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Chairman: Prince WAN WAITHAYAKON (Thailand).

Question of South West Africa: advisory opinion of the International Court of Justice (*continued*)

[Item 35]*

1. The CHAIRMAN asked if any members of the Committee wished to explain the votes they had cast on the draft resolution approved at the 196th meeting.
2. Mr. SOLDATOV (Union of Soviet Socialist Republics) recalled that his delegation had voted in favour of sub-paragraph (a) of paragraph 4 of the draft resolution, but he emphasized that the States which were permanent members of the Security Council should not be called upon to appoint experts. His delegation would continue to take a firm stand on that point. It had voted against sub-paragraph (d) of the same paragraph on the grounds that it was inadequate. The position was perfectly clear: the various measures taken by the Union of South Africa were obvious violations of the provisions of the Charter. That was why his delegation had submitted an amendment (A/C.4/L.126) to draft resolution A/C.4/L.122.
3. With regard to the paragraphs relating to the advisory opinion of the International Court of Justice, his delegation had abstained from voting on them because it had always considered that the question did not come within the competence of the Court and that, in addition, an advisory opinion from the Court was unnecessary since the problem was quite clear.
4. Mr. CRAW (New Zealand) explained that his delegation had voted against the draft resolution for the reasons given by the representatives of Peru and Sweden (196th meeting). His delegation would have preferred the draft resolution contained in document A/C.4/L.124/Rev.1.
5. Mr. SCHAULSOHN (Chile) recalled that his delegation had voted against the text adopted on the grounds that the draft resolution contained in document A/C.4/L.124/Rev.1, which had not been put to

the vote, was preferable, since its provisions took more account of the Court's advisory opinion. The statements made by the representative of the Union of South Africa (196th meeting) seemed only to confirm that view. He pointed out that the draft resolution approved at the 196th meeting had been approved by only a small majority, which meant that it might not be adopted by the General Assembly. He therefore strongly urged delegations to make an attempt to reach agreement before the question came up for discussion in the Assembly.

6. Mr. KAPSAMBELIS (Greece) said that his delegation had voted against the various paragraphs of the draft resolution and against the text as a whole because it considered that a different draft resolution on the same subject would have had a better chance of gaining the support of a larger majority.

7. Mr. S. RAO (India) said that his delegation had voted in favour of the draft resolution. He wished to draw the Committee's attention to passages from statements made on various occasions by the Prime Minister of the Union of South Africa. For example, the latter had stated, on 14 April 1950 before his country's Parliament, that he was still determined to reject any request from the United Nations that South West Africa should be placed under the Trusteeship System, or any demand that the Union of South Africa should submit annual reports or repeal certain of its legislative provisions. He had added that the United Nations had asked the Court for an opinion, not for a verdict. After the Court had delivered its advisory opinion, the Prime Minister of the Union of South Africa had pointed out that there were contradictions in that opinion, for it stated at one point that the Union of South Africa was not obliged to place South West Africa under the Trusteeship System, but it also stated that the United Nations had certain rights with respect to the Territory. He had added that situations such as that created by the statements of the Reverend Michael Scott might recur and provoke a flagrant intervention in the internal affairs of the Union of South Africa.

* Indicates the item number on the General Assembly agenda.

8. On 7 August 1950, the Prime Minister of the Union of South Africa had again stated that he had no intention of yielding to the demands of the United Nations, adding that the League of Nations had been a reasonable organization with which negotiations had been quite possible, whereas the United Nations wished to impose its ideas, particularly with regard to the equality of the white and the coloured races.

9. Mr. Rao had thought it important to refer to those statements for the benefit of members of the Committee who still advocated negotiations, so that they would be fully aware of the results likely to be achieved in that field.

10. Mr. GARREAU (France) said that his delegation accepted the advisory opinion of the International Court of Justice but had voted against the draft resolution because it considered that text to be in contradiction with the terms of the advisory opinion. The problem before the General Assembly was to decide on the conditions which would lead to the restoration of the mandates system for South West Africa in a form as close as possible to the original Mandate. No unilateral decision could be taken in that respect, however. His delegation considered that the only possible way of implementing the Court's advisory opinion was to enter into negotiations, a course which seemed very difficult following the Committee's approval of the draft resolution.

11. He strongly urged delegations to be realistic and to consider whether it would not be advisable to reopen the discussion.

12. Mr. RYCKMANS (Belgium) explained that he had voted against the draft resolution because he had felt that its adoption would lead the United Nations along a hopeless course.

13. After hearing the points made by the representative of India, he wondered whether there was really any hope that the Union of South Africa would be persuaded to submit annual reports and transmit petitions, unless there were initial negotiations. Those who had not yet lost all hope of solving the problem could always in the last resort submit draft resolution A/C.4/L.124/Rev.1 to the General Assembly.

14. Mr. ABRAHAM (Ethiopia) said that his delegation had been in full agreement with the draft resolution which had been approved, but had been obliged to abstain from voting on it because it could not accept the procedure proposed for the implementation of the Court's advisory opinion. The Committee's fundamental aim should be to ensure the welfare of the population of South West Africa. He was therefore sorry that members who had always shown a spirit of conciliation had been unable to agree on a text which would obtain a two-thirds majority. If the draft approved by the Committee was rejected by the General Assembly, he thought the question should be reopened on the basis of a text along the lines of draft resolution A/C.4/L.124/Rev.1. It was essential that something should be done so that the people concerned would not lose hope.

15. Mr. SUCHARITAKUL (Thailand) explained that his delegation had voted against the preamble to

the draft resolution because it preferred the preamble to the draft of which it was one of the sponsors (A/C.4/L.124/Rev.1).

16. Mr. KHALIDY (Iraq) recalled that he had not taken an active part in supporting either of the draft resolutions, although he was a sponsor of one of them. It was true that the draft resolution had been approved by a very narrow margin and that it would in all likelihood be rejected by the General Assembly. He therefore appealed to all members of the Committee to try to find some compromise text on which more agreement could be reached.

17. Mr. JOBIM (Brazil) thought that, in approving the draft resolution, the Committee had shown that it was not prepared to tolerate measures which might run counter to the permanent interests of the indigenous inhabitants of the territory concerned. It had thus respected the principle regarding Non-Self-Governing Territories embodied in the Charter.

18. The representative of the Union of South Africa had tried to prove (196th meeting) that his country was under no obligation to maintain South West Africa under the Mandate or to place it under the Trusteeship System. Mr. Jobim pointed out that all delegations were agreed on the obligations imposed by the Mandate but were far from agreed regarding the Trusteeship System. The representative of the Union of South Africa had also stated that he did not share the Brazilian delegation's view on the inevitability of the application of the Trusteeship System.

19. Everyone was well aware that the most highly qualified persons who had interpreted the Charter had stated that its drafting had been strongly influenced by the principles of Anglo-Saxon law, which meant that its terms were never rigid. Moreover, it was clear from paragraph 2 of Article 2 and paragraph 2 of Article 80 that, besides the strictly legal obligations, there were also moral obligations based on the notion of a trust and, consequently, upon good faith. That was in fact the overriding concept in Anglo-Saxon law. In his opinion, even the obligations based on good faith had some of the characteristics of legal obligations. History had shown that the legal sanction of a trust was based on the fact that the trustee had certain moral obligations. It was sufficient to add that the Charter embodied the general principles which applied to the concept of a trust in Anglo-Saxon law.

20. During his brilliant survey of English law, the representative of the Union of South Africa had omitted to mention one important aspect—the notion of equity. That principle was applicable in cases of transactions which conferred an otherwise non-existent moral right, particularly in the case of a trust, or when it was necessary to protect already established rights. Whenever there was a conflict between those two aspects of the legal system, it was the principle of equity which prevailed. Furthermore, paragraph 2 of Article 38 of the Statute of the International Court of Justice provided for recourse to that principle.

21. Even if delegations did not wish to apply the principles of Anglo-Saxon law in the case of South West Africa, they could not but conclude that the

Mandatory Power was under an obligation to place that Territory under the Trusteeship System. It should not be forgotten that in Roman law, as well as in Germanic law, moral obligations, or those involved in a trust, acquired a certain legal force. Once a person had contracted such an obligation, he could not afterward evade it or alter the consequences.

22. The Union of South Africa had recognized the authority of the United Nations which, through the intermediary of the General Assembly and the Trusteeship Council, received annual reports and took new decisions. Thus the Mandatory Power could no longer evade its obligations which, though they might formerly have been moral obligations, had now become legal, even if the question was considered from the point of view of the more restrictive principles of Roman law. If the Committee wished to abide by the principle on which the Mandates System had been based, it could not contemplate any solution save the application of the Trusteeship System to South West Africa.

23. His delegation supported the draft resolutions before the Committee (A/C.4/L.122 and A/C.4/L.128). In conclusion, he recalled that Burke, who had been the first to proclaim the trust principle, had stated in 1783 before the House of Commons that the very essence of the system lay in the fact that the trustee was called upon to account for the manner in which he was fulfilling his obligations and that he would lose his rights as trustee if he did not act in the interests of the trust.

24. Mr. LANNUNG (Denmark) fully agreed with the views expressed by the representatives of Ethiopia and Iraq. He hoped that many delegations were prepared to try to find a compromise text on the basis of draft resolution A/C.4/L.124/Rev.1.

25. Mr. DONGES (Union of South Africa) thought it would be appropriate to inform the Committee of his delegation's attitude towards the two draft resolutions before the Committee (A/C.4/L.122 and A/C.4/L.128). His government had always refused categorically to place South West Africa under the Trusteeship System. There had been no change since it had first expressed that refusal. On the contrary, his government had even stronger reasons now for standing by its attitude and for continuing to maintain that it had no obligation, either moral or legal, to conclude a trusteeship agreement with the United Nations. There was therefore no point in adopting draft resolutions to that end, for they would simply repeat resolutions previously adopted by the General Assembly, resolutions containing invitations which were still open for acceptance by the South African Government if it so desired. Such invitations were in any event unnecessary.

26. He appreciated the arguments raised by the representative of Brazil in support of a legal obligation on the part of the South African Government based on equity jurisprudence, but pointed out that one of the members of the International Court of Justice, who was highly qualified in the matter, had reached very definite conclusions on the subject. He wondered whether the representative of Brazil was prepared to accept those conclusions.

27. Mr. RYCKMANS (Belgium) saw no reason why the General Assembly should not invite the Union of

South Africa to negotiate an agreement on the subject of South West Africa. Nevertheless, since the advisory opinion of the International Court of Justice stated that the Union of South Africa was under no obligation to place the Territory in question under the Trusteeship System, it would seem better to avoid any express reference to a trusteeship agreement. He would therefore vote against the draft resolutions in documents A/C.4/L.122 and A/C.4/L.128.

28. Mr. TURGEON (Canada) assumed that all members of the Committee were extremely anxious that the problem should be solved, and that they recognized, as the representative of Ethiopia had done, that those who would have to bear the consequences of a delay were the inhabitants of the Territory itself. His delegation would vote against the two draft resolutions A/C.4/L.122 and A/C.4/L.128, for it did not think it was enough simply to adopt texts which might well prove ineffective; it was essential to try to take steps to ensure the solution of the problem in the very near future.

29. His delegation would willingly have voted in favour of draft resolution A/C.4/L.124/Rev.1, for the steps it envisaged were exactly those which should normally be taken as a result of the Court's advisory opinion.

30. Mr. INGLES (Philippines) said that in order to help the Committee to reach agreement on a single text reaffirming the previous resolutions of the General Assembly, his delegation, in consultation with the other sponsors of draft resolution A/C.4/L.122, had decided to propose that the sponsors of draft resolution A/C.4/L.128 should replace paragraphs 2 and 3 of the operative part of that text by paragraph 1 of the operative part of draft resolution A/C.4/L.122.

31. Mr. GERIG (United States of America) wondered whether the United Nations could really deal with questions falling within the internal legislation of Member States. His delegation had always spoken in favour of the conclusion of a trusteeship agreement for South West Africa. It admitted that the Union of South Africa was under no legal obligation to place South West Africa under the Trusteeship System, but felt it would be advisable for that Government to do so. He doubted whether the adoption of a new resolution to that effect during the current session would add anything to the resolutions which the General Assembly had already adopted on the subject.

32. Mr. S. RAO (India) recalled that the representative of the Philippines, speaking on behalf of the sponsors of draft resolution A/C.4/L.122, had agreed to withdraw that text if the provisions of paragraph 1 of its operative part were inserted in resolution A/C.4/L.128. Thus there was doubtless no need for speakers to comment on draft resolution A/C.4/L.122; the discussion would advance more rapidly and in a more orderly fashion if speakers confined themselves to discussion of draft resolution A/C.4/L.128.

33. The CHAIRMAN suggested that the sponsors of the latter draft should consult together to decide whether they could accept the alteration suggested by the representative of the Philippines. Until their reply was known, the two draft resolutions remained

before the Committee and speakers could make comments on both texts.

34. Lord OGMORE (United Kingdom) said that his delegation was convinced that the Assembly should enter into negotiations with the Union of South Africa with a view to the conclusion of an agreement which would reproduce as fully as possible the terms of the Mandate for South West Africa. In that connexion, it was to be regretted that the Committee had not approved the draft resolution submitted jointly by the United States and seven other Powers (A/C.4/L.124/Rev.1.).

35. Before deciding on any proposal, all delegations should try to bear in mind the basic fact that the co-operation of the Union of South Africa would be necessary for the implementation of any measure proposed.

36. The Government of the Union of South Africa could quite legitimately consider that the draft resolution approved at the 196th meeting went much too far, in view of the advisory opinion delivered by the International Court of Justice. It could also contend with perfect justification that draft resolutions A/C.4/L.122 and A/C.4/L.128 did not take the Court's conclusions adequately into account. The United Kingdom delegation itself was of that opinion and would vote against those draft resolutions and against any similar text.

37. In reply to question (b) (as contained in General Assembly resolution 338 (IV)), the International Court of Justice had concluded "that the provisions of Chapter XII of the Charter do not impose on the Union of South Africa a legal obligation to place the Territory under the Trusteeship System" (A/1362, p. 144). Thus the Assembly could not, by a unilateral decision, force the Union of South Africa to conclude a trusteeship agreement for South West Africa. To do that would not really be in the interests of the population of the Territory.

38. The General Assembly had already adopted several resolutions on the question of South West Africa. It now had the advisory opinion of the International Court of Justice before it; if it departed from that opinion in order to adopt new measures, it would be running the risk of embarking on a hopeless course, and that was certainly not what those who were sincerely anxious to protect the interests of South West Africa wanted.

39. In conclusion, he urged the Committee to be realistic and to reject draft resolutions A/C.4/L.122 and A/C.4/L.128, and to make sure of the co-operation of the Union of South Africa in any measure it thought fit to adopt.

40. Mr. KHALIDY (Iraq) thought that, before continuing the discussion, the Committee should know whether the delegations of India, Indonesia and the Philippines had in fact withdrawn their draft resolution (A/C.4/L.122).

41. The CHAIRMAN pointed out that the fate of that draft resolution depended upon the reply of the sponsors of draft resolution A/C.4/L.128 to the suggestion made by the representative of the Philippines. If they accepted that suggestion, draft resolution A/C.4/L.122 would be withdrawn.

42. Mr. PEREZ CISNEROS (Cuba) asked what would be the exact wording of the paragraph which would replace paragraphs 2 and 3 of the operative part of draft resolution A/C.4/L.128.

43. Mr. INGLES (Philippines) said that the text would be that of paragraph 1 of the operative part of draft resolution A/C.4/L.122, amended to read:

"Reiterates that the normal way of modifying the international status of the Territory would be to place it under the Trusteeship System by means of a trusteeship agreement in accordance with the provisions of Chapter XII of the Charter."

44. He pointed out that that text reproduced the wording of the advisory opinion of the International Court of Justice (A/1362, p. 141).

45. The United Kingdom representative had quoted the second part of the Court's reply to question (b), but he had omitted to mention the first part of that reply. In the second part of its reply, the Court had concluded by eight votes to six "that the provisions of Chapter XII of the Charter do not impose on the Union of South Africa a legal obligation to place the Territory under the Trusteeship System"; but it had concluded unanimously in the first part of its reply "that the provisions of Chapter XII of the Charter are applicable to the Territory of South-West Africa in the sense that they provide a means by which the Territory may be brought under the Trusteeship System" (A/1362, p. 144).

46. The Court had stated on page 140 of its advisory opinion: "It may thus be concluded that it was expected that the mandatory States would follow the normal course indicated by the Charter, namely, conclude Trusteeship Agreements." On page 141, it had stated: "Before answering this question, the Court repeats that the normal way of modifying the international status of the Territory would be to place it under the Trusteeship System by means of a Trusteeship Agreement in accordance with the provisions of Chapter XII of the Charter."

47. He thought that those quotations from the advisory opinion of the International Court of Justice provided incontestable justification for the paragraph from draft resolution A/C.4/L.122, which he proposed should take the place of paragraphs 2 and 3 of the operative part of draft resolution A/C.4/L.128.

48. Mr. PEREZ CISNEROS (Cuba), speaking on behalf of the five delegations sponsoring the draft resolution in document A/C.4/L.128, willingly accepted the amendment proposed by the representative of the Philippines.

49. That amendment endorsed the opinion of the Court and stressed the view of the majority of the members of the Committee that the only normal procedure for modifying the international status of South West Africa was to place the Territory under the Trusteeship System.

50. Mr. Pérez Cisneros thought that the Committee could now confine itself to the examination of draft resolution A/C.4/L.128 as amended; he hoped that the proposal, when put to the vote, would be adopted by a substantial majority.

51. Mr. SOLDATOV (Union of Soviet Socialist Republics), on a point of order, drew attention to rule 121 of the rules of procedure of the General Assembly. Under that rule, the draft resolution in document A/C.4/L.122 could not be withdrawn since it had been the subject of an amendment submitted by the USSR delegation (A/C.4/L.126). He would not, however, oppose the desires of the authors of the proposal, if he was permitted to submit an amendment to draft resolution A/C.4/L.128. He did not see how such a request could be refused, since the Committee, in effect, had just agreed to the amendment of that draft resolution by the delegation of the Philippines.

52. Consequently, he was submitting an amendment (A/C.4/L.130) to draft resolution A/C.4/L.128, which was identical in substance with the amendment (A/C.4/L.126) submitted by his delegation to the draft resolution given in document A/C.4/L.122.

53. The CHAIRMAN said that the USSR amendment was in order and would be considered by the Committee.

54. Mr. SANTISO GALVEZ (Guatemala) pointed out once more that at the fourth session of the General Assembly, his delegation had expressed the view that it was in no way necessary for the Assembly to request an advisory opinion of the International Court of Justice.¹

55. That view had been based upon three considerations: first, the provisions of the Charter were very clear and explicit as far as the legal position of South West Africa was concerned; secondly, the request for an advisory opinion by the Court prevented the General Assembly from taking an immediate decision on a question which had important political and moral aspects and which called for a quick solution; thirdly, since an advisory opinion was not binding, the General Assembly was free to take any decision which it deemed necessary on political grounds, without recourse to or regard for such an opinion.

56. For those reasons the delegation of Guatemala had, since the fourth session, held the view that it would be preferable simply to invite the Union of South Africa to place the Territory of South West Africa under the Trusteeship System.

57. At all events, the Committee now had before it the advisory opinion of the International Court of Justice. The Guatemalan delegation noted with satisfaction that that opinion agreed, in part, with its own view, which was that the provisions of Chapter XII of the Charter applied in the case of South West Africa. It was in an effort to ensure respect for those provisions that the Committee had approved a draft resolution at its 196th meeting.

58. The delegation of Guatemala was convinced that South West Africa came within the meaning of Article 77, sub-paragraph 1 a of the Charter, and not of sub-paragraph 1 c of that Article. Moreover, Guatemala thought it appropriate that the General Assembly should reiterate and confirm its previous resolutions on the question. He therefore hoped that the Committee would

approve the draft resolution in document A/C.4/L.128, as amended, but without further modification.

59. Mr. ALI (Pakistan) had listened with interest to the statement of the United States representative, who considered it unnecessary for the General Assembly to renew its previous invitations to the Union of South Africa to present a draft trusteeship agreement for South West Africa. The delegation of Pakistan did not share that view. It was precisely because the South African Government had not yet complied with the Assembly's request, that that request should be renewed, in the hope that the Union of South Africa would alter its attitude.

60. The Ethiopian and Canadian representatives had asserted that, if the draft resolutions before the Committee were approved, the General Assembly would find itself in an *impasse* and that such a situation might be detrimental to the interests of the population of South West Africa. The delegation of Pakistan could not share that view. The draft resolution which the Committee had adopted at its 196th meeting could have no adverse consequences for the population of that Territory. South West Africa was at present administered by the Union of South Africa and, unless that government's intentions were assumed to be bad, its attitude towards the population of the Territory would be unaffected by the adoption of that resolution.

61. Although some delegations would no doubt have preferred to see the Territory of South West Africa placed under the International Trusteeship System, it could not be contended that the resolutions adopted had in any way harmed the population of the Territory. The Pakistan delegation therefore supported the joint draft resolution (A/C.4/L.128) in which the General Assembly reiterated its previous requests to the Union of South Africa.

62. It had also been contended that the draft resolution already approved by the Committee had been approved by a very small majority and that, therefore, it might not obtain the two-thirds majority required for its adoption at a plenary meeting. The delegation of Pakistan had always had faith in the merits of a conciliatory policy and considered that a text could no doubt be found which would be acceptable to all parties and would obtain the required number of votes in the plenary meeting.

63. The delegation of Pakistan reserved its position in regard to the statement made by the representative of the USSR.

64. Lord OGMORE (United Kingdom) took up the Philippine representative's statement that he had given incomplete quotations from the advisory opinion of the Court, and said that he would complete the quotations he had previously made in order to give the Committee an accurate picture of the situation.

65. After reading out the last paragraph on page 139 and the five paragraphs on page 140 of the advisory opinion of the Court (A/1362), he stated that no desire to suppress any part of the Court's opinion could now be imputed to the United Kingdom delegation.

66. Mr. MANTILLA (Ecuador) said the Committee should bear in mind that the solution of the problem

¹ See *Official Records of the General Assembly, Fourth Session, Fourth Committee, 140th meeting.*

should be based on the principle that South West Africa should be placed under trusteeship. The Court's answers to questions (a), (b) and (c) put to it by General Assembly resolution 338 (IV) provided sound reasons for putting that principle into effect. The Court had not, however, given a very clear answer to question (b). It had stated that the provisions of Chapter XII of the Charter provided a means by which the Territory might be brought under the Trusteeship System, but it had also found by a small majority that those provisions did not impose any legal obligation on the Union of South Africa to place the Territory under the Trusteeship System. It had given no indication of whether, in the absence of a legal obligation, there did exist a moral obligation for the Union of South Africa to do so.

67. The dissenting opinions of six judges of the Court were interesting in that connexion.

68. Vice-President Guerrero had expressed the view that the Charter did impose an obligation on the Union of South Africa to place the Territory of South West Africa under the Trusteeship System and that the Union of South Africa was therefore bound under paragraph 2 of Article 80 of the Charter not to delay or postpone the negotiation and conclusion of an agreement for placing the Territory under the Trusteeship System (A/1362, p. 144 and 145).

69. Judges Zoricic and Badawi Pasha had declared that they regretted their inability to concur in the answer given by the Court to the second part of question (b) and that they shared in general the views expressed on that point in the dissenting opinion of Judge De Visscher (A/1362, p. 145).

70. Judges Alvarez, De Visscher and Krylov had appended to the opinion of the Court statements of their dissenting opinions.

71. Mr. Mantilla quoted the third and sixth paragraphs of part VII of the dissenting opinion of Judge Alvarez, on pages 183 and 184 of the advisory opinion (A/1362), and the sixth paragraph of part VIII on page 185 of the advisory opinion. He then quoted the first paragraph of the dissenting opinion of Judge De Visscher, on page 186 of the advisory opinion and the first sentence of the fifth paragraph and the final paragraph of the dissenting opinion of Judge Krylov, on pages 191 and 192.

72. From those texts taken together he concluded that the Territory of South West Africa might be placed under the International Trusteeship System. Although the Court's answer to the second part of question (b) was not clear, for the reasons already indicated, the joint draft resolution A/C.4/L.128, of which Ecuador was a co-sponsor, interpreted the Court's opinion as a recognition of the fact that, in the absence of any legal obligation, the provisions of Chapter XII of the Charter imposed a moral obligation on the Union of South Africa to place the Territory of South West Africa under the Trusteeship System. The delegation of Ecuador was thus confident that the draft resolution was in conformity with the spirit of the Charter. Combined with the joint draft resolution of India, Indonesia and the Philippines on the lines proposed by the Philippine representative, the draft resolution before the Committee (A/C.4/L.128) provided a correct and speedy solution of the problem.

73. The CHAIRMAN declared the list of speakers closed.

The meeting rose at 1.15 p.m.