



# 1942 Protocol of Rio de Janeiro

November 1994

LL File No. 1995-1020  
LRA-D-PUB-001204

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## 1942 PROTOCOL OF RIO DE JANEIRO

The dispute between Ecuador and Peru over their boundaries in the upper Amazon basin is perhaps the lengthiest unresolved controversy among the South American states. It has led to hostilities between the neighboring countries, threatened Inter-American solidarity of the Organization of American States (OAS) and still placed obligations on the United States, Argentina, Brazil and Chile as guarantors of a peace settlement concluded in 1942 but not yet completely executed.<sup>1</sup>

In the colonial period the territory east of the Andes between the Marañon and Caquetá Rivers was handed back and forth between the viceroys of Lima and Bogotá until, when independence came, its true jurisdictional status was in doubt. Disagreement over possession of this vast area was a factor leading to war between Colombia and Peru in 1829 in which Colombia gained the upper hand. Peru was prepared at that time to surrender the territory north of the Marañon; but, before the details could be worked out, Ecuador split off from Colombia and the balance of power tilted in favor of Peru.<sup>2</sup>

Ecuador's official claims to this territory east of the Andes, bounded by the Putumayo and Amazon Rivers, rested on three factors. The **first** was the discovery of the Amazon river in 1542 by an expedition organized in Quito and led by its governor, Gonzalo Pizarro. The **second** was the broad extent of the territory allotted in 1563 by Philip II to the province (*audiencia*) of Quito. The **third** was the 1829 Treaty of Guayaquil between the new states of New Granada and Peru, which, following the defeat of an invading Peruvian army at the battle of Tarqui, reaffirmed the boundary between the previous viceroalties. Ecuadorans assumed that this boundary, approved by Sucre and Bolivar, would be its boundary with Peru when it seceded from New Granada in 1830, and that Ecuador and Peru, therefore, would have as their natural limits the Marañon-Amazon river east of the Andes as far as the Brazilian border. Ecuador counted on its traditional friendship with New Granada (after 1863, Colombia) for agreement on a northern border near the Putumayo river, and left the eastern terminus of its claim to later negotiations with Brazil.<sup>3</sup>

The territorial claims of Peru were gradually developed after 1839 and became definite in 1851 when Peru and Brazil agreed on their present boundary north of the Amazon. This line was also accepted by Ecuador in its Treaty of 1904 with Brazil. As evidence of Peru's authority to make the agreement, a Royal Decree of July 15, 1802, was cited as giving jurisdiction to Peru over the vaguely defined former captaincy general of Mainas east of a north-south line at the upper limits of navigation of the northern tributaries of the Marañon-Amazon river.<sup>4</sup> The line followed the tops of the highest

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<sup>1</sup> W. Krieg, *Ecuadoran-Peruvian Rivalry in the Upper Amazon* (U.S. Department of State, 1986).

<sup>2</sup> *Id.*

<sup>3</sup> B. Wood, *Aggression and History 2* (Institute of Latin American Studies, Columbia University, 1978).

<sup>4</sup> *Id.*

peaks of the eastern spur of the Andes. There was an east-west discrepancy of 800 km. along the Andes south to north enclosed by the Marañon and Putumayo rivers, or rather more than 200,000 km.<sup>5</sup>

Two other smaller regions entered the dispute: part of the present Department of Tumbes north of the river of that same name; and the former region of Jaen, now the northern sector of the Department of Cajamarca. However, these regions had been settled by Peruvians, and Ecuador's main concern with them involved boundary rectifications, rather than serious claims to the whole territory, as was the case with the Oriente.<sup>6</sup>

The most relevant diplomatic events in a century of negotiations are as follows:

### **The Garcia-Herrera Treaty**

This Treaty, signed in 1890, is the largest compromise through direct negotiations between Ecuador and Peru. Peru had been gravely weakened by its crushing defeat and occupation by Chile in the War of the Pacific, 1879-1884; and in 1887 it accepted an Ecuadoran proposal that the boundary dispute be submitted to arbitration by the King of Spain.<sup>7</sup> Soon afterwards, however, Ecuador, fearful that the Peruvian Government's close connections with high officials in Madrid might result in an adverse legal decision, succeeded in persuading Peru to attempt a compromise settlement once more.<sup>8</sup> The resultant Garcia-Herrera Treaty, which allocated Ecuador access to the Marañon from the Santiago to the Pastaza River, was ratified in Quito after six weeks of emotional debate.<sup>9</sup>

The Peruvian Congress, however, adopted amendments that would have given Ecuador access to the Marañon River only at the mouth of the Santiago River and just to the east at Borja, a center of early missionary work by Jesuits from Quito. These changes, in turn, were rejected by Ecuador. The two parties, finding a friendly compromise impossible, renewed their arrangement for an arbitral decision.<sup>10</sup> This episode revealed the early strength of the Peruvian intent to exclude Ecuador from effective access to the Marañon River. The Santiago River is not a significant navigable stream like the Pastaza or the Napo Rivers; and, furthermore, its mouth is above the Manseriche Rapids, a formidable barrier with currents that are strong enough to prevent passage of barge cargoes. Peru, even at a time of maximum weakness following the Chilean conflict, was willing to make this small concession only.<sup>11</sup>

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<sup>5</sup> *Id.* at 3.

<sup>6</sup> *Id.*

<sup>7</sup> A. Guerra, *El Conflicto Limitrofe entre Ecuador y Peru* 23 (Santiago de Chile, Editorial Universitaria, 1965).

<sup>8</sup> *Id.* at 25.

<sup>9</sup> *Id.* at 23.

<sup>10</sup> *Id.* at 25.

<sup>11</sup> Wood, *supra* note 3, at 4.

## Arbitration by the King of Spain

The lengthy arbitral proceedings, interrupted by the Garcia-Herrera negotiations, culminated in a recommendation to the king of a line drawn by his Council of State in 1909. This line was somewhat less favorable to Ecuador than that of the Garcia-Herrera Treaty, but it still gave Ecuador co-dominium along the Marañon River from the Santiago to the Pastaza confluence. On the whole, the Council of State's recommendation was in favor of the Peruvian thesis based on the decree of 1802, although the line was well to the east of the Borja-Tulcan line that Peruvians had unilaterally derived from that decree.<sup>12</sup>

The risk of war, if the 1890 settlement was not followed, was fulfilled in 1910 when both countries mobilized their armies. The fighting was short because organized mediation by Argentina, Brazil and the United States stopped the state of war. However, the King of Spain decided that it would be unseemly if his decision should either give rise to armed conflict or should be rejected by either or both parties to the dispute, and he declined to issue any award.<sup>13</sup> However, the line traced by the Spanish Council of State was drawn only after the presentation of massive documentation by both countries and intensive research by Spanish jurists, and so was the closest approximation to a decision on the legal merits that was reached during the whole course of the dispute. This boundary line as traced by the Council of State has had a tremendous influence in shaping later political decisions. The first such influence was evident when Ecuador refused to accept the proposal of the mediators of 1910. Ecuador suggested that the question be submitted to the International Court of Justice at The Hague, probably because the Ecuadorans anticipated that Court would arrive at a decision not greatly different from that recommended by the Spanish Council of State.<sup>14</sup>

There was a long blank in diplomatic progress towards a settlement of the dispute after 1910. On July 6, 1936, however, Ecuador and Peru decided to carry on direct negotiations in Washington under the auspices of the Government of the United States in order to approve the basis of a subsequent arbitral process. In the 1936 Agreement, both countries agreed to maintain a *status quo* of their garrisons in the disputed territory until a final arbitral decision was reached. However, it was also understood that the existing positions of outposts would not be regarded as conferring any legal rights.<sup>15</sup>

Immediately after the signature of the 1936 Agreement, the Peruvian Foreign Minister, Alberto Ulloa, sent to the U.S. Government a description of his understanding of how the line of the *status quo* had to be traced. Ulloa in fact assigned Ecuador no posts, and Ecuador occupied no territory closer than about 100 km. from the Marañon River. The Ecuadoran Government did not publicly contest the accuracy of this *status quo* line of 1936. It became, along with the line of the Spanish Council of State, an important precedent in the position taken by external observers about the dispute.<sup>16</sup>

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<sup>12</sup> *Id.* See appended map.

<sup>13</sup> Guerra, *supra* note 7, at 4.

<sup>14</sup> *Id.* at 4.

<sup>15</sup> *Id.* at 5.

<sup>16</sup> *Id.*

## Hostilities and Protocol of Rio de Janeiro

The ineffective negotiations of 1936-38 in Washington were terminated by the Peruvian Government which proposed direct negotiations in Lima as had been secretly agreed upon in the spring of 1938 between President Alberto Enriquez Gallo of Ecuador and President Oscar Benavides of Peru. A new provisional Ecuadoran President, Manuel Maria Borrero, however, repudiated his predecessor's agreement and proposed instead that the dispute be arbitrated by the American states (except Peru) that had on October 1938 arrived to an arbitral solution of the Chaco dispute.<sup>17</sup> This proposal was frustrated not only by Peru's objections but also by Chile's refusal to participate. The situation was allowed to drift until Ecuador, concerned by reports of Peruvian troops concentrations along the border near the Pacific Ocean, appealed for aid to keep the peace. At that point, Argentina, Brazil and the United States joined in offering "their friendly services in furthering the prompt, equitable and final settlement of the dispute."<sup>18</sup>

Ecuador accepted this offer immediately, but Peru's response was qualified. It accepted not "friendly services" but only "good offices" which had not been tendered. The Peruvian response split the would-be mediators, whose separate rejoinders, while accepting the Peruvian position as providing a basis for further discussion, indicated differences of view about the nature of their original proposal.<sup>19</sup> These differences were not quickly composed, and the three mediators made no new proposals before brief fighting broke out along the Zarumilla River in July 1941. This renewed hostility resulted in a complete victory for the Peruvian army which occupied Ecuador's southwestern province of Oro. In addition, east of the Andes, Peruvian forces drove the Ecuadorans out of all their advanced positions along the rivers, including the principal base of Rocafuerte. The Peruvians advanced at some points as much as 200 km. beyond the 1936 *status quo* line.<sup>20</sup>

With Ecuadoran resistance at an end, the Peruvian forces accepted the mediators' suggestions for a cease fire. In October 1941, Peru accepted the terms of the Talara Truce boundary, which separated by some 25 km. the armed forces of the two countries in El Oro province. However, Peruvian troops remained in undisputed Ecuadoran territory. The mediators involved in urgent issues related to World War II took no effective measures to dislodge them. No action was taken before the entry into war by the United States and certain other American countries as a consequence of the Japanese attack on Pearl Harbor.<sup>21</sup>

At the Inter-American Conference held in Rio de Janeiro, amid the urgency of wartime consultations, the Ecuadoran delegation, faced with the choice between the termination of any further assistance from the mediators and the acceptance of known demands by Peru, signed the Protocol of

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<sup>17</sup> R. Zanabria Zamudio, *Luchas y Victorias por la Definición de una Frontera* 278 (Lima, Editorial Juridica, 1969).

<sup>18</sup> Guerra, *supra* note 7.

<sup>19</sup> *Id.* at 6.

<sup>20</sup> *Id.* at 28.

<sup>21</sup> Krieg, *supra* note 1, at 104.

Peace, Amity and Boundaries, on January 29, 1942, known as the Rio Protocol. The Protocol's boundary line, while bitterly resented by Ecuadorans because it deprived them of direct river access to the Marañon, did not deviate greatly from the 1936 *status quo* line.<sup>22</sup>

The Protocol was formally completed with the exchange of the instruments of ratification in Rio de Janeiro in April 1942. Markers have been placed to define the line over some 95% of the length of the designated boundary. A dispute has left a gap of about 75 km. in the demarcation of the border in the Santiago-Zamora region.

Afterwards, the official position of Ecuador was that the Protocol was null and void because it was signed under duress when Peruvian troops remained on Ecuadoran territory. However, the boundary as marked at such time, has in fact been generally observed by both countries since 1942. Discoveries of oil along the border, rather to the advantage of Ecuador than Peru, have greatly reduced the number and rigor of Ecuadoran demands for revision of the Protocol. However, the Ecuadoran Government has not resigned its claims nor is it likely to do so in the near future. In 1960, Ecuador's position was seriously weakened when the mediating governments, firmly rejecting a claim of nullity of the Protocol, stated that the Protocol is a valid instrument and should be complied with.<sup>23</sup>

The Protocol is a treaty in all but name. It affirmed the intent of the two governments to maintain peace and friendship and to abstain from any act capable of disturbing those relations. Peruvian troops were to withdraw behind the new boundary within 15 days after its signature. Troops would remain in their new positions until the boundary was completed, and Ecuador would exercise only civil jurisdiction over the area evacuated by Peru as in the demilitarized zone set up in the Talara Truce.<sup>24</sup>

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November 1994

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<sup>22</sup> Guerra, *supra* note 7, at 76.

<sup>23</sup> *Id.* at 7.

<sup>24</sup> Krieg, *supra* note 1, at 116.