

**REPORTS OF INTERNATIONAL  
ARBITRAL AWARDS**

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**RECUEIL DES SENTENCES  
ARBITRALES**

**Tacna-Arica question (Chile, Peru)**

4 March 1925

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XXIV.

TACNA—ARICA QUESTION <sup>1</sup>.

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**PARTIES:** Chile, Peru.

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**SPECIAL AGREEMENT:** July 20, 1922.

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**ARBITRATOR:** Calvin Coolidge (U.S.A.).

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**AWARD:** Washington, D.C., March 4, 1925.

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Powers of arbitrator.—Good offices.—Burden of proof of bad faith.—Discrimination.—Colonization policy.—Educational policy.—Expulsion of priests.—Boycott of labour.—Conscription policy.—Expulsion of citizens.—Conditions of plebiscite.—Payment of and security for indemnity.

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<sup>1</sup> For bibliography, index and tables, see Volume III.



### Special Agreement.

*Translation*<sup>1</sup>.

PROTOCOL OF ARBITRATION BETWEEN CHILE AND PERU, WITH SUPPLEMENTARY  
ACT, SIGNED AT WASHINGTON, JULY 20, 1922.

#### PROTOCOL OF ARBITRATION.

The following representatives of Chile and Peru: Don Carlos Aldunate and Don Luis Izquierdo, Envoys Extraordinary and Ministers Plenipotentiary of Chile on Special Mission, and Don Meliton F. Porrás and Don Hernán Velarde, Envoys Extraordinary and Ministers Plenipotentiary of Peru on Special Mission, having met together at Washington, D.C., at the invitation of the Government of the United States of America, to find a solution for the long-standing controversy in regard to the unfulfilled provisions of the Treaty of Peace of October 20, 1883, and, having exchanged their full powers, have agreed as follows:

#### *Article 1.*

It is established that the only difficulties in connection with the Treaty of Peace on which the two countries have not come to an agreement are the questions arising from the unfulfilled stipulations of Article 3 of the said Treaty.

#### *Article 2.*

The difficulties referred to in the previous Article shall be submitted to the arbitration of the President of the United States of America, who shall settle them after hearing both parties and taking into account the arguments and proofs put forward by them; there shall be no appeal against his decision.

The time-limits and procedure shall be settled by the arbitrator.

#### *Article 3.*

The present Protocol shall be submitted for the approval of the respective Governments and the ratifications shall be exchanged at Washington, D.C., by the diplomatic representatives of Chile and Peru within a period not exceeding three months.

In faith whereof the Plenipotentiaries have affixed to the present Protocol their signatures and seals.

Signed and sealed in two copies at Washington, D.C., this twentieth day of July, one thousand, nine hundred and twenty-two.

(L. S.) (Signed) CARLOS ALDUNATE.

(L. S.) (Signed) LUIS IZQUIERDO.

(L. S.) (Signed) M. F. PORRAS.

(L. S.) (Signed) HERNÁN VELARDE.

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<sup>1</sup> Translated by the Secretariat of the League of Nations.

## SUPPLEMENTARY ACT.

With a view to defining the scope of the arbitration provided for in Article 2 of the Protocol drawn up this day, the undersigned agree upon the following points:

(1) The following question, raised by Peru at the meeting of the Conference on May 27 last, shall be included in the arbitration:

With a view to determining in what manner effect should be given to the stipulations of Article 3 of the Treaty of Ancon, the question as to whether or no a plebiscite shall be held in the present circumstances shall be submitted to arbitration.

The Government of Chile may submit to the arbitrator all the arguments in its defence which it may think fit.

(2) In the event of a plebiscite being decided upon, the arbitrator shall be empowered to determine the conditions under which it shall be held.

(3) If the arbitrator decides against a plebiscite, the two parties shall, at the request of either, negotiate in regard to the situation arising from this decision.

In the interests of peace and good order it is understood that, in this eventuality, the present administrative organisation of the provinces shall not be disturbed pending an agreement in regard to the assignment of the territory.

(4) Should they be unable to reach an agreement, the two Governments shall have recourse to the good offices of the Government of the United States of America.

(5) The questions still at issue in regard to Tarata and Chilcaya shall also be submitted to arbitration, should the final decision in regard to the assignment of the territory referred to in Article 3 of the said Treaty render it necessary.

This Act forms an integral part of the Protocol to which it refers.

In faith whereof the Plenipotentiaries have affixed to the present instrument their signatures and seals.

Done in duplicate at Washington, D.C., this twentieth day of July, one thousand nine hundred and twenty-two.

(L. S.) (Signed) CARLOS ALDUNATE.

(L. S.) (Signed) LUIS IZQUIERDO.

(L. S.) (Signed) M. F. PORRAS.

(L. S.) (Signed) HERNAN VELARDE.

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**In the Matter of the Arbitration between the Republic of Chile and the Republic of Peru, with respect to the unfulfilled Provisions of the Treaty of Peace of October 20, 1883, under the Protocol and Supplementary Act signed at Washington July 20, 1922.**

OPINION AND AWARD OF THE ARBITRATOR.

In response to the invitation of the Government of the United States of America, representatives of the Republic of Chile and the Republic of Peru assembled in the City of Washington in May, 1922, for the purpose of arriving at a settlement with respect to the unfulfilled provisions of the Treaty of Peace of October 20, 1883. As a result of their deliberations, a Protocol of Arbitration was signed containing the following provisions:

*“Article 1.* It is herein recorded that the only difficulties arising out of the Treaty of Peace concerning which the two countries have not been able to reach an agreement, are the questions arising out of the unfulfilled provisions of Article 3 of said Treaty;

*“Article 2.* The difficulties to which the preceding article refers will be submitted to the arbitration of the President of the United States of America who shall decide them finally and without appeal, hearing both Parties and after due consideration of the arguments and evidence which they may adduce. The terms and procedure shall be determined by the Arbitrator.”

At the same time the following Supplementary Act was signed:

“For the purpose of defining the scope of the arbitration provided for in Article 2 of the Protocol subscribed upon this same date, the undersigned are agreed to leave on record the following points:

“1. Included in such arbitration is the following question, brought up by Peru in the session of the Conference of the 27th of May last:

‘In order to determine the manner in which the stipulations of Article 3 of the Treaty of Ancon shall be fulfilled, it is agreed to submit to arbitration the question whether, in the present circumstances, a plebiscite shall or shall not be held.’

The Government of Chile may submit to the Arbitrator such arguments in reply as may seem appropriate for its defence.

“2. In case the holding of the plebiscite should be declared in order, the Arbitrator is empowered to determine the conditions thereof.

“3. Should the Arbitrator decide that a plebiscite need not be held, both Parties, at the request of either of them shall discuss the situation brought about by such award.

“It is understood, in the interest of peace and good order, that in such an event and pending an agreement as to the disposition of the territory, the administrative organization of the provinces shall not be disturbed.

“4. In the event that no agreement should ensue, both Governments will solicit, for this purpose, the good offices of the Government of the United States of America.

"5. Included in the arbitration likewise are the claims pending with regard to Tarata and Chilcaya, according to the determination of the final disposition of the territory to which Article 3 of the Treaty refers.

"This Agreement is an integral part of the Protocol to which it refers."

Ratifications of the Protocol and Supplementary Act having been exchanged, the President of the United States of America accepted the office of Arbitrator, and the Cases and Counter-Cases of the respective Parties have been submitted in accordance with a schedule of arbitral procedure proposed by the Parties and approved by the Arbitrator. The record, comprising nearly six thousand pages, having been carefully examined, the Arbitrator now renders the following *Opinion and Award*.

#### TREATY OF ANCON.

Article 3 of the Treaty of Peace of October 20, 1883, known as the Treaty of Ancon, reads as follows:

"Art. 3. The territory of the provinces of Tacna and Arica, bounded on the north by the river Sama from its source in the Cordilleras on the frontier of Bolivia to its mouth at the sea, on the south by the ravine and river Camarones, on the east by the Republic of Bolivia and on the west by the Pacific Ocean, shall continue in the possession of Chile subject to Chilean laws and authority during a period of ten years, to be reckoned from the date of the ratification of the present treaty of peace.

"After the expiration of that term a plebiscite will decide by popular vote whether the territory of the above-mentioned provinces is to remain definitely under the dominion and sovereignty of Chile or is to continue to constitute a part of Peru. That country of the two, to which the provinces of Tacna and Arica remain annexed shall pay to the other ten million pesos of Chilean silver or of Peruvian soles of equal weight and fineness.

"A special protocol, which shall be considered an integral part of the present treaty, will prescribe the manner in which the plebiscite is to be carried out, and the terms and time for the payment of the ten millions by the nation which remains the owner of the provinces of Tacna and Arica"<sup>1</sup>.

#### THE ARBITRATOR'S DUTY.

The Protocol and Supplementary Act, which must be read together, provide not only for arbitration but in a specified contingency for the good offices of the Government of the United States, but these contingent good offices have nothing to do with the duty which the terms of submission cast upon the Arbitrator.

That duty is —

1. To decide whether in the present circumstances a plebiscite shall or shall not be held to determine the definitive sovereignty of the territory in question as between Chile and Peru.

<sup>1</sup> (N. B. This text is the translation given in the Appendix to the Peruvian Case. The Chilean translation, which is taken from the Foreign Relations of the United States for 1883, is not materially different.)

2. If the Arbitrator decides in favor of a plebiscite to determine the conditions of that plebiscite, including the terms and time of the payment to be made by the nation succeeding in the plebiscite as provided in Article 3 of the Treaty of Ancon.

3. If the Arbitrator decides against the plebiscite to take no further action as Arbitrator, except that—

4. Whether the decision be for or against a plebiscite, the Arbitrator is to decide the pending questions with respect to Tarata and Chilcaya arising respectively on the northern and southern boundaries of the territory.

### **First—The Question of the Plebiscite.**

*The first question is whether in the present circumstances a plebiscite shall or shall not be held.*

The territory of the provinces of Tacna and Arica is understood to be about nine thousand square miles in area and to have a population of between thirty and forty thousand. It belongs to the desert region of the Pacific coast. There are some mineral resources but these do not appear to be extensive. The valleys proceeding from the mountains on the east give opportunities for agriculture. In one of these valleys lies the city of Tacna, which was the capital of the Peruvian province of that name. The city of Arica, the capital of the other Peruvian province mentioned in Article 3 of the Treaty of Ancon is a port on the Pacific Ocean about forty miles from Tacna, with which it is connected by railroad. Arica is the terminal of the railroad running to La Paz, Bolivia, and has commercial importance.

At the time of the signing and ratification of the Treaty of Ancon, Chile was already in possession of the territory of the provinces of Tacna and Arica, here in question, as a result of the War of the Pacific. By the terms of the Article it was agreed that she should continue in possession of this territory for a period of ten years and that during this period it should be "subject to Chilean laws and authority". It was further agreed that "after the expiration of that term" a plebiscite should be held to decide whether the territory should "remain definitely under the dominion and sovereignty of Chile" or should "continue to constitute part of Peru", i.e., whether the territory should be permanently Chilean or permanently Peruvian. The paragraph then goes on to provide, "that country of the two" to which the provinces of Tacna and Arica "remain annexed" shall pay the other ten million Chilean pesos or Peruvian soles. Finally, the Article provides for the negotiation by the two countries of "a special protocol" which will prescribe, first, "the manner in which the plebiscite is to be carried out" and second "the terms and time for the payment of the ten millions".

The question whether a plebiscite shall or shall not be held depends upon the question whether the second and third paragraphs of Article 3 of the Treaty of Ancon are still in effect. If these provisions have not expired by lapse of time, if they have not been abrogated or discharged by the conduct of the Parties so that performance can no longer be demanded, the plebiscite should be held because that is the agreement. If that agreement for any reason is no longer binding, then the plebiscite should not be held unless a new agreement for that purpose is made.

As the question thus relates to the construction, operation and obligation of this part of the treaty, the province of the Arbitrator is more narrow than the range of the arguments which have been presented. It is neither the



duty nor the privilege of the Arbitrator to pass upon the causes or the conduct of the War of the Pacific, or upon the justice of the terms of peace, or upon the relations of either Party to the Republic of Bolivia, or upon the wisdom of the provisions of Article 3 of the Treaty of Ancon, or upon the economic effects of the treaty, or upon alleged general equities of the present situation, or upon any questions whatever which are aside from the meaning and efficacy of the agreement itself.

The correct interpretation of Article 3 of the Treaty of Ancon, as a whole, and it might almost be said, of every word thereof, has been ably and ingeniously debated between the Parties for years, and is again ably and ingeniously discussed in their Cases and Counter-Cases. Into the refinements of this debate it is not necessary to go, inasmuch as they do not, in the opinion of the Arbitrator, affect the considerations which are controlling in the determination of the issues in this arbitration.

#### LAPSE OF TIME.

At the outset, it should be observed that the second and third paragraphs of Article 3 do not provide for the termination of their obligations by lapse of time. The Article contains no provision for forfeiture. It fixed no period within which the plebiscite must be taken. The plebiscite was to be had "after the expiration of that term", that is, after the ten years but no limit was defined. It was to be taken pursuant to a special agreement which it was left to the Parties to make. But no time was fixed within which the special protocol for the plebiscite was to be negotiated. Whatever may have been the reasons for leaving the matter thus at large, the fact remains that it was left without prescribed limit of time and the obligations of the Parties under the treaty must be determined accordingly.

If it be suggested that such an agreement—an agreement to agree with no time specified and no forfeiture provided—is unsatisfactory or meaningless, a threefold answer presents itself, first, that the Arbitrator is not empowered to alter the treaty or to insert provisions, however salutary they might be in his judgment viewing the matter retrospectively, which the High Contracting Parties did not see fit to include; second, that the Treaty of Ancon was a peace treaty—the Parties were engaged in a devastating war. Apparently the Parties in 1883-1884 thought it better to agree that they would agree at some unspecified time in the future than to agree to disagree in the present. They may well have taken into account the fact that failure to agree upon the terms of a plebiscite when the matter came up again for adjustment would leave unsettled one of the great issues of the War of the Pacific, and they may have believed that inasmuch as a reopening of hostilities on this account after a lapse of at least ten years was improbable and an amicable agreement would be in the interest of both Parties, it was at once unnecessary and inadvisable to prescribe a time-limit for the negotiations. Finally, the present arbitration is the best evidence that the agreement, elastic as it was, was not without force, since these great States, in response to its provisions, having failed again and again during the course of years to make the contemplated protocol, have now submitted to arbitration the question of the plebiscite and its conditions.

It may further be observed that the Parties at the time of the making of the treaty must have realized that they could have no assurance of the result of a plebiscite which was not to be held until after the expiration of ten years. That result was left to hope and conjecture. It might be that wise and

beneficial administration might dispose the voters to favor the continuance of existing authority while oppressive administration or measures hostile to the welfare and traditions of the people might have an opposite effect. The character of the future administration and its effect, whatever its character, upon the disposition of the voters could not be safely predicted. The Parties nevertheless agreed to postpone the plebiscite long enough to make the result uncertain. And the point of the agreement was that neither Chile nor Peru was to be assured of definitive control but that the decision should be left to popular vote.

It is apparent that there are no physical obstacles to the holding of a plebiscite at the present time. So far as the necessary arrangements for a plebiscite are concerned, it cannot be said that it must be abandoned because it has become in the nature of things impracticable to hold it.

Nor has there been an agreement between the Parties to terminate the provisions of Article 3.

It is the contention of Peru, maintained with earnestness and eloquence, that Chile wilfully prevented the timely holding of a plebiscite and that her action in the course of her administration of the territory constituted a perversion of the conditions essential to the plebiscite as contemplated by the treaty; in short, that Chile by preventing the performance of Article 3 has discharged Peru from her obligations thereunder, and hence that a plebiscite should not now be held and that Chile should be regarded as a trespasser in the territory in question since the year 1894.

This contention raises two principal questions: *First*, with respect to the conduct of Chile in relation to the efforts to reach an agreement for plebiscite; and *second*, with respect to her administration of the territory of the provinces of Tacna and Arica.

#### THE FAILURE TO AGREE.—DELAYS IN NEGOTIATIONS.

It has not been contended that the plebiscite should have been held before the expiration of the ten-year period. The nature of the obligation imposed by Article 3 must be derived from its terms. Until the special agreement was made there could be no plebiscite. As the Parties agreed to enter into a special protocol, but did not fix its terms, their undertaking was in substance to negotiate in good faith to that end, and it would follow that a wilful refusal of either Party so to do would have justified the other Party in claiming discharge from the provision. But, as the Parties did not in the treaty prescribe the conditions of the plebiscite and left these to be the subject of a future agreement, it is manifest that with respect to the negotiations looking to such an agreement they retained the rights of sovereign States acting in good faith. Neither Party waived the right to propose conditions which it deemed to be reasonable and appropriate to the holding of the plebiscite, or to oppose conditions proposed by the other Party which it deemed to be inadvisable. The agreement to make a special protocol with undefined terms, did not mean that either Party was bound to make an agreement unsatisfactory to itself provided it did not act in bad faith. Further, as the special protocol was to be made by sovereign States, it must also be deemed to be implied in the agreement set forth in Article 3 that these States should act respectively in accordance with their constitutional methods, and *bad* faith is not to be predicated upon the refusal of ratification of a particular proposed protocol deemed by the ratifying authority to be unsatisfactory. In order to justify either Party in claiming to be discharged

from performance, something more must appear than the failure of particular negotiations or the failure to ratify particular protocols. There must be found an intent to frustrate the carrying out of the provisions of Article 3 with respect to the plebiscite; that is, not simply the refusal of a particular agreement proposed thereunder, because of its terms, but the purpose to prevent any reasonable agreement for a plebiscite. While there should be no hesitation in finding such intent, or bad faith, if established, and in holding the Party guilty thereof to the consequences of its action, it is plain that such a purpose should not be lightly imputed. Undoubtedly, the required proof may be supplied by circumstantial evidence, but the *onus probandi* of such a charge should not be lighter where the honor of a Nation is involved than in a case where the reputation of a private individual is concerned. A finding of the existence of bad faith should be supported not by disputable inferences but by clear and convincing evidence which compels such a conclusion.

It is unnecessary to review in detail the history of the negotiations between the Parties. To determine whether Peru has sustained her burden of proof with respect to the course of negotiations requires a painstaking examination of the diplomatic exchanges between the two countries which fill hundreds of pages in the record. This examination has been made and its results can be stated in a brief compass.

#### SUMMARY OF NEGOTIATIONS.

Formal negotiations to arrive at the terms of the special protocol for a plebiscite were begun in 1892 and were diligently prosecuted for several months in formal conferences, the debates in which covered the principal questions which had arisen between the two governments, including the boundary questions which have been submitted in the present arbitration, and resulted in the Jimenez-Solar exchanges of January 26, 1894, which, however, left open the most vital conditions of the plebiscite. The negotiations were continued, but the ten-year period expired without further progress being made, and they were then interrupted, and the gains already made were largely lost by a cabinet crisis in Chile and the death of the President of Peru. In the early part of 1895, civil disturbances in Peru resulted in the establishment of a Provisional Board of Government with which the Chilean Minister opened negotiations in August, 1895, which were carried through numerous conferences and ended by an exchange of notes in February, 1896, disclosing the respective views which had been found to be irreconcilable. There followed an interval in which the matter was not pressed by either government, the reasons for which were set forth in a joint memorandum of August 14, 1897, in which also each government expressed its desire to have a definite solution. Thereafter Senor Billinghamurst, Vice-President of Peru, was sent on special mission to Santiago to negotiate the protocol. As a result the so-called Billinghamurst-Latorre protocol was signed on April 16, 1898. The Executives of the two countries thus reached an agreement upon all points except two, namely, the qualifications of the voters at the plebiscite and whether the voting should be public or secret, and it was agreed that these questions should be left to the arbitration of the Queen of Spain. In Peru, the protocol was approved. In Chile, the Committee of Foreign Affairs of the Senate reported on the protocol unfavorably by a divided vote, but the Senate nevertheless approved it on August, 1898. A majority of the Committee of Foreign Relations of the Chilean Chamber of Deputies first voted in favor of the protocol but later reported

adversely and the Chamber of Deputies failed to give its approval. The ground especially asserted was that the points proposed to be left to arbitration should be settled directly between the two governments and the records were returned to the Executive so that new negotiations might be had "for the purpose of carrying into effect Article 3 of the Treaty of Ancon". While there was extreme disappointment in Peru at this result, neither Peru nor Chile regarded the rejection of the Billingham-Latorre protocol as a justification for terminating the negotiations under the treaty.

Meanwhile a serious dispute had arisen over the methods of Chilean administration in Tacna and Arica. Peru's vigorous complaints led to a diplomatic debate which reached an impasse and Senor Chacaltana, Peru's Minister to Chile, was recalled in March, 1901. The representation was not renewed until 1905. In February of that year, the Minister of Foreign Relations of Peru addressed a direct diplomatic communication to the Chilean Minister of Foreign Relations protesting against the Treaty of 1905 between Chile and Bolivia providing among other things for the construction of a railway at Chile's expense from Arica to La Paz, and giving Bolivia commercial privileges. Peru protested against this treaty as an infringement of her sovereign rights. Chile responded giving the Chilean theory in justification and concluded by inviting Peru to resume negotiations. In his reply of April 25, 1905, the Peruvian Foreign Minister said that his Government was "highly pleased to accept Your Excellency's invitation to negotiate the fulfilment of the Treaty of Ancon in respect of the provinces of Tacna and Arica". Ministers were accredited but the record does not disclose the negotiations had.

On March 25, 1908, the Chilean Minister of Foreign Affairs, Senor Puga Borne, in an elaborate note addressed to the Peruvian Minister at Santiago, proposed a series of five conventions relating respectively to commerce, merchant marine, a connecting railroad, the plebiscite and the indemnity, and set forth his views as to the manner of holding the plebiscite. The Peruvian Minister, Senor Seoane, declined to combine the plebiscitary protocol with other matters. He refuted the suggestion which had been made that "according to modern precedents the plebiscite incorporated in the history of international law constitutes a formula for disguised cession" and presented at length Peru's position as to the terms of the plebiscite. Later it was agreed that the negotiations should proceed at Lima. Thereafter occurred the so-called wreath incident. The Chilean Minister at Lima expressed a desire to place a bronze wreath on the mausoleum erected to the memory of the Peruvian soldiers who died in the war with Chile. This proposal was first accepted but later this acceptance was withdrawn and the Chilean Minister immediately returned home.

In the absence of diplomatic representation of either country at the capital of the other, there ensued a period of direct negotiations between the Foreign Ministers of the two countries. These negotiations began in August, 1909, with a note by the Chilean Foreign Minister complaining of certain language used by the President of Peru in his message to Congress in relation to the question of Tacna and Arica. The Peruvian Minister replied in justification and in another note took up the questions connected with Chilean administration, which will be discussed later. In October, 1909, Chile presented certain definite proposals as to the conditions of a plebiscite, these being founded on the Billingham-Latorre protocol and covering the points which by that protocol were to be referred to arbitration. Peru replied in November, 1909, with a memorandum of counter-proposals modifying in certain

important respects the Chilean plan. Correspondence ensued setting forth the answer of Chile to Peru's complaints as to the conduct of administration in the territory of Tacna and Arica and Peru rejoined. In a note of March 3, 1910, the Chilean Foreign Minister recurred to the idea that the plebiscites in international law were but disguised formulas for annexation and applied this to the case of Tacna and Arica saying that the provisions in question of the Treaty of Ancon were devised "as the only means designated by history of satisfying the territorial demands of Chile without deeply wounding a national sentiment of Peru". "Nevertheless", the Chilean Foreign Minister added, his Government "has sought in the holding of the plebiscite the satisfaction of its legitimate exigencies, and it only asks that the act be essentially popular and that it be effected without violating for a single instant, by interrupting them, its rights as a sovereign in the territories of Tacna and Arica". The Chilean Foreign Minister then set out in considerable detail proposed conditions for the plebiscite—providing that it should be held within six months after the exchange of ratifications of the protocol, and setting forth the manner in which a Directive Board and Registration and Receiving Committees should be appointed and act, the qualification of voters and the canvass of the votes.

Peru did not answer these proposals. Once more, on March 19, 1910, as in 1901, diplomatic relations were severed as a protest against the course of Chile's administration in Tacna and Arica. The Chilean Foreign Minister replied to the notice of the withdrawal of Peru's representative by calling attention to the fact that it came almost immediately after his detailed proposals for a plebiscite.

Diplomatic relations were not resumed. In September, 1912, Senor Billinghurst became President of Peru. Evidently as a result of informal negotiations, there occurred on November 10, 1912, an exchange of telegrams between the Foreign Ministers of the two countries, called the Huneeus-Valera telegrams. These were identic and provided: (1) for the postponement of the plebiscite until the year 1933; (2) for the supervision of the plebiscite by a committee of five delegates—two Chileans, two Peruvians, with the President of the Supreme Court of Justice of Chile presiding; (3) for the right to vote of persons born in Tacna and Arica, and Chileans and Peruvians that may have resided for three years in the territory and who are able to read and write. There are other conditions less important. President Billinghurst explained his reasons for this agreement in a message delivered at a secret session of the Peruvian Congress. When the Huneeus-Valera exchanges were made public there was a violent outburst of public opinion in Peru against President Billinghurst and the feeling thus engendered apparently contributed to the downfall of his Government in 1914. In May of that year the new government of Peru announced its succession to office and was promptly recognized by Chile. In December, 1914, Peru requested of Chile the expulsion of the former President Billinghurst from Tacna and Arica and this request was granted.

In 1920, the President of Chile authorized Senor Puga Borne to negotiate informally with the President of Peru with the instruction to keep so far as possible within the limits of prior negotiations and to submit new propositions to the home government as he might think fit. Apparently nothing came of this.

On December 12, 1921, the Chilean Foreign Minister made another attempt to reopen negotiations as to the plebiscitary protocol by proposing directly to the Peruvian Foreign Minister that the Huneeus-Valera plan be

taken as a basis for perfecting the protocol. Peru responded by inviting Chile to "submit jointly the entire question of the South Pacific that divides us to an arbitration, agreed to through the initiative of the Government of the United States of America". The ensuing negotiations led up to the present arbitration.

#### CONCLUSIONS AS TO THE NEGOTIATIONS.

The conduct of the negotiations must be viewed in the light of the rights and obligations of the Parties, under the treaty, as already set forth. It is not necessary to discuss the merits of the positions taken from time to time on either side. The question now presented is not whether the particular views, proposals, arguments and objections of either Party during the course of the negotiations should be approved, but as to the good faith with which these views, proposals, arguments and objections were advanced. The failure to agree upon a special protocol fixing the conditions of the plebiscite cannot therefore be regarded as being in itself a breach of the treaty. The Parties, by Article 3 of the Treaty of Ancon, having left to a future agreement the conditions of the plebiscite must be deemed to have thereby agreed that each Party should have the right to make proposals, and to object to the other's proposals, so long as they acted in good faith.

From an examination of the history of the negotiations the Arbitrator is unable to find any proper basis for the conclusion that Chile acted in bad faith. The record fails to show that Chile has ever arbitrarily refused to negotiate with Peru the terms of the plebiscitary protocol. On the contrary, the record shows affirmatively that Chile not only has accepted Peru's invitations to proceed with the negotiations but has herself initiated negotiations. Such causes of delay as a cabinet crisis, a revolution, the illness of a minister, the death of a president—political contingencies which did not lie beyond the contemplation of the Parties—cannot be charged to either side as constituting a wilful refusal to proceed with negotiations. The argument based on the failure of Chile to ratify the Billinghurst-Latorre protocol of 1898 must proceed on the assumption either that Chile was bound to ratify that particular agreement or that Chile's conduct in relation thereto establishes absence of good faith in the prosecution of the negotiations pursuant to the treaty. Neither position can be maintained. The Billinghurst-Latorre protocol provided that two important conditions of the plebiscite, namely, the qualifications of voters and the secrecy of the vote should be submitted to the arbitration of the Queen of Spain. Chile had not promised to agree to such an arbitration and acted within her rights in seeking a direct agreement upon these points. Nor does Chile's conduct in relation to the protocol afford ground for a finding of bad faith. The Executive of Chile negotiated the protocol and the Chilean Senate approved it. As already stated, the Committee of the Chilean Chamber of Deputies first approved the protocol and then changed its recommendation and the Chamber of Deputies acted on the adverse report of the Committee. The Legislature of Chile under the constitutional system of Chile had the same right to refuse to approve the protocol as the Executive had to negotiate it and no unfavorable inference can be drawn from the exercise by the Legislature of its constitutional prerogative in the circumstances described. The disposition of the Billinghurst-Latorre protocol cannot be regarded as due to anything other than the normal processes of constitutional government in relation to a matter of transcendent public interest, nor did Peru even under

the stress of disappointment make the rejection of the protocol a basis for refusing to go on with negotiations for the fulfilment of the Treaty of Ancon. In considering the obligations of that treaty, regard must be had as well to the freedom which the Parties enjoyed under that treaty, by virtue of the fact that the conditions of the plebiscite were left to a future agreement, as to the duty which the treaty imposed. It must be concluded that Chile was no more bound to ratify the Billinghurst-Latorre protocol than Peru was bound to accept later the proposals made by Chile.

The Arbitrator is of the opinion that so far as the negotiations for the special protocol are concerned neither Party can be charged with bad faith and that there is no ground for the conclusion that Chile's action in respect to these negotiations has resulted in the abrogation of the second and third paragraphs of Article 3 of the Treaty of Ancon or absolved Peru from the obligation to proceed to their fulfilment.

#### CHILEAN ADMINISTRATION IN TACNA AND ARICA.

It follows from what has been said that the provisions in question of the Treaty of Ancon must be regarded as still in effect unless the course of Chile in the administration of Tacna and Arica has been of such a character as to frustrate the purposes of these provisions and hence to deprive them of force.

Article 3 provided that the described territory of the provinces of Tacna and Arica should "continue in the possession of Chile subject to Chilean laws and authority during a period of ten years" and that "after the expiration of that term" (the Peruvian translation of the text has been set forth above) there should be a plebiscite to decide whether the territory "is to remain definitely under the dominion and sovereignty of Chile or is to continue to constitute a part of Peru". There has been a long and serious controversy between the Parties (1) as to the nature of the authority thus conceded to Chile, and (2) as to the status of the territory after the expiration of the ten-year period. Chile has maintained that she had full dominion and sovereignty subject to termination by an adverse plebiscite held under the treaty, and that pending the holding of the plebiscite this sovereignty continued. Peru has insisted that the territory remained under the sovereignty of Peru; that Chile was only a possessor with administrative authority for ten years and that at the end of that period Chile's authority ceased.

(1) It is unnecessary to discuss the arguments on the question of sovereignty. It is sufficient for the purposes of the Arbitrator to take the express words of the treaty. Under the first paragraph of Article 3, the territory was to be in Chile's possession and "subject to Chilean laws and authority". This provision is without express qualification. There is no condition set forth as to either laws or authority, that is, as to the character of laws or the extent of authority. "Laws and authority" clearly embrace the full legislative, executive and judicial power. The Arbitrator has no privilege to limit the power thus conferred by the treaty. If any limit is to be found it must be in the terms of the treaty itself; that is, in the provision for a plebiscite. It may be implied that the exercise by Chile of legislative, executive and judicial power should not go to the extent of frustrating the provision for a plebiscite. Further than this, it is not possible to go without derogation of the authority which the Parties agreed that Chile should have. The question whether the administration of the territory was wise or unwise,

beneficial or the reverse, was not submitted by the treaty to any review and is not reviewable by the Arbitrator. The administration of government in all countries exhibits in varying degrees the infirmities of human nature and affords abundant room for controversy as to the wisdom and justice of measures, but the Parties in their treaty did not attempt to create limitations even of a general character.

(2) Article 3 made no provision as to what should happen after the expiration of the ten-year period and pending the holding of a plebiscite. As the plebiscite was not to be held until the term had expired, it must be deemed to have been within the contemplation of the Parties that there might be an interval before the result of the plebiscite could be ascertained. But no express provision was made for this contingency. It seems unreasonable to suppose that the Parties intended that after the expiration of the ten years Chile should surrender possession to Peru, that then the plebiscite should be held, and that, if it were decided in favor of Chile, the possession should then be restored to Chile. Such a disruption and reconstitution of administrative authority would involve practical difficulties which it is hardly to be thought that the Parties intended to create. Chile was in possession of the territory when the treaty was made and was to continue in possession for ten years, and after that period a plebiscite was to be held to determine whether the territory was "to remain definitely" under her dominion and sovereignty. The fair construction is that Chile was to retain possession pending the holding of a plebiscite and that thus retaining possession her administrative authority continued. This would be subject, of course, to the continuance in effect of the provisions of the treaty, and with the implied undertaking on the part of Chile that she would not prevent the holding of a plebiscite and would negotiate in good faith to make the contemplated special protocol to establish the conditions of the plebiscite. This seems to have been the understanding at the outset, for in the Memorandum delivered by the Minister of Foreign Relations of Peru to the Minister of Chile on March 9, 1894, it appeared that the Chilean Minister desired to include among the bases of a protocol "that the territories should remain during the plebiscite in the same state as that in which they are to-day" and that the Peruvian Foreign Minister responded "that it would be unnecessary to say so, for, only in order to change the person of the occupant, would an express declaration be necessary". If this was the situation immediately after the ten-year period expired, there is no warrant for holding that the failure to agree on the special protocol for the plebiscite produced a change unless there was bad faith in the conduct of the negotiations, and this charge, as already stated, cannot be sustained.

The Arbitrator finds the conclusion inescapable that the territory continued "subject to Chilean laws and authority" pending the negotiations for the special protocol. The question then is whether this authority has been used in such a way as to frustrate the purpose of the agreement for the plebiscite.

The conduct, of which Peru complains and which was the subject of numerous and elaborate protests evoking serious controversy, is charged to have been the execution of a policy described as "Chilenization" of the territory, embracing as alleged, (a) the subsidized introduction of Chilean citizens and (b) the dispersion of the Peruvian population after 1900.

A. The acts charged as constituting the subsidized introduction of Chilean citizens may be summarized as follows: (1) the creation of the Department of Tarata; (2) the removal of the court of appeals from Iquique to Tacna;



(3) the removal of military headquarters from Iquique to Tacna and the concentration of Chilean military forces in the provinces; (4) founding of newspapers for pro-Chilean propaganda; (5) the subsidizing of factories; (6) the granting of railway, irrigation and other concessions; (7) colonization; and (8) the arrangements in regard to the Arica customs.

As to these charges, it may be said: The creation of the Department of Tarata involves the question of the extent of the territory covered by Article 3, a question which will be considered in dealing with the boundary dispute. In so far, however, as the creation of this department was a matter of the administrative organization of a portion of the territory placed by the treaty under "Chilean laws and authority", there would be no ground for complaint as there was no restriction upon the authority of Chile to provide administrative organization of the territory. The same is true of the removal of the court of appeals from Iquique to Tacna, the removal of military headquarters from Iquique to Tacna, and the concentration of military forces in the provinces, if such concentration took place. All these acts were clearly within the authority conferred upon Chile by the treaty. Chile denies the charge that periodicals and newspapers were founded to carry on pro-Chilean propaganda, but apart from the issue of fact the Arbitrator finds it impossible as matter of law to deny to Chile the right to establish or subsidize newspapers in territory "subject to Chilean laws and authority". Chile admits the subsidizing of new industries in Tacna and Arica but adds that "unfortunately however these factories have been forced to discontinue operations". Whether such factories succeeded or failed, there can be no question of Chile's general right to subsidize industry. It is unnecessary to consider an extreme situation in which large sums of government money invested in the subsidizing of industries in Tacna and Arica might have stimulated a considerable artificial immigration of persons into the provinces, because no such showing has been made on the facts.

The granting of railway, irrigation and other concessions was clearly within the authority of Chile. The life of the concessions might be limited to such time as she possessed the legislative and executive power, but this is a matter which it is not necessary for the Arbitrator to determine in this case. Such a limitation would not affect the validity of the concessions during the time of the grantor's possession and authority. The only aspect in which the granting of railway and other concessions need to be considered as a factor in "Chilenization" is in relation to the tendency of such enterprises to bring Chileans, particularly Chilean workmen, into Tacna and Arica. The principal enterprise of this character undertaken by Chile as disclosed by the record was the construction of the Arica-La Paz railway undertaken in accordance with the provisions of the Chilean-Bolivian Treaty of 1904. The record indicates that this railway resulted in the introduction into the provinces of Tacna and Arica of a number of Chilean laborers. To what extent these laborers remained in the provinces after the completion of the road in 1913 does not affirmatively appear, but there were such obvious economic reasons for the Arica-La Paz railway that it could not reasonably be inferred that the importation of Chilean labor in connection with this project was anything more than an incident to an enterprise which Chile was entitled to undertake. Undoubtedly successful concessions meant industrial development, development meant population, and increase of the population of the provinces in these circumstances naturally meant a greater proportion of persons of Chilean nationality, but Peru cannot object to the legitimate and normal development of the provinces during the period in which they

remain under Chilean laws and authority. There is nothing in the treaty requiring stagnation.

The question of colonization is intimately related to the matter of concessions. Indeed so far as the record shows it is chiefly if not entirely in connection with the construction of public works such as the Arica-La Paz railway that Chile has achieved any measure of practical success in "colonizing" Tacna and Arica. The question of colonization was discussed between the two countries in 1900 principally upon the basis of Chile's right to alienate public lands in connection with colonization schemes, and the evidence indicates that more or less ambitious plans for colonization were from time to time under consideration and that the colonization laws of Chile were extended to Tacna and Arica in 1909. There is, however, no adequate proof that any of these colonization plans were carried out and Chile denies that the colonization law was ever actually put into operation or that any land was purchased as therein provided or that there was any substitution under these laws of Peruvian farmers by Chilean farmers. This denial is not met by any adequate affirmative evidence. In view of this state of the record it becomes unnecessary to consider to what extent Chile could have carried out a systematic policy of expropriation and colonization of the lands in Tacna and Arica before it would have amounted to such a depopulation of the provinces and substitution of Chilean for Peruvian inhabitants as to frustrate the purpose of Article 3 of the Treaty of Ancon. It is sufficient to say that the evidence fails to establish any such colonization on the part of Chile as would form any basis for a conclusion that Peru had been discharged from her plebiscitary obligation.

By various arrangements with Bolivia, Chile has conceded to Bolivia commercial and customs privileges in the ports of Tacna and Arica which have given rise to diplomatic protests on the part of Peru. Chile expressly concedes that "should Tacna and Arica as a consequence of the plebiscite be returned to the sovereignty of Peru, the latter would take this territory free from any incumbrances resulting from such a trade agreement". In these circumstances it is not perceived that Peru has any just complaint on account of any commercial and customs arrangements which Chile may have made for the regulation of the territory subject to her authority. If such arrangements benefited the territory and thereby promoted immigration this was merely a legitimate incident of the administration of the territory contemplated by the treaty.

The Arbitrator therefore holds that, with respect to the specific acts adduced by Peru as tending to show the subsidized introduction of Chilean citizens, either as a matter of law these acts were within Chile's right under the treaty during the period in which the territory is "subject to Chilean laws and authority" or there is no sufficient evidence to show that they were in fact committed.

*B.* The acts of which Peru has complained as constituting the dispersion of the Peruvian population after 1900 are: (1) The closing of the Peruvian schools; (2) the expulsion of the Peruvian priests; (3) the suppression of Peruvian newspapers; (4) depriving Peruvians of the right to assemble and display the Peruvian flag; (5) the boycotting of Peruvian labor; (6) the conscription of Peruvian youth into the Chilean army; (7) the expulsion of Peruvian citizens; and (8) general persecution of the Peruvian people through mob violence either tolerated or encouraged by the authorities and miscellaneous official persecution of all kinds.

*Peruvian Schools.* On May 14, 1900, the Governor of Tacna issued a decree closing the Peruvian schools. The Peruvian Government made vigorous protest. It was stated by the Peruvian Minister of Foreign Affairs that this action was "contrary to the laws of Chile and, consequently, contrary to the Treaty of Ancon, which dictates their force and effect in these territories". The Chilean Minister of Foreign Affairs in answer denied that there had been exceptional procedure and asserted justification under Chilean law. It was said that permits had been refused for the schools in question because of the violation of the law by the Peruvian teachers; that neither the history nor the geography of Chile was taught as required by the general law, and that on the other hand sentiments of hostility toward Chile were inculcated in the pupils and a campaign of propaganda carried on, in view of which the action was taken pursuant to law. It was replied on behalf of Peru that schools maintained by private individuals or by tuition fees paid by pupils were subject to the inspection established by law in respect of the morality and order of the establishment but not in respect of the teaching that may be imparted in them or of the methods that may be employed. The Chilean Minister rejoined by reasserting his position saying that "if in those schools propaganda has been made against Chile, if sentiments of hatred toward this country have been inculcated in their pupils, if in this way the authority and rights that Chile exercises have been denied", these considerations were sufficient to justify the measure as one of public order. The Peruvian Minister insisted that there was no teacher of honorable and lofty views who does not endeavor to inculcate into his pupils sentiments of love and self-denial in favor of their fatherland; that this was one of the most elementary and sacred duties; and that if in fulfilling it, the teachers had been guilty of unbecoming exaggerations, they should have been curbed according to law, but not in any other way. The matter rested with this disagreement. There is no adequate disproof of the grounds upon which Chile acted and it does not appear that she misinterpreted her laws, which cannot be regarded as being in excess of her authority. It should be added that the record indicates that Chile has not failed to provide appropriate educational facilities for the people of the territory. There are a few complaints in the record to the effect that the authorities in the Chilean schools have discriminated against Peruvians or endeavored to force Peruvians to elect Chilean nationality, but these complaints are not sufficiently numerous or well sustained to be accepted as establishing any deliberate policy.

*The Expulsion of Peruvian Priests.* Both Chile and Peru are Roman Catholic countries and there is no question of an attempt to introduce an alien faith. The question is essentially one of ecclesiastical patronage. As the Peruvian Minister said in his note of November 14, 1900 :

"In Peru, as in Chile, the Catholic Church lives and prospers under the protection of the age-old system of patronage. According to the latter, the Civil Government, in the territorial divisions which are permanently under its control, intervenes in the creation and subdivision of dioceses, or parishes, in the creation of apostolic or other vicarages, in providing ecclesiastical benefices, and in all other functions closely related to the temporal attributes of States. Patronage, furthermore, irrespective of the source from which it is derived, is a prerogative intimately associated with the exercise of national sovereignty. Its action upon certain churches continues until sovereignty over the territories in which they are located ceases, and it is not trans-

ferred except when sovereignty itself is finally and permanently transferred. In respect to Tacna and Arica, neither has Peru ceded final control and sovereignty over them, nor has Chile acquired either of these; the moment has not arrived, therefore, to consider that the attributes of Peru, as patron in respect to these churches, are at an end."

The Chilean Foreign Minister in his answer of January 19, 1901, took issue with this position. He said:

"Your Excellency recognizes that in Peru, as in Chile, the Catholic Church lives and is developed under the auspices of the secular regime of patronage.

"This principle being established, it only remains to ascertain to which of the two Governments pertains the exercise of patronage for the provision of ecclesiastical functions and benefices in the territory that Chile occupies pursuant to the stipulations of the Treaty of Ancon.

"If the Treaty of Ancon placed the territories of Tacna and Arica under the dominion of the Chilean Constitution and laws, it would seem unquestionable that the President of the Republic must use there the special faculty that is bestowed on him by the Constitution of the State in Article LXXXII, section 13, which says:

"13. To exercise the faculties of patronage in respect of churches and ecclesiastical benefices and persons in conformity with the law."

The Peruvian Minister insisted in reply that the rights asserted were related to the permanent and definitive sovereignty, and belonged to Peru. In accordance with the position of Chile based on the provision that the territory should be subject to its "laws and authority", the Chilean Government demanded that the Peruvian priests secure permits from the Chilean authorities. The priests declined to request these permits and the Chilean Government closed the churches. The Peruvian priests, it is alleged, then "opened oratories which they called private but which were in fact public" and the Chilean Government ended the controversy by expelling the priests under an order of February 17, 1910. It appears that later in that year, the Holy See, without appearing to take sides in the growing controversy, created a Military Vicarship in charge of a Chilean Chaplain, who was afterwards promoted by the Holy See to the episcopal dignity.

It is not the province of the Arbitrator to deal with any matter of ecclesiastical policy, but as the fundamental question seems to have been one of ecclesiastical patronage as above stated, there is no sufficient reason for concluding that this patronage did not pertain to the territorial authority. The wisdom or expediency of the action is not before the Arbitrator.

*Peruvian Newspapers.* The Peruvian Case charges Chile with suspending and suppressing Peruvian newspapers but it does not satisfactorily prove this charge. In his correspondence with the Chilean Foreign Office in 1900-1901, the Peruvian Minister expressed his apprehension that the Chilean Government would yield to the wishes of subordinate officials who desired to suppress the voice of the press but he made no charge that the Government had actually interfered with the press and the Chilean Government denied that it had done so. There the matter appears to have rested so far as diplomatic exchanges are concerned until 1918 when the closing of Peruvian newspapers was listed as one of the features of the so-called Chilenization campaign in the circular of the Peruvian Minister of Foreign Affairs of

December of that year. No evidence was adduced in support of this passing reference. In like manner the Chilean Minister of Foreign Affairs in his reply of December 6, 1918, contented himself with a parenthetical assertion of the "liberty of the press". In the memorandum of the Peruvian Minister of Foreign Affairs of February 14, 1919, there appear extracts from a memorial which certain Peruvian citizens are said to have "just presented to the President of the Republic and which Government investigation proves to be absolutely accurate". In the course of this memorial it is stated "this persecution was exemplified . . . by the assault and destruction of the Union Club Building in 1911 and by that of the printing offices of *La Voz del Sur*, *El Tacora* and *El Morro de Arica* during the same year".

While there is no sufficient evidence in the record to show that Chile has either suppressed or censored the Peruvian press of Tacna and Arica by operation of law or by action of the Chilean Government, there is satisfactory evidence to show that Peruvian newspapers were destroyed by mob violence in 1911. Although it is not possible on the evidence to charge this action to the Government of Chile, it does appear that the Peruvian newspapers have not been reestablished and the situation thus existing demands consideration in fixing the conditions of a possible plebiscite.

*Depriving Peruvians of the Right to assemble and display the Peruvian Flag.* The principal incidents brought forward in support of this charge are ancient and trivial. The charge fails on the dual ground that it is not sufficiently supported by the record, and that it is not shown that any regulations which may have been made were not within the reasonable discretion of the Chilean Government in the circumstances obtaining in Tacna and Arica.

*Boycotting of Peruvian Labor.* This is a charge which is easy to make, hard to prove, and almost equally hard to disprove affirmatively. It is made by Peru repeatedly in official documents and in the affidavits of private parties. It is denied by Chile except as to preference on public works such as the Arica-La Paz Railway. In these circumstances it has been necessary to examine in detail the individual cases in which Peru has endeavored to establish the boycotting of workmen. Among twenty-seven specific cases of expulsion, persecution, etc., which are presented in the Peruvian Case and contested in the Chilean Counter-Case and which therefore afford the best basis for testing the contentions of the Parties, there are two cases in which Peru has endeavored to establish the boycotting of workmen, the cases of Roberto Nalvarte and Alberto Forero Marquez. In both of these instances Peru distinctly fails to make out a case. Among the three hundred and forty cases of expulsion set forth in the Peruvian Counter-Case there are some cases in which it is alleged that the affiant was deprived of employment because he was a Peruvian. Bearing in mind that these are *ex parte* affidavits to which Chile has had no opportunity to reply, there are very few of these affidavits which, in the opinion of the Arbitrator, make out a sufficient case *prima facie* and there is evidence elsewhere in the record which casts serious doubt upon some of these. In other words, there is a paltry showing of specific cases of boycotting of Peruvian labor and these rest upon *ex parte* affidavits. This is too unsubstantial a foundation upon which to establish such a charge. While the evidence leaves in the mind of the Arbitrator a question whether there has not been more discrimination against Peruvian labor than the record establishes there is nothing to indicate that this discrimination has attained such proportions as to make it possible to consider it as affording any ground for a decision against a plebiscite.

*Conscription.* Peru charges that Chile is applying her conscription laws to Peruvian citizens in Tacna and Arica as a means of driving them out of the provinces and thereby eliminating their votes in case a plebiscite is had. To this charge Chile interposes a threefold defence to the effect first, that conscription is not an effective way to Chilenize a Peruvian recruit; second, that children of Peruvian parents born in Tacna and Arica and claiming Peruvian nationality are not in fact conscripted; and third, that Peru has not put in evidence the requirements of Chilean law with respect to the military service of Peruvians. The first defence misses the point of the charge. Peru does not charge that the conscription laws are being used to win votes for Chile through the Chilenization of the conscripts, but that they are being used to eliminate Peruvian votes because young Peruvians on being called on to register or enlist prefer to emigrate to Peru. The second defence is on the merits; it rests largely on the circular of the Chilean Minister of Foreign Affairs of February 12, 1920, in which, after asserting that under the Constitution of Chile, Chilean conscription laws rightfully apply to all persons in Tacna and Arica, including Peruvians, the Minister proceeds: "Nevertheless, by special administrative disposition, all youths born in Tacna and Arica who because of their Peruvian parentage, may have indicated their preference to adhere to Peru, have been eliminated from the military service in those provinces." As this defence asserts the applicability of the Chilean conscription laws and rests upon administrative leniency in their enforcement, it is unnecessary to consider the third defence. The claim of leniency in enforcement raises an issue of fact and requires an examination of some two hundred affidavits introduced by Peru in which the affiants claim to have been forced to leave Tacna and Arica to avoid military service or to have been expelled from Tacna and Arica because of their failure or refusal to discharge their military duty under the Chilean conscription laws. The great majority of these affidavits appear in the Peruvian Counter-Case and Chile has therefore had no opportunity to meet them with evidence in rebuttal. Making due allowance for this, however, and taking into account the other evidence in the record, the Arbitrator is unable to conclude that the policy of administrative leniency proclaimed by the Chilean Government with respects to conscripts born in Tacna and Arica of Peruvian parentage who themselves claim to be Peruvians, has been consistently pursued by the administrative officers on the ground. While the affidavits indicate that the enforcement of the law has been intermittent as to time and sporadic as to places and persons, and that many young Peruvians have not been molested even in places and at times when the law was being enforced against other Peruvians, they also indicate that in a considerable number of cases, particularly in the year 1923, the Chilean conscription laws have been used not so much for the obtaining of recruits (for so far the policy of leniency appears to have been reasonably well carried out) but with the result, if not the purpose, of driving young Peruvians from the provinces. So far as this has been done, the Arbitrator holds it to be an abuse of Chilean authority. However, while the record leaves it somewhat uncertain as to the extent of this abuse, it is clear that there is no sufficient showing either as to time or persons or places to establish such a serious situation as would discharge the plebiscitary obligations of the treaty. The intermittent and sporadic infractions which have occurred are however important in connection with the consideration of the conditions of a plebiscite.

*Expulsion of Peruvian Citizens.* The Peruvian Case and Counter-Case and the Peruvian diplomatic correspondence submitted to the Arbitrator charge repeatedly that Chile has expelled and is expelling the Peruvian population of Tacna and Arica both *en masse* and as individuals. The Chilean Counter-Case and the Chilean diplomatic documents meet this charge with unqualified denials, except as to fifty-two persons whose expulsion is admitted and justified on the ground of "repeated violations of the laws and attempted conspiracies against the State".

Peru has submitted in support of her contentions several hundred individual cases in which she maintains that expulsion has taken place. As has been heretofore stated, twenty-seven specific instances of direct or indirect expulsion are presented in the Peruvian Case and controverted in the Chilean Counter-Case. Three hundred and forty additional cases are presented in as many affidavits in the Peruvian Counter-Case and there are certain other cases scattered through the documents. Each of these cases may involve either one or more individuals. Most of the evidence on both sides is in the form of *ex parte* affidavits of persons residing either in Tacna and Arica or lately resident there and now resident in Peru, and therefore subject to a greater or less degree to observation on account of their relation to the case and the environment under which they give their evidence.

In the case of the affidavits presented in the Peruvian Counter-Case Chile has had no opportunity to present evidence in rebuttal, and of course in no case has there been opportunity for the confrontation or cross-examination of the witnesses. In these circumstances the natural difficulties of arriving at the truth in a contested matter of this sort are greatly increased. In view however of the number of these cases put forward and the number of cases in which Chile has had an opportunity to produce evidence in rebuttal, the Arbitrator believes that a general conclusion can be safely formed from these cases in connection with the other evidence in the record. An examination accordingly has been made of each individual case of expulsion put forward in the record. To discuss these cases individually would expand this opinion far beyond its proper limits and any other discussion beyond the statement of the Arbitrator's conclusions would be unsatisfactory if not useless. The Arbitrator is of the opinion that as is usual in cases of this character, the truth lies between the extreme contentions of the respective Parties. The Arbitrator accepts the statement on behalf of Chile that only fifty-two persons have been formally expelled in such a manner as to cause their cases to be formally recorded in the archives of the Ministry of Foreign Relations. But the Arbitrator cannot overlook the fact that it is not necessary for the local Chilean officials to make a case of expulsion of record in order to accomplish it and that expulsions may be brought about informally by threats and intimidation without even being brought to the attention of the Chilean Government or made of record in the Ministry of Foreign Relations. In fact the evidence in the record indicates that the majority of the so-called cases of expulsion were brought about through the application or threatened application of the conscription laws and that in many of these cases there was no expulsion in any technical sense of the word. The affiant left "voluntarily" in order to escape the application of the law. The Arbitrator holds that the evidence indicates that the informal expulsions of various kinds have considerably outnumbered the formal expulsions which are admitted and justified by the Chilean agents. How many of these formal or informal expulsions were based on good cause it is impossible to say on the record presented, but it is reasonable to

conclude that aside from the conscription cases there were also other cases in which justification could not be successfully established. When all this is said however, it is very far from justifying the picture of mass expulsion and depopulation painted in the Peruvian documents. The Arbitrator finds that Peru's charges of wholesale expulsion and depopulation are not supported by the record. It is believed that Chile has underestimated the number of expulsions and that Peru has overestimated them. Taking the entire evidence into consideration, and the nature of the ultimate question presented for the determination of the Arbitrator and the principles that must be applied in its determination, as already stated, the Arbitrator is unable to find in the expulsions which have taken place any such serious and deliberate violation of Peru's treaty rights as to justify Peru in repudiating the plebiscitary obligations of Article 3. The expulsions which have taken place are however relevant in connection with the further question submitted to the Arbitrator.

*General Persecution of Peruvians through Mob Violence and otherwise.* Little need be said with respect to the question of mob violence which occupies a considerable place in the record. Unfortunately mob violence is not unknown in any country. It occurred in Chile at Iquique both in 1911 and in 1918 and Peruvians suffered. Iquique is some seventy-five miles south of the southern border of Tacna and Arica and what happened at Iquique has no direct bearing upon the matters with which this arbitration is concerned. Unfortunately again a little later on, both in 1911 and in 1918-1919, mob violence occurred in Tacna and Arica and again Peruvians were the sufferers. The responsibility for the mob violence in Tacna and Arica in 1911 and in 1918-1919 on the part of the Chilean Government is not established on this record. Again, the record is full of miscellaneous charges of official persecution of Peruvian citizens in Tacna and Arica. These charges in so far as they are serious, and some of them are very serious, are not sustained by credible and specific evidence. They rest on general declarations, and the Arbitrator is constrained to hold that these charges of general persecution are not adequately supported. There are also numerous charges of petty persecution, some of which if taken individually might be sustained, but all of which put together are not sufficiently serious to affect the decision of the weighty question under consideration.

*Conclusion.* The Arbitrator is far from approving the course of Chilean administration and condoning the acts committed against Peruvians to which reference has been made, but finds no reason to conclude that a fair plebiscite in the present circumstances cannot be held under proper conditions or that a plebiscite should not be had. The agreement which the Parties made that the ultimate disposition of the territory of Tacna and Arica should be determined by popular vote is in accord with democratic postulates. It furnished when it was made a desirable alternative to a continuance of strife and it affords to-day a method of avoiding the recurrence of a not improbably disastrous clash of opposing sentiments and interests which enter into the very fiber of the respective nations. In agreeing upon a determination of the embittered controversy by popular vote, the Parties had recourse to a solution which the present circumstances not only do not render impracticable but rather the more imperative as a means of amicable disposition. The Parties in the Treaty of Ancon provided no alternative mode of settlement and made no provision for limitation of time or for forfeiture. It is manifest



that if abuses of administration could have the effect of terminating such an agreement, it would be necessary to establish such serious conditions as the consequence of administrative wrongs as would operate to frustrate the purpose of the agreement, and, in the opinion of the Arbitrator, a situation of such gravity has not been shown.

The Arbitrator holds that the provisions of the second and third paragraphs of Article 3 of the Treaty of Ancon are still in effect; that the plebiscite should be held; and that the interests of both Parties can be properly safeguarded by establishing suitable conditions therefor.

### **Second—The Conditions of the Plebiscite.**

The Supplementary Act of the Protocol of Arbitration provides that "in case the holding of a plebiscite should be declared in order, the Arbitrator is empowered to determine the conditions thereof".

The Parties having failed to agree on the special protocol contemplated by Article 3 of the Treaty of Ancon prescribing "the manner in which the plebiscite is to be carried out" have submitted this question to the Arbitrator and the present Award is therefore to be deemed to be the substitute for the special protocol. The Treaty of Ancon contains no provision as to the conditions of the plebiscite, stating merely that it is to be a decision "by popular vote". As the time for the plebiscite was not fixed, save that it was not to be until after the expiration of the ten-year period, the constituency to which the Parties were to appeal was manifestly that existing at the time of the plebiscite, and, aside from the futility of such an attempt, there is no warrant for an endeavor by artificial rules to reestablish a constituency of a past period, although it may be appropriate to make reasonable regulations which will have regard to the position of the Peruvians of the provinces who may have been wrongfully expelled. The conditions of the plebiscite should be such as will be plain and practical and work substantial justice between the Parties in the present circumstances. They have also been framed in the light of the proposals made and views expressed by the Parties respectively in the course of their negotiations, and the Arbitrator has not failed to consider whatever historical precedents may be deemed to be of value.

### **QUALIFICATIONS OF VOTERS.**

In the beginning of the Jimenez-Solar negotiations it was maintained on behalf of Peru that "the right of suffrage belonged to none except Peruvians", while the Chilean Minister urged that "all the inhabitants of the territory .... had the right to declare their will to belong either to Peru or to Chile". However, this point was yielded on behalf of Peru and both Peruvians and Chileans were to be allowed to vote under the Peruvian draft protocol of February 23, 1894, submitted in the Jimenez-Solar negotiations. That draft drew a distinction as respects residence between Peruvians and Chileans permitting "Peruvians .... who reside at present in the provinces of Tacna and Arica" to vote, but only allowing "Chileans who can establish a continuous residence of two years .... and who live there at present" to participate in the election.

Again, in the negotiations leading to the Billinghamst-Latorre protocol of April 16, 1898 the representative of Chile maintained that "all the inhabitants of the territory" should vote; the Peruvian representative, "that only Peruvians born in the territory or that reside in it ought to be permitted to

vote". By the terms of the protocol, this was one of the points to be submitted to arbitration.

In the Puga Borne-Seoane negotiations of 1908 it was contended for Chile "that all the qualified inhabitants of the territory should be called on to exercise the right of plebiscitary suffrage", but it was answered for Peru that "the right of sovereignty belongs to the natives alone" or as the Peruvian translation has it, "the right to vote belongs to the denizens alone".

In the Edwards-Porras negotiations of 1909-1910, it was proposed on behalf of Chile that "all the inhabitants, Chileans, Peruvians and foreigners" should vote. It was responded on behalf of Peru that "all the Peruvians and Chileans" should have the right to vote that met the following requirements: "a. Twenty-one years of age, b. residence in the territory at least from July 1, 1907. Those also may take part who, born in the territory of Tacna and Arica, may be present at the moment of the vote, if they shall have been registered previously for that purpose. Public employees and members of the army or of the police that may be in service in the provinces mentioned may not vote."

The Huneeus-Valera exchanges of November 10, 1912, provided as follows: "Persons born in Tacna and Arica, and Chileans and Peruvians that may have resided for 3 years in the territory will be entitled to vote." The Chilean Case in referring to the provisions of the Huneeus-Valera exchanges according a vote to "persons born in Tacna and Arica" without a residential requirement, points out that the Huneeus-Valera plebiscite was only to take place in 1933, but expresses the view that "the right to vote because of birth in the territory is an unimportant matter".

It thus appears that on three occasions in the course of negotiations the representatives of Peru have conceded the right to vote to Chileans having prescribed residence in the territory, and that the insistence on the right to vote of persons born in the territory, irrespective of present residence is not strongly opposed. The latter provision will give opportunity to such native Peruvians of the territory as may have been expelled, without attempting the difficult task of determining all the questions of fact as to particular cases.

The only remaining question as respects nationality is whether the right to vote should be extended to residents of Tacna and Arica who are neither Peruvians nor Chileans. It must be remembered that a whole generation has grown up in the territory, since the treaty, among them a number of foreigners who are neither Chileans nor Peruvians, who do not know whether the land in which they live will ultimately be Chilean or Peruvian, and who may well have been restrained by this uncertainty from acquiring either Chilean or Peruvian nationality, although Peru permits naturalization after two years' residence and Chile after only one year's residence. In these circumstances, it would be no more than fair, while the number of such voters apparently would not be large, to permit foreigners, i.e., persons neither Chileans nor Peruvians, who have had a *bona fide* actual residence in the territory for a sufficient length of time to become naturalized in either Chile or Peru, and who are willing to make affidavit of their intention to seek naturalization in whichever country is successful at the plebiscite, to have a vote. Aside from persons born in the territory, there remains to consider what period of *bona fide* residence in Tacna and Arica ought to qualify any person as a voter at the plebiscite irrespective of the place of his birth.

The Arbitrator is of the opinion that the date upon which the qualifications of every voter in the plebiscite should be fixed, to the extent at least that he cannot acquire rights by the lapse of time thereafter, should be the date of

the protocol of arbitration and supplementary act, namely, July 20, 1922. Also, that any person of Peruvian or Chilean nationality, who has resided continuously in Tacna and Arica for two years prior to July 20, 1922, and who has continued to maintain his residence therein until the date of registration should be entitled to vote. Further, that any person of any other nationality who has resided continuously in Tacna and Arica for two years prior to July 20, 1922, and who has continued so to reside until the date of registration, and who makes a solemn declaration in a form to be provided of his intention to continue to reside in the province and to seek naturalization under the laws of the country successful in the plebiscite should be likewise entitled to vote. And, also that for obvious reasons it would be advisable in addition to the foregoing requirements as to residence in the territory to require residence for a short but reasonable period immediately before registration in the sub-delegation in which the voter registers.

Women's suffrage does not exist either in Chile or Peru. Neither Party has requested it nor has it been suggested in any of the negotiations between the Parties.

Ability to read and write is made a qualification for the exercise of the right of suffrage in both countries. But in view of the circumstances and of what is understood to be the character of a considerable portion of the population of the territory, it is believed to be just that a literacy qualification should not be required of those who own real property situated in the territory.

In both countries, there are certain disqualifications by reasons of military service. and in Peru, the civil servants of the State are also excluded from the right of suffrage. It is believed that persons born in Tacna and Arica should not be deprived of a vote in this plebiscite by reason of either military or civil service. With respect to others, in view of the policy of the laws of Chile and Peru, it is deemed to be advisable that those in the military service should not vote, and while Chile does not exclude from the franchise those engaged in the civil service, the Arbitrator sees no reason in this case for establishing a difference between the military and civil services.

Accordingly, the Arbitrator holds that the following persons shall be entitled to vote in the plebiscite directed to be held under this award:

A. Male persons, 21 years old, able to read and write, who qualify under one of the following classifications numbered 1, 2 and 3:

1. Persons born in Tacna and Arica, that is, in the territory as hereinafter defined in this Award;

2. Chileans and Peruvians who

(a) on July 20, 1922, had resided two years continuously in said territory; and

(b) continue so to reside in said territory until the date of registration; and

(c) reside for three months immediately preceding registration in the sub-delegation in which they are resident at the time of registration; and

(d) make an affidavit as to residence in a form to be prescribed by the Plebiscitary Commission hereafter described.

3. Foreigners, i.e., persons who are neither Chileans nor Peruvians, who are eligible for naturalization in either Chile or Peru and who fulfill the qualifications described in subdivisions *a*, *b*, *c* and *d*, under paragraph A-2. and who, in addition, make affidavit in a form prescribed by the

Plebiscitary Commission of their intention to apply at once for naturalization in the State winning the plebiscite.

B. 1. Provided, however, that no person shall be denied the right to vote at the plebiscite solely because of inability to read and write who on July 20, 1922, and continuously from that date until the date when he applies for registration was the owner of real property in said territory.

2. Provided, further, that no person shall acquire a vote through residence in said territory under the provisions of paragraphs A-2 and 3 if during any part of such required period of residence he has been a member in any capacity of the army, navy, carbineers, government police, secret service, or gendarmerie of either Chile or Peru, or has received compensation as such; or has been a government official or civil employee in the political, judicial or fiscal service of either country, or has received compensation as such.

3. Provided, further, that military persons of all ranks and civil employees of every degree of both governments who were born in said territory shall be given the opportunity to return to their native place both to register and vote in the plebiscite.

4. Provided, further, (a) that no person serving a term of imprisonment after sentence for a non-political offence involving moral turpitude or (b) under guardianship, *non compos mentis* or insane, shall be allowed to register or vote.

The Governments of Chile and Peru shall facilitate the entry into Tacna and Arica and the transit through Chile and Peru respectively for that purpose of any person claiming to be entitled to vote at the plebiscite, and the Plebiscitary Commission shall be competent to receive claims based on alleged violations of the foregoing provision and to decide as to the validity of such claims and the right of such persons to vote.

#### SUPERVISION OF THE PLEBISCITE.

It is obvious that the holding of the plebiscite should be appropriately supervised by competent and impartial authority, and in the negotiations of the Parties considerable attention has been given to the constitution of such authority. As one of the conditions of the plebiscite, the Arbitrator decides that there shall be constituted a Plebiscitary Commission, and Registration and Election Boards with the following organization, powers and duties:

#### *Plebiscitary Commission.*

A. *Constitution.* A Plebiscitary Commission shall be constituted consisting of three members, one to be appointed by the Government of Chile, one to be appointed by the Government of Peru, and the third member, who shall act as President of the Commission, to be appointed by the President of the United States.

In case one Party to the arbitration appoints a member of the Plebiscitary Commission but the other Party fails to appoint a member for thirty days after the time hereafter provided in this Award, it shall thereupon become the duty of the President of the Plebiscitary Commission to appoint a member to fill the vacancy thus existing. In making this appointment the President of the Commission is not limited as to nationality except that no more than

one member of the Plebiscitary Commission may be a national of either Chile or Peru.

Vacancies shall be filled according to the manner of the original appointment.

*B. Procedure.* The Plebiscitary Commission shall act by a majority vote and shall establish its own rules of procedure subject to the provisions of this Award.

*C. Powers.* 1. The Plebiscitary Commission shall have in general complete control over the plebiscite and shall have authority to determine all questions as to the registration of voters, the casting and counting of the vote and whether the persons claiming the right to register and vote are qualified to do so, subject only to the provisions of this Opinion and Award.

2. Without limiting the generality of the foregoing, the Plebiscitary Commission shall have the power and duty to promulgate rules and regulations for the plebiscite which shall provide as follows:

- (1) For the procedure of Registration and Election Boards;
- (2) For public notice of the time and places of registration and the time and places of voting;
- (3) For the registration of voters;
- (4) For the opening to public scrutiny of the lists of registered voters before the date set for voting so as to furnish opportunity for the investigation of contested cases and the correction of the voting lists;
- (5) For the secrecy of the ballot;
- (6) For the printing of the plebiscitary ballots which shall be in simple form with two columns headed by representations of the national flags of Chile and Peru, respectively, with the words "for Chile" in one column and the words "for Peru" in the other, and a square in each column to be marked by the voter according to his preference;
- (7) For the reception and counting of the ballots;
- (8) For the tabulation and scrutiny of the returns of the vote;
- (9) For appeals from the Registration and Election Boards to the Plebiscitary Commission;
- (10) For proceedings either by way of appeal from the Registration and Election Boards or by way of original contest proceedings before the Plebiscitary Commission to exclude any or all votes cast or apparently cast at any voting place on account of intimidation, bribery or fraud.

*D. Appeal to the Arbitrator.* 1. The Arbitrator reserves the power and right on his own motion to entertain an appeal from the Plebiscitary Commission on any question decided by it. The Arbitrator further reserves the power and right to entertain an appeal on the certificate of the Commission to the effect that the question decided involves the interpretation of the Award, the jurisdiction of the Commission, or some question of general importance in relation to the holding or result of the plebiscite and that one member of the Commission has filed a dissenting opinion in writing and requested that the question be certified to the Arbitrator.

In every case of appeal, the Arbitrator reserves the power and right to determine the time and manner in which, and the record upon which, the appeal shall be submitted to the Arbitrator.

*E. Report to the Arbitrator—Contest Proceedings.* After the tabulation and scrutiny of the returns submitted by the Registration and Election Boards

to the Plebiscitary Commission is complete, the Plebiscitary Commission shall report by telegraph the result of the plebiscite to the Arbitrator and to the Ministers of Foreign Affairs of the Parties. Within five days after this report either Party may institute contest proceedings before the Plebiscitary Commission upon the ground that the result of the plebiscitary vote as announced has been affected by intimidation, bribery or fraud to such an extent that the result reached does not represent the will of the people of Tacna and Arica. If such contest proceedings be instituted the Commission shall hear said proceedings summarily in accordance with rules of procedure to be determined by it and report its finding thereon at the earliest possible date to the Arbitrator and to the Parties. If no contest proceedings are instituted within five days, the Plebiscitary Commission shall so advise the Arbitrator and the respective Ministers of Foreign Affairs by telegraph.

*Registration and Election Boards.*

*A. Constitution and Number.* At least four Registration and Election Boards and as many more as the Plebiscitary Commission finds to be necessary, each Board consisting of three members, shall be appointed in the following manner:

One member shall be appointed by each member of the Plebiscitary Commission, other than the President of the Commission, and the third, who shall act as President of the Board, shall be appointed by the President of the Plebiscitary Commission. Vacancies shall be filled according to the manner of the original appointment.

*B. Procedure.* The Registration and Election Boards shall respectively act by majority vote.

*C. Place of sitting.* One Registration and Election Board shall sit in Arica, one in Tacna and the others shall sit in such places as may be designated by the Plebiscitary Commission to the end that proper opportunity shall be given to persons qualified to register and vote.

*D. Powers.* The Registration and Election Boards shall proceed, in accordance with regulations promulgated by the Plebiscitary Commission, to make up and publish lists of the voters entitled to take part in the plebiscite and shall receive and count the vote. No person not duly registered shall be allowed to vote in the plebiscite.

THE TIME OF THE PLEBISCITE.

The members of the Plebiscitary Commission shall be appointed within four months from the date of the rendition of this Award, and the Commission shall assemble in the City of Arica for its first meeting not later than six months from the date of the rendition of this Award. These times may be changed by the Arbitrator. The Commission shall thereupon proceed at once to formulate rules for its own procedure and regulations governing the plebiscite in conformity with the conditions herein set forth, and shall fix the date for the plebiscite, and the time and places of registration and voting.

The dates, times and places so fixed may be changed by the Commission.

EXPENSES OF THE PLEBISCITE.

*A.* The expenses of the plebiscite shall be borne by the two countries in equal parts.

B. The members of the Plebiscitary Commission shall be repaid their actual expenses and each member shall receive as compensation a sum equivalent to \$1,000 per month during the period of service.

C. The Commission shall at the earliest practicable moment make and submit to the Arbitrator an estimate of the total cost of carrying out the plebiscite, and a schedule showing the amounts which from time to time should be made available for the use of the Commission. Upon the approval of this estimate and schedule by the Arbitrator the two Governments shall deposit these sums in equal parts in an institution designated by the Commission and in the amounts and at the times specified in the estimate. If necessary, a supplementary estimate or estimates, schedule or schedules shall be made and submitted in like manner. Any amount not expended in the necessary and proper expenses of the plebiscite shall be repaid by the Commission at the conclusion of its labors to the two Governments in equal parts.

D. Within four months after the date of the rendition of this Award, the two Governments shall each deposit in a financial institution to be designated by the Secretary of State of the United States the sum of \$15,000 to be made available for the initial expenses and compensation of the members of the Plebiscitary Commission.

E. The Arbitrator may extend the period fixed for the first deposit and may likewise modify any schedule presented by the Commission either before or after its approval in order to conform to any modification of the date of the plebiscite.

F. In case either Party does not deposit its moiety of any amount required for the expenses of the plebiscite within the time or times specified as hereinbefore provided, or as provided in any schedule prepared by the Commission and approved by the Arbitrator, the other Party may advance the requisite amount in order that the work of the Plebiscitary Commission may not be interrupted, and any amount so advanced shall be added or subtracted as the case may be in paying the treaty sum of ten millions as hereinafter provided and the reimbursement of such advance or advances shall be secured in the same manner as the payment of the ten millions is secured.

G. The Plebiscitary Commission shall appoint a bonded disbursing officer who shall on the authority of the Commission disburse from the sums deposited as aforesaid the amounts required for the work of the Commission and the Registration and Election Boards.

#### PROCLAMATION OF THE RESULT OF THE PLEBISCITE.

Upon being properly advised by the Plebiscitary Commission of the result of the plebiscite, the Arbitrator in case no contest proceedings have been instituted as hereinbefore provided, will proclaim the result by notifying both Parties. In case contest proceedings are instituted the Arbitrator upon receiving the report of the Plebiscitary Commission thereon will either proclaim the result of the plebiscite by notifying the Parties accordingly or will declare the plebiscitary vote void and decree a new plebiscite within three months.

#### LEGISLATION IN AID OF PLEBISCITE.

Both Chile and Peru shall enact appropriate legislation providing within their respective jurisdictions for the protection of the members of the

Plebiscitary Commission and the Registration and Election Boards in the discharge of their functions; for the apprehension, trial and punishment of persons guilty of intimidation, bribery, fraud or other offence in connection with registration or voting in the plebiscite, or of interference with the Plebiscitary Commission or any of its members or any Registration and Election Board or any member or employee thereof in the discharge of their respective functions or duties; for compelling the attendance of witnesses before the Plebiscitary Commission and the Registration and Election Boards upon request of the Commission duly made to some appropriate Chilean or Peruvian authority as the case may be and for the punishment of witnesses who when duly summoned refuse to testify before the Commission or any Registration and Election Board or who are guilty of perjury.

#### CLAIMS FOR REIMBURSEMENT AND ACCOUNTING.

Chile contends that the Arbitrator shall impose as a condition of the plebiscite that in case Chile is defeated in the plebiscite she should be reimbursed for her expenditures for public works during the past forty years in Tacna and Arica.

Peru on the other hand insists that any investments or improvements made by Chile in Tacna and Arica since 1894 were made at her own peril, and that Peru is not responsible for their value. And, furthermore, Peru contends that not only has Chile already received the ten million pesos provided by the treaty through her prolonged occupancy of Tacna and Arica after the expiration of the original ten-year period, but that Peru is entitled to an award of twenty million pesos in addition by way of payment on account of Chile's prolonged and illegal occupation of the territory.

Although the Arbitrator is of the view that the conclusions heretofore set forth in this Opinion and Award are in effect decisive of these claims set up by the respective Parties, the Arbitrator does not consider himself to be entitled by the Terms of Submission to pass upon these claims as substantive matters. The Arbitrator is empowered to decide whether or not a plebiscite shall be held, and having decided in the affirmative the Arbitrator is then empowered to fix the conditions of the plebiscite, but the Arbitrator holds that the conditions which it is within his competence to impose are those which relate to the holding of the plebiscite and the matters which were to have been established by the special protocol contemplated by the Treaty of Ancon. The claims presented by the Parties do not relate to the manner in which the plebiscite is to be carried out.

The Arbitrator therefore dismisses these claims of both Parties on the ground that they are not within his jurisdiction.

#### THE PAYMENT OF THE TEN MILLIONS.

Article 3 of the Treaty of Ancon provided, in the third paragraph relating to the contemplated special protocol, that this protocol should prescribe "the manner in which the plebiscite is to be carried out, and the terms and time for the payment of the ten millions by the nation which remains the owner of the provinces of Tacna and Arica". As this payment by the terms of Article 3 depends upon and is to follow the plebiscite, it is deemed to be within the duty of the Arbitrator under the agreement of submission to determine the time and terms of payment. The matter is one in which there is no controlling legal principle. It is a question to be determined within certain general limits of fairness in the light of the treaty obligation.



Chile in her Case has informed the Arbitrator of her present desires, but doubtless because in her view of the case it was unnecessary to do so, Peru has not discussed the plan for the payment of the ten millions suggested by Chile or indicated her present views on the subject. Chile, however, in addition to proposing a plan of payment, has also indicated her present readiness to accept an arrangement which was at one time acceptable to Peru, namely, the arrangement for which provision was made in the Billinghurst-Latorre protocol of April 16, 1898. This was as follows:

“Article XV. The indemnity of ten million *pesos* prescribed by Article III of the Treaty of October 20, 1883, will be paid by the country that shall become the owner of the provinces of Tacna and Arica on the following terms: one million within the period of ten days, reckoned from the proclamation of the general result of the plebiscite; another million within the following year; and two millions at the end of each year of the subsequent four years.

“The sums referred to will be paid in Peruvian silver *soles* or in Chilean silver coin of the kind that circulated at the time when the Treaty of October 20, 1883, was signed.

“Article XVI. The total products of the Custom-House at Arica are assigned for the payment of the indemnity mentioned in the preceding article.”

As there is no apparent reason for adopting a basis of a different sort, the Arbitrator holds that the payment of the ten millions should be made in the following amounts and at the following times:

One million within ten days after the proclamation by the Arbitrator of the result of the plebiscite;

A second million within the year following; and

Two millions at the end of each year of the subsequent four years.

These sums shall be paid in Peruvian silver *soles* or in Chilean silver coin equivalent to the kind in circulation on October 20, 1883.

The total revenues of the Custom-House at Arica are assigned as security for the above payments.

### **Third—The Boundary Questions—Tarata and Chilcaya.**

The remaining questions relate to the boundaries of the territory to which Article 3 of the Treaty of Ancon refers. The Article describes that territory as follows:

“The territory of the provinces of Tacna and Arica, bounded on the north by the river Sama from its source in the Cordilleras on the frontier of Bolivia to its mouth at the sea, on the south by the ravine and river Camarones, on the east by the Republic of Bolivia, and on the west by the Pacific Ocean, shall continue in the possession of Chile subject to Chilean laws and authority during a period of ten years, to be reckoned from the date of the ratification of the present treaty of peace.”

#### **THE NORTHERN BOUNDARY—TARATA.**

Immediately after the signing of the treaty, a dispute arose as to the northern boundary and the controversy has continued ever since. Chile contends that the treaty established a river line, that is, the river Sama from

its source to its mouth and that this line should be defined and followed as the northern boundary irrespective of any Peruvian provincial lines. According to Chile's contention, the territory in question would embrace not only territory of the Peruvian provinces of Tacna and Arica but also a portion of the Peruvian province of Tarata. Peru insists that Article 3 of the treaty dealt solely with the Peruvian provinces of Tacna and Arica and that no part of the province of Tarata was included.

It is not open to dispute that at the time of the signing of the treaty there existed under Peruvian law, and had existed for several years, a Peruvian department known as the department of Tacna and that this department embraced three provinces known as the provinces of Tacna, Arica and Tarata. It is also clear that the reference in the treaty to the provinces of Tacna and Arica must be taken to relate to the Peruvian provinces of Tacna and Arica. If it were not for the description of the river Sama as a boundary no one would suggest that any territory was included which was not within the limits of the two Peruvian provinces named.

The argument for the inclusion of other territory is that the reference to the two provinces must be deemed to be controlled by the described river line. The difficulty with this argument is that there is in fact no such river line as the treaty describes. There is no river Sama that has "its source in the Cordilleras on the frontier of Bolivia". The river Sama as known and defined is formed by the confluence of the river Chaspaya and the river Tala, a confluence which takes place west of the town of Tarata (the capital of the Peruvian province of that name). From that junction the river Sama flows to its mouth at the sea cutting across the northern portion of the Peruvian province of Tacna. So that there was territory of that province lying south of the river Sama and the Peruvian province of Arica lay to the south of the province of Tacna. There is a dispute as to which of the tributaries of the river Sama east of the junction of the rivers Chaspaya and Tala should be regarded as the main affluent or the continuation of the river Sama, but neither the Chaspaya nor the Tala, nor their tributaries, conform to the description of the treaty and enable the Arbitrator to establish any line of the river Sama as described "from its source in the Cordilleras on the frontier of Bolivia to its mouth at the sea". The Chilean Case states that the Chilean geographer, Alejandro Bertrand, in a report to the Government of Chile in 1903, suggested "as a solution of the problem brought up by the fact that the river Sama does not rise in the mountains bordering upon Bolivia", the adoption of a line that would unite the source of the Chaspaya or of the Ticalaco (which appears to be a tributary of the Tala) with the intersection of the two old Peruvian departments of Tacna and Puno at the Bolivian border. In this uncertainty, Chile insisting upon a river line suggests that the Arbitrator appoint a Special Commissioner to investigate and report for the purpose of establishing a boundary line in the area intervening between the head of one or the other of the tributaries of the river Sama and the frontier of Bolivia.

After the treaty was signed, Chile established her occupation on the line of the river Ticalaco, a river which lies about midway between the northern tributary of the Sama, the Chaspaya, and a southern tributary (apparently through the Tala), the Estique, but she insists that she has always claimed the Chaspaya as the true source of the Sama. Peru at once protested against occupation under the treaty of any portion of the province of Tarata and has always maintained this position. Chile, under her claim of right, proceeded to establish a Chilean province of Tacna, including a sub-delega-

tion of Tarata. In a despatch of July 14, 1886, from the Peruvian Consul in Iquique to the Peruvian Foreign Minister, it is stated that Chile has assumed jurisdiction in three of the districts of the Peruvian province of Tarata, that is, the districts of Tarata, Tarucachi and Estique.

It is quite apparent that the representatives of the Parties who negotiated the treaty, had little exact knowledge of the geography of the region to the east and wrote into the treaty an inaccurate description. It should also be said that there has not been furnished to the Arbitrator satisfactory evidence as to the exact line of the old Peruvian provincial boundaries. The record is strikingly deficient in appropriate maps and geographical information bearing upon these questions.

Despite these difficulties, the Arbitrator finds certain controlling considerations in the construction of the treaty. The fundamental question is the intention of the Parties and any artificial construction is to be avoided. The Peruvian provinces of Tacna and Arica were well known political divisions with their respective capitals of like names, and the Peruvian province of Tarata was also a well known political division with its capital of the same name. It is difficult to believe that representatives of Governments who, however lacking in exact geographical information, knew of these political divisions, and the jurisdictions they denoted, and particularly the most important towns they embraced, would have used the expression "the territory of the provinces of Tacna and Arica" when they intended to embrace not only such territory but also a portion of the territory of a distinct political division known as Tarata. The argument that this reference to political divisions should yield to a described geographical boundary assumes that there is a definite geographical boundary laid down, which is not the case, or that the description of a geographical boundary indicates an intention to include territory lying outside the provinces of Tacna and Arica, when in truth the description of a geographical boundary which did not exist serves to indicate that they did not know where the geographical boundary lay which they were attempting to describe. The reference to the political divisions known as the provinces of Tacna and Arica cannot, in the judgment of the Arbitrator, be overridden by a description of a line which it is impossible to lay down as described.

Some light is thrown upon the question by the history of the negotiations leading to the Treaty of Ancon. In the conference of October 28, 1880, Chile stated as one of the conditions of peace: "Retention on the part of Chile of the territory of Moquegua, Tacna, and Arica, occupied by Chilean forces." In the protocol of February 11, 1882, Chile made the condition: "Occupation of the region of Tacna and Arica for ten years." Reference is made by Chile in her Counter-Casp to a proposal of the Minister of the United States in Chile to the Chilean Foreign Minister, in the course of good offices, that Chile should have the right to purchase "the Peruvian territory between the river Camarones and the river Sama", but if any significance is to be attached to this as a proposal of a river line exclusively, it is met by the fact that in the later protocol of May 10, 1883, the Parties did not set forth a river line but stated that "The territories of Tacna and Arica shall continue in the possession of Chile", etc.

There were further discussions on the wording of the paragraph in question when the time came for the signature of the formal treaty, and it is to be regretted that the record is not more complete on this point. There is some evidence in the record which indicates that Chile endeavored to obtain the insertion of the expression "department of Tacna" which would have em-

braced the provinces of Tacna, Arica and Tarata. The Peruvian Counter-Case quotes from the work of Gonzalo Bulnes ("Guerra del Pacifico"—Vol. III, p. 578) what purports to be a telegram from the Chilean Foreign Minister, then in Lima, to the President of Chile, on October 18, 1883, two days before the signing of the treaty, as follows:

"In subscribing the definitive treaty, read the telegram of Aldunate to Santa Maria (President of Chile), dated October 18, 1883, we said that the *department (departamento)* of Tacna was to remain for ten years in the power of Chile; and the negotiators of Iglesias (President of Peru) argue that what was agreed in May, covered only the area, until the plebiscite of the *provinces (provincias)* of Tacna and Arica as far as the river Sama, and *not the additional province of Tarata (no la otra provincia de Tarata)* which reaches up to Locumba and which also forms part of the *departamento de Tacna*. In the presence of this difficulty, I do not dare to decide anything by myself. If we, concluding a treaty, had said that we ceded the territories (*territorios*) of Santiago and Victoria, would it be understood that we also ceded Rancagua? Everything is prepared for the delivery of Lima and Callao on Saturday; and the present difficulty causes grave perturbation."

While Chile has not had the opportunity to reply to the Peruvian Counter-Case, it is apparent from the Chilean Counter-Case that some question of this sort had arisen, as it gives a telegram of October 19, 1883, from the President of Chile to the Chilean negotiators as follows:

"The telegrams and records that we have consulted convince us that we always have pointed to the river Sama as the boundary line between the Peruvian territory and that territory that is to be turned over to Chile. According to the conditions of the agreement we took the Sama in its entire extension, from the coast to the point where it branches off and continues to the Bolivian border, all settlements south of that line to be included in the territory to be ceded. When the said line was fixed it was also kept in mind that the entire road leading into Bolivia—a fact that could not be overlooked—remained in the territory to be ceded, according to the result of the plebiscite. If, by taking the Sama as the boundary line, Tarata remains under our control, let it be so. We are keeping our word. We did not speak of departments but of territories when we mentioned Tacna and Arica before, because we fixed a line such as the Sama, which might or might not be a boundary line in the Peruvian territorial divisions of those regions."

Peru has had no opportunity to comment on this telegram.

The inference to be drawn from these exchanges is that the question of including territory of the province of Tarata was in the minds of the Parties. If Chile sought to include Tarata, she did not succeed in securing a reference to the province of Tarata in the description. If it was thought that the mention of the river boundary would effect this purpose, the fact remains that the description of the territory as that "of the provinces of Tacna and Arica" was put in the treaty and the river line was deprived of a controlling significance by its inaccuracy. If it be assumed, as appears to be the fact, that the question of the inclusion of territory of the province of Tarata was presented, it is deemed to be decisive that the treaty does not set forth a river line exclusively, and that the words "the territory of the provinces of Tacna and Arica" were retained. There is no sufficient evidence of inten-

tion, and no provision of sufficient precision, as to justify the conclusion that any territory of the province of Tarata was included in Article 3.

It does not militate against this view that the exact line of the Peruvian provincial boundary is not defined in the record, or that there may have been some uncertainty in relation thereto. The capital of the province of Tarata was the town of Tarata, a town of considerable importance. This furnishes a test as, on the Chilean claim, the town of Tarata was to go to Chile. But it is plain that neither of the Parties supposed that the town of Tarata was in the territory of the provinces of Tacna and Arica. So, also, arguments based on the strategic or economic importance of Tarata must be dismissed. If Chile for any reason attached importance to the retention of Tarata, it is all the more significant that she did not include in the treaty any reference to the province of Tarata, while making distinct reference to the provinces of Tacna and Arica. Not only the first paragraph, but also the second and third paragraphs, of Article 3 of the treaty refer to these provinces. The second paragraph states that the plebiscite will decide "whether the territories of the above-mentioned provinces will remain under the dominion and sovereignty of Chile or continue to form part of Peru". It is added that either of the two countries to which "the provinces of Tacna and Arica" may remain annexed shall make the described payment. The third paragraph provides that the special protocol will prescribe the terms and time of the payment to be made by the nation "which may remain in possession of the provinces of Tacna and Arica".

The Arbitrator decides that no part of the Peruvian province of Tarata is included in the territory covered by the provisions of Article 3 of the Treaty of Ancon; that the territory to which Article 3 relates is exclusively that of the Peruvian provinces of Tacna and Arica as they stood on October 20, 1883; and that the northern boundary of that part of the territory covered by Article 3 which was within the Peruvian province of Tacna is the river Sama.

#### THE SOUTHERN BOUNDARY—CHILCAYA.

The southern boundary of the territory covered by Article 3 of the Treaty of Ancon is stated therein to be "the ravine and river Camarones".

In this relation, it should be noted that Article 2 of the treaty provided for the cession by Peru to Chile in perpetuity of "the territory of the littoral province of Tarapaca, the boundaries of which are on the north the ravine and river Camarones".

It thus appears that by both these articles the boundary between the Peruvian province of Tarapaca, ceded absolutely to Chile, and of the territory of the Peruvian provinces of Tacna and Arica to be continued, as stated, in the possession of Chile, is given simply as "the ravine and the river Camarones". There appears to be no dispute as to this boundary between the mouth of the river Camarones at the Pacific Ocean and Arapunta, the junction of the two principal tributaries, the Ajatama coming in from the north-east and the Caritaya coming in from the south-east. Chile contends that the Ajatama is the true continuation of the Camarones and claims the line of the Ajatama to the point where it is joined by the Rio Blanco and from that point draws a line to the Bolivian frontier which is based largely upon what Chile asserts to have been the legal or traditional boundary line between the territories of the Peruvian provinces of Arica and Tarapaca. This is in accord with a Chilean decree of May 4, 1904.

Chile, however, asks that an expert commission be appointed by the Arbitrator to fix the line.

Peru expresses her intention of abiding by the decision which the Arbitrator may consider to be appropriate and equitable, but is understood to claim the river Caritaya as the true boundary from Arepunta to its source, apparently maintaining that that source intersects with the Bolivian frontier.

Between these two lines lie the valuable borax deposits of Chilcaya, over which there has been a serious controversy between rival private claimants. This dispute may have been influential in bringing about the delimitation decree made by Chile in 1904. Much of the evidence introduced in this record consists of reports and opinions which were pertinent to the controversy between private litigants. In the litigation, it was held in 1904, by the Chilean court in Arica that the plaintiffs, claimants of the borate mines of Chilcaya under Tarapaca titles had failed to sustain their claims by a preponderance of evidence and that the judgment should be in favor of the defendants in possession claiming under Arica titles. The court held, however, that it was not competent to decide on the boundaries between Arica and Pisagua (Tarapaca). On January 3, 1905, this decision was affirmed on technical grounds by the Chilean Court of Appeals of Tacna.

Both Parties seem to agree that the treaty line and the old Peruvian provincial boundary line are the same, and the Arbitrator taking the clause in question in the light of its context is of this view. It is impossible, however, to fix this line upon the data submitted to the Arbitrator.

The Arbitrator decides that the southern boundary of the territory covered by Article 3 of the Treaty of Ancon is the Peruvian provincial boundary between the Peruvian provinces of Arica and Tarapaca as they stood on October 20, 1883.

#### CONCLUSION.

The Arbitrator accordingly decides:

That the territory to which Article 3 of the Treaty of Ancon relates, and the disposition of which is to be determined by the plebiscite to be held as hereinbefore provided, is the territory of the Peruvian provinces of Tacna and Arica as they stood on October 20, 1883; that is to say, so much of the territory of the said Peruvian province of Tacna as is bounded on the north by the river Sama, and the whole of the said Peruvian province of Arica;

That the Arbitrator reserves the power and right to appoint a Special Commission consisting of three persons, one to be nominated by Chile, another to be nominated by Peru, and the third to be designated by the Arbitrator, to draw the boundary lines of the territory covered by Article 3 of the Treaty of Ancon in accordance with the determination of the Arbitrator in this Opinion and Award; that if either Party fails to make its nomination of a member of said Commission within four months after the date of this Opinion and Award, the Arbitrator shall have the power and right to appoint a member of said Special Commission to fill the vacancy so arising; and that vacancies in said Special Commission shall be filled in the same manner as the original appointments;

That within four months after the date of this Opinion and Award, each Party shall deposit a sum to be fixed by the Arbitrator in an institution to be named by him in order to meet the expenses and compensation of the members of said Special Commission and the Parties shall within two months

after the date of this Opinion and Award submit to the Arbitrator their estimates of said expenses and compensation; that the failure of either Party to submit such estimate, shall not prevent the decision of the Arbitrator as to the amount of such deposit, and if either Party fails to make deposit of the amount fixed by the Arbitrator, the other Party may make the deposit required and the amount so advanced by either Party on behalf of the other shall be added to or deducted from the amount to be received or paid by such Party, making the advance, under the second paragraph of Article 3 of the Treaty of Ancon;

That all the periods hereinbefore mentioned may be extended or changed by the Arbitrator;

That the holding of the plebiscite as hereinbefore provided shall not be delayed to await the proceedings or report of said Special Commission on boundaries but that either Party may challenge the right of any person to register or vote in said plebiscite upon the ground that he was born or resided as the case may be, outside the limits of the territory covered by Article 3 of the Treaty of Ancon as defined in this Opinion and Award, and the Plebiscitary Commission shall cause a separate record to be kept of all such persons whose right to register and vote may be affected by the report of the Special Commission on boundaries, and the votes of such persons shall also be separately kept.

That the Arbitrator reserves the power and right to pass upon, adopt, modify or reject the report of said Special Commission, or to appoint a new Special Commission and pass upon its report in like manner;

That if it appears from the report of the Plebiscitary Commission that the result of the plebiscite may depend upon the votes of persons whose right to register or vote may be in doubt until the boundaries of the territory covered by Article 3 of the Treaty of Ancon have been fixed as hereinbefore provided, the Arbitrator shall withhold the proclamation of the result of the plebiscite until said boundaries have been fixed and the right of such persons to register and vote has been determined accordingly.

IN TESTIMONY WHEREOF I have hereunto set my hand and caused the seal of the United States to be affixed<sup>1</sup>.

*Done in triplicate at the City of Washington on the fourth day of March in the year one thousand nine hundred and twenty-five and of the Independence of the United States the one hundred and forty-ninth.*

[SEAL]

CALVIN COOLIDGE.

BY THE PRESIDENT:

CHARLES E. HUGHES,  
*Secretary of State.*

<sup>1</sup> Difficulties arose in regard to the execution of this award. Finally, with the assistance of the United States of America, a treaty between Chile and Peru for the settlement of the Tacna-Arica territorial dispute was concluded at Lima on June 3rd, 1929.