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# AIRGRAM

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HANDLING INDICATOR

TO DEPARTMENT OF STATE

INFO : AmEmbassy RIO DE JANEIRO

FROM AmEmbassy ASUNCION

DATE: February 16, 1966

SUBJECT: Analysis of the Guairá Falls Dispute

REF : Our A-167 of October 13, 1963; A-188 of October 31, 1965; A-219 of December 1, 1965; A-241 of December 19, 1965; Embtel 259 of January 29, 1966; Embtel 262 of January 31, 1966.

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### A. Introduction

The above-referenced A-167 from 1963 gives considerable background on the origins of the Guairá Falls dispute. The 1965 airgrams transmitted copies of notes exchanged during the recent resurgence of this issue, and the referenced telegrams provide the latest developments in which the dispute appears to have taken a new and more serious turn.

Enclosure:

Map of Guairá

GROUP 3

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In 1962-63, the dispute flared up, prompting our A-167, because the Brazilian press had announced plans to develop the hydroelectric potential of the falls. At present, the principal issue is the presence of Brazilian troops in territory that the Paraguayans regard as still uncharted. The most recent development is the Paraguayan report that these troops have been reinforced and that the Brazilians are now building a road into the disputed area. This development is especially serious in that the Paraguayans themselves have sent a new frontier detachment of over 150 men and officers to Guairá. Clearly, as the number of troops increases, the possibilities of an incident also increase.

Although the boundary with Brazil was established by a treaty in 1872 and by a Mixed Boundary Commission in 1872-74, there were ambiguities as to details. A Protocol signed in 1930 empowered a new Mixed Border Commission to put intermediate markers in the Guairá area. Two principal questions emerged. One, more directly related to the hydroelectric problem, was whether the Guairá Falls themselves (Salto de las Siete Caídas) belonged to Brazil or to Paraguay and Brazil in condominium. The other, more pertinent to the current dispute over the Brazilian troops, was whether the boundary along the Mbaracayú mountain range, which runs west from Guairá, followed the northern or the southern ridge just before the falls. The Brazilians claim that the southern ridge is the boundary and their troops have penetrated the zone between these two parallel ridges. Since the 1872 Treaty said that the east-west border should follow the highest part of the Mbaracayú range, and since the Paraguayans believe the northern ridge to be the tallest, Paraguay has protested this movement of Brazilian troops.

Below, the reporting officer has tried to analyze the principal issues involved in the dispute. This approach will hopefully provide useful background on the problems that remain to be resolved, as well as to suggest possible bases for a solution. The approach is not historical, and the above-referenced communications should be seen for further background on the case. In discussing the various aspects of the dispute, the writer has referred back to official documents whenever possible. Various treatises have been written by Paraguayans about Guairá, many of which claim the whole area for Paraguay. The following is intended to represent strictly the official government-to-government points of view.

B. Map of the Area: Explanation

It is useful to refer to the enclosed map for a visual representation of the present dispute. The two dotted lines from the Paraná River west represent what is believed to be the two parallel ridges. The solid line crossing the northern ridge is the approximate location of the road the Brazilian soldiers have begun to construct. The solid part of this line represents completed construction, while the dotted extension represents a pioneer road still in the

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early construction stage. It is interesting to note that the Paraguayan airstrip below the southern ridge also appears to cross into the disputed territory. (This picture was taken by an IAGS contractor about a year ago. At that time, no road construction was in evidence. The lines on the picture have been drawn by the Embassy's Defense Attaché.)

One should also note from this picture the peculiar structure of the Seven Falls, which lie in a line north-south and fall from east to west. The southern ridge of the Mbaracayá hits the falls exactly in front of the fifth fall. These two ridges, in turn, are mere outcroppings, joining at a point some 20 kilometers from the falls.

C. IssuesWas the boundary definitively established in 1874?

There can be little doubt that the boundary lines, as drawn by the Mixed Boundary Commission in 1872-74, established the juncture of the Mbaracayá range and the falls at a point near the fifth fall. This is stated quite explicitly in the 16th Act of the first Border Commission of October 19, 1874. Such a juncture would seem to favor the Brazilian contention that the boundary follows the southern ridge of the Mbaracayá at the falls. But one can also draw a line from the end of the northern ridge to the fifth fall, and the text of the 16th Act does not appear to be explicit enough to discount this. (The text says that the line goes in the "general direction" of so many degrees for so many kilometers until it reaches the "fifth and most important" of the Seven Falls.) To be certain where the boundary lies, one would need a detailed map. Unfortunately, the Embassy does not have copies of the official maps which were drawn in 1874 and signed by the Paraguayan and Brazilian members of the boundary commission. It would appear, however, that the official map is unfavorable to the Paraguayans since they insist quite strongly in their latest note (Note #712 of December 14, pp. 14-18) that treaties take precedence over acts and acts over maps when a boundary is in question.

The Brazilians, of course, insist that the work of the commission in 1872-74 has definitively established the border.

The question reopened in 1930?

In reply to the Brazilian argument that the border was established by the Boundary Commission of 1872-74, the Paraguayans turn to another document; the Protocol of 1930. The primary purpose of this Protocol was to create a Boundary Commission to carry out the terms of a Complementary Boundary Treaty signed in 1927, which makes no mention of the Guairá Falls area. But the Protocol also empowered the new Boundary Commission to repair old boundary markers and to

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place intermediate markers along the Mbaracayá to Guairá. These new markers were to be placed so that they would be directly visible one from the other. Although the Protocol adds that the lines are to be drawn in accordance with the 1872 Treaty and with the final act of the 1872-74 Border Commission, the Paraguayans hold that it has essentially reopened the border question.

The acts of the Boundary Commission from 1872-74 established only one official marker along the Mbaracayá; that of Ybicuf, where the range joins the Amambay mountains. No marker was placed at the falls themselves since they were considered a "natural boundary". Hence, the Paraguayans contend that the entire border along the Mbaracayá from Ybicuf to the falls - 135 kilometers - was not effectively demarcated until the new Commission began its work. They chide the Brazilians for claiming that the border has been completely demarcated since 1874 when the reconstituted Boundary Commission has laid some 341 new markers from Ybicuf to the point where the range splits just before the falls.

The Paraguayans use the case of the 1934 markers (See our A-167, pp. 12-14) to buttress their argument that the 1930 Protocol reopened the border question. This marker, constructed by the new Commission as an "observation post," lies at the foot of the southern ridge of the Mbaracayá. Although Brazil wished to have an official boundary marker established in this area, the Paraguayans refused to accept the idea until scientific observations could be made. The Paraguayans thus established for the record at the beginning of the work of the new Commission that they at least considered the boundary as still undetermined.

Where is the cumbre?

The Treaty of 1872 definitely states that the border lies along the cumbre, or the highest part, of the Mbaracayá. The Paraguayans claim that the northern ridge is the cumbre and should hence be the border. This claim is based on the fact that the most recent measurements of the new Boundary Commission show that the three high points in the northern ridge are higher on the average than the three highest points in the southern. (See our A-167, pp. 15-16) However, the highest point in either ridge is in the southern, and the southern ridge has more high points in total than the ridge to the north. There might, therefore, be a case for arguing that the cumbre is the southern ridge even on the basis of the latest measurements.

Another factor complicating the issue is that of the watershed. The Brazilians seem to believe that the watershed is along the southern ridge which, if true, (and assuming a watershed can be established at this point), would be another argument in favor of the southern ridge as the cumbre. (See GOB Note #310 of October 29, 1965, paragraph 15, quote from the 8th Act of the new Commission.)

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Do the falls themselves belong to Brazil?

The Treaty of 1872 is indefinite on this point, stating simply that the boundary goes up the Paraná River to the Salto Grande and then from the Salto Grande across the Mbaracayá. Since the Paraguayans insist on the primacy of the treaty, it is interesting to note that the wording "salto grande" seems to imply "fifth fall", which leaves open the possibility of awarding at least the first four falls exclusively to Brazil on the basis of the treaty alone. Nevertheless, one can argue, as most Paraguayan writers do, that "Salto Grande" is a generic term for the falls as a whole. In addition, even if the fifth fall is accepted as the boundary, a straight line drawn from the foot of the northern ridge (assuming the northern is deemed the cumbre) to the crest of the fifth fall would cut across the four northern falls rather than leaving exclusively to Brazil.

If one turns from the Treaty to the acts of the 1872-74 Boundary Commission, it is clear that the border was intended to be at the fifth fall. But even these acts do not solve the question of whether this line was to go all the way to the crest of the fall or to some point in front of the fall. Although the official maps of the Boundary Commission would elucidate this matter if drawn in enough detail, they could well be ambiguous, especially since the Brazilians emphasize the acts rather than the maps of 1872-74 in defending their idea that the boundary ends in front of the falls. (While the maps may solve the question of which ridge of the Mbaracayá was considered the boundary in 1874, it would require more detail to determine the exact terminus of the line at the falls.) The view of the 1872-74 Commission that the falls themselves constitute a "natural boundary marker" is a possible argument against the Brazilian contention that the line stops short in front of the falls.

It is worth considering the Brazilian position in more detail. In their recent Note #310, the Brazilians hold that the "extreme eastern" point of the Paraguayan frontier is on the right bank of the river, exactly in the area of the 1934 observation post. They cite the 16th and 17th Acts of the 1872-74 Boundary Commission in support of this position. (See paragraph 7 of the note) However, this is an interpretation of the 16th and 17th Acts and is not specifically stated in these documents. Indeed, the Brazilians would appear to have taken a right-bank position as a bargaining point since, in the 1934 dispute over the observation post, they apparently gave the Paraguayans at least to the thalweg, or the deepest part of the river before the falls. (See GOP Note #712, pp. 18-19)

This question of the thalweg is an interesting one. (It is treated in more detail in our A-167, pp. 9-10). It appears that the Brazilians originally tried to have the right bank of the river established as the border in the 1872 Treaty but compromised with the wording that it should follow the "cauce o canal." Although this wording is ambiguous, it can be argued from the peculiar structure

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of the falls - falling from the east into a north-south gorge - that the "canal" is the gorge itself and not the falls, which would thus lie to the east in Brazilian territory. This would mean that, on the basis of the Treaty itself (which the Paraguayans regard as the primary document in the case), the falls belong to Brazil. Nevertheless, the Paraguayans could counter with the argument that the main channel should be followed right up to the falls themselves, or that the whole concept of channel or thalweg is inapplicable when a waterfall is reached.

What about hydroelectric development?

Hydroelectric development is undoubtedly the principal issue lying behind the Guairá dispute. The Paraguayans would like to have the border as far north as possible to strengthen their claim over the falls, while the Brazilians would like to have it stop on the right bank of the Paraná leaving the falls exclusively to Brazil. Although the principal point of contention in the recent exchange of notes has been the northern versus the southern ridge, with the Brazilian troops between, the Paraguayans developed an interesting argument in the exchange of 1962-63, prompted directly by the hydroelectric development issue. The argument was that, since Paraguay owns the right bank of the river at the falls, it has rights over the waterflow and condominium over use of the water resources. This argument could be used even if it is determined that the boundary stops at the right bank. (See GOP Note #368 of June 10, 1963, sent as an enclosure to our A-5 of July 3, 1963.)

Interestingly, the Brazilians are already diverting water around the falls just to the south of the seventh fall to provide electricity for the town of Puerto Guairá. This was done apparently without GOP protest. The project which caused the Guairá dispute to arise in 1962 called for a major diversion to the east of the falls, returning the water to the river at a point some 25 kilometers below the falls. (See our A-167, p. 19) It is worth noting, however, that another proposal was to develop electricity by building a dam below the falls across the Paraná itself. Since the river is the boundary south of the falls, this proposal would necessitate a condominium approach.

D. Comment:Who has the better case?

The drafting officer is not a lawyer and does not know the legal practices followed in boundary disputes. Without a thorough background in international law, it is difficult to judge, for example, whether a treaty should take precedence over the work of a commission created by that treaty after the work of the commission has been approved by both governments. Likewise, it is difficult

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to judge the degree to which a protocol such as that of 1930 can reopen a question supposedly solved over 80 years before, especially when the protocol specifies that the earlier work is to be followed. Other questions of a more technical nature, such as how to determine the highest part of a mountain range or how to treat the problems of thalweg and condominium, also require a knowledge of precedents from international law.

Another problem is that of discovering exactly what was intended by those signing the 1872 Treaty, what was determined by the 1872-74 Commission, and what have been the guiding principles and decisions of the 1930 Commission since it began its work. The documents that have been made available thus far are incomplete. It would be most interesting, as suggested above, to have the official maps signed by the members of the Mixed Commission in 1874. In addition, it would be particularly instructive to have the last Act of the new Commission and whatever other information might be available on its work in 1962-63, when the question of the two parallel ridges came to a head. From the latest GOP note, it appears that completion and approval of the work on the final stretch of the Mbaracayá border has been delayed by the "poor health" of the Brazilian First Commissioner. (Note #712, p. 30) The Brazilians claim, however, that the work stopped because the Paraguayan commissioners "did not want to finish 19 markers already constructed, nor to agree to the construction of 12 other markers already planned." (Note #310, paragraph 9)

Nevertheless, with these qualifications in mind, the reporting officer would offer a layman's opinion that the Brazilians probably have the stronger case, both as to the Mbaracayá ridges and to the falls. The Paraguayans might argue that earlier treaties gave the Guairá area to Paraguay and that they were under duress in 1872, having just lost the Triple Alliance War (this last point is suggested in the GOP's Note #712, but the GOP has based its case on the 1872 treaty as it stands and this would certainly be the first point of reference in any legal judgment of the case. To be sure, the treaty and subsequent acts are ambiguous. In addition, the 1930 Protocol did reopen the boundary question in a sense, whether or not the Brazilians admit it. But the weight of past tradition seems to be on the side of at least most of what the Brazilians claim.

To the extent that actual possession of the falls could serve as an argument in favor of ownership, the Brazilians also appear to have the stronger case. They are already using the falls for electricity, they have a sizeable town, Porto Guairá, nearby and they have the only accessible road presently leading to the area. (In addition, it has been reported that most of the people in the territory conceded to Paraguay are Brazilians and use Brazilian currency.)

But the fact that Brazil has the stronger case does not mean that it has the only case. To most Paraguayans, this issue is vitally important. The Brazilians do not appear to have given it the attention it is due. Their notes have an unsympathetic, unmagnanimous tone, and they have to all appearances deliberately

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provoked the Paraguayans by moving troops and building a road into the disputed area. An effort toward conciliation by the Brazilians would appear to be in order, especially given the principle that larger nations should be forthcoming in disputes with their smaller and less powerful neighbors. (Ref: CA-6394, December 20, 1965)

Need for a comprehensive solution

It can be readily seen from the above that this dispute is a complicated one. A comprehensive solution is needed which would settle once and for all the questions of the mountain ridges, ownership of the falls themselves, and hydroelectric rights. Given the highly charged feelings on the Paraguayan side, it seems doubtful that the two nations will be able to solve the dispute on a bilateral basis. Perhaps a temporary settlement can be made, with the Brazilians withdrawing their troops, but this would merely postpone final resolution of the issues. For that reason, and since there are various legal questions involved, it might well be advisable to bring the whole matter before an international court. Of course, the Paraguayans could always refuse to accept the decision of such a court, and well might, if it went against them. But the very fact that an objective international body had so decided would tend in the long run to erode the Paraguayan sensitivity to what they deem the "imperialism" of Brazil.

Although it would be impertinent to anticipate the solution to the dispute, one suggestion which may be worth considering vis-a-vis the cumbre question is to sidestep the issue of the two parallel ridges altogether by drawing the boundary from the last high point just before the split, which is higher than any subsequent point in the two ridges, direct to the fifth fall. (If our indication of the two ridges on the enclosed map is correct, then such a line might also sidestep the problem of the Brazilian road and the Paraguayan airstrip by cutting neatly between them.) With regard to the falls themselves, it should be noted that, even if they are awarded exclusively to Brazil, there would seem to be some justice to the Paraguayan claim for a voice in their development. One solution to this question might be to insure Paraguay an option of partial ownership, up to a given percent, in any hydroelectric plant to be built in the area.

For the Ambassador



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