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Memorandum From Michael Kozak of the Office of the Assistant Legal Adviser for Inter-American Affairs to the Assistant Legal Adviser for Inter-American Affairs (Feldman)

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Nota de Archivo: *Summary: This memorandum set forth a legal framework for possible binding arbitration of the Chile-U.S. disputes. Source: National Archives, RG 59, Central Files 1970–73, INCO 15–2 CHILE. No classification marking. All brackets are in the original.*

Chile Copper-Arbitration Procedures

The General Treaty of Inter-American Arbitration, signed January 5, 1929 appears to be the only existing agreement within the Inter-American System which would provide a framework for binding arbitration of the present disputes between the U.S. and Chile and to which both countries are signatories. The bilateral 1914 Treaty for the Settlement of Disputes between the U.S. and Chile has previously been suggested as a possible alternative. This memo considers the applicability of these treaties to the issues presented by the present controversy, the procedural advantages and disadvantages of each, and the character of the arbitral panel each procedure might produce.

The Frame of Reference

The 1914 Treaty provides that “the . . . Parties agree that all disputes that may arise in the future between them, shall . . . be submitted [to the procedures specified in the treaty which include arbitration].” However, Article IV provides:

“Notwithstanding, any question that may affect the independence, the honor or the vital interests of either or both of the countries, or the provisions of their respective Constitutions, or the interests of a third nation, will not be submitted to such or any other arbitration.” (emphasis added).

Under Article 1 of the 1929 Treaty, the Parties “bind themselves to submit to arbitration all differences of an international character . . . which it has not been possible to adjust by diplomacy and which are juridical in their nature, including “the interpretation of a treaty; any question of international law; the existence of any fact which, if established, would constitute a breach of an international obligation; and the nature and extent of the reparation [for such breach].” Excepted under Article 2 are disputes “within the domestic jurisdiction of any of the Parties to the dispute and . . . not controlled by international law, and those which affect the interest of [a non-Party State].”

Chile signed the 1929 Treaty with the reservation that it did not accept obligatory arbitration with respect to disputes arising out of acts occurring before the treaty entered into force nor

“for those questions which, being under the exclusive competency of the national jurisdiction, the interested parties claim the right to withdraw from the cognizance of the established judicial authorities, unless said authorities decline to pass

judgment on any action or exception which any natural or juridical foreign person may present to them in the form established by the laws of the country."

This reservation interprets the exception contained in the treaty for "disputes within the domestic jurisdiction of any of the Parties to the dispute" as precluding resort to international arbitration where domestic remedies have been made available.

The range of disputes arbitrable under the 1914 Treaty is not restricted to strictly "legal" questions. But, given the fact that the copper expropriations were carried out pursuant to a Constitutional amendment, the disclaimer contained in the 1914 Treaty could be seized upon by political elements in Chile opposed to arbitration of the expropriation question. Furthermore, it would seem desirable to de-emphasize the importance of that Treaty in order to avoid focusing the attention of such groups on the troublesome language contained therein which purports to extend that disclaimer to "any other arbitration."

An agreement to submit the issue of compensation to arbitration under the 1929 Treaty, would necessarily imply agreement that the question was not "under the exclusive competency of the national jurisdiction" and was "controlled by international law." Thus, it seems that the Chilean Government could not agree to arbitration under this treaty of all aspects of the current controversy without prejudicing its position that the measure of compensation to be paid in cases of expropriation is a matter within the exclusive competence of domestic jurisdiction.

Procedures

The 1914 Treaty establishes a permanent International Commission to which disputes may be submitted, on the motion of either Government, for investigation and report. The Commission must complete its report within one year from the date it begins the investigation, although this period may be extended by mutual agreement. The Commission's report is not binding on the parties, but is to serve as the basis for renewed attempts for a negotiated settlement. The scope of this investigatory process is not restricted by the disclaimer previously cited which becomes applicable once the matter is submitted to arbitration. If after six months from the date the Commission's report is received a settlement has not been reached, "the dispute will then be submitted to the Permanent Court of Arbitration established at The Hague." A special convention agreed to by both parties is required to specify "the matter in controversy, the extent of the Arbiters' powers, [and procedural regulations]." Under Article V, the special convention "remains . . . subject to the constitutional requisites of both countries."

The 1929 Treaty provides for the establishment of an ad hoc arbitral panel in each case. No time limit is set for the selection process. Article 4 provides:

The Parties to the dispute shall formulate by common accord, in each case, a special agreement which shall clearly define the particular subject-matter of the controversy, the seat of the court, the rules which will be observed in the proceedings, and the other conditions to which the Parties may agree.

If an accord has not been reached with regard to the agreement within three months reckoned from the date of the installation of the court, the agreement shall be formulated by the court.

The U.S. ratified the treaty with the understanding "that the special agreement in each case shall be made only by the President, and then only by and with the advice and consent of the Senate, provided two thirds of the Senators present concur." Under article 8, the reservations made by a party may be invoked against it by the others.

The 1914 Treaty would not appear to provide a suitable framework for "prompt" submission of the current disputes to binding arbitration. The apparently mandatory prerequisites of investigation and report by the International Commission and renewed negotiations by the parties would undoubtedly require the full 18 month period provided for in the treaty

before the matter could even be submitted to binding arbitration.

In addition, the scope of the Commission's investigation and report would not be restricted by a prior compromis, and the possibility should not be overlooked that should the matter eventually go to arbitration, the decision of the arbitrators might be influenced by the outcome of the prior proceedings before the Commission. It should be noted that either party may invoke the investigatory process, and that both are bound to "furnish the Permanent International Commission with all the means and facilities required for its investigation and report." Thus, if Chile were so disposed it could force submission of the question to this procedure.

The 1929 Treaty also contains potential for delay. Article I of that Treaty provides that "the provisions of this Treaty shall not preclude any of the parties, before resorting to arbitration, from having recourse to procedures of investigation and conciliation established on conventions then in force between them." In testifying before the Senate Committee on Foreign Relations the Secretary of State, Mr. Kellogg, stated with respect to this provision that "if any of the parties desires conciliation first, it is entitled to have recourse to that procedure by an unilateral request." Thus, the 1929 Treaty, like the 1914 Treaty, could be seized upon by a party to delay the initiation of the arbitration process. Unlike the 1914 Treaty, however, this Treaty does not of its own force require prior investigatory proceedings.

The major procedural obstacle to prompt arbitration of the current dispute under the 1929 Treaty would be the U.S. reservation. It would clearly make necessary the approval of the U.S. Senate to any compromis that might be formulated between the executive branches of the U.S. and Chilean Governments. In addition, although the Treaty does not explicitly require the approval of the compromis by the Chilean Senate, the fact that the reciprocity provision would permit the Chilean Government to insist upon such a procedure vis à vis the U.S. could tend to engender political pressure within the Chilean system to do so. The reservation also precludes the alternative of formulation of the accord by the court itself.

A question has been raised as to whether the reservation could be construed as applying only in cases where the United States is the real party in interest. The 1929 Treaty was first submitted to the U.S. Senate for its advice and consent in 1929. In 1932, the Senate consented with reservations which were determined by the Department to be unacceptable. Accordingly, the President declined to ratify the Treaty and in 1934 resubmitted it to the Senate with a view to eliminating the most unacceptable of the reservations. In a letter to Senator Pittman, Chairman of the Senate Committee on Foreign Relations, dated February 19, 1934 the Secretary of State, Cordell Hull, proposed a substitute resolution which included the following provision:

"Resolved (two-thirds of the Senators present concurring therein), That the Senate advise and consent to the ratification of Executive ,Congress,Session, a General Treaty of Inter-American arbitration, signed at Washington, January 5, 1929, with the understanding to be made a part of such ratification, that the special agreement provided for in Article 4 of the treaty, in each case where the question to be arbitrated concerns a claim against the United States, shall be made on the part of the Government of the United States of America only by the President by and with the advice and consent of the Senate, notwithstanding any provisions of the treaty to the contrary."

The language limiting the requirement of Senate approval to cases involving claims against the U.S. was deleted from the reservation finally adopted by the Senate and approved by the President. It would be difficult to overcome the argument that the Senate was well aware that the effect of the reservation could have been restricted to particular types of matters and that it rejected this approach in favor of a generally applicable provision.

As previously noted, the special convention required in each case under the 1914 Treaty procedure "remains . . . subject to the constitutional requisites of both countries." I have been unable to locate any definitive background information regarding the purpose of this provision. L/T has expressed the view, however, that this provision should be read in the context of the position traditionally taken by the U.S. Senate that its consent to the agreement of the U.S. to arbitrate

should be sought with respect to each individual arbitration. The reservation advanced by the Senate with respect to U.S. ratification of the 1929 Treaty was one manifestation of that view. Similar understandings are included in U.S. ratifications of a number of bilateral and multi-lateral arbitration treaties. The legislative history of the ratification of the 1929 Treaty demonstrates a Senatorial concern that the compromis in each case constituted a separate treaty, and therefore, that the Senate could not waive or delegate to the Executive its Constitutional authority with respect to such agreements.

Apparently, no distinction was made under this view between arbitrations in which the U.S. was the real party in interest and those involving the claims of U.S. nationals against foreign governments. An example of contemporary practice is found in "a protocol relative to a claim on the government of Chile in the case of the ship "Good Return" signed December 6, 1873 between the U.S. and Chile. The claim related to an American whaling vessel which had been seized by Chilean authorities in 1832. Although the protocol concluded for the ad hoc arbitration of the issue presented no possibility that the U.S. could be held liable, it was explicitly subject to approval by both Governments, and was submitted to the U.S. Senate for ratification. It is interesting to note that the protocol also explicitly provided that it would come into force "previous to its approval by the national congress of [Chile]."

In more recent years, a distinction has been made in practice between cases involving potential liability of the U.S.G. and those in which no such issue existed. L/C has informed me that the U.S. has been party to only one arbitration since World War II. That case involved the claims of U.S. landowners whose property had been flooded by the construction of Gutt Dam in Canada. Authorizing legislation was sought in that case (a) because appropriations were required to pay both the U.S. agent and our share of the costs of the arbitration and (b) because there was the possibility of a Canadian counter-claim against the U.S.G. A number of arbitrations conducted prior to the war which did not involve potential U.S. liability were undertaken by Executive Agreement, without Congressional authority. Funds necessary to defer the necessary costs were provided for in the Department's appropriation without special authorization. Thus, it would appear that whatever the Senatorial view may have been in 1914 with regard to the "constitutional requisites" of concluding a compromis, under the modern view no Senate approval of such agreements is required unless potential liability of the U.S. is involved. A strong argument could therefore be made that the advice and consent of the Senate is not required to conclude a compromis under the 1914 Treaty. It would be difficult to make the same argument with respect to the 1929 Treaty, however, since the U.S. reservation thereto is explicit with respect to the procedure to be followed.

Composition of the Arbitral Panels

The 1914 Treaty provides for submission of disputes to the Permanent Court of Arbitration at The Hague, the membership of which would be determined in accordance with the agreements establishing that body. The composition of the Permanent International Commission charged with conducting the preliminary investigation of the dispute is provided for by the Treaty itself. Each Government is to appoint two members, only one of whom may be of its own nationality. The fifth member, the President, is chosen by agreement between the two Governments and he may not be of the same nationality as any of the other members. Prior to the beginning of the investigation, each government may replace the members appointed by it and may withdraw its approval of the fifth member. If a successor cannot be agreed upon within 30 days, the President of the Swiss Confederation is to appoint one.

As you know, Chile has designated as members of the Commission Messrs. Edmundo Vargas of Chile and Manfred Lachs of Poland and has agreed with the U.S. upon the appointment of Mme. Suzanne Bastid of France as President. The U.S. in 1965 notified Chile that it would appoint the remaining two members "in due time" but has failed to do so.

The 1929 Treaty provides for the designation of an arbitrator or tribunal by mutual agreement or, in the absence of such agreement, provides for selection of a five member panel. Each party may select one member from the persons it has designated as members of the PCA. Each may designate another member who may be a national of any other "American"

state. The fifth member is to be selected by the other four, with preference being given to persons of “American” nationality. Failing agreement, each designates a “non-American” member of the PCA and these two persons select the fifth member, the only restriction being that he not be a national of either party to the dispute. Although this procedure clearly favors an “all-American” panel, it would appear to provide adequate protection against a Latin American majority (e.g. the U.S. could designate a U.S. and a Canadian national and insist upon a non-American fifth member).

Conclusions

Neither the 1914 bilateral nor the 1929 Inter-American treaty would appear to provide a satisfactory framework for the comprehensive arbitration of the issues outstanding between the U.S. and Chile. The primary obstacle to such arbitration under both procedures is the fact that Chile has previously taken positions respecting the nature of the primary issues which clearly imply that they are not arbitrable within the frames of reference of the existing treaties. Although Chile might find it possible to submit selected issues under these procedures (e.g. the suggestion that the partial repudiation of the Braden debt be resolved through the 1914 procedure), it is doubtful that the U.S. could accept such a limited treatment of the overall problem unless adequate assurances were made that the other issues would be dealt with effectively through other means. In addition, both procedures are fraught with potentialities for delay and provide further opportunities for interference by opposition elements.

Neither treaty would appear to offer a comprehensive model for an ad hoc agreement. It might be acceptable to the U.S. to agree to utilize the investigatory panel already partially designated under the 1914 Treaty or the procedure for selecting a panel provided for in the 1929 Treaty in order to create the impression that both countries were adhering to previous international commitments if this would be politically advantageous to the Chilean Government. In addition, this procedure might prove less disparaging to the efficacy of the Inter-American system than would a total rejection of existing dispute settlement procedures in favor of a completely ad hoc arrangement.

It should be noted that both the 1914 and 1929 Treaties provide Chile with opportunities to seriously delay or prejudice the possibility of submitting the issues to arbitration while appearing to honor its international obligations in this respect. Under either Treaty, Chile could force submission of the issue to a lengthy conciliation process in which the panel would be without benefit of a joint compromis specifically defining the issues. The investigatory processes could be directed towards irrelevant but potentially embarrassing questions such as the ITT affair. Ultimately, Chile could agree to submit the issue to arbitration, subject to legislative consent, and then orchestrate a non-partisan rejection of the process on the grounds that the issues involved are excluded from the frames of reference of these agreements.

Thus, it seems that emphasis should be placed upon formulating an ad hoc arrangement which would permit the prompt submission and resolution of the issues without prejudicing either party’s legal position.