United States Department of State

Washington, D.C. 20520

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ACTION MEMORANDUM
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DECL:OADR

NO OBJECTION
NATIONAL SECURITY COUNCIL

TO: The Secretary

THROUGH: G - Mr. Wirth

FROM: ARA - Alexander F. Watson
INM - Robert S. Gelbard
L - Michael J. Matheson, Acting

SUBJECT: Implementing the President's Decision on Colombia Peru Forcedown Policies

ISSUE FOR DECISION

Whether to proceed with the steps outlined below to renew, on an interim basis, the provision of aerial tracking assistance to Colombia and Peru and to improve the USG's international legal posture with respect to the provision of such assistance.

ESSENTIAL FACTORS

On June 21, the President decided to propose an amendment to the U.S. criminal statute that currently constrains the provision of aerial tracking assistance to the governments of Colombia and Peru. As currently drafted, the amendment would provide that it shall not be unlawful for foreign officials to damage or destroy an aircraft reasonably suspected to be involved in drugtrafficking, or for employees or agents of the United States to provide assistance for such actions, "if the President has determined that such actions are necessary because of the threat posed by drugtrafficking to the national security of that country and that the country has appropriate procedures in place to protect innocent aircraft."

The President also decided that upon enactment of this legislation, the United States would resume the provision of the assistance that has been cut off since May 1. The President explicitly did not condition the resumption of assistance on a solution to the international law problems associated with the USG's provision of such assistance. Instead, the plan he approved suggested that the USG would take steps to reduce the USG's exposure to criticism that such asssistance violates international law.

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We propose the following three-part strategy to renew U.S. assistance on an interim basis immediately and to improve our international posture following the change in U.S. domestic law. This memorandum does not discuss the legislative strategy for amending U.S. criminal law, as this issue is being handled by H and the White House.

Step I: Seek interim agreements with Colombia and Peru to resume assistance consistent with existing U.S. criminal law. The USG recently proposed agreements under which Colombia and Peru would agree not to use, directly or indirectly, U.S.-provided information for actions in which weapons were used against civil aircraft in service. Colombia indicated that it would sympathetically consider such a proposal only on an interim basis and only in the context of the USG undertaking to change its criminal law. There is similar basis for optimism that Peru might accept a similar interim agreement. The parties would terminate such agreements when the criminal law amendment is enacted. Assistant Secretary Gelbard has already notified Colombian and Peruvian authorities of the President's decision and raised the possibility of expeditiously securing the interim assurances we seek from their governments. Once obtained, we would resume assistance and intelligence-sharing as quickly as possible.

Step II: Encourage Colombia and Peru to improve their compliance with international law. Current Colombian and Peruvian policies are inconsistent with customary international law and Article 3(d) of the Chicago Convention. With respect to the Chicago Convention, the USG could attempt to advance a narrower interpretation of Article 3(d) or could encourage Peru and Colombia to take steps to bring their actions into compliance with the Convention. Article 89 states that the Convention's provisions shall not affect the freedom of action of a party that declares a state of national emergency and notifies the fact to the ICAO Council. Thus, Colombia and Peru could address the Chicago Convention problem without the need for gaining international acceptance of a new interpretation of Article 3(d) by declaring a state of national emergency and notifying the ICAO Council. While this option is not without risk (i.e., it might encourage other states to derogate from their Chicago Convention obligations by declaring national emergencies and could exacerbate international reaction to these policies), we could work with these governments to draft such a declaration to reflect the extraordinary threat drug trafficking poses to those governments and the procedures they are following to protect innocent aircraft. In our discussions for interim agreements, we will suggest, and offer assistance

in formulating, such declarations. In our consultations with major aviation powers described below, we will solicit their views on an Article 89 declaration.

Step III: Consult with potential partners on accepting the existence of a narrow exception to customary international law in the extraordinary circumstances faced by Colombia and Peru.

In light of the strong views of the international community for protecting civil aircraft and our own interests in discouraging the use of weapons against civil aircraft, we would attempt to persuade others of the existence of a narrow exception to customary international law. We would take the following steps:

- We would work with Colombia and Peru to determine Latin American support for a narrow exception in cases in which drug trafficking threatens the political institutions of a state and where the country imposes strict procedures to reduce the risk of attack against non-drug trafficking aircraft.

- Contemporaneously, the USG would consult with major aviation partners, in capitals, to explore support for a limited exception.

After evaluating the response from Latin America and the major aviation powers, we would determine whether and how to advance an initiative at ICAO. Simultaneously, we would explore with other Security Council members the possibility of UN Security Council action.

RECOMMENDATION

That you approve the general strategy outlined above to implement the President's June 21 forcedown decision.

Approve _____ Disapprove _____

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