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Memorandum From the Executive Secretary of the Department of State (Eliot) to the President's Assistant for National Security Affairs (Kissinger)

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Nota de Archivo: *Washington. Source: National Archives, Nixon Presidential Materials, NSC Files, Box 777, Country Files, Latin America, Chile, Vol. VIII. Secret; Exdis. Drafted by Feldman and Bradfield; cleared by Benedick, Crimmins, and Hennessy. In a June 4 memorandum to Kissinger, Jorden summarized this memorandum and received Kissinger's approval of the State–Treasury proposal for submitting the dispute over copper to arbitration. (Ibid.)*

Chile—Next Steps

The March 22–23 U.S.–Chile bilateral talks concluded in a virtual impasse. The GOC formally proposed application of the non-binding 1914 Treaty procedure (investigation and report) to the copper dispute and requested a U.S. response. We pressed Chile on its commitment under the Paris Club Agreement to have direct negotiations on copper compensation and stressed the need for a substantive rather than cosmetic solution. We suggested that both sides review their positions and consider continuing the talks at a higher level.

Since the 1914 Treaty procedure, in the form proposed by Chile, does not promise a resolution of the problem and would permit delay during which we would be under pressure to restore normal financial relations with Chile, we do not wish to accept it. However, under its terms, Chile may attempt to invoke the treaty unilaterally; if it does so, unless we have offered a plausible counterproposal, we would be put in the very embarrassing public position of attempting to avoid honoring a treaty obligation which Chile had proposed as the means for resolving the copper dispute. A continuance of our existing policy of insisting on a bilateral settlement could very well result in an erosion of support for our position, strengthen Chile's position at the next Paris Club meeting (July 1973), and encourage the IFIs to proceed with lending to Chile in the light of Chile's reasonable steps offer of conciliation under the 1914 Treaty.

In view of these circumstances, the Departments of State and Treasury believe that the U.S. should counter the Chilean proposal with a formal offer to submit the copper dispute to expeditious and binding arbitration. We are developing a specific proposal that will ensure an impartial tribunal and proper terms of reference and procedural rules.

Our case on the Chile compensation problem is sufficiently strong to give a good chance of our obtaining an objective third party finding that Chile has an obligation to pay substantial compensation to the expropriated copper companies. Such a result would achieve important long-standing objectives of U.S. foreign policy by establishing that international law requires effective payment of just compensation for expropriated property and that investment disputes should be settled by impartial procedures rather than unilateral imposition. Moreover, an objective third party determination would afford Allende the most credible basis for obtaining domestic support for the payment of compensation. We are not sanguine the GOC will accept arbitration, but such a proposal would strengthen our international position on this issue.

Any third party adjudication, whether binding or not, carries the risk (in our view acceptable) of a ruling favorable to Chile's position on compensation that would have serious implications for the security of all U.S. foreign investment in similar situations. If we accept the risk of recourse to a third party, it would be in our interest to have the outcome binding: in fact, the investors whose cause we would be espousing are unlikely to agree to a non-binding procedure. (We would continue to consult closely with the companies.)

An arbitration proposal raises questions about the consistency of this approach with our objectives as defined in NSDM 93 (maintaining maximum economic pressure on the GOC) since we believe it would cause some movement in the international financial institutions toward a resumption of lending to Chile. Resumption of lending by the IFIs in the circumstances of submission of outstanding investment disputes to arbitration would be consistent with the President's expropriation policy and with the requirements of the Gonzales and Hickenlooper Amendments. But such movement would offer very little if any short term relief to Chile's serious balance of payments difficulties. Moreover, a flat refusal by the USG to apply the 1914 Treaty, without a counterproposal, would also affect adversely U.S. influence with Chile's creditors and the international financial institutions. Thus, in either case some movement in the IFIs may result. This factor, and the positive results we can expect from an arbitration proposal lead us to the conclusion that the proposal is consistent with the directives contained in NSDM 93.

Thus, Treasury and State believe that an arbitration proposal is essential to maintain a credible posture before the public and other creditor governments in response to the Chilean proposal to use the procedures of the 1914 Treaty. We expect the next meeting of the Paris Club to be in early July. Therefore, unless there is objection to this approach, we plan to make this proposal to the GOC in early June.