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Action Memorandum From the Assistant Secretary of State for Economic and Business Affairs (Armstrong) and the Assistant Secretary of State for Inter-American Affairs (Meyer) to Secretary of State Rogers

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CHILE—Next Steps in Bilateral Talks

Background

The United States and Chile entered into bilateral discussions in December 1972 on a wide range of issues between the two governments, focusing primarily on the question of compensation for expropriated property and debt repudiation under Article IV of the Paris Club Agreed Minute on Chile debt rescheduling. The first round of these discussions produced no substantive movement by the Chileans toward a solution to the compensation issue. However, toward the conclusion of the discussions, the Chilean delegation suggested the invocation of a third party mechanism to deal with the question of just compensation.

This memorandum sets forth a proposed strategy on the next round of talks, now set for March 22–23 in Washington, concentrating on further exploration of the possible use of a third party mechanism.

Chilean Tactics and Objectives

During the first round of bilateral talks, the Chilean delegation stated that because of domestic Chilean legal, constitutional and political constraints, bilateral negotiations could not lead to a solution of the compensation question. The Chilean delegation suggested that the introduction of a third party mechanism into the discussions, coupled with the progress on ancillary issues such as access to the international financial institutions, cessation of Kennecott litigations, and agreement on rescheduling of Chile’s 1972 debt service to the United States, might provide a way out of the bilateral impasse. The specific third party mechanism mentioned was the 1914 U.S.–Chile Treaty for the Advancement of Peace, although the door was left open for other devices we might wish to suggest.

The Chilean delegation stated that it was making a great concession in even suggesting it would submit a Chilean act of sovereignty to review by a third party.

We believe that Chile’s objective in making this suggestion is to improve its position with foreign creditors, including the international financial institutions. The Paris Club and international opinion can be expected to support third party settlement, and the IFIs are likely to argue that if a third party settlement procedure is in process, they can resume lending

on the grounds that good faith negotiations are taking place.

U.S. Objectives and Strategy

By the time we resume our bilateral talks the March 4 congressional elections will have taken place and their results can give us a better sense of the political climate in Chile. We will wish in any event not to help Allende and the Popular Unity government to consolidate their position, but at the same time to hold open the longer run possibility of finding an acceptable solution to the compensation question and recovering moneys owed by Chile.

Our primary purposes in the next session of bilateral talks are to continue pressing the GOC for a negotiated solution to the outstanding compensation and the repudiated debt problems; to move the Chilean delegation as far as possible toward the definition of impartial and binding third party procedures the GOC would accept as the means for reaching a solution; and to continue to minimize any propaganda or substantive advantage the GOC may seek to obtain from other creditors or lending institutions as a consequence of the talks.

In seeking to achieve these purposes, we would not at this stage propose binding arbitration under any specific mechanism (such as the 1899 Hague Convention, 1929 Inter-American Arbitration Convention, or an ad hoc agreement), concentrating instead on questions which would draw out the Chilean views:

(a) Can Chilean legal and political restrictions, which apparently preclude achieving a negotiated solution, be overcome so as to permit implementing a solution arrived at by a third party mechanism?

(b) What are the characteristics of a third party mechanism acceptable to Chile?

(c) What specific issues would Chile be willing to submit to arbitration?

(d) Would Chile accept a simplified, expeditious and binding proceeding?

Chilean responses to these questions would indicate the extent of Chilean receptivity to a meaningful third party proceeding, and the likelihood of their accepting a binding as opposed to a non-binding procedure (such as conciliation under the 1914 Treaty). We may wish in later sessions to go beyond this, but we believe such judgments can be deferred until we hear further from the Chileans.

Other Considerations

Submission of the copper dispute to a third party mechanism under mutually acceptable conditions has both advantages and risks (whether the procedure is binding or non-binding). The principal advantages are:

(a) The dispute would be kept open (in contrast with IPC in Peru), and pressure would be kept on the GOC for settlement;

(b) Submission of the dispute to third party settlement by Chile would constitute an implicit repudiation of the Allende government’s insistent assertion that such matters are strictly within Chilean sovereignty (as well as a long tradition in Latin America of objection to international adjudication of these kinds of disputes), and would be a significant step in our attempts to gain acceptance in Latin America for viable third party procedures in lieu of unilateral action in investment disputes;

(c) An impartial, objective third party determination could establish the obligation of a host government under international law to compensate for expropriated properties.

Nevertheless, third party settlement offers the following risks for the United States:

(a) During the time (12–18 months) which would be required to complete the process, some of the financial pressures on the GOC (especially through the IFIs) would be loosened;

(b) There exists a risk—in our view acceptable—of an adverse decision on the excess profits or compensation issues which would have an extremely damaging impact going well beyond the copper dispute.

An additional consideration is that if Chile should in the end insist on utilizing the 1914 Treaty, it would be difficult to find legal grounds for refusing. Our failure to accept could result in the breaking off of the discussions, with the GOC in a relatively advantageous position to exploit the situation. Under these circumstances, our interests would be better served by an attempt to so structure the 1914 Treaty procedure as to make it expeditious and binding.

Recommendation

That you authorize further exploration with the Chileans of their receptivity to a mutually acceptable third party mechanism for the settlement of the copper dispute.