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AIRGRAM

ADIR-PERU

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A-135

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NO.

HANDLING INDICATOR

TO : DEPARTMENT OF STATE

INFO : Ecuador Desk Officer, ARA
Amconsul GUAYAQUIL
Amembassy SANTIAGO, BUENOS AIRES, RIO DE JANEIRO

FROM : Amembassy QUITO DATE: September 7, 1963

SUBJECT : Ecuador's Position of Peruvian Boundary Question

REF : Embtels 110 and 152.

Return to H

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On August 31 the Ecuadorean Foreign Minister, Neftali PONCE Miranda, handed Ambassador Bernbaum an official Memorandum setting forth Ecuador's present position on the Ecuador-Peru boundary problem. The Memorandum, which was addressed to each of the states guaranteeing the Protocol of Rio de Janeiro of January 29, 1942, referred to the recent resolution by the Peruvian Chamber of Deputies calling for a unilateral placing of boundary markers in the so-far undemarcated Zamora-Santiago region. It states that faced with this Peruvian resolution, Ecuador is obliged to point out to the Guarantor States that any unilateral action by Peru would be completely arbitrary, illegal, and without any validity in establishing the true boundary. The Memorandum refers to the geographic error (lack of a watershed between the Zamora and Santiago Rivers)* contained in the Rio Protocol with respect to this zone, stating that because of this error the Protocol cannot be enforced in the Zamora-Santiago region. It points out that because of this error the work of establishing the boundary was interrupted 15 years ago and that nothing has happened since to justify resumption at this time. The Memorandum reiterates Ecuador's position that the Rio Protocol as a whole violates international law and that the entire question should be submitted to juridical procedures to determine its invalidity. Peru, it points out, has shown no willingness to submit the matter to juridical determination as suggested by President Arosemena before the Council of the Organization of

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see A6 under Unofficial Translation

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FORM 4-62 DS-323

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American States on July 24, 1962. The Memorandum quotes the Ecuadorean Foreign Minister's public statement of August 17, 1963, (not a note to Peru as stated in Embtel 152) protesting any unilateral placement of boundary markers and insisting the geographical error in the Protocol leaves it as unenforceable now as it was 15 years ago. (See Embtel 110)

On September 1, the Junta published its "political plan" for Ecuador outlining its proposals for a new social and economic structure of the nation. In this plan the Junta, in a rather mild and matter-of-fact tone, proclaimed the question of Ecuador's territory as one of primary concern to the Government.

COMMENT: The Memorandum handed the Ambassador was strong, yet not inflammatory in tone. It appears to be an unambiguous statement of Ecuador's position and a repeated appeal that the question of the Protocol be submitted to a juridical solution. This Memorandum, however, plus the statement concerning the territorial question in the Junta's "master-plan" for Ecuador, indicate the degree to which the boundary question is an active and potentially explosive issue. The Embassy has attempted to discourage continued public discussion of the boundary question, but the recent Peruvian resolution and the nationalistic fervor engendered by Ecuador's celebration last week of the 400th anniversary of the Audiencia de Quito (see Embtel 143) have again brought the issue to public consciousness.

Although Ecuador is ready to submit the problem to an international juridical solution, it is implicit that it would expect and strive for a decision of "nullity", thus allowing Ecuador to start over from the situation existing before the Peruvian military action in 1941-42, the only "just" solution really acceptable to Ecuador. This is a step better than VELASCO's unilateral declaration of "nullity", but does not appear to go so far as accepting minor revision of the Protocol, whether as the result of a decision by an international body or of bilateral agreement, to allow final determination of the boundary in the undemarcated sector. Although the Junta is pinning its legal argument more on the inexecutability of the Protocol because of the geographical

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"error", the alleged "criminal aggression" by Peru is still in the back of its mind as the principal emotional and political basis for invalidity of the 1942 Rio Protocol.

BERNBAUM
07

Enclosure:

Text and unofficial translation of Ecuadorean Memorandum.

* They are in effect the same river, the Zamora becoming the Santiago at the village of La Union where the Rio Namangoza joins the main stream.

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M E M O R A N D U MEnclosure to A-135
from Quito.UNOFFICIAL TRANSLATION

The Minister of Foreign Relations of Ecuador considers it necessary to point out to the Foreign Ministries of the Guarantor States of the Protocol of January 29, 1942, the following points:

2. The Chamber of Deputies of Peru, in its session of August 16, 1963, approved a motion to the effect that Peru, inviting the Guarantor States to witness the operation, proceed unilaterally to erect boundary markers in the Zamora-Santiago region.
3. Faced with this attitude on the part of the Peruvian Chamber of Deputies, the Minister of Foreign Relations of Ecuador hastens to make clear to the chancelleries of the Guarantor States of the Protocol that any unilateral placement of boundary markers by Peru would be an act absolutely arbitrary, lacking any validity in determining the true boundary, and without legality according to the norms of international law.
4. The Foreign Ministries of the Guarantor States are well aware of the reasons for the interruption of the work of demarcating the boundary 15 years ago. These reasons have not disappeared, nor has Peru, during all of this period, been able to refute them. Because of this, it is obvious that Ecuador has had to oppose at all times any attempt to enforce the Protocol in this area, with respect to which the Protocol contains an essential geographic error.
5. The Memorandum presented to the Guarantor States on July 29, 1959, by Ecuador through its Ambassador to Rio de Janeiro - who was received by the representatives of the Guarantors - established clearly the impossibility of continuing the attempt to demarcate a boundary in the Zamora-Santiago sector: Ecuador reiterated that, because of factors imposed by nature, it was impossible to enforce the Protocol of January 29, 1942, in the Zamora-Santiago region since no watershed existed between the Zamora and Santiago Rivers, or to continue the demarcation where there was no valid agreed line.
6. The Ecuadorean Government has clearly expressed its point of view with respect to this still-unsettled problem with Peru. ^{Ecuador?} On July 24, 1962, the constitutional President of Peru, [?] in a formal speech before the Council of the Organization of American States in Washington, stated:

"It is the law in the Americas that all existing problems, or those which may arise, in the Continent must be resolved by peaceful and juridical means. A

serious problem exists between Ecuador and Peru. The Protocol of January 29, 1942, is absolutely incompatible with the fundamental principles and norms of American international law. Ecuador is ready to submit the dispute with Peru to one of the instruments for peaceful settlement of international controversies contained in inter-American agreements now in force. Continental solidarity requires that a just solution to this dispute be found, which would permit the two countries to begin a fruitful cooperation and intimate relationship for the common good."

7. As can be seen, Ecuador has expressed before the Americas its readiness to seek a peaceful and juridical solution to the problem. To date, there has not been evidenced a similar readiness on the part of Peru.

8. Respect for treaties does not exclude the possibility that a treaty may violate international law, and that, for that reason, a juridical proceeding may establish its invalidity. It is necessary to distinguish between the revision of a treaty and the nullification of a treaty: revision may be achieved through the mutual agreement of parties to the treaty, but nullification does not necessarily depend upon consent of all parties, if the nullification is a consequence of the violation of fundamental norms of law. For this reason, nullification, as the result of a juridical process imposed by international law, far from injuring the juridical conscience of the Americas, would exalt and strengthen it.

9. In conformity with this criteria, the Foreign Ministry of Ecuador, having knowledge of the motion approved by the Chamber of Deputies of Peru concerning the proposed unilateral demarcation of the boundary, made a public declaration on August 17, 1963, containing the following points:

"As the Protocol of 1942 violates international law, it must be subject to juridical procedures for a determination of its invalidity. Until such procedures are carried out, it is obvious that Ecuador must oppose the proposed execution of the Protocol, particularly in a sector with respect to which the Protocol contains an essential error. The unilateral demarcation of the boundary proposed by the Chamber of Deputies of Peru would clearly be improper; since any demarcation having to be,

by its nature, a combined operation of both parties, this unilateral action would be without legality. Such action would be even more improper since, apart from the serious reasons maintained by Ecuador for the invalidity of the Protocol, it would be proposed that a boundary be demarcated in an area with respect to which the Protocol is unenforceable due to a geographical error contained in it because of the inexistence of a watershed between the Zamora and Santiago Rivers which itself establishes the physical inexistence of a boundary line. For this reason the work of establishing the boundary has been interrupted since 1948. Thus this problem was clearly defined 15 years ago.

Quito, August 31, 1963.

M E M O R A N D U MEnclosure to A-135
from Quito

El Ministerio de Relaciones Exteriores del Ecuador considera necesario hacer presente a las Ilustres Cancillerías de los Estados Garantes del Protocolo de 29 de enero de 1942 los siguientes puntos.

2. La Cámara de Diputados del Perú, en sesión de 16 de agosto de 1963, ha aprobado una moción en el sentido de que el Perú, invitando a los Estados Garantes para que se hagan presentes en la operación, proceda unilateralmente a la colocación de hitos en el sector Zamora-Santiago.
3. Ante semejante actitud de la Cámara de Diputados del Perú, el Ministerio de Relaciones Exteriores del Ecuador se apresura a poner de manifiesto ante las Ilustres Cancillerías de los Estados Garantes del Protocolo que cualquier erección unilateral de hitos de parte de aquel país sería un hecho absolutamente arbitrario, carente de valor demarcatorio y desprovisto de toda juridicidad, según las normas del Derecho Internacional.
4. Las Cancillerías de los Estados Garantes del Protocolo de 1942 conocen a cabalidad las razones por las cuales fué interrumpida la demarcación hace quince años. Esas razones no han desaparecido ni han podido a lo largo de todo este tiempo ser refutadas por el Perú. Y por ello es obvio que el Ecuador ha debido oponerse en todo momento a la pretendida ejecución del Protocolo en un sector respecto del cual el instrumento adolece de error geográfico esencial.
5. El Memorandum que presentó el Ecuador a los Estados Garantes el 29 de julio de 1959, por intermedio del Embajador en Rio de Janeiro - quien fué recibido en el seno de la Junta de Garantes - dejó perfectamente establecida la imposibilidad de proseguir la demarcación en el sector Zamora-Santiago. Reiteró el Ecuador que, por la naturaleza de las cosas, es imposible ejecutar el Protocolo de 29 de enero de 1942, en la zona afectada por la inexistencia del *divortium aquarum* entre el río Zamora y el río Santiago y proseguir la demarcación donde no hay línea válidamente acordada.

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6. El Gobierno ecuatoriano ha expuesto claramente su criterio, respecto al problema pendiente con el Perú. El día 24 de julio de 1962, el Presidente Constitucional del Ecuador, en discurso formal que pronunció en Washington, ante el Consejo de la Organización de los Estados Americanos, dijo:

"Es ley en América que todos los problemas que existan o se produzcan en el Continente deben ser resueltos por medios pacíficos y jurídicos. Entre el Ecuador y el Perú hay un grave problema pendiente. El Protocolo de 29 de enero de 1942 es absolutamente incompatible con los principios y normas fundamentales del Derecho Internacional Americano. El Ecuador se mantiene dispuesto a someter la cuestión con el Perú a uno de los medios de solución pacífica de las controversias internacionales consagrados en las convenciones interamericanas vigentes. La solidaridad continental exige que se dé a este litigio una solución justa, que permitiría que los dos países inicien una fecunda cooperación y estrecho intercambio para común beneficio."

7. Como se ve, el Ecuador expresó ante América su voluntad de buscar una solución pacífica y jurídica. De parte del Perú no ha habido todavía reacción alguna en ese sentido.

8. El respeto a los tratados no excluye la posibilidad de que un tratado resulte violatorio de la ley internacional, y de que se siga por lo tanto un procedimiento jurídico que llegue a establecer su invalidez. Es preciso distinguir entre la revisión de un tratado y la nulidad de un tratado: la revisión se hace por mutuo consentimiento de las Partes; pero la anulación no depende necesariamente de ese consentimiento, si es consecuencia de la violación de normas fundamentales del Derecho. Por eso, la nulidad, como resultado de un proceso jurídico impuesto por la ley internacional, lejos de herir la conciencia jurídica de América, la enaltece y consolida

9. En conformidad con ese criterio, la Cancillería del Ecuador, al tener conocimiento de la moción aprobada en la Cámara de Diputados del Perú, sobre la pretendida demarcación unilateral, entregó, con fecha 17 de agosto de 1963, un Comunicado en los siguientes términos:

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"Siendo como es el Protocolo de 1942 violatorio de la ley internacional tiene que estar sujeto al procedimiento jurídico que establezca su invalidez. En tanto no se cumpla ese procedimiento, es obvio que el Ecuador se ha de oponer a la pretendida ejecución del Protocolo, en un sector respecto del cual el instrumento adolece, además, de error esencial. La demarcación unilateral que pretende la Cámara de Diputados del Perú sería un claro contrasentido, pues debiendo toda demarcación ser, por su naturaleza, una operación conjunta de las Partes, esa acción unilateral carecería de juridicidad. Y el contrasentido sería tanto mayor cuanto que, aparte de las Partes, esa acción unilateral carecería de juridicidad. Y el contrasentido sería tanto mayor cuanto que, aparte de las graves causas para la invalidez que invoca el Ecuador, se pretendería, además, demarcar una zona en la cual el Protocolo resulto inejecutable por error geográfico esencial, a causa de la inexistencia de la divisoria de aguas entre el río Zamora y el río Santiago, que determina aún la inexistencia física de línea de frontera. Por eso se detuvo la obra demarcatoria desde 1948. Quedó así este problema firmemente establecido hace quince años."

Quito, a 31 de agosto de 1963.