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Memorandum From the Acting Chairman of the Ad Hoc Interagency Working Group on Chile (Crimmins) to the President's Assistant for National Security Affairs (Kissinger)

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Nota de Archivo: *Summary: This memorandum transmitted the paper titled "Options for the United States in the Event of Expropriation of U.S. Business Interests by Chile," for consideration by the Senior Review Group. The paper stressed that the chances for expropriation of the mining and metal processing industries were high and outlined various strategies the United States could employ in the event. Source: National Archives, Nixon Presidential Materials, NSC Institutional Files (H-Files) Box H–50, SRG Meeting, Chile 12/23/70. Secret; Nodis. Enclosures 2 through 6 are attached but not published. These papers were distributed to the members of the Senior Review Group on December 21. The SRG meeting was held December 23. The minutes are printed in Foreign Relations, 1969–1976, volume XXI, Chile, 1969–1973, Document 194.*

Chile

There are enclosed six papers for consideration by the Senior Review Group. They have been approved by the Ad Hoc Interagency Working Group on Chile.

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Enclosure 1

OPTIONS FOR THE UNITED STATES IN THE EVENT OF EXPROPRIATION OF U.S. BUSINESS INTERESTS BY CHILE

I. Prospects for Expropriation

The book value of U.S. direct investment in Chile is approximately $800 million, more than half in mining and metal processing. Replacement value is, of course, much higher. The largest single components are Anaconda's and Kennecott's 49% participation in mixed companies which account for the bulk of Chile's copper production. (The agreement under which Anaconda transferred 51% ownership to the GOC in 1969 also requires the GOC to acquire the remaining 49% by 1982 under an agreed compensation formula.) There are numerous other enterprises wholly or partly owned in the U.S. in extractive, manufacturing or service industries, and in commerce.

The USG liability under investment insurance against expropriation could be $310 million. Present cash reserves to meet that and all other investment insurance liabilities worldwide are $86 million. These reserves have been growing with annual premiums which last year amounted to $20 million. Claims require a year to ripen from the dates of the individual expropriations. Still, wide-spread expropriation of U.S. interests would exhaust the reserves and require the USG to seek

further appropriations from Congress for these losses.

The GOC has set itself on an irreversible course toward expropriation of a very substantial part of the U.S. investment, beginning with the large copper mining interests.

There is a wide range of ways in which the GOC could carry out its takings. There could be sweeping seizures of enterprises by category, or there could be case-by-case negotiations. There could be takings with little or no satisfactory provision for compensation, or there could be reasonable assurance of it, whether by law or regulation, by Executive promise, by establishment of favorable judicial or administrative precedent, or by willingness to have serious negotiations with the owners. There could be adherence to clear and predictable procedures, or resort to devices and subterfuges such as introducing counterclaims, however implausible, to wash out compensation, as in the IPC case in Peru. The GOC could help labor disputes and other kinds of demands against company managements turn into pressures for expropriation, it could try to hinder this kind of development, or it could take a hands-off attitude. Expropriations could take place in low key, or could be staged as Roman circuses for propaganda effect. The GOC could carry them out with a show of impartiality, or it could openly discriminate against U.S. owners in extent of property taken or the treatment given, or both.

All these contrasting modes of action could have in-between gradations, and the GOC could employ every variety of mix among them.

GOC expropriations will probably begin soon, perhaps within the coming weeks. There are signs that the GOC is already behind its original schedule, probably because of delays in getting agreement within the UP coalition on the expropriation measures now being drawn up. The most obvious sign is the non-appearance in the Congress of expropriation legislation which Allende publicly promised for the first week of December, and then for the second week.

At this moment there are no actual expropriations of U.S.-owned properties in train, but “interventions” under Chilean labor laws have taken place in three enterprises partly or wholly owned by U.S. citizens. In these cases court appointed “interventors” have taken either full or supervisory management control. The chances appear to be even or better in two of the cases (NIBSA, a brass fabricating plant half owned by the Northern Indiana Brass Co.; and the 60% U.S.-owned Ralston Purina chicken and feed producing plant) that the owners will be unable to recover control of management, and the situation is likely to lead to expropriation.

There is a triple impetus behind the GOC movement toward its expropriation program; its ideological thrust; its desire for the political rewards of striking at the foreign-exploiter symbol (expropriation of the copper holdings especially has an appeal in Chile extending well beyond Marxist sectors); and its eagerness to gain access to current copper (and other) earnings to ease its heavy budget pressures.

There are also inhibitions on the GOC. First and foremost is its announced—and evident—desire to retain international respectability and, more importantly in the short range, to retain credit-worthiness in the Western lending community.

Less important inhibitions would include difficulties of finding managerial and technical talent to run the enterprises for the GOC and the converse consideration of possible encouragement of further damaging emigration of this kind of talent under an expropriation program.

The statements and actions of the GOC in its first month in power, coupled with the known attitudes and intentions of coalition UP leaders over recent years, warrant the following net judgment: The GOC will certainly move shortly to expropriate U.S. properties. The GOC will probably make dispositions, especially on compensation, which will result in little or no prompt dollar payments to claimants but which will enable the GOC to make strong propaganda claims of legality and justice in its treatment of the foreign interests concerned. In the likely event that it will pay in local currency or bonds over long periods, it will play heavily on nationalistic themes of sovereignty and dignity. If, as is probable, it reduces

amounts of claims on grounds of plundered patrimony, tax evasions and other malfeasances asserted in support of counterclaims, it will add to the “anti-imperialist” theme the counterpoint of betrayal of Chile by previous anti-patriotic administrations.

In any case, Chilean expropriatory acts and our response will be the single greatest determinant of the course of U.S.-Chilean relations. The repercussions will be significant within Chile and in other countries in Latin America.

II. Considerations Affecting the USG Response to Expropriations

A. U.S. Objectives

The USG has two already established, over-arching purposes governing all our dealings with the GOC:

1. To maintain a correct but cool public posture toward the GOC so as to avoid giving it a basis on which to rally domestic and international support for consolidation of the regime; but

2. To seek to maximize pressures on the GOC to prevent its consolidation and to hurt its ability to implement policies contrary to U.S. and hemisphere interests.

In addition, there are several U.S. objectives specifically connected with expropriation:

1. To obtain compensation for U.S. companies injured by expropriation in the interests of our general policy on protection of U.S. business, in the interests of the affected companies themselves, and in the interests of our investment guaranty program.

2. To protect other U.S. holdings in Chile vulnerable to expropriation but not taken.

3. To protect U.S. properties in other countries in Latin America and elsewhere which may be influenced by developments in Chile and our response to them.

4. To assure that the GOC bears full onus for confrontation on the expropriation issue and that our position is as invulnerable as possible.

B. The Hickenlooper Amendment

1. Foreign Assistance—The Adair-Hickenlooper Amendment (Section 620(e)(1), FAA) provides that the President shall suspend assistance to the government of any country that takes certain adverse actions against U.S. investors and fails within a reasonable time (not more than six months) to take appropriate steps to discharge its obligations under international law to the U.S. citizens concerned, including speedy compensation in convertible foreign exchange equivalent to the full value thereof. Such suspension is to continue until the President is satisfied that appropriate steps are being taken. The actions contemplated by the statute include:

(a) nationalization, expropriation, or seizure of ownership or control of property owned by U.S. citizens or by entities 50% owned by U.S. citizens;

(b) repudiation of agreements with such U.S. citizens or entities; and

(c) discriminatory taxes or other exactions, or restrictive maintenance or operational conditions, or other actions which have the effect of nationalizing or seizing ownership or control of property.

The statute does not require that compensation be paid, or even that a firm agreement be concluded, within the six-month period. It does require that “appropriate steps” be undertaken within that period. The suspension is mandatory and may not

be waived by the President, but the Executive Branch makes the determination whether “appropriate steps” are being taken. Appropriate steps could include good faith negotiations, international arbitration, or even local judicial remedies when those remedies are adequate and sufficiently speedy. The U.S. investor would not be expected to exhaust local judicial remedies that are manifestly inadequate.

The Adair-Hickenlooper Amendment applies to assistance under the FAA or any other Act, including Title I of PL 480. However, by express statutory exception, the amendment does not apply to famine or disaster relief, the Export-Import Bank, Peace Corps, or programs under the Mutual Educational and Cultural Exchange Act. It includes military assistance.

The FAA further provides that no assistance shall be provided to governments indebted to U.S. citizens in certain circumstances, such as where available legal remedies have been exhausted or where the debt is not denied by the government, provided the President does not find such action contrary to the national security (Section 620(c), FAA).

No monetary assistance is to be provided under the FAA for use to compensate owners for expropriated or nationalized property. If the President determines that such assistance has been used by the government for such purpose, no further assistance shall be furnished to such government until appropriate reimbursement is made to the United States (Section 620(g), FAA).

2. The IDB—Section 15(c) of the Inter-American Development Bank Act requires the United States to veto any loan from the Bank’s Fund for Special Operations for any activity in a country during any period for which assistance has been suspended under Section 620(e)(1) of the FAA.

3. IBRD—There are no U.S. statutory requirements concerning IBRD loans in these circumstances, but the IBRD itself has adopted a policy of withholding loans in situation in which uncompensated expropriations have taken place and reasonable steps are not being taken toward the solution of the problem.

C. Other Specific Considerations

1. Investment Guaranties. Because of our great exposure under investment guaranties in force in Chile, the handling of the expropriation issue will be of great importance to the viability of the guaranty program and of OPIC itself, and to the promotion of private investment as a means of development.

2. Chilean Debt to the USG. The Chilean position on its debt to the USG, which exceeds $983 million, will be affected as the expropriation action-reaction scenario unfolds. Of this, $176 million is owed to Eximbank by the copper companies.

3. Vulnerability of the Chilean Economy to U.S. Measures and to Decline in Foreign Investment. Pending the findings of a detailed study now under way, a summary judgment here is that the range of measures available to the U.S. for reprisal against Chile and the presumed drop in investment from non-U.S. sources that would result from expropriation would create serious problems for the Chilean economy but would not cripple it.

4. Resort to Soviet and Communist Chinese Assistance. Although Allende has professed a desire not to become dependent on any single foreign power, and although the USSR and Communist China would probably be very reluctant to assume large assistance burdens, the chances are considerably better than even that, in response to U.S. retaliatory measures, Chile would draw closer to the Communist powers.

5. Internal Political Effects. Given (a) the widespread acceptance within the Chilean public of expropriation of foreign properties, especially copper companies, as a legitimate national act; (b) probable indifference by many non-Marxists to the principle of compensation; and (c) probable GOC “fuzzing-up” of the compensation question, the Allende Government would have a good base for rallying popular support to itself in the face of U.S. counteraction. The degree of success

would depend in considerable part on the nature and pace of other internal measures Allende would have instituted prior to expropriation and on the circumstances under which the U.S.-Chilean confrontation on expropriation had occurred.

6. Effects on other U.S. Holdings in Chile. The prospects for any significant U.S. property in Chile are not bright in any event, but the application by the USG of retaliatory measures against the initial expropriations would almost certainly accelerate the pace of other takings.

7. Effects on U.S. Holdings in Latin America. The application or withholding of Hickenlooper and other sanctions would probably not be determining with respect to the actions of other governments toward U.S. properties. The chances are that each government would be guided by its own economic and political needs.

8. Political Effects in Latin America. Latin American reaction will depend greatly on how the Chilean situation evolves and on the circumstances existing at the time the U.S. makes its moves.

Strong U.S. initiatives to apply Hickenlooper Amendment provisions to Chile would touch widespread sensitivities in Latin America and arouse in some sectors considerable sympathy for Chile. Many Latin Americans believe that the application of the Hickenlooper Amendment would be in violation of Article 19 of the Charter of the OAS, which prohibits member states from carrying out measures of economic coercion against other members. However, the Marxist and avowedly anti-U.S. nature of the Chilean regime would dilute sympathy for that country in comparison with the potential in the case of a country such as Peru.

If the U.S. approach were one of restraint, showing that Chile was forcing us into the measures we were taking, there would be significantly less adverse political reaction to us throughout Latin America.

On the other hand, failure by the U.S. to act would be interpreted in other Latin American sectors, especially among conservatives, as a sign of weakness.

9. Effects on our posture toward Peru. Application of the Hickenlooper Amendment to Chile could, depending on circumstances at the time, raise questions on our not having applied it to Peru, and call for some justification.

III. Options

Option 1. (a) Immediately upon expropriation action by Chile, overtly suspend assistance, but without formally invoking the Hickenlooper Amendment. This would stop draw-downs of AID loans and grants, suspend PL 480 and military assistance, and require vetos of any loan from the IDB Fund for Special Operations. In addition, we would bar Eximbank and FCIA export credit coverage, seek to have World Bank family institutions restrict their loans, seek to prevent IDB from making non-FSO loans, withdraw the AID Mission and Milgrp, and reduce the diplomatic mission to minimum strength.

(b) Formally apply Hickenlooper Amendment, without waiting out the six months period, as soon as plausible grounds are available for concluding that a reasonable period of time has elapsed without the GOC taking “appropriate steps” to discharge international obligations.

Advantages.

—It would give the most forceful signal on the seriousness of the consequences of expropriation actions.

—It would stop at an early date disbursements of uncommitted balances in the assistance pipeline—now $19 million for AID and $41 million for Eximbank.

Disadvantages.

—It would coalesce support for the Allende regime in Chile and elsewhere in Latin America. (Option 1(b) would intensify the anti-U.S. reaction without providing an argument credible to the Latin Americans that the U.S. action was required by law.)

—It would destroy chances for obtaining compensation of expropriated properties and increase exposure of U.S. Treasury under investment guaranty agreements; stimulate Chile to make further uncompensated expropriations, and invite repudiation of the $983 million debt owed to the U.S. Government.

—It would prejudice the U.S. position that suspension of assistance is not economic coercion within the meaning of Article 19 of the OAS Charter.

—It would create serious difficulties for us with the IDB and IBRD, which would probably regard our action as premature and unreasonable.

Option 2. Refrain from applying the Hickenlooper Amendment until the six-month period runs out; take no initiatives to talk with the Chilean Government nor to give guidance to U.S. companies affected. During this period we would continue and intensify present economic restrictions on Chile, approaching as rapidly as can be done in a non-overt way the de facto application of Hickenlooper Amendment sanctions.

Advantages.

—It would avoid reactions based on prematurity of U.S. action under Option 1, and allow time for clarification of the GOC position which could reinforce the U.S. position as the injured party.

—It would afford U.S. investors some time to work out settlements that would cut their losses and those of the U.S. Treasury.

—It would minimize U.S. involvement in complex expropriation compensation negotiations.

Disadvantages.

—Deferral of sanctions would permit pipeline funds to continue to flow to Chile.

—Application of sanctions in six months, particularly if done overtly at one point in time, would permit the GOC to use U.S. “intervention” as an issue to rally support at home and elsewhere in Latin America.

—Failure to encourage negotiated settlements or recourse to third party settlement would prejudice the interests of U.S. investors and the U.S. Treasury and weaken U.S. arguments that the application of sanctions does not violate Article 19 of the OAS Charter.

Option 3. Use the six months waiting period provided in the Hickenlooper Amendment to try to work out expropriation settlements, taking the approach that ambiguities in compensation provisions are worth exploration in direct talks with the Chilean Government. We would take steps to insure that the Chilean Government had as soon as possible a clear understanding of our position on expropriation and compensation. We would meanwhile urge the U.S. companies affected to exhaust all meaningful local remedies. We would continue to apply but not go beyond the present economic restrictions against Chile. We would be prepared to consider relaxation of these restrictions, depending on Chilean responses and the outlook for obtaining results favorable to us. (This would require modification of present guidance on U.S. policy toward Chile.)

Advantages.

—It would maximize the possibility of avoiding a confrontation which would enable the Allende regime to gain support at home and elsewhere.

—It would be consonant with a cool but correct posture toward Chile.

—It would strengthen the U.S. legal basis for application of sanctions by putting the GOC in the position of rejecting our proposals for settlement.

Disadvantages.

—It would continue disbursements under existing obligations.

—It would defer a clear U.S. denunciation of the Allende regime's actions on expropriation.

Option 4. The same as Option 3, but looking to the possibility of not applying the Hickenlooper Amendment so long as plausible grounds existed for delay. Investors would be encouraged to exhaust local remedies. Hickenlooper sanctions might be applied gradually with as little publicity as possible to avoid confrontation on a set date.

Advantages.

—It would permit maximum flexibility for the U.S. to pursue its basic objective of maintaining a correct public posture and limiting economic support for the Allende regime.

—It would avoid a direct confrontation which could disrupt the inter-American system.

—It would maximize the legal justification and support of the actions which the U.S. may take.

Disadvantages.

—It would delay a clear U.S. denunciation of the Allende regime's actions.

—It could incur Congressional charges that the Executive branch ignores the Hickenlooper Amendment and is coddling a Communist regime.

—It would protract the flow of assistance.