

Institution: Permanent Court of International Justice
 Type: Order
 Full Title: *Case of the Free Zones of Upper Savoy and the District of Gex*
 Requested by: French and Swiss Governments
 Party(ies): France & Switzerland
 Dated: August 19th, 1929
 Initiated:¹ March 29th, 1928
 Session: Seventeenth (Ordinary) Session
 General List No.: 35
 No. (by type): N/A
 Authoritative Lang.: French
 Language in File: English Only
 Link: http://www.worldcourts.com/pcij/eng/decisions/1929.08.19_savoy_gex/
 Citation: PCIJ, Ser. A., No. 22, 1929.
 Official Publication: Publications of the Permanent Court of International Justice
 Series A, No. 22; Collection of Judgment
 A.W. Sijthoff's Publishing Company, Leyden, 1929
 Language of the Official Publication: French & English

Content:

	<i>in file</i>	<i>in original</i>
Order of August 19 th , 1929	pp. 01-17	pp. [04-22]
Opinion by M. Nyholm.	pp. 18-22	pp. [23-27]
Opinion by M. Negulesco	pp. 23-33	pp. [28-39]
Opinion by M. Eugène Dreyfus	pp. 34-40	pp. [40-47]
Observations by M. Pessôa.	pp. 41-43	pp. [48-51]

In the text below original pagination is provided in [square brackets].

By using this document you provide your consent to the Terms and Conditions that can be found at <http://www.worldcourts.com/index/eng/terms.htm>, which provide among other things, that you agree to:

- use this document for personal (non-commercial) and/or educational use only;
- not to alter any part of this document by any means;
- not to upload this document on the internet server or make it available to any other internet user by any means and for any purpose (including educational and personal); or make it available to others who could upload this document on the internet server or make it available to (an)other internet user(s) by any means and for any purpose (including educational and personal) on your behalf or not, with or without your permission.

Although, best efforts have been made to ensure absence of errors, you agree that this document is provided to you without any warranty as to the accuracy of information, and you will use it at your own risk.

¹ date of the request for an advisory opinion or date of the application in contentious cases.

[5] The Permanent Court of International Justice,

<i>Before:</i> Mm. Anzilotti,	<i>President,</i>
Loder, Nyholm, De Bustamante, Altamira, Oda, Huber, Pessôa, Hughes,	<i>Judges,</i>
Mm. Negulesco, Wang,	<i>Deputy-Judges,</i>
M.Dreyfus,	<i>Judge ad hoc.</i>

Composed as above,

After deliberation,

Having regard to Articles 48, 54, and 58 to 60 of the Court's Statute,

Whereas, by a Special Agreement dated October 30th, 1924, ratified on March 21st, 1928, and duly notified to the Registrar of the Court on March 29th, 1928, the President of the French Republic and the Swiss Federal Council, in view of the fact that France and Switzerland, having been "unable to agree in regard to the interpretation to be placed on Article 435, [6] paragraph 2, of the Treaty of Versailles, with its annexes, and as it has proved to be impossible to effect the agreement provided for therein by direct negotiations,

"Have decided to resort to arbitration in order to obtain this interpretation and for the settlement of all the questions involved in the execution of paragraph 2 of Article 435 of the Treaty of Versailles",

Whereas the two Parties have respectively appointed as their Agents,

the French Government, M. Jules Basdevant, Professor in the Faculty of Law of Paris and Assistant Legal Adviser to the Ministry of Foreign Affairs;

the Swiss Government, H. E. M. A. de Rigny, Swiss Minister to the Netherlands, and M. Paul Logoz, member of the Swiss National Council and Professor at the University of Geneva; and as Counsel,

the French Government, M^c Paul-Boncour, Deputy, former Minister and Counsel before the Court of Appeal of Paris;

the Swiss Government, M. Walter Burckhardt, Professor at the University of Berne, and M. Paul-Edmond Martin, Professor at the University of Geneva and Director of the Geneva State Archives;

Having regard to the Cases, Counter-Cases and Replies duly submitted by the Parties on September 5th, 1928, January 23rd, and June 12th, 1929, and the documents annexed thereto;

Having duly heard the oral pleadings presented by M^c Paul-Boncour and M. Logoz and the replies made by M^c Paul-Boncour, M. Basdevant and M. Logoz on July 9th, 10th, 11th, 12th, 13th, 15th, 16th, 18th, 19th, 22nd and 23rd, 1929;

Whereas, according to Article 1, paragraph 1, of the said Special Agreement, "it shall rest with the Permanent Court of International Justice to decide whether, as between Switzerland and France, Article 435, paragraph 2, of the Treaty of Versailles, with its annexes, has abrogated or has for its object the abrogation of the provisions of the Protocol of the Conference of Paris of November 3rd, 1815, of the Treaty of Paris of November 20th, 1815, of the Treaty of Turin of March 16th, 1816, and of the Manifesto of the Sardinian Court of Accounts of September 9th, 1829, regarding the customs [7] and economic régime of the free zones of Upper Savoy and the Pays de Gex, having regard to all facts anterior to the Treaty of Versailles, such as the establishment of the Federal customs in 1849, which are considered relevant by the Court";

Whereas, under paragraph 2 of the same article of the Special Agreement, "the High Contracting Parties agree that the Court, as soon as it has concluded its deliberation on this question, and before rendering any judgment, shall accord to the two Parties a reasonable time to settle between themselves the new régime to be applied in those districts, under such conditions as they may consider expedient, as provided in Article 435, paragraph 2, of the said Treaty. This time may be extended at the request of the two Parties";

Whereas under Article 2, paragraph 1, of the Special Agreement: "failing the conclusion and ratification of a convention between the two Parties within the time specified, the Court shall, by means of a single judgment rendered in accordance with Article 58 of the Court's Statute, pronounce its decision in regard to the question formulated in Article 1 and settle for a period to be fixed by it and having regard to present conditions, all the questions involved in the execution of paragraph 2 of Article 435 of the Treaty of Versailles";

Whereas, according to the notes exchanged on October 30th, 1924, between the French Minister for Foreign Affairs and the Swiss Minister at Paris, it is understood between the Parties, amongst other things, "that no objection shall be raised on either side to the communication by the Court to the Agents of the two Parties, unofficially and in each other's presence, of any indications which may appear desirable as to the result of the deliberation upon the question formulated in Article 1, paragraph 1, of the Arbitration Convention";

Whereas, under Article 3, paragraph 3, of the Special Agreement of October 30th, 1924, the written Reply to be filed by each Party shall formulate "its final conclusions";

Whereas the Reply filed on behalf of the French Government submits that the Court should: [8]

[*Translation.*]

"In accordance with the letters attached to the Special Agreement, communicate to the Agents of the two Parties, unofficially and in each other's presence, any indications which may appear desirable as to the result of its deliberation upon the question formulated in Article 1, paragraph 2, of the Special Agreement;

Determine the import of its deliberation and, in the circumstances contemplated by Article 2 of the Special Agreement, so formulate the operative part of its judgment that its effect shall be to decide that, as between France and Switzerland, Article 435, paragraph 2, of the Treaty of Versailles, with its annexes, has abrogated the provisions of the Protocol of the Conferences of Paris of November 3rd, 1815, of the Treaty of Paris of November 20th, 1815, of the Treaty of Turin of March 16th, 1816, and of the Manifesto of the Sardinian Court of Accounts of September 9th, 1829, regarding the customs and economic régime of the free zones of Upper Savoy and the District of Gex;

As soon as it has concluded its deliberation on this question and before pronouncing any decision, accord to the two Parties a reasonable time to settle between themselves the new régime to be applied in those districts under such conditions as they may consider expedient, as provided by Article 435, paragraph 2, of the Treaty of Versailles, this time being capable of extension at the request of the two Parties";

Whereas the Reply filed on behalf of the Swiss Government submits that:

[*Translation.*]

"1. As between France and Switzerland, Article 435, paragraph 2, of the Treaty of Versailles, with its annexes, has not abrogated the provisions of the Protocol of the Conferences of Paris of November 3rd, 1815, of the Treaty of Paris of November 20th, 1815, of the Treaty of Turin of March 16th, 1816, or of the Manifesto of the Sardinian Court of Accounts of September 9th, 1829, regarding the customs and economic régime of the zones of Upper Savoy and the District of Gex.

2. As between Switzerland and France, Article 435, paragraph 2, of the Treaty of Versailles, with its annexes, has not for its object the abrogation of the provisions of the Protocol of the Conferences of Paris of November 3rd, 1815, of the Treaty of Paris of November 20th, 1815, of the Treaty of Turin of March 16th, 1816, or of the Manifesto of the Sardinian Court of Accounts of September 9th, 1829, regarding the customs and economic regime of the free zones of Upper Savoy and the District of Gex, *that is to say*, that as between Switzerland and France, Article 435, paragraph 2, of the Treaty of Versailles, [9] with its annexes, is not intended necessarily to lead to the abrogation of the aforesaid provisions, but simply means that Switzerland and France may abrogate them by mutual consent";

Whereas, in the same document, with reference to the fixing of the time provided for in Article 1, paragraph 2, of the Special Agreement, it is said that

"The Federal Government reserves the right to make such submissions as may be indicated in regard to this point when the Court has given the Parties the necessary indications as to the result of its deliberation upon the question of interpretation (Article 1, paragraph 1, of the Special Agreement) on the solution of which are dependent the direct negotiations here referred to";

Whereas Article 435 of the Treaty of Versailles is as follows:

"The High Contracting Parties, while they recognize the guarantees stipulated by the treaties of 1815, and especially by the Act of November 20th, 1815, in favour of Switzerland, the said guarantees constituting international obligations for the maintenance of peace, declare nevertheless that the provisions of these treaties, conventions, declarations and other supplementary acts concerning the neutralized zone of Savoy, as laid down in paragraph 1 of Article 92 of the Final Act of the Congress of Vienna and in paragraph 2 of Article 3 of the Treaty of Paris of November 20th, 1815, are no longer consistent with present conditions. For this reason the High Contracting Parties take note of the agreement reached between the French Government and the Swiss Government for the abrogation of the stipulations relating to this zone which are and remain abrogated.

The High Contracting Parties also agree that the stipulations of the treaties of 1815 and of the other supplementary acts concerning the free zones of Upper Savoy and the Gex District are no longer consistent with present conditions, and that it is for France and Switzerland to come to an agreement together with a view to settling between themselves the status of these territories under such conditions as shall be considered suitable by both countries";

Whereas the relevant passages in the annexes to this article are as follows: [10]

"I.

The Swiss Federal Council has informed the French Government on May 5th, 1919, that after examining the provisions of Article 435 in a like spirit of sincere friendship, it has happily reached the conclusion that it was possible to acquiesce in it under the following conditions and reservations:

1. The neutralized zone of Haute-Savoie:

.....

2. Free zone of Haute-Savoie and the District of Gex.

(a) The Federal Council makes the most express reservations to the interpretation to be given to the statement mentioned in the last paragraph of the above article for insertion in the Treaty of Peace, which provides that 'the stipulations of the treaties of 1815 and other supplementary acts concerning the free zones of Haute-Savoie and the Gex District are no longer consistent with present conditions'. The Federal Council would not wish that its acceptance of the above wording should lead to the conclusion that it would agree to the suppression of a system intended to give neighbouring territory the benefit of a special régime which is appropriate to the geographical and economical situation and which has been well tested.

In the opinion of the Federal Council, the question is not the modification of the customs system of the zones as set up by the treaties mentioned above, but only the regulation in a manner more appropriate to the economic conditions of the present day of the terms of the exchange of goods between the regions in question. The Federal Council has been led to make the preceding observations by the perusal of the draft convention concerning the future constitution of the zones which was annexed to the note of April 26th from the French Government. While making the above reservations, the Federal Council declares its readiness to examine in the most friendly spirit any proposals which the French Government may deem it convenient to make on the subject.

(b) It is conceded that the stipulations of the treaties of 1815 and other supplementary acts relative to the free zones will remain in force until a new arrangement is come to between France and Switzerland to regulate matters in this territory.

II.

The French Government have addressed to the Swiss Government, on May 18th, 1919, the following note in reply to the communication set out in the preceding paragraph: [11]

In a note dated May 5th, the Swiss Legation in Paris was good enough to inform the Government of the French Republic that the Federal Government adhered to the proposed article to be inserted in the Treaty of Peace between the Allied and Associated Governments and Germany.

The French Government have taken note with much pleasure of the agreement thus reached, and, at their request, the proposed article, which had been accepted by the Allied and Associated Governments, has been inserted under No. 435 in the Peace conditions presented to the German plenipotentiaries.

The Swiss Government, in their note of May 5th on this subject, have expressed various views and reservations.

Concerning the observations relating to the free zones of Haute-Savoie and the Gex District, the French Government have the honour to observe that the provisions of the last paragraph of Article 435 are so clear that their purport cannot be misapprehended, especially where it implies that no other Power but France and Switzerland will in future be interested in that question.

The French Government, on their part, are anxious to protect the interests of the French territories concerned, and, with that object, having their special situation in view, they bear in mind the desirability of assuring them a suitable customs régime, and determining, in a manner better suited to present conditions, the methods of exchanges between these territories and the adjacent Swiss territories, while taking into account the reciprocal interests of both regions.

It is understood that this must in no way prejudice the right of France to adjust her customs line in this region in conformity with her political frontier, as is done on the other portions of her territorial boundaries, and as was done by Switzerland long ago on her own boundaries in this region.

The French Government are pleased to note on this subject in what a friendly disposition the Swiss Government take this opportunity of declaring their willingness to consider any French proposal dealing with the system to be substituted for the present régime of the said free zones, which the French Government intend to formulate in the same friendly spirit.

Moreover, the French Government have no doubt that the provisional maintenance of the régime of 1815 as to the free zones referred to in the above-mentioned [12] paragraph of the note from the Swiss Legation of May 5th, whose object is to provide for the passage from the present régime to the conventional régime, will cause no delay whatsoever in the establishment of the new situation which has been found necessary by the two Governments. This remark applies also to the ratification by the Federal Chambers, dealt with in paragraph 1 (*a*) of the Swiss note of May 5th, under the heading 'Neutralized zone of Haute-Savoie' ";

Whereas, at the present stage of the proceedings, the Court, is simply asked to accord to the two Parties a reasonable time to settle between themselves a "new régime" for the free zones of Upper Savoy and the District of Gex; as this time is to be accorded "as soon as" the Court's "deliberation" on the question set out in Article 1, paragraph 1, of the Special Agreement is concluded, and before "rendering any judgment"; as it will rest with the Court only in certain circumstances and at a later stage to "pronounce its decision" upon the said question by means of a "judgment rendered in accordance with Article 58 of the Statute"; but seeing that "no objection shall be raised" by the Parties to the "communication by the Court unofficially" to their Agents

"of any indications which may appear desirable as to the result of the deliberation" upon the said question;

Whereas the spirit and letter of its Statute, in particular Articles 54, paragraph 3, and 58, do not allow the Court "unofficially" to communicate to the representatives of two Parties to a case "the result of the deliberation" upon a question submitted to it for decision; as, in contradistinction to that which is permitted by the Rules (Article 32), the Court cannot, on the proposal of the Parties, depart from the terms of the Statute;

Whereas, on the other hand, according to the preamble of the Special Agreement of October 30th, 1924, there is reason to believe that the agreement between the Parties contemplated by Article 435, paragraph 2, of the Treaty of Versailles, has hitherto proved to be impossible because they have "been unable to agree in regard to the interpretation to be placed upon" the said article and its annexes; as consequently it would be useless to grant the Parties time within which to conclude this agreement, without informing them at the same [13] time or previously, what, in the Court's opinion is the correct interpretation of the said texts as between France and Switzerland;

Whereas the judicial settlement of international disputes, with a view to which the Court has been established, is simply an alternative to the direct and friendly settlement of such disputes between the Parties; as consequently it is for the Court to facilitate, so far as is compatible with its Statute, such direct and friendly settlement;

Whereas the Court must, in any event, fix by order, in accordance with Article 48 of the Statute, the time contemplated by Article 1, paragraph 2, of the Special Agreement; and whereas, in contradistinction to judgments contemplated by Article 58 of the Statute, to which reference is made in Article 2, paragraph 1, of the Special Agreement, orders made by the Court, although as a general rule read in open Court, due notice having been given to the Agents, have no "binding" force (Article 59 of the Statute) or "final" effect (Article 60 of the Statute) in deciding the dispute brought by the Parties before the Court;

Whereas, in case of doubt, the clauses of a special agreement by which a dispute is referred to the Court must, if it does not involve doing violence to their terms, be construed in a manner enabling the clauses themselves to have appropriate effects;

Whereas it is possible, without infringing the provisions of the Statute, to give effect in all essential respects to the common will of the Parties as expressed in the Special Agreement,

by indicating, in the grounds of the order according to the Parties the time referred to in Article 1, paragraph 2, of the Special Agreement, the result of the Court's deliberations upon the question formulated in Article 1, paragraph 1, of that instrument;

As, nevertheless, it is important to set forth clearly that special agreements whereby international disputes are submitted to the Court should henceforth be formulated with due regard to the forms in which the Court is to express its opinion according to the precise terms of the constitutional provisions governing its activity, in order that the Court may be able to deal with such disputes in the ordinary course and without resorting, as in the present case, to a construction which must be regarded as strictly exceptional, [14]

Makes the following Order:

As to the evidence:

Whereas, in the course of his argument on July 13th, the Agent for the Swiss Government filed a volume entitled: *Publications des Comités suisses en faveur du maintien des zones franches de 1815 et 1816*, and as, in his reply of July 19th, the Agent for the French Government submitted, as a preliminary objection, that this publication should not be received in evidence;

As, in his reply on July 22nd, the Agent for the Swiss Government stated that he left the decision on this point to the Court;

Whereas, according to Article 52 of its Statute, "after the Court has received the proofs and evidence within the time specified for the purpose, it may refuse to accept any further oral or written evidence that one Party may desire to present unless the other side consents";

Whereas the extracts from the said volume read by the Agent for the Swiss Government during the hearing are not necessary at the present stage of the proceedings to enable the Court to form its opinion upon the question submitted to it by Article 1, paragraph 1, of the Special Agreement;

As to the Court's function:

Whereas, according to Article 1, paragraph 1, of the Special Agreement, it rests with the Court to decide whether, as between France and Switzerland, Article 435, paragraph 2, of the Treaty of Versailles, with its annexes, has abrogated or has for its object the abrogation of the provisions of the Protocol of the Conferences of Paris of November 3rd, 1815, of the Treaty of

Paris of November 20th, 1815, of the Treaty of Turin of March 16th, 1816, and of the Manifesto of the Sardinian Court of Accounts of September 9th, 1829, regarding the customs and economic régime of the free zones of Upper Savoy and the District of Gex, having regard to all facts anterior to the Treaty of Versailles;

Whereas the expression "as between France and Switzerland" has the effect of limiting the function of the Court solely to that of determining the reciprocal rights and [15] obligations arising in connection with the régime of the free zones for the two countries, under Article 435, paragraph 2, of the Treaty of Versailles, with its annexes, apart from the legal relations as between signatories of the said Treaty resulting from this article;

Whereas, having regard more particularly to the aim of the Special Agreement, as this aim appears from its preamble when it states that the Parties have been unable to agree in regard to the interpretation to be placed upon Article 435, paragraph 2, of the Treaty of Versailles, with its annexes; having regard to the fact that the real divergence which was the cause of the failure of the Parties to reach an agreement, related to the question whether the régime of the zones could be abolished without Switzerland's consent; and having regard to the fact that the Court cannot as a general rule be compelled to choose between constructions determined beforehand none of which may correspond to the opinion at which it may arrive, the Court is entirely free to interpret Article 435, paragraph 2, with its annexes, of the Treaty of Versailles upon both points without restriction, that is, whether it has abrogated the former provisions in question, and whether it has for its object their abrogation; as, therefore, if it arrives at the conclusion that the article, with its annexes, has not abrogated the former provisions relating to the free zones, it is not obliged to say that it has for its object their abrogation, but, on the contrary, may equally say that this is not the intention of the article, with its annexes;

Whereas, in view of the indications afforded by the preamble of the Special Agreement and by the history of the negotiations which have taken place between the Parties with a view to reaching the agreement contemplated by Article 435, paragraph 2, and which have been cited before the Court, the task of the latter, in replying to the question whether the said article, with its annexes, has for its object the abrogation of the former provisions relating to the free zones, is to decide whether or not Switzerland is obliged to accept, as a basis for the future negotiations contemplated by Article 1, paragraph 2, of the Special Agreement, the abolition of the régime of the free zones, that is to say, in particular the transfer of the French customs barrier in these

territories to the [16] political frontier; and whereas it is, in fact, evident that if France and Switzerland succeed in reaching the agreement provided for in the said article and in Article 2, paragraph 1, of the Special Agreement, that agreement, whatever its contents may be, will have the formal effect of abrogating the former provisions; and therefore if, in replying to the question put, the Court were not to regard the expression "has for its object the abrogation of" as meaning "is intended necessarily to lead to the abrogation of", its reply would not eliminate the fundamental difficulties which have hitherto impeded the negotiations between France and Switzerland and which have induced them to have recourse to the Court;

As to the questions submitted:

Whereas the Court, in performing its function in the light of the foregoing considerations, must have regard to all facts antecedent to the Treaty of Versailles, and particularly the establishment of the Federal customs in 1849, which are considered relevant by it;

Whereas these facts, taken together, are clearly relevant to the question submitted to the Court in that they explain the conclusion drawn by the High Contracting Parties to the Versailles Treaty in their declaration to the effect that "the stipulations of the treaties of 1815 and of the other supplementary acts concerning the free zones of Upper Savoy and the Gex District are no longer consistent with present conditions", namely "that it is for France and Switzerland to come to an agreement together with a view to settling between themselves the status of these territories under such conditions as shall be considered suitable by both countries"; and as the subsequent examination of the question by the Court has been entirely conducted in the light of this consideration;

Whereas the text itself of Article 435, paragraph 2, of the Treaty of Versailles draws from the statement that the former stipulations are not consistent with present conditions, no other conclusion but that France and Switzerland are to settle between themselves the status of the free zones, a conclusion which is tantamount to a declaration of disinterestedness as regards that status, on the part of the High Contracting Parties other than France; as, in particular, this text does [17] not set forth the conclusion that as a necessary consequence of this inconsistency the former stipulations relating to the free zones are abrogated;

Whereas, furthermore, in Article 435, paragraph 1, of the Treaty of Versailles, the High Contracting Parties, after stating that the "provisions of these treaties [of 1815], conventions, declarations and other supplementary acts concerning the neutralized zone of Savoy.... are no longer consistent with present conditions", take "note of the agreement reached between the French Government and the Swiss Government for the abrogation of the stipulations relating to this zone", adding that these stipulations "are and remain abrogated";

Whereas the expression "are no longer consistent with present conditions", when used in the first paragraph of the article, constitutes the ground on which the High Contracting Parties acquiesce in an agreement already concluded between France and Switzerland abolishing the neutral zone; as, when it is used in the second paragraph of the same article, it also constitutes the ground on which the High Contracting Parties declare that they acquiesce in an agreement - in this case a future agreement - between France and Switzerland;

As, consequently - no matter what its significance might be in other contexts -, there is no reason for regarding the expression "are no longer consistent with present conditions" as *ipso facto* involving, in the second paragraph of the article, the abolition of the free zones, since in the first paragraph its meaning is not such as automatically to involve the abolition of the neutral zone;

Whereas, in any event, Article 435 of the Treaty of Versailles is not binding on Switzerland, which is not a Party to this Treaty, except to the extent to which that country has itself accepted it; as this extent is determined by the note of the Swiss Federal Council of May 5th, 1919, an extract from which constitutes Annex I to this article; as it is by this action and by this action alone that the Swiss Government has "acquiesced" in the "provisions of Article 435", namely "under the conditions and reservations" which are set out in the said note; [18]

Whereas, amongst the aforesaid conditions and reservations, it is stated *inter alia* that "the Federal Council would not wish that its acceptance of the above wording [i. e. Article 435, paragraph 1, of the Treaty of Versailles] should lead to the conclusion that it would agree to the suppression of a system.... which has been well tested", namely the régime of the free zones;

As, accordingly, the said article, assuming that it were possible to interpret it as involving the abolition of the said régime, could not be operative as between France and Switzerland, unless Switzerland's consent were not necessary for such abolition;

Whereas the Court is unable to regard as decisive the arguments to the contrary which it has been sought to deduce from other passages of the said note of the Federal Council and from the whole of the French note of May 18th, 1919, which forms Annex II to Article 435 of the Treaty of Versailles;

As, with regard to this latter note, the Court - which, though its task is to interpret the said article *with its annexes*, nevertheless remains free to estimate the weight to be attached from this point of view to each of the annexes - is unable to regard it as possessing any weight for the purposes of interpretation, having regard especially to the fact that it cannot in any circumstances affect the conditions of the Federal Council's acquiescence in the article in question, that acquiescence being a unilateral act on the part of Switzerland;

Whereas, in regard to the possibility of abolishing the régime of the free zones without Switzerland's consent, the actual terms of Article 435, paragraph 2, generally speaking, would seem to presuppose the existence of a right on the part of Switzerland derived from the former stipulations; as, in the same connection, Switzerland's consent has in fact been sought; and lastly, as the High Contracting Parties have inserted, after Article 435, the Swiss note of May 5th, 1919, which, in the Court's opinion, is entirely based on the existence of such a right on the part of Switzerland;

Whereas, with particular regard to the Sardinian zone, Switzerland, in her capacity as Party to the Treaty of Turin [19] of March 16th, 1816, has acquired a contractual right to the withdrawal of the customs barrier in that district;

Whereas, with particular regard to the zone of Saint-Gingolph, the Court, being of opinion that the Treaty of Turin of March 16th, 1816, has not been abrogated, the same is true as regards the Manifesto of the Royal Chamber of Accounts of Sardinia dated September 9th, 1829, the question of the legal nature of that instrument remaining however reserved;

Whereas, with particular regard to the zone of Gex, both Article 435, paragraph 2, of the Treaty of Versailles and the Special Agreement treat this zone in exactly the same way as the zone of Upper Savoy; and as this zone forms part of a territorial arrangement in favour of Switzerland, an arrangement which, being contemplated in the "Declaration of the Powers assembled at the Congress of Vienna in regard to Switzerland" of March 20th, 1815, to which Switzerland acceded by act of the Diet of the Helvetian Confederation dated May 27th. 1815,

was restated in the Protocol signed on November 3rd, 1815, at Paris (this Protocol being referred to in the Special Agreement and expressly mentioning the withdrawal of the French customs barriers "from the Swiss frontiers facing the Jura"), and received final form in Article 1 of the Treaty of Peace signed at Paris on November 20th, 1815, the preamble and third paragraph of this article being as follows:

[Translation.]

"The frontiers of France shall be as they were in 1790, save for the modifications in one direction or the other which are indicated in this article.

3. In order to establish direct communication between the Canton of Geneva and Switzerland, that part of the District of Gex bordered on the east by the Lake of Geneva, on the south by the territory of the Canton of Geneva, on the north by that of the Canton of Vaud, on the west by the course of the river Versoix and by a line including the communes of Collex-Bussy and Meyrin, leaving the commune of Fernex to France, shall be ceded to the Helvetian Confederation to be united to the Canton of Geneva. The line of the French customs shall be placed to the west of the Jura, so that the whole District of Gex shall be outside this line"; [20]

Whereas the aforesaid Protocol of November 3rd, 1815, was formally transmitted to Switzerland by the Powers signatory to the Declaration of Vienna of March 20th, 1815, together with a Declaration of November 20th, 1815, following upon the act of accession of May 27th, 1815, of the Helvetian Diet to the said Declaration of March 20th, 1815;

Whereas all these instruments, taken together, as also the circumstances in which they were executed, establish, in the Court's opinion, that the intention of the Powers was, besides "rounding out" the territory of Geneva and assuring direct communication between the Canton of Geneva and the rest of Switzerland, to create in favour of Switzerland a right, on which she could rely, to the withdrawal of the French customs barrier from the political frontier of the District of Gex, that is to say, a right to the free zone of Gex;

Whereas the Court, having reached this conclusion simply on the basis of an examination of the situation of fact in regard to this case, need not decide as to the extent to which international law takes cognizance of the principle of "stipulations in favour of third Parties";

Whereas, if Article 435, paragraph 2, with its annexes, of the Treaty of Versailles has not, as between France and Switzerland, abrogated the former provisions relating to the free zones, neither has it for its object the abrogation thereof; as, in fact, since the High Contracting

Parties in Article 435, paragraph 2, of the Treaty of Versailles, have not drawn from their statement as to the inconsistency of the former stipulations concerning the free zones with present conditions any consequence other than that it is for France and Switzerland to come to an agreement together with a view to settling between themselves the status of these territories under such conditions as shall be considered suitable by both countries, without in any way prejudging the question of the contents of this agreement which, therefore, may or may not, according to the common will of the Parties, lead to the abrogation of the régime of the free zones; and since Switzerland, in her note of May 5th, 1919, annexed to the said article, made an express reservation regarding abolition in the future ("would agree") of the régime of the free zones resulting from the former stipulations concerning them, it [21] is impossible to conclude that as between France and Switzerland, the aforesaid article and its annexes is intended necessarily to lead to the abrogation of the said provisions, thus compelling Switzerland to accept the abrogation of the régime of the free zones as the only possible basis of the future agreement between herself and France;

Whereas this view is in no way weakened by the facts antecedent to the Treaty of Versailles; as, on the contrary, it is corroborated by the facts relating to the drafting of Article 435 of the Treaty of Versailles which have been cited before the Court;

As to the time to be granted:

Whereas, having regard to the circumstances of the present case, a period of approximately nine months seems to be sufficient to allow the Parties to establish the basis of an agreement which they have themselves, on many occasions, recognized as highly desirable;

THE COURT

(1) excludes as evidence at the present stage of the case the *Publications des LComités suisses en faveur du maintien des zones franches de 1815 et 1816* filed at the hearing of July 13th, 1929, by the Agent for the Swiss Government;

(2) accords to the Government of the French Republic and to the Government of the Swiss Confederation a period expiring on May 1st, 1930, to settle between themselves, under

such conditions as they may consider expedient, the "new régime" to be applied in the districts contemplated by Article 435, paragraph 2, of the Treaty of Versailles.

Done in French and English, the French text being authoritative, at the Peace Palace, The Hague, this nineteenth day of August, nineteen hundred and twenty-nine, in three copies, one of which shall be placed in the archives of the [22] Court and the others delivered to the Agents of the Government of the French Republic and of the Swiss Federal Government respectively.

(Signed) D. Anzilotti,
President.

(Signed) Å. Hammarskjöld,
Registrar.

MM. Nyholm, Judge, Negulesco, Deputy-Judge, and Dreyfus, Judge *ad hoc*, whilst concurring in the operative portion of the present order, declare that they are unable to agree with the reasons to the extent which they have themselves indicated in the separate opinions set forth hereafter.

M. Pessôa, Judge, while agreeing with the present order, desires to add thereto the observations which follow hereafter.

(Initialed) D. A.

(Initialed) A. H.

[23] Opinion by M. Nyholm.

[*Translation.*]

It will be noted that the order of Court, which is rather an interlocutory judgment, arrives at the conclusion that the provisions of 1815 involving the withdrawal of the French customs line in the District of Gex are not abrogated and cannot be abrogated without Switzerland's consent. This conclusion does not appear justified by the text of Article 435, paragraph 2, of the Treaty of Versailles.

In this article, the Conference of Versailles, whose authority is recognized by the Parties, declared that the stipulations of 1815 are no longer consistent with present conditions, and that it is for France and Switzerland to come to an agreement together with a view to settling the status of these territories.

The clause, as it stands, contains a sufficiently clear indication that an existing state of affairs is abolished and a new state of affairs established.

No doubt the article would have been still clearer if the first sentence had been followed by an express declaration of abrogation of the provisions, and if the second sentence further contained rules for the establishment of the new state of affairs, and an indication of what would follow in case of disagreement. But, even without these additions, the idea of a change in the situation seems sufficiently clear.

In the Court's decision, there is a special argument drawn from a comparison of the first and second paragraphs of Article 435 to the effect that the words "are no longer consistent with present conditions" do not, in the first paragraph, imply automatic abrogation, and that the same must be the case in the second paragraph. But this argument runs counter to the fact that in the first paragraph an agreement existed, of which it was sufficient to take note. The Court then argues that the words "stipulations are no longer consistent with present conditions" are merely a declaration that the Powers cease to interest themselves in the matter, and that the terms of the article do not involve an abrogation. But how can it be imagined that a legislator should [24] intend to maintain in force rules which he himself declares to be out of date ? The words, therefore, express the intention that these rules *shall disappear*. That such was the intention, and further that this intention was carried into effect is shown from the fact that the former situation - withdrawal of the customs line - was *replaced* by a quite different situation, namely, that the

relations between France and Switzerland in the districts in question have become free and are made subject to an agreement to be entered into by the two countries. It is clear that the former state of things and the new freedom *cannot exist at the same time*; they are not two *mutually supporting* rules; on the contrary, the one excludes the other. It follows that, from a textual interpretation of Article 435, *the provisions of 1815 are abrogated*.

* * *

Against such a result, Switzerland protested. It is important to note that, at the last moment, Switzerland took certain steps ; but she applied solely to France in her capacity as a neighbour and not as one of the Powers which created the Treaty of Versailles. The record indeed shows that Switzerland *never applied to the Powers*. All that could be drawn from the Swiss observations and the French replies is strictly without legal value, since *France*, a neighbour and a future opponent in the dispute, *had no right to reply in the name of the Powers*.

Switzerland, in her note of May 5th, protested against the abrogation, and made reservations. But any protest in the note, which emanates from Switzerland herself, must be based on the existence of a right; it goes without saying that in view of the wording of the 1815 provisions, in which Switzerland was not even mentioned, *it is for the latter to prove the existence of the right claimed by her*.

To prove her *right*, Switzerland cannot rely on the mere *existence* of the note, which, as has been said, emanates from Switzerland herself. It is only *the insertion* of this note as an annex which might in itself constitute an important element of proof in Switzerland's favour. The publication of an [25] annex containing the Swiss contentions is in fact equivalent to an authoritative interpretation of Article 435.

But, as has been said, the terms of the Swiss note with its "reservations" imply the prior existence of a *right*. It is not therefore possible to place importance, as the Court does, on the fact that, 'in the note of May 5th, Switzerland states that "she acquiesces under reservations". To make such a declaration it is necessary first to have a right on which to base oneself.

The Court's decision stops short at the proof which might be drawn from *the insertion* of the annex. This proof would be conclusive *if the note of May 5th were the only annex*. But this

annex loses its effect as proof from the fact that by the insertion of Annex II, the French note of May 18th, there are two notes directly opposed to one another. It is no longer possible to consider one of the notes only, for they are an indivisible whole and incapable of separation.

The consequence is that the Powers, instead of appending to Article 435 an authoritative interpretation, have set out two arguments which might be put forward in regard to interpretation. The purpose of this twofold insertion may be uncertain; but the fact remains that, from the note of May 5th, no- conclusion can be drawn as to the creation of a right for Switzerland.

In order to revive the importance of the note of May 5th, the only method is to set aside the French note of May 18th, and this is what the Court's decision has done. But this result seems to be all the less admissible, as the reasons do not appear to justify the decision.

As the principal ground for setting aside the note of May 18th, it is not sufficient to say, as the Court does, that it "is unable to regard as decisive the arguments to the contrary which it has been sought to deduce.... from the whole of the French note of May 18th, 1919". Nor does the second ground for the Court's decision seem any sounder, namely, that "the Court - which, though its task is to interpret the said article *with its annexes*, nevertheless remains free to estimate the weight to be attached from this point of view to each of the annexes—is unable to regard it [the French [26] note] as possessing any weight for the purposes of interpretation, having regard especially to the fact that it [the note] cannot in any circumstances affect the conditions of the Federal Council's acquiescence in the article in question, that acquiescence being a unilateral act on the part of Switzerland". The above grounds seem to be simple assertions rather than arguments. The French note of May 18th forms with the Swiss note of May 5th a single whole explaining the two sides of the question. If, as the decision says, the French note of May 18th "cannot.... affect the conditions of [Swiss] acquiescence" which is "a unilateral act on the part of Switzerland", no more is it possible to say that the Swiss note could affect the conditions of the French note. The two notes must be placed on an equal footing without it being possible, apart from sound reasons to the contrary, to give the preponderance to one of them. Having set aside the argument based on *the insertion* of the note of May 5th, it remains to be considered whether Switzerland has any *rights*. The declarations in the note of May 5th lead to suppose that these rights exist, and this is what the Court's decision seems to

recognize. Without discussing these pretended rights, referred to in Counsel's arguments, the Court merely says that in its opinion the note of May 5th "is entirely based on the existence of such a right".

A consideration of the Swiss arguments on this point seems however to lead to the conclusion that such rights do not exist.

In the first place, Switzerland asserts that the 1815 provisions created for France a servitude in Switzerland's favour. If these provisions can involve, as regards the signatory Powers, an obligation imposed on France, they none the less have nothing in common with the idea of a servitude, and they are certainly not a servitude as regards Switzerland. The withdrawal of the customs line is a domestic affair of France. It may *de facto* be of importance as regards customs matters for the neighbouring State, but no *de jure* relation is thereby set up between the two countries.

Secondly, Switzerland's argument that the provisions are for her stipulations *in favorem tertii* is without foundation. Such provisions are not admissible in inter-states relations. The principle of sovereignty is opposed thereto. The "stipulation [27] *in favorem tertii*" is, by its nature, a civil obligation which can hardly apply between nations with their constitutional systems. Amongst other reasons, the unilateral character is ill suited to relations between States which must be placed on a footing defined by their reciprocal rights, and further, the *execution* of such a provision could not fail to give rise to difficult problems. As a matter of fact, the stipulation *in favorem tertii* does not appear to be valid in international law, for it does not create a right in favour of the third State, save of course when a new agreement is added to the original one. This theory is largely accepted by legal doctrine and the opinion of the most highly qualified authors on international law.

Thirdly, Switzerland maintains that the new régime set up by Article 435 (agreement) presupposes that, failing an agreement, recourse must always be had to the former system. But this interpretation is grammatically impossible. In such a case it would have been necessary to add words to the end of the article to make this clear.

Fourthly, it is known that one draft of Article 435, paragraph 2, contained the clause that the 1815 provisions were abrogated. Evidently, the removal of these words might constitute an argument in Switzerland's favour. But information as to the reasons for this removal and the

circumstances connected therewith is entirely lacking. Even with the removal, the text of Article 435, however, remains clear.

Moreover, there is in the whole matter no information as to the facts to form the basis for a decision in law. Nothing is known of what took place at Paris. There are no minutes nor even the slightest indication as to details. Moreover, it appears from a declaration of M. Ador, published some years afterwards, that his principal object was the question of Swiss neutrality, and that, as regards the free zones, he secured that the question, which was moreover regarded as secondary, "should be dealt with separately".

It therefore appears that no fact and no argument can justify the Swiss contention that the provisions of 1815 are maintained in force.

(Signed) D. G. Nyholm.

[28] Opinion by M. Negulesco.

[*Translation.*]

The undersigned differs from the majority of the Court for the following reasons:

On March 29th, 1928, the Government of the French Republic and the Swiss Federal Council notified the Court of the Special Agreement concluded between them on October 30th, 1924, concerning the free zones of Upper Savoy and. the District of Gex.

Article 1 of the Special Agreement states the question put to the Court.

Under this article, the Court has to decide what is the correct interpretation of Article 435, paragraph 2, with its annexes, • of the Treaty of Versailles, and to say whether "as between France and Switzerland" that article and its annexes "has abrogated or is intended to lead to the abrogation of" the provisions of the treaties of 1815 which established the free zones of the District of Gex and Upper Savoy.

The request made to the Court that it shall say whether Article 435, paragraph 2, with its annexes, "has abrogated or is intended to lead to the abrogation of" the provisions of the treaties of 1815, must be construed as meaning that, if the Court arrives at the conclusion that the provisions in question are not abrogated, it must consider whether Article 435, paragraph 2, "is intended to lead to the abrogation of" these provisions. This expression refers to two different situations, one implying that Switzerland is under an obligation to abrogate the provisions relating to the free zones by means of an agreement to be concluded with France, the other, on the contrary, leaving Switzerland entirely free as to the basis and conclusions of this agreement.

According to the first of these interpretations, Switzerland's obligation would be to accept as the basis of the future negotiations the disappearance of the obsolete regime which compelled France to withdraw her customs barrier behind her[29] political frontier; according to the second interpretation, on the contrary, Switzerland, not being bound in this way, would be free to conclude or not to conclude the agreement under such conditions as she considered suitable.

The expression "as between France and Switzerland" seems *prima facie*, to be without meaning, for an article of a treaty must be read in the same way whether it concerns signatories of the treaty or non-signatories.

The expression "as between France and Switzerland" can only be understood in one way, namely, that it is for the Court to ascertain the meaning of Article 435, paragraph 2, taken by itself, and then to see, after examining the annexes and the treaties of 1815, how far the terms of this article can be enforced as against Switzerland which took no part in the signature of the Treaty of Versailles.

* * *

The treaties of 1815, concluded for an indefinite period, were imposed on France in consequence of the situation of fact which made the economic life of Geneva very difficult owing to the proximity of the French customs barrier which coincided with the political frontier. It was this which led the Powers to compel France to withdraw her customs barrier so as to make possible the creation of the free zones of the District of Gex and Upper Savoy.

The situation of fact changed during the XIXth century. Switzerland, having achieved political unity, established her customs barriers on her frontiers in 1849. The zones which, before 1849, had only received the produce of the Canton of Geneva, now received produce from the whole of Switzerland.

France could not, in consequence of this changed situation, unilaterally denounce the treaties of 1815. When Russia, in 1870, during the war between France and Germany, declared that she would no longer be bound by the stipulations of the Treaty of Paris of 1856 concerning the neutralization of the Black Sea, the Powers assembled at London proclaimed the principles set forth in the Protocol of January 17th, 1871. The Powers recognized the right to invoke the clause *rebus sic [30] stantibus* as a ground for the extinction of treaties, but at the same time rejected Russia's claim to be able unilaterally to denounce a treaty.

Article 19 of the Treaty of Versailles permits changes in or the abrogation of a treaty which has become inapplicable owing to a new situation having arisen; but only as a result of a unanimous vote of the Assembly of the League of Nations and not by means of a unilateral declaration. Article 19 of the Treaty of Versailles therefore confirms the validity of the clause *rebus sic stantibus* and at the same time rejects any claim to apply it unilaterally.

Article 435 of the Treaty of Versailles is simply the application of this principle. When the Powers signatory to the treaties of 1815 were reassembled at Versailles, they were in a position to decide by agreement whether the claim of France was well founded.

France, in fact, had submitted two claims for the abrogation of former stipulations: one in regard to the zones of Upper Savoy neutralized from a military standpoint, and the other in regard to the free zones of Upper Savoy and the District of Gex.

The Powers signatory to the Treaty of Versailles recognized in both cases that the French claim was well founded and that the treaties of 1815, concluded by reason of the situation of fact, were "no longer consistent with present conditions". The Powers stated' this in the terms of Article 435.

This article is in fact composed of two paragraphs which relate to two different matters: the first deals with the zone of Upper Savoy neutralized from a military standpoint and mentions the agreement between France and Switzerland, the second deals with the free zones of Upper Savoy and the District of Gex and does not mention this agreement. This is explained by the fact that, France having recognized at the Conference that Switzerland had adhered to the Treaty of November 20th, 1815, concerning the zone neutralized from a military standpoint, Switzerland's consent was required; on the other hand, as France maintained that Switzerland had taken no part in the Treaty of 1815 concerning the free zones, the latter country's consent was not necessary.

[31]

When. the Powers recognized in paragraph 1 of Article 435, as regards the zone, of Upper Savoy neutralized from a military standpoint, that the provisions of the treaties of 1815 and other supplementary acts were "no longer consistent with present conditions", they stated that these provisions were and remained abrogated; this is expressly set forth in the last part of the first paragraph, as a consequence of their recognition of the fact above mentioned: "for this reason the High Contracting Parties take note of the agreement reached between the French Government and the Swiss Government for the abrogation of the stipulations relating to this zone which are and remain abrogated".

The second paragraph begins as follows:

"The High Contracting Parties also agree that the stipulations of the treaties of 1815 and of the other supplementary acts concerning the free zones of Upper Savoy and the Gex District are no longer consistent with present conditions.... "

The expression "also" connects the two paragraphs and shows the needlessness of a declaration of abrogation which, in the first paragraph, is the consequence of the establishment of the fact that the stipulations of the treaties of 1815 are no longer consistent with present conditions. When the Powers add, in the second paragraph: "and that it is for France and Switzerland to come to an agreement together with a view to settling between themselves the status of these territories under such conditions as shall be considered suitable by both countries", they indicate that the two States are placed on an equal footing by the abolition of the regime of the free zones, and consequently that it is for France and Switzerland to settle between themselves the regime of these territories.

It is in fact generally recognized that the signatories of a great political treaty, which has changed the map of the world, may abrogate even tacitly the provisions of previous treaties which are not consistent with present conditions.

The Treaty of Versailles, in several cases of the abrogation of. previous stipulations, sometimes proceeds by way of express abrogation, but at other times abrogation follows implicitly from a declaration to the effect that conditions have changed. [32]

Thus Article 31 of the Treaty of Versailles says that the stipulations of the treaties of April 19th, 1839, which established the status of Belgium, "no longer conform to the requirements of the situation". It is to be noted that though abrogation has not been decreed by all the Powers signatory to the Treaty of Versailles, but only consented to by Germany, this phrase is to be regarded as the statement of a fact from which abrogation follows as a consequence. Thus, the Preamble of the Treaty of Locarno, signed on October 16th, 1925, between Germany, Belgium, France, Great Britain and Italy, notes the abrogation of the treaties of 1839 concerning the neutrality of Belgium. The same interpretation has been adopted by the Dutch Government in its negotiations with Belgium, with a view to the settlement of the situation resulting from Article 31 of the Treaty of Versailles.

* * *

The preparatory work further demonstrates France's unchanging intention to abrogate the provisions of the 1815 treaties concerning the free zones and the attitude adopted by Switzerland, which did not oppose the abrogation by asserting her right to the free zones.

On December 18th, 1918, the French Ambassador informed the Federal Council that the French Government "had made up its mind to abolish the survivals of another epoch which were no longer consistent with present requirements".

In the French note of February 24th, 1919, sent to the Swiss Minister at Paris, the question of "substituting for the free zones regime a regime which would conform to modern ideas and requirements.... and which would be based on an equitable system of reciprocity" was raised.

But no. reciprocity can be said to exist without the abolition of the free zones and the establishment of a line of customs at the political frontier. On April 29th, 1919, in M. Pichon's letter to M. Ador, France's intentions are clearly specified: firstly, the abolition by the Powers of the 1815 treaty stipulations and, secondly, the conclusion of an agreement with Switzerland on an equal footing. [33]

In the telegram of May 3rd to the French Charge d'affaires, M. Pichon reaffirms France's wish to abolish the provisions of the 1815 treaties.

Furthermore, Switzerland does not assert either by her note of January 14th, or by her notes of May 2nd and May 5th, that her assent was legally requisite for the abrogation of the 1815 treaties by which the zones regime is imposed upon France; it was only on May 29th, 1919, after the insertion of Article 435 in the Treaty of Versailles, by a decision taken by the signatory Powers, that Switzerland declares that she has a right, since the stipulations of "the 1815 treaties "cannot be modified or replaced otherwise than by common agreement between Switzerland and France".

The foregoing proves that the signatory Powers to the Treaty of Versailles, at the time when Article 435 was adopted, did not encounter any opposition on the part of Switzerland, by way of the assertion of her right. It is consequently difficult to accept the contention that the Powers, including France, had proclaimed that a diminution of sovereignty, imposed upon France, was to continue its existence in the future.

* * *

The two annexes attached to Article 435 of the Treaty of Versailles are two notes: one dated May 5th, 1919, is addressed to the French Government by the Swiss Federal Council; the other, dated May 18th, is the French Government's reply to the note of May 5th.

The two notes were not addressed to the signatory Powers to the Treaty of Versailles, but were mutually exchanged between the two Governments. They must be looked upon as unilateral declarations possessing equal legal weight, since they were inserted in the Treaty before June 28th, 1919, the date upon which the Treaty was signed.

France brought about the insertion of these notes because it was in her interest to do so. Article 435 had abrogated the treaty stipulations of 1815 without Switzerland's assent. France, whilst contesting Switzerland's right to oppose abrogation - since in France's view Switzerland had not participated [34] in the 1815 treaties which had created the free zones -, nevertheless wished on political grounds to obtain her assent for the purpose of maintaining good neighbourly relations. France claims that the note of May 5th embodies Switzerland's consent to the abrogation; Switzerland maintains the opposite.

The Swiss note of May 5th must be considered as a declaration by which Switzerland recognizes an article of the Treaty subject to the reservations contained in the declaration. This unilateral action can only have one effect: to bind Switzerland within, the limits of her own declaration.

By its note of May 5th, the Swiss Government informs the French Government that after examining the provisions of Article 435, it is happy to acquiesce therein, under the following reservations. The first reservation concerning the free zones of Upper Savoy and the District of Gex is that the Swiss Government does not desire to accede to the declaration by the Powers "that the stipulations of the treaties of 1815 are no longer consistent with present conditions", since "its acceptance of the above wording" might "lead to the conclusion that it would agree to the suppression of a system.... which has been well tested".

.This refusal by Switzerland to accede gives us the interpretation which the Swiss Government itself attributed to the stipulations of Article 435, paragraph 2; it recognizes that the words "are no longer consistent with present conditions" mean the abrogation of the 1815 treaties.

Article 435, paragraph 2, after abrogating the 1815 treaties, provides for the possibility of France and Switzerland settling in common agreement between themselves the regime of these

territories. The Swiss note of May 5th, by its second reservation, accepts the abrogation on condition that the zones regime remains in force until a new arrangement is made between Switzerland and France.

Then, moreover, there follows sub-section *(b)* of the Swiss note which, being inserted at the end of the note, is a provision of a transitory nature:

"(b) It is conceded that the stipulations of the treaties of 1815 and other supplementary acts relative to the free zones will remain in force until a new arrangement is [35] come to between France and Switzerland to regulate matters in this territory. "

Switzerland agrees that upon the day the new agreement comes into force the former stipulations will cease to exist. But it is impossible to see by what legal process these stipulations will cease to exist unless it is by the abrogation of the stipulations by the provisions of Article 435, paragraph 2, of the Treaty of Versailles.

By its note of May 18th, 1919, the French Government in the first place takes note of the adherence of the Federal Government to the draft article to be inserted in the Treaty of Versailles, and, as regards the Swiss reservations relating to the free zones, the French Government agrees with the Swiss Government to a "provisional" maintenance of the 1815 regime until the "conventional regime" between the two Powers comes into force. Moreover, the French Government "have no doubt that the provisional maintenance of the régime of 1815 as to the free zones referred to in the above-mentioned paragraph of the note from the Swiss Legation of May 5th, whose object is to provide for the passage from the present regime to the conventional regime, will cause no delay whatsoever in the establishment of the new situation which has been found necessary by the two Governments".

Since the two notes are of equal weight legally, we must consider whether they are in agreement or whether they are contradictory. The agreement between France and Switzerland, to which the second reservation relates, not having been so far concluded, it is the first reservation, consisting in Switzerland's refusal to give her consent to the abrogation of the 1815 treaties, which must be taken into consideration. And since this is in contradiction with the note of the French Government of May 18th, the inference is that the two notes mutually nullify each other and we are brought back to Article 435, paragraph 2, of the Treaty of Versailles.

It should be observed that at the time when the Treaty of Versailles was signed, France, who had never abandoned her claim to the abrogation of the 1815 treaties as regards the free zones, had previously brought about the insertion, as an annex, of her note of May 18th, 1919, and this further confirms her intention to abrogate the provisions in question. And [36] since France and all the other Powers unanimously adopted Article 435, it is not easy to say that the Powers meant, contrary to the intention of France, to continue in the future, for the benefit of Switzerland, the regime of the free zones which constitutes, as regards France, a diminution of her sovereignty.

* * *

What the Powers wished to effect by Article 435, paragraph 2, was the abrogation of the 1815 treaty stipulations. The question is whether they were entitled to do so without Switzerland's assent. This leads to a consideration of the question whether Switzerland took part in the 1815 treaties or whether these treaties created a right in favour of Switzerland.

As regards the free zone of Upper Savoy, known as the Sardinian zone, Switzerland had a right by virtue of the Treaty of Turin of March 16th, 1816, which could not be abrogated by virtue of Article 435, paragraph 2, without Switzerland's assent.

The facts antecedent to the Treaty of Versailles, in particular the establishment of the Federal customs in 1849, which are considered relevant by the Court and which led to the drafting of Article 435, paragraph 2, may, in so far as concerns the Sardinian zone, justify abrogation by application of the clause *rebus sic stantibus* in virtue of an agreement freely concluded between France and Switzerland.

As regards the Gex zone, it was created by the Treaty of November 20th, 1815, signed and ratified by France with Austria, Great Britain, Prussia and Russia. Switzerland did not participate in this Treaty either as a signatory or by her adherence thereto.

Since Switzerland had no contractual right by virtue of the Treaty of November 20th, 1815, we must consider whether the Powers stipulated a right in her favour by virtue of that Treaty.

It is possible, in an international convention, to stipulate a right in favour of a third State. But whereas, according to such municipal laws as allow of such a stipulation, the third Party has

a right by virtue of the stipulation itself, in international law the States having made such a stipulation [37] mutually undertake to conclude - together with the third State - a supplementary agreement which will be appended to the agreement originally made. With this object, the treaty may provide for the right of adherence by third Powers interested therein, and failing a stipulation of this nature, an agreement between the signatory States and the third State must be concluded.

The adherence of a third State to a treaty already concluded can only take place where such a right has been provided for therein. But the Treaty of November 20th, 1815, does not provide in favour of any other State for any right of adherence.

The Court, by its Judgment No. 7, laid down that Poland, who was not a signatory of the Armistice Convention or of the Spa Protocol, cannot avail herself of these instruments, since, as the Court laid down: "The instruments in question make no provision for a right on the part of other States to adhere to them. "

Switzerland, being unable to assert adherence, must prove that an agreement was concluded between her and the Powers signatory to the Treaty of 1815 establishing that France had accepted an obligation towards Switzerland to withdraw her customs barrier and that consequently the provisions in question cannot be abrogated without Switzerland's consent. If Switzerland cannot prove that an agreement was made between herself and the Powers under the conditions above mentioned, it must be concluded that France can be under no obligation in virtue of the Treaty of November 20th, 1815, except towards the signatory Powers.

Again, in order that a State may make use of a stipulation in its favour, the name of that State must be mentioned in the treaty in question. The Treaty of November 20th, 1815, imposes on France the obligation to withdraw her customs barrier behind her political frontier and does not indicate that there is any question of a right in favour of Switzerland. The terms of the Treaty are as follows:

[*Translation.*]

"The line of the French customs shall be placed to the west of the Jura so that the whole of the District of Gex shall be outside this line". [38]

Switzerland's name does not even appear in the provisions relating to the creation of the zone. There is nothing but the obligation of France to withdraw her customs barrier behind the political frontier. As the Treaty says nothing, it is to be concluded that the Great Powers

signatory of the Treaty of 1815 are the holders of the rights to be exercised against France. It is impossible, by reason of the silence of a treaty, to create rights in favour of third States. It is clear that Switzerland has a great interest in the existence of this zone, but this interest does not justify the exercise of a right.

Even if it be held that several States may, under a treaty, create rights in favour of a third State without its name being even mentioned, it is difficult to say that this treaty cannot be abrogated without such third State's consent. Thus it cannot be maintained that third Powers at peace with Germany, which are entitled to free passage through the Kiel Canal, under Article 380 of the Treaty of Versailles, can by their veto prevent the abrogation of that provision, notwithstanding the fact that they took no part in this Treaty.

Even if Switzerland had a right under a stipulation in her favour, she could only exercise it as long as the Treaty of 1815 has not been abrogated by the Signatory Powers.

The foregoing conclusions are supported by international precedent in the case of the Aaland Islands. The position of Sweden with regard to the Convention signed on March 30th, 1856, between France, Great Britain and Russia regarding the demilitarization of the Aaland Islands is the same as that of Switzerland with regard to the Treaty of November 20th, 1815.

The report of the Committee of Jurists (*Official Journal of the League of Nations*, October 1920, p. 18) defines the legal position of Sweden in regard to the Treaty of March 30th, 1856, and formulates the principles applying to the case:

"As concerns Sweden, no doubt she has no contractual right under the provisions of 1856, as she was not a signatory Power. Neither can she make use of these provisions as a third Party in whose favour the contracting Parties had created a right under the Treaty, since - though it may, generally speaking, be possible to create a right in favour of [39] a third Party in an international convention - it is clear that this possibility is hardly admissible in the case in point, seeing that the Convention of 1856 does not mention Sweden, either as having any direct rights under its provisions, or even as being intended to profit indirectly by the provisions. Nevertheless, by reason of the objective nature of the settlement of the Aaland Islands question by the Treaty of 1856, Sweden may, as a Power directly interested, insist upon compliance with the provisions of this Treaty in so far as the contracting Parties have not cancelled it. This is all

the more true owing to the fact that Sweden has always made use of it and it has never been called in question by the signatory Powers. "

For the foregoing reasons, the conclusion of the undersigned is that Article 435, paragraph 2, of the Treaty of Versailles, with its annexes, has abrogated the provisions of the Treaty of November 20th, 1815, regarding the free zone of the District of Gex, and has not abrogated the provisions of the Treaty of Turin of March 16th, 1816, regarding the free zone of Upper Savoy.

The facts antecedent to the Treaty of Versailles which are considered relevant by the Court and which led to the drafting of Article 435, paragraph 2, containing the declaration of the High Contracting Parties to the effect that the old provisions "are no longer consistent with present conditions", may, by application of the clause *rebus sic stantibus*, lead to the abrogation of the Treaty of March 16th, 1816, concerning the free zone of Upper Savoy, in virtue of an agreement freely concluded between France and Switzerland.

(Signed) Demetre Negulesco.

[40] Opinion by M. Eugène Dreyfus.

[*Translation.*]

However strange be the form in which the Court has felt bound to express a purely provisional opinion on the interpretation, as between Switzerland and France, of Article 435, paragraph 2, and its annexes, of the Treaty of Versailles, its interpretation is clear: these provisions have not abrogated the old stipulations which created the free zones; they had not even for their object such abrogation, and that in spite of all the facts prior to the Treaty of Versailles which the Court declares to be relevant, but without any influence on its present interpretation under the Special Agreement.

I very much regret my inability to agree with the reasons in the order which establish that interpretation, in the first place because they involve an addition to the terms of the Special Agreement, and secondly because Article 435, paragraph 2, and annexes, becomes, as between Switzerland and France, a provision void of meaning, a dead letter.

In Judgment No. 9 (page 12), the Court had laid down a very true principle the application of which by all tribunals is to be recommended, namely, that when the terms of a special agreement have a clear meaning permitting the judge to understand exactly the mission with which he has been entrusted by the Parties, it is by the terms of that Special Agreement that he should be guided in his decision, and not by the conclusions which may have been put forward by the Parties. The Special Agreement which brought the present suit before the Court is expressed in terms that leave no room for doubt: as between France and Switzerland, has Article 435, paragraph 2, of the Treaty of Versailles, with its annexes, abrogated here and now the provisions establishing the free zones ? or, if it has not immediately abrogated, has it for its object their abrogation ? These last words in themselves imply no idea of obligation or compulsion; they contemplate simply a future abrogation such as France and Switzerland might decide on in time to come. When the framers of the Treaty of Versailles provided in Article 435, paragraph 2, that [41] the stipulations concerning the free zones were no longer consistent with present conditions and that a status established by agreement between the two countries should be substituted therefor in these territories, had they for their object the abrogation of these stipulations, i. e. to bring about their abrogation in the future by the Parties concerned ?. That is the only and quite limited question put by the Special Agreement; its purpose is not in any way

to secure a decision whether possibly abrogation might be realized by agreement between the two countries, nor yet whether Switzerland would possibly be bound to consent thereto; neither the words "by agreement" nor the word "necessarily" are found in the Special Agreement, and the very simple literal and grammatical interpretation which I adopt seems in every respect preferable to that which the Court has admitted, and which the Swiss Government had set forth in its conclusions with a prolixity which shows that the meaning if the Special Agreement (nevertheless perfectly clear) has been thereby strangely transformed.

The question which in my opinion should predominate in the whole discussion was whether Switzerland had a right to the maintenance of the free zones, and what was the nature of that right as regards each zone; this question was, however, only examined as a secondary consideration by the Court. It is beyond dispute that Switzerland was not a Party to the Treaty of Versailles, and that if it be admitted that she had in the past a contractual right, that diplomatic instrument could not deprive her of such right without her consent. As regards the Sardinian zone, Switzerland certainly draws her right from Article 3 of the Treaty of Turin of March 16th, 1816, signed by her with Sardinia, whose obligations must now be assumed by France; Switzerland must therefore, in principle, continue to enjoy that right in spite of Article 435, paragraph 2, of the Treaty of Versailles, but subject to any possible application of the clause *rebus sic stantibus*. The order of Court has justly recognized the relevance in the matter of such facts prior to the Treaty of Versailles as the establishment of the Federal customs in 1849, and it may therefore be regretted that the Court has not at the present moment expressly had before it the question whether these new facts are such that the change in conditions unilaterally proclaimed [42] by Article 435, paragraph 2, of the Treaty of Versailles, must necessarily involve, as between France and Switzerland, the nullity of the provisions which more than a century ago set up the Sardinian and Saint-Gingolph zones. But this point is wholly reserved, and I merely note that at the moment it is admitted even in the Court's opinion that the facts put forward by France are in this respect relevant.

As regards the zone of the District of Gex, Switzerland cannot rely on any right under a treaty. The fact "that the French Government has consented to withdraw its customs line from the frontiers of Switzerland in the direction of the Jura" is mentioned for the first time, but purely incidentally, in the Protocol of November 3rd, 1815, signed by the plenipotentiaries of Austria, Great Britain, Prussia and Russia and annexed to the Declaration signed at Paris on November

20th, 1815. Article 3 of the Treaties of Paris signed on November 20th, 1815, by France with Austria, Great Britain, Prussia and Russia, afterwards determined the exact limits within which the customs line should be withdrawn.... This forms the birth certificate of the Gex zone; it runs as follows: "The French customs line shall be placed west of the Jura in such a way that the whole of the District of Gex shall lie outside this line. "

It is important to note that neither in the Protocol of November 3rd, nor, above all, in Article 3 of the Treaties of November 20th, 1815, is Switzerland mentioned; although she did adhere by a formal act to the Declaration of Vienna of March 20th, 1815, by which the Powers signatory of the Treaty of Paris recognized and guaranteed her perpetual neutrality, Switzerland adhered neither to the Protocol of November 3rd nor the Declaration of November 20th, 1815, to which the Protocol was annexed. These instruments are quite distinct from the Declaration of March 20th, 1815, which had a quite different purpose, and accession to the latter cannot involve accession to the former. Nor did Switzerland sign the Treaties of November 20th, 1815, which fixed the limit of withdrawal of the customs, nor did she adhere or accede to their provisions it was Pictet-de Rochemont, her envoy, who obtained for her the privilege of a withdrawal of the customs line by France, but Switzerland [43] took part neither in the Protocol of November 3rd, 1815, which lays down the principle, nor in the treaties which carry it out: she therefore acquired from France no contractual right. The advantage of a free zone was granted to her by Austria, Great Britain, Russia, Prussia and later Portugal (identical treaty with France dated August 28th, 1817) by a stipulation in her favour; now these same Powers in Article 435, paragraph 2, of the Treaty of Versailles declare that the stipulations of the treaties of 1815 and of the other supplementary acts concerning the free zone of the District of Gex are no longer consistent with present conditions and that a regime to be established by agreement between France and Switzerland shall be put in their place. They therefore undid in 1919 what they had done in 1815, and they consequently authorized France to re-establish her customs line at her political frontier.

Switzerland disputes this and, in the absence of a direct contractual right such as she has never claimed in regard to the Gex zone, she claims that the Powers signatory to the Treaties of Paris at least made a stipulation on her behalf and thus gave her a veritable right which they cannot deprive her of without her consent.

The theory of the stipulation *in favorem tertii*, which the Court declared to be effective in the present case, without, however, expressing an opinion as to its admissibility in international

public law, is well known in private law; but its forms vary infinitely in different municipal legislations, and whereas for instance Article 112 of the Swiss Federal Code on Contracts proclaims the entire validity of stipulations on behalf of a third Party, Article 1121 of the French Civil Code only admits these in two cases: when they form a condition of a stipulation made on one's own behalf or of a gift made to another.

In view of this diversity in the nature and legal effects of the stipulation *in favorem tertii* in municipal law, there can be no question of transferring it as such into international public law, nor in particular of giving it such an unlimited field of application as in the present case. It therefore seems certain that it cannot be laid down as a general rule that a State which stipulates on behalf of another State, guarantees [44] the latter, not being a Party to the treaty in which the stipulation appears, an individual and irrevocable right, the execution of which it might personally demand, even if the State stipulating declared that it freed the debtor State from the obligation imposed upon it in favour of the third State. Such is the predominant view of authorities at the present date, and it is summed up as follows by Professor Anzilotti, President of the Permanent Court of International Justice, in his *Course of International Law*, French edition, 1929, vol. I, page 424:

"Whereas the law of a State may lay down that where a stipulation has been made *in favorem* in the absence of a special rule in derogation of general principles, a right of the third State to *tertii*, that third Party immediately acquires the right to demand its fulfilment or acquires that right by a simple act of its own will, the very structure of the international legal system shows that demand the execution of stipulations favourable to it can only arise in virtue of an agreement between the contracting Parties on the one side and the third State on the other. "

Thus, the stipulation *in favorem tertii* is contrary to the usual structure of the international legal system. How then can it be given legal effect ?

The same ideas have prevailed in international practice; it is enough for me to quote Article 380 of the Treaty of Versailles, which certainly did not intend to confer any irrevocable right on the States for which it opened access to the Kiel canal. It is admitted that as regards the withdrawal of the French customs line, Switzerland signed no agreement either with the Allied Powers or with France in 1815; whereas the Declaration of November 20th, 1815, in its last

paragraph, invited all the Powers of Europe to accede to its provisions, and in fact numerous States did so accede, Switzerland alone neither adhered nor acceded in any form whatever to it, without doubt because she considered that she could not draw any right from that treaty. She merely profited by it and cannot now, a century later, claim that these diplomatic instruments in which her name is not even mentioned conferred upon her any right. The Treaty of November 20th, 1815, imposed on France a duty to do something: to place her customs line west of the Jura in such a way that the whole [45] District of Gex lies outside that line. From that obligation to do something, which was carried out by the French State, there may have resulted for Switzerland certain advantages; but the only obligation entered into by France in 1815 was towards the Allied Powers. From the moment that those Powers, in 1919, having again met together, declared that they freed France from her obligation, the latter cannot exist *in æter-num* merely because some advantages accrued to Switzerland, a third State, from its execution. Still less can this be the case when, in freeing France from her obligation, the Allied Powers took account of the special interests of Switzerland or rather of Geneva, since they recommended the two countries to give to the zones territories a special status, which France, moreover, has declared herself ready to grant.

In these circumstances and as regards the Gex zone, Article 435, paragraph 2, of the Treaty of Versailles certainly put an end to the former situation, which was based on no right in favour of Switzerland. Nor must it be said that, in the terms in which it is expressed, this clause was devoid of all abrogatory effect. When the French Government in 1919, without in any way being obliged to do so, spontaneously communicated to M. Gustave Ador the draft which became paragraph 2 of Article 435 of the Treaty of Versailles, the Federal Council itself replied, in its note of May 5th, 1919, that it made express reservations precisely because it did not wish that "its acceptance of the above wording should lead to the conclusion that it would agree to the suppression of a system intended to give neighbouring territory the benefit of a special regime which is appropriate to the geographical and economic situation, and which has been well tested". From this declaration by the Federal Government it follows that the intention of the provision which has textually become Article 435, paragraph 2, certainly had for effect the suppression, here and now, of the free zones. It may be submitted that this interpretation was supported by oral conversations at the moment, and it seems really impossible ten years afterwards to maintain that this clause had no abrogatory significance, even if this contention

were based on the different wording of the two paragraphs of Article 435. It must not be [46] forgotten that if the first paragraph expressly abrogates the provisions relating to the neutral zone, this is solely because it merely constitutes a recognition of an agreement already arrived at; the word "also" in paragraph 2 further shows that the declaration of changed conditions should have the same meaning in the two paragraphs and should equally involve the abrogation of the provisions distinctly referred to therein.

It is for these reasons that I am led to conclude that, as between France and Switzerland, Article 435, paragraph 2, and its annexes, have abrogated the provisions of the Protocol of the Conferences of Paris of November 3rd, 1815, and of the Treaties of Paris of November 20th, 1815, which created the Gex zone. As regards the zones of Upper Savoy and Saint-Gingolph, subject to a subsequent decision by the Court to the effect that the facts declared relevant by it in the affair permit the application here of the rule *rebus sic stantibus*, I consider that the same clause had for its object their abrogation. If it had not at least had this object, the clause would mean nothing, for it is not sufficient to say that, in signing it, the Allied Powers, who had formerly imposed on France the humiliation of placing her customs line within her political frontier, could solely have wished to declare that henceforth they ceased to interest themselves in the matter and that they now authorized France and Switzerland to settle it as they thought fit. Sardinia before 1860 and France afterwards had no need of a declaration of disinterestedness by the Powers signatories to the treaties of 1815 to modify the regime of the free zones in concluding with Switzerland the Conventions of June 8th, 1856, June 30th, 1864, June 14th, 1881, and October 20th, 1906. When the signatory Powers, in Article 435, paragraph 2, framed what is claimed to be a declaration of mere disinterestedness in regard to the question of the free zones as between France and Switzerland, they did not intend to make a platonic and theoretical declaration; this declaration had, in their intention, an object and must produce a practical effect. When these Powers solemnly declared that the stipulations concerning these free zones were no longer consistent with present conditions, they did not merely wish to declare - what was obvious and had [47] already been done in the past - that Switzerland and France might henceforth settle the status of these territories as they thought fit; in so far as their declaration inscribed in paragraph 2 of Article 435 did not *ipso jure* abrogate the free zones because it ran counter to a right which might be put forward as against France, it at least meant that abrogation

in the future appeared necessary and that it was extremely desirable that the two countries should, if possible, succeed in bringing it about.

(Signed) Eugène Dreyfus.

[48] Observations by M. Pessôa.

[*Translation.*]

I.

The object of orders, in the words of Article 48 of the Statute, is "the conduct of the case", the decision as to "the form and time in which each Party must conclude its arguments".

In the present case it seems to me that there is no question of this. France and Switzerland, having "been unable to agree in regard to the interpretation to be placed on Article 435, paragraph 2, of the Treaty of Versailles, with its annexes", and having need of this interpretation "to settle the new regime" contemplated by the said article for the territories of Upper Savoy and the District of Gex, have requested the Court to say, "*before pronouncing any decision*", whether Article 435 "has abrogated or is intended to lead to the abrogation of" certain provisions of the Treaty of Paris of November 20th, 1815, and other instruments.

What the two countries therefore seek from the Court is a *legal opinion* as to the doubtful interpretation of a treaty. What they seek from it is therefore *its views* as to this interpretation. There is no question of arranging for "the conduct of the case" or deciding the time and form for the conclusion of the respective arguments, which is the purpose of orders; it is in reality a question of an *advisory opinion* sought by the actual Parties to the dispute, notwithstanding the definite terms of Articles 14 of the Covenant and 72 of the Rules of Court, according to which only the Council or Assembly of the League of Nations may ask the Court for advisory opinions, and the Court may only give such opinions to one of those bodies. When doubts arose between Turkey and Greece regarding the interpretation of the Agreement of December 1st, 1926, the two countries did not directly approach the Court with a request for the correct interpretation of the instrument; it was the Council of the League [49] of Nations which did so. The Franco-Swiss case is entirely similar; there was no reason for pursuing a different course, especially seeing that that course is contrary to the very terms of a clause of the Court's constitutional provisions.

If it is desirable to extend the Court's powers, let the Covenant be amended and the Court be given all the powers considered to be expedient; but so long as the Covenant remains as it is,

the Court cannot, of its own authority, arrogate to itself a power which the Covenant expressly withholds from it.

It is contended that in the present case, the purpose of the order is to fix a period of time - namely, that contemplated by Article 1, paragraph 2, of the Special Agreement.

But in actual fact this is not so, for the fixing of this time *follows* the *decision* given by the Court in the *order* in regard to the points at issue between the two Parties and is scarcely an *effect* or *consequence* of this decision. The *main* object of the order is to establish what is, in the opinion of the Court, the true construction of Article 435 of the Peace Treaty and to convey this *opinion* to the Parties in reply to their request for the *opinion* of the Court. The time-limit comes *afterwards* and cannot even be fixed *unless the decision as to the interpretation has been given*; this clearly shows that the time-limit is merely a *secondary* and *incidental* point in the order.

It is impossible therefore to avoid the logical conclusion: the case is not one for *judgment*, since the Special Agreement expressly rules out a judgment; nor is it one for an *advisory opinion*, since neither the Council nor Assembly has asked for one; nor for an *order*, which is not required for the purpose of the conduct of the case; and since the Court can only express a decision by one of these three means, it follows that it should have refused to entertain the case, on the ground that the clause whereby the Special Agreement seeks the Court's opinion is not valid, having regard to the imperative terms of Article 14 of the Covenant and Article 72 of the Rules of Court. [50]

II.

I quite agree with the Court when it states that Article 435, paragraph 2, of the Treaty of Versailles *has not abrogated* the provisions of the Treaty of 1815 and other supplementary instruments.

With regard, however, to the other question put by the Special Agreement, I venture to make the following observations:

According to Article 435, the free zones constitute a regime which is not consistent with present conditions. It says so in definite terms. It is easy to understand why: this regime involves a restriction upon the sovereignty of France, which, in principle and like any other nation, is entitled to exert its fiscal authority throughout its territory as far as the line of its political

frontier. The intention of the Treaty therefore is that such a regime *should* disappear. A regime which *is no longer consistent* with present conditions *should not* remain unaltered. It *should* be replaced by another. The intention, the idea - "the object" - of the Treaty is therefore the abrogation of this régime. But the *new* regime is to be created by mutual agreement between the two countries. The agreement will thus relate not to the *actual fact of replacement*, but solely to *the form and conditions* of replacement.

The last part of paragraph 2 of Article 435 expressly contemplates *a new régime*. How can the Treaty contemplate a new regime if its *object is not the abrogation* of the present one ?

The two countries refer continually to a "new arrangement". How can they contemplate a new arrangement if there is no idea of replacing the existing one ?

It is pointed out that in Annex I, Switzerland opposes the *abolition* of the zones. But the note of May 29th indicates better the ideas of that country: it recognizes that the former stipulations "may be modified or *replaced* by mutual agreement" between the Parties. It therefore acquiesces in the abrogation contemplated by Article 435, for the replacement of a régime also involves its abrogation. [51]

Finally, it appears to me that the second question of the Special Agreement might have been answered by stating that Article 435 *has for its object the abrogation* as between France and Switzerland of the provisions of the Treaty of 1815 and other supplementary instruments, and the replacement of them, by means of an agreement between the two countries, by others which are consistent with present circumstances, the former regime remaining in force until the new one is adopted.

It is perhaps a question of form and not of substance, for the Court (pages 15-16) recognizes that if the two countries succeed in reaching the agreement provided for in Article 435, paragraph 2, this agreement will have the formal effect of abrogating the former provisions; but it appears to me that the terms of the reply indicated above would be more exactly in accordance with the intention and wording of the Treaty.

(Signed) Epitacio Pessôa.