SEPARATE OPINION OF JUDGE SIR PERCY SPENDER

The central issue in this case is, in my opinion, whether the dispute alleged by the Republic of Cameroon is a dispute within the meaning of the adjudication clause; Article 19 of the Trusteeship Agreement. Since I reach the conclusion that the dispute alleged is not a dispute within the meaning of that Article, the Court is, in my opinion, without jurisdiction.

This Court in 1962 had occasion in the *South West Africa* cases [1] to consider an adjudication clause which was contained in the Mandate Instruments under the Covenant of the League of Nations, a clause which in all essentials—apart from one matter to which reference will later be made—was the same as that set out in Article 19 of the Trusteeship Agreement the subject of consideration in this case. The very core of the Court's reasoning which led it to give to the adjudication clause in the South West African Mandate the all-embracive interpretation it did was, in my view, that that clause was inherently necessary, was essential to the unctioning of the Mandate System and the exercise of the Mandate, in order to ensure the performance by the Mandatory Power of its obligations to the peoples of the Mandated Territory as set forth in the Mandate Instrument. The clause, in the Court's opinion, thus provided an essential judicial security for the performance of these obligations. These considerations led the Court to conclude that the adjudication clause in the Mandate Instrument covered not only disputes between a State, a Member of the League, and the Mandatory Power in relation to provisions of the Mandate Instrument whereunder individual rights or interests were conferred upon States, Members of the League or their nationals, but also the provisions thereof which imposed general obligations upon the Mandatory Power in the interests of the people of the Mandated Territory—the obligations to carry out the "sacred trust" imposed upon and undertaken by it.

In the present case the context of the adjudication clause—Article 19 of the Trusteeship Agreement—is not the same as it was in the *South West Africa* cases, though it is in all essential wording the same. In the *South West Africa* cases the clause had to be interpreted in the context of the Covenant of the League and the terms of the Mandate Instrument; in the present case it must be interpreted in

[1] *I.C.J. Reports 1962*, p. 319.

the context of the International Trusteeship System established under the Charter of the United Nations and the terms of the Trusteeship Agreement itself. Moreover, much of the foundation upon which the Court erected its reasoning in the cases of *South West Africa* in the instant case crumbles away; the Court in those cases itself recognizing that the necessity for the adjudication clause—essentiality—which was stated by it to characterize the clause in the Mandate System disappeared under the International Trusteeship System of the United Nations; it was "dispensed with" by the terms of the Charter [1].

My colleague, Judge Sir Gerald Fitzmaurice, and I disagreed with the reasoning of the Court as well as with the interpretation it placed upon the adjudication clause in the Mandate Instruments, and we expressed our view at length. Although a great deal of what we then had to say is directly applicable to the interpretation to be accorded to the adjudication clause in this case—in particular we rejected the view that the adjudication clause was either essential or necessary to the Mandate System or the Mandate Instrument—none the less, since the task of interpretation in this case is not the same as that which faced the Court in the *South West Africa* cases, it would, I think, be neither sufficient nor satisfactory to refer in general to the reasoning then advanced by my colleague and myself and content myself with a brief presentation of my views in the case. I think it advisable to express in some detail the reasons which lead me, in this case, to the conclusion that the dispute alleged by the Applicant is not a dispute within the meaning of Article 19 of the Trusteeship Agreement before the Court.

* * *

The Broad Issues to Be Determined

The Applicant alleges breaches by the Respondent of Articles 3, 5, 6 and 7 of the Trusteeship Agreement. The breaches alleged are not particularized except under heads of "complaints" in the Application and Memorial. The Articles above mentioned express in broad and general terms obligations undertaken by the Administering Authority with the United Nations to administer the Territory in such a manner as to achieve the basic objectives of the International Trusteeship System laid down in Article 76 of the United Nations Charter (and to this end the Administering Authority undertook to collaborate fully with the General Assembly and the Trusteeship Council on the discharge of their functions) (Article 3): to promote the development of free political institutions suited to the Territory and assure its inhabitants an increasing share in

[1] *I.C.J. Reports 1962*, at 342.

administrative and other services and develop their participation in government as might be appropriate to the particular circumstances of the Territory and its people, special regard being had to the provisions of Article 5 *(a)* of the Trusteeship Agreement (Article 6): and to apply in the Territory, *inter alia*, recommendations already existing or thereafter drawn up by the United Nations which might be appropriate to the particular circumstances of the Territory and conduce to the achievement of the basic objectives of the International Trusteeship System (Article 7). Article 5 *(a)*, to which reference is made above, provided that for all purposes of the Trusteeship Agreement the Administering Authority should have full powers of legislation, administration and jurisdiction and should administer the Territory in accordance with the Authority's own laws as an integral part of its territory "with such modification as may be required by local conditions" and subject to the provisions of the United Nations Charter and of the Trusteeship Agreement.

Though the Applicant alleges breaches generally of the provisions of the Trusteeship Agreement no other specific provision of the same is adverted to by the Applicant or referred to in its "complaints", which constitute, as its Application states, the subject-matter of its dispute with the Respondent Government, other than Article 5 *(b)* which provides that the Administering Authority should be entitled, *inter alia*, to constitute the Territory into an administrative union or federation with adjacent territories under its sovereignty or control and to establish common services between such territories and the Trust Territory where such "measures" were not inconsistent with the basic objectives of the International Trusteeship System or with the terms of the Trusteeship Agreement.

The gist of the complaints of the Applicant Government may be stated as follows: the objective of development of free political institutions, etc., has not been achieved; this it is alleged was a breach of Article 3 of the Agreement: the Northern Cameroons had been administered as an integral part of Nigeria and not as a distinct territory; this is alleged to have been a breach of Article 5 *(b)* of the Agreement: the Trust Territory had been administered in two separate parts, the Southern and Northern Cameroons with two administration systems and following, it is asserted, separate courses of political development; this is alleged to be contrary to a "rule of unity" presumably inherent in the Trusteeship Agreement. These breaches are further alleged to have continued from 1946 onwards and are stated to have deployed their effects in a continuous manner up to the time of the plebiscite held in the Northern Cameroons in February 1961 preventing consultation with the people sufficient to satisfy the requirements of the Trusteeship Agreement, as a result of which plebiscite the Trusteeship Agreement was brought to an end before the objectives of Article 76 of the Charter had been achieved. Thus, it is said, Northern Cameroons became part of the State of Nigeria.

Four additional complaints are set forth in the Application three of which relate to alleged breaches of a resolution of the General Assembly 1473 of 12 December 1959, the remaining one dealing with certain alleged practices, acts or omissions of "the local Trusteeship Authorities" during the period preceding and during the plebiscite; which it is further alleged prevented a free and unfettered expression of opinion. All of these four additional complaints are asserted to be in conflict with the Trusteeship Agreement[1].

The Applicant State does not seek any specific redress in relation to the alleged breaches of the Trusteeship Agreement complained of; it seeks only a declaration of the law.

* * *

It will thus be seen that the dispute alleged to exist between the Applicant and the Respondent relates exclusively to the general obligations of the Respondent under the Trusteeship Agreement undertaken by it with the United Nations to achieve the objectives of the International Trusteeship System established by the Charter in the interests of the people of territories who had not yet attained self-government or independence.

To what Extent Does the Recent Decision of this Court in the South West Africa Cases Bear upon the Present Case?

In the *South West Africa* cases the view of the Court that Article 7 of the Mandate Instrument was inherently necessary or essential to the functioning of the Mandate System, giving effect to the concept of what has been termed the "judicial protection of the sacred trust", was of the very heart of the Court's reasoning. This view found its first expression in the Judgment when the Court was dealing, not with the question of what was a dispute within the meaning of Article 7 of the Mandate, but with the question raised by the Second Objection of the Union of South Africa which centred on the term "another Member of the League of Nations..." in that Article. The Union of South Africa had claimed that Ethiopia and Liberia did not have the status required by the Article to invoke the jurisdiction of the Court since neither was any longer a Member of the League of Nations. The Court, after stating that this contention was claimed to be based upon the natural and ordinary meaning of the words "another Member of the League of Nations", did not, as I understand the Judgment, deny that the natural and ordinary meaning of the words were as contended for by the Union of South Africa. It stated that the rule of interpretation that recourse should

[1] See in particular Articles 3 and 7 of the Trusteeship Agreement.

be had, in the first place, at least, to the ordinary and natural meaning of words was not an absolute rule of interpretation and then proceeded to observe that—

> "Where such a method of interpretation results in a meaning incompatible with the spirit, purpose and context of the clause or instrument in which the words are contained, no reliance can be validly placed on it" (*I.C.J. Reports 1962*, at 336).

The Court then proceeded to state its reasons why reliance, in the light of this observation, could not be placed upon the natural and ordinary meaning of the words in question. The centre of its reasons was the assertion that "judicial protection of the sacred trust in each Mandate was an essential feature of the Mandates System"; the administrative supervision by the League was "a normal security" to ensure full performance by the Mandatory of the "sacred trust" but "the specially assigned role of the Court was even more *essential*[1], since it was to serve as the final bulwark of protection by recourse to the Court against possible abuse or breaches of the Mandate"[2]; for without this additional security, the Court went on to say, the supervision by the League and its Members could not be effective in the last resort since supervision by the League Council was subject to the rule of unanimity of its Members, including the approval of the Mandatory itself. In the event of a conflict between the Mandatory and other Members of the Council, in the last resort, the Court continued, "the only course left *to defend the interests of the inhabitants*[1] in order to protect the sacred trust would be to obtain an adjudication by the Court...". This, it said, could only be achieved by a State a Member of the League invoking the adjudication clause in the Mandate Instrument.

> "It was for this *all-important purpose*[1] that the provision was couched in broad terms embracing *'any dispute whatever'*[1]... It is thus seen *what an essential part*[1] Article 7 was intended to play as one of the securities in the Mandates System for the observance of the obligations by the Mandatory..." (*I.C.J. Reports 1962*, at 337.)

Moreover, the Court added, this "essentiality of judicial protection for the sacred trust", the right to implead the Mandatory before the Permanent Court, was "specially and expressly" conferred upon the Members of the League "evidently also because it was the most reliable procedure of ensuring protection by the Court, whatever might happen to or arise from the machinery of administrative supervision"[3].

There was, the Court said, an "important difference" in the structure and working of the system of supervision of mandated

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[1] Emphasis added.
[2] *I.C.J. Reports 1962*, at 336.
[3] *Ibid.*, at 337-338.

territories under the League and that of trust territories under the United Nations, namely that the unanimity rule in the Council of the League had under the Charter been displaced by the rule of a two-thirds majority. This observation of the Court was directed to meet an argument that Article 7 was not an essential provision of the Mandate Instrument for the protection of the sacred trust of civilization, in support of which argument attention had been called to the fact that three of the four "C" Mandates when brought under the trusteeship provisions of the Charter of the United Nations did not contain, in the respective trusteeship agreements, any adjudication clause. It was in the course of dealing with this argument that a statement of the Court, greatly relied upon by the Respondent in this case to distinguish the present case from that of *South West Africa,* was made. The Court's statement was as follows:

> "Thus legally valid decisions can be taken by the General Assembly of the United Nations and the Trusteeship Council under Chapter XIII of the Charter without the concurrence of the trustee State and the *necessity* [1] for invoking the Permanent Court for judicial protection which prevailed under the Mandates System is *dispensed with under the Charter* [1]." [2]

In the Dissenting Opinion of myself and Judge Sir Gerald Fitzmaurice in those cases there appear the reasons why we were unable to agree with this reasoning of the Court, and there is no need to repeat them here. It is sufficient for the moment to note the reasoning of the Court and to observe that it was directed to establishing that in the events which happened there arose out of a debate in the Assembly of the League, on the eve of its dissolution, a unanimous agreement among all Member States that the Mandate should be continued to be exercised after the dissolution of the League of Nations in accordance with the obligations defined in the Mandate Instrument, including that of the Mandatory under the adjudication clause; that this specific obligation survived and necessarily involved reading into the clause the words "Members of the United Nations" in place of the words "Members of the League of Nations".

It is evident that the view of the Court was—and with this I am in full accord—that in a trusteeship agreement under the provisions of the Charter of the United Nations an adjudication clause is not inherently necessary or essential to secure the observance of the general obligations of the Administering Authority undertaken by it in the interests of the inhabitants.

When later in its Judgment the Court turned to the examination of the Third Preliminary Objection of South Africa which the Court said consisted essentially of the proposition that the dispute brought

[1] Emphasis added.
[2] *I.C.J. Reports 1962,* at 342.

before the Court was not a dispute as envisaged in Article 7 of the Mandate, again the thesis of "essentiality" of the adjudication clause in the Mandate Instrument was to the fore of the Court's approach; it was indeed of its essence. Having already asserted and developed the thesis earlier in its Judgment, it returned to and reasserted it. The adjudication clause in the Mandate Instrument was "clearly in the nature of implementing one of the '*securities*[1] for the performance of this trust', mentioned in Article 22, paragraph 1" of the Covenant of the League.

> "The right to take legal action conferred by Article 7 ... is an *essential*[1] part of the Mandate itself and *inseparable* from its *exercise*[1]... While Article 6 of the Mandate ... provides for administrative supervision by the League, Article 7 in effect provides, with the express agreement of the Mandatory, for *judicial protection*[1] by the Permanent Court by vesting the right of invoking the compulsory jurisdiction against the Mandatory for the *same purpose*[1]..."[2]

Taking the view the Court did throughout its Judgment of the purpose and function of the adjudication clause—of its inherent necessity, of its essentiality, as part of the Mandate System, and its inseparability from the exercise of the Mandate itself, it is understandable, perhaps inevitable, that in interpreting the adjudication clause in the Mandate Instrument it gave to it the wide and all-embracive interpretation it did. There can, I think, be no doubt whatever that the Court's thesis of the purpose the clause was intended to serve completely controlled its interpretation thereof. To the rest of the Article the Court applied, it said, the rule of the natural and ordinary meaning of the words which rule it had found reasons to disregard when dealing with the Second Objection. The words upon which the emphasis was laid in interpreting the rest of the adjudication clause in the Mandate Instrument were the same words which appear in the adjudication clause with which we are presently concerned, namely "any dispute whatever" and "relating to the interpretation or the application of the provisions of" the Mandate Instrument.

It is important to quote what the Court said in full[3]. It said:

> "The language used is broad, clear and precise: it gives rise to no ambiguity and it permits of no exception. It refers to any dispute whatever relating not to any one particular provision or provisions, but to 'the provisions' of the Mandate, obviously meaning all or any provisions, whether they relate to substantive obligations of the Mandatory toward the inhabitants of the Territory or toward the other Members of the League or to its obligation to submit to supervision by the League under Article 6 or to protection under

[1] Emphasis added.
[2] *I.C.J. Reports 1962*, at 344.
[3] *Ibid.*, at 343.

> Article 7 itself. For the *manifest* [1] scope and purport of the provisions of this Article indicate that the Members of the League *were understood* [1] to have a *legal right or interest* [1] in the observance by the Mandatory of its obligations both toward the inhabitants of the Mandated Territory, and toward the League of Nations and its Members."

It is upon this pronouncement of the Court that the Applicant rests its contention that the dispute in this case is one which comes within the content of Article 19 of the Trusteeship Agreement.

In the Joint Dissenting Opinion of Judge Sir Gerald Fitzmaurice and myself we gave our reasons, with the great respect which is due to the Court, not only for thinking that the Court had erred in its thesis of "essentiality", "inherent necessity" and "inseparability", but also why we thought, read in their context, the words of Article 7 of the Mandate Instrument revealed an ambiguity which precluded that Article being interpreted in the manner the Court did. However, whether the Court was or was not right in the interpretation which it accorded Article 7 of the Mandate Instrument, it is, I think, abundantly evident that that interpretation cannot automatically be applied to the adjudication clause in the present case. The thesis of "essentiality", etc., can find no place in this case [2]. Moreover the context in which Article 19 of the Trusteeship Agreement must be interpreted is different to the context in which Article 7 of the Mandate had to be interpreted.

However the reasoning of the Court in the *South West Africa* cases is looked at, the interpretation it accorded the adjudication clause in that case has, I believe, little judicial authority in the determination of the meaning of Article 19 in this case.

* * *

None the less that interpretation is now sought to be applied—lifted and transposed—to the adjudication clause in the present case; the words of Article 19 of the Trusteeship Agreement being the same in all essentials as the adjudication clause in the Mandate Instruments the language of which was said by the Court to be "broad, clear and precise" and permitting of "no exception", the same interpretation it is contended, must be applied to Article 19.

This line of reasoning is inadmissible. What is necessary to be done is to interpret Article 19 of the Trusteeship Agreement *in its context* and *in the light of the surrounding circumstances* at the time

[1] Emphasis added.

[2] See in particular *I.C.J. Reports 1962*, at 342.

the Agreement was entered into. The Applicant hardly directed itself to this task but relied, in the main, upon the Court's view in the *South West Africa* cases that the adjudication clause admitted of no exception, thus it extended to cover the invocation of the Court's jurisdiction not only in the interests of the inhabitants, which was a central consideration in the Court thesis in the *South West Africa* cases, but also in the interests of a State itself, as the Applicant is asserting a right to do in the present case.

It will be my task to examine Article 19, not merely as a clause containing certain words, but in its context and surrounding circumstances in order to ascertain the intention of the two Parties to the Trusteeship Agreement—the United Nations and the Respondent—in relation to that Article, and to demonstrate that the Applicant's contention is ill founded.

Article 19 of the Trusteeship Agreement

Article 19 reads as follows:

> "If any dispute whatever should arise between the Administering Authority and another Member of the United Nations relating to the interpretation or application of the provisions of this Agreement, such dispute, if it cannot be settled by negotiation or other means, shall be submitted to the International Court of Justice provided for in Chapter XIV of the United Nations Charter."

* * *

The Applicant's contentions, reduced to essentials, may be stated thus. Upon becoming a Member of the United Nations such rights as are accorded by Article 19 to States Members thereof became vested in it; it was thereupon entitled to invoke the jurisdiction of this Court, not only in relation to disputes thereafter arising between itself and the Administering Authority concerning alleged breaches of the provisions of the Trusteeship Agreement subsequently occurring, but also in relation to any dispute thereafter arising concerning breaches alleged to have occurred at any time antecedently without limitation of time; that right is not restricted to failure to perform obligations assumed by the Administering Power under the provisions of the Trusteeship Agreement which confer upon it and other States, Members of the United Nations, or their nationals individual rights or interests but extends so as to cover any failure by the Administering Authority to observe its general obligations towards the inhabitants of the trust territory and towards the United Nations; that it is entitled to invoke the jurisdiction of this Court in respect of the provisions of the Agreement relating to these last-mentioned obligations not only in defence of the interests of the inhabitants of the trust territory but separately

and independently in its own right; that it may seek from the Court a declaratory decree that this or that breach has occurred and that the Court is not only entitled to declare that such a breach occurred, but is bound to do so notwithstanding that the trust agreement has already come to an end and notwithstanding any resolution of the General Assembly or any conduct on its part vis-à-vis the Administering Authority in relation to the carrying out of the provisions of the Trusteeship Agreement.

* * *

It becomes therefore necessary to interpret Article 19 of the Trusteeship Agreement in order to ascertain what meaning is to be accorded the words "any dispute whatever ... relating to ... the provisions of this Agreement", etc., and in particular to ascertain whether the dispute alleged by the Applicant is one which falls within the ambit of this Article.

The Context in which Article 19 Must Be Interpreted

It is not possible to interpret Article 19 as if it were a separate instrument, comparable, for example, to a declaration of a State accepting the compulsory jurisdiction of the Court under Article 36 (2) of the Statute of the Court, yet this, in my opinion, is precisely what is attempted to be done in the present case. What may appear clear in such an exercise may become very unclear when an adjudication clause is read in its context.

The context in which Article 19 must be read is the Trusteeship Agreement of which it forms part, and the International Trusteeship System established by Chapter XIII of the Charter of the United Nations of which the Trusteeship Agreement is part and with which its provisions are interwoven. Moreover the provisions of Chapter XIII of the Charter and the international system which it established form the background and part of the surrounding circumstances in which the Trusteeship Agreement was entered into, without an appreciation of which it is, in my view, quite impossible to ascertain the intention of the Parties to the Trusteeship Agreement in relation to Article 19.

It is convenient first to consider the provisions of Chapter XIII of the Charter particularly since the Trusteeship Agreement incorporates and refers to such provisions, and contains, as do all trusteeship agreements, an obligation on the part of the administering authority, which is indeed the dominant obligation to be found in the Trusteeship Agreement, so to administer the territory as to achieve the objectives of Article 76 of the Charter.

Trusteeship System—Chapter XIII of the Charter

When the trusteeship was negotiated and entered into the League of Nations had come to an end. A new organization had been set up: the United Nations. To carry out the purposes of its Charter there were established six principal organs, three of which were the General Assembly, the Trusteeship Council and this Court. The Charter called for the establishment of an international trusteeship system for the administration and supervision of such territories as might be placed thereunder by voluntary agreement. "The functions of the United Nations with regard to trusteeship agreements"—except such as might relate to strategic areas—including their approval, were exercisable by the General Assembly and by the General Assembly alone[1]. The Trusteeship Council, operating under the authority of the General Assembly was charged with the duty of assisting the General Assembly in carrying out the functions of the United Nations, including that of the supervision of the administration of the Trust Territory. It was (so to speak) the organ established to police the execution of the provisions of the Trusteeship Agreement to ensure that the basic objectives of the Trusteeship System in respect of each Trusteeship Agreement were achieved, reporting from time to time direct to the General Assembly on the discharge of its duties.

The conclusion must be that the Charter contemplated that these two principal organs—the General Assembly and the Trusteeship Council—and only these two organs should police the execution and carrying out of the objectives of the International Trusteeship System and of the provisions in any Trusteeship Agreement directed to this end, and by their supervision of the administration of territories by the Administering Authorities and of the obligations undertaken by them in Trusteeship Agreements, by questionnaires formulated by the Trusteeship Council on the political, economic, social and educational advancement of the inhabitants of each Trust Territory within the competence of the General Assembly (to which questionnaires the Administering Authorities were bound to respond), by scrutinising the answers thereto, by considering the reports submitted by Administering Authorities, by accepting petitions, by periodic visits to the Trust Territories and by other action taken in conformity with the terms of Trusteeship Agreements, to ensure that the obligations of each Administering Authority in relation to the achievement of the basic objectives of the Trusteeship System were being fulfilled.

It must have been evident, even to those unacquainted with the difficulties of administering Trust Territories, that problems of administration and differences of opinion in relation thereto would,

[1] Article 85 of the Charter.

at times, inevitably occur between the United Nations and the Administering Authorities or, at least, would be likely to occur, and that, whatever they were, they were to be resolved, so far at least as the Charter contemplated, through the machinery of the Trusteeship Council and the General Assembly and in no other way.

The Charter provided its own machinery for securing the compliance by the Administering Authorities of their respective obligations in relation to the objectives of the Trusteeship System. There is no room for any contention that it was inherently necessary or essential that a Trusteeship Agreement should contain an adjudication clause to secure in the last resort or at all compliance by the Administering Authorities of the obligations undertaken by them in the interests of the peoples of the various Trust Territories.

Thus, *all* of the functions of the United Nations with regard to Trusteeship Agreements for all areas not designated as strategic areas, the supervision of the administration of the Trust Territories, the policing of the obligations owed both to the United Nations itself and the peoples of the territory, as set forth in the provisions of any Trusteeship Agreement to be entered into, were vested exclusively in the General Assembly. Though an organ of the United Nations, no function in relation to administration or supervision or the enforcement of any obligation undertaken by the Administering Authority or any judicial protection of the interests of the inhabitants was assigned to the Court by Chapter XIII.

By provisions to be found elsewhere in the Charter[1], the General Assembly or the Trusteeship Council could, if it thought fit, seek an advisory opinion of the Court. It was not bound to do so and, if it did, it was not bound thereby; *all the functions* of the United Nations in relation to Trusteeship Agreements entered into by it were for the General Assembly and it alone to exercise. Whether an advisory opinion was sought or not in no way affected the plenary powers of the Assembly to exercise, in relation to any Trusteeship Agreement, all the functions of the United Nations.

It is now necessary to consider the provisions of Article 76 of the Charter the achievement of the objectives of which the Administering Authority in the instant case undertook by Article 3 of the Trusteeship Agreement. The central provision of this Article in the context of present consideration is sub-clause *(b)* thereof, which provides that one basic objective of the International Trusteeship System was—

> "to promote the political, economic, social and educational advancement of the inhabitants of the trust territories, and their progressive development towards self-government or independence

[1] Article 96 of the Charter.

as may be appropriate to the particular circumstances of each territory and its peoples and the freely expressed wishes of the peoples concerned, and as may be provided by the terms of each trusteeship agreement".

The Applicant complains, as has been noticed, that one of the obligations which the Administering Authority failed to discharge was that contained in Article 3 of the Trusteeship Agreement. If Article 19 of the Trusteeship Agreement gives a right to a State to invoke the jurisdiction of the Court on the interpretation of or application of Article 3 of the Agreement, this would extend to any alleged breach of the Article alleged to have occurred at any time during the duration of the Trusteeship Agreement.

The obligation of the Administering Authority to achieve the objective set out in Article 76 *(b)* of the Charter involves considerations which, on their face, are peculiarly for *political* appreciation, and these, so far as the Charter contemplated, were, as has been observed, for the General Assembly, with the assistance of the Trusteeship Council, to evaluate. It is not readily apparent what *legal* norms could be applied to determine whether or not the Administering Authority had breached Article 3 of the Trusteeship Agreement; what legal norms, for example, could be applied by the Court at any given point of time during the currency of the Trusteeship Agreement and in a variety of circumstances to a situation in which it was alleged by a State invoking the provisions of the adjudication clause that the Administering Authority had failed "to *promote* the *political* ... advancement of the inhabitants ... as may be *appropriate* to the *particular circumstances* of each territory". The words of Article 76 *(b)* have a special political content; they appear to call for political evaluation and determination only. Certainly it is apparent that, so far as the Charter contemplated, it was a matter exclusively for political evaluation by an organ, which, both by its composition and the machinery provided by the Charter, was equipped to discharge that task. Yet if the Applicant's contention in this case were correct, the Court was intended by the adjudication clause, at the instance of any State, a Member of the United Nations, to pronounce upon these very matters, and to do so irrespective of any determination made in respect thereof by the General Assembly itself or any view which it held or might hold.

As was said in the Joint Opinion in the *South West Africa* cases when referring to the words contained in the Mandate Instrument (Article 2 thereof), under which the Mandatory Power undertook "to promote to its utmost the material and moral well-being and the social progress of the inhabitants ... ", there is hardly a term in Article 76 *(b)* of the Charter "which could not be applied in widely different ways to the same situation or set of facts, according to different subjective views as to what it meant, or ought to mean...

They involve questions of appreciation rather than of objective determination" such as a legal determination necessarily involves. "The proper forum for the appreciation and application of a provision of this kind is unquestionably a technical or political one, such as ... the Trusteeship Council and the Assembly of the United Nations [1]." There can be no doubt that the General Assembly and the Trusteeship Council constituted the forum exclusively contemplated by the Charter for the determination of the matters referred to in Article 76 *(b)* of the Charter. What was said in the Joint Opinion applies with equal force to the consideration of Article 3 of the Trusteeship Agreement and, as will subsequently appear, to other Articles thereof, the breach of which is complained of by the Applicant.

To accord to Article 19 the comprehensive meaning contended for by the Applicant permitting it to challenge in this Court, by way of a dispute between itself and the Administering Authority, the General Assembly's supervision of the Administering Authority's obligations to the people of the Trust Territory, there must be presumed an intention on the part of the United Nations acting through the General Assembly to accord a right to any State to challenge as and when *it* thought fit, as between the Administering Authority and itself, whether in law the objectives of Article 3 had been or were being achieved by the latter. It would seem somewhat odd that the General Assembly as a matter of deliberate intent should accord such a wide and unfettered right to any State.

It is no answer to this observation to say that such a challenge under the provisions of the adjudication clause is not, in law, a challenge to the competency of the General Assembly, and that no dispute between the State and the General Assembly is involved, as the Applicant in this case has been at great pains to assert. In practice it would be well-nigh impossible to separate an Administering Authority's obligation to comply with the provisions of Article 3, and complementary Articles, from the duty of supervision which the General Assembly was called upon to discharge to ensure those obligations were complied with. The question we are concerned with is whether the adjudication clause was *intended* by the Parties thereto to accord such a right to States in their individual capacity.

It would seem indisputable that the General Assembly, exercising all the functions of the United Nations in relation to any trusteeship agreement, had the authority, binding upon its Members, to determine when the objectives of the Trusteeship System as set forth in Article 76 *(b)* of the Charter had been achieved and the freely expressed wishes of the people concerned had been ascertained, and with the consent of the Administering Authority, to

[1] *I.C.J. Reports 1962*, at 466-467.

bring the Trusteeship Agreement to an end, as indeed it did in this case. Yet if the Applicant's contention is correct, it is entitled in this case to seek the adjudication of this Court on whether, as between itself and the Administering Authority, the objectives of the Trusteeship System as set out in Article 76 *(b)* of the Charter were in fact achieved, and whether the freely expressed wishes of the people concerned were in fact expressed or ascertained; in short, that it had two forums where it could challenge the conduct of the Administering Authority—and the General Assembly—namely the General Assembly itself, and this Court. It is true that the challenge in this Court is not one in which the United Nations is directly a party, but there can be no doubt whatever that a decision of the Court in the Applicant's favour would adversely and seriously reflect upon the past supervision of the General Assembly and its action in bringing the Trusteeship Agreement to an end and, as well, the manner in which it discharged its duties in relation to the inhabitants of the Territory whose interests it was bound to protect.

If the interpretation which should properly be placed upon Article 19 does give such a comprehensive right to a State, it is of no moment that the General Assembly and the Administering Authority did not when the Trusteeship Agreement was entered into, direct their minds to every contingency in which the right might be exercised. If however the interpretation contended for by the Applicant is correct, it assumes that the General Assembly and the Administering Authority, fully aware that between them they were in control of the carrying out of any trusteeship agreement and were, whilst the same remained yet to be performed, competent to agree between themselves that the obligations of the Administering Authority in relation to the peoples of the Territory were being fulfilled, either wholly or in certain particular respects, and competent to bring the Trusteeship Agreement to an end, when it was determined that the objectives of Article 76 *(b)* of the Charter had been achieved, none the less intended to allow an *uncontrolled* right to any State to canvass before the Court decisions already reached between the General Assembly and the Administering Authority, or about to be reached between them. This assumption could not lightly be made. It is nothing to the point to say that the field in which the General Assembly operated was a political one whilst the functions of the Court are judicial. The General Assembly dominated the situation at all times and had authority of its own. It would seem unlikely that it would have been prepared to allow that authority to be canvassed in any way, directly or indirectly, at the will of any State without, at least, making its intention manifestly clear, and not left to the interpretation of a jurisdictional clause. Some other trace of its will might reasonably be expected to have remained to bear witness. None is. It is equally unlikely that an Administering Authority, not bound to agree to any

judicial function being discharged by this Court, would have been prepared to submit to the position in which, having to satisfy the General Assembly that it was carrying out or had achieved the objectives of Article 76 *(b)* of the Charter, its administration would also be subject to examination and adjudication by this Court at the instance of any State or States, irrespective of whether or not the General Assembly was satisfied with the manner in which that administration was being or had been carried out.

The Trusteeship Agreement

The provisions of the Trusteeship Agreement which consists of 19 clauses fall into two categories, one of which relates solely to the achievement of the objectives of the Trusteeship System, the other to provisions conferring specific individual rights upon States or upon their nationals.

In the first category of provisions are the following:

Article 1 defines the Territory; Article 2 designates the Administering Authority responsible for the administration of the Territory; Article 3, the dominant Article of the whole Agreement, contains an undertaking by the Administering Authority "to administer the Territory in such a manner as to achieve the basic objectives" laid down in Article 76 of the Charter and to collaborate fully with the General Assembly of the United Nations and the Trusteeship Council in the discharge of their functions; Article 4 provides that the Administering Authority is to be responsible for the peace, good government and defence of the Territory and for ensuring that it shall play its part in the maintenance of international peace; Article 5 provides that the Administering Authority, for all purposes of the Agreement, should have certain powers of legislation and administration; Article 6 contains a stipulation that the Administering Authority should promote the development of "free political institutions suited to the Territory" and to this end should assure to inhabitants a progressively increasing share in the administrative and other services of the Territory, should develop their participation in advisory and legislative bodies "as may be appropriate to the particular circumstances of the Territory and its people" and should take all other "appropriate measures with a view to the political advancement of the inhabitants in accordance with Article 76 *(b)*" of the Charter; Article 7 contains an undertaking by the Administering Authority to apply in the Territory, *inter alia,* recommendations drawn up by the United Nations or its specialized agencies "which may be appropriate to the particular circumstances of the Territory" and conduce to the achievement of the basic objectives of the Trusteeship System; Article 8 contains safeguards of the native population in relation to land and natural resources; Article 12 contains an obligation by the Administering

Authority "as may be appropriate to the circumstances of the Territory" to continue and extend elementary education designed to abolish illiteracy and provide such facilities for secondary and higher education as "may prove desirable or practicable" in the interests of the inhabitants; Article 13 contains, *inter alia*, an undertaking to ensure freedom of conscience and religion in the Territory; Article 14 contains a guarantee by the Administering Authority of freedom of speech, of press, of assembly and of petition to the inhabitants of the Territory; Articles 15 and 16 are machinery provisions to ensure that the objectives of the Trusteeship System are achieved such as, for example, an obligation of the Administering Authority to make an annual report to the General Assembly on the basis of the Trusteeship Council's questionnaire; Articles 17 and 18 are ancillary in nature.

The different provisions of this category either contain or relate to undertakings entered into by the Administering Authority with the United Nations which concern themselves with the interests of the inhabitants and in particular the achievement of the objective indicated in Article 76 *(b)* of the Charter. They create obligations owing by the former to the latter but none owing to States in their individual capacity. The supervision of the Administering Authority's administration of the territory in giving effect to the objectives of the International Trusteeship System and the discharge of these obligations as contained in them fall, so far as contemplated by the Charter, within the functions of the United Nations exercised by the General Assembly. These provisions produced their effects for all States, Members of the United Nations, and in this sense each had an interest in their performance. This however was a political interest only—no matter what the nature or immediacy of the interest—to be expressed through the General Assembly of the United Nations. The general obligations contained in this category of provisions were owed to the United Nations in its organic capacity in the interests of the inhabitants of the Territory; they were not owed to States in their individual capacity. No legal right or interest is given individually to States, Members of the United Nations, in their performance—unless the adjudication clause, of itself, must be interpreted to give such an interest.

The obligations of the Administering Authority undertaken by it to the United Nations are expressed in broad terms and often, as will be seen, in words of very general political content. The promotion of free political institutions suited to the Territory, and measures to that end as may be appropriate to the particular circumstances of the Territory and its people, the provision of facilities which may prove desirable or practicable, the application of recommendations of the United Nations, etc., which may be

appropriate, etc., and conduce to the achievement of the objectives of the Trusteeship System, etc., relating to different obligations undertaken by the Administering Authority appear to be matters for political evaluation, and difficult, to say the least, of objective judicial adjudication. Any disputes which might arise in the United Nations as to whether or not the Administering Authority was discharging its obligations, so far as the provisions of the Trusteeship Agreement reveal—apart from whatever Article 19 was intended to provide—appear to be for determination within the General Assembly and nowhere else.

The second category of provisions are those under which the Administering Authority agreed with the United Nations to confer certain legal rights or interests upon States (or their nationals) in their individual capacity, thus giving rise to correlative obligations on the part of the Administering Authority vis-à-vis States, Members of the United Nations, in their individual capacity. The distinction between the two categories is most evident.

Thus Article 9 confers a number of such rights relating to equal treatment on social, economic, industrial and commercial matters for all Members of the United Nations and their nationals and provides that "the rights *conferred*[1] by this Article on nationals of Members of the United Nations apply equally to companies and associations controlled by such nationals ... in accordance with the law of any Member of the United Nations". By Article 10 measures to give effect to these rights are made subject to the duty of the Administering Authority under Article 76 of the Charter, etc., and Article 11 provides that nothing in the Trusteeship Agreement "shall *entitle*[1] any Member of the United Nations to *claim* for itself or its nationals ... the *benefits*[1] of Article 9" in any respect in which it does not give equality of treatment to inhabitants, companies and associations of the Territory.

Whereas the first category of provisions appear peculiarly for political evaluation, the second category clearly relate to provisions relating to rights of States or their nationals which admit of judicial interpretation and application.

* * *

It is contended by the Applicant that, though under the provisions of the Charter it may not have been essential to the effective working of the Trusteeship System, that there should be a competence in the Court to adjudicate on any alleged breach of a Trustee-

[1] Emphasis added.

ship Agreement in respect of the provisions thereof concerned with the social, economic, educational and political development of the people to independence or self-government, it was none the less open to the parties to a Trusteeship Agreement to provide that the Court should have such a competence. This, it is said, the Parties intended by Article 19 of the Trusteeship Agreement to do—indeed, that this was the prime purpose it was intended to serve. This is but a bare assertion of what in truth has to be established. There is not, in my view, the slightest reliable evidence, unless it be Article 19 itself, which is the subject of interpretation, to support this assertion.

The Purpose Article 19 Was Intended to Serve and its Interpretation

Article 19 appears to be no more than a jurisdictional clause to provide a tribunal for the adjudication of certain disputes, and in its essentials it is cast in a common form. Such a clause would normally refer to disputes which relate to rights and obligations between the parties which exist and are to be found *outside the terms of the clause itself;* disputes in which a State claims to be aggrieved by the infraction, on the part of another State, of an existing right or interest otherwise possessed by it.

Such a clause, in short, normally does not confer any additional right or interest upon a State other than a right to have recourse to the tribunal once the conditions imposed by the clause are complied with. A dispute within the meaning of such a clause normally would relate to a legal right or interest in the State claiming to be aggrieved, which resides or is to be found elsewhere than in such a clause itself. It would indeed be unusual to find in a jurisdictional clause a substantive right which itself could be made the subject of a dispute.

In the present case, rights and obligations as between the Applicant and the Respondent do exist outside the terms of the clause itself; they are to be found in the provisions of the Trusteeship Agreement which specifically confer individual rights upon the Applicant or its nationals with corresponding obligations upon the Administering Authority. The clause refers obviously to disputes relating thereto. Article 19 accordingly provides a tribunal for the adjudication of such disputes. Apart, however, from the right of recourse to the Court so provided, Article 19 does not provide, certainly not *in terms,* for any legal right or interest in a State beyond those which may be found elsewhere in other provisions of the Trusteeship Agreement.

The Applicant's contention would, if it were accepted, compel an interpretation of Article 19 giving it a meaning which normally such an adjudication clause would not bear. In truth the contention involves reading into the Article by implication a grant to States, in their individual capacity, of a substantive right in the performance of provisions of the Trusteeship Agreement, which them-

selves by their terms confer no individual legal right or interests upon States. Such an interpretation could only be justified if it could be established that it was strictly necessary so to do to give effect to the manifest intention of the parties. But where is that intention manifest? To establish it one would need to look outside the clause itself, which is the subject of interpretation, since normally such a jurisdictional clause confines itself to the conferment of an adjective or procedural right only, and the means by which it may be exercised; in brief a right of recourse to a tribunal in relation to a dispute concerning legal rights or interests to be found outside the perimeter of the clause itself.

There is no reliable piece of evidence outside the clause itself of any such intention on the part of the United Nations and the Administering Authority. In truth the evidence is the other way. In my opinion it is not possible to imply in Article 19 the conferment of any substantive right upon any State or read it as so doing. If a State, a party to a dispute, possesses, outside of Article 19 itself, a substantive individual legal right or interest an infraction or threatened infraction of which leads to a dispute, that dispute is one within the meaning of the Article. If the State does not possess any such substantive individual legal right or interest, no dispute within the meaning of Article 19 could arise.

The Applicant's contention however is that the scope and purpose of the Article—how that scope and purpose is to be ascertained except from the bare words of the Article itself is left rather in the air—must be understood to have accorded it an individual legal right or interest in the observance by the Administering Authority of its obligations towards the inhabitants and towards the United Nations which are contained in the provisions of the Trusteeship Agreement (thus forming the basis of a dispute between itself and the Administering Authority) although those provisions do not, in themselves, accord to the Applicant any such right or interest.

Article 19, in my opinion, must be interpreted in a sense which reconciles the rights and obligations of the Applicant and the Respondent. These rights and obligations—whatever they may be—reside not in Article 19 itself but elsewhere in the provisions of the Trusteeship Agreement. Read in their context, the Article refers to disputes relating to the interpretation or application of the provisions of the Agreement which confer individual rights on a State or its nationals. So read, it makes sense. In my view, read in its context, it refers to such disputes only.

* * *

This view appears strikingly confirmed by facts known to the Sub-Committee of the Fourth Committee of the General Assembly

appointed to examine eight draft trusteeship agreements (including that the subject of present consideration) which later were approved by the General Assembly.

The draft first examined by that Sub-Committee was that relating to Western Samoa. Its provisions were exhaustively scrutinized, as indeed were those of all the drafts; the New Zealand draft on which most of the discussion took place was, however, taken as a basis for the examination of all other draft trusteeship agreements [1].

The Western Samoa draft contained the adjudication clause. In the course of considering a modification to the clause proposed by the delegate of China (but not adopted) at its meeting on 20 November 1946, such attention as was given to this clause by the Sub-Committee (and so far as the Summary Record reveals, very little was, and none in my opinion on the purpose it was intended to serve) centred around the question whether if a dispute arose between the Administering Authority and a State a Member of the United Nations it should not, at first, be referred to the Trusteeship Council [2]. A draft Trusteeship Agreement relating to New Guinea was also, with six other draft agreements, before the Sub-Committee, all six of which contained the adjudication clause. The delegate of Australia during discussion referred to the fact that there was no adjudication clause in the New Guinea draft. An obligation to submit to this Court a dispute between itself and another State was, the delegate of Australia said, covered by its acceptance of the compulsory jurisdiction of the Court by a declaration under Article 36 of the Court's Statute [2].

Whatever its extent, that obligation was thus limited to the terms of such declaration and governed by it.

It was thus apparent to the Sub-Committee that any dispute between Australia as an Administering Authority and another State in relation to the interpretation or application of any provision of that Trusteeship Agreement would, if this statement was accepted as an equivalent of the adjudication clause which appeared in all the other drafts, or a reason for its omission, be subject not only to the terms of Article 36 of the Statute and the terms of Australia's declaration of acceptance thereunder, but could only relate to such provisions (if any) of that Trusteeship Agreement—with an adjudication clause omitted—whereunder some individual legal right or interest was conferred upon a State a Member of the United Nations. Such a legal right or interest could not find its basis in a non-existent adjudication clause and could therefore only have existence apart therefrom. In short, whether any State did or did not have an individual legal right or interest in the per-

[1] United Nations Official Record of 2nd part of 1st Session of General Assembly, Fourth Committee, Trusteeship, Part II, pp. 2-3.

[2] *Ibid.*, at pp. 85 *et sqq.*

formance by the Administering Authority of *any* obligation contained in the New Guinea Trusteeship Agreement and a right to invoke the jurisdiction of this Court in a dispute between it and the Administering Authority relating to the interpretation or application of a provision of that Trusteeship Agreement would need to be determined, exclusively from the terms of the Agreement themselves (with the adjudication clause omitted), and the terms of Australia's acceptance of the Court's jurisdiction under Article 36 of the Court's Statute [1].

Accordingly if the statement of the Australian delegate was accepted by the Committee as explaining the absence of an adjudication clause in the draft Trusteeship Agreement relating to New Guinea, no dispute relating to the Trusteeship Agreement could be adjudicated upon by this Court unless the provisions of the Trusteeship Agreement themselves gave an individual right or interest to a State in the performance of all or any of its provisions, and then only to the extent it fell within the ambit of Australia's declaration of acceptance of this Court's jurisdiction.

If then the statement of the Australian delegate was so accepted by the Sub-Committee, it is hardly conceivable that the Sub-Committee would have thought that the presence of the adjudication clause was necessary to give or that it gave any rights or interests to any State beyond such as might be found within the provisions of a Trusteeship Agreement outside an adjudication clause itself.

If, on the other hand, as will subsequently be considered, the Sub-Committee did not accept the statement of the delegate of Australia as the equivalent of the adjudication clause, or as explaining its absence, and if, as is claimed (and as was held by this Court in the *South West Africa* cases to be so in respect of mandate instruments), the all-important scope and purport of the clause must be understood to have accorded to a State, a Member of the United Nations, a legal right or interest in the observance by the Administering Authority of its obligations towards the inhabitants contained in the Trusteeship Agreement, it is beyond understanding

[1] Australia's obligation to submit any dispute to the jurisdiction of this Court was governed by Article 36 (5) of this Court's Statute, in virtue of a declaration to the Permanent Court of International Justice dated 21 August 1940, which continued in force until 6 November 1954 when Australia made its first declaration of acceptance of this Court's jurisdiction under Article 36 (2) of the Court's Statute.

Its declaration of 1940, which was on the basis of reciprocity, was for a period of five years (which had in 1946 already expired) and thereafter until notice of termination. Thus it could have terminated its acceptance at any time, or renewed it subject to special conditions and exceptions. Its acceptance of the Court's jurisdiction could accordingly only apply to a limited number of States, Members of the United Nations, so creating inequality as between them; moreover, it could only apply to disputes which fell within the content of Australia's declaration if it continued in force, or any declaration which replaced it.

why, in the meticulous scrutiny to which each Trusteeship Agreement was subjected by the Sub-Committee, no insistent attempt was made, when all other Articles thereof were settled, to have an adjudication clause included in the Australian draft Trusteeship Agreement, why no mention of its omission was contained in the Report of the Sub-Committee to its parent Committee, or in the Report of that Committee to the General Assembly or in the debates in the General Assembly itself.

However the matter is looked at it is, I think, evident that if there is not to be found in the body of a Trusteeship Agreement (that is, in the provisions thereof, apart from the adjudication clause itself) provisions conferring upon a State, a Member of the United Nations, a legal right or interest in the performance by the Administering Authority of some obligation undertaken by it under one or more of its provisions—the adjudication clause would not itself confer any right on a State to have interpreted or applied by this Court *any* provision of the trusteeship agreement. The operation of the clause is limited, subject to the conditions stipulated therein, to providing a tribunal to which recourse may be had by a State in relation to any dispute relative to the interpretation or application of provisions of the trusteeship agreement which in themselves accorded an individual legal right or interest in the performance of obligations of the Administering Authority contained therein [1].

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[1] By article 76 *(d)* of the Charter it was provided that one of the objectives of the International Trusteeship System was—

> "to ensure equal treatment in social, economic and commercial matters for all Members ... subject to the provisions of Article 80".

Article 80 provided that—

> "Except as may be agreed upon in individual trusteeship agreements ... nothing in this Chapter shall be construed in or of itself to alter in any manner the rights whatsoever of any States ... or the terms of existing international instruments..."

Every Trusteeship Agreement approved by the General Assembly contained the central obligation of the Administering Authority to administer in such a manner as to achieve the basic objectives laid down in Article 76 of the Charter. Though in my opinion the undertaking of the Administering Authority in respect to this obligation, given to the United Nations, did not confer upon any State or its nationals any individual legal right or interest in its performance either in relation to objective 76 *(d)* of the Charter or otherwise (an undertaking to the United Nations on the part of the Administering Authority to *achieve* general objectives), it may be open to the faint argument that the undertaking read together with Article 76 *(d)* of the Charter did confer such a right or interest by necessary implication. Whatever be the correct view, it still remains true that the adjudication clause is limited to disputes relating to such provisions of the Trusteeship Agreement whereunder such rights or interests are conferred upon a State or its nationals.

The Articles in certain of the Trusteeship Agreements in which individual legal rights or interests in States were expressly conferred upon States or their nationals (such as are to be found in Article 9 of the Trusteeship Agreement in the instant case), though they relate in general to the broad objective stated in Article 76 *(d)*

* * *

There are, however, reasons independent of those already advanced which compel an interpretation adverse to that contended by the Applicant. The Applicant, relying as has been noted upon the words "any dispute whatever ... relating to the provisions of the Trusteeship Agreement" and the Court's statement in the *South West Africa* cases that these words admit of no exception, claims that the natural and ordinary meaning of these words exclude any other interpretation than that which it asserts they bear.

Although the cardinal rule of interpretation is that words are to be read, if they may so be read, in their ordinary and natural sense, this rule is, as I have had occasion before to observe, sometimes a counsel of perfection, for ambiguity may be hidden in the plainest and most simple of words even in their ordinary and natural meaning. In the context of Chapter XIII of the Charter and the provisions of the Trusteeship Agreement itself, Article 19 is not by any means as clear as it is contended by the Applicant [1]. On close examination it presents an important ambiguity, as did the comparable clause in the *South West Africa* cases, which calls for an interpretation which goes beyond a bare examination of the words to be found in Article 19 detached from its context. That ambiguity is introduced by the words "*if* it cannot be settled by negotiation or other means".

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of the Charter, were the subject of prolonged and intensive negotiation when the draft agreements were under examination by the Sub-Committee of the Fourth Committee. These provisions specifically conferred rights; such rights were removed from any limitations under Article 80 of the Charter; they extended the field to include industrial matters as well as matters social, economic and commercial; they made provisions against the granting of general monopolies subject to certain exceptions in favour of the Administering Authorities (see Article 10 of the present Trusteeship Agreement), and in some made the entitlement of the benefits of the rights conferred subject to reciprocal equality of treatment by other States (see Article 11 of the present Trusteeship Agreement and compare Article 8 of the Trusteeship Agreement relating to French Cameroons). Moreover in the Trusteeship Agreement relating to Western Samoa, a right—the missionary right—was conferred upon nationals of States, Members of the United Nations, which seems to have little or nothing to do with the objective indicated in Article 76 *(d)* of the Charter.

[1] Constantly it is asserted that the language of the adjudication clause is clear, precise and unambiguous. It is not without significance that during the discussion in the Sub-Committee of the Fourth Committee on the Western Samoan draft the view of at least the delegate of one State was that it was not clear whether the adjudication clause obliged the State in dispute with the Administering Authority also to submit the dispute to this Court, nor whether the adjudication clause automatically referred a dispute to the Court or whether it was necessary first that a special agreement should be entered into (which was precisely what the Applicant in this case in its letter of 1 May 1961 asked the Respondent to agree to).

However this may be, it would seem to indicate that the language of the adjudication clause, clear and unambiguous as it claimed to be, may not be so.

These words, of themselves, provide the key to the interpretation of Article 19, in particular the key to the discovery of the meaning of the words "any dispute whatever".

The condition "if it cannot be settled by negotiation or other means" is one which applies to all disputes within the meaning of the clause and thus characterizes the disputes which fall within the ambit thereof. As Judge Moore pointed out in the *Mavrommatis Palestine Concessions* case (P.C.I.J., Series A/B, Judgment No. 2 at p. 62) this condition is to be found in a large number of arbitration treaties entered into over the years both before and since the mandate instruments and trusteeship agreements "as a vital condition of their acceptance and operation". The words do not mean, as he pointed out, that the dispute "must be of such a nature that it is not susceptible of settlement by negotiation"; this would destroy the effectiveness of the condition.

Read in their present context they necessarily imply, in my opinion, that a dispute within the meaning of Article 19 must be of a class, character or type which is *capable of being settled* between the parties thereto in a final manner and between parties having the competence so to do. Whatever is the meaning to be given to the words "or other means"—and this will be considered later—they must, in my view, mean that the parties to the dispute are able to choose and agree upon the means to be employed to *settle* the dispute finally, and competent to bind themselves to the result of the means employed to achieve a settlement. Thus the dispute must be one which each is competent to settle between itself and the other State or States whatever the means employed so to do.

A dispute which relates to individual interests or rights of a State or its nationals conferred by the provisions of the Trusteeship Agreement is inherently capable of final settlement between the Administering Authority and a State, a Member of the United Nations[1]; but a dispute which is not of that class, character or type but on the contrary is of a class, character or type which relates to the performance of obligations stipulated therein undertaken by the Administering Authority with the United Nations, in the interests of the peoples of Trust Territories, and in defence of those interests, to achieve the advancement and well-being of the peoples of the Trust Territory and their development to the ultimate goal of independence or self-government, in accordance with the objectives of the International Trusteeship System established by the Charter of the United Nations, is inherently incapable of settlement by any means between the Administering Authority and any other State.

These last-mentioned obligations, which hereafter are sometimes referred to as general obligations, directed to promotion of the

[1] Any such right might presumably be renounced by a State (*Mavrommatis Concessions*, P.C.I.J., Series A/B, Judgment No. 2 at p. 30).

political, economic, social and educational advancement of the inhabitants and their progressive development toward self-government or independence; cannot of their very nature be affected, altered, modified, amended or compromised in any manner whatever without the consent of the United Nations. It would not be competent, in my opinion, for the Administering Authority to agree with another State that any one of these general obligations should in any particular circumstances be interpreted or applied in a certain manner. In my opinion the meaning of the words "any dispute whatever", conditioned by the words "if it cannot be *settled* ... etc.", between the parties, read in their context refer to such disputes in relation to the interpretation and application of the provisions of the Trusteeship Agreement, which of their nature, are of a class character or type which the parties are competent to settle between themselves. All disputes whatever relating to the interpretation or application of provisions of the Trusteeship Agreement which are of that class, character or type, but only such disputes as are, are those to which Article 19 has application.

* * *

The task of the Court is to ascertain the intention of the United Nations and the Administering Authority when this Agreement was entered into. It is indisputable, I think, that the General Assembly, acting within its authority under the Charter, and the Administering Authority, were entitled, under the terms of the Charter and as the parties to the Trusteeship Agreement, to interpret the provisions thereof relating to the general obligations of the Administering Authority, and apply them as they agreed between themselves. It would seem somewhat extreme to ascribe to the United Nations—acting through the General Assembly—quite apart from any intention of the Administering Authority so to do, an intention to grant to any State a right, at its own unrestrained will, to challenge judicially an interpretation or application of the Trusteeship Agreement which the General Assembly (the organ chosen by the Charter to exercise all the functions of the United Nations relating to the Trusteeship Agreement) and the Administering Authority, agreed between themselves, gave effect to the Agreement and so satisfied its requirements.

* * *

These considerations alone compel me to the conclusion that Article 19 should be interpreted as applying exclusively to disputes relating to individual rights or interests accorded to a State, or its nationals, by provisions of the Trusteeship Agreement.

* * *

By way of parenthesis it should be added that the words "or other means" ("if it cannot be settled by negotiations or other means")—words which did not appear in the Mandate Instruments—do not, for reasons already advanced, affect the conclusion arrived at on the interpretation to be accorded to Article 19. A few words, however, on the meaning to be accorded these words "or other means" may conveniently be inserted.

The words, in my opinion, must be construed *ejusdem generis*. There is some confirmation *aliunde* for this view.

Among eight Trusteeship Agreements approved by the General Assembly on 13 December 1946 there is to be found one and one only in which the adjudication clause varied in verbiage from that contained in each of the others. Yet it could not be disputed, I think, that the purpose and scope of each was precisely the same. In the Trusteeship Agreement relating to Western Samoa the relevant words are "by negotiation or *similar* means". The meaning of the words employed in the other Trusteeship Agreements should be interpreted in the same sense.

* * *

The Surrounding Circumstances when the Trusteeship Agreement was Entered into

That the Applicant's contention on the interpretation to be accorded Article 19 is unfounded is also, I think, evident from the surrounding circumstances at the time the Trusteeship Agreement was entered into, some of which have already been referred to.

It will be recalled that the Mandates were divided into three categories referred to generally as A, B and C Mandates depending upon the state of political development which they had achieved. The people in the "C" Mandated Territories were, due to their remoteness from the centres of civilization and other factors, for the most part in the most backward state of development. One would think that if the United Nations, as one of the parties to the Trusteeship Agreements (the great majority of which, including that in the present case, were negotiated and entered into at the same time in 1946), intended that an important, if not the overriding purpose of the adjudication clause we are concerned with was to provide for judicial adjudication by this Court at the instance of any State, a Member of the United Nations, to defend or assert the interests of the peoples of these territories in order to protect them against breaches of obligations undertaken by the Administering Authority to these peoples, such a provision as Article 19—which had appeared in all the mandate instruments—was very much more advisable or desirable to be inserted in Trusteeship Agreements which related to previous "C" Mandates than

would be the case in Trusteeship Agreements relating to previous "B" mandated territories whose people were more advanced in political development. Certainly it could not with reason be contended it was any the less so. Yet the significant fact is that of the Trusteeship Agreements dealing with the four previously mandated "C" territories only one contained any adjudication clause[1]. This fact bears directly upon the purpose the adjudication clause was intended to serve in the Trusteeship Agreements in which it did appear. In the Trusteeship Agreements where the adjudication clause does not appear its omission was not as we have seen due to mistake or oversight, it was omitted deliberately. The omission of the adjudication clause in these three Trusteeship agreements does not square with the contention that the purpose of the clause was to secure adjudication by this Court at the instance of any State, a Member of the United Nations, claiming that there had been, or was continuing, a breach by the Administering Authority of *any* of its obligations under the provisions of the Trusteeship Agreement including those undertaken by the Administering Authority which were concerned with the welfare and political advancement of the inhabitants of the territory.

The obvious inference is that an adjudication clause was not considered in these cases as serving *any* useful purpose. If this inference is correct, as I believe it is, it would point clearly in the direction that the purpose which the adjudication clause was to serve, in such Trusteeship Agreements in which it did appear, was not to accord to any State any right to invoke the jurisdiction of the Court in relation to a dispute between itself and the Administering Authority on the interpretation or application of any of the general provisions of the Trusteeship Agreement which were concerned with the carrying out of the objectives of the Trusteeship System in the interests of the indigenous population; it was to serve quite a different purpose. It seems inescapable that the purpose could only have been to provide a tribunal for the adjudication of disputes between the Administering Authority and a State relating to provisions of the Trusteeship Agreements which by their terms conferred individual rights upon States or their nationals.

Thus the surrounding circumstances at the time the present Trusteeship Agreement was entered into negative the interpretation of Article 19 contended for by the Applicant. The omission of the adjudication clause in these three Trusteeship Agreements is, I think, conclusive against the Applicant's contention on the meaning of Article 19.

* * *

[1] The three in which it did not appear were those relating to New Guinea, Nauru and the previous Japanese Mandate in the Pacific.

The matter does not, however, rest here. On the same day, namely 13 December 1946[1], the General Assembly approved two Trusteeship Agreements which related to previous "C" Mandates, namely Western Samoa and New Guinea: in one the adjudication clause appears, *in the other there is none.*

In the mandate instruments relating to these two territories there was a provision which conferred rights or interests upon States Members of the League or their nationals, and each contained the adjudication clause[2]. These rights, considered by many States, Members of the League, to be of importance in these somewhat primitive areas, were, in terms, that the Mandatory Power "Shall allow all missionaries, nationals of any State, a Member of the League of Nations, to enter into, travel and reside in the territory for the purpose of prosecuting their calling".

When Western Samoa was brought under the Trusteeship System of the Charter, its Trusteeship Agreement, after stipulating the obligation common to all Trusteeship Agreements, namely to administer the territory so as to achieve the objectives of Article 76 of the Charter[3], in a subsequent provision, again accorded the same rights to missionaries, nationals of a State, a member of the United Nations as were contained in the mandate instrument. Consequently the adjudication clause found its place in the relevant Trusteeship Agreement, just as it did in the mandate instrument. The Trusteeship Agreement which related to New Guinea, on the other hand, did not contain *any* provision specifically according *any* rights or interests to States or their nationals, the rights accorded to missionaries, etc., thus were not included.

During the course of the deliberations in the Sub-Committee of the Fourth Committee of the General Assembly, which scrutinized the provisions of each draft Trusteeship Agreement before it, a number of new clauses to the New Guinea draft (some of them designed to have written into that draft the conferring of individual rights or interests on States, Members of the United Nations, or their nationals, similar to those conferred in the Trusteeship Agreement presently before the Court[4]) were proposed by different delegations.

Specifically there was a proposal by the United States Delegation to include two clauses, the one in identical terms to

[1] The same day on which the Trusteeship Agreement for British Cameroons was approved by the General Assembly.

[2] In the case of "A" and "B" Mandates the rights specifically conferred upon States or their nationals were quite extensive; in the case of "C" Mandates these rights were minimal.

[3] See footnote 1 at pp. 87, 88, ante.

[4] See Annexes 5 to 5*(g)* to United Nations Official Records of second part of 1st Session of the General Assembly, pp. 240 to 248 and sub-committee Doc. A/C.4/Sub. 1/31.

Article 9 of the Western Samoan draft (freedom of conscience and religion) which conferred rights upon missionaries, nationals of States, Members of the United Nations, to enter, travel, reside and carry on their calling; the other identical to Article 16 of the Western Samoan draft, the *adjudication clause.* These proposals had been before the Sub-Committee for a considerable time and had been circulated[1].

The Sub-Committee had commenced its deliberations on 15 November 1946. At its first meeting of 3 December 1946 it was decided to postpone discussion of the new Articles proposed, *inter alia,* by the United States until the end of the examination of the New Guinea draft agreement.

At the Sub-Committee's second meeting the same day the modification proposed by the Delegation of the United States to the draft agreement for New Guinea, namely to add an Article identical to Article 16 of the draft agreement for Western Samoa, was postponed for later consideration in connection with other proposed new articles.

Later at the same meeting the delegate for Australia made the Australian Government's position quite plain. It was prepared, in order to meet a number of proposed modifications to its draft, to add, as it did, an additional clause (now Article 8 of the Trusteeship Agreement for New Guinea) but was not prepared to go any further. This additional clause did not contain any provision conferring individual rights upon States, Members of the United Nations or their nationals; in particular it did not provide for any rights to missionaries, nationals of a State, a Member of the United Nations[2]. On the following day at the Sub-Committee's second meeting of that day the delegate of the United States withdrew his proposal to insert certain Articles in the New Guinea draft, specifically he withdrew the proposal to insert an Article concerning "*the procedure to be followed with respect to disputes over the interpretation and application of the provisions of the draft agreement*[3]".

There was no protest, no debate, no comment. Nor was there any when the Sub-Committee reported to its parent Committee.

One week after, all eight of the Trusteeship Agreements to which reference has previously been made (including the Trusteeship Agreement for the British Cameroons) were approved by the General Assembly. No observation of any kind was made on the

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[1] Records of 2nd part of 1st session of the General Assembly Fourth Committee; Trusteeship Part II, p. 26, Annex 5 *(b)* and Sub-Committee Doc. A/C.4/Sub. 1/31.

[2] *Ibid.,* at pp. 151-152 and Annexes 5 *(f)* and 5 *(h)*.

[3] Records of 2nd part of 1st session of the General Assembly Fourth Committee; Trusteeship Part II, pp. 163-164.

absence of an adjudication clause in the New Guinea Trusteeship Agreement.

It seems hardly believable, if the all-important purpose of the adjudication clause were that presently contended for by the Applicant, that the omission of an adjudication clause could have passed without some comment. Yet none was made.

In the light of this record it is quite impossible to reconcile what took place in the Sub-Committee, the Fourth Committee and the General Assembly itself with the contention of the Applicant that Article 19 of the Trusteeship Agreement was intended to accord a right to any State, a Member of the United Nations, to have recourse to this Court in relation to a dispute concerning the interpretation or application of the general provisions of a Trusteeship Agreement dealing with the obligations of an Administering Authority undertaken by it in the interests of the inhabitants of the territory. Where there were to be found in a Trusteeship Agreement approved by the General Assembly *any* provisions which conferred or were understood to confer individual rights or interests upon States, Members of the United Nations, or their nationals, the adjudication clause appeared, where a Trusteeship Agreement contained none, as was the case for example of that relating to New Guinea, no adjudication clause appeared[1], the General Assembly did not regard it as serving any purpose.

This conclusion is I think inescapable. However, in the remote possibility that it could be urged that Australia's explanation as to the absence of the adjudication clause to which reference has previously been made[2] was accepted by the Sub-Committee as sufficient or as the equivalent of an adjudication clause the same conclusion, for reasons already advanced, must be reached.

However the matter is viewed the interpretation of Article 19 of the Trusteeship Agreement in the instant case contended for by the Applicant is shown to be without substance.

* * *

Having regard to all the foregoing considerations it would not seem possible to support the proposition that Article 19 of the Trusteeship Agreement with which the Court is presently concerned had anything to do with the general obligations of the Administering Authority's obligations such as those on the alleged breach of which the Applicant in this case bases its claim for relief. It is

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[1] The mandate instrument and the Trusteeship System Agreement in relation to Nauru stand precisely on the same footing as that relating to New Guinea. The Trusteeship Agreement relating to Nauru was approved by the General Assembly nearly a year later, in November 1947. The absence of an adjudication clause did not invite comment.

[2] See pp. 85 and 86 and footnote at p. 86, *ante*.

demonstrated that a dispute within the meaning of Article 19 of the Trusteeship Agreement relates solely and exclusively to individual rights or interests, whatever they were, which were conferred by provisions of the Trusteeship Agreement upon States or their nationals.

* * *

The history of the drafting of the adjudication clause and how and why it came to be included in the Mandate instruments from which it was taken when the Trusteeship Agreements were being drafted bears out completely the conclusion arrived at.

The inescapable truth of the matter is that the adjudication clause to be found in each mandate instrument and that found in Trusteeship Agreements had a common parentage. They were conceived to serve the same purpose, their scope and intendment were the same. They had nothing to do with the general obligations of either the Mandatory Powers or the Administering Authorities, or the interests of the peoples of the territories, but, on the contrary, were intended to serve the mundane purpose of providing a tribunal for the adjudication of disputes arising out of the interpretation or application of provisions in both the Mandate Instruments and the Trusteeship Agreements which in themselves conferred individual rights or interests on States or their nationals, and were intended to serve this purpose only [1].

* * *

If, however, contrary to the conclusion I have felt bound to arrive at on the interpretation to be accorded Article 19 the Court has jurisdiction in these proceedings I agree that the Court, for reasons appearing in its Judgment, should refrain from proceeding further.

(Signed) Percy C. SPENDER.

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[1] See *I.C.J. Reports 1962*, Joint Opinion of Judge Sir Gerald Fitzmaurice and myself, pp. 554-559, where the history of the origin and development of the adjudication clause and how it came to be inserted in the mandate instruments is reviewed.