1925

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THE TACNA-ARICA ARBITRATION

By Quincy Wright*

The award by the president of the United States on March 4, 1925 marks an important step toward solution of the long pending dispute between Chile and Peru, though it can not be said that the dispute is finally settled. In brief the award decided that a plebiscite should be held to determine the ultimate sovereignty of the two provinces of Tacna and Arica. It also declared the conditions and procedure for holding the plebiscite and for paying a sum of money by the successful state. Finally it determined the precise geographical limits of the plebiscite area.

The arbitration resulted from an agreement reached at Washington on July 20, 1922 recording 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 three of said treaty" and agreeing to submit these difficulties to the arbitration of the president of the United States who shall determine the terms and procedure and decide the difficulties "finally and without appeal, hearing both parties and after due consideration of the arguments and evidence which they may adduce." A supplementary agreement of the same date further specified:

"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

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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."

The president accepted the position of arbitrator on January 29, 1923 and a schedule of arbitral procedure proposed by the parties on March 2 and approved by the arbitrator on March 13 provided six months, with two months additional on request of either party, for submission of the cases and three months additional for the counter cases. As the additional two months were allowed at the request of Chile, the final documents were not submitted until February 13, 1925. These occupied about 6,000 pages. There was no oral argument.

The arbitration was notable because of the broad powers given the arbitrator. He was not only competent to decide an issue which had often been the cause of diplomatic breaches between the parties in the past, but he was authorized to prescribe the procedure of arbitration, though in fact the parties reached agreement, and to declare administrative regulations to give the award effect. As the exercise of some of these powers required practical and political rather than legal judgment, it is not surprising that the parties preferred arbitration to judicial

1Article 53 of the I Hague Convention of 1907 gave the Permanent Court of Arbitration power to settle the compromis in certain circumstances though the power has never been exercised.

2The compromis of the North Atlantic Fisheries Arbitration (Great Britain v. United States) January 27, 1909, art. 4, gave the tribunal power to recommend regulations which however would not be effective unless accepted by the parties. (Wilson, Hague Arbitration Cases, pp. 138, 173, 187). The compromis of the Behring Sea Fur Seal Arbitration (Great Britain v. United States) February 29, 1892, art. 7, authorized the tribunal to determine concurrent regulations necessary to preserve the seal herds on the high seas. In addition to such regulations, the tribunal recommended regulations applicable within the jurisdiction of the parties. (Moore, Digest of International Arbitrations, pp. 949, 956.) It is not unusual for arbitrators to be given power to specify the form and manner in which pecuniary awards shall be paid. (See compromis, Pious Fund Arbitration, United States v. Mexico, May 22, 1902, art. 10, Wilson, op. cit. pp. 6, 11.
settlement though the latter was open to them through the Permanent Court of International Justice,\(^3\) and that, of the two types of arbitration, they preferred the head of an impartial state to a tribunal of international jurists though the latter might have been selected through the Permanent Court of Arbitration.\(^4\) The president of the United States was doubtless selected as arbitrator because of his initiative in calling the conference which lead to the agreement to arbitrate and because of the sentiment of Pan-Americanism which was alluded to in the closing session of this conference.

Article 3 of the Treaty of Ancon of October 3, 1883, about which the dispute turned, is in the following terms:\(^5\)

"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 (or at) 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.

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\(^3\)Neither Chile nor Peru are parties to the protocol of the Permanent Court of International Justice, though Chile has signed it. As both are members of the League of Nations the court was open to them under article 35 of the statute.

\(^4\)Both Chile and Peru acceded to the 1899 Hague Convention for the Pacific Settlement of International Disputes. Both signed the 1907 convention but neither seems to have ratified.

\(^5\)El territorio de las provincias de Tacna y Arica, que limita por el norte con el río Sama, desde su nacimiento en las cordilleras limitrofes con Bolivia hasta su desembocadura en el mar, por el sur con la quebrada y río de Camarones, por el oriente con la República de Bolivia, y por el poniente con el mar Pacífico, continuara poseído por Chile y sujeto a la legislacion y autoridades chilenas durante el termino de diez años contados desde que se ratifique el presente Tratado de paz. Espirado este plazo, un plebiscito decidira si el territorio, de las provincias referidas ueda definitivamente del dominio y soberania de Chile, o si continua siendo parte del territorio peruano. Aquel de los dos paises a cuyo favor queden anexadas las provincias de Tacna y Arica, pagara al otro diez millones de pesos moneda chilena de plata o soles peruanos de igual lei y peso que aquella.

Un protocolo especial, que se considerara como parte integrante del presente Tratado, establecera la forma en que el plebiscito deba tener
"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."

This treaty terminated the war of the Pacific from 1879 to 1883 and that war originated in controversies concerning the northern boundary of Chile. The barren desert of Atacama rendered exact determination of this boundary of little importance until exploration for nitrates began, mainly at the initiative of Chileans in 1842. A dispute then arose with Bolivia at that time in possession of the province of Antofogasta north of Atacama. This dispute resulted in a treaty in 1866 which established the boundary at the 24th parallel but provided for division of profits from nitrates and minerals in the zone from the 23rd to the 25th parallel. This treaty was modified by treaties in 1872 and 1874 the latter of which prohibited any increase of taxation of Chileans in the Bolivian half of this zone or vice versa.

In the mean time Peru had embarked on the policy of nationalizing the nitrate industry in her territory of Tarapaca just north of Antofogasta with results adverse to Chilean nationals engaged in the business. In 1873 Peru and Bolivia entered into a secret alliance to which they tried to attach Argentine Republic, which was engaged in an acrimonious boundary dispute with Chile, but without success. Possibly on the strength of this alliance Bolivia imposed some taxes, apparently in contravention of her treaty of 1874 with Chile and as a result of Chilean protests the war began, with Chilean occupation of the littoral in Antofogasta. Peru promptly came to the assistance of her ally.

Chile finds in this history evidence of an aggressive policy for monopolization of all the nitrate deposits by Peru whose finances were in a chaotic condition. Peru, on the other hand, interprets the course of Chile as one of territorial aggression justifying her in defensive precautions. These different opinions upon responsibility for the war of the Pacific have been a basic factor in all negotiations and are discussed at length by Peru and replied to by Chile in the present arbitration. They doubtless have a bearing upon the moral character of the present claims but a decision seems impossible. The present writer is inclined
to think that Peru, Bolivia and Chile were all to some extent at fault. The alluring wealth in the desert area was a temptation to the adjacent states which proved too much of a strain for diplomacy to handle.

It was therefore wise to exclude this question from consideration as appears to have been done by the compromise.

"It is," says the award, "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."

Chile was victorious in the war and after various attempts at mediation by the United States, the treaty of Ancon was signed and ratified by which Peru ceded to Chile all the nitrate territory of Tarapaca. In addition Chilean occupation of the comparatively valueless territories of Tacna and Arica, north of Tarapaca was provided for as described in article 3. Bolivia signed a truce in 1884 evacuating Antofogasta and in 1895 signed a treaty with Chile permanently alienating Antofogasta in exchange for Tacna and Arica in case Chile acquired them by the plebiscite and for a part south of Arica in case she did not. Chile however rejected this and finally by treaty in 1904 Bolivia recognized the transfer of her sea coast to Chile. Thus since 1904 Chile has had a clear title to all the nitrate territory formerly belonging to Bolivia and Peru with the exception of the most northern part, Tacna and Arica.

The plebiscite authorized was not held in 1894 though negotiations to that end were begun in 1892 and carried on continuously until 1901 when diplomatic relations were broken by Peru as a result of the rejection by the Chilean Chamber of the "Billinghurst-Latorre Protocol" which had left the questions of electoral qualifications and the secret ballot to arbitration by the queen regent of Spain. Negotiations were renewed in 1905, 1908, and 1912. The latter resulted in the Valera-Huneecus agreement for postponing the plebiscite until 1933. This was accepted by President Billinghurst of Peru but was not ratified.

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6Opinion and Award of the Arbitrator, p. 6.
and contributed to the revolution of 1914 which overthrew the Billinghurst government. Negotiations were renewed in 1921 and in the following year a conference between the parties was held in Washington at the invitation of the president of the United States. This resulted in the agreement to arbitrate of July 20, 1922.

After 1902, Peru complained of "Chilenization" of the plebiscite area and it seems to be generally admitted that a plebiscite among the inhabitants of the area in 1894 would have been overwhelmingly for Peru, while at the present time it would probably favor Chile.

It is not surprising, therefore, that in the present arbitration, Peru opposed the holding of a plebiscite. She argued that the treaty required a plebiscite "at the expiration" of the ten year period, that failure to hold the plebiscite at that time through obstruction by Chile rendered that portion of the treaty void, and that since the treaty gave merely a temporary occupation not sovereignty to Chile, with this event, Peru was entitled "to unencumbered possession and sovereignty of her provinces." Consequently Peru asserted that since 1894 Chile had been a trespasser on the area. In addition, the continued refusal of Chile to agree to fair terms of a plebiscite and her "Chilenization" policy had so changed the situation that a plebiscite now would be contrary to the spirit of the treaty. Consequently the arbitrator should recognize full title of Peru.

Chile contended that the treaty of Ancon gave her full sovereignty of the provinces with reversion to Peru upon fulfillment of these three conditions: expiration of at least ten years, Peruvian success in a plebiscite the terms of which to be agreed upon, Peruvian payment of ten million soles. She insisted that the treaty set no definite date for the plebiscite which was to be held "after the expiration" of the ten year period, and as its holding was contingent upon agreement on the manner of its carrying out and the terms of payment of the ten millions by both parties, delay might be expected and was not due to obstruction on the part of Chile. Furthermore, determination of territorial disputes by plebiscite is in accord with present accepted principles of "consent of the governed" and expediency suggests that the arbitrator adopt the only practical means of settling the question. In

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7The case of Peru, p. 251.
this connection Chile insisted that the arbitration was confined to the question of holding the plebiscite. Peru's contention that sovereignty had already reverted to her was therefore wholly outside the arbitrator's jurisdiction, in fact the agreement to arbitrate and notes exchanged in connection with its negotiation establish that if the award was against holding a plebiscite the status quo should remain until the parties reached a new agreement.

As to the Peruvian interpretation that the phrase "continue to constitute a part of Peru" in article 3 of the treaty of Ancon proved that she was to be the sovereign until the plebiscite, Chile could equally prove her sovereignty from the phrase "remain definitely under the dominion and sovereignty of Chile." "Continue" (continua) and "remain" (queda) seem almost identical, and as the territory could not "constitute a part of Peru" and at the same time be "under the dominion and sovereignty of Chile," Chile interpreted "continue" to refer to the condition prior to 1883 while "remain" referred to that prior to the plebiscite. It is to be noted that though asserting that she acquired sovereignty of the territory by the treaty of Ancon, Chile clearly recognized it as subject to the contingent interest of Peru. She did not utilize the argument which she had advanced in 1905 and later that the negotiators understood the plebiscite to be merely a device for assuaging the feeling of Peru with no intention that it should ever result in Chilean alienation of the territory.8

The arbitrator decided that the plebiscite should be held, thus sustaining on this point the Chilean point of view. Much of the Peruvian argument rested on a translation of the phrase "Espirado este plazo" in article 3 of the treaty of Ancon by the expression "at the expiration of the time" while the Chilean text used the preposition "after."9 The difference was attributed by Chile to bad faith on the part of Peru and the statement is made that the use of the translation "at" occurs for the first time "so far as Chile has been able to find after careful examination" in a publication on "The Question of the Pacific" by E. M. Borchard,

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8Chilean to Peruvian foreign minister, March 15, 1905, appdx. to the case of Chile, p. 360; Chilean Red Book, 2nd ed., 1912, appdx. to case of Peru, p. 458. See also case of Peru, p. 136; Wambaugh, A Monograph on Plebiscites, pp. 26, 162.

9See case of Peru, p. 22, counter case of Peru, p. 50, case of Chile, p. 1, appdx. p. 679.
one of the counsel for Peru, in 1920. The present writer is bound to say in justice to Peru and Mr. Borchard that the Chilean government could not have pushed its examination very far. The word "at" is used in the translation appearing in British and Foreign State Papers for 1883 which is reprinted in Wambaugh's Monograph on Plebiscites, 1920, p. 993. In fact "at" is possibly the preferable rendering of the Spanish original, "Espirado este plazo." Nevertheless, through some unaccountable circumstance in the document as produced in the appendix to the Peruvian case the word "after" is used as it is in the official publication, Foreign Relations of the United States for 1883, which was produced in the Chilean case. This, the arbitrator, citing the texts given by both countries was able to say:

"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."

Thus in the opinion of the arbitrator the issue depended on two questions: (1) Did the failure to agree on the terms of the plebiscite after 1894 result from Chilean bad faith? "There must be found an intent to frustrate the carrying out of the provision of article 3 with respect to the plebiscite" and the "onus probandi of such a charge should not be lighter when the honor of a nation is involved than in a case where the reputation of a private individual is concerned." (2) "Has the course of Chile in the administration of Tacna and Arica been of such a character as to frustrate the purposes of these provisions and hence to deprive them of force?"

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10 Counter case of Chile, p. 27.
11 Vol. 74, p. 349.
12 See translation in editorial by James Brown Scott, 17 Am. J. Int. L. 82.
13 Page 731.
14 Opinion and award of the arbitrator, p. 7.
16 Ibid, p. 18.
The arbitrator decided that Chilean bad faith in frustration of the plebiscite had not been proved and that in view of the express statement in the treaty of Ancon that the territory was "subject to Chilean law and authority" which embraces "full legislative, executive and judicial power" her activities were not contrary to that instrument though in some instances "Chilenization" measures were to be considered in fixing the terms of the plebiscite.

The decision on the remaining questions of the arbitration came nearer to meeting the Peruvian point of view. The arbitrator refused to accept the Chilean contention that precedents of plebiscites showed that supervision should vest in the existing administrative authorities of the territory but provided for a commission of three, one each appointed by Chile, Peru and the president of the United States with appeal to the arbitrator. The qualifications of voters, the time of plebiscite, procedure of registration, expenses and method of paying the ten million, all of which had been the subject of protracted negotiation were laid down in detail. The arbitrator followed so far as possible details agreed on in these past negotiations. The vote will be among literate, sane, non-criminal men over 21 years old who were born in the territory, wherever they may now reside; or who have resided in the territory since at least two years prior to July 20, 1922 (the date of the agreement to arbitrate) and are either Peruvians, Chileans or foreigners ready to naturalize in the state winning the plebiscite. The literacy requirement does not apply to owners of real estate, and persons in government or military employment can not vote from residence but may from birth in the territory. The plebiscite commission is to meet in Arica within six months from rendition of the award and is to set the date for the plebiscite.

The last question concerning the boundaries of Tacna and Arica arose out of vagueness in the geographical description in the treaty of Ancon and was decided according to the Peruvian contention. The boundaries were held to be those of the provinces as they existed under Peruvian jurisdiction prior to 1883 on the principle that in treaty interpretation "the fundamental question is the intention of the parties and any artificial construction is to be avoided." 17

17Ibid, pp. 55-56.
"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."

Because of some doubt as to the location of these boundaries, particularly the southern boundary of Arica in the Chilcaya region with important borate mines the arbitrator reserved the right to appoint a commission of three, one each nominated by Peru, Chile and the arbitrator to draw the boundary.

The arbitration promises to settle amicably a long standing difference though, on April 2, the Peruvian government took exception to part of the award. It indicated, however, its willingness to carry it out in case the fairness of the plebiscite were assured by certain additional guarantees. The arbitrator's reply of April 9 drew attention to the agreed finality of the award and defended it as justified by the translation of article 3 of the treaty of Ancon submitted by Peru herself, by the substance of this article apart from academic distinctions in the terminology, and by the practical construction placed on it by the two countries in the negotiations from 1894 to 1912. He also suggested that Peruvian allegations with regard to Chilean expulsions and oppressions since announcement of the award be submitted to the plebiscite commission and gave assurances that the plebiscite would be properly safeguarded, particularly because of the character of General John J. Pershing whom he had appointed President of the Commission. He, however, considered himself without power, under the arbitration agreement and the treaty of Ancon to comply with the Peruvian request that American be substituted for Chilean troops in the plebiscite area until after the plebiscite.

Although international law was applied where appropriate, there is little reference to authority and much of the award, notably the second part, involved practical judgment rather than the application of law. In arranging for a plebiscite some use seems
to have been made of the experience gained in recent years with reference to the need for impartial control.18

For Europe, the award may be of interest as an endorsement of the sanctity of boundary treaties even when imposed as a result of war,19 and of the principle of plebiscites as a practical solution of difficulties when agreed to by the parties.20 Whether the results of this long deferred plebiscite will be such as to justify this confidence remains to be seen.

For the Bolivian claim to recover her lost provinces of Antofogasta or to receive compensation in Tacna and Arica on the ground that the treaty of 1904 was ratified under coercion and that she needs a corridor to the sea, the award gives little encouragement. This claim, it will be recalled, was submitted to the League of Nations Assembly in 1921, at which time the Chilean objections to consideration were supported.21 Bolivia also asked that her claim be considered in the Washington Conference which led up to the present arbitration but without result.22

It remains true that boundaries established by treaty cannot be altered under existing international law except by agreement of the parties or by force, the results of which receive general recognition in the family of nations. Article 19 of the League of

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18Wambaugh, op. cit. p. 12.
19Opinion and award of the arbitrator, p. 6.
20"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 today a method of avoiding the recurrence of a not improbable 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." Opinion and award of the arbitrator, p. 36.
21See discussion Dec. 16, 1920, Sept. 7, 15, 28, 1921, Records of 1st assembly, Plenary Meetings, pp. 580-581, Records of 2nd assembly, Plenary Meetings, pp. 45-53, 261, 466-468 and report of commission of jurists, ibid, p. 466. Peru and Bolivia first submitted their controversies with Chile to the League of Nations on November 1, 1920, but Peru withdrew her request. Appdx. to the Counter case of Chile, p. 342, 17 Am. J. Int. L. 84.
22On January 28, 1922 Bolivia asked the president to listen to the claims of Bolivia in the Washington conference to which he had invited Peru and Chile on January 18. The president replied that the invitations did not contemplate a hearing before himself and had been accepted by the two governments merely for the purpose of direct negotiation. Consequently the question of including Bolivia was for "the exclusive consideration of the two governments concerned" and he was "precluded from taking the initiative suggested."
Nations Covenant suggests that a strong moral obligation to modify certain boundary treaties may sometimes exist. It would appear that the recognition of this moral obligation by states is a prerequisite to the elimination of force as a means of modifying the status quo.