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Telegram From the Department of State to the Embassy in Chile

Identificador Archival:	frus:frus1969-76v21/d250
Agencia Emisora:	Departamento de Estado
Fecha del Documento:	1971-08-18
Colección / Serie:	FRUS 1969–1976, vol. XXI: Chile, 1969–1973

Nota de Archivo: *Washington. Source: National Archives, RG 59, Central Files 1970–73, INCO 15–2 CHILE. Confidential; Immediate. Drafted by Feldman, Morgan, and Fisher; cleared by Samuels, Miller, Salans (L), Weintraub (E), and Hunt (OPIC); and approved by Meyer.*

152097. Subject: Chile Copper Negotiations.

1. Now that Chile copper bill has become law, we believe USG should reiterate its position in writing. Accordingly, you are requested to seek appointment with Foreign Minister to present the first person note set forth below. Main purposes of this representation are to demonstrate seriousness we attach to points heretofore made orally to GOC officials on many occasions and at all levels; to avoid any miscalculation on part of GOC of possible consequences of their actions toward US investors; and to lay basis for future US position in event problem cannot be resolved. In preparing this text, however, we have been mindful that any US note may require a Chilean reply and that we do not wish to precipitate a response that would jeopardize or make much more difficult achievement of our objective of encouraging fair settlements negotiated directly by GOC and companies. Thus, we have set forth our legal case against the amendment in general terms only, without dwelling at length on specific arguments.

2. When you present this note, you should expand upon points made in text, drawing upon previous guidance as appropriate, and emphasizing following:

(1) US position continues to be that we are prepared to have the relations with Chile that it is prepared to have with us. Our natural preference is that these relations would be mutually positive and constructive. At same time these relations, as with any nation in Hemisphere, will depend not on internal structures or social systems but on actions which affect our interests and the inter-American system. In this respect we consider it essential that every effort be made on both sides to eliminate to extent we can any possibility of misunderstanding or miscalculation.

(2) Among the interests to which US attaches importance is fair treatment of US investors abroad. We do not question Chile’s right to structure its economy in any way it sees fit, but we do expect that US investors will be treated fairly and without discrimination as required by international law. (At this point you could once again mention special inclusion of Andina in the bill and ask when deal with Cerro will be signed, recalling unfulfilled high-level assurances on this matter.)

(3) US has number of serious problems with copper bill as enacted. In particular, we are concerned that book value is not a fair measure of compensation to which companies are entitled under international law. In these cases fair market value of assets alone—wholly apart from going-concern value of enterprises—is probably much greater than historic book value. We hope GOC can find sufficient flexibility in the law to do full justice. Needless to say, the companies and USG would look upon any significant deductions from book value (whether by way of deductions in asset values, assertion of unfounded liabilities, or a determination of excess profits) as punitive and confiscatory. Moreover, failure of GOC to honor

debts of former operating companies, or notes already issued by GOC with respect to purchase of equity interests in those companies, would be viewed in the same light.

(4) To mention these facts is not to imply that US desires anything but normal relations with Chile. If fair settlements are not made, USG would of course maintain its position in accordance with international law and its own legislative requirements. We are encouraged by settlements that have been negotiated to date (apart from delay in finalizing Cerro agreement), and we have also taken careful note of assurances of fair treatment that have been given by President Allende. If major copper cases can be settled on a mutually satisfactory basis by negotiation between GOC and companies, there would be no reason for those cases to become a question between our two governments.

(5) We are aware that GOC has agreed to enter into discussions with both Kennecott and Anaconda. The companies have indicated they are prepared to begin at once. We hope GOC will take steps to get talks underway as soon as possible. The companies will be cooperating with Contraloria in its work, but it would seem prudent, if a satisfactory solution is to be achieved, that there be full and continuing exchange of views between companies and GOC before work of Contraloria advances much further. If Foreign Minister should allude to independence of Contraloria, you should acknowledge that tradition. However, you should note role of CODELCO in presenting objections to assets of companies and you should express concern that atmosphere in which these processes unfold not be influenced by propaganda attacks upon companies which put in question GOC's intent to provide just compensation. Further, there are issues of considerable importance not within the jurisdiction of Contraloria that should be discussed by companies and GOC at an early date (i.e. special deductions, terms of compensation, etc.)

3. Text of note is as follows: Quote.

Excellency:

I have the honor to refer to Law 17,450 of July 16, 1971, amending the Constitution of the Republic of Chile so as to nationalize those companies which constitute "the Major Copper Mining Industry as designated by law and, in addition, the Compania Minera Andina," and to Decrees 69, 70, 71, 72, and 73 of July 17, 1971, pursuant to which the Government of Chile has taken possession and control of the assets and management of these companies. The effect of these provisions is to expropriate the interests of certain United States investors in the Chilean copper industry. Interests of investors from other foreign countries are not affected.

The Government of the United States of America recognizes the right of every sovereign state to expropriate foreign-owned private property within its territory for a public purpose, provided such taking is not discriminatory and that reasonable provision is made for the payment of just compensation as required by established principles of international law. Such compensation, of course, should be paid promptly, in an amount that is adequate, and in a form effectively realizable by the investor.

Law 17,450 contemplates that some compensation may be paid for the interests affected, but the amount of that compensation, and the terms on which it would be payable, are uncertain. The nationalization law also appears to suspend the judicial review normally available in Chile and establishes a special tribunal composed of government officials as well as of judges.

My Government is constrained to note that several aspects of the nationalization law give rise to serious concern. Among these are the following: The law establishes a restrictive basis of valuation that may not represent the fair value of the interests nationalized. It permits a deduction to be fixed by the President of Chile based on alleged excess profits since 1955. My Government notes in this regard that the profits of the copper companies were earned in accordance with Chilean law and specific agreements of the Government of Chile. The Government of Chile approved the making and the manner

of these investments, and as to significant portions thereof, that approval was certified to my Government by official communication. The law, moreover, abrogates without assurance of compensation agreements solemnly concluded in recent years between the U.S. investors and the Government of Chile.

On the other hand, my Government understands that to the extent that the Contraloria lacks flexibility in the execution of the law, the final result can be significantly ameliorated by actions within the discretion of the President of Chile. The exercise of such discretion could avoid the application of deductions which would further reduce the compensation permitted under the restrictive evaluation provisions of the law. My Government has noted the public statements of President Allende that the Government of Chile will honor the debts of the companies that have been nationalized and will deal with the investors on the basis of justice and equity. My Government also welcomes the agreements that have been reached with certain other U.S. investors. It is concerned, however, that the agreement negotiated some months ago by authorized representatives of the Government of Chile with the Cerro Corporation has not been signed on behalf of the Government of Chile despite repeated assurances that have been given on this point. It is disquieted by lack of implementation of repeated assurances that discussions would be held with representatives of the Anaconda Company and Kennecott Copper Corporation.

My Government is convinced that this problem, and similar problems arising out of the expropriation of other United States interests, can still be resolved amicably if the nationalization law is interpreted and implemented in a spirit of justice.

My Government earnestly hopes that the Government of Chile will pursue this course.

I can assure Your Excellency that the good offices of this Embassy continue to be available for whatever assistance they may serve in furthering settlements of these cases that will help maintain the good relations that exist between the United States of America and the Republic of Chile. Unquote.