

CHAPTER III

'Good Offices': The Swiss Experience

A. GENERAL REMARKS

1. It would be presumptuous, within the context of the present survey, to want to cover the totality of 'Good Offices' of modern times, as actually performed. This would remain very much in the sphere of generalities. For those who would wish to go into all the details, comprehensive surveys are available, especially with regard to the classical conflict-settling instruments of international law. However, based on his knowledge of Swiss practice, and his personal experience of it, your author proposes to confine himself to a number of such selected examples characteristic for the ensemble of the subject-matter.¹ A further limitation: for the time being we are looking at only the good offices belonging to the classical categories of international law (i.e., good offices in the strict legal sense, mediation, conciliation, arbitration and international jurisdiction), keeping not only the Protecting Power but also the more recent pragmatic forms of services for the chapters that follow.

Generally, it can be said that the history of Switzerland since its origin, the *Bund* of 1291, the first Federal Charter, has been closely associated with the principles of the peaceful settlement of disputes. It was rooted in the necessity, over centuries, to keep together the rather disparate, heterogeneous parts of the loosely knit ancient Confederation through the intercession of member-Confederates.

1. For more details on the Swiss practice see Probst, Bindschedler-Robert, as well as the recent publications of Stamm and Dreher.

Transposing the traditional experience thus gained into our modern era certainly helped Switzerland in its ability for corresponding endeavours within the Family of Nations.

The following description of a number of particularly illustrative cases of such good offices (which by no means claims to be complete) goes back to the year 1870. In the interests of as comprehensive a documentation as possible, we cover not only the settlement and judgment of actual international differences between sovereign States but also certain borderline cases, provided, of course, that international significance was indeed attributed to them. In addition, special peace-serving missions of a political nature, which can be embodied in some degree in the notion of 'Good Offices' (in its wider meaning) are likewise dealt with, so far as it has been possible to grasp them.

2. First, however, a question of the *method* for the description arises. Several models are known. A first systematic survey of Swiss participation in the procedures for settling international disputes embodied in international law goes back to the year 1958. This was done in the form of an internal study of the Swiss Federal Department of Foreign Affairs which was worked out by your author – at that time a member of the staff of the Directorate of International Law.² The survey and study were originally triggered by the problem of whether and how Switzerland, as a neutral State, could take part in the international commissions which had been set up for the safeguarding of the armistice in Korea in 1953 (we will come back to this later). In conformity with this concrete formulation of the problem, the material was arranged mainly according to the *pragmatic viewpoint*, i.e., which offices or officials had in the past been called upon, or had been available to take on, such mandates. It showed a broad spectrum. In particular, a few basic variants could be distinguished which are now briefly described:

- a) 'Good Offices' by the Federal Council (i.e., the Government), whereby this body either performs the offices itself or nominates the incumbent of such offices.
- b) 'Good Offices' by the President of the Swiss Confederation

2. *Documentation du Service Juridique DPF*, E57, not published. The essay by Probst, 'Die "Guten Dienste" der Schweiz', in *Jahrbuch der Schweiz. Vereinigung für Politische Wissenschaften* (1963), as well as its English translation is a summary of the above analysis.

(or sometimes another member of the Federal Council such as the Minister for Foreign Affairs), again whether this be as direct incumbent or by choice of such.³

- c) 'Good Offices' by other *high officials* as well as *diplomatic and consular officers*, which are usually appointed (or at least authorized) therefor by the Federal Council or one of its members.
- d) 'Good Offices' by the *Federal Supreme Court*.
- e) 'Good Offices' by the *President of the Federal Supreme Court*, again by himself or by assigning a suitable person.
- f) 'Good Offices' by *members of the Federal Supreme Court* or even of other Swiss Courts.

3. Another criterion for the arrangement of the material consists in a *chronological* description of the various 'Good Offices' performed by a State, no matter to which category they belong. As historian, Stamm,⁴ who divided up the material into single periods, has chosen this method. It shows, in characteristically revealing fashion, the history and gradual development of international conflict-settling methods, in which also the changing political and psychological readiness of States for peaceful conflict-settling is reflected – right up to the present time.

4. Yet a further method is analysis according to *legal criteria*, which Dreher⁵ has made his own. He examines the historical origins; analyses the definition of 'Good Offices' emerging therefrom, on the basis of the evolving doctrine; investigates the existing bilateral, regional and universal treaties up to the most recent past; compares 'Good Offices' with the other conflict-settling procedures; and, finally, describes their scope of application and *modus operandi*. It

3. For better comprehension, it should be said that it is the seven-member Federal Council (and not the President of the Confederation) which, as a collegiate body, is the supreme executive authority of the Confederation and which constitutes the 'Head of State', so to speak. The President of the Confederation is elected from the midst of this body by Parliament (both chambers in joint meeting) for a term of one year but cannot be re-elected for the following year. Essentially, the President's task, apart from representative duties, consists in presiding over the meetings of the Federal Council but he also remains Head of his special Ministry (Department) during the presidential year.

4. Doctorate thesis, University of Berne, cf. bibliography.

5. Doctorate thesis, University of Zurich, cf. bibliography.

would be going too far to give details here; many will anyhow emerge in the present analysis.

5. Which of the three methods is best suited to the following Swiss case-study? The question cannot be answered categorically, the more so, since each one of them has an impact of its own. Best and most suitable would be not to exclude any, but rather to combine them and put one or other in the limelight according to material and problem.

B. GOOD OFFICES AND MEDIATION

1. Let us begin with the bottom rung of the efforts to reach settlement: good offices (in the narrower sense) and mediation. We know that the two terms can differ (although only in nuances) in so far as good offices aim at the initiation or a resumption of negotiations, while the goal of mediation is to bring about agreement of the parties.⁶ Yet, as already established, the borderline between the two methods is theoretically and actually so fluid that it is reasonable to deal with both institutions together. In the centre, drawn from the wealth of practice, stands the essential question of the risk that could arise, if the worst comes to the worst, for the State which offers its good offices or its mediation, or both.

The starting position seems clear. We have already explained it in the use of terms. To recapitulate: in fact, the States can make good offices and mediation available either on the basis of a request of the parties in dispute or 'as far as circumstances allow'⁷ proceed of their own accord. Even if they do the latter, no prohibited intervention is present; for the First Hague Convention describes it not only 'as expedient and desirable' but also expressly states that the exercise of this right by Powers strangers to the dispute, even during the course of hostilities, can never be regarded by either of the parties in dispute as an unfriendly act. As for the rest, good offices and mediation have exclusively the character of advice and never of binding force (Art. 6). This, in itself, should rule out complications. In reality, however,

6. Cf. Dreher, 104-109.

7. For the significance of this qualification in case of a nationalistically-tainted war (First World War) or a war with an ideological leitmotiv (Second World War), see Tiercy, 127.

according to the prevailing constellation or the political predominance of a mediatory State, such an offer, although admitted by the Hague Convention, can be perceived as interference, if not even as intimidation.⁸ In the same vein, Fauchille⁹ drew attention to the fact that some authors, whose views, incidentally, diverge, have raised the question of whether it is fitting for a neutral State to offer its mediation to other States when they are already at war. 'Pas de principe absolu; pure question de tact politique' is his own conclusion.

This view is confirmed by manifold experience. The possibilities of intercession, especially so-called political mediation in periods of increased international tension appear rather limited. This is particularly true when hostilities have already broken out, hardening positions on one or the other or both sides. Depending on the situation, resorting to mediation might also be interpreted as an indication of weakness to be avoided if possible.

2. A first example dates from the beginning of this century after the outbreak of the *Boer War* when, in March 1900, the Presidents of the South African Republic and the Orange Free State were asking a number of European States, among them Switzerland, and the United States of America for their friendly intercession in London, aiming at the restoration of peace. Since the endeavours undertaken direct in London by the two South African Governments had been rejected, and since the British Government had precluded mediation by third powers from the outset, the Swiss Government, to its regret, had also to renounce further steps.¹⁰ A second similar effort was made in 1902 by the Dutch Government, again suggesting the taking up of negotiations with the two Republics. This was likewise rejected by London.

3. The American President, Theodore Roosevelt, was blessed with better success in the *Russo-Japanese War* when, in 1905, he called upon the two belligerents to enter into direct negotiations. He at once placed the necessary infrastructure, on American soil, at the disposal of the delegations of both States (which, in the circumstances, agreed to his request) and granted them hospitality. The discussions took place, as President Roosevelt had stipulated beforehand, neither under the leadership nor the surveillance of the United States. Only on

8. Lammasch, 13.

9. I/3, 518.

10. Stamm, 44-46, Dreher, 65-66.

difficult points did the neutral American Government show its readiness to put forward, on request, non-binding proposals or advice to both sides. The signing of the peace treaty took place on 5 September 1905 in Portsmouth near Boston.¹¹

4. Mediation efforts gained a new impetus in the course of the *First World War* without, however, the many soundings or ventures having met with success. In a few cases they even gave rise to serious misgivings:

(a) The best known of these initiatives was the *offer of good offices* to both sides by *US President Woodrow Wilson* of 20 December 1916. The United States had not at that time entered the war. On 12 December, i.e., only a few days previously, this initiative had been preceded by a *German note destined for the Entente Powers*; it was transmitted to their capitals via the Protecting Powers. With reference to the military successes of the Germans and their Allies, it was proposed that the Entente Powers enter immediately into peace negotiations. In the case of Italy, it was incumbent on Switzerland, as the Protective Power for the German Reich, to inform the Government in Rome of the contents of this Note. In his instructions to the Swiss Envoy in the Italian capital charged with this task, the Swiss Minister of Foreign Affairs, Arthur Hoffmann, had pondered the question whether, on that occasion, certain 'very fine feelers' to a conclusion of peace could not be put out. This, however, then remained undone (for good reasons) in the face of the soon perceivable negative posture of the Entente Powers and also of the changing fortunes of the war, which in the meantime had again swung markedly in their favour.¹² This reticence indeed proved to be right, as the German *démarche* was overshadowed by the initiative of the American President, launched shortly afterwards. Wilson's declaration, made in a friendly spirit, conveyed through the American diplomatic missions and addressed to the Governments of the belligerent States of both sides, boiled down to the fact that he wished to encourage the beginning of mutual discussions for the re-establishment of peace and also wanted to make inquiries as to what circumstances could lead to an early end to the war.

11. Dreher, 66-67.

12. For more details on this episode, as seen from Switzerland, and the later domestic difficulties for Federal Councillor Hoffmann connected therewith, see Stamm, 70-73.

In so doing, the President consciously avoided submitting peace proposals of his own, or offering mediation. Further, nowhere was there any talk of good offices (in the sense of the Hague Convention). Thus, above all, a political expression was to be seen in his initiative which, according to the conception at that time, appeared to remain outside the scope of this legal term. Yet, according to the present-day, broadened conception of international law, Wilson's note can quite as well be regarded as such an instrument: the United States offered its good offices to bring the estranged parties closer together.¹³

(b) Switzerland had also become involved in this matter.¹⁴ The driving force behind the Swiss concern was its humanitarian tradition; its precarious position, caught between the main European fronts; the rapidly increasing economic constriction, owing to cut-off imports; or, as the Federal Council put it, its fervent desire for an early end to the hostilities.¹⁵ At that time the most varied attempts to mediate a peace were converging on the American President from all over the world. Thus, when it became known towards the end of November 1916 that Wilson was planning his own initiative in this connection, the Swiss Envoy in Washington was instructed by the Federal Council to approach the American President with a view to eliciting information and, possibly, to taking joint action. Wilson, who received the Envoy on 22 November, remarked that he wished to proceed alone with his peace initiative so as not to cause anyone embarrassment nor, the less so, to have to discriminate against anyone. But he would be grateful if the neutral States would help him in gathering information on the feelings of the people in the warring countries of Europe so that he could better judge when, for him, the moment for negotiating had come.

This moment came on 21 December 1916 as the President launched the already-mentioned initiative among the Governments of the warring States. Notwithstanding the cool response with which the German initiative had already met a short time before among the Entente Powers, the Federal Council believed, at the prompting of its foreign minister, that in the prevailing circumstances it should at least

13. In the same sense Dreher, 67-68.

14. Decision of the Federal Council of 22 December 1916, as reproduced in Stamm, 219, note 28.

15. For more see Stamm, 73-78 (and the sources there indicated) on which our presentation is based. *Id.*, Tiercy, 132-135.

fall in with and support the American President's initiative even though this could not be entered upon jointly. Before Christmas 1916 the diplomatic representatives of Switzerland accordingly handed over the Swiss Peace Note to the governments to which they were accredited. President Wilson had it published immediately, whereupon a few days later also Sweden, Norway and Denmark followed the Swiss example with a similar statement.

What is to be made of this procedure? In the United States it was in general warmly welcomed. None the less, even there, a few papers thought that Switzerland's course of action was favouring Germany. Seen as a whole, however, the attitude of the belligerents was negative. Although among the Central Powers the American initiative brought many fine words in its wake, it did not lead to any constructive proposals. For their part, the Entente States gave a substantially negative answer, and at the same time let their displeasure at the attitude of the European Neutrals, which they considered to be pro-German, be felt. It must be added that the most understanding was shown towards neutral Switzerland, locked in and isolated by the war. Taken singly, the French reaction turned out to be fairly courteous; that from London sounded markedly cooler; and the Italian foreign minister drew attention to the fact that, in politics, what matters is not the form but the effect – adding that the step taken by the Neutrals, although formally independent, actually appeared as a continuation or as a consequence of the offer of the Central Powers, which preceded the Wilson appeal.¹⁶

With that, the Swiss effort reached deadlock. Since the Federal Council's Note represented little more than support for the Wilson appeal, and since the American President had expressed the wish to continue alone, that is without the co-operation of the other Neutrals, nothing more could be done. Shortly afterwards even Wilson dropped all his efforts, as the relationship between Washington and Berlin grew rapidly darker. Nevertheless, at the end of January 1917 the Swiss Federal Council tried once again to reanimate the deadlocked endeavours, proposing to President Wilson to convene a conference of the Neutrals to discuss the foundations of international legal order, and thereby to prepare for peace and the construction of an international organization therefor. These efforts were, however, rapidly thwarted

16. Stamm, 75–76.

by Germany's unexpected switch to unrestricted submarine warfare (which did not spare American ships), whereupon the United States severed its diplomatic relations with the Reich. While Spain was charged with the representation of American interests in Berlin, Germany, for its part, designated Switzerland, as Protecting Power, to represent it in the United States. Even in this transitional phase, however, the Swiss Envoy, prompted by an obscure German manoeuvre, did not give up his endeavours to put out feelers between Washington and Berlin. But this time, too, not one of the parties was found to be ready for a concession. And then, as the whole attempt ultimately came to the notice of the Press through an odd indiscretion, and as none of the sides wanted to be suspected of weakness, there was no hesitation in Germany to disown the Swiss Envoy. Although the American Secretary of State, Robert Lansing, attested that the Swiss Envoy had been motivated only by a desire for peace and for the good of Switzerland, the Envoy was accused in the newspapers of having disregarded the rules of neutrality. The march of events could no longer be halted: on 6 April 1917 the United States of America declared war on the German Reich. Soon afterwards, the Swiss Federal Council deemed it opportune to replace the Swiss Envoy by a new diplomatic representative.¹⁷

(c) It was to have been expected that the previous experience would have warned the Swiss Government and particularly its foreign minister to be careful about conducting further experiments in this delicate area. This was not so, however, and the most hazardous development was yet to follow. The episode, known as the *Hoffmann-Grimm Affair*, began when in the Spring of 1917 the Swiss member of parliament, National Councillor Robert Grimm, a Social Democrat, travelled on a German transit visa from Stockholm to the Russian capital Petrograd; true, this was on his own initiative, but was not without previous consultation with Foreign Minister Hoffmann.¹⁸ There, after the abdication in mid-March of the Czar, the Provisional Government under Prince Lvov on the one side and the workers' and soldiers' council (with Kerensky as the leading personality) on the

17. For details of this sequence of events Stamm, 78–81; see also Tiercy, 134–135.

18. The following summary is based on Bonjour, II, 612–631; the exhaustive research by Stauffer, Hoffmann/Grimm; but also Stamm, 81–83; Tiercy, 135–139; *id.*, Probst, 26–27 (English, 9).

other, were vying with each other in precarious coexistence in pursuit of control. The declared aim of this journey of the Swiss politician was to obtain the agreement of the Provisional Government to the return home of Russian emigrants from Swiss exile. More important to him, however, was to explore, in the sense of the peace programme adopted by the International Socialist Conferences of 1915 and 1916, what possibilities of a speedy end to the war might emerge from the revolutionary situation in Russia.

On 26 May, Grimm, having assured the Swiss Legation in Petrograd that he had Hoffmann's agreement to do so, arranged for a cipher telegram to be sent to Hoffmann by the Legation. In it, on the basis of his impressions gained on the spot, Grimm indicated that he had found in Russia a general desire for peace; that from a political, economic and military point of view a conclusion of peace was a pressing necessity; and that it would be recognized as such by the authoritative quarter. The negotiations in abeyance could, however, be jeopardized by a German offensive in the East. Should this not happen, then a settling would become possible within a relatively short time. So, in his telegram, Grimm asked to be informed of the German war aims, as far as known to Hoffmann. Following confidential contacts with the German side but without quoting official utterances, Hoffmann replied a few days later (also by a cipher telegram to the Legation in Petrograd, addressed for Grimm's attention) that according to his information no offensive would be mounted by Germany as long as an amicable agreement with Russia appeared possible. What Germany was striving for, according to his (Hoffmann's) persuasion, was an honourable peace. Then followed certain, more concrete, indications as to what these preconditions should consist of.

Barely two weeks later, on 16 June, the Swedish newspaper *Socialdemokraten* was in a position to publish the exact wording of the text of this dispatch. How this could have happened, whether the telegram had been deciphered or had otherwise become known through indiscretion, could never be clearly elicited. But the publication of the text caused a world-wide sensation.

In the capitals of the allied Powers where the Press seized on the news the very same day, Hoffmann's action was immediately condemned as one-sided support of the enemy. London was particularly indignant about the course of action of the Swiss Foreign Minister; the

British Envoy in Berne accused him bluntly of a 'very serious step amounting to a breach of Neutrality', and a part of the Swiss public and Parliament also joined in this rebuke. For its part, the Russian coalition government expelled Grimm, whom it now called a German agent, from the country, and placed the diplomatic correspondence of the Swiss Legation under supervision. In so doing, the government, now actually being run by Kerensky, wanted to exonerate itself, vis-à-vis the Entente, from being suspected of aspiring to a separate peace with Germany.

With the remark that Grimm by no means aimed at a separate peace but that he had the general peace in mind, Hoffmann sought to counter this impression. In regard to his own motives, Hoffmann stressed that he felt his action to be in the interest of the country *and* the cause of peace. The two concerns were not to be separated from each other; the war very heavily affects the Neutrals, too, and with it conjurs up 'a Swiss want for peace' ('eine schweizerische Not nach Frieden'); against this, the country can be calling on 'a right to peace'. In working towards its realization, a Neutral defends its own threatened right to life. Admitting, however, that the publication of his telegram to Grimm had created a new conjunction which could compromise the domestic situation as well as imperil relations, Hoffmann decided on 18 June 1917 to submit his resignation as Federal Councillor. The fact that he had not previously taken any of his government colleagues into his confidence over the exchange of telegrams with Grimm, made it easier for the Federal Council to dissociate itself from the action of its Foreign Minister, to restore the confidence of the Entente Powers in Swiss impartiality and also to assuage Swiss public opinion. During the Parliamentary session in which the President of the Swiss Confederation announced the resignation of his government colleague (of whose conduct he disapproved), he at the same time conceded that the Foreign Minister had striven only to act in the interests of Switzerland; he paid tribute to Hoffmann's work as a member of the Government.

(d) With this, the Swiss efforts in the First World War to contribute, with its 'Good Offices', towards the establishment of peace, came to an end. As from the entry into the war of the United States in April 1917, the Entente anyhow lost interest in mediation and speculations about peace before the overpowering of Germany. So it came about that it was not before October 1918 that the Swiss Confederation could again concern itself with the peace process in transmitting to the

American President the German wish to enter into cease-fire negotiations. This was done, however, strictly within the context of Switzerland's function as the Protecting Power for the German Reich, without any commentary of its own.

5. In the subsequent *period of the League of Nations* Switzerland was presented with rather less opportunity to exercise good offices and mediation in the sense of these specific juridical terms. Let us just mention, however, the mediation in 1923 by Federal Councillor *Giuseppe Motta*, Switzerland's Minister for Foreign Affairs during that era, who was entrusted with settling the threatening *conflict on Corfu between Italy and Greece*. He intervened at the explicit request of *all* the parties concerned and he certainly acted with the utmost discretion. Both these circumstances may well explain his eventual success. He thus most efficiently served the cause of peace.¹⁹

6. (a) With the outbreak of the *Second World War* the temptation and impulse to contribute to the restoration of peace became, for obvious reasons, once again greater for the European neutral nations. This was particularly so in the case of Sweden which, not least concerned for the fate of Finland, made various attempts in this direction, but it also applied to Switzerland which was particularly exposed by virtue of its strategic geographical location. The significant Swedish efforts, in which Count Folke Bernadotte in particular played a major role towards the end of the war, have been described comprehensively by Professor Wilhelm Carlgren, Head of Archives in the Swedish Ministry of Foreign Affairs, in the publication issued in 1985 and entitled 'Schwedische und schweizerische Neutralität im Zweiten Weltkrieg' (Swiss and Swedish Neutrality during the Second World War). Similarly, within the scope of the same publication, there is a presentation by your author and his co-author and colleague Paul Stauffer, relating to the simultaneous Swiss mediatory efforts. The following indications are taken primarily from this study.²⁰

To begin with it should be remembered that neutral Switzerland, already sufficiently alarmed by the precarious situation in which it had found itself between the fronts in the First World War, was successively encircled during the course of the Second World War by a

19. Bindschedler-Robert, 687, Stamm, 146 et seq.

20. Carlgren, 97-110, Probst-Stauffer, 293-306, including the sources indicated therein. Also of interest is Stamm, 174-191, with informative insights into the Swiss internal political background.

single belligerent, the Axis Powers. This may be regarded as another reason why Switzerland, warned by its earlier experience, exercised increased, though not absolute, caution in its search for peace.

(b) Not least, the recollection of the dramatic failure of Arthur Hoffmann's exploratory attempts at peace might have prompted Marcel Pilet-Golaz, Switzerland's Foreign Minister during most of the Second World War, to proceed with greater circumspection with regard to similar initiatives. Nevertheless he, too, made efforts to hasten the end of hostilities, in accordance with the concept of the national interest, as he saw it. His overriding concern was to find, in the extensive protecting power activities of his country which were frequently reciprocal, a suitable springboard towards a peacemaking function. Pilet accordingly put out appropriate feelers in 1942: in conjunction with an Italian-British exchange of wounded and sick prisoners of war, which had been arranged through Swiss intercession, he twice approached the German Envoy in Berne on the subject of simultaneously using the thus established contact to explore possibilities for peace. However, the rejection of his proposal by the German representative, who had received instructions to this effect from Berlin, effectively sealed the fate of his attempt.

(c) A characteristic and, by virtue of Switzerland's previous experience, understandable tendency in the peace efforts of Pilet-Golaz was to spur others to action but at the same time to keep Switzerland and himself as much in the background as possible. However, even this indirect course of action proved sometimes risky. In early November 1941, for example, Pilet informed the Vichy-French Ambassador in Berne (who in turn reported the information to his superiors) of a German diplomatic initiative which, according to his (Pilet's) sources, had been launched with the aim of establishing a new European order. Berlin, it was said, hoped that France, Spain, Portugal, Sweden and Switzerland would join the Axis Powers in this initiative (which Pilet, however, speaking for Switzerland, declared inopportune). In London, where Pilet's remarks immediately became known through indiscretion, the suspicion arose that the Swiss were prepared to be a party to the promulgation of a German drive for peace. Berne thereupon urged its London chargé d'affaires to exercise the utmost caution and emphatically denied having been approached by any belligerent power for the purposes of exploratory peace negotiations or other measures.

(d) Equally unsuccessful ended an attempt by Pilet in the Spring of

1943 to induce the Vatican to initiate a peace offensive. Alerted by rumours of the possibility of a separate German-Soviet peace, Pilet apparently deemed then an understanding between the Allied Western Powers and the Axis Powers worthwhile pursuing. His personal assessment of the situation led him to believe he could assure the Papal Nuncio in Berne that a Vatican initiative to this effect would find the support of the European neutral States, i.e., Switzerland, Spain, Portugal and Sweden. As was the case with the talks he conducted with the French Ambassador, he also proceeded here without the knowledge of his government colleagues. Although the Papal Secretary of State judged Pilet's proposal doomed to failure at that moment, the German Embassy at the Vatican nevertheless got to hear of the Swiss initiative and reported it to Berlin. But the German Foreign Office flatly rejected the idea.

Perhaps in order to prepare the ground for the peace initiative he had proposed to the Vatican, Pilet also expressed his fears of a possible separate German-Soviet peace to the United States Envoy in Berne. The latter passed this information on to the State Department but hinted in his report that there were doubts as to whether Pilet's fears were well founded. As a result of this, no response was issued from Washington.

(e) In February and March 1943, in other words shortly after he himself had proposed the above-mentioned peace move to the Papal Nuncio in Berne, Pilet received word of a *Spanish peace initiative* for which the Ministry of Foreign Affairs in Madrid requested the support of Switzerland and other neutral States. After a thorough debate in the Government, Pilet was empowered to communicate a refusal to Madrid. It would appear that the Federal Council did not wish Swiss neutrality to be compromised by being associated as a 'second' with a peace initiative by Franco's pro-Axis Spain. As was to be subsequently proved, the 'peace offensive by neutral States' inspired by Spain would have primarily served to amplify the simultaneous personal peace efforts of General Franco, who saw in the increasingly impressive post-Stalingrad dominance of the Soviet Union's military might an urgent reason for the 'Anglo-Americans' and the Axis Powers to reach an understanding.

(f) In August 1943 the Swiss Foreign Minister had to reject an appeal by the *Italian Badoglio Government*, for the Swiss to intercede on its behalf with the Western Allies, as unacceptable within the

framework of Switzerland's policy of neutrality. Indeed, the hard-pressed Italians had urged that Switzerland should request the Allies, in its own name and by invoking neighbourly interests, to exercise lenience in their treatment of Italy. At the same time the Swiss were to maintain the utmost secrecy about the fact that the impetus for this move came from the Rome Government which was still officially a co-belligerent with Germany and which harboured fears of German retaliation were the truth to be disclosed.

(g) At an unofficial level, however, and on a limited scale, Swiss mediatory efforts during the final phase of the war in Italy were to open up significant potentials. Thus, Carlo Steinhäuslin, the Swiss Honorary Consul in Florence, which in the summer of 1944 was in the battle zone between the Germans retreating to the north and the pursuing Allied troops, was able to contribute by his personal efforts towards the prevention of the destruction of the city and its invaluable art treasures.

(h) The situation became even more menacing when in February 1945 news began to trickle in from Italy of new German orders to annihilate the partisan groups which were fighting the German troops in northern Italy and to destroy everything which could be of practical military and economic value to the enemy, before retreating to the Alps for the so-called 'Endkampf' (final battle). It was at this point that, alerted by Italian friends, Max Waibel, then a major in the Swiss Army Intelligence Service, and his friend Dr. Max Husmann, interceded and managed to arrange for those leading officers of the German Army Group C (Italy) who were willing to negotiate, to convene on Swiss soil with the renowned Allen W. Dulles, Special Assistant to the American Minister and Head of the Office of Strategic Services (OSS) in Berne. This was a move which, after difficult, lengthy and delicate negotiations, finally brought about the premature capitulation of the German military forces in northern Italy. The role which Waibel and Husmann played in all this, in order to ensure that the attempt did not fail, gradually exceeded that of mere go-between and at times approached a true mediatory function; by active involvement in the negotiating process the Swiss were able to rescue it time and again from breakdown. While it is true that the armistice did not come into force in the Italian theatre until 2 May 1945, only about one week before capitulation on the other European fronts, the significant effect was nevertheless that the devastation orders given by the

German High Command were deliberately disregarded, in consideration of the secret negotiations, thereby sparing innumerable human lives and preserving the vital industrial nerve of the country for the subsequent rebuilding of Italy.

The services rendered by the Swiss persons involved in the successful realization of *Operation Sunrise* (the American codename for these secret negotiations)²¹ merit even higher esteem when one considers that they acted at their own risk and without the knowledge of official circles. Had the Swiss authorities been consulted in advance, they would certainly have had difficulty in agreeing to the initiative for reasons of Switzerland's policy of neutrality. Accordingly, they formally voiced their disapproval of Major Waibel's action in disregard of service regulations in his capacity as a military officer, while refraining from imposing further sanctions in appreciation of his worthy motives. In fact, however valuable the action might seem today, this example also illustrates the difficulty which arises in acting as mediator in the case of armed conflict without violating the standards of good conduct which a policy of neutrality implies. True, purely from the standpoint of *international law*, a charge of conduct inconsistent with neutrality could hardly have been made against him in the juridical sense, since the Hague Convention of 1907 grants States not involved in a conflict the right to offer good offices or mediation even during the course of hostilities. Moreover, the Convention establishes only rights and duties as between States, and does not cover those relating to private persons. But if, however, a neutral State is granted the right to mediate between belligerents, then such a right is even less capable of being denied to individuals, since the duties of neutrality, which directly affect the State, are more extensive than those which the State, in accordance with international law, is obliged to impose on persons within its territorial jurisdiction. Nevertheless, a prerequisite for correct mediation is that this should be exercised impartially by neutrals and not be used just as a means in favour of one side only. Since, however, Waibel acted as an individual, this point appears to have rather more political, than legal, relevance.

21. From the comprehensive literature (see also Probst/Stauffer, note 15), cf. in particular the two publications by Max Waibel: *Peace Mediator*; and *Capitulation* (with a commentary by Hans Rudolf Kurz); as well as in Allen Dulles/Gero von S. Graevenitz, *Unternehmen Sunrise*, Düsseldorf/Vienna 1967.

Admittedly a legal argument can be adduced to the effect that Switzerland, although the Major had acted as a private individual only, could nevertheless have been made responsible for his conduct, since in principle a State is answerable for the actions of its military persons. However, in this particular case the political ambience seems more important than such legal subtleties. For one thing, the German High Command could have taken offence at the fact that it was *Swiss* individuals who after all enabled the unauthorized contact to be established and fostered between the regional German commanders and their Anglo-American counterparts. This benefited mainly the Allies and ran counter to the interests of the German conduct of the war. That charges of this nature did not in fact arise is probably primarily attributable to the already far-advanced process of disintegration of the Nazi régime at the time of the 'Sunrise' negotiations.²² On the other hand, even the capitulation conceived at a purely military level of a regional German Army Group to Allied Western generals could have political implications for their Soviet ally, since this move afforded the Anglo-Americans an advantage, in their race for possession of the crumbling 'Fortress Europe', over the Russians who continued, as before, to be confronted with bitter resistance. At any rate, this was the suspicion in Moscow, who, at this very stage in the war, looked upon every sign of a possible separate peace between Germany and the Western Allies with profound mistrust. Herein lay the second, politically problematic aspect of the Swiss involvement. The Soviets were – at least initially – doubtless unaware of the extent to which Swiss mediators had contributed to the materialization of the German-Anglo-American negotiations on northern Italy, and did not therefore make any formal objections in Berne, with whom they as yet maintained no diplomatic relations. But the mere fact that Switzerland was the arena of the meetings which the Soviets followed with such suspicion could only intensify Stalin's already intrinsic dislike of that country. At all events, the Soviets, as soon as they had been informed by their Western allies about the opening of the talks with repre-

22. Nevertheless the meetings between the highest German official involved in *Sunrise*, SS Obergruppenführer Wolff, and Allied Western representatives did not go unnoticed in Berlin. Wolff for his part attempted to justify his action by alleging that in reality he wished to find out about the chances for a general separate peace with the Anglo-Americans, for the purpose of closing ranks against the Soviets. For more on this, see Probst/Stauffer, 298.

sentatives of the German army in Italy, immediately demanded to be allowed to take part in the negotiations. The rejection of this request led to a bitter controversy which was carried on at the highest level – Stalin on the one hand and Roosevelt and Churchill on the other – and which in retrospect may be regarded as a kind of prologue to the Cold War. With the entry into force of the Capitulation Act, which after various dramatic turns of events was eventually signed at Allied Headquarters in Caserta, a large part of those aims to which the Swiss mediators had aspired by offering their services in *Operation Sunrise* had been fulfilled: to prevent, by curtailing hostilities, the useless sacrifice of human lives and values in a neighbouring region with which Switzerland had been closely associated culturally, economically and otherwise since time immemorial. The presence of a Soviet representative at the signing of the Capitulation Agreement showed that it had been possible, after all, to pour oil on the troubled waters of allied politics.

(i) After the Allied invasion armies had landed in Normandy and on the French Mediterranean coast and thereafter pressed rapidly forward, Swiss diplomatic and consular representatives took advantage of the opportunity of mediating between Allied commanding officers and local civilian and military authorities in France and Germany, to avoid useless loss of life and unnecessary devastation. Among the best known of such actions were the many and diverse efforts undertaken at considerable personal risk by Minister Walter Stucki as the official Swiss representative to the Vichy government, in order to ensure that the Spa town itself could be handed over by the then existing representatives of 'state' authority to the 'Free French' without fighting, spilling of blood or harassment by German troops. In so doing, Stucki had to negotiate not only with the two French camps (Vichy régime and resistance fighters) hostile to each other, but also with the commanding officers of the German bodies of troops, Gestapo formations, etc.²³ A further example is the meeting which the Swiss Consul-General in Cologne, F.R. von Weiss, arranged, at great personal risk, on 8 March 1945, between the German and American commanding officers at the front and which led on that same day to the handing over, without a fight, of the town of Bad Godesberg to the American troops.

23. The course and eventual success of this negotiation are discussed in detail in Walter Stucki's book *Von Pétain zur Vierten Republik* (see in particular pp. 97–126).

These last actions are certainly to be regarded as mediations within the legal sense of this notion.²⁴ Moreover, the diplomatic and consular officers involved could even draw some legitimacy from representing the Swiss Protecting Power in charge of American as well as of British interests and being thus bound to safeguard Allied property endangered by military operations.

(k) Meanwhile the dramatic events of the last winter of the war and the German collapse in the Spring of 1945, followed by the capitulation of Japan in the Autumn of the same year, offered renewed opportunities for special actions by the Swiss. In view of the exceptional circumstances with which they had to contend, their efforts sometimes had to go far beyond the scope of ordinary mediation. One of these was the *rescue operation in aid of Hungarian Jews* mounted by the Swiss Legation in Budapest.²⁵ After the German occupation of Hungary in March 1944 the matter became even more pressing when the 'right-radical' Arrow Cross (fascist) movement won the upper hand in October of that year and, together with the Germans, embarked on a systematic deportation of the Jews. The prime instrument used by the Swiss Legation in this rescue operation was immigration certificates for Palestine which had been issued by Great Britain as the then mandatory power for Jewish persons and families. When the Protecting-Power Department of the Legation learned of the existence of thousands of such certificates in Budapest, it took advantage of the fact that Palestine, as a British mandated territory, came under the sphere of the Swiss Protecting-Power Mandate for the United Kingdom in Hungary, to issue equivalent attestations to the holders of such certificates and to provide Swiss collective passports for approximately every thousand of the persons concerned. Even if subsequent efforts to enable these people actually to emigrate before the end of the war were frustrated by the Germans' delaying tactics, at least their deportation to the extermination camps could be prevented. A

24. In this sense see Bindschedler-Robert, p. 686.

25. Sources: Carl Lutz, 'Die Judenverfolgungen unter Hitler in Ungarn', *NZZ*, 30.6.1961; Werner Rings, *Advokaten des Feindes*, 150 et sqq., Econ 1966; Johann-Markus Werner, 'Hilfe für verfolgte amerikanische Juden im Zweiten Weltkrieg', *Der Bund*, No. 50 of 1 March 1986; Alexander Grossmann, *Nur das Gewissen: Carl Lutz und seine Budapester Aktion* (Wald 1986), in particular 39, 54–188, 269–270; by the same author *NZZ*, 'Carl Lutz und die Rettung ungarischer Juden 1944/45', No. 39 of 17 February 1987; see also Bindschedler 131–132 and Probst 41 (English, 32–33). Vogel, article in *LNN* of 14 May 1988.

similar instrument was Switzerland's representation – specially created and backed by the Americans – of El Salvador's interests in Hungary. This enabled the Legation to issue Jews in danger with El Salvadorean citizenship certificates, drawn up for the purpose, which the Hungarian authorities were persuaded to recognize after protracted and tedious negotiations.

It is estimated that these and other measures enabled the lives of a small fraction of Hungarian Jews – yet still some 46,000 – to be saved. Thousands were sheltered in the 'Swiss houses' created by the Legation for better protection, and some hundreds could be rescued even from the internment camps. The driving force behind all this was the Swiss Consul Carl Lutz, Head of the Foreign Interests Section of the Legation. He worked in conjunction with his compatriot Friedrich Born, Delegate of the International Committee of the Red Cross in Hungary, who is also credited with having saved, by his own efforts, around 25,000 of these unfortunate people.²⁶ At the same time the Swedish diplomat Raoul Wallenberg was engaged in similar effective activities in Budapest in the cause of the Jews. Consul Lutz was in touch with him. Wallenberg was taken prisoner by the Soviets after Budapest fell and has been missing ever since.

These efforts to rescue the Jews officially took place within the framework of Switzerland's Protecting Power activities on behalf of Great Britain and El Salvador. In reality, however, they constituted a particular action of unusual nature which far exceeded the bounds of the normal Protecting Power function and they exhibited definite characteristics of actual mediation.

(1) The Swiss citizen, however, who was most deeply engaged in peace efforts before as well as during the Second World War did not display this activity in any official capacity. We refer to the writer and historian Professor Carl J. Burckhardt, who from 1918 to 1922 was in the Swiss Foreign Service as an attaché and who in 1945 assumed a key diplomatic function as Swiss Envoy to France. From March 1937 until the outbreak of war Burckhardt served as High Commissioner of the League of Nations in Danzig and subsequently again joined the International Committee of the Red Cross (ICRC), which he had entered in 1933 and of which he became President towards the end of the war.

26. See Arieh Ben-Tov, *Facing the Holocaust in Budapest* (1988). See also Yad-Vashem, Favez, 315–330, and Vogel's article in LNN.

Burckhardt's high political function in Danzig will be discussed separately at a later stage in the appropriate context. Although the ultimately unavoidable failure of his efforts at the time to prevent the German attack on Poland and thus the start of the Second World War, had severely disillusioned him in his efforts to alter destiny, which took its inevitable course, he did not let himself become resigned. He was able to call on the connections he had established during his time in Danzig, particularly with the British Foreign Office, while on the other hand close liaison with Berlin was ensured by virtue of the fact that his friend of many years, Ernst von Weizsäcker, who was trying to counter Hitler's calamitous policy, was German Foreign Office Secretary of State there and indeed had held this office since 1938. During Burckhardt's many journeys under the auspices of the ICRC, he still saw a possibility of easing communication beyond the fronts for those who – truly or ostensibly – sought peace. Resuming the thread of his talks and efforts during his Danzig mission, Burckhardt started new soundings soon after the outbreak of the war. In the course of these activities feelers were put out by the Germans, and by Göring in particular, to explore the possibility of talks with influential British figures in high office; an enterprise which, however, very soon miscarried owing to the mistrust of London regarding the true intentions of the Nazi régime.²⁷ Later, Burckhardt's role essentially consisted in passing on information to Great Britain about the German national-conservative opposition circles' expressed readiness to negotiate, and to find out whether London would be prepared to recognize the representatives of this 'other Germany' as negotiating partners in case an attempt to overthrow Hitler should prove successful. Moreover, Burckhardt's German interlocutors were already intensively occupied with the question of mutually acceptable peace conditions and hoped to learn through him of London's attitude to such a solution. But even at the internal British level such speculations had already become explosive issues. The participation as from 1941 of the USSR and the USA in the war on the side of the Allies presented an added political dimension which caused the problems to become much more acute: whatever submissions were made by the

27. For more details on the secret diplomatic efforts for peace during this first phase, where not only Burckhardt's role but also the parallel attempts at contact by the extremely active Swedish industrialist Birger Dalherus are outlined, see Stauffer, *Festschrift Probst*, 'Friedenserkundungen in der Anfangsphase des Zweiten Weltkriegs', 375–399.

German opposition to the British would in turn have had to be reported by the British to their American and Soviet Allies if they did not wish to be accused of aiming at a separate peace. These and other pertinent considerations subsequently led Burckhardt to assume an attitude of utmost caution towards the enticements of secret peace diplomacy. This was further reinforced when during a stay in London at the end of 1941 his British contacts gave him to understand that they were prepared to discuss only Red Cross matters with him – the reason for which he had come to London in the first place. Despite this, in 1945 the idea was going around in leading Nazi circles to try using Burckhardt, the Swiss who enjoyed a legendary reputation, as a peace emissary. It is true that he then conducted negotiations with a representative of the Nazi régime. In point of fact, however, these discussions dealt with purely humanitarian issues: in March 1945 Himmler's deputy Kaltenbrunner had finally consented to allow the International Committee of the Red Cross right of access to the concentration camps, thereby enabling the Geneva institution to save many human lives virtually at the last minute.²⁸

(m) While the unconditional surrender of Germany was concluded at the front and, as described, was achieved in Italy shortly before with the assistance of privately performed Swiss co-operation, the *Japanese offer of capitulation* was submitted in the autumn of 1945 to the Allied Powers through the *Swiss Protecting Power*. This Power also acted as a technical intermediary in the subsequent negotiations between the Parties, which were terminated on 2 September with the surrender of Japan.

7. *Summary Appraisal*. If one attempts to sum up the experience of Switzerland in the field of good offices and mediation in the course of both World Wars, then it is hardly conclusive and partly contradictory. Admittedly, according to the Hague Convention of 1907, as already mentioned several times, such efforts can never be regarded by the conflicting parties as an unfriendly act. But in the light of the passions kindled by the war, reality took on a very different aspect.²⁹

(a) *The War of 1914–18* was a striking example of such limits and

28. With regard to Burckhardt's various contacts in his private efforts for peace, which are only briefly touched upon here, see Probst/Stauffler, 302 (where the additional sources are also to be found). For additional information see also Stamm, 176–177.

29. In the following sense, specifically Bindschedler-Robert, 685; see also Stamm, 180, and Tiercy, 139–140.

throughout the entire hostilities it was evident that a policy of good offices and mediation in an attempt to bring the adversaries together rested on extremely fragile foundations, if any at all. The few *démarches* undertaken by the Federal Council in this respect were mostly failures and in some cases even mistakes: the support given in 1916 to President Wilson's peace initiative; the efforts made in 1917 by the Swiss Envoy shortly before the United States entered the war; the telegram in that same year from Federal Councillor Hoffmann to National Councillor Grimm in Russia, reporting on the German conditions for peace on the Eastern front, which the Allies regarded as an attempt to conclude a separate peace and which resulted in Hoffmann's resignation. Such cases clearly demonstrate how difficult and delicate mediatory activities of this nature can turn out to be, and how much diplomatic skill, intuitive feeling for the politics of neutrality and experience in foreign affairs are necessary if the mediator wants to have even a slim chance of success. Moreover, they conclusively prove the extreme importance for the neutral State to choose the right moment for offering its good offices. Indeed, in certain circumstances it seems practically impossible in war to find the moment at which an offer of mediation would not appear as favouring one of the parties and thus be regarded by the other as biased.³⁰ The mediator, in short, runs the risk of alienating one or other, or both, of the parties as he makes his own recommendations clear.³¹

(b) Switzerland went through a similar experience during the *Second World War*. Although it was at all times ready to exercise its services for peace mediation, the political and strategic constellation, the absolute refusal of the Allies even to contemplate Hitler as a trustworthy negotiating partner, and, finally, the demand for unconditional surrender made it hardly possible for neutral Switzerland to make independent and active efforts for trying to put an end to the hostilities. Once again, political mediation found no support in the prevailing conditions. When in 1943 the Swiss Foreign Minister, on the basis of German information and in circumstances which in the end remained obscure, allegedly tried to enquire about the prospects for peace between the Germans (then under increasing Russian pressure) and the Western Allies, this move was regarded as an

30. Stamm, 83.

31. Northedge/Donelan, 298.

unfriendly act by the Soviet Union, which had caught wind of it.³² In 1944 this grievance against Switzerland figured among the motives for the Soviet refusal of the Swiss request to establish diplomatic relations; a refusal which led to the resignation of Foreign Minister Pilet-Golaz. It was not until March 1946 that the obstacle could be overcome. Thus the only route remaining open to the Swiss was to alleviate as far as possible the suffering of those affected by the war through humanitarian action; to prevent, through personal initiatives by Swiss individuals, needless sacrifice of lives and pointless destruction in the last stages of the war in Western Europe; and in particular to maintain a modicum of relations between the belligerents by exercising the main task devolved upon it of representing foreign interests. As previously mentioned, we shall return to this last important aspect in the appropriate context.

8. *After the conclusion of the Second World War* and the intensified peacekeeping and peace re-establishing activity of the newly created United Nations Organization, carried out according to its mandate, it appeared in the nature of things that the individual State would hardly ever again be called upon by other States to offer its good offices and its conflict-settling mediation. In reality, however, things did not quite work out as expected. The sphere in which the United Nations Organization displays its beneficial activity is wide, essential and indispensable. Yet it has been precisely in highly political questions, which require particular discretion and subtlety, that the single State can still play a special role. One particular opportunity arose for Switzerland at the beginning of the 1960s with the Algerian uprising against the still-existing French domination. While, tragically, the conflict was becoming more and more critical, at the same time the recognition began to dawn on both sides that the time had come for a statesmanlike settlement. As it so happened the task fell to Swiss intermediaries, chiefly to Ambassador Olivier Long, then a high-ranking economic diplomat and later Director-General of the GATT, to establish preliminary contacts between emissaries of both parties on neutral Swiss soil, with Swiss official support and in utmost secrecy as well as under the strictest security, thus carefully paving the way for official *French-Algerian negotiations*. Its final phase in March 1962

32. On this subject see in particular *Bonjour*, VI, 116 ff., as well as Stamm 177, and Bindschedler-Robert, *loc. cit.*

held in *Evian*, On the French side of Lake Geneva, eventually led to the independence of Algeria. Even in this phase Switzerland continued to play an appropriate role in accommodating and assuring the security (by police and troops) of the Algerian delegation which, for prestige reasons, insisted on maintaining its headquarters on the Swiss side of the lake; in organizing its transport (mostly by helicopter) to the meeting place on French territory; in providing it with the necessary means of communication and information; and more generally in endeavouring to promote an atmosphere of confidence between the two parties. Personal relations having developed between the Algerian negotiators and the Swiss diplomats in charge of the operations (your author happened to be one of them), the Algerians came to speaking with them of the problems arising from the negotiations and asking them for their opinion and advice. Similar ties were maintained by the Swiss with the French side. This, quite naturally, led to a kind of unofficial interaction, thus efficiently contributing to the success of the negotiations.³³

9. In contrast to the often misunderstood peace efforts during both World Wars, the skilfully exercised good offices in the French-Algerian conflict, which at certain times almost approached actual mediation, did not lead to any noteworthy political complications. Both sides highly appreciated the value of the Swiss role and expressly voiced their gratitude. But little was known publicly of the true course of this many-faceted operation, which lasted for nearly two years until the end of the bloody seven-year war in Algeria. The negotiations were continually hampered by fresh difficulties, unexpected complications, menacing external events and above all by the mutual distrust which arose again and again. The secret of their final success lay to a considerable extent in the strict secrecy self-imposed by the participants, and in particular the Swiss intermediaries, in order to ward off disturbing influences. Moreover there were good reasons, based on both political and psychological considerations, for such discretion to be maintained even long after the end of the conflict and the birth of the independent State of Algeria. Thus it finally took a full quarter of a century until the main Swiss intermediary, Ambassador Oliver Long felt free to bring to the public eye a factual report containing a precise, detailed, step for step – but for this reason all the

33. For more on this, see Probst, 35–36 (English, 22–24).

more impressive – account of those dramatic events. It is a happy coincidence that his book was published just before the completion of our editorial work.³⁴ On the surface, as already mentioned, the intermediary's duties consisted above all of making the necessary contacts and provisions for communications, transport, accommodation as well as the safety of the parties concerned while on Swiss soil. With regard to his actual task, however, he exercised distance and reticence. These qualities laid the foundations for the confidence indispensable in such a situation. Thus, the parties were to approach the intermediary for counsel and assistance in critical situations. The positive outcome of the operation is, however, also a striking example of the scope for effective action offered by an appropriate policy of neutrality. As Long once remarked in this connection: 'Il n'est pas mauvais non plus de rappeler incidemment aux grandes puissances que l'on a parfois besoin d'un plus petit que soi.' (It's not a bad thing either to remind the big powers that they may need a smaller power than themselves from time to time.)

C. CONCILIATION AND ARBITRATION

1. (a) *Preliminary remarks.* In the previous chapter we discussed good offices (in the specific juridical sense) and mediation together, in the light of their notional proximity. For our specific purposes we now intend to do the same with regard to conciliation and arbitration (including international jurisdiction). This may seem at first surprising. It would perhaps appear more pertinent to link arbitration with international jurisdiction only, since both have in common the fact that the conflicting parties are bound to observe the verdict to which they have submitted themselves of their own free will, in individual cases or in general. The difference lies principally in the instance which makes the award: in the case of arbitration this is an organ – be it *ad hoc* for an individual case or be it on a permanent basis – created by agreement between the parties; in the case of international jurisdiction it is a permanent corporate body created by the community of States. Specifically, one thinks of the International Court of Justice within the United Nations system, together with its predecessor within the

34. Oliver Long, *Le dossier secret des Accords d'Evian*.

League of Nations.³⁵ On the other hand the procedure for conciliation is different. Here, too, the parties agree to submit their difference to an impartial instance, the Conciliation Commission. Its primary task is to clarify the facts. This is also done by an international commission of inquiry, as would likewise be part of the tasks of a court of arbitration or an international court. However, in contrast to arbitration and jurisdiction, the Conciliation Commission makes no binding award but simply submits proposals for settling the differences, which the parties can freely decide to accept or reject within a certain period. Thus while it is true that conciliation exceeds the scope of mediation, it is considerably less effective, because of its lack of mandatory nature, than an arbitral decision or a court judgment.³⁶

(b) Why, then, should conciliation on the one hand, and arbitration and jurisdiction on the other hand, still be treated together? I should like to explain this in the context of a peculiarity of Swiss legal history which has already been touched upon and which, while it may also apply to other countries, was specially characteristic of the old Confederation: namely, the tradition in past centuries of settling internal conflicts between the largely independent Cantons wherever possible by means of subsequent conciliatory and arbitral procedures. On the whole, they had adopted the custom of not concluding, be it internally or externally, any agreements at all without at the same time making provisions for the settlement of the differences. In this way the settlement of disputes by peaceful methods had become a firmly entrenched institution. Many an internal difference had been brought to terms in this manner in the course of more than half a millennium³⁷ Between the thirteenth and sixteenth centuries alone such settlements are estimated to number approximately 1,500.³⁸ A specific method

35. For more details on this and on the evolution from the Hague Peace Conferences of 1899 and 1907 up to the present, which can only be briefly outlined in the following section, reference may be made not only to the abundant international literature on the subject, but also to the presentation of the Swiss viewpoint in Probst, *Schiedsgerichtsbarkeit*, Bindschedler, *Streiterledigung*, as well as to Monnier, *Recueil*, Dreher, 57–67, and Stamm, 116–117.

36. Nevertheless for some years now a tendency towards 'jurisdictionalization' of the conciliation procedure has been apparent. The Third United Nations Law of the Sea Conference confirmed this increasing tendency, even including some elements of a quasi-obligatory nature in particular circumstances and on specific questions; for more details see Monnier, *Annuaire*, 21–24.

37. Schindler, *Year-Book*, 76, Weyeneth, 3 ff., Probst, *Schiedsgerichtsbarkeit*, 99, see also Stuyt, Nos. 19 and 30.

38. Stamm, 17.

thus emerged on the basis of this long experience. It consisted of the arbitrators endeavouring primarily to dispose of the conflict 'by concord' (German: 'nach Minne'), i.e., trying first of all to conciliate; only when this course failed did they have to judge the conflict 'by right' (German: 'nach Recht'). This method was then codified in the Federal Treaty of 1815, which ruled that, for differences between the Cantons, conciliation had to be attempted prior to any other type of adjustment – an initial attempt by the arbitrators selected by the parties, and a second by the same arbitrators, but with the inclusion of an umpire; if this proved unsuccessful, then, provided the parties consented, the arbitrators decided on equity; if no consent of the parties was forthcoming, the judgment was made in accordance with legal criteria. That the purely legal judgment should be resorted to only after other means had failed indicates a profound insight into the special nature of inter-State disputes. It was this same insight which was to be the foundation for the modern policy of bilateral international arbitration which Switzerland pursued later.³⁹

(c) With the Federal Constitution of 1848, which transformed the Confederation of States into a Federal State, internal federal arbitration came to an end. In its place appeared the Federal Court, whose duty since then has been also to rule on inter-cantonal disputes. From then on it was in the relationship with other nations that the notion of arbitration assumed ever greater importance. This was a threefold development: first, Switzerland promoted international arbitration by undertaking, in pursuit of a fundamental peace programme, a large number of arbitral commitments vis-à-vis other countries; second, it submitted to arbitral proceedings in a number of disputes; finally and most important, Swiss personalities or authorities were constantly being called upon to officiate as arbitrators in disputes between other States.

In the present context our prime interest is in this third aspect. Nevertheless, for the sake of completeness we shall first touch on the other two.

2. (a) As far as *promotion of the idea of international arbitration* is concerned, there was little to discuss in this matter until the turn of the century. Real institutional arbitration agreements – those which refer to conflicts which have not yet occurred but which may arise in the

39. Probst, *Schiedsgerichtsbarkeit*, 99/100.

future, i.e., agreements which set up a court of arbitration as an institution specifically designed to act throughout their duration⁴⁰ – were not concluded by Switzerland until the turn of the century. This notwithstanding, in certain earlier treaties on residence, friendship and trade, institutional arbitration clauses were included which provided for mandatory arbitration for all differences resulting from the interpretation and application of the relevant treaties.⁴¹ Such clauses, moreover, were also contained in earlier multilateral conventions to which Switzerland was a party (e.g., the Universal Postal Agreement of 1874) and to which many others have been added since. Besides this, already in the last century, and later, Switzerland was ready in certain cases to set up isolated courts of arbitration which were designed only to settle one single conflict (*lis iam nata*).

(b) Both of the *Hague Peace Conferences of 1899 and 1907* gave international arbitration a fresh impetus. The Convention of 1899 for the peaceful settlement of international disputes and that of 1907, which has given a new extended format over that of its predecessor, are still in force. By codifying and developing the practices already followed by the States prior to the conventions, they not only set up a secretariat, but, more important, instituted a procedural order which can be applied for international inquiry commissions and cases of arbitration. In addition, the conventions led to the establishment of a Permanent Court of Arbitration which in reality, as we know, is neither a court nor permanent, but forms a pool of persons (of which each State can designate four) who are particularly qualified to assume the office of arbitrator. The aim was to put an end to the constantly recurring problem of selecting qualified arbitrators. Of the proposals which led to this, the most significant one was that made as far back as 1893 by Professor Carl Hilty of Berne.⁴²

(c) Since the Hague Conventions did not embody any obligation to submit any disputes to arbitration, *special institutional arbitration treaties* had to be concluded in order to create such an obligation for future disputes. Up to the First World War this led to a first wave of about 100 such bilateral treaties of a reciprocal nature between States in Europe and America. Switzerland had concluded nine of them.

40. For the distinction between institutional and isolated arbitrations see Lammasch, 55, and Schindler, *Arbitration*, 57.

41. See Monnier, 4, footnote 4.

42. Lammasch, 120, Probst, *Schiedsgerichtsbarkeit*, 102, Monnier, *Recueil*, 4–5.

Nevertheless the weakness of these earlier treaties lay in the fact that they left all too many back doors open. It was easy for the States to evade this still unfamiliar obligation to submit future disputes of an unknown character to an arbitral decision as a matter of course. The obligation should only apply if it did not affect the vital interests – the independence, sovereignty and honour – of the parties to the agreement, or the interests of third States. It was left entirely to each State's discretion to judge whether a conflict should be regarded as one which entailed such reservations and was therefore to be withheld from arbitration. It was also foreseen that in every case of dispute the States should further conclude a special agreement (compromis) by means of which the court would be created and the matter in dispute formulated. If a compromis could not be achieved, the dispute could not be submitted to arbitration.⁴³ The agreements also did not generally provide for any other procedures which could have been implemented in place of arbitration (such as in particular conciliation). Thus, in practice, the range of these treaties was rather narrow, despite a basic willingness to co-operate.

(d) The experience of the First World War and the establishment of the *League of Nations*, which Switzerland joined in 1920, brought about a fundamental change of attitudes. The League of Nations created an alternative obligation to submit a dispute which could lead to a break, either to a court of arbitration or to the League of Nations' Council. Since the latter, due to its composition, could be inclined to be influenced by considerations of political opportunism, Switzerland felt compelled to enter into *particular arbitration commitments* with as many States as possible in order to be able to submit disputes to a non-political instance which ruled in accordance with legal principles. The report of the Swiss Government on international arbitration treaties, dated 11 December 1919, drafted by Professor Max Huber at the time when he held the office of Legal Adviser to the Swiss Ministry of Foreign Affairs, and approved by the Federal Assembly, describes the programme of this new forward looking policy. It culminates in the lapidary statement: '*The greatest strength of the small State lies in its good right.*' This good right 'in general finds

43. See Schindler, *Arbitration*, 2, Probst, *Schiedsgerichtsbarkeit*, 102–104.

even stronger backing and greater security in arbitration agreements than in any other policy whatsoever'.⁴⁴

The first treaty concluded on the basis of this report was the Treaty on Arbitration and Conciliation of 3 December 1921, with the German Reich, which eliminates two basic defects of previous agreements. It provides for an arbitral procedure for juridical disputes and a conciliation procedure for disputes that are not of a juridical nature. In the case of juridical disputes the plea could still be made that a matter affected the independence, territorial integrity or other vital interests of the party in question. However, this no longer resulted in the matter failing to reach examination at all, but only in its submission to conciliation instead of arbitration, if the opposing party acknowledged the applicability of the objection. If, however, the plea was rejected by the opposing party, then its admissibility was to be decided upon in arbitration. The definitive decision on the plea was thus for the first time withdrawn from the discretion of the party concerned, and settlement in accordance with the treaty thereby became obligatory. In a certain sense this aligned with the old federal tradition of settling disputes not only 'by right' but also enabled such to be done *ex aequo et bono*.⁴⁵ Owing to its realistic and progressive attitude, the treaty of 1921 represented a milestone in the history of international procedures for the settlement of disputes. At the time it broke new ground and gave impetus to a great number of similar treaties which were concluded with European and non-European States. Before the start of the Second World War there were still about 250 of these agreements in force, of which Switzerland was a party to 23 (mainly with European States but also with overseas countries such as Brazil, Japan and the USA). Compulsory arbitral clauses of a general nature contained in some treaties of friendship are also to be included herein.⁴⁶ Most of these agreements still apply today. Furthermore, Switzerland systematically made use of the forum of the League of Nations to apply itself to fostering the *obligatory* nature of peaceful settlement, especially in the case of the reluctant major powers.

44. *Bericht des Bundesrates an die Bundesversammlung betr. internationale Schiedsverträge* (Report of the Federal Council to the Federal Assembly regarding international arbitration treaties), BB1, 1919, V, pp. 928 ff., Probst, *Schiedsgerichtsbarkeit*, 106–108. Bindschedler, *Streiterledigung*, 876–879.

45. As also in Monnier, *Recueil*, 4.

46. Probst, *Schiedsgerichtsbarkeit*, 109.

(e) Switzerland's dedication to the peaceful settlement of conflicts also led to repeated Swiss initiatives after the Second World War again to strengthen the weakening notion of arbitration bilaterally as well as multilaterally.⁴⁷ The Swiss project for a system for the peaceful settlement of international disputes which is pending before the Conference on Security and Co-operation in Europe (CSCE) is only one example of this.⁴⁸

D. INTERNATIONAL JURISDICTION

1. Now that we have discussed arbitration, let us turn to the matter of international jurisdiction. For this we have to return to the years following the end of the First World War. The need for a court of justice with judges permanently sitting to handle all relevant tasks had been recognized for some time. The birth of the League of Nations as a multilateral organization of States paved the way for this significant step. It became a reality when the *Permanent Court of International Justice* was created, a body for which the League of Nations Covenant had made provision and which was adopted by the League of Nations Assembly at the end of 1920; it began its activity in The Hague in 1922. In this way a truly permanent international court of justice had finally been erected. It was thus no longer necessary to set up a special court of arbitration for every conflict. Above all, this court of justice was able primarily to build up a consistent jurisdictional practice on matters of international law. For the first time, too, there was an opportunity for unilateral submission of complaints. Admittedly, this needed the express prior recognition of the competence of the Court. But the Statute of the Court also provided the opportunity for the States, by signing the so-called *optional clause* of Article 36, to recognize the Court's jurisdiction for all or for particular international disputes, as enumerated in this Article (which in fact covered all cases that could arise). Thus the State was bound to any other State which had made the same declaration. It was by its unilateral declaration therefore assured of a commitment, analogous to an obligatory arbitration agreement, by any other State which had also made such

47. For more on this see Probst, *Schiedsgerichtsbarkeit*, 126–146, and the sources given therein.

48. Monnier, *Annuaire*, 17–19.

declaration. This made it much easier for a State to enter into such commitment and furthered its participation in the system.⁴⁹ This was the fulfilment of an idea which had been submitted *in nuce* by Professor Max Huber, as far back as the Hague Peace Conference of 1907 but which proved as yet in advance of the *Zeitgeist*.⁵⁰ Switzerland was one of the first States to sign the Statute of the Court and to acknowledge *in toto* the obligatory nature of jurisdiction as outlined in Article 36.

2. (a) Following the end of the League of Nations, after the Second World War, the Permanent Court of International Justice likewise ceased to exist. It was replaced by the International Court of Justice as the principal judicial organ of the United Nations. Although the new Court cannot be regarded as the successor to the old Hague Court of Justice in the strict legal sense, in fact it nevertheless represents its continuation. The Statute of the new Court is in all significant aspects identical with that of its predecessor and also contains the optional clause. Switzerland was the first non-member of the United Nations Organization, in 1948, to adhere to the Court's Statute and to continue recognizing its optional clause.

(b) The most important contribution in this context to international jurisdiction and to the development of international law by Switzerland was made in the person of Professor Max Huber, who had been elected to the Permanent Court of International Justice's first term of office, and who presided over this supreme international court, as the youngest of its judges, from 1925 to 1929. Paul Rüegger (later Swiss Ambassador), himself active in The Hague from 1925 to 1929 as Deputy-Registrar, summarized the importance of this contribution on the occasion of Huber's seventieth birthday.⁵¹

It is very largely thanks to him that the Court's judgments and advisory opinions which were given in the first nine years of its

49. Schindler, *Treaties*, 9, Probst, *Schiedsgerichtsbarkeit*, 106 et seq. Bindschedler, *Streiterledigung*, 880–881.

50. Probst, *Schiedsgerichtsbarkeit*, 102; Monnier, 5; see also Max Huber, 526: 'Auf diese Weise wäre das Prinzip der universellen obligatorischen Schiedsgerichtsbarkeit in der allgemeinen Konvention niedergelegt, dabei aber den Staaten eine völlige Freiheit gelassen worden' ('In this way the principle of universal obligatory arbitration would be set down in the General Convention, while at the same time leaving complete liberty to the States').

51. Schindler, *Year-Book*, 88.

existence – and which frequently bear the stamp of his authorship and represent a creative and lasting contribution to international law – enjoy such high regard.

Max Huber retired, entirely of his own free will, from this highest judicial office in the world, only when he was co-opted as President of the International Committee of the Red Cross in Geneva. It is no exaggeration to say that during his time as a Judge he contributed in a very great measure to the development, working procedures and uniformity of supranational jurisdiction. Among the most important cases he had to deal with in The Hague was that of the English steamship '*Wimbledon*', chartered by a French company, which was *en route* with a cargo of munitions for Poland, then at war with the Soviet Union, and which Germany refused passage through the Kiel Canal. The French regarded the German action as a violation of the Versailles Treaty and claimed compensation on behalf of the French company. The Court agreed with this interpretation by 12 votes to 9, and found against Germany (1923). Huber himself, however, as a Swiss with a finely tuned sense of the principles of neutrality, regarded the German move as a legitimate defence of a neutral stance in the Polish-Soviet conflict, and drew up, together with the other opposing judges, a 'dissenting opinion' which caused a considerable stir and contributed much to his international reputation. A further judgment of great importance in which Huber had the casting vote as President and which has remained a landmark decision to this day, was the case of the French mail steamship '*Lotus*' which had collided in the Aegean with a Turkish steamship, whereupon the latter immediately sank, taking with it eight members of the crew to a watery grave. France raised objections against the procedure initiated in the matter by the Turkish authorities in Istanbul, arguing that a ship sailing under the French flag on the high seas was subject to French jurisdiction and consequently its captain could not be tried in Turkey. But the Permanent Court of International Justice rejected the French appeal (1927). The significance of the case lay in Huber's deliberations on the dualistic theory at the level of conflict between the area of validity of international law and of national law.⁵²

52. Stamm, 118–119, and the additional literature referred to therein.

E. THE ROLE OF SWITZERLAND AS PARTY TO A CONFLICT⁵³

1. Having described Switzerland's contribution to the development of conciliation, arbitration and international jurisdiction, we now have a look at the question of to what extent the Swiss Government itself was able to put these instruments to the test, in the role of party to a conflict. Since the second half of the last century the realization of the idea of arbitration for the peaceful settlement of disputes between Switzerland and other States was considered a total of 15 times. Thirteen times the initiative came from Switzerland, and only twice from another State. While Switzerland entered into these two requests without further ado, the Swiss proposals were rejected four times by the opposing parties. In the latest of the four cases (*Interhandel*), Switzerland submitted the dispute to the Hague International Court of Justice.

2. Of the twelve cases in which an inter-State proceeding was actually introduced, four came to a premature end: two by amicable settlement, one by the opposing party's decision to yield, and one other by withdrawal.

Thus, eight cases remained in which the proceedings took their course. Three of them were put to conciliation; all of them led to a satisfactory solution acceptable to both parties. Four of the cases were fought out by arbitration; in three of them the award was granted in favour of Switzerland, in one against it. As to the *Interhandel* case, submitted to the International Court of Justice, it could finally be settled out of Court.

Of the twelve cases mentioned there were three in which the inter-State proceedings were based on an isolated agreement concluded solely for the actual dispute. In two cases an arbitration clause from a trade agreement was applied. In five of them, existing institutional arbitration treaties of general scope formed the basis of the settlement. Only twice was the optional clause of the Statute of the International Court of Justice invoked.

In eight of the twelve cases the opposing party was a neighbouring State (France four times, Italy three times, and Germany once), and only in four was a more distant country involved (Chile, Yugoslavia, Romania and the USA).

53. For a more detailed account see Probst, *Schiedsgerichtsbarkeit*, 128–136.

Finally, if these cases in which proceedings were initiated are classified according to substance, it is seen that financial demands were the subject of three of the twelve; in another three, fiscal matters were the point at issue; two concerned questions of sovereignty; yet another three centred on a border dispute, a question of diplomatic law and a case of sequestration respectively; lastly, in the *Free Zone* dispute (with France) several elements came into play.

3. *Assessed as a whole*, the 12 cases mentioned may be said to represent a rather meagre result for an almost 100-year-old history of arbitral settlement. However it would be wrong to draw hasty conclusions from this. One of the reasons for the scant demands made on international bodies by Switzerland may lie in the fact that it seldom had to contest disputes with foreign countries, since it mostly succeeded in settling differences at an early stage by diplomatic means. Added to this is the fact that more often than not the mere possibility of being able to call on an independent arbitration court, or even the indication of the intention to do so, was enough to cause a change of heart in the opposing party. The fact that the Nazi Reich in 1935 retracted in the matter of the kidnapping of a former German Jew from Swiss territory is evidence of how significant the mere existence of an arbitral commitment can be when a small State has to defend its rights against a major power (at least so long as no vital interests are involved). Wherever conciliation or arbitration was actually carried out, the results were by and large positive. Other cases in which the settlement of a difference failed to be accomplished attest less against arbitration itself than much more to its often inadequate framework which still has room for improvement.

F. THE CHANGING FATES OF INTERNATIONAL ARBITRATION

1. The impact that conciliation, arbitration and jurisdiction has made on international affairs seems substantial enough to enlarge upon the contribution Switzerland made to their development and the practical experience which the country could draw from it. More important, however, for our purposes of study, is the question of the extent to which *Switzerland or individual Swiss citizens* could, as holders of appropriate mandates, lend a helping hand to third States to settle their differences. The answer to this question is by its very nature closely

associated with the degree of intensity with which the community of States was prepared to settle, and was capable of settling, disputes, by peaceful means rather than by war or other recourse.

2. Looking at the course of events since the middle of the last century, a succession of periods with increasing and decreasing amplitudes can be observed.⁵⁴

(a) A first true apex of arbitral settlement was reached in the last three decades of the nineteenth century and until just after the turn of the century. Of the large number of cases which were dealt with during that period, those in which Switzerland was directly involved in an arbitral role (some 20 of them) may not necessarily appear outstanding, as far as their number is concerned. But if one examines them from the point of view of their legal or material impact, they consistently took on a particularly influential, even political connotation and legal interest.

(b) After the two Hague Conferences of 1899 and 1907 had paved the way to organizing and institutionalizing international arbitration, improved prevention of conflicts had been expected. The practical result, however, turned out to be disappointing. To be sure, there continued to be some remarkable cases in which the existence of a procedure and the availability of a pool of potential arbitrators within the Permanent Court of Arbitration was helpful in many respects. Yet, even this new opening did not prove sufficiently effective to cope with the underlying tension that was threatening an elusive sense of European calm. Neither did it suffice to contend with the newly emerging conflicts of power. Just three months after the first Hague Conference ended, the war between Britain and the Boers broke out and all mediatory attempts proved unable to settle the conflict in time. It had to be fought to what for the Boers was a bitter end. Even prior to this, the race of the powers for additional colonial possession was in full progress: the United States of America had already laid hands on the Philippines, King Leopold II of Belgium had conjured up a personal empire, and the German Reich, for its part, as a late-comer,

54. The following compilation mainly based on the internal analysis already mentioned (cf. Ch. III, note 2, above) and the summarized account thereof (viz. in particular Probst, 37-46, English version, 26-37); Stamm, 27-63; Bindschedler-Robert, 682-689; more recent: Monnier, *Recueil*, 4-7, including the specific sources referred to therein.

was forcibly creating a colonial empire of its own. Added to this, in 1904 the Russo-Japanese war broke out, causing the Second Hague Peace Conference to be postponed. When it eventually did convene Germany resolutely opposed the pleas for disarmament. Thus it seemed inevitable that the tensions would become more acute; that new ones would be added; and that the arms race would continue unchecked. The danger of a European war increased materially. But even this period also produced a number of interesting arbitration cases.

(c) The outbreak of the First World War of course put an end to such arbitral activity. But it was resumed as soon as peace was re-established. First, it was carried on within the scope of the many mandates which were established by virtue of the Peace Treaties of 1919 and 1920. Then it was reflected in the efforts of the newly created League of Nations to prevent further wars by striving to ensure a secure order of peace; in this the creation of the Permanent Court of International Justice represented a keystone. And, finally, arbitration found a voice in the Swiss policy of building up a comprehensive network of bilateral treaties of arbitration which became a landmark for other States to follow.

(d) But once more it was the gloom of the political climate, on which the clouds had been darkening since the beginning of the thirties, which was suppressing this wave of complacency. The *outbreak of the Second World War* put the final seal on it. Yet the specific instruments which had earlier been created for securing peace in fact *outlasted* the war and came to life again. Compared, however, with the period between the wars, their significance had in some way shrunk. This time, for instance, the renewed Swiss initiative to extend the network of bilateral arbitration treaties was accorded only partial success. Even the role of the International Court of Justice in its new disposition has not remained unchallenged. The emergence of new States with different conceptions, principles and ideals of their own, has affected the previous homogeneity and made things more laborious.⁵⁵

(e) Nowadays, in fact, a substantial part of the peace efforts has been transferred to the *United Nations*. Switzerland – not a member of

55. For more: Monnier, *Annuaire*, 11–17, and Bindschedler, *Streiterledigung*, 882–884.

the United Nations but co-operating with many of its organs and belonging to most of its Specialized Agencies – participates in such activities as appropriate. Moreover, Swiss 'Good Offices', this time in the very general meaning of the term, are much in demand. We shall return to this later. But then even the demand for arbitration has again increased over the last few years.

G. SWITZERLAND'S ACTIVE CONTRIBUTION TO INTERNATIONAL ARBITRATION

1. How, then, does the active role of Switzerland fit into the chequered history of arbitration since the 1870s up to the present day? It is not the intention here to compile a catalogue of the actions undertaken. Nevertheless, a number of noteworthy cases, some of which have left their mark on the practice of international law, shall be touched upon.⁵⁶ In so doing, we shall abstain, for the moment, from including arbitral functions which fell to Switzerland within the context of Peace Treaties and in part extended beyond the limit of strict arbitral functions, as well as some special mandates with a preponderant or strong political connection. They will be treated later in their own context. For the purposes of the following presentation of traditional arbitration cases, including a commission of inquiry, our method will be to arrange them, regardless of chronology, in accordance with the more juridically substantive criterion of the Swiss mandatory concerned or, if need be, of the Swiss organ called upon to designate this mandatory. This leads us to the compilation which now follows.

2. *The Federal Council* (i.e., the Swiss Government) was asked four times in all to act as an *arbitrator*. In 1890 it proclaimed its readiness, at the request of Portugal and of the independent Congo State, to accept the function of arbitrator in differences that might arise during the settlement of the frontiers in Africa between the *Congo* and the adjacent territory allotted to *Portugal*; the mandate, however, did not have to be carried out as the differences were overcome by direct

56. Same sources as indicated in note 54 above; completed by Schindler, Stuyt, Scott and Weyeneth; further *Recueil des décisions des tribunaux arbitraux mixtes institués par les traités de paix*; *Geschäftsberichte des Bundesrates* (annual reports of the Swiss Government). Other sources are expressly indicated.

negotiation and settled in the Brussels Agreement of 25 May 1891. By the agreement dated 10 April 1897, Brazil and France called upon the Federal Council to arbitrate in their difference on the *boundary question between French Guyana and Brazil*; the Federal Council decided to accept the 'honourable mission' and made an arbitral award on 1 December 1900.⁵⁷ A subsidiary mandate (originally the British Government was designated arbitrator) with which *Argentina and Chile* wished to entrust the Federal Council in 1902 with arbitrating all the differences which might arise between those two States was, however, not accepted; in its decision the Federal Council was guided by its principle of declining arbitral mandates of a general, permanent and comprehensive nature, the consequences of which appeared difficult to assess. On the basis of an agreement in 1916 between *Colombia and Venezuela*, the Federal Council made an award in 1922 – prepared by the Swiss Envoy to Paris, Minister Charles Lardy – which settled a century-old *boundary dispute*. The on-the-spot rectification of the boundary was carried out by a commission of 13 experts appointed by the Federal Council.

3. In five cases the *Federal Council appointed arbitrators* at the request of the conflicting parties to help them settle their differences. The choice fell always on prominent Swiss personalities. In autumn 1899 an arbitral tribunal appointed in this way by the Federal Council, composed of the President of the Federal Court of Justice (Supreme Court of Switzerland), a high-ranking official and an expert on railroads, made an arbitral award in the dispute between Great Britain and Colombia with regard to the *Antioquia Railroad*. In the Spring of 1900 an arbitral tribunal – consisting of the Vice-President of the Federal Court of Justice, the President of the Executive of the Canton of Vaud, and a professor of law – made an award in the dispute between Great Britain and the United States on the one hand and Portugal on the other in consequence of the abrogation of the Lourenço Marques Railroad concession (*Delagoa Bay*) in Portuguese East Africa. When the national arbitrators in a disagreement between Russia and Turkey on account of *Turkish war reparations*, dating from the Russo-Turkish war of 1877–1878, did not come to a solution on the appointment of the chairman, the Swiss Federal Council was

57. Sentence du Conseil fédéral suisse dans la question des frontières de la Guyane française et du Brésil, du 1^{er} décembre 1900 (Staempfli, Berne).

asked to nominate a candidate; its choice fell again on Minister Charles Lardy; the award, contributing, as it did, towards filling some gaps in international law,⁵⁸ was made in November 1912. In 1921 an international commission of inquiry was appointed (in accordance with the Hague Convention of 1907) in order to clarify the circumstances which had led to the torpedoing of the Dutch steamship *Tubantia* by a German submarine; the Federal Council had been asked by the parties involved to appoint the chairman; ex-Federal Councillor Arthur Hoffmann was selected; the report of the Commission of Inquiry of 27 February 1922, subsequently led to a settlement. The treaty between Germany and Lithuania, signed on 10 February 1925, which was to carry into effect the *Memel Convention* of May 1924, stipulated that differences of opinion on nationality issues, originating from the time of the changeover of sovereignty in the Memel region from Germany to Lithuania were, in the last resort, to be submitted to a neutral arbitrator to be appointed by the Swiss Government. When such a difference actually arose, the Federal Council appointed ex-federal Judge Victor Merz who settled the case in 1937. In the *British-Cypriot Agreements of 1960*, establishing the Republic of Cyprus, it was provided that each party might, if necessary, ask the Swiss Government to appoint an expert for determining the exact boundary of the United Kingdom Sovereign Base areas.

4. *The President of the Confederation* was twice asked to accept *arbitral mandates*. This occurred for the first time at the end of the nineteenth century in a dispute between France and Venezuela on a denial of justice with regard to a French national (*Fabiani case*). The then President of the Confederation, Adrien Lachenal, made his award in December 1896. The second case is of a more recent date; it concerns the long-lasting frontier problems between Argentina and Chile. In fact the frontier between the two States, when they became independent in 1816 and 1818 respectively, had only been fixed in a general way and, after innumerable negotiations, has in part remained so to this day. In the Spring of 1960 the Presidents of Argentina and Chile once more agreed to launch a new attempt to overcome the remaining questions. They were unanimous on two issues: on the one hand that the still pending differences with regard to the border in the region of Paleno should be passed, as before, to the British Crown for

58. François, 518.

decision; on the other hand, that all future disputes which might still arise in the Cordilleras border area were to be submitted to the 'permanent and automatic' arbitration of the President of the Swiss Confederation. They further agreed to leave the solution of the as yet equally unresolved border problem in the *Beagle Channel* to the International Court of Justice.⁵⁹ Finally, however, no other route having proved successful, the definitive ruling was made by the Pope in March 1985, after six years of mediation. The agreement concluded on this matter contains an arbitration clause for all disputes arising therefrom which are unable to be settled by conciliation. Both parties again appealed to the Swiss Government's availability for nominating the members and the President of the Court of Arbitration provided therefor, should no direct agreement be forthcoming on its composition. In the sense of its traditional policy of 'Good Offices', the Swiss Government assumed the mandate.⁶⁰

5. *The President of the Confederation* is asked frequently – and the Head of a Department occasionally – to co-operate in *appointing arbitrators*. In over 40 treaties of conciliation, judicial settlement and arbitration between third States and in a number of other bilateral conventions there are clauses to that effect. The *treaties of Locarno* of 1925⁶¹ can also be ranged in this category: the President of the Swiss Confederation is asked, in default of other arrangements, to make the required appointments in so far as no such appointments have been made by the Conciliation Commission within three months.

More important than these general clauses, however, are the approximately 20 concrete individual cases in which Swiss arbitrators nominated by the President of the Confederation were actually involved in a decision-making capacity. It is not pertinent for us in this presentation to list a complete catalogue of these actions. Nevertheless they include a number of actions which in one way or another made substantial contributions to the clarification and development of the rules of international law.

Among such cases, the international lawyer will certainly recall the famous difference between the United States of America and Great

59. NZZ of 9 April 1960; Bereinigung der chilenisch-argentinischen Grenzstreitigkeiten.

60. *Press Communiqué* of the Swiss Federal Department of Foreign Affairs, dated 19 October 1984.

61. Oppenheim/Lauterpacht, 89–90.

Britain in connection with the armament of the Confederate privateer *Alabama* during the American Civil War. After severe altercations the Parties consented to appoint a Court of Arbitration consisting of five members, two of whom being chosen by the conflicting Parties themselves, while the remaining three were to be nominated by the King of Italy, the Emperor of Brazil and the President of the Swiss Confederation respectively. The selection of the last named fell on the former Swiss President of the Confederation and then National Councillor (Member of Parliament) Jakob Stämpfli, who from then on considerably influenced the course of the matter. The actual negotiations took place in a meeting room of the Geneva Town Hall, which to this day is still called the 'salle de l'Alabama' (the Alabama Room). The award made in 1872 bound England to pay direct reparations for the damages inflicted upon American trade. It thus brought to an end serious tension between the Great Powers, had a fundamental bearing on the shaping of the law of neutrality and is considered the first important arbitration of more recent times. Although, as we now know, the award caused some bitter resentment in London,⁶² both Governments expressed to the Swiss Government their appreciation of the manner in which the arbitrator it had nominated fulfilled his tasks.⁶³

Among a number of other cases in which persons of Swiss nationality were appointed sole arbitrators by the President of the Confederation, or chairmen of arbitral tribunals or of conciliation commissions, we might just mention the dispute between the USA and Chile arising from an incident involving the American warship *Baltimore* (1894), the dispute between Norway and the USA which developed after *requisition by the USA of Norwegian ships in 1917* (upon America's entering the war), the demarcation of the *frontier between Turkey and Iraq* on the basis of a British-Iraqi-Turkish Treaty (1926) and the difference of opinion between *Greece and the International Commission of Finance* set up in 1897 after the war between Greece and Turkey (1928).

6. *The Swiss Supreme Court* (Federal Tribunal), too, was repeatedly

62. Stamm, 19–20; see also the most recent study relating to this by Lotti Genner.

63. For more on this see Schindler, *Year-Book*, 84–85; Oppenheim-Lauterpacht, II, 714–716; Stuyt, No. 94; Weyeneth, 54 ff.; Fauchille, I/3 ff.; Lapradelle et Politis, II, 713.

active in the service of international arbitration, be it by the body as such, be it by nominating outside arbitrators, or be it finally by single members of the Court.

The Supreme Court as a whole was involved in two cases: a single arbitration and a more general mandate. In the single one, the Court was called upon to give its verdict in an old and complex dispute going back to the war between Chile and Peru of 1879–1883 over *Peruvian guano deposits*. With the approval of all States involved (France, Chile, Peru and Great Britain), the Federal Court made its judicial decision in July 1901. Of even greater political importance was the unusual mandate with regard to the Moroccan Bank, entrusted to the Swiss Supreme Court as such by the *Act of Algeciras*. Indeed, the Court was invested with the threefold authority as a Court of Appeal for judging on actions introduced in Morocco against the Bank; for deciding differences between the Moroccan Government and the Bank; and for ruling on disputes between the Bank and its shareholders. After consideration by the Swiss Government and with the approval of the Swiss Parliament, the mandate was accepted with the proviso that the procedure would be set up according to the Swiss Supreme Court's own discretion. The decision was motivated by the conviction that Switzerland should not deny co-operation if the entire framework of peace so arduously erected in Algeciras were not again to be questioned. Twice, in 1936 and 1940, the Federal Court had to pass a sentence.

7. As for the *President of the Federal Court of Justice*, he had to make awards either as arbitrator or as chairman of the Arbitral Tribunal in a difference between *Italy and Peru* concerning a treaty interpretation (1903), in a dispute between Austria and Hungary with regard to the determination of a frontier at the so-called 'Meerauge' Peak in the Tatra Mountains (1902), in a litigation between France and Peru concerning the compensation of French creditors (1921), and in financial differences between Romania and Germany dating from the time of the First World War (*Junghans and Deutsche Bank* cases). Moreover, in several international agreements (as for instance in the treaty between Iran and the International Oil Syndicate which put an end to the Iran Oil conflict in 1954, and in the convention of 1957 on the foundation of the 'Société irano-italienne des pétroles') the President of the Court was entrusted with making primary or subsidiary appointments of arbitrators.

8. There have been numerous cases in which *members of the Federal Court of Justice* or even of the Federal Insurance Court have been asked to assume international arbitral functions at the request of foreign governments. Some of these arbiters were designated by the Swiss Federal Council, the President of the Confederation, the Minister for Foreign Affairs, or even by the President of the Federal Court himself. If, however, a federal judge is approached directly for assuming an international mandate, he is no longer free to accept it on his own. Indeed, by a federal order dated 19 December 1924, the approbation of the Court has to be obtained prior to the acceptance of such an appointment, and an arbitral function with any bearing on the political relations between Switzerland and foreign countries can only be exercised after agreement between the Court and the Federal Council. Lately, not least due to the Court's chronic overload of work, these rules have been reconfirmed and even become more stringent.⁶⁴

9. (a) The activity of *outstanding Swiss personalities* called upon as individuals to assume arbitral functions without being mandated or selected by a federal authority, as in the cases mentioned up to now, proved equally of considerable significance. We refer to such cases in which Swiss personalities were solicited directly by the parties or, indeed, even through the intermediary of the Ministry of Foreign Affairs, but at all events purely *in a private capacity*. In these cases it was left to their own discretion whether to obtain the opinion of the Swiss authorities before accepting the function, which is customary in most cases with a political background, or else to judge by themselves whether to accept or reject. At all events, in contrast to a civil servant, there exists no obligation for them to secure the approval of their country's authorities. If such consent is nevertheless requested and accordingly granted, then it may appear that the private mission is endowed with a certain official sanctioning which can differ from case to case. As a rule, however, under international law, no responsibility of the State is implied. Neither legally nor politically can the activities of a private citizen, who is not acting in an official capacity, be imputed to his State.

(b) Since the creation of an institutional jurisdiction of The Hague after the First World War, many justiciable disputes have no doubt

⁶⁴. See, among others, Philippe Pidoux, 'Bundesrichter als Schiedsrichter', *NZZ* of 1 February 1985.

been absorbed by the Hague Court. Nevertheless, a wide field was still left open for professional lawyers and other eminent personalities to lend their co-operation to arbitral tribunals or even to make awards as sole arbitrators. In eight out of some 20 cases settled within the framework of the Permanent Court of Arbitration, issued out of the Hague Peace Conferences of 1899 and 1907 – or at least under the auspices of this institution and in co-operation with its secretariat – Swiss arbitrators were involved, six times even as chairmen of the court of arbitration or as sole arbitrators. Yet arbitration cases with Swiss participation outside this Hague procedure were at least as frequent. The fact that the arbitrators belong to a neutral State, coupled with their reputation for objectivity, has kept the demand for Swiss umpires constantly alive. In a certain sense this turned Switzerland into a true reservoir of arbitrators.⁶⁵

(c) In what follows, though it is far from complete, just some of the *best-known examples* of the arbitral functions of some Swiss experts of public international law are recalled.

First and foremost, mention should again be made of Max Huber, who achieved fame in particular by his brilliant judicial and presidential skills at the Permanent Court of International Justice during the League of Nations period. Yet over and above all this, he was much in demand as an international arbitrator, and figured, incidentally, as President or member of 15 international conciliation commissions.⁶⁶ Among his most significant awards we recall the two he made as Sole Judge, first in the difference between Great Britain and Spain concerning British claims for damage to life and property of British subjects in the Spanish Zone of Morocco (1925), and, second, between the United States and the Netherlands concerning the sovereignty over the Island of Palmas (1928). In the first award, the definition of the responsibility of the State for illicit damage suffered by foreigners on the territory of a Protectorate is still regarded as being of general juridical value. In the second case Huber's extensively motivated award represented a substantial contribution to the doctrine on the occupation of territory and on the acquisition of sovereignty. Finally, Huber was a member of the International Committee of three jurists

65. Schindler, *Arbitration*, 43–44, Stamm, 120. For the list of awards given by the Permanent Court of Arbitration see Oppenheim-Lauterpacht, 40–41.

66. Schindler, *Year-Book*, 85 and 87.

appointed by the Council of the League of Nations in 1920 for the purpose of clarifying the legal situation and submitting a report on the dispute between Sweden and Finland concerning the Åland Islands; the recommendations contained therein constituted the basis for the subsequent settlement (more on this later).

Even before the Max Huber era, Minister Charles Lardy, for 34 years Swiss Envoy to France, was one of the most sought-after international arbiters by virtue of his reliability, impartiality and clear judgment.⁶⁷ His selection by the Federal Council, at the request of the parties, as umpire in the Arbitration Court concerning compensation in favour of Russian nationals for their losses suffered during the Russo-Turkish war of 1877–1878, has already been discussed in another context. Among his other activities we should also mention the award made in 1914 when he was Sole Judge in the dispute between the Netherlands and Portugal on the course of the frontier on the island of Timor, and his participation in a three-member Court of Arbitration in a difference between Spain, France and Great Britain on the one hand and Portugal on the other, regarding the confiscation of religious property by Portugal.

By no means less important was the arbitral function of Professor Eugene Borel. Two awards he made as Sole Arbitrator should be singled out: the one on the apportionment of the Ottoman Public Debt to the successor States of the Ottoman Empire (1925), called the Ottoman Debt Arbitration, and the other on the dispute between Sweden and the USA concerning Swedish claims for losses incurred as a result of the detention in ports of the USA, during the First World War, of the Swedish ships *Kronprins Gustav Adolf* and *Pacific* (1932). The first mandate, founded on the Treaty of Lausanne of 1923, had been assigned to Borel by the Council of the League of Nations, and the second one on the basis of an agreement between the parties involved.

In the mid-twenties Professor Walther Burckhardt presided over a subcommittee, instituted by the League of Nations, which had to examine a dispute between Great Britain, France and Italy on the one

67. Stamm, 48, and in particular Henri Thévenaz, 'La contribution de Charles-Edouard Lardy à l'arbitrage international', in *En hommage à Paul Guggenheim* (Geneva, 1968), 743.

hand, and Romania on the other, with regard to the competence of the European Danube Commission; the subcommittee presented its final report, which also contained conciliation proposals, in July 1925. Professor Burckhardt also chaired a Romanian-German arbitral tribunal in connection with pending financial claims of the First World War; in the course of this procedure he made an award in the Schlessiger case (1935).

Several arbitral missions were assigned to Professor Georges Sauser-Hall in the years after the Second World War. Especially well known is his implication in the ownership case of the Albanian Gold, confiscated by the Germans in Rome. France, the United Kingdom and the USA having agreed to settle this by arbitration, requested the President of the International Court of Justice to nominate an arbitrator. His choice fell on Sauser-Hall who decided in favour of Albania (February 1953). In 1954, the same Sauser-Hall became chairman of an Arbitral Tribunal between the Federal Republic of Germany and Israel concerning certain Jewish property rights in Germany. At the initiative of France and with British, American and German consent, he was appointed in 1956 as one of the three members to the Arbitral Commission on Property, Rights and Interests in Germany, with its seat at Koblenz (we shall revert to it). In the same year he was named third neutral member of the British-Italian conciliation commission convened on the basis of the Peace Treaty of 1947 between the Allies and Italy. Besides this, he was chairman of an arbitration tribunal concerned with the differences between the Kingdom of Saudi Arabia and the Arabian American Oil Company (ARAMCO) which made its arbitral award on 23 August 1958.

In May 1949 France and Italy jointly designated Federal Judge Plinio Bolla as member of the French-Italian Conciliatory Commission on the basis of the Peace Treaty of 1947. After 1949, when he resigned from the Federal Court of Justice, Bolla was appointed to the five-man Arbitral Tribunal concerned with the dispute between France and Spain on the utilization of the water of Lake Lanoux in the Pyrénées – which was settled in 1957 – and was entrusted with a mandate concerning the determination of the frontier between Ethiopia and Somaliland (1957).

Professor Paul Guggenheim was another Swiss internationalist much in demand for arbitral functions. In a dispute between the British General Electric Company and the Dutch Phillips Company,

he had to rule, as Sole Judge, whether an agreement on markets, made between the two companies at the time of British rule in India, should continue to apply in Pakistani territory after the establishment in 1947 of the two independent States of India and Pakistan. In the *Nottebohm* nationality case submitted to the International Court of Justice, Liechtenstein in 1953 exercised its right (Art. 31 of the Court Statute) as a Party not represented in Court, to nominate Paul Guggenheim as *ad hoc* judge having equal rights. Moreover, in 1960, Guggenheim chaired the Italo-French Conciliation Commission provided for by the Peace Treaty with Italy in a dispute concerning requisitions in the ports of Somaliland and Eritrea.

Even before this, Professor Hans Huber, former member of the Swiss Federal Court, had been nominated as deputy neutral member in the Permanent Arbitration Court which France and the Federal Republic of Germany had convened for definitive settlement of the Saar question.

When in the course of 1952 a fisheries dispute implying serious consequences broke out between Great Britain and Iceland, the Head of the Swiss Delegation to the Organization of European Economic Co-operation in Paris, Minister Gérard Bauer, proposed that an attempt be made to settle the difference within the Organization. The idea was welcomed. A five-member international Conciliation Commission was formed and Minister Bauer, with the approval of the Swiss Federal Council, was appointed its chairman. It took two years of at times difficult negotiations for the commission to succeed in reaching a solution in November 1956 which was satisfactory to all concerned.

Another renowned personality in international juridical circles was the Swiss diplomat Paul Rüeegg. As Deputy Registrar, he had already worked alongside Max Huber during the latter's presidency of the Permanent Court of International Justice. During and after the Second World War he held the office of Swiss Envoy first in Rome and then in London. Later he presided over the International Committee of the Red Cross from 1948 to 1955. Of all his lifelong and multifarious services to international law – for decades also as a member of the Permanent Court of Arbitration – his significant contribution to the activities of the International Labour Organisation (ILO) should be singled out. In particular, Paul Rüeegg had to preside over a Commission of Inquiry on a Ghanaian complaint accusing Portugal of defi-

cient application of the 1957 Convention on the abolition of forced labour in its African territories. The final conclusions of the Commission (February 1962), reached after thorough investigation and extensive travel, won the approval of both parties. Some years later, in 1968, Rüeegger was called upon to preside over a study group to examine the situation of labour and trade unions in Spain. The conclusions of the group, which did not confine itself to fact-finding, but also attached importance to evaluating the matter in the light of the Organisation's general principles, were conspicuous enough to eventually serve, some seven years later, in a changed political situation, as guidelines for the new Spanish labour legislation.⁶⁸

Rüeegger performed a service of outstanding value to the maintenance of peace on the occasion of the *Cuban Missile Crisis* of October 1962. Even though this does not come directly within the context of Swiss 'Good Offices' in its general sense, since Rüeegger acted as the Envoy of the International Committee of the Red Cross, it may nevertheless be appropriate to touch on this event here. As will be recalled, President Kennedy had decided, as a reaction to the stationing of the Soviet missiles on Cuba, to proclaim a blockade of the island, which for the USA would have been tantamount to controlling foreign shipping on the high seas – a politically audacious move, and a dangerous development which caused the world to fear a third global conflict; a catastrophe which Paul Rüeegger was attempting to prevent. The United Nations having solicited the ICRC, he arrived in New York at the height of the crisis and was received by Secretary-General U Thant. With extreme tenacity he set about trying to settle the affair and to induce the Governments directly concerned to accept control of the cargo of the ships heading towards Cuba to be undertaken by inspectors of the United Nations. The underlying principles which came to light in this move on the part of Paul Rüeegger prompted a relaxation of tension, which ultimately was to culminate in an auspicious end to the crisis, with the withdrawal of the Soviet missiles.⁶⁹

68. Francis Blanchard, 'La contribution de Paul Rüeegger à l'oeuvre de l'Organisation internationale du Travail', in *A Paul Rüeegger pour son 80^e anniversaire* (Riehen/Basle, 1977), 61–71.

69. Preface by René-Jean Dupuy to Paul Rüeegger's publication *L'aspiration à la paix et la vie internationale* (Académie de la Paix, Florence, July 1986). See also René-Jean Dupuy, 'Paul Rüeegger et le droit international' in *A Paul Rüeegger pour son 80^e anniversaire* (Riehen/Basle, 1977), 39–40, U Thant, 177–194.

Three proceedings from the recent past are also worthy of mention, since they indicate a new, accrued interest in recourse to the institution of arbitral settlement. The first of these cases concerned an arbitration between *France* and *Canada* on a difference between those two countries regarding the application of the Agreement on reciprocal relations on fisheries, which had been signed in Ottawa on 27 March 1972. The tribunal which made its award on 17 July 1986, had its seat in Geneva. Professor Bernard Dutoit of the University of Lausanne acted as its Registrar.

The same procedure is being applied in the still-pending arbitration case between *Senegal* and *Guinea-Bissau* concerning the difference relating to the determination of their maritime frontier: here, too, Geneva was designated the seat of the tribunal and Professor Etienne Grisel, also of the University of Lausanne, was nominated Registrar.

Finally, a particularly topical case with notable wide-ranging political implications concerned the contested coastal strip of Taba on the Gulf of Akkaba, between *Israel* and *Egypt*. As may be recalled, in August 1986 both parties agreed to an arbitration framework which was to settle the difference. To the five-man Court of Arbitration which was called for this purpose and to which one representative of each of the two parties belongs, three other impartial members were appointed: these are a Swede (Judge Gunnar Lagergren) as President, a Frenchman (Pierre Belet), as well as a Swiss professor of public international law, Dietrich Schindler, Jr., of the University of Zurich, as members. Moreover, Professor Bernard Dutoit of the University of Lausanne, previously involved in settling the Franco-Canadian dispute, was appointed Registrar. The seat of the tribunal is once more Geneva. For this purpose the Geneva government has placed a villa at the tribunal's disposal. The procedures were ceremoniously opened on 10 December 1986, in the historic 'salle de l'Alabama' in Geneva's Town Hall. After almost two years of deliberations, the arbitral award on 29 September 1988 went basically in favour of Egypt with a majority of four to one votes.

10. After this survey of the Swiss role in the field of international arbitration in its widest sense, over more than a century, how can Swiss experiences be evaluated? And what is the balance of the country's active contribution in the field?

Viewed as a whole, this balance appears to yield a positive result. The efforts undertaken have contributed in most cases both effectively

and permanently to the solution of problems and to the peaceful settlement of international disputes. Reciprocally, they have also proved fruitful for Switzerland. It decidedly benefits arbitration to be essentially founded on fixed rules and established procedures. Thus from the very outset arbitration is better safeguarded against risks than the less well-protected procedure of mediation (including good offices in a narrower sense), and even more so than actions of a political nature which evolve within less definable boundaries and are therefore much more vulnerable.

Nevertheless, the field of arbitration also has its critics. It is an old truism that you cannot please everyone. Up to the point at which a difference of opinion develops into a dispute and is submitted to an arbitral tribunal, this has generally been preceded by unsuccessful and tedious direct negotiations. The opponents have hardened their resolve, and what may have begun as a question of right or substance has already grown into a delicate case of prestige. If the arbitrator, given such an atmosphere, decides in favour of one party, he runs the danger of being accused of bias by the other party. If he seeks a compromise which satisfies neither side, he risks being criticized by both. One still recalls the British annoyance on the occasion of the first major arbitral award in recent history where a Swiss arbitrator was involved (Alabama case 1872). In the conflict regarding the frontier between Brazil and French Guyana, in which at the end of 1900 the Swiss Federal Council decided in favour of Brazil, Switzerland attracted some biting comments from the French press, while the verdict gave rise to jubilant celebration in Brazil. When, in the dispute between Great Britain and Colombia concerning the construction of the Antioquia Railway, a three-man court of arbitration consisting of Swiss citizens, appointed by the Swiss Government, eventually charged Colombia to make financial reparation, this prompted a Swiss resident in that country to warn that such an award would have severe repercussions for the Swiss community in Colombia, as well as for Swiss trade.⁷⁰ Yet in the long term, once heated emotions had cooled down, such reactions did not have any lasting effect. Indeed, experience has shown that in the long run, losing parties have never borne any lasting grudges which might have had a damaging effect on Swiss foreign policy.⁷¹

70. Stamm, 30-33.

71. An opinion shared by Guggenheim.

Remonstrances such as those mentioned above have not prevented the Federal Council from continuing to accept mandates; from nominating Swiss arbitrators; or, if such arbitrators were directly approached, from allowing them – expressly or tacitly – to exercise their mandates at their own discretion. The Swiss Confederation was even once accused by some French voices of trying to monopolize this international institution. Yet, particularly in the nineteenth century, there was sometimes little alternative left to disputing parties looking for an impartial arbitrator; indeed, the number of States which possessed the necessary prerequisites, such as permanent neutrality, political self-sufficiency, a history unburdened by power politics, a sufficient reservoir of trained jurists, and, in addition, a satisfactory level of moral authority, was still very small.⁷² And the appreciation and recognition generally accorded to Swiss arbitral awards also played a role.

At the same time Switzerland too benefited from this involvement in international arbitration. It gained a growing experience in matters of international law, of which it was later to take advantage for itself. Simultaneously, it opened to Switzerland inroads into international affairs, without infringing its neutral stance. By its efforts in the realm of arbitration it also promoted the gradual institutionalization of this procedure through the medium of the Hague Peace Conferences and by means of international jurisdiction.

Bilateral arbitration might have lost some of its attraction since its heyday. Nevertheless, the notion of arbitration still continues to hold sway. Some recent arbitration cases even permit one to discern, if not a renaissance of inter-State arbitration, then at least some favourable trends towards a more frequent recourse to this conflict-settling method.⁷³

72. Stamm, *ibid.*

73. Monnier, *Recueil*, 13-14.