N° 320.

ALLEMAGNE ET SUISSE

Traité d'arbitrage et de conciliation, signé à Berne le 3 décembre 1921.

GERMANY AND SWITZERLAND

Treaty of Arbitration and Conciliation, signed at Berne, December 3, 1921.

Anerkennt das Schiedsgericht die bezeichneten Einreden als begründet, so überweist es die Streitigkeit dem Vergleichsverfahren ; sonst entscheidet es selbst darüber.

Eine Partei, die eine der erwähnten Einreden der Gegenpartei nicht als zutreffend anerkennt, kann sich gleichwohl ohne vorherige Herbeiführung einer schiedsgerichtlichen Entscheidung über die Einrede mit der Durchführung des Vergleichsverfahrens einverstanden erklären. Sie kann dabei jedoch den Vorbehalt machen, dass, wenn der Vergleichsvorschlag nicht von beiden Parteien angenommen wird, das Schiedsgericht zur Entscheidung über die Einrede und gegebenenfalls auch über die Streitigkeit selbst angerufen werden kann.

Artikel 5.

Das Schiedsgericht legt seinen Entscheidungen zugrunde:

Erstens : die zwischen den Parteien geltenden Übereinkünfte allgemeiner oder besonderer Art und die sich daraus ergebenden Rechtssätze ;

Zweitens : das internationale Gewohnheitsrecht als Ausdruck einer allgemeinen, als Recht anerkannten Übung ;

Drittens : die allgemeinen von den Kulturstaaten anerkannten Rechtsgrundsätze.

Soweit im einzelnen Falle die vorstehend erwähnten Rechtsgrundlagen Lücken aufweisen, entscheidet das Schiedsgericht nach den Rechtsgrundsätzen, die nach seiner Ansicht die Regel des internationalen Rechtes sein sollten. Es folgt dabei bewährter Lehre und Rechtsprechung.

Mit Zustimmung beider Parteien kann das Schiedsgericht seine Entscheidung, anstatt sie auf Rechtsgrundsätze zu stützen, nach billigem Ermessen treffen.

Artikel 6.

Sofern nicht die Parteien im einzelnen Falle eine entgegenstehende Vereinbarung treffen, wird das Schiedsgericht in folgender Weise bestellt :

Die Richter werden auf der Grundlage des Verzeichnisses der Mitglieder des durch das Haager Abkommen zur friedlichen Erledigung internationaler Streitfälle [1] vom 18. Oktober 1907 geschaffenen Ständigen Schiedshofs im Haag gewählt.

Jede Partei ernennt einen Schiedsrichter nach freier Wahl. Gemeinsam berufen die Parteien drei weitere Richter und aus deren Mitte den Obmann. Sofern einer der gemeinsam berufenen Richter nach seiner Wahl die Staatsangehörigkeit einer der beiden Parteien erwirbt, auf deren Gebiete seinen Wohnsitz nimmt oder in deren Dienste tritt, kann jede Partei verlangen, dass er ersetzt werde. Streitigkeiten darüber, ob diese Voraussetzungen zutreffen, werden von den übrigen vier Richtern entschieden, wobei der ältere der gemeinsam berufenen Richter den Vorsitz führt und bei Stimmengleichheit eine doppelte Stimme hat.

Die Wahl der Richter erfolgt von neuem für jeden einzelnen Streitfall. Die vertragschliessenden Teile behalten sich jedoch vor, im gemeinsamen Einverständnis die Wahlen in der Weise vorzunehmen, dass für gewisse Arten von Streitfällen während eines bestimmten Zeitraumes dieselben Richter dem Schiedsgericht angehören.

Mitglieder des Schiedsgerichts, die aus irgendeinem Grunde ausscheiden, werden in der gleichen Weise ersetzt, wie sie berufen worden sind.

[1] De Martens, Nouveau Recueil Général de Traités, troisième série, tome III, page 360.

[1] British and Foreign State Papers, vol. 100, page 298,

[1] TRADUCTION.

No. 320. — TRAITÉ D'ARBITRAGE ET DE CONCILIATION ENTRE LA CONFÉDÉRATION SUISSE ET LE REICH ALLEMAND, SIGNÉ A BERNE LE 3 DÉCEMBRE 1921.

LA CONFÉDÉRATION SUISSE et LE REICH ALLEMAND décidés à respecter réciproquement et infrangiblement leur indépendance et l'intégrité de leur territoire,

décidés à affermir et développer les relations pacifiques et amicales qui, depuis des siècles, n'ont cessé d'exister entre le peuple suisse et le peuple allemand,

décidés à donner, dans les rapports entre les deux Etats, la plus large application possible au principe du règlement arbitral des litiges internationaux,

convaincus que, dans les différends qui, de par leur nature, ne se prêtent pas à une solution arbitrale, le recours à des hommes de confiance de toute impartialité offre, dans tous les cas, une garantie en faveur d'un règlement pacifique du litige,

ont résolu de conclure un Traité général d'arbitrage et de conciliation et ont désigné dans ce but leurs plénipotentiaires, savoir :

LE CONSEIL FÉDÉRAL SUISSE :

M. le Professeur Dr Max HUBER ;

LE PRÉSIDENT DU REICH ALLEMAND :

M. le Dr Friedrich GAUS, Conseiller actuel de Légation, jurisconsulte à l'Office des Affaires étrangères ;

lesquels, après s'être fait connaître leurs pleins pouvoirs reconnus en bonne et due forme, sont convenus des dispositions suivantes :

Article 1.

Les Parties contractantes s'engagent à soumettre à la procédure d'arbitrage ou à la procédure de conciliation les litiges, de quelque nature qu'ils soient, qui s'élèveraient entre elles et n'auraient pu être résolus par la voie diplomatique dans un délai raisonnable.

Les litiges pour la solution desquels une procédure spéciale a été prescrite par d'autres conventions en vigueur entre les Parties contractantes, seront réglés conformément aux dispositions de ces conventions.

Article 2

A la requête d'une des Parties, seront soumis à l'arbitrage, sous réserve des dispositions des articles 3 et 4, les litiges ayant pour objet :

Premièrement : le contenu, l'interprétation et l'exécution d'un traité conclu entre les deux Parties ;

[1] Transmise au Secrétariat de la Société des Nations par le Conseil Fédéral Suisse.

[1] Transmitted to the Secretariat of the Leargue of Nations by the Swiss Federal Council.

[1] TRANSLATION.

No. 320. — TREATY OF ARBITRATION AND CONCILIATION BETWEEN THE SWISS CONFEDERATION AND THE GERMAN REICH, SIGNED AT BERNE, DECEMBER 3, 1921.

The SWISS CONFEDERATION and the GERMAN REICH, resolved to respect mutually and inviolably their independence and the integrity of their territories ;

Resolved to strengthen and develop the peaceful and amicable relations which have existed for centuries between the Swiss nation and the German nation ;

Resolved, in the relations between the two States, to give the widest possible application to the principle of the settlement of international disputes by arbitration ;

And convinced that, in differences which by their nature do not allow of a solution by arbitration, recourse to trustworthy persons of known impartiality offers in all cases a guarantee of a pacific settlement ;

Have decided to conclude a general Treaty of Arbitration and Conciliation and have for this purpose appointed as their plenipotentiaries :

For the SWISS FEDERAL COUNCIL :

Professor Max HUBER ;

For the PRESIDENT OF THE GERMAN REICH :

Dr. Friedrich GAUS, Councillor of Legation, Legal Adviser to the Ministry of Foreign Affairs.

Who, after communication of their full powers, found in good and due form, have agreed to the following provisions :

Article 1.

The Contracting Parties undertake to refer to the procedure of arbitration or conciliation disputes of any nature whatsoever which may arise between them and which it has not been possible to settle, within a reasonable period, by diplomatic means.

Disputes for the solution of which a special procedure has been laid down in other Conventions in force between the Contracting Parties, shall be settled in accordance with the provisions of such Conventions.

Article 2.

At the request of one of the Parties, disputes regarding the following subjects shall, unless otherwise provided for in Articles 3 and 4, be submitted to arbitration :

Firstly, the contents, interpretation and application of any treaty concluded between the two Parties ;

[1] Traduit par le Secrétariat de la Société des Nations.

[1] Translated by the Secretariat of the League of Nations.

Secondly, any point of international law ;

Thirdly, the existence of any fact which, if established, would constitute a violation of an international engagement ;

Fourthly, the extent and nature of the reparation due for such violation.

In case of disagreement as to whether the dispute falls under one of the above categories, this preliminary question shall be referred to arbitration.

Article 3.

In regard to questions which, under the national laws of the Party against which an action has been brought, are within the competence of juducial authorities, including administrative tribunals, the defendant Party may require, on the one hand, that the dispute shall not be submitted to arbitral award until a final decision has been pronounced by these judicial authorities and, on the other hand, that the matter shall be brought before the Tribunal not later than six months after the date of such decision. The above provisions shall not apply if justice has been refused and if the matter has been brought before the courts of appeal provided for by law.

In the case of disputes regarding the application of the preceding provision, the Arbitral Tribunal shall decide.

Article 4.

If, in a dispute coming under one of the categories mentioned in Article 2, one of the Parties pleads that the question at issue is one which affects its independence, the integrity of its territory or other vital interests of the highest importance, and if the opposing Party admits that the plea is well founded, the dispute shall not be subject to arbitration, but to the procedure of conciliation. If, however, the plea is not recognised as well founded by the opposing Party, this point shall be settled by means of arbitration.

The above provisions shall apply if, in a dispute coming under one of the categories mentioned in Article 2, one Party, although not pleading its independence, the integrity of its territory, or other vital interests of the highest importance, pleads that the dispute is mainly political and, for this reason, does not allow of a decision based exclusively on legal principles. At the same time, as an exception to the provision laid down in Article 9, the Tribunal can only recognise the validity of this plea if all its members unanimously agree thereto, or if there is only one dissentient.

If the Tribunal recognises the validity of such pleas it shall refer the dispute for settlement to the procedure of conciliation. If the contrary is the case, it shall give an award on the dispute itself.

A Party which does not recognise the validity of one of the pleas of exception put forward by the opposing Party, may, nevertheless, without first having recourse to arbitration, agree to the application of the procedure of conciliation. It may, however, stipulate that if the proposal for settlement by conciliation is not accepted by both parties, the Tribunal shall be required to give a decision regarding the plea of exception, and, if necessary, regarding the dispute itself.

Article 5.

The Tribunal shall apply :

Firstly : the conventions in force between the Parties, whether general or special, and the principles of law arising therefrom ;

Secondly : international custom as evidence of a general practice accepted as law ;

Thirdly : the general principles of law recognised by civilised nations.

If, in a particular case, the legal bases mentioned above are inadequate, the Tribunal shall give an award in accordance with the principles of law which, in its opinion, should govern international law. For this purpose it shall be guided by decisions sanctioned by legal authorities and by jurisprudence.

If the Parties agree, the Tribunal may, instead of basing its decision on legal principles, give an award in accordance with considerations of equity.

Article 6.

Subject to special agreement to the contrary in each particular case, the Tribunal shall be constituted as follows :

The judges shall be chosen from the list of Members of the Permanent Court of Arbitration established by The Hague Convention, dated October 18, 1907, for the pacific settlement of international disputes.

Each Party shall appoint its own arbiter. The Parties shall jointly nominate three other arbiters, one of whom shall be the umpire. If, after having been appointed, one of the judges jointly elected acquires the nationality of one of the Parties, appoints his domicile in its territory or enters its service, either of the Parties may claim that he be replaced. Any disputes which may arise as to whether either of these conditions exists shall be settled by the other four judges ; the eldest of the judges jointly elected shall take the chair in these cases, and if the votes are equally divided, he shall give a casting vote..

For each individual dispute there shall be a fresh election of judges. The Contracting Parties, however, reserve the right to act in concert regarding these elections, so that for a certain class of dispute arising within a fixed period, the same judges shall be seated on the Tribunal.

In case of the death of members of the Tribunal, or of their retirement, for any reason whatever, they shall be replaced according to the manner determined for their appointment.

Article 7.

In each individual case the Contracting Parties shall, in pursuance of the present Treaty, draw up an agreement of reference (" compromis "), to determine the subject of the dispute, any special terms of reference which may be accorded to the Tribunal, its composition, the place where it shall meet, the total amount that each Party concerned shall be obliged to deposit in advance to cover expenses, the rules to be observed with regard to the form and time limits of the proceedings, and any other detail that may be considered necessary.

Any disputes arising out of the terms of the agreement of reference, shall, subject to the terms of Article 8, be referred to arbitration.

Article 8.

If the agreement of reference has not been determined within a period of six months after one Party concerned has notified the other of its intention to refer the dispute to arbitration, either Party may request the Permanent Board of Conciliation provided for under Article 14, to establish the agreement of reference. The Permanent Board of Conciliation shall, within two months after having been convened, settle the terms of the agreement of reference abiding by the conclusions of each Party when determining the subject of the dispute.

The same procedure shall apply when one Party has not nominated the arbitrators for whose appointment it is responsible, or when the Parties concerned cannot agree upon the choice of judges to be jointly appointed, or upon the umpire.

Pending the constitution of the Tribunal, the Permanent Board of Conciliation shall also be competent to give an award upon any other dispute arising out of the agreement of reference.

Article 9.

The decisions of the Tribunal shall be based upon a majority vote.

Article 10.

The arbitration award shall specify the manner in which it is to be carried out, especially as regards the time-limits to be observed.

If in an arbitration award it is proved that a decision or measure of a court of law or other authority of one of the Parties is wholly or in part contrary to international law, and if the constitutional law of that Party does not permit, or only partially permits, the consequences of the decision or measure in question, to be annulled by administrative measures the arbitration award shall award the injured Party equitable satisfaction of another kind.

Article 11.

Subject to compromissorial clauses to the contrary, either Party may claim a revision of the award by the Tribunal which gave the award. This demand shall only be warranted by the discovery of a fact, which exercises a decisive influence on the award, and which, at the time of the close of the discussion in Court was unknown to the Tribunal itself and to the Party demanding the revision, unless that Party ought to have been aware of it.

If, for any reason, any Members of the Tribunal do not take part in the revision proceedings, substitutes for them shall be appointed in the manner determined for their own appointment.

The limit of time within which the demand provided for in the first paragraph may be presented, shall be fixed in the arbitral award, unless it has already been fixed in the agreement of reference.

Article 12.

Any dispute arising between the Parties concerned as to the interpretation and execution of the award shall, in the absence of an agreement to the contrary, be submitted to the Tribunal which pronounced it. In the latter case the provision contained in Article 11, paragraph 2, shall also apply.

Article 13.

Any dispute which, under the terms of the present Treaty, cannot be referred to arbitration, shall, at the request of one of the Parties concerned, be submitted to the procedure of conciliation.

If the opposing Party claims that a dispute, for which conciliation procedure has been initiated, should be settled by the Tribunal, the latter shall first pronounce judgment upon this preliminary question.

The Governments of the Contracting Parties shall be entitled to agree that a dispute which, under the terms of the present Treaty, can be settled by arbitration, shall be referred to the conciliation procedure, either without appeal or subject to appeal to the Tribunal.

Article 14.

A Permanent Board of Conciliation shall be constituted for the procedure of conciliation.

The Permanent Board of Conciliation shall consist of five members. The Contracting Parties shall appoint one member each of their own choice, and nominate the other three members by

mutual agreement. These three members shall not be nationals of the Contracting Parties, nor shall they be domiciled on their territory, nor employed in their service. The Contracting Parties shall by mutual agreement elect the President from among these three Members.

Either of the Contracting Parties shall at any time, if no procedure is pending or if no procedure has been proposed by one of the Parties, have the right to recall the member appointed by it, and to appoint a successor. In the same circumstances either Contracting Party shall be entitled to withdraw its consent to the appointment of any one of the three Members jointly elected. In that case a new member shall be appointed, without delay, by joint nomination.

While the procedure is actually in progress, the Members shall receive remuneration, the amount of which shall be fixed by the Parties concerned. The expenses of the Permanent Board of Conciliation shall be divided equally between the Contracting Parties.

The Permanent Board of Conciliation shall be constituted in the course of the six months following the exchange of ratifications of the present Treaty. Retiring members shall be replaced as soon as possible in the manner laid down for the first election.

The Permanent Board of Conciliation shall determine its own meeting-place, and shall be at liberty to transfer it.

The Permanent Board of Conciliation shall, if need be, establish a registry. If it appoints nationals of the Contracting Parties to positions in this office, it shall treat both Parties alike.

If the nomination of the members to be appointed in common has not taken place within the six months following the exchange of ratifications, or, in the case of a vacancy on the Permanent Board of Conciliation, within the three months dating from the retirement or death of a member, the provisions of Article 45, paragraphs 4 to 6, of the Hague Convention, dated October 18, 1907, for the Pacific Settlement of International Disputes, shall be applicable by analogy as regards the appointment of members.

Article 15.

The Permanent Board of Conciliation shall draw up a report which shall determine the facts of the case and shall contain proposals for settling the dispute.

The report shall be submitted within six months from the day on which the dispute was laid before the Permanent Board of Conciliation, unless the Parties shall agree to cancel or extend this time-limit. The report shall be drawn up in three copies, one of which shall be handed to each of the Parties and the third preserved in the archives of the Permanent Board of Conciliation.

The report shall not, either as regards statement of facts or as regards legal considerations, be in the nature of a final judgment binding upon the Parties. Each Party shall, however, state, within a time-limit to be fixed by the report, whether and within what limits it recognises the accuracy of the facts noted in the report and accepts the proposals which it contains. The duration of this time-limit shall not exceed three months.

Article 16.

The Permanent Board of Conciliation shall begin work as soon the question shall have been submitted to it by one of the Parties. That Party shall communicate its request to the President of the Permanent Board of Conciliation and at the same time to the opposing Party.

The Contracting Parties shall undertake to facilitate in all cases and in all respects, the work of the Permanent Board of Conciliation, and in particular, to grant it all legal assistance through the agency of competent authorities. The Permanent Board of Conciliation shall be entitled, within the limits of the competence of the local Courts, to summon and examine witnesses and experts and search premises in the territory of the Contracting Parties. It may draw up the procedure for the taking of evidence at a plenary meeting, or entrust this task to one or several members chosen by common agreement.

Article 17.

Every decision shall be taken by a majority of the members of the Permanent Board of Conciliation. Its deliberations shall be valid if all the Members have been duly convoked and if all the members elected by common agreement are present at the meeting.

Article 18.

The award pronounced as the result of the procedure of arbitration shall be carried out in good faith by the Parties concerned.

The Contracting Parties shall undertake during the course of the arbitration or conciliation proceedings to refrain as far as possible from any action liable to have a prejudicial effect on the execution of the award or on the acceptance of the proposals of the Permanent Board of Conciliation. They shall refrain from any act of a legal nature in connection with the conciliation proceedings until the expiration of the time limit fixed by the Permanent Board of Conciliation for the acceptance of its proposals.

At the request of one of the Parties, the Tribunal may order provisional measures to be taken in so far as the Parties are in a position to secure their execution, through administrative channels ; the Permanent Board of Conciliation may also formulate proposals to the same effect.

Article 19.

Subject to the contrary provisions laid down in the present Treaty or the agreement of reference, the procedure of arbitration and conciliation is regulated by the Hague Convention for the pacific settlement of international disputes, of October 18, 1907.

In as far as the present Treaty refers to the stipulations of the Hague Convention, the latter shall continue to be applicable to relations between the Contracting Parties, even if one or both of them denounce the Convention.

The Tribunal or the Permanent Board of Conciliation shall be competent to decide as to the necessary provisions with regard to periods of grace or other details connected with the method of arbitration or conciliation, in so far as neither the present Treaty nor the agreement of reference, nor other Conventions in force between the Parties contain stipulations on these points.

Article 20.

The present Treaty shall come into force as soon as possible. The instruments of ratification shall be exchanged at Berne.

The Treaty shall come into force one month after the exchange of ratifications.

It is valid for a period of ten years. If, however, it is not denounced six months before the expiration of this period, it shall remain in force for a further period of two years, and so on, as long as it has not been denounced within the prescribed period.

If a dispute which has been referred to arbitration or conciliation has not been settled when the present Treaty expires, the case shall be proceeded with according to the stipulations of the Treaty or of any other Convention which the contracting Parties may agree to substitute therefor.

In witness whereof, the Plenipotentiaries have signed the present Treaty.

Done in duplicate at Berne on December 3, 1921. (December third, nineteen hundred and twenty-one.)

(Signed) MAX HUBER.
(Signed) GAUS.

FINAL PROTOCOL OF THE TREATY OF ARBITRATION AND CONCILIATION CONCLUDED BETWEEN SWITZERLAND AND GERMANY.

(1) The Contracting Parties are agreed that in doubtful cases the stipulations of the present Treaty shall be interpreted in favour of the application of the principle of settlement of disputes by arbitration. In particular, the Contracting Parties declare that ordinary frontier disputes shall not be considered as disputes affecting their territorial integrity in the sense provided in Article 4 of the Treaty.

(2) The Contracting Parties declare that the Treaty shall apply equally to disputes arising out of events which occurred prior to its conclusion. In consideration of their general political bearing, an exception shall, however, be made with regard to disputes arising directly out of the world-war.

(3) The Treaty shall not cease to be applicable if a third State is concerned in a dispute. The Contracting Parties shall endeavour, if necessary, to induce the third State to agree to refer the dispute to arbitration or conciliation. In this case the two Governments may, if they so desire, jointly provide that the Tribunal or the Permanent Board of Conciliation shall be composed of members specially chosen for the case. If no agreement is reached with the third State within a reasonable period, the Contracting Parties shall proceed with the case in accordance with the provisions of the Treaty.

(4) The Contracting Parties declare that disputes between Germany and a Third State, in which Switzerland might be interested as a Member of the League of Nations, cannot be considered as disputes between the Contracting Parties in the sense intended by the present Treaty.

BERNE, *December* 3, 1921.

(Signed) MAX HUBER.
(Signed) GAUS.