrict U.S. investment or to circumscribe the actions of European subsidiaries of U.S. companies.

B. Legal Considerations

1. Commerce Department

The legal issue posed by the use of this option is whether there is authority under the Export Administration Act to control exports by U.S.-controlled foreign firms. The EAA provides authority to control exports from foreign countries that are sent by "any person subject to the jurisdiction of the United States." (EAA §§ 5(a) (national security) and 6(a) (foreign policy); 50 U.S.C.A. App. §§ 2404(a) and 2405(a)). This phrase could be interpreted to include U.S. owned or controlled foreign companies. There is no requirement under the statute that U.S. origin goods or technology be involved.

The authority was added to the EAA in 1977, with legislative history that it was to be used sparingly in view of international repercussions. The effect of that 1977 amendment has been "to broaden the potential reach of peacetime, non-emergency foreign policy controls to exports by foreign subsidiaries of all products and data (not merely strategic) to all destinations (not merely the embargoed nations and other Communist countries)." (Abbott, Linking Trade to Political Goals: Foreign Policy Export Controls in the 1970s and 1980s, 65 Minn. L. Rev. 739, 847 (1981). During consideration of the EAA in 1979, the Senate acknowledged that the arguably broadened effect "may not have been considered adequately by the Congress at the time the provision was adopted;" however, it withdrew an amendment that would have eliminated the 1977 authority "pending further study." (S. Rep. No. 169, 96th Cong., 1st Sess. 11 (1979)). The authority to date has been exercised only once. Its use was pinpointed to provide a contractual defense for nondelivery of foreign manufactured Levi's uniforms for Moscow Olympics participants (15 C.F.R. § 385.2(d) (1981)).

Controls on exports by U.S.-controlled foreign firms have been imposed by Treasury under the authority of the Trading with the Enemy Act (50 U.S.C.A. App. § 5(b)). The same jurisdictional reach is in the International Emergency Economic Powers Act (Id. § 1703(a)(1). In practice, the extraterritorial reach of the Treasury-administered controls, such as the Cuban embargo, has been cut back over the years in the face of foreign government protests and challenges (Compare 31 C.F.R. § 515.541 (1975) with id. § 515.559 (1981)). The more recent Iranian Assets Control Regulations did not require licenses for exports of goods and technology by non-banking U.S.-controlled foreign firms (31 C.F.R. §§ 535.207, .429, and .430 (1980)).

The legislative history and past practice of administering similar controls under analogous statutes raises the issue of whether such option would be effective in light of predictable negative foreign reactions. Consideration of the issue should involve not only likely diplomatic protests and non-cooperation of foreign courts but also the use by a foreign government of statutes that would block U.S. enforcement actions of suspected unauthorized exports. Foreign statutes would also subject persons in the foreign country to penalties for making or for responding to U.S. inquiries. A foreign government could also use these laws to prohibit firms doing business in its territory (including U.S.-controlled foreign firms) from complying with U.S. exports controls (See e.g., Protection of Trading Interests Act, 1980, c. 11 (United Kingdom); Law 80-538, (1980) J.O. 1799 (France). It should be noted that, as in the Fruehauf case, a foreign government has the power to finesse that claim of jurisdiction by simply having a receiver appointed which would end "U.S. control" (Fruehauf Corp. v. Massardy, (1965) La Semaine Juridique II 14274 (bis) (Cour d'appel, Paris), (1965) Gaz. Pal. II 86, 5 Int'l Legal Mat'ls 476, reprinted in A. Lowenfield, Trade Controls for Political Ends § 3.3 at 81 (1977).)

The United States could counter these potential foreign reactions by suspending the U.S. export privileges of foreign firms violating U.S. controls (15 C.F.R. §§ 387.1(b), 388.3 (1981)). This suspension can be achieved through administrative hearings and would not require the gathering of evidence abroad. This U.S. sanction might induce a foreign company that is dependent upon continued access to U.S. goods and technology to persuade its government to moderate its response to U.S. controls, however, such unilateral action on our part could well lead to serious trade problems in the future.

2. State Department

Foreign subsidiaries are incorporated where they operate, and are citizens of the country of incorporation. The French and others therefore deny our legal right to regulate subsidiaries and see such regulations as an affront to their economic interests and sovereignty. Moreover, past jurisdictional conflicts with the U.S. have led several of our allies, including the U.K. and France, to pass or threaten special legislation to block their nationals -- including U.S. subsidiaries -- from honoring U.S. requirements.

The French have been particularly sensitive about extraterritoriality. In a celebrated case in the 1960's, the French courts took over operation of a U.S. subsidiary to prevent it from complying with the U.S. embargo on China. This precedent is important, because it involves the only foreign country in which a U.S. subsidiary (Dresser Industries, France) has a substantial pipeline contract.

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The conflict with key European allies and Canada over such extraterritorial application of U.S. export controls goes back for many years. It reached a high point during the early 1960's over U.S. embargoes to Cuba and China. Jurisdictional conflicts led several of our allies to pass or threaten special legislation to block locally incorporated U.S. subsidiaries from honoring U.S. requirements. Indeed, in one case in the 1960's, the French courts took over the operation of a U.S. subsidiary of Freuhauf to prevent its compliance with the embargo on China trade.

Attempting to force the Western European subsidiaries of a U.S. company such as Dresser (France) to refuse to fulfill its contract for equipment to be installed on the West Siberian pipeline would place the subsidiary between conflicting U.S. and French policies, laws or requirements and could invite renewed French action to thwart our controls.

Issue II. Whether U.S. export controls on oil and gas equipment should be applied to foreign-made (i.e., licensee-made) products based on U.S. technology transferred before December 30, 1981.

A. Policy Considerations

1. Commerce Department

Several companies in Europe use General Electric's technology to produce gas turbines, and have signed contracts with the USSR to supply the pipeline's 41 compressor stations. No deliveries have been made. At the time of the technology transfers, no license nor written assurances were required. The G.E. Manufacturing Associates include AEG-KANIS Turbinehfabri (West Germany), John Brown Engineering (U.K.), and Nuovo Pignone (Italy). Alsthom-Atlantique (France) also has a license arrangement with G.E. to produce turbines. Lastly, Rolls Royce (U.K.) manufactures a turbine for which a coupling shaft is a product of U.S. technology, as is the compressor itself.

If these products could be prevented from going to the Soviet Union and option I is implemented, the President would be provided significant leverage to delay or block the pipeline. The allies argue that we should only include products of U.S. technology which is transferred after December 30, 1981, and that to cover earlier technology is retroactive application of U.S. law.

2. State Department

Commerce also proposes that we retroactively extend controls over exports by foreign licensees using U.S. technology exported before December 30, 1981. . . .

The purpose of these controls would be to reach all firms which use G.E. technology to manufacture pipeline equipment. If these controls work, they would cripple, among others, a British firm requiring such previously transferred G.E. technology. However, according to information from G.E., Rolls Royce's ability to manufacture a different type of turbine and a non-U.S. origin compressor would not be affected by our controls. Our attempt to control the British firm using G.E. technology would virtually ensure that the British would not cooperate in controlling Rolls Royce exports.

Moreover, action against licensees will bode ill for future U.S. trade potential. Foreign firms will avoid buying U.S. technology wherever possible to avoid the risk that U.S. export controls will reach out and cripple their business.

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As we have noted, both controls on subsidiaries and retroactive controls on licensees would have enormous political cost. The Europeans will see these controls as a U.S. effort to subject them to our export controls, and to transfer decision-making on export controls from their capitals to Washington. Other countries will not stand by while we attempt actions profoundly disruptive to their economies.

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Even if we could place legally effective extra-territorial controls reaching all firms which plan to use G.E. turbine technology for exports for the gas pipeline, they would not reach Rolls Royce which can supply turbines derived from the RB-211 jet engine. Furthermore, bringing foreign licensees under the controls umbrella, would post serious political and economic problems. Since World War II, Europe has been dependent on the U.S. for substantial imports of advanced industrial technology. If the U.S. were now to reach out and control retroactively European products made from U.S. technology transferred prior to the imposition of our own export controls, a large percentage of Europe's industrial output could be affected. The Europeans would undoubtedly view such a tactic as a heavy-handed attempt to force European countries into embargoing exports to the USSR. Moreover, in the longer run this would undercut the attractiveness and competitiveness of U.S. technology in Europe for years to come. They would find such an action intolerable. The result would be that it would create a great deal of ill will with very questionable results.

B. Legal Considerations

1. Commerce Department

The legal issue posed by the use of this option is whether the Export Administration Act (EAA) provides the authority for subsequently controlling the export from a foreign country of a foreign product of U.S. technology, if, at the time the U.S. technology was exported from the United States, there were no controls on the technology or its foreign direct product.

The EAA provides authority to license the export of goods or technology "subject to the jurisdiction of the United States" (EAA §§ 5(a), 50 U.S.C.A. App. § 2404(a) (national security); and id. 6(a), id. § 379.8) through conditions imposed by general regulation or specific licensing conditions at time of export from the United States, i.e., while the goods or technology are still under U.S. territorial jurisdiction. Such reexports are subject to controls existing at the time of reexport. Thus, the regulations "tie a string" on the U.S. goods or technology, reserving the right to bar later the reexport of an item to a destination to which it could have been freely exported when it left the U.S.

Such assertion of control over foreign transactions does not fit easily into internationally recognized principles of jurisdiction, but a "defensible" case can be made for the international legality of conditions of extraterritorial control imposed at the time of export. The ultimate issue under this option is whether the EAR provision controlling the export of foreign products of U.S. technology (id. § 379.8 (a)(3)) can be interpreted or amended to control foreign produced turbines or compressors on the basis of U.S. technology exported prior to the imposition of the December 30, 1981 controls. Section 379.8(a)(3) contains no express reservation of the right to subject such foreign products to U.S. controls in effect at the time of export from the foreign country, as is done in the previously mentioned EAR reexport sections. In addition, no precedent exists under the EAR for such an application of these controls (Carter Administration controls on oil and gas production and exploration equipment were applied prospectively).

The legal grounds for what amounts to retroactive control after technology is already abroad and outside U.S. territorial jurisdiction are tenuous. There is a very high risk that any attempt to interpret or amend the product of technology provisions to have them reach back to cover foreign exports involving technology exported prior to the new controls would not be sustained if challenged in U.S. courts. As discussed in Option I, if these controls were imposed, foreign countries could block enforcement by statutes or other legal means.

2. State Department

There is no precedent for such action and our domestic legal authority to do so is highly questionable.

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In the case of licensees, the situation is complicated by different types of licensing arrangements involved. We have U.S. legal authority to impose controls over products based on U.S. technology transferred after December 31, 1981, but legal authority over products based on technology previously transferred is difficult to enforce effectively