INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

APPLICATION OF THE INTERIM ACCORD OF 13 SEPTEMBER 1995

(THE FORMER YUGOSLAV REPUBLIC OF MACEDONIA
v. GREECE)

JUDGMENT OF 5 DECEMBER 2011

2011

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

APPLICATION DE L'ACCORD INTÉRIMAIRE DU 13 SEPTEMBRE 1995

(EX-RÉPUBLIQUE YOUGOSLAVE DE MACÉDOINE
c. GRÈCE)

ARRÊT DU 5 DÉCEMBRE 2011

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INTERNATIONAL COURT OF JUSTICE

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APPLICATION OF THE INTERIM ACCORD OF 13 SEPTEMBER 1995

(THE FORMER YUGOSLAV REPUBLIC OF MACEDONIA *v.* GREECE)

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*

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*

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*

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*

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*

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JUDGMENT

Present: *President* Owada; *Vice-President* Tomka; *Judges* Koroma, Simma, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov, Cançado Trindade, Yusuf, Greenwood, Xue, Donoghue; *Judges* ad hoc Roucounas, Vukas; *Registrar* Couvreur.

In the case concerning application of the Interim Accord of 13 September 1995,

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between

the former Yugoslav Republic of Macedonia,

represented by

H.E. Mr. Nikola Poposki, Minister for Foreign Affairs of the former Yugoslav Republic of Macedonia,

H.E. Mr. Antonio Miloshoski, Chairman of the Foreign Policy Committee of the Assembly of the former Yugoslav Republic of Macedonia,

as Agents;

H.E. Mr. Nikola Dimitrov, Ambassador of the former Yugoslav Republic of Macedonia to the Kingdom of the Netherlands,

as Co-Agent;

Mr. Philippe Sands, Q.C., Professor of Law, University College London, Barrister, Matrix Chambers, London,

Mr. Sean D. Murphy, Patricia Roberts Harris Research Professor of Law, George Washington University,

Ms Geneviève Bastid-Burdeau, Professor of Law, University of Paris I, Panthéon-Sorbonne,

Mr. Pierre Klein, Professor of International Law, Director of the Centre of International Law, Université Libre de Bruxelles,

Ms Blinne Ní Ghrálaigh, Barrister, Matrix Chambers, London,

as Counsel;

Mr. Saso Georgievski, Professor of Law, University Saints Cyril and Methodius, Skopje,

Mr. Toni Deskoski, Professor of Law, University Saints Cyril and Methodius, Skopje,

Mr. Igor Djundev, Ambassador, State Counsellor, Ministry of Foreign Affairs of the former Yugoslav Republic of Macedonia,

Mr. Goran Stevcevski, State Counsellor, International Law Directorate, Ministry of Foreign Affairs of the former Yugoslav Republic of Macedonia,

Ms Elizabeta Gjorgjieva, Minister Plenipotentiary, Deputy-Head of Mission of the former Yugoslav Republic of Macedonia to the European Union,

Ms Aleksandra Miovska, Head of Co-ordination Sector, Cabinet Minister for Foreign Affairs of the former Yugoslav Republic of Macedonia,

as Advisers;

Mr. Mile Prangoski, Research Assistant, Cabinet of Minister for Foreign Affairs of the former Yugoslav Republic of Macedonia,

Mr. Remi Reichold, Research Assistant, Matrix Chambers, London,

as Assistants;

Ms Elena Bodeva, Third Secretary, Embassy of the former Yugoslav Republic of Macedonia in the Kingdom of the Netherlands,

as Liaison Officer with the International Court of Justice;

Mr. Ilija Kasaposki, Security Officer of the Foreign Minister of the former Yugoslav Republic of Macedonia,

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and

the Hellenic Republic,

represented by

H.E. Mr. Georges Savvaides, Ambassador of Greece,
Ms Maria Telalian, Legal Adviser, Head of the Public International Law Section of the Legal Department, Ministry of Foreign Affairs of Greece,

as Agents;

Mr. Georges Abi-Saab, Honorary Professor of International Law, Graduate Institute of International Studies, Geneva, member of the Institut de droit international,
Mr. James Crawford, S.C., F.B.A., Whewell Professor of International Law, University of Cambridge, member of the Institut de droit international,

Mr. Alain Pellet, Professor of International Law, University of Paris Ouest, Nanterre-La Défense, member and former Chairman of the International Law Commission, associate member of the Institut de droit international,
Mr. Michael Reisman, Myres S. McDougal Professor of International Law, Yale Law School, member of the Institut de droit international,

as Senior Counsel and Advocates;

Mr. Arghyrios Fatouros, Honorary Professor of International Law, University of Athens, member of the Institut de droit international,
Mr. Linos-Alexandre Sicilianos, Professor of International Law, University of Athens,
Mr. Evangelos Kofos, former Minister-Counsellor, Ministry of Foreign Affairs of Greece, specialist on Balkan affairs,

as Counsel;

Mr. Tom Grant, Research Fellow, Lauterpacht Centre for International Law, University of Cambridge,
Mr. Alexandros Kolliopoulos, Assistant Legal Adviser, Public International Law Section of the Legal Department, Ministry of Foreign Affairs of Greece,
Mr. Michael Stellakatos-Loverdos, Assistant Legal Adviser, Public International Law Section of the Legal Department, Ministry of Foreign Affairs of Greece,
Ms Alina Miron, Researcher, Centre de droit international de Nanterre (CEDIN), University of Paris Ouest, Nanterre-La Défense,

as Advisers;

H.E. Mr. Ioannis Economides, Ambassador of Greece to the Kingdom of the Netherlands,
Ms Alexandra Papadopoulou, Minister Plenipotentiary, Head of the Greek Liaison Office in Skopje,
Mr. Efstathios Paizis Paradellis, First Counsellor, Embassy of Greece in the Kingdom of the Netherlands,
Mr. Elias Kastanas, Assistant Legal Adviser, Public International Law Section of the Legal Department, Ministry of Foreign Affairs of Greece,

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Mr. Konstantinos Kodellas, Embassy Secretary,

as Diplomatic Advisers;

Mr. Ioannis Korovilas, Embassy attaché,
Mr. Kosmas Triantafyllidis, Embassy attaché,

as Administrative Staff,

THE COURT,

composed as above,

after deliberation,

delivers the following Judgment:

1. On 17 November 2008, the former Yugoslav Republic of Macedonia (hereinafter the "Applicant") filed in the Registry of the Court an Application instituting proceedings against the Hellenic Republic (hereinafter the "Respondent") in respect of a dispute concerning the interpretation and implementation of the Interim Accord signed by the Parties on 13 September 1995, which entered into force on 13 October 1995 (hereinafter the "Interim Accord"). In particular, the Applicant sought

> "to establish the violation by the Respondent of its legal obligations under Article 11, paragraph 1, of the Interim Accord and to ensure that the Respondent abides by its obligations under Article 11 of the Interim Accord in relation to invitations or applications that might be made to or by the Applicant for membership of NATO or any other international, multilateral or regional organization or institution of which the Respondent is a member".

2. In its Application, the Applicant, referring to Article 36, paragraph 1, of the Statute, relied on Article 21, paragraph 2, of the Interim Accord to found the jurisdiction of the Court.

3. Pursuant to Article 40, paragraph 2, of the Statute, the Application was communicated forthwith to the Government of the Respondent by the Registrar; and, in accordance with paragraph 3 of that Article, all States entitled to appear before the Court were notified of the Application.

4. Since the Court included upon the Bench no judge of the nationality of either of the Parties, each Party proceeded to exercise its right conferred by Article 31, paragraph 3, of the Statute to choose a judge *ad hoc* to sit in the case. The Applicant chose Mr. Budislav Vukas and the Respondent Mr. Emmanuel Roucounas.

5. By an Order dated 20 January 2009, the Court fixed 20 July 2009 and 20 January 2010, respectively, as the time-limits for the filing of the Memorial of the Applicant and the Counter-Memorial of the Respondent. The Memorial of the Applicant was duly filed within the time-limit so prescribed.

6. By a letter dated 5 August 2009, the Respondent stated that, in its view, "the Court manifestly lacks jurisdiction to rule on the claims of the Applicant in this case", but informed the Court that, rather than raising preliminary objections under Article 79 of the Rules of the Court, it would be addressing "issues of jurisdiction together with those on the merits". The Registrar immediately communicated a copy of that letter to the Applicant.

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The Counter-Memorial of the Respondent, which addressed issues relating to jurisdiction and admissibility as well as to the merits of the case, was duly filed within the time-limit prescribed by the Court in its Order of 20 January 2009.

7. At a meeting held by the President of the Court with the representatives of the Parties on 9 March 2010, the Co-Agent of the Applicant indicated that his Government wished to be able to respond to the Counter-Memorial of the Respondent, including the objections to jurisdiction and admissibility contained in it by means of a Reply. At the same meeting, the Agent of the Respondent stated that her Government had no objection to the granting of this request, in so far as the Respondent could in turn submit a Rejoinder.

8. By an Order of 12 March 2010, the Court authorized the submission of a Reply by the Applicant and a Rejoinder by the Respondent, and fixed 9 June 2010 and 27 October 2010 as the respective time-limits for the filing of those pleadings. The Reply and the Rejoinder were duly filed within the time-limits so prescribed.

9. In accordance with Article 53, paragraph 2, of the Rules of Court, the Court, after ascertaining the views of the Parties, decided that copies of the pleadings and documents annexed would be made accessible to the public on the opening of the oral proceedings.

10. Public hearings were held between 21 and 30 March 2011, at which the Court heard the oral arguments and replies of:

For the Applicant: Mr. Antonio Miloshoski,
Mr. Philippe Sands,
Mr. Sean Murphy,
Mr. Pierre Klein,
Ms Geneviève Bastid-Burdeau,
Mr. Nikola Dimitrov.

For the Respondent: Ms Maria Telalian,
Mr. Georges Savvaides,
Mr. Georges Abi-Saab,
Mr. Michael Reisman,
Mr. Alain Pellet,
Mr. James Crawford.

11. At the hearings, a Member of the Court put a question to the Respondent, to which a reply was given in writing, within the time-limit fixed by the President in accordance with Article 61, paragraph 4, of the Rules of Court. Pursuant to Article 72 of the Rules of Court, the Applicant submitted comments on the written reply provided by the Respondent.

*

12. In the Application, the following requests were made by the Applicant:

"The Applicant requests the Court:

(i) to adjudge and declare that the Respondent, through its State organs and agents, has violated its obligations under Article 11, paragraph 1, of the Interim Accord;

(ii) to order that the Respondent immediately take all necessary steps to comply with its obligations under Article 11, paragraph 1, of the Interim

Accord, and to cease and desist from objecting in any way, whether directly or indirectly, to the Applicant's membership of the North Atlantic Treaty Organization and/or of any other 'international, multilateral and regional organizations and institutions' of which the Respondent is a member, in circumstances where the Applicant is to be referred to in such organizations or institutions by the designation provided for in paragraph 2 of United Nations Security Council resolution 817 (1993)."

13. In the written proceedings, the following submissions were presented by the Parties:

On behalf of the Government of the Applicant,

in the Memorial:

"On the basis of the evidence and legal arguments presented in this Memorial, the Applicant

Requests the Court:

(i) to adjudge and declare that the Respondent, through its State organs and agents, has violated its obligations under Article 11, paragraph 1, of the Interim Accord; and

(ii) to order that the Respondent immediately take all necessary steps to comply with its obligations under Article 11, paragraph 1, of the Interim Accord, and to cease and desist from objecting in any way, whether directly or indirectly, to the Applicant's membership of the North Atlantic Treaty Organization and/or of any other 'international, multilateral and regional organizations and institutions' of which the Respondent is a member, in circumstances where the Applicant is to be referred to in such organization or institution by the designation provided for in paragraph 2 of United Nations Security Council resolution 817 (1993)."

in the Reply:

"On the basis of the evidence and legal arguments presented in this Reply, the Applicant

Requests the Court:

(i) to reject the Respondent's objections as to the jurisdiction of the Court and the admissibility of the Applicant's claims;

(ii) to adjudge and declare that the Respondent, through its State organs and agents, has violated its obligations under Article 11, paragraph 1, of the Interim Accord; and

(iii) to order that the Respondent immediately take all necessary steps to comply with its obligations under Article 11, paragraph 1, of the Interim Accord, and to cease and desist from objecting in any way, whether directly or indirectly, to the Applicant's membership of the North Atlantic Treaty Organization and/or of any other 'international, multilateral and regional organizations and institutions' of which the Respondent is a member, in circumstances where the Applicant is to be referred to in such organization or institution by the designation provided for in paragraph 2 of United Nations Security Council resolution 817 (1993)."

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On behalf of the Government of the Respondent,

in the Counter-Memorial and in the Rejoinder:

"On the basis of the preceding evidence and legal arguments, the Respondent, the Hellenic Republic, requests the Court to adjudge and declare:

(i) that the case brought by the FYROM[1] before the Court does not fall within the jurisdiction of the Court and that the FYROM's claims are inadmissible;

(ii) in the event that the Court finds that it has jurisdiction and that the claims are admissible, that the FYROM's claims are unfounded."

14. At the oral proceedings, the following submissions were presented by the Parties:

On behalf of the Government of the Applicant,

at the hearing of 28 March 2011:

"On the basis of the evidence and legal arguments presented in its written and oral pleadings, the Applicant requests the Court:

(i) to reject the Respondent's objections as to the jurisdiction of the Court and the admissibility of the Applicant's claims;

(ii) to adjudge and declare that the Respondent, through its State organs and agents, has violated its obligations under Article 11, paragraph 1, of the Interim Accord; and

(iii) to order that the Respondent immediately take all necessary steps to comply with its obligations under Article 11, paragraph 1, of the Interim Accord, and to cease and desist from objecting in any way, whether directly or indirectly, to the Applicant's membership of the North Atlantic Treaty Organization and/or of any other 'international, multilateral and regional organizations and institutions' of which the Respondent is a member, in circumstances where the Applicant is to be referred to in such organization or institution by the designation provided for in paragraph 2 of United Nations Security Council resolution 817 (1993)."

On behalf of the Government of the Respondent,

at the hearing of 30 March 2011:

"On the basis of the preceding evidence and legal arguments presented in its written and oral pleadings, the Respondent, the Hellenic Republic, requests the Court to adjudge and declare:

(i) that the case brought by the Applicant before the Court does not fall within the jurisdiction of the Court and that the Applicant's claims are inadmissible;

(ii) in the event that the Court finds that it has jurisdiction and that the claims are admissible, that the Applicant's claims are unfounded."

* * *

[1] The acronym "FYROM" is used by the Respondent to refer to the Applicant.

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I. Introduction

15. Before 1991, the Socialist Federal Republic of Yugoslavia comprised six constituent republics, including the "Socialist Republic of Macedonia". In the course of the break-up of Yugoslavia, the Assembly of the Socialist Republic of Macedonia adopted (on 25 January 1991) the "Declaration on the Sovereignty of the Socialist Republic of Macedonia", which asserted sovereignty and the right of self-determination. On 7 June 1991, the Assembly of the Socialist Republic of Macedonia enacted a constitutional amendment, changing the name "Socialist Republic of Macedonia" to the "Republic of Macedonia". The Assembly then adopted a declaration asserting the sovereignty and independence of the new State and sought international recognition.

16. On 30 July 1992, the Applicant submitted an application for membership in the United Nations. The Respondent stated on 25 January 1993 that it objected to the Applicant's admission on the basis of the Applicant's adoption of the name "Republic of Macedonia", among other factors. The Respondent explained that its opposition was based *inter alia* on its view that the term "Macedonia" referred to a geographical region in south-east Europe that included an important part of the territory and population of the Respondent and of certain third States. The Respondent further indicated that once a settlement had been reached on these issues, it would no longer oppose the Applicant's admission to the United Nations. The Respondent had also expressed opposition on similar grounds to the Applicant's recognition by the member States of the European Community.

17. On 7 April 1993, in accordance with Article 4, paragraph 2, of the Charter, the Security Council adopted resolution 817 (1993), concerning the "application for admission to the United Nations" of the Applicant. In that resolution, noting that "a difference has arisen over the name of the [Applicant], which needs to be resolved in the interest of the maintenance of peaceful and good-neighbourly relations in the region", the Security Council:

> "1. *Urge[d]* the parties to continue to co-operate with the Co-Chairmen of the Steering Committee of the International Conference on the Former Yugoslavia in order to arrive at a speedy settlement of their difference;
>
> 2. *Recommend[ed]* to the General Assembly that the State whose application is contained in document S/25147 be admitted to membership in the United Nations, this State being provisionally referred to for all purposes within the United Nations as 'the former Yugoslav Republic of Macedonia' pending settlement of the difference that has arisen over the name of the State;
>
> 3. *Request[ed]* the Secretary-General to report to the Council on the outcome of the initiative taken by the Co-Chairmen of the Steering Committee of the International Conference on the Former Yugoslavia."

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18. On 8 April 1993, the Applicant was admitted to the United Nations, following the adoption by the General Assembly, on the recommendation of the Security Council, of resolution A/RES/47/225. On 18 June 1993, in light of the continuing absence of a settlement of the difference over the name, the Security Council adopted resolution 845 (1993) urging the Parties "to continue their efforts under the auspices of the Secretary-General to arrive at a speedy settlement of the remaining issues between them". While the Parties have engaged in negotiations to that end, these negotiations have not yet led to a mutually acceptable solution to the name issue.

19. Following its admission to the United Nations, the Applicant became a member of various specialized agencies of the United Nations system. However, its efforts to join several other non-United Nations affiliated international institutions and organizations, of which the Respondent was already a member, were not successful. On 16 February 1994, the Respondent instituted trade-related restrictions against the Applicant.

20. Against this backdrop, on 13 September 1995, the Parties signed the Interim Accord, providing for the establishment of diplomatic relations between them and addressing other related issues. The Interim Accord refers to the Applicant as "Party of the Second Part" and to the Respondent as "Party of the First Part", so as to avoid using any contentious name. Under its Article 5, the Parties

> "agree[d] to continue negotiations under the auspices of the Secretary-General of the United Nations pursuant to Security Council resolution 845 (1993) with a view to reaching agreement on the difference described in that resolution and in Security Council resolution 817 (1993)".

21. In the Interim Accord, the Parties also addressed the admission of, and membership by, the Applicant in international organizations and institutions of which the Respondent was a member. In this regard, Article 11, paragraph 1, of the Interim Accord provides:

> "Upon entry into force of this Interim Accord, the Party of the First Part agrees not to object to the application by or the membership of the Party of the Second Part in international, multilateral and regional organizations and institutions of which the Party of the First Part is a member; however, the Party of the First Part reserves the right to object to any membership referred to above if and to the extent[2] the Party of the Second Part is to be referred to in such organization or institution differently than in paragraph 2 of United Nations

[2] In the French version of the Interim Accord published in the *United Nations Treaty Series* the expression "if and to the extent" has been rendered by the sole conjunction "si". For the purposes of this Judgment, the Court will however use, in the French text, the expression "si [et dans la mesure où]", which is a more literal translation of the original English version.

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Security Council resolution 817 (1993)." (*United Nations Treaty Series (UNTS)*, Vol. 1891, p. 7; original English.)

22. In the period following the adoption of the Interim Accord, the Applicant was granted membership in a number of international organizations of which the Respondent was already a member. On the invitation of the North Atlantic Treaty Organization, the Applicant in 1995 joined the Organization's Partnership for Peace (a programme that promotes co-operation between NATO and partner countries) and, in 1999, the Organization's Membership Action Plan (which assists prospective NATO members). The Applicant's NATO candidacy was considered in a meeting of NATO member States in Bucharest (hereinafter the "Bucharest Summit") on 2 and 3 April 2008 but the Applicant was not invited to begin talks on accession to the Organization. The communiqué issued at the end of the Summit stated that an invitation would be extended to the Applicant "as soon as a mutually acceptable solution to the name issue has been reached".

II. Jurisdiction of the Court and Admissibility of the Application

23. In the present case, the Applicant maintains that the Respondent failed to comply with Article 11, paragraph 1, of the Interim Accord. The Respondent disagrees with this contention both in terms of the facts and of the law, that is, in regard to the meaning, scope and effect of certain provisions of the Interim Accord. In the view of the Court, this is the dispute the Applicant brought before the Court, and thus the dispute in respect of which the Court's jurisdiction falls to be determined.

24. The Applicant invokes as a basis for the Court's jurisdiction Article 21, paragraph 2, of the Interim Accord, which reads as follows:

> "Any difference or dispute that arises between the Parties concerning the interpretation or implementation of this Interim Accord may be submitted by either of them to the International Court of Justice, except for the difference referred to in Article 5, paragraph 1."

25. As already noted (see paragraph 6 above), the Respondent advised the Court that, rather than raising objections under Article 79 of the Rules of Court, it would be addressing issues of jurisdiction and admissibility along with the merits of the present case. The Court addresses these issues at the outset of this Judgment.

26. The Respondent claims that the Court has no jurisdiction to entertain the present case and that the Application is inadmissible based on the

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following reasons. First, the Respondent submits that the dispute concerns the difference over the name of the Applicant referred to in Article 5, paragraph 1, of the Interim Accord and that, consequently, it is excluded from the Court's jurisdiction by virtue of the exception provided in Article 21, paragraph 2. Secondly, the Respondent alleges that the dispute concerns conduct attributable to NATO and its member States, which is not subject to the Court's jurisdiction in the present case. Thirdly, the Respondent claims that the Court's Judgment in the present case would be incapable of effective application because it could not effect the Applicant's admission to NATO or other international, multilateral and regional organizations or institutions. Fourthly, the Respondent submits that the exercise of jurisdiction by the Court would interfere with ongoing diplomatic negotiations mandated by the Security Council concerning the difference over the name and thus would be incompatible with the Court's judicial function.

27. Moreover, the Respondent initially claimed that its action cannot fall within the jurisdiction of the Court since it did not violate any provision of the Interim Accord by operation of Article 22 thereof, which, according to the Respondent, super-ordinates the obligations which either party to the Interim Accord may have under bilateral or multilateral agreements with other States or international organizations. Therefore, in the Respondent's view, its alleged conduct could not be a source of any dispute between the Parties. The Court notes, however, that as the proceedings progressed, the Respondent focused its arguments on Article 22 in its defence on the merits. Accordingly, the Court will address Article 22 if and when it turns to the merits of the case.

1. Whether the Dispute Is Excluded from the Court's Jurisdiction under the Terms of Article 21, Paragraph 2, of the Interim Accord, Read in Conjunction with Article 5, Paragraph 1

28. Article 21, paragraph 2, of the Interim Accord (see paragraph 24 above) sets out that any "difference or dispute" as to the "interpretation or implementation" of the Interim Accord falls within the jurisdiction of the Court, with the exception of the "difference" referred to in Article 5, paragraph 1, of the Interim Accord, which reads as follows:

> "The Parties agree to continue negotiations under the auspices of the Secretary-General of the United Nations pursuant to Security Council resolution 845 (1993) with a view to reaching agreement on the difference described in that resolution and in Security Council resolution 817 (1993)."

29. With regard to this difference, as stated above, Security Council resolution 817, in its preambular paragraph 3, refers to "a difference [that] has arisen over the name of the State, which needs to be resolved

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in the interest of the maintenance of peaceful and good-neighbourly relations in the region". This resolution "[u]rges the parties to continue to co-operate with the Co-Chairman of the Steering Committee of the International Conference on the Former Yugoslavia in order to arrive at a speedy settlement of their difference" (operative paragraph 1).

30. Following this resolution, the Security Council adopted resolution 845 of 18 June 1993 which, recalling resolution 817 (1993), also "[u]rges the parties to continue their efforts under the auspices of the Secretary-General to arrive at a speedy settlement of the remaining issues between them".

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31. According to the Respondent's first objection to the Court's jurisdiction, the dispute between the Parties concerns the difference over the Applicant's name which is excluded from the Court's jurisdiction by virtue of Article 21, paragraph 2, read in conjunction with Article 5, paragraph 1. The Respondent contends that this exception is broad in scope and excludes from the Court's jurisdiction not only any dispute regarding the final resolution of the name difference, but also "any dispute the settlement of which would prejudge, directly or by implication, the difference over the name".

32. The Respondent maintains that the Court cannot address the Applicant's claims without pronouncing on the question of the non-resolution of the name difference since this would be the only reason upon which the Respondent would have objected to the Applicant's admission to NATO. The Respondent also claims that the Court cannot rule upon the question of the Respondent's alleged violation of Article 11, paragraph 1, without effectively deciding on the name difference as it would be "putting an end to any incentive the Applicant might have had to negotiate resolution of the difference as required by the Interim Accord and the Security Council". Finally, the Respondent maintains that the actual terms of the Bucharest Summit Declaration and subsequent NATO statements demonstrate that the main reason for NATO's decision to defer the Applicant's accession procedure was the name difference. Therefore, in the Respondent's submission, the exception provided for in Article 21, paragraph 2, of the Interim Accord applies.

33. The Applicant, for its part, argues that the subject of the present dispute does not concern — either directly or indirectly — the difference referred to in Article 5, paragraph 1, of the Interim Accord. The Applicant disagrees with the broad interpretation of the exception contained in Article 21, paragraph 2, proposed by the Respondent, submitting that it would run contrary to the very purpose of the Interim Accord, and that Article 11, paragraph 1, would be undermined if the Respondent's argument were upheld. The Applicant maintains that the present dispute does not require the Court to resolve or to express any view on the difference

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over the name referred to in Article 5, paragraph 1, and is consequently not excluded by Article 21, paragraph 2. The Applicant also claims that the statement by NATO after the Bucharest Summit indicating that membership would be extended to the Applicant when a solution to the name issue has been reached does not transform the dispute before the Court into one about the name.

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34. The Court considers that the Respondent's broad interpretation of the exception contained in Article 21, paragraph 2, cannot be upheld. That provision excludes from the jurisdiction of the Court only one kind of dispute, namely one regarding the difference referred to in Article 5, paragraph 1. Since Article 5, paragraph 1, identifies the nature of that difference by referring back to Security Council resolutions 817 and 845 (1993), it is to those resolutions that one must turn in order to ascertain what the Parties intended to exclude from the jurisdiction of the Court.

35. Resolutions 817 and 845 (1993) distinguished between the name of the Applicant, in respect of which they recognized the existence of a difference between the Parties who were urged to resolve that difference by negotiation (hereinafter the "definitive name"), and the provisional designation by which the Applicant was to be referred to for all purposes within the United Nations pending settlement of that difference. The Interim Accord adopts the same approach and extends it to the Applicant's application to, and membership in, other international organizations. Thus Article 5, paragraph 1, of the Interim Accord requires the Parties to negotiate regarding the difference over the Applicant's definitive name, while Article 11, paragraph 1, imposes upon the Respondent the obligation not to object to the Applicant's application to, and membership in, international organizations, unless the Applicant is to be referred to in the organization in question differently than in resolution 817 (1993). The Court considers it to be clear from the text of Article 21, paragraph 2, and of Article 5, paragraph 1, of the Interim Accord, that the "difference" referred to therein and which the Parties intended to exclude from the jurisdiction of the Court is the difference over the definitive name of the Applicant and not disputes regarding the Respondent's obligation under Article 11, paragraph 1. If the Parties had intended to entrust to the Court only the limited jurisdiction suggested by the Respondent, they could have expressly excluded the subject-matter of Article 11, paragraph 1, from the grant of jurisdiction in Article 21, paragraph 2.

36. Not only does the plain meaning of the text of Article 21, paragraph 2, of the Interim Accord afford no support to the broad interpretation advanced by the Respondent, the purpose of the Interim Accord as a whole also points away from such an interpretation. In the Court's

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view, one of the main objectives underpinning the Interim Accord was to stabilize the relations between the Parties pending the resolution of the name difference. The broad interpretation of the exception under Article 21, paragraph 2, of the Interim Accord suggested by the Respondent would result in the Court being unable to entertain many disputes relating to the interpretation or implementation of the Interim Accord itself. As such, the name difference may be related, to some extent, to disputes the Parties may eventually have as to the interpretation or implementation of the Interim Accord.

37. The fact that there is a relationship between the dispute submitted to the Court and the name difference does not suffice to remove that dispute from the Court's jurisdiction. The question of the alleged violation of the obligation set out in Article 11, paragraph 1, is distinct from the issue of which name should be agreed upon at the end of the negotiations between the Parties under the auspices of the United Nations. Only if the Court were called upon to resolve specifically the name difference, or to express any views on this particular matter, would the exception under Article 21, paragraph 2, come into play. This is not the situation facing the Court in the present case. The exception contained in Article 21, paragraph 2, consequently does not apply to the present dispute between the Parties which concerns the Applicant's allegation that the Respondent breached its obligation under Article 11, paragraph 1, of the Interim Accord, as well as the Respondent's justifications.

38. Accordingly, the Respondent's objection to the Court's jurisdiction based on the exception contained in Article 21, paragraph 2, of the Interim Accord cannot be upheld.

2. Whether the Dispute Relates to the Conduct of NATO or Its Member States and whether the Court's Decision Could Affect Their Rights and Obligations

39. By way of objection to the Court's jurisdiction in the present case and the admissibility of the Application, the Respondent claims that the object of the Application relates to the conduct of NATO and its other member States, because the decision to defer the invitation to the Applicant to join the Organization was a collective decision taken by NATO "unanimously" at the Bucharest Summit, and not an individual or autonomous decision by the Respondent. Thus, it is argued that the act complained of is attributable to NATO as a whole and not to the Respondent alone. Moreover, in the view of the Respondent, even if the decision to defer the Applicant's admission to NATO could be attributed to the Respondent, the Court could not decide on this point without also deciding on the responsibility of NATO or its other members, over whom it has no jurisdiction. Accordingly, the Respondent argues that the interests of a third party would form the subject-matter of any decision the Court may take. The Respondent further contends that, in accordance with the *Monetary Gold*

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case law, the Court "will not exercise jurisdiction where the legal interests of an absent third party form 'the very subject matter' of the jurisdiction".

40. The Applicant, for its part, argues that its Application is directed solely at the Respondent's conduct and not at a decision by NATO or actions of other NATO member States. The Applicant claims that the Respondent's conduct is distinct from any decision of NATO. It contends that the Court does not need to express any view on the legality of NATO's decision to defer an invitation to the Applicant to join the Alliance.

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41. In order to examine the Respondent's objection, the Court has to consider the specific object of the Application. The Applicant claims that "the Respondent, through its State organs and agents, has violated its obligations under Article 11, paragraph 1, of the Interim Accord" and requests the Court to make a declaration to this effect and to order the Respondent to "take all necessary steps to comply with its obligations under Article 11, paragraph 1, of the Interim Accord".

42. By the terms of the Application, the Applicant's claim is solely based on the allegation that the Respondent has violated its obligation under Article 11, paragraph 1, of the Interim Accord, which refers specifically to the Respondent's conduct, irrespective of the consequences it may have on the actual final decision of a given organization as to the Applicant's membership. The Court notes that the Applicant is challenging the Respondent's conduct in the period prior to the taking of the decision at the end of the Bucharest Summit and not the decision itself. The issue before the Court is thus not whether NATO's decision may be attributed to the Respondent, but rather whether the Respondent violated the Interim Accord as a result of its own conduct. Nothing in the Application before the Court can be interpreted as requesting the Court to pronounce on whether NATO acted legally in deferring the Applicant's invitation for membership in NATO. Therefore, the dispute does not concern, as contended by the Respondent, the conduct of NATO or the member States of NATO, but rather solely the conduct of the Respondent.

43. Similarly, the Court does not need to determine the responsibility of NATO or of its member States in order to assess the conduct of the Respondent. In this respect, the Respondent's argument that the rights and interests of a third party (which it identifies as NATO and/or the member States of NATO) would form the subject-matter of any decision which the Court might take, with the result that the Court should decline to hear the case under the principle developed in the case of the *Monetary Gold Removed from Rome in 1943*, is misplaced. The present case can be distinguished from the *Monetary Gold* case since the Respondent's conduct can be assessed independently of NATO's decision, and the rights

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and obligations of NATO and its member States other than Greece do not form the subject-matter of the decision of the Court on the merits of the case (*Monetary Gold Removed from Rome in 1943 (Italy* v. *France; United Kingdom and United States of America), Preliminary Question, Judgment, I.C.J. Reports 1954*, p. 19; *East Timor (Portugal* v. *Australia), Judgment, I.C.J. Reports 1995*, p. 105, para. 34); nor would the assessment of their responsibility be a "prerequisite for the determination of the responsibility" of the Respondent (*Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 261, para. 55). Therefore, the Court considers that the conduct forming the object of the Application is the Respondent's alleged objection to the Applicant's admission to NATO, and that, on the merits, the Court will only have to determine whether or not that conduct demonstrates that the Respondent failed to comply with its obligations under the Interim Accord, irrespective of NATO's final decision on the Applicant's membership application.

44. The Court accordingly finds that the Respondent's objection based on the argument that the dispute relates to conduct attributable to NATO and its member States or that NATO and its member States are indispensable third parties not before the Court cannot be upheld.

3. Whether the Court's Judgment Would Be Incapable of Effective Application

45. The Respondent argues that a Court ruling in the present case would be devoid of any effect because the Court's Judgment would not be able to annul or amend NATO's decision or change the conditions of admission contained therein. It further contends that even if the Court were to find in the Applicant's favour, its Judgment would have no practical effect concerning the Applicant's admission to NATO. Accordingly, the Respondent claims that the Court should refuse to exercise its jurisdiction in order to preserve the integrity of its judicial function.

46. The Applicant, for its part, submits that it is seeking a declaration by the Court that the Respondent's conduct violated the Interim Accord, which in its view represents a legitimate request in a judicial procedure. The Applicant argues that it is "only by misrepresenting the object of the Application that the respondent State can claim that a judgment of the Court would have no concrete effect". By contrast, the Applicant claims that a judgment of the Court would have a concrete legal effect, and in particular, it "would result in the applicant State once more being placed in the position of candidate for NATO membership *without running the risk of once again being blocked by an objection on grounds not covered in the Interim Accord*" (emphasis in the original).

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47. As established in the Court's case law, an essential element for the proper discharge of the Court's judicial function is that its judgments "must have some practical consequence in the sense that [they] can affect existing legal rights or obligations of the parties, thus removing uncertainty from their legal relations" (*Northern Cameroons (Cameroon* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1963*, p. 34).

48. In the present case, the Court recalls that, in its final submissions, the Applicant requests the Court,

"(i) to reject the Respondent's objections as to the jurisdiction of the Court and the admissibility of the Applicant's claims;
(ii) to adjudge and declare that the Respondent, through its State organs and agents, has violated its obligations under Article 11, paragraph 1, of the Interim Accord; and
(iii) to order that the Respondent immediately take all necessary steps to comply with its obligations under Article 11, paragraph 1, of the Interim Accord, and to cease and desist from objecting in any way, whether directly or indirectly, to the Applicant's membership of the North Atlantic Treaty Organization and/or of any other 'international, multilateral and regional organizations and institutions' of which the Respondent is a member, in circumstances where the Applicant is to be referred to in such organization or institution by the designation provided for in paragraph 2 of United Nations Security Council resolution 817 (1993)."

49. In its request, the Applicant asks the Court to make a declaration that the Respondent violated its obligations under Article 11, paragraph 1, of the Interim Accord. It is clear in the jurisprudence of the Court and its predecessor that "the Court may, in an appropriate case, make a declaratory judgment" (*Northern Cameroons (Cameroon* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1963*, p. 37). The purpose of such declaratory judgment "is to ensure recognition of a situation at law, once and for all and with binding force as between the Parties; so that the legal position thus established cannot again be called in question in so far as the legal effects ensuing therefrom are concerned" (*Interpretation of Judgments Nos. 7 and 8 (Factory at Chorzów), Judgment No. 11, 1927, P.C.I.J., Series A, No. 13*, p. 20).

50. While the Respondent is correct that a ruling from the Court could not modify NATO's decision in the Bucharest Summit or create any rights for the Applicant vis-à-vis NATO, such are not the requests of the Applicant. It is clear that at the heart of the Applicant's claims lies the Respondent's conduct, and not conduct attributable to NATO or its member States. The Applicant is not requesting the Court to reverse NATO's decision in the Bucharest Summit or to modify the conditions for membership in the Alliance. Therefore, the Respondent's argument that the Court's Judgment in the present case would not have any practi-

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cal effect because the Court cannot reverse NATO's decision or change the conditions of admission to NATO is not persuasive.

51. The *Northern Cameroons* case is to be distinguished from the present case. The Court recalls that, in the former case, Cameroon, in its Application, asked the Court to "adjudge and declare . . . that the United Kingdom has, in the application of the Trusteeship Agreement of 13 December 1946, failed to respect certain obligations directly or indirectly flowing therefrom", and that, by the time the case was argued and decided in 1963, the Agreement had already been terminated. By contrast, in the present case, Article 11, paragraph 1, of the Interim Accord remains binding; the obligation stated therein is a continuing one and the Applicant's NATO membership application remains in place. A judgment by the Court would have "continuing applicability" for there is an "opportunity for a future act of interpretation or application of that treaty in accordance with any judgment the Court may render" (*Northern Cameroons (Cameroon* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1963*, pp. 37-38).

52. Similarly, the Respondent's reliance on the *Nuclear Tests* cases does not support its position. In these cases, the Court interpreted the Applications instituting proceedings before it, filed by Australia and New Zealand, as concerning future testing by France of nuclear weapons in the atmosphere. On the basis of statements by France which the Court considered to constitute an undertaking possessing legal effect not to test nuclear weapons in the atmosphere, the Court held that there was no longer a dispute about that matter and that the Applicants' objective had in effect been accomplished; thus no further judicial action was required (*Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, p. 271, para. 56; *Nuclear Tests (New Zealand* v. *France), Judgment, I.C.J. Reports 1974*, p. 476, para. 59).

53. The present dispute is clearly different from the latter cases: the Respondent has not taken any action which could be seen as settling the dispute over the alleged violation of Article 11, paragraph 1. Furthermore, a judgment of the Court in the present case would not be without object because it would affect existing rights and obligations of the Parties under the Interim Accord and would be capable of being applied effectively by them.

54. The Court accordingly finds that the Respondent's objection to the admissibility of the Application based on the alleged lack of effect of the Court's Judgment cannot be upheld.

4. Whether the Court's Judgment Would Interfere with Ongoing Diplomatic Negotiations

55. The Respondent contends that if the Court were to exercise its jurisdiction, it would interfere with the diplomatic process envisaged by the Security Council in resolution 817 (1993) and this would be contrary

to the Court's judicial function. It argues that a judgment by the Court in favour of the Applicant "would judicially seal a unilateral practice of imposing a disputed name and would thus run contrary to Security Council resolutions 817 (1993) and 845 (1993), requiring the Parties to reach a negotiated solution on this difference". The Respondent thus submits that, on the basis of judicial propriety, the Court should decline to exercise its jurisdiction.

56. In response, the Applicant argues that the Court, in determining the scope of Security Council resolution 817 (1993) and of the Interim Accord, would in no way settle the dispute over the name, or impose a conclusion on the ongoing negotiation process between the Parties on this subject since the object of its claim in the present case and the object of the negotiation process are different. The Applicant contends that the Respondent's argument is premised on a confused understanding of the object of the Applicant's claim. The Applicant contends that the existence of negotiations does not preclude the Court from exercising its judicial function.

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57. Regarding the issue of whether the judicial settlement of disputes by the Court is incompatible with ongoing diplomatic negotiations, the Court has made clear that "the fact that negotiations are being actively pursued during the present proceedings is not, legally, any obstacle to the exercise by the Court of its judicial function" (*Aegean Sea Continental Shelf (Greece* v. *Turkey), Judgment, I.C.J. Reports 1978*, p. 12, para. 29; see also *United States Diplomatic and Consular Staff in Tehran (United States of America* v. *Iran), Judgment, I.C.J. Reports 1980*, p. 20, para. 37).

58. As a judicial organ, the Court has to establish

> "first, that the dispute before it is a legal dispute, in the sense of a dispute capable of being settled by the application of principles and rules of international law, and secondly, that the Court has jurisdiction to deal with it, and that that jurisdiction is not fettered by any circumstance rendering the application inadmissible" (*Border and Transborder Armed Actions (Nicaragua* v. *Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, p. 91, para. 52).

The question put before the Court, namely, whether the Respondent's conduct is a breach of Article 11, paragraph 1, of the Interim Accord, is a legal question pertaining to the interpretation and implementation of a provision of that Accord. As stated above, the disagreement between the Parties amounts to a legal dispute which is not excluded from the Court's jurisdiction. Therefore, by deciding on the interpretation and implementation of a provision of the Interim Accord, a task which the Parties agreed to submit to the Court's jurisdiction under Article 21, paragraph 2, the Court would be faithfully discharging its judicial function.

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59. The Parties included a provision conferring jurisdiction on the Court (Art. 21) in an agreement that also required them to continue negotiations on the dispute over the name of the Applicant (Art. 5, para. 1). Had the Parties considered that a future ruling by the Court would interfere with diplomatic negotiations mandated by the Security Council, they would not have agreed to refer to it disputes concerning the interpretation or implementation of the Interim Accord.

60. Accordingly, the Respondent's objection to the admissibility of the Application based on the alleged interference of the Court's Judgment with ongoing diplomatic negotiations mandated by the Security Council cannot be upheld.

5. Conclusion concerning the Jurisdiction of the Court over the Present Dispute and the Admissibility of the Application

61. In conclusion, the Court finds that it has jurisdiction over the legal dispute submitted to it by the Applicant. There is no reason for the Court to decline to exercise its jurisdiction. The Court finds the Application admissible.

III. Whether the Respondent Failed to Comply with the Obligation under Article 11, Paragraph 1, of the Interim Accord

62. The Court turns now to the merits of the case. Article 11, paragraph 1, of the Interim Accord provides:

> "the Party of the First Part [the Respondent] agrees not to object to the application by or the membership of the Party of the Second Part [the Applicant] in international, multilateral and regional organizations and institutions of which the Party of the First Part is a member; however, the Party of the First Part reserves the right to object to any membership referred to above if and to the extent the Party of the Second Part is to be referred to in such organization or institution differently than in paragraph 2 of United Nations Security Council resolution 817 (1993)".

The Parties agree that this provision imposes on the Respondent an obligation not to object to the admission of the Applicant to international organizations of which the Respondent is a member, including NATO, subject to the exception in the second clause of paragraph 1.

63. The Applicant contends that the Respondent, prior to, and during, the Bucharest Summit, failed to comply with the obligation not to object contained in the first clause of Article 11, paragraph 1.

64. The Respondent maintains that it did not object to the Applicant's admission to NATO. As an alternative, the Respondent argues that any

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objection attributable to it at the Bucharest Summit does not violate Article 11, paragraph 1, because it would fall within the second clause of Article 11, paragraph 1. In support of this position, the Respondent asserts that the Applicant would have been referred to in NATO "differently than in" paragraph 2 of resolution 817. In addition, the Respondent argues that, even if it is found to have objected within the meaning of Article 11, paragraph 1, such an objection would not have been inconsistent with the Interim Accord because of the operation of Article 22 of the Interim Accord.

65. The Applicant counters with the view that the Respondent's objection does not fall within the scope of the second clause of Article 11, paragraph 1, of the Interim Accord and that the obligation not to object is not obviated by Article 22.

66. The Court will first address the two clauses of Article 11, paragraph 1, and then will consider the effect of Article 22.

1. The Respondent's Obligation under Article 11, Paragraph 1, of the Interim Accord not to Object to the Applicant's Admission to NATO

A. The meaning of the first clause of Article 11, paragraph 1, of the Interim Accord

67. The first clause of Article 11, paragraph 1, of the Interim Accord obliges the Respondent not to object to "the application by or membership of" the Applicant in NATO. The Court notes that the Parties agree that the obligation "not to object" does not require the Respondent actively to support the Applicant's admission to international organizations. In addition, the Parties agree that the obligation "not to object" is not an obligation of result, but rather one of conduct.

68. The interpretations advanced by the Parties diverge, however, in significant respects. The Applicant asserts that in its ordinary meaning, interpreted in light of the object and purpose of the Interim Accord, the phrase "not to object" should be read broadly to encompass any implicit or explicit act or expression of disapproval or opposition, in word or deed, to the Applicant's application to or membership in an organization or institution. In the Applicant's view, the act of objecting is not limited to casting a negative vote. Rather, it could include any act or omission designed to oppose or to prevent a consensus decision at an international organization (where such consensus is necessary for the Applicant to secure membership) or to inform other members of an international organization or institution that the Respondent will not permit such a consensus decision to be reached. In particular, the Applicant notes that NATO members are admitted on the basis of unanimity of NATO member

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States, in accordance with Article 10 of the North Atlantic Treaty. That provision states, in the relevant part, as follows:

> "The Parties may, by unanimous agreement, invite any other European State in a position to further the principles of this Treaty and to contribute to the security of the North Atlantic area to accede to this Treaty." (North Atlantic Treaty, 4 April 1949, Art. 10, *UNTS*, Vol. 34, p. 248.)

69. The Respondent interprets the obligation "not to object" more narrowly. In its view, an objection requires a specific, negative act, such as casting a vote or exercising a veto against the Applicant's admission to or membership in an organization or institution. An objection does not, under the Respondent's interpretation, include abstention or the withholding of support in a consensus process. As a general matter, the Respondent argues that the phrase "not to object" should be interpreted narrowly because it imposes a limitation on a right to object that the Respondent would otherwise possess.

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70. The Court does not accept the general proposition advanced by the Respondent that special rules of interpretation should apply when the Court is examining a treaty that limits a right that a party would otherwise have. Turning to the Respondent's specific arguments in regard to the first clause of Article 11, paragraph 1, the Court observes that nothing in the text of that clause limits the Respondent's obligation not to object to organizations that use a voting procedure to decide on the admission of new members. There is no indication that the Parties intended to exclude from Article 11, paragraph 1, organizations like NATO that follow procedures that do not require a vote. Moreover, the question before the Court is not whether the decision taken by NATO at the Bucharest Summit with respect to the Applicant's candidacy was due exclusively, principally, or marginally to the Respondent's objection. As the Parties agree, the obligation under the first clause of Article 11, paragraph 1, is one of conduct, not of result. Thus, the question before the Court is whether the Respondent, by its own conduct, did not comply with the obligation not to object contained in Article 11, paragraph 1, of the Interim Accord.

71. The Court also observes that the Respondent did not take the position that any objection by it at the Bucharest Summit was based on grounds unrelated to the difference over the name. Therefore, the Court need not decide whether the Respondent retains a right to object to the

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Applicant's admission to international organizations on such other grounds.

B. Whether the Respondent "objected" to the Applicant's admission to NATO

72. The Court now turns to the evidence submitted to it by the Parties, in order to decide whether the record supports the Applicant's contention that the Respondent objected to the Applicant's membership in NATO. In this regard, the Court recalls that, in general, it is the duty of the party that asserts certain facts to establish the existence of such facts (*Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010 (I)*, p. 71, para. 162; *Maritime Delimitation in the Black Sea (Romania* v. *Ukraine), Judgment, I.C.J. Reports 2009*, p. 86, para. 68). Thus, the Applicant bears the burden of establishing the facts that support its allegation that the Respondent failed to comply with its obligation under the Interim Accord.

73. To support the position that the Respondent objected to its admission to NATO, the Applicant refers the Court to diplomatic correspondence of the Respondent before and after the Bucharest Summit and to statements by senior officials of the Respondent during the same period. The Respondent does not dispute the authenticity of these statements. The Court will examine these statements as evidence of the Respondent's conduct in connection with the Bucharest Summit, in light of its obligation under Article 11, paragraph 1, of the Interim Accord.

74. The Applicant referred to diplomatic correspondence from the Respondent to other NATO member States exchanged prior to the Bucharest Summit. An aide-memoire circulated by the Respondent to its fellow NATO member States in 2007 points to the ongoing negotiations between the Parties pursuant to resolution 817 and states that "[t]he satisfactory conclusion of the said negotiations is a *sine qua non*, in order to enable Greece to continue to support the Euro-atlantic aspirations of Skopje". The aide-memoire further states that the resolution of the name issue "is going to be the decisive criterion for Greece to accept an invitation to FYROM to start NATO accession negotiations".

75. The Applicant also introduced evidence showing that, during the same period, the Respondent's Prime Minister and Foreign Minister stated publicly on a number of occasions that the Respondent would oppose the extension of an invitation to the Applicant to join NATO at the Bucharest Summit unless the name issue was resolved. On 22 February 2008, the Respondent's Prime Minister, speaking at a session of the Respondent's Parliament, made the following statement with regard to the difference between the Parties over the name: "[W]ithout a mutually acceptable solution allied relations cannot be established, there cannot be an invitation to the neighbouring country to join the Alliance. No solution means — no invitation." The record indicates that the Prime Minister reiterated this position publicly on at least three occasions in March 2008.

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76. The Respondent's Foreign Minister also explained her Government's position prior to the Bucharest Summit. On 17 March 2008, she declared, referring to the Applicant, that "[i]f there is no compromise, we will block their accession". Ten days later, on 27 March 2008, in a speech to the governing party's Parliamentary Group, she stated that until a solution is reached, "we cannot, of course, consent to addressing an invitation to our neighbouring state to join NATO. No solution — no invitation. We said it, we mean it, and everyone knows it."

77. The Applicant also points to the statement of the Respondent's Prime Minister, made on 3 April 2008 at the close of the Bucharest Summit in a message directed to the Greek people:

> "It was unanimously decided that Albania and Croatia will accede to NATO. Due to Greece's veto, FYROM is not joining NATO.
>
> I had said to everyone — in every possible tone and in every direction — that 'a failure to solve the name issue will impede their invitation' to join the Alliance. And that is what I did. Skopje will be able to become a member of NATO only after the name issue has been resolved."

The Applicant notes that this characterization of events at the Summit is corroborated by other contemporaneous statements, including that of a NATO spokesperson.

78. In addition, the Applicant relies on diplomatic correspondence from the Respondent after the Bucharest Summit, in which the Respondent characterizes its position at the Summit. In particular, the Applicant introduced a letter, dated 14 April 2008, from the Respondent's Permanent Representative to the United Nations to the Permanent Representative of Costa Rica to the United Nations that included the following statement:

> "At the recent NATO Summit Meeting in Bucharest and in view of the failure to reach a viable and definitive solution to the name issue, Greece was not able to consent to the Former Yugoslav Republic of Macedonia being invited to join the North Atlantic Alliance."

The Applicant asserts that the Respondent sent similar letters to all other Members of the United Nations Security Council and to the United Nations Secretary-General. The Respondent does not refute this contention.

79. On 1 June 2008, in an aide-memoire sent by the Respondent to the Organization of American States and its member States, the Respondent made the following statement:

> "At the NATO's Summit in Bucharest in April 2008, allied leaders, upon Greece's proposal, agreed to postpone an invitation to FYROM to join the Alliance, until a mutually acceptable solution to the name issue is reached."

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80. The Respondent stresses the absence of a formal voting mechanism within NATO. For that reason, the Respondent asserts that, irrespective of the statements by its government officials, there is no means by which a NATO member State can exercise a "veto" over NATO decisions. The Respondent further maintains that its obligation under Article 11, paragraph 1, does not prevent it from expressing its views, whether negative or positive, regarding the Applicant's eligibility for admission to an organization, and characterizes the statements by its government officials as speaking to whether the Applicant had satisfied the organization's eligibility requirements, not as setting forth a formal objection. The Respondent further contends that it was "unanimously" decided at the Bucharest Summit that the Applicant would not yet be invited to join NATO, and thus that it cannot be determined whether a particular State "objected" to the Applicant's membership. According to the Respondent, "Greece did not veto the FYROM's accession to NATO . . . It was a *collective* decision made on behalf of the Alliance as a whole." (Emphasis in the original.)

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81. In the view of the Court, the evidence submitted to it demonstrates that through formal diplomatic correspondence and through statements of its senior officials, the Respondent made clear before, during and after the Bucharest Summit that the resolution of the difference over the name was the "decisive criterion" for the Respondent to accept the Applicant's admission to NATO. The Respondent manifested its objection to the Applicant's admission to NATO at the Bucharest Summit, citing the fact that the difference regarding the Applicant's name remained unresolved.

82. Moreover, the Court cannot accept that the Respondent's statements regarding the admission of the Applicant were not objections, but were merely observations aimed at calling the attention of other NATO member States to concerns about the Applicant's eligibility to join NATO. The record makes abundantly clear that the Respondent went beyond such observations to oppose the Applicant's admission to NATO on the ground that the difference over the name had not been resolved.

83. The Court therefore concludes that the Respondent objected to the Applicant's admission to NATO, within the meaning of the first clause of Article 11, paragraph 1, of the Interim Accord.

2. The Effect of the Second Clause of Article 11, Paragraph 1, of the Interim Accord

84. The Court turns now to the question whether the Respondent's objection to the Applicant's admission to NATO at the Bucharest Summit fell within the exception contained in the second clause of Article 11, paragraph 1, of the Interim Accord.

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85. In this clause, the Parties agree that the Respondent "reserves the right to object to any membership" by the Applicant in an international, multilateral or regional organization or institution of which the Respondent is a member "if and to the extent the [Applicant] is to be referred to in such organization or institution differently than in paragraph 2 of United Nations Security Council resolution 817 (1993)". The Court recalls that paragraph 2 of resolution 817 recommends that the Applicant be admitted to membership in the United Nations, being "provisionally referred to for all purposes within the United Nations as 'the former Yugoslav Republic of Macedonia' pending settlement of the difference that has arisen over the name of the State".

86. The Applicant maintains that the exception in the second clause of Article 11, paragraph 1, applies only if the Applicant is to be referred to by the organization itself as something other than "the former Yugoslav Republic of Macedonia". In its view, resolution 817 contemplated that the Applicant would refer to itself by its constitutional name ("Republic of Macedonia") within the United Nations. The Applicant asserts that this has been its consistent practice since resolution 817 was adopted and that the Parties incorporated this practice into the second clause of Article 11, paragraph 1. The Applicant also cites evidence contemporaneous with the adoption of resolution 817 indicating, in its view, that it was understood by States involved in the drafting of that resolution that the resolution would neither require the Applicant to refer to itself by the provisional designation within the United Nations nor direct third States to use any particular name or designation when referring to the Applicant. On this basis, it is the Applicant's position that the Respondent's right to object pursuant to Article 11, paragraph 1, does not apply to the Applicant's admission to NATO because the same practice would be followed in NATO that has been followed in the United Nations. The Applicant asserts that the reference to how it will be referred to "in" an organization means, with respect to an organization such as NATO, *inter alia*: the way that it will be listed by NATO as a member of the organization; the way that representatives of the Applicant will be accredited by NATO; and the way that NATO will refer to the Applicant in all official NATO documents.

87. The Respondent is of the view that the Applicant's intention to refer to itself in NATO by its constitutional name, as well as the possibility that third States may refer to the Applicant by its constitutional name, triggers the exception in the second clause of Article 11, paragraph 1, and thus permitted the Respondent to object to the Applicant's admission to NATO. In the Respondent's view, resolution 817 requires the Applicant to refer to itself as the "former Yugoslav Republic of Macedonia" within the United Nations. The Respondent does not dispute the Applicant's claim of consistent practice within the United Nations, but contends that the Respondent engaged in a "general practice of protests" in regard to

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use of the Applicant's constitutional name, before and after the conclusion of the Interim Accord. To support this assertion, the Respondent submits evidence of eight instances during the period between the adoption of resolution 817 and the conclusion of the Interim Accord in which the Respondent claimed that the Applicant's reference to itself by the name "Republic of Macedonia" within the United Nations was inconsistent with resolution 817.

88. With respect to the text of Article 11, paragraph 1, the Respondent points out that the second clause of that Article applies when the Applicant is to be referred to "in" an organization, not only when the Applicant is to be referred to "by" the organization in a particular way. Moreover, the Respondent argues that the phrase "if and to the extent that" in the second clause means that Article 11, paragraph 1, is not merely an "on/off switch". Instead, in the Respondent's view, the phrase "to the extent" makes clear that the Respondent may object in response to a limited or occasional use of a name other than the provisional designation (such as when the Applicant "instigates the use" of a different name by the officers of an organization or by other member States of the organization). In support of this interpretation the Respondent asserts that the phrase "if and to the extent that" would lack *effet utile* if it were not interpreted as the Respondent suggests, because this would render the words "to the extent that" without legal content.

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89. The Court notes that the Parties agree on the interpretation of the second clause of Article 11, paragraph 1, in one circumstance: the exception contained in the second clause permits the Respondent to object to the Applicant's admission to an organization if the Applicant is to be referred to by the organization itself other than by the provisional designation. The Respondent also asserts that it has the right to object in two other circumstances: first, if the Applicant will refer to itself in the organization using its constitutional name and, secondly, if third States will refer to the Applicant in the organization by its constitutional name. The Applicant disagrees with both of these assertions.

90. Although the Parties articulate divergent views on the interpretation of the clause, i.e., whether the Respondent may object if third States will refer to the Applicant using its constitutional name, the Respondent does not pursue, as a factual matter, the position that any objection at the Bucharest Summit was made in response to the prospect that third States would refer to the Applicant in NATO using its constitutional name. Thus, in the present case, the Court need not decide whether the second clause would permit an objection based on the prospect that third States would use the Applicant's constitutional name in NATO. On the other

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hand, the Parties agree that the Applicant intended to refer to itself within NATO, once admitted, by its constitutional name, not by the provisional designation set forth in resolution 817. Thus, the Court must decide whether the second clause of Article 11, paragraph 1, permitted the Respondent to object in that circumstance.

91. The Court will interpret the second clause of Article 11, paragraph 1, of the Interim Accord, in accordance with Articles 31 and 32 of the Vienna Convention on the Law of Treaties of 1969 (hereinafter the "1969 Vienna Convention"), to which both the Applicant and the Respondent are parties. The Court will therefore begin by considering the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.

92. The Court observes that the Parties formulated the second clause using the passive voice: "if and to the extent the [Applicant] is to be referred to . . . differently than in" paragraph 2 of resolution 817. The use of the passive voice is difficult to reconcile with the Respondent's view that the clause covers not only how the organization is to refer to the Applicant but also the way that the Applicant is to refer to itself. As to the inclusion of the phrase "to the extent", the Court recalls the Respondent's contention that the phrase lacks legal effect ("effet utile") unless it is interpreted to mean that the Respondent's right to object is triggered not only by the anticipated practice of the organization, but also by the use of the constitutional name by others. The Court cannot agree that the phrase would have legal effect only if interpreted as the Respondent suggests. The phrase would still have a legal significance, for example, if it were interpreted to mean that the Respondent has a right to object for so long as the organization refers to the Applicant by the constitutional name. Accordingly, the Court rejects the Respondent's contention that the phrase "to the extent" is without legal effect unless the second clause of Article 11, paragraph 1, permits the Respondent to object to admission to an organization if the Applicant is to refer to itself in the organization by its constitutional name.

93. As for the phrase "to be referred to . . . differently than in paragraph 2 of United Nations Security Council resolution 817 (1993)", it will be recalled that the relevant text of that resolution recommends that the Applicant be admitted to membership in the United Nations, being "provisionally referred to for all purposes within the United Nations as 'the former Yugoslav Republic of Macedonia'" pending settlement of the difference over the name. Thus, a central question for the Court is whether the prospect that the Applicant would refer to itself in NATO by its constitutional name means that the Applicant is "to be referred to . . . differently than in paragraph 2 of Security Council resolution 817 (1993)". The Court therefore examines the text of resolution 817 in relation to the second clause of Article 11, paragraph 1. That resolution was adopted

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pursuant to Article 4, paragraph 2, of the Charter of the United Nations, which states that admission of a State to membership in the Organization is effected by a decision of the General Assembly upon the recommendation of the Security Council. Thus, it could be argued that paragraph 2 of resolution 817 is directed primarily to another organ of the United Nations, namely the General Assembly, rather than to individual Member States. On the other hand, the wording of paragraph 2 of resolution 817 is broad — "for all purposes" — and thus could be read to extend to the conduct of Member States, including the Applicant, within the United Nations.

94. Bearing in mind these observations regarding the text of the second clause of Article 11, paragraph 1, and of resolution 817, the Court will now proceed to ascertain the ordinary meaning of the second clause of Article 11, paragraph 1, in its context and in light of the treaty's object and purpose. To this end, the Court will examine other provisions of the treaty and a related and contemporaneous agreement between the Parties.

95. Article 1, paragraph 1, of the Interim Accord, provides that the Respondent will recognize the Applicant as an "independent and sovereign state" and that the Respondent will refer to it by a provisional designation (as "the former Yugoslav Republic of Macedonia"). Nowhere, however, does the Interim Accord require the Applicant to use the provisional designation in its dealings with the Respondent. On the contrary, the "Memorandum on 'Practical Measures' Related to the Interim Accord", concluded by the Parties contemporaneously with the entry into force of the Interim Accord, expressly envisages that the Applicant will refer to itself as the "Republic of Macedonia" in its dealings with the Respondent. Thus, as of the entry into force of the Interim Accord, the Respondent did not insist that the Applicant forbear from the use of its constitutional name in all circumstances.

96. The Court also contrasts the wording of the second clause of Article 11, paragraph 1, to other provisions of the treaty that impose express limitations on the Applicant or on both Parties. In Article 7, paragraph 2, for example, the Applicant agrees to "cease" the use of the symbol that it had previously used on its flag. This provision thus contains a requirement that the Applicant change its existing conduct. Additional provisions under the general heading of "friendly relations and confidence-building measures" — namely, the three paragraphs of Article 6 — are also framed entirely as commitments by the Applicant. By contrast, although the Parties were aware of the Applicant's consistent use of its constitutional name in the United Nations, the Parties drafted the second clause of Article 11, paragraph 1, without using language that calls for a change in the Applicant's conduct. If the Parties had wanted the Interim Accord to mandate a change in the Applicant's use of its constitutional name in international organizations, they could have included

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an explicit obligation to that effect as they did with the corresponding obligations in Article 6 and Article 7, paragraph 2.

97. The significance of this comparison between the second clause of Article 11, paragraph 1, and other provisions of the Interim Accord is underscored by consideration of the overall structure of the treaty and the treaty's object and purpose. While each Party emphasizes different aspects of the treaty in describing its object and purpose, they appear to hold a common view that the treaty was a comprehensive exchange with the overall object and purpose of: first, providing for the normalization of the Parties' relations (bilaterally and in international organizations); secondly, requiring good-faith negotiations regarding the difference over the name; and, thirdly, agreeing on what the Respondent called "assurances related to particular circumstances", e.g., provisions governing the use of certain symbols and requiring effective measures to prohibit political interference, hostile activities and negative propaganda. Viewed together, the two clauses of Article 11, paragraph 1, advance the first of these objects by specifying the conditions under which the Respondent is required to end its practice of blocking the Applicant's admission to organizations. Another component of the exchange — the provisions containing assurances, including those that impose obligations on the Applicant to change its conduct — appears elsewhere in the treaty. In light of the structure and the object and purpose of the treaty, it appears to the Court that the Parties would not have imposed a significant new constraint on the Applicant — that is, to constrain its consistent practice of calling itself by its constitutional name — by mere implication in Article 11, paragraph 1. Thus, the Court concludes that the structure and the object and purpose of the treaty support the position taken by the Applicant.

98. Taken together, therefore, the text of the second clause of Article 11, paragraph 1, when read in context and in light of the object and purpose of the treaty, cannot be interpreted to permit the Respondent to object to the Applicant's admission to or membership in an organization because of the prospect that the Applicant would refer to itself in that organization using its constitutional name.

99. The Court next examines the subsequent practice of the Parties in the application of Article 11, paragraph 1, of the Interim Accord, in accordance with Article 31, paragraph 3 *(b)*, of the 1969 Vienna Convention. The Applicant asserts that between the conclusion of the Interim Accord and the Bucharest Summit, it joined at least 15 international organizations of which the Respondent was also a member. In each case, the Applicant was admitted under the provisional designation prescribed by paragraph 2 of resolution 817 and has been referred to in the organiza-

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tion by that name. However, the Applicant has continued to refer to itself by its constitutional name in its relations with and dealings within those international organizations and institutions. The Court notes, in particular, the Applicant's assertion that the Respondent did not object to its admission to any of these 15 organizations. This point went unchallenged by the Respondent. Although there is no evidence that the Respondent ever objected to admission or membership based on the prospect that the Applicant would use its constitutional name in such organizations, the Respondent does identify one instance in which it complained about the Applicant's use of its constitutional name in the Council of Europe after the Applicant had already joined that organization. The Respondent apparently raised its concerns for the first time only in December 2004, more than nine years after the Applicant's admission, returning to the subject once again in 2007.

100. The Court also refers to evidence of the Parties' practice in respect of NATO prior to the Bucharest Summit. For several years leading up to the Bucharest Summit, the Applicant consistently used its constitutional name in its dealings with NATO, as a participant in the NATO Partnership for Peace and the NATO Membership Action Plan. Despite the Applicant's practice of using its constitutional name in its dealings with NATO, as it did in all other organizations, there is no evidence that the Respondent, in the period leading up to the Bucharest Summit, ever expressed concerns about the Applicant's use of the constitutional name in its dealings with NATO or that the Respondent indicated that it would object to the Applicant's admission to NATO based on the Applicant's past or future use of its constitutional name. Instead, as detailed above, the evidence makes clear that the Respondent objected to the Applicant's admission to NATO in view of the failure to reach a final settlement of the difference over the name.

101. Based on the foregoing analysis, the Court concludes that the practice of the Parties in implementing the Interim Accord supports the Court's prior conclusions (see paragraph 98) and thus that the second clause of Article 11, paragraph 1, does not permit the Respondent to object to the Applicant's admission to an organization based on the prospect that the Applicant is to refer to itself in such organization with its constitutional name.

102. The Court recalls that the Parties introduced extensive evidence related to the *travaux préparatoires* of the Interim Accord and of resolution 817. In view of the conclusions stated above (see paragraphs 98 and 101), however, the Court considers that it is not necessary to address this additional evidence. The Court also recalls that each Party referred to additional evidence regarding the use of the Applicant's constitutional name, beyond the evidence related to the subsequent practice under the Interim Accord, which is analysed above. This evidence does not bear directly on the question whether the Interim Accord permits the Respondent to object to the Applicant's admission to or membership in an orga-

nization based on the Applicant's self-reference by its constitutional name, and accordingly the Court does not address it.

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103. In view of the preceding analysis, the Court concludes that the Applicant's intention to refer to itself in an international organization by its constitutional name did not mean that it was "to be referred to" in such organization "differently than in" paragraph 2 of resolution 817. Accordingly, the exception set forth in the second clause of Article 11, paragraph 1, of the Interim Accord did not entitle the Respondent to object to the Applicant's admission to NATO.

3. Article 22 of the Interim Accord

104. Article 22 of the Interim Accord provides:

> "This Interim Accord is not directed against any other State or entity and it does not infringe on the rights and duties resulting from bilateral or multilateral agreements already in force that the Parties have concluded with other States or international organizations."

105. The Applicant maintains that Article 22 "is simply a factual statement". It "does not address the rights and duties of the Respondent: it merely declares that the Interim Accord as a whole does not infringe on the rights and duties of third States or other entities". According to the Applicant, Article 22 expresses "the rule set forth in Article 34 of the 1969 Vienna Convention . . . that '[a] treaty does not create either obligations or rights for a third State without its consent'". The Applicant notes that the Respondent's interpretation would render Article 11, paragraph 1, meaningless by allowing the Respondent to object simply by invoking an alleged right or duty under another agreement.

106. The Respondent takes the position that, even assuming that the Court were to conclude that the Respondent had objected to the Applicant's admission to NATO, in contravention of Article 11, paragraph 1, such objection would not breach the Interim Accord, because of the effect of Article 22. In the written proceedings, the Respondent construed Article 22 to mean that both the rights and the duties of a party to the Interim Accord under a prior agreement prevail over that party's obligations in the Interim Accord. In particular, the Respondent argued that it was free to object to the Applicant's admission to NATO because "any rights of Greece under NATO, and any obligations owed to NATO or to the other NATO member States must prevail in case of a conflict" with the restriction on the Respondent's right to object under Article 11, paragraph 1. The Respondent relied on its right under Article 10 of the North Atlantic

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Treaty to consent (or not) to the admission of a State to NATO and its "duty to engage actively and promptly in discussions of concern to the Organization". The Respondent argues that Article 22 "is a *legal* provision" (emphasis in the original) and not "simply a factual statement" and that the Applicant's interpretation of Article 22 — that it restates the rule in Article 34 of the [1969 Vienna Convention] — "would render Article 22 essentially an exercise in redundancy".

107. In the course of the oral proceedings, however, the Respondent appears to have narrowed its interpretation of Article 22, stating that it has a right to object "if, and only if, the rules and criteria of those organizations *require* objection in the light of the circumstances of the application for admission" (emphasis added). From the fact that NATO is a "limited-membership organization" with the specific objective of mutual defence, the Respondent also infers a duty "to exercise plenary judgment in each membership decision". In the Respondent's view, each member State thus has not only a right but also a duty to raise its concerns if it believes that an applicant does not fulfil the organization's accession criteria. With respect to the content of those accession criteria as they relate to the Applicant, the Respondent relies principally on a NATO press release entitled "Membership Action Plan (MAP)", adopted at the close of the Washington, D.C. NATO Summit on 24 April 1999, stating that aspiring members would be expected, *inter alia*, "to settle ethnic disputes or external territorial disputes including irredentist claims . . . by peaceful means" and "to pursue good neighbourly relations".

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108. The Court first observes that if Article 22 of the Interim Accord is interpreted as a purely declaratory provision, as the Applicant suggests, that Article could under no circumstances provide a basis for the Respondent's objection.

109. Turning to the Respondent's interpretation of Article 22, the Court notes the breadth of the Respondent's original contention that its "rights" under a prior agreement (in addition to its "duties") take precedence over its obligation not to object to admission by the Applicant to an organization within the terms of Article 11, paragraph 1. That interpretation of Article 22, if accepted, would vitiate that obligation, because the Respondent normally can be expected to have a "right" under prior agreements with third States to express a view on membership decisions. The Court, considering that the Parties did not intend Article 22 to render meaningless the first clause of Article 11, paragraph 1, is therefore unable to accept the broad interpretation originally advanced by the Respondent. In this regard, the Court notes that the Court of Justice of the European Communities has rejected a similar argument. In particu-

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lar, that court has interpreted a provision of the Treaty establishing the European Economic Community which states that "rights and obligations" under prior agreements "shall not be affected by" the provisions of the treaty. The European Court has concluded that this language refers to the "rights" of third countries and the "obligations" of treaty parties, respectively (see Case 10/61 *Commission* v. *Italy* [1962] ECR, p. 10; see also Case C-249/06 *Commission* v. *Sweden* [2009] ECR I-1348, para. 34).

110. The Court thus turns to the Respondent's narrower interpretation of Article 22, i.e., that "duties" under a prior treaty would take precedence over obligations in the Interim Accord. Accepting, *arguendo*, that narrower interpretation, the next step in the Court's analysis would be to evaluate whether the Respondent has duties under the North Atlantic Treaty with which it cannot comply without being in breach of its obligation not to object to the Applicant's admission to NATO. Thus, to evaluate the effect of Article 22, if interpreted in the manner suggested by the Respondent in the narrower and later version of its argument, the Court must also examine whether the Respondent has established that the North Atlantic Treaty imposed a duty on it to object to the Applicant's admission to NATO.

111. The Respondent offers no persuasive argument that any provision of the North Atlantic Treaty required it to object to the Applicant's membership. Instead the Respondent attempts to convert a general "right" to take a position on membership decisions into a "duty" by asserting a "duty" to exercise judgment as to membership decisions that frees the Respondent from its obligation not to object to the Applicant's admission to an organization. This argument suffers from the same deficiency as the broader interpretation of Article 22 initially advanced by the Respondent, namely, that it would erase the value of the first clause of Article 11, paragraph 1. Thus, the Court concludes that the Respondent has not demonstrated that a requirement under the North Atlantic Treaty compelled it to object to the admission of the Applicant to NATO.

112. As a result of the foregoing analysis, the Court concludes that the Respondent's attempt to rely on Article 22 is unsuccessful. Accordingly, the Court need not decide which of the two Parties' interpretations is the correct one.

4. Conclusion concerning whether the Respondent Failed to Comply with Article 11, Paragraph 1, of the Interim Accord

113. Thus, the Court concludes that the Respondent failed to comply with its obligation under Article 11, paragraph 1, of the Interim Accord by objecting to the Applicant's admission to NATO at the Bucharest

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Summit. The prospect that the Applicant would refer to itself in NATO using its constitutional name did not render that objection lawful under the exception contained in the second clause of Article 11, paragraph 1. In the circumstances of the present case, Article 22 of the Interim Accord does not provide a basis for the Respondent to make an objection that is inconsistent with Article 11, paragraph 1.

IV. Additional Justifications Invoked by the Respondent

114. As an alternative to its main argument that the Respondent complied with its obligations under the Interim Accord, the Respondent contends that the wrongfulness of any objection to the admission of the Applicant to NATO is precluded by the doctrine of *exceptio non adimpleti contractus*. The Respondent also suggests that any failure to comply with its obligations under the Interim Accord could be justified both as a response to a material breach of a treaty and as a countermeasure under the law of State responsibility. The Court will begin by summarizing the Parties' arguments with respect to those three additional justifications.

1. The Parties' Arguments with regard to the Respondent's Additional Justifications

A. The Parties' arguments with regard to the exceptio non adimpleti *contractus*

115. The Respondent states that the *exceptio non adimpleti contractus* is a general principle of international law that permits the Respondent "to withhold the execution of its own obligations which are reciprocal to those not performed by [the Applicant]". According to the Respondent, the *exceptio* would apply in respect of the failure of one party to perform a "fundamental provision" of the Interim Accord. In the view of the Respondent, the *exceptio* permits a State suffering breaches of treaty commitments by another State to respond by unilaterally suspending or terminating its own corresponding obligations. In particular, the Respondent contends that its obligation not to object (under Article 11, paragraph 1) is linked in a synallagmatic relationship with the obligations of the Applicant in Articles 5, 6, 7 and 11 of the Interim Accord, and thus that under the *exceptio*, breaches by the Applicant of these obligations preclude the wrongfulness of any non-performance by the Respondent of its obligation not to object to the Applicant's admission to NATO.

116. The Respondent also states that "the conditions triggering the exception of non-performance are different from and less rigid than the conditions for suspending a treaty or precluding wrongfulness by way of countermeasures". According to the Respondent, the *exceptio* "does not

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have to be notified or proven beforehand . . . There are simply no procedural requirements to the exercise of the staying of the performance through the mechanism of the *exceptio*." The Respondent also points to several situations in which it maintains that it complained to the Applicant about the Applicant's alleged failure to comply with its obligations under the Interim Accord.

117. The Applicant asserts that the Respondent has failed to demonstrate that the *exceptio* is a general principle of international law. The Applicant also argues that Article 60 of the 1969 Vienna Convention provides a complete set of rules and procedures governing responses to material breaches under the law of treaties and that the *exceptio* is not recognized as justifying non-performance under the law of State responsibility. The Applicant further disputes the Respondent's contention that the Applicant's obligations under Articles 5, 6 and 7 of the Interim Accord are synallagmatic with the Respondent's obligation not to object in Article 11, paragraph 1. The Applicant also takes the position that the Respondent did not raise the breaches upon which it now relies until after the Respondent objected to the Applicant's admission to NATO.

B. The Parties' arguments with regard to a response to material breach

118. The Respondent maintains that any disregard of its obligations under the Interim Accord could be justified as a response to a material breach of a treaty. The Respondent initially stated that it was not seeking to suspend the Interim Accord in whole or in part pursuant to the 1969 Vienna Convention, but later took the position that partial suspension of the Interim Accord is "justified" under Article 60 of the 1969 Vienna Convention (to which both the Applicant and Respondent are parties) because the Applicant's breaches were material. The Respondent took note of the procedural requirements contained in Article 65 of the 1969 Vienna Convention, but asserted that, if a State is suspending part of a treaty "in answer to another party . . . alleging its violation", *ex ante* notice is not required.

119. The Applicant contends that the Respondent never alerted the Applicant to any alleged material breach of the Interim Accord and never sought to invoke a right of suspension under Article 60 of the 1969 Vienna Convention. The Applicant notes that the Respondent confirmed its non-reliance on Article 60 in the Counter-Memorial. In addition, the Applicant calls attention to the "specific and detailed" procedural requirements of Article 65 of the 1969 Vienna Convention and asserts that the Respondent has not met those. The Applicant further contends that prior to the Bucharest Summit, the Respondent never notified the Applicant of any ground for suspension

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of the Interim Accord, of its view that the Applicant had breached the Interim Accord or that the Respondent was suspending the Interim Accord.

C. The Parties' arguments with regard to countermeasures

120. The Respondent also argues that any failure to comply with its obligations under the Interim Accord could be justified as a countermeasure. As with the Respondent's argument regarding suspension in response to a material breach, the Respondent's position on countermeasures evolved during the proceedings. Initially, the Respondent stated that it did not claim that any objection to the Applicant's admission to NATO was justified as a countermeasure. Later, the Respondent stated that its "supposed objection would fulfil the requirements for countermeasures". The Respondent described the defence as "doubly subsidiary", meaning that it would play a role only if the Court found the Respondent to be in breach of the Interim Accord and if it concluded that the *exceptio* did not preclude the wrongfulness of the Respondent's conduct.

121. The Respondent discusses countermeasures with reference to the requirements reflected in the International Law Commission Articles on State Responsibility (Annex to General Assembly resolution 56/83, 12 December 2001, hereinafter referred to as "the ILC Articles on State Responsibility"). It asserts that the Applicant's violations were serious and that the Respondent's responses were consistent with the conditions reflected in the ILC Articles on State Responsibility, which it describes as requiring that countermeasures be proportionate, be taken for the purpose of achieving cessation of the wrongful act and be confined to the temporary non-performance of the Respondent's obligation not to object. The Respondent also states that the Applicant was repeatedly informed of the Respondent's positions.

122. The Applicant calls attention to the requirements in the ILC Articles on State Responsibility that countermeasures must be taken in response to a breach by the other State, must be proportionate to those breaches and must be taken only after notice to the other State. In the view of the Applicant, none of these requirements were met. The Applicant further states its view that the requirements for the imposition of countermeasures contained in the ILC Articles on State Responsibility reflect "general international law".

2. The Respondent's Allegations that the Applicant Failed to Comply with Its Obligations under the Interim Accord

123. The Court observes that while the Respondent presents separate arguments relating to the *exceptio*, partial suspension under Article 60 of the 1969 Vienna Convention, and countermeasures, it advances certain minimum conditions that are common to all three arguments. First, the

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Respondent bases each argument on the allegation that the Applicant breached several provisions of the Interim Accord prior to the Respondent's objection to the Applicant's admission to NATO. Secondly, each argument, as framed by the Respondent, requires the Respondent to show that its objection to the Applicant's admission to NATO was made in response to the alleged breach or breaches by the Applicant, in other words, to demonstrate a connection between any breach by the Applicant and any objection by the Respondent. With these conditions in mind, the Court turns to the evidence regarding the alleged breaches by the Applicant. As previously noted (see paragraph 72), it is in principle the duty of the party that asserts certain facts to establish the existence of such facts.

A. Alleged breach by the Applicant of the second clause of Article 11, paragraph 1

124. The Court begins with the Respondent's claim that the second clause of Article 11, paragraph 1, imposes an obligation on the Applicant not to be referred to in an international organization or institution by any reference other than the provisional designation (as "the former Yugoslav Republic of Macedonia"). The Respondent alleges that the Applicant has failed to comply with such an obligation.

125. The Applicant, for its part, asserts that the second clause of Article 11, paragraph 1, does not impose an obligation on the Applicant, but instead specifies the single circumstance under which the Respondent may object to admission.

126. The Court notes that on its face, the text of the second clause of Article 11, paragraph 1, does not impose an obligation upon the Applicant. The Court further notes that, just as other provisions of the Interim Accord impose obligations only on the Applicant, Article 11, paragraph 1, imposes an obligation only on the Respondent. The second clause contains an important exception to this obligation, but that does not transform it into an obligation upon the Applicant. Accordingly, the Court finds no breach by the Applicant of this provision.

B. Alleged breach by the Applicant of Article 5, paragraph 1

127. The Court next considers the Respondent's allegation that the Applicant breached its obligation to negotiate in good faith. It will be recalled that Article 5, paragraph 1, of the Interim Accord provides:

> "The Parties agree to continue negotiations under the auspices of the Secretary-General of the United Nations pursuant to Security Council resolution 845 (1993) with a view to reaching agreement on the difference described in that resolution and in Security Council resolution 817 (1993)."

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128. The Respondent asserts that the Parties understood that the negotiations pursuant to Article 5, paragraph 1, have always been meant to reach agreement on a single name that would be used for all purposes. The Respondent contends that the Applicant has departed from this understanding by pressing for a "dual formula" whereby the negotiations are "limited solely to finding a name for use in the bilateral relations of the Parties" and thus has attempted "unilaterally to redefine the object and purpose of [the] negotiations". The Respondent further contends that the Applicant's continuous use of its constitutional name to refer to itself and its policy of securing third-State recognition under that name deprives the negotiations of their object and purpose. The Respondent also makes the more general allegation that the Applicant has adopted an intransigent and inflexible stance during the negotiations over the name.

129. The Applicant, on the other hand, is of the view that it "gave no undertaking under resolution 817, the Interim Accord or otherwise to call *itself* by the provisional reference" (emphasis in the original) and maintains that its efforts to build third-State support for its constitutional name do not violate its obligation to negotiate in good faith, as required by Article 5, paragraph 1. The Applicant contends that the Interim Accord did not prejudge the outcome of the negotiations required by Article 5, paragraph 1, by prescribing that those negotiations result in a single name to be used for all purposes. In addition, the Applicant argues that it showed openness to compromises and that it was the Respondent that was intransigent.

130. The Court observes that it is within the jurisdiction of the Court to examine the question raised by the Respondent of whether the Parties were engaged in good faith negotiations pursuant to Article 5, paragraph 1, without addressing the substance of, or expressing any views on, the name difference itself, which is excluded from the Court's jurisdiction under Article 21, paragraph 2, of the Interim Accord (see paragraphs 28 to 38 above).

131. At the outset, the Court notes that although Article 5, paragraph 1, contains no express requirement that the Parties negotiate in good faith, such obligation is implicit under this provision (see 1969 Vienna Convention, Art. 26; see also *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America), Judgment, I.C.J. Reports 1984*, p. 292, para. 87; *Fisheries Jurisdiction (United Kingdom* v. *Iceland), Merits, Judgment, I.C.J. Reports 1974*, pp. 33-34, paras. 78-79; *Fisheries Jurisdiction (Federal Republic of Germany* v. *Iceland), Merits, Judgment, I.C.J. Reports 1974*, p. 202, para. 69; *Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, p. 268, para. 46; *Nuclear Tests (New Zealand* v. *France), Judgment, I.C.J. Reports 1974*, p. 473, para. 49; *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports 1969*, pp. 46-47, para. 85).

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132. The Court notes that the meaning of negotiations for the purposes of dispute settlement, or the obligation to negotiate, has been clarified through the jurisprudence of the Court and that of its predecessor, as well as arbitral awards. As the Permanent Court of International Justice already stated in 1931 in the case concerning *Railway Traffic between Lithuania and Poland*, the obligation to negotiate is first of all "not only to enter into negotiations, but also to pursue them as far as possible, with a view to concluding agreements". No doubt this does not imply "an obligation to reach an agreement" (*Railway Traffic between Lithuania and Poland, Advisory Opinion, 1931, P.C.I.J., Series A/B, No. 42*, p. 116; see also *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010 (I)*, p. 68, para. 150), or that lengthy negotiations must be pursued of necessity (*Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 13). However, States must conduct themselves so that the "negotiations are meaningful". This requirement is not satisfied, for example, where either of the parties "insists upon its own position without contemplating any modification of it" (*North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports 1969*, p. 47, para. 85; see also *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010 (I)*, p. 67, para. 146) or where they obstruct negotiations, for example, by interrupting communications or causing delays in an unjustified manner or disregarding the procedures agreed upon (*Lake Lanoux Arbitration (Spain/France) (1957), Reports of International Arbitral Awards (RIAA)*, Vol. XII, p. 307). Negotiations with a view to reaching an agreement also imply that the parties should pay reasonable regard to the interests of the other (*Fisheries Jurisdiction (United Kingdom* v. *Iceland), Merits, Judgment, I.C.J. Reports 1974*, p. 33, para. 78). As for the proof required for finding of the existence of bad faith (a circumstance which would justify either Party in claiming to be discharged from performance), "something more must appear than the failure of particular negotiations" (Arbitration on the *Tacna-Arica Question (Chile/Peru) (1925), RIAA*, Vol. II, p. 930). It could be provided by circumstantial evidence but should be supported "not by disputable inferences but by clear and convincing evidence which compels such a conclusion" *(ibid.)*.

133. The Court turns to examine whether the obligation to negotiate in good faith was met in the present case in light of the standards set out above.

134. The Court observes that the failure of the Parties to reach agreement, 16 years after the conclusion of the Interim Accord, does not itself establish that either Party has breached its obligation to negotiate in good faith. Whether the obligation has been undertaken in good faith cannot be measured by the result obtained. Rather, the Court must consider whether the Parties conducted themselves in such a way that negotiations may be meaningful.

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135. The record indicates that, during the course of the negotiations pursuant to Article 5, paragraph 1, the Applicant had resisted suggestions that it depart from its constitutional name and that the Respondent had opposed the use of "Macedonia" in the name of the Applicant. In addition, the record reveals that political leaders of both Parties at times made public statements that suggested an inflexible position as to the name difference, including in the months prior to the Bucharest Summit. Although such statements raise concerns, there is also evidence that the United Nations mediator presented the Parties with a range of proposals over the years and, in particular, expressed the view that, in the time period prior to the Bucharest Summit, the Parties were negotiating in earnest. Taken as a whole, the evidence from this period indicates that the Applicant showed a degree of openness to proposals that differed from either the sole use of its constitutional name or the "dual formula", while the Respondent, for its part, apparently changed its initial position and in September 2007 declared that it would agree to the word "Macedonia" being included in the Applicant's name as part of a compound formulation.

136. In particular, in March 2008, the United Nations mediator proposed that the Applicant adopt the name "Republic of Macedonia (Skopje)" for all purposes. According to the record before the Court, the Applicant expressed a willingness to put this name to a referendum. The record also indicates that it was the Respondent who rejected this proposed name.

137. The Court also notes that the United Nations mediator made comments during the period January-March 2008 that characterized the negotiations in positive terms, noting the Parties' obvious desire to settle their differences.

138. Thus, the Court concludes that the Respondent has not met its burden of demonstrating that the Applicant breached its obligation to negotiate in good faith.

C. Alleged breach by the Applicant of Article 6, paragraph 2

139. Article 6, paragraph 2, provides:

> "The Party of the Second Part hereby solemnly declares that nothing in its Constitution, and in particular in Article 49 as amended, can or should be interpreted as constituting or will ever constitute the basis for the Party of the Second Part to interfere in the internal affairs of another State in order to protect the status and rights of any persons in other States who are not citizens of the Party to the Second Part."

140. The Respondent's allegations under this heading relate principally to the Applicant's efforts to support or to advocate on behalf of persons now resident in the Applicant's territory (who are also, in some cases, the

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Applicant's nationals) who left or were expelled from the Respondent's territory in connection with its civil war in the 1940s (or who are the descendants of such persons) and who assert claims in relation to, among other things, abandoned property in the Respondent's territory. Some allegations on which the Respondent relies refer to events subsequent to the Bucharest Summit. Thus, the objection at the Summit could not have been a response to them. The Respondent also complains about the Applicant's alleged efforts to support a "Macedonian minority" in the Respondent's territory made up of persons who are also the Respondent's nationals.

141. For its part, the Applicant asserts that its concern for the human rights of minority groups in the Respondent's territory and for the human rights of its own citizens cannot reasonably be viewed as constituting interference in the Respondent's internal affairs.

142. The Court finds that the allegations on which the Respondent relies appear to be divorced from the text of Article 6, paragraph 2, which addresses only the Applicant's interpretation of its Constitution. The Respondent has presented no convincing evidence to suggest that the Applicant has interpreted its Constitution as providing a right to interfere in the Respondent's internal affairs on behalf of persons not citizens of the Applicant. The Court therefore does not find that the Applicant breached Article 6, paragraph 2, prior to the Bucharest Summit.

D. Alleged breach by the Applicant of Article 7, paragraph 1

143. Article 7, paragraph 1, provides:

> "Each Party shall promptly take effective measures to prohibit hostile activities or propaganda by State-controlled agencies and to discourage acts by private entities likely to incite violence, hatred or hostility against each other."

144. The Respondent alleges that the Applicant breached this provision based on its failure to take effective measures to prohibit hostile activities by State-controlled agencies, citing, for example, allegations relating to the content of school textbooks. In that respect, the Respondent refers to history textbooks used in the Applicant's schools that depict a historic "Greater Macedonia" and that present certain historical figures as the ancestors of the Applicant's current population. According to the Respondent, these and other examples demonstrate that the Applicant has taken no measures to prohibit hostile activities directed against the Respondent and has actively engaged in such propaganda.

145. The Respondent also alleges that the Applicant breached a second obligation set forth in Article 7, paragraph 1: the obligation to discourage acts by private entities likely to incite violence, hatred or hostility

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against the Respondent. In particular, the Respondent cites an incident on 29 March 2008 (in the days prior to the Bucharest Summit) in which several outdoor billboards in Skopje depicted an altered image of the Respondent's flag. In addition, the Respondent alleges a consistent failure by the Applicant to protect the premises and personnel of the Respondent's Liaison Office in Skopje.

146. For its part, the Applicant asserts that the school textbooks reflect differences concerning the history of the region. It further claims that the billboards in Skopje in March 2008 were erected by private individuals and that it acted promptly to have them removed. The Applicant denies the allegations regarding the Respondent's diplomatic staff and premises and refers the Court to documents relating to its efforts to provide adequate protection to those diplomatic staff and premises and to investigate the incidents alleged by the Respondent.

147. Based on its review of the Parties' arguments and the extensive documentation submitted in relation to these allegations, the Court finds that the evidence cannot sustain a finding that the Applicant committed a breach of Article 7, paragraph 1, prior to the Bucharest Summit. The textbook content described above does not provide a basis to conclude that the Applicant has failed to prohibit "hostile activities or propaganda". Furthermore, the Respondent has not demonstrated convincingly that the Applicant failed "to discourage" acts by private entities likely to incite violence, hatred or hostility towards the Respondent. The Applicant's assertion that it took prompt action in response to the March 2008 billboards was not challenged by the Respondent, and the evidence shows that, at a minimum, the Applicant issued a statement seeking to distance itself from the billboards. The Court notes the obligation to protect the premises of the diplomatic mission and to protect any disturbance of the peace or impairment of its dignity contained in Article 22 of the Vienna Convention on Diplomatic Relations, and observes that any incident in which there is damage to diplomatic property is to be regretted. Nonetheless, such incidents do not *ipso facto* demonstrate a breach by the Applicant of its obligation under Article 7, paragraph 1, "to discourage" certain acts by private entities. Moreover, the Applicant introduced evidence demonstrating its efforts to provide adequate protection to the Respondent's diplomatic staff and premises.

E. Alleged breach by the Applicant of Article 7, paragraph 2

148. Article 7, paragraph 2, provides:

> "Upon entry into force of this Interim Accord, the Party of the Second Part shall cease to use in any way the symbol in all its forms displayed on its national flag prior to such entry into force."

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149. The Respondent asserts that the Applicant has used the symbol described in Article 7, paragraph 2, in various ways since the Interim Accord entered into force, thus violating this provision.

150. The Respondent does not dispute that the Applicant has changed its flag, as required. The Respondent's allegations relate to the use of the symbol in other contexts, including an alleged use by a regiment of the Applicant's army depicted in a publication of the Applicant's Ministry of Defence in 2004. The record indicates that the Respondent raised its concerns to the Applicant about that use of the symbol at that time and the Applicant does not refute the claim that the regiment did use the symbol.

151. The Applicant asserts that the regiment in question was disbanded in 2004 (an assertion left unchallenged by the Respondent), and there is no allegation by the Respondent that the symbol continued to be used in that way after 2004.

152. The Respondent also introduces evidence with respect to fewer than ten additional instances in which the symbol has been used in the territory of the Applicant in various ways, mainly in connection with either publications or public displays.

153. The Court observes that these allegations relate either to the activities of private persons or were not communicated to the Applicant until after the Bucharest Summit. Nevertheless, as previously noted, the record does support the conclusion that there was at least one instance in which the Applicant's army used the symbol prohibited by Article 7, paragraph 2, of the Interim Accord.

F. Alleged breach by the Applicant of Article 7, paragraph 3

154. Article 7, paragraph 3, provides:

> "If either Party believes one or more symbols constituting part of its historic or cultural patrimony is being used by the other Party, it shall bring such alleged use to the attention of the other Party, and the other Party shall take appropriate corrective action or indicate why it does not consider it necessary to do so."

155. The Respondent asserts that Article 7, paragraph 3, means that each party should abstain from using the symbols referred to therein because such conduct could undermine the objectives of the Interim Accord. The Respondent further asserts that the Applicant has violated this provision in a variety of ways, including by issuing stamps, erecting statues and renaming the airport of the capital.

156. The Court notes that in contrast to Article 7, paragraph 2, the text of Article 7, paragraph 3, does not expressly prohibit the Applicant from using the symbols that it describes. Rather, it establishes a procedure for situations in which one Party believes the other Party to be using its historical or cultural symbols.

157. Because Article 7, paragraph 3, does not contain any prohibition on the use of particular symbols, the renaming of an airport could not itself constitute a breach. The threshold question is thus whether the Respondent brought its concern "to the attention" of the Applicant prior to the Bucharest Summit. The Respondent introduced evidence showing that in December 2006, the Respondent's Foreign Minister described the Applicant's conduct as "not consistent with the obligations concerning good neighbourly relations that emanate from the Interim Agreement" and as not serving "Skopje's Euro-Atlantic aspirations", without, however, referring expressly to the renaming of the airport. During a parliamentary meeting in February 2007, the Respondent's Foreign Minister expressly characterized the Applicant's renaming of the airport as a breach of the Interim Accord. There is no evidence of communication to the Applicant on this matter.

158. Although it does not appear that the Respondent brought its concern to the attention of the Applicant in a manner contemplated by Article 7, paragraph 3, the Applicant was aware of the Respondent's concern, and the Applicant's Foreign Minister explained the rationale behind the renaming of the airport in a January 2007 interview to a Greek newspaper.

159. On the basis of this record, the Court concludes that the Respondent has not discharged its burden to demonstrate a breach of Article 7, paragraph 3, by the Applicant.

*

160. In light of this analysis of the Respondent's allegations that the Applicant breached several of its obligations under the Interim Accord, the Court concludes that the Respondent has established only one such breach. Namely, the Respondent has demonstrated that the Applicant used the symbol prohibited by Article 7, paragraph 2, of the Interim Accord in 2004. After the Respondent raised the matter with the Applicant in 2004, the use of the symbol was discontinued during that same year. With these conclusions in mind, the Court will next state its findings regarding each of the three justifications advanced by the Respondent.

3. Conclusions concerning the Respondent's Additional Justifications

A. Conclusion concerning the exceptio non adimpleti contractus

161. Having reviewed the Respondent's allegations of breaches by the Applicant, the Court returns to the Respondent's contention that the *exceptio*, as it is defined by the Respondent, precludes the Court from finding that the Respondent breached its obligation under Article 11, paragraph 1, of the Interim Accord. The Court recalls that in all but one instance (the use of the symbol prohibited by Article 7, paragraph 2 (see

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paragraph 153)), the Respondent failed to establish any breach of the Interim Accord by the Applicant. In addition, the Respondent has failed to show a connection between the Applicant's use of the symbol in 2004 and the Respondent's objection in 2008 — that is, evidence that when the Respondent raised its objection to the Applicant's admission to NATO, it did so in response to the apparent violation of Article 7, paragraph 2, or, more broadly, on the basis of any belief that the *exceptio* precluded the wrongfulness of its objection. The Respondent has thus failed to establish that the conditions which it has itself asserted would be necessary for the application of the *exceptio* have been satisfied in this case. It is, therefore, unnecessary for the Court to determine whether that doctrine forms part of contemporary international law.

B. Conclusion concerning a response to material breach

162. As described above (see paragraph 118), the Respondent also suggested that its objection to the Applicant's admission to NATO could have been regarded as a response, within Article 60 of the 1969 Vienna Convention, to material breaches of the Interim Accord allegedly committed by the Applicant. Article 60, paragraph 3 *(b)*, of the 1969 Vienna Convention provides that a material breach consists in "the violation of a provision essential to the accomplishment of the object or purpose of the treaty".

163. The Court recalls its analysis of the Respondent's allegations of breach at paragraphs 124 to 159 above and its conclusion that the only breach which has been established is the display of a symbol in breach of Article 7, paragraph 2, of the Interim Accord, a situation which ended in 2004. The Court considers that this incident cannot be regarded as a material breach within the meaning of Article 60 of the 1969 Vienna Convention. Moreover, the Court considers that the Respondent has failed to establish that the action which it took in 2008 in connection with the Applicant's application to NATO was a response to the breach of Article 7, paragraph 2, approximately four years earlier. Accordingly, the Court does not accept that the Respondent's action was capable of falling within Article 60 of the 1969 Vienna Convention.

C. Conclusion concerning countermeasures

164. As described above (see paragraphs 120 and 121), the Respondent also argues that its objection to the Applicant's admission to NATO could be justified as a proportionate countermeasure in response to breaches of the Interim Accord by the Applicant. As the Court has already made clear, the only breach which has been established by the Respondent is the Applicant's use in 2004 of the symbol prohibited by Article 7, paragraph 2, of the Interim Accord. Having reached that conclusion and in the light of its analysis at paragraphs 72 to 83 concerning the reasons given by the Respondent

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for its objection to the Applicant's admission to NATO, the Court is not persuaded that the Respondent's objection to the Applicant's admission was taken for the purpose of achieving the cessation of the Applicant's use of the symbol prohibited by Article 7, paragraph 2. As the Court noted above, the use of the symbol that supports the finding of a breach of Article 7, paragraph 2, by the Applicant had ceased as of 2004. Thus, the Court rejects the Respondent's claim that its objection could be justified as a countermeasure precluding the wrongfulness of the Respondent's objection to the Applicant's admission to NATO. Accordingly, there is no reason for the Court to consider any of the additional arguments advanced by the Parties with respect to the law governing countermeasures.

165. For the foregoing reasons, the additional justifications submitted by the Respondent fail.

* * *

166. Lastly, the Court emphasizes that the 1995 Interim Accord places the Parties under a duty to negotiate in good faith under the auspices of the Secretary-General of the United Nations pursuant to the pertinent Security Council resolutions with a view to reaching agreement on the difference described in those resolutions.

* * *

V. Remedies

167. The Court recalls that, in its final submissions pertaining to the merits of the present case, the Applicant seeks two remedies which it regarded as constituting appropriate redress for claimed violations of the Interim Accord by the Respondent. First, the Applicant seeks relief in the form of a declaration of the Court that the Respondent has acted illegally, and secondly, it requests relief in the form of an order of the Court that the Respondent henceforth refrain from any action that violates its obligations under Article 11, paragraph 1, of the Interim Accord.

168. As elaborated above, the Court has found a violation by the Respondent of its obligation under Article 11, paragraph 1, of the Interim Accord. As to possible remedies for such a violation, the Court finds that a declaration that the Respondent violated its obligation not to object to the Applicant's admission to or membership in NATO is warranted. Moreover, the Court does not consider it necessary to order the Respondent, as the Applicant requests, to refrain from any future conduct that violates its obligation under Article 11, paragraph 1, of the Interim Accord. As the Court previously explained, "[a]s a general rule, there is no reason to suppose that a State whose act or conduct has been declared

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wrongful by the Court will repeat that act or conduct in the future, since its good faith must be presumed" (*Navigational and Related Rights (Costa Rica* v. *Nicaragua), Judgment, I.C.J. Reports 2009*, p. 267, para. 150).

169. The Court accordingly determines that its finding that the Respondent has violated its obligation to the Applicant under Article 11, paragraph 1, of the Interim Accord, constitutes appropriate satisfaction.

* * *

170. For these reasons,

The Court,

(1) By fourteen votes to two,

Finds that it has jurisdiction to entertain the Application filed by the former Yugoslav Republic of Macedonia on 17 November 2008 and that this Application is admissible;

in favour: *President* Owada; *Vice-President* Tomka; *Judges* Koroma, Simma, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov, Cançado Trindade, Yusuf, Greenwood, Donoghue; *Judge* ad hoc Vukas;

against: *Judge* Xue; *Judge* ad hoc Roucounas;

(2) By fifteen votes to one,

Finds that the Hellenic Republic, by objecting to the admission of the former Yugoslav Republic of Macedonia to NATO, has breached its obligation under Article 11, paragraph 1, of the Interim Accord of 13 September 1995;

in favour: *President* Owada; *Vice-President* Tomka; *Judges* Koroma, Simma, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov, Cançado Trindade, Yusuf, Greenwood, Xue, Donoghue; *Judge* ad hoc Vukas;

against: *Judge* ad hoc Roucounas;

(3) By fifteen votes to one,

Rejects all other submissions made by the former Yugoslav Republic of Macedonia.

in favour: *President* Owada; *Vice-President* Tomka; *Judges* Koroma, Simma, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov, Cançado Trindade, Yusuf, Greenwood, Xue, Donoghue; *Judge* ad hoc Roucounas;

against: *Judge* ad hoc Vukas.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this fifth day of December, two thousand

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and eleven, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the former Yugoslav Republic of Macedonia and the Government of the Hellenic Republic, respectively.

(Signed) Hisashi OWADA,
President.

(Signed) Philippe COUVREUR,
Registrar.

Judge SIMMA appends a separate opinion to the Judgment of the Court; Judge BENNOUNA appends a declaration to the Judgment of the Court; Judge XUE appends a dissenting opinion to the Judgment of the Court; Judge *ad hoc* ROUCOUNAS appends a dissenting opinion to the Judgment of the Court; Judge *ad hoc* VUKAS appends a declaration to the Judgment of the Court.

(Initialled) H.O.

(Initialled) Ph.C.

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SEPARATE OPINION OF JUDGE SIMMA

The Court missed an opportunity to clarify a controversial point of law by avoiding to deal with the question whether the exceptio non adimpleti contractus*, put forward by the Respondent as a "defence" against the accusation of treaty breach separate, and to be distinguished, from reliance on Article 60 of the 1969 Vienna Convention or on a justification of Greece's objection to FYROM's admission to NATO by qualifying it as a countermeasure, still has a right of place in international law — the answer which the Court should have given, is an unqualified "no": Article 60 of the Vienna Convention is to be understood as exhausting the right, flowing from a primary rule of the law of treaties, to suspend performance of a treaty obligation as a reaction to a prior breach by another part — a countermeasure applied in the same context might to an external observer be hard to distinguish from the operation of Article 60, but would be based on a secondary rule of State responsibility and thus be subject to a different legal régime.*

1. I am in agreement with the findings of the Court with regard to both its jurisdiction and the merits of the case. The only concern I have relates to the way in which the Judgment treats one specific argument advanced by the Respondent, namely the issue of the so-called *exceptio non adimpleti contractus*.

2. To explain my concern and put the matter into context: Greece's main defence against the Applicant's accusation of breach of the Interim Accord through the Respondent's behaviour in the question of the FYROM's NATO membership was, obviously, to deny such breach altogether and contend that it complied with its obligations under the Accord. But then Greece put forward the alternative argument that even if the Court were to find that the Respondent had violated the Interim Accord, the wrongfulness of Greece's objection to the admission of the FYROM to NATO would be precluded by — no less than — three justifications ("subsidiary defences"), presented with different degrees of conviction and thus convincingness, as it were, but all based on the allegation of prior breaches of the Interim Accord committed by the Republic of Macedonia: in the first instance by the doctrine of the *exceptio non adimpleti contractus*, secondly, because Greece's objection could be explained as a response to material breaches of the Accord by the FYROM on the basis of the law of treaties, and thirdly, because Greece's behaviour could also be regarded as a countermeasure against the FYROM's preceding breaches recognized as justified by the law of State responsibility.

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3. The Judgment ultimately rejects all of these defences, and rightly so. It does so for two reasons: to begin with, the Court was only able to find one single, isolated instance in which the Applicant violated the Interim Accord — a breach discontinued after the Respondent had raised its concern (Judgment, paras. 148-151, 160), and not accepted by the Court as having been material (*ibid.*, para. 163). Furthermore, the Judgment emphasizes that in no case had Greece succeeded in convincing the Court that its objection to Macedonia's admission to NATO had any factual connection with — i.e., was a response to — the Applicant's alleged prior treaty breaches, thus possibly giving rise to the various justifications pleaded (*ibid.*, paras. 161, 163-164). I fully support this finding. I am convinced that before and at the time of NATO's Bucharest meeting, that is, at the time of Greece's objection to FYROM membership of the Alliance in violation of the Interim Accord, nobody responsible for this course of action in Athens thought of this objection as constituting any of the reactions foreseen in international law to counter a preceding treaty breach by the Applicant, as which it was construed after the fact by Greece's counsel in the present litigation, neither in terms of the *exceptio* nor as a reaction to breach allowed by the law of treaties nor as a countermeasure in the technical sense. I have difficulties to view Greece's 2008 action as anything but a politically motivated attempt at coercing the FYROM to back down on the name issue. After having been brought before the Court, what the Respondent then tried *ex post facto* was to hide, somewhat desperately and with a pinch of embarrassment, this show of political force amounting to a treaty breach behind the three juridical fig leaves, presented as "subsidiary defences" by very able counsel (but *ad impossibilia nemo tenetur*). In the Judgment, these arguments got the treatment they deserved.

4. Let me now turn to the specific point on which I take issue with the Court's approach: the way in which the Judgment goes about the evaluation of the *exceptio non adimpleti contractus*, put forward, as I have just described, by Greece as a justification separate, and different, from the other two "defences" of response to breach positioned in the law of treaties and that of State responsibility. Greece presented the *exceptio* as a "general principle of international law" permitting the Respondent to withhold performance of those of its own obligations which are reciprocal to, i.e., linked in a synallagmatic relationship with, the fundamental provisions of the Interim Accord allegedly not complied with by the Applicant (thus the description of the Greek position in the Judgment's paragraph 115). Further (and conveniently), the Respondent contended that "the conditions triggering the exception of non-performance are different from and less rigid than the conditions for suspending a treaty

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or precluding wrongfulness by way of countermeasures" (Counter-Memorial of Greece, para. 8.7); thus, the exception "does not have to be notified or proven beforehand . . . There are simply no procedural requirements to the exercise of the staying of the performance through the mechanism of the *exceptio*." (*Ibid*., para. 8.26.)

5. The Applicant, on the contrary, doubted the character of the *exceptio* as a general principle of international law and disputed the Greek contention that its own obligations under the Interim Accord are to be regarded as synallagmatic with the Respondent's obligation not to object stipulated in Article 11, paragraph 1, of the Accord. In the FYROM's view, Article 60 of the 1969 Vienna Convention on the Law of Treaties provides a complete set of rules and procedures governing responses to material breaches under that law. Furthermore, the Applicant did not accept that the *exceptio* could justify non-performance under the law of State responsibility (thus the summary of the FYROM's view in paragraph 117 of the Judgment).

6. In the face of such conflicting statements about points of law — arguments playing a non-negligible role in the framing of the Respondent's case, whether bordering the specious or not —, one would have expected the Court to go to the heart of the matter and engage in a state-of-the-art exercise of clarifying the legal status and interrelationship of the three "defences" invoked by Greece. However, the Court refrained from doing so. Such abstinence will once again disappoint those observers who might have expected some illuminating words on rather controversial questions of law; a decision a little less "transactional" in a matter in which the Court could have afforded to speak out. As concerns the *exceptio non adimpleti contractus* in particular, it appears that the Court openly shies away from taking a stand. Let us see how it deals with the *exceptio* as invoked by Greece: as I have already mentioned, the Court recalls that the Respondent failed to establish breaches of the Interim Accord save in one immaterial instance and to show a connection between that one breach and the Greek objection to the Applicant's admission to NATO. And then the Judgment continues as follows:

> "The Respondent has thus failed to establish that the conditions *which it has itself asserted* would be necessary for the application of the *exceptio* have been satisfied in this case. It is, therefore, unnecessary for the Court to determine whether that doctrine forms part of contemporary international law." (Judgment, para. 161; emphasis added.)

That much about *jura novit curia*. Why such *Berührungsangst*?

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7. As far as I am concerned, I may have become immunized against the Court's apparent *haptophobia* in my academic childhood, having authored my first scholarly article in English on the question of treaty breach and responses thereto more than 40 years ago[1]. So I may be allowed, in all due modesty, to set the record straight and try to compensate the Court's abstinence as to the *exceptio*'s whereabouts and "right to life" with the following brief observations[2].

8. In its Counter-Memorial the Respondent defines the *exceptio* in accordance with the respective entry in the *Dictionnaire de droit international public*:

> "Literally: [the] 'exception of a non-performed contract'. An exception that the injured Parties can invoke because of the non-performance of a conventional agreement by another contractual Party and which allows in turn not to apply in turn the conventional agreement in part or as a whole." (Counter-Memorial of Greece, para. 8.8.)

9. Greece distinguishes the *exceptio* so defined from Article 60 of the Vienna Convention. In its view, while Article 60 presupposes the occurrence of material breaches, the *exceptio* entitles a State to suspend performance of its own obligations vis-à-vis another State in breach of obligations that do not amount to material breaches (*ibid.*, para. 8.28). I have already drawn attention to Greece's further statement according to which the *exceptio* can be resorted to without any procedural preconditions. Lastly, the Respondent argues that "the condition triggering the defence based on the *exceptio non adimpleti contractus* is that the Applicant State has breached its obligations resulting from the Treaty if said provisions are the *quid pro quo* of the allegedly breached obligations of the Respondent" (*ibid.*, para. 8.31; see also CR 2011/10, pp. 30-32, paras. 18-27).

[1] B. Simma, "Reflections on Article 60 of the Vienna Convention on the Law of Treaties and Its Background in General International Law", in 20 *Österreichische Zeitschrift für öffentliches Recht*, pp. 5-83 (1970). Since, as the French say, *on revient toujours à ses premiers amours*, I have returned to my academic first love in a number of further contributions; cf., B. Simma, "Zum Rücktrittsrecht wegen Vertragsverletzung nach der Wiener Konvention von 1969", in H. Kipp (ed.), *Um Recht und Freiheit. Festschrift für F. A. Freiherr von der Heydte*, pp. 615-630 (1977); "Termination and Suspension of Treaties: Two Recent Austrian Cases", in 21 *German Yearbook of International Law*, pp. 74-96 (1978); Commentary on Article 60 (together with Christian Tams), in O. Corten and P. Klein (eds.), *The Vienna Convention on the Law of Treaties: A Commentary*, Vol. II, pp. 1351-1378 (2011); "Reciprocity", in R. Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law* (online edition 2011).

[2] They are essentially based on my earlier publications cited in the preceding note, to which I must refer the reader for a more profound treatment of the matter, as well as on some "work in progress" on responses to breach of treaties.

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10. Even before any assessment of the correctness of Greece's views, what becomes apparent already now is that the concept of the *exceptio* flows from the principle of reciprocity. The importance of this notion for the "health" of international law can hardly be overestimated. Reciprocity constitutes a basic phenomenon of social interaction and consequently a decisive factor also behind the growth and application of law. In fully developed domestic legal systems the idea of reciprocity has to a large extent been absorbed and supplanted by specific norms and institutions; immediate, instinctive, raw, reciprocity has been "domesticated", as it were. The lower the degree of institutionalization of a legal order, however, the more mechanisms of direct reciprocity will still prevail as such. Hence, its continuing relevance for international law despite the latter's undeniable movement from bilateralism towards community interest: as long as the international legal order lacks regular and comprehensive mechanisms of centralized enforcement and thus has to live with auto-determination and self-help, reciprocity will remain a major *leitmotiv* — in some instances a constructive force maintaining stability in the law, in some others a threat to that very stability. Reciprocity at the basis of international law thus bears a Janus head: one and the same idea can serve both as a propelling force in the making and keeping of the law and as a trigger in the breakdown of legal order. Focusing on the positive impact of our phenomenon, it will be reciprocal interest in the observance of rules — "each . . . State within the community of nations accepting some subtraction from its full sovereignty in return for similar concessions on the side of the others"[3] — that supplies one, if not the main reason for international law somehow managing to accomplish its tasks, despite the absence of most features considered indispensable by domestic lawyers. The possibility of a State reciprocating in kind a breach of an international obligation will provide a powerful argument for its observance. The idea of reciprocity therefore lies at the root of various methods of self-help by which States may secure their rights. The historical development of these methods provides convincing examples of how "raw" reciprocity has been channelled and civilized by subjecting it to legal limits. In this way, reciprocity has been crystallized into international law's sanctioning mechanisms, among them reprisals (nowadays politically correctly called "countermeasures") and non-performance of treaties due to breach.

11. It is to that second category that the *exceptio* belongs. To use the terms of the law in force on the matter (Article 60 of the 1969 Vienna Convention on the Law of Treaties, on which *infra*), if an international

[3] *The Cristina* (1938), A.C. 485.

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treaty has been breached, the other party, or parties, to the treaty may invoke the breach as a ground for terminating it or suspending its operation; such reaction is permissible as a consequence of — and thus depending on — the synallagmatic character of international agreements. Expressed a bit more emphatically: "The rule *pacta sunt servanda* is linked to the rule *do ut des*"[4]; "good sense and equity rebel at the idea of a State being held to the performance of its obligations under a treaty which the other contracting party is refusing to respect"[5].

12. The functional synallagma thus confirmed to be applicable also in international law has its historical roots in the law of contracts of most legal systems. Its genealogy can be traced back to the ancient Roman law foundations of the civil law tradition (the Roman *bonae fidei judicia*)[6], as well as to early English contract law concepts of reciprocity in dependent obligations or mutual promises, the doctrine of consideration, and breach of condition[7]. According to what is probably the majority view in international legal doctrine, the widespread acceptance of the principle in the main legal traditions of the civil and common law systems allows to recognize it as a general principle of law under Article 38, paragraph 1 *(c)*, of the Court's Statute.

13. The question is, of course, the transferability of such a concept developed *in foro domestico* to the international legal plane, respectively the amendments that it will have to undergo in order for such a general principle to be able to play a constructive role also at the international level. The problem that we face in this regard is that in fully developed national legal systems the functional synallagma will operate under the control of the courts, that is, at least, such control will always be available if a party affected by its application does not accept the presence of the conditions required to have recourse to our principle. What we encounter at the level of international law, however, will all too often be instances of non-performance of treaty obligations accompanied by invocation of our principle, but without availability of recourse to impartial adjudication of the legality of these measures[8]. Absent the leash of judicial control, our principle will thus become prone to abuse; the issue of legality will often

[4] M. Bartos in the course of the discussion of what would become Article 60, at the 692nd meeting of the International Law Commission, *Yearbook of the International Law Commission (YBILC)*, 1963, Vol. I, p. 124, para. 30.

[5] H. Waldock, Second Report on the Law of Treaties, commentary to Article 20, para. 1, *YBILC*, 1963, Vol. II, p. 73.

[6] R. Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition*, 1990, pp. 801-802, note 133.

[7] *Ibid.*, pp. 803-804.

[8] For extensive references to State practice, see my 1970 article, *op. cit. supra* note 1.

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remain contested; a State resorting to unilateral abrogation might have been

> "determined for quite other reasons [than an alleged breach] to put an end to the treaty and, having alleged the violation primarily to provide a respectable pretext for its action, has not been prepared to enter into a serious discussion of the legal principles governing the denunciation of treaties on the basis of violations by the other party"[9].

The frequency of precisely these circumstances in the relevant State practice renders state-of-the art recognition of the principle's consecration as customary international law very difficult — a point not always heeded in doctrine.

14. The traditional, "standard", treatment of the functional synallagma in the international legal literature has thus consisted in its recognition in principle, supported by its apparent matter-of-courseness, often with a hint to the existence of a respective general principle, but then frequently accompanied by a warning of the danger of auto-determination of its pre-conditions[10]. The complications brought about by the emergence of multilateral treaties did not unduly bother the bulk of the literature.

15. The recognition of our principle dates back to the classic writers of our discipline. According to Hugo Grotius, for instance, "[i]f one of the parties violates a treaty, such a violation releases the other from its engagements. For every clause has the binding force of a condition."[11] And in the same sense Emeric de Vattel: "[T]he State which is offended or injured by the failure of the other to carry out the treaty can choose either to force the offender to fulfil its promises or can declare the treaty dissolved because of the violation of its provisions."[12] Similar statements abound in the literature up to the time of the Vienna Convention, to which I will turn shortly.

16. Among the confirmations of the consequences of synallagmatic treaty provisions in the case of breach in the (pre-Vienna Convention) jurisprudence of international courts and tribunals, the voices of Judges Anzilotti and Hudson in their opinions in the case of *Diversion of Water from the Meuse,* decided by the Permanent Court in 1937, are probably most representative. In that case Belgium had contended that by construc-

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[9] H. Waldock, Second Report on the Law of Treaties, commentary to Article 20, *op. cit. supra* note 5.

[10] Extensive references in my 1970 article, *op. cit. supra* note 1.

[11] *De Iure Belli ac Pacis Libri Tres*, Vol. II, Chap. 15, para. 15 (1625; English translation from B. P. Sinha, *Unilateral Denunciation of Treaty because of Prior Violations of Obligations by other Party Nine* (1966)).

[12] *Le droit des gens, ou principes de la loi naturelle, appliqués à la conduite et aux affaires des nations et des souverains*, Vol. II, Chap. 13, para. 200 (1758; English translation by Fenwick, Carnegie Edition, 1916). For extensive references to the views of early and contemporary writers on our principle, see my 1970 article, *op. cit. supra* note 1.

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ting certain works contrary to a nineteenth-century treaty, the Netherlands had forfeited the right to invoke the treaty, and requested the Court to declare that it was entitled to reserve the rights accruing to it from the breaches of the treaty. The Court found that the Netherlands had not breached the treaty and therefore did not pronounce upon Belgium's contention. Judge Anzilotti took a different view, however, and emphasized in his dissenting opinion that he was

> "convinced that the principle underlying this submission *(inadimplenti non est adimplendum)* is so just, so equitable, so universally recognized, that it must be applied in international relations also. In any case, it is one of these 'general principles of law recognized by civilized nations' which the Court applies in virtue of Article 38 of its Statute."[13]

In the same vein, Judge Hudson, in his individual opinion in the case, expressed the view

> "that where two parties have assumed an identical or a reciprocal obligation, one party which is engaged in a continuing non-performance of that obligation should not be permitted to take advantage of a similar non-performance of that obligation by the other party".[14]

17. Like any decent principle, ours, too, got a Latin name, respectively a Latin circumscription — in fact not just one, but several: *frangenti fidem non est fides servanda, inadimplenti non est adimplendum, exceptio non(rite) adimpleti contractus*[15]. Returning to plain English, what is relevant here is that in the overwhelming part of the literature, no distinction was ever, or is currently, made between the maxim *inadimplenti non est adimplendum* and its expression in the form of an *exceptio*; both Latin terms pronounce the same principle — *inadimplenti* in its entirety, the *exceptio* viewed from the position of a State which, upon another contracting party's demand for performance of a treaty obligation, responds in the good old Roman law way by connecting its own non-performance with a breach on the part of the other. This is important in the light of my following point: the "reach" of the codification of our principle in Article 60 of the Vienna Convention.

18. In the work of the International Law Commission on the law of treaties, the provision dealing with breach, Article 60, is essentially based on a proposal made by Special Rapporteur H. Waldock in 1963, that is,

[13] *Diversion of Water from the Meuse, Judgment, 1937, P.C.I.J., Series A/B, No. 70*, p. 50 (dissenting opinion Judge Anzilotti).

[14] *Ibid.*, p. 77 (individual opinion Judge Hudson).

[15] It remained for the editors of the *Yearbook of the International Law Commission* to combine the two terms by speaking of a maxim *exceptio inadimplenti non est adimplendum*, and ascribing this strange creation to me: *YBILC*, 1999, Vol. I, p. 165, para. 41.

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at a relatively late stage in the legislative history of the Vienna Convention[16]. It developed into a complex Article which, according to the general view, copes quite successfully with the challenge of retaining legal certainty in the face of the many complications in the operation of our principle, in particular of its application to different types of multilateral treaties[17].

19. What is decisive in the present context, however, is that Article 60 of the Vienna Convention is meant to regulate the legal consequences of treaty breach in an exhaustive way. The exhaustive, conclusive nature of our provision is confirmed by the Convention's Article 42, paragraph 2, which reads as follows:

> "2. The termination of a treaty, its denunciation or the withdrawal of a party, may take place only as a result of the application of the provisions of the treaty or of the present Convention. The same rule applies to suspension of the operation of a treaty."

20. Thus, *extra conventionem nulla salus*; on this point, the Applicant got it quite right (cf. paragraph 5 above). But, as a matter of course, Article 42

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[16] For details see my 1970 article, *op. cit. supra* note 1.

[17] Article 60 reads as follows:

> "*Termination or suspension of the operation of a treaty as a consequence of its breach*
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> 1. A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part.
> 2. A material breach of a multilateral treaty by one of the parties entitles:
>   *(a)* the other parties by unanimous agreement to suspend the operation of the treaty in whole or in part or to terminate it either:
>   (i) in the relations between themselves and the defaulting State; or
>   (ii) as between all the parties;
>   *(b)* a party specially affected by the breach to invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State;
>   *(c)* any party other than the defaulting State to invoke the breach as a ground for suspending the operation of the treaty in whole or in part with respect to itself if the treaty is of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty.
> 3. A material breach of a treaty, for the purposes of this article, consists in:
>   *(a)* a repudiation of the treaty not sanctioned by the present Convention; or
>   *(b)* the violation of a provision essential to the accomplishment of the object or purpose of the treaty.
> 4. The foregoing paragraphs are without prejudice to any provision in the treaty applicable in the event of a breach.
> 5. Paragraphs 1 to 3 do not apply to provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties."

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can only reach as far as the Vienna Convention as a whole is intended to reach. This leads us to the Convention's Article 73, according to which its provisions shall not prejudge any question that may arise in regard to a treaty from, *inter alia,* the international responsibility of a State. In the language of the ILC, by now generally accepted and adopted in the literature, the Vienna Convention is designed to provide an exhaustive restatement of the "primary rules" on treaty breach but does not touch upon matters of State responsibility, regulated by "secondary rules" as codified and progressively developed in the ILC's 2001 Articles. In other words, Article 60 has nothing to do with State responsibility, and State responsibility has nothing to do with the maxim *inadimplenti non est adimplendum* or the *exceptio non adimpleti contractus*. The functional synallagma attached to treaties embodying reciprocal obligations finds its (not necessarily Latin) expression entirely in the primary rules of the law of treaties. On the other hand, it is in the law on State responsibility where countermeasures have found their place, and it is justified, indeed necessary, therefore to deal with them separately — as the Parties to our case have done and as our Judgment does —, even though countermeasures resorted to as a consequence of the breach of a treaty may also lead to suspension of provisions of that same treaty, that is, they may "look alike" for practical purposes while being subjected to a different legal régime — a matter to which I have devoted particular attention in my scholarly contributions[18].

21. Returning to the primary rules on the consequences of a breach of treaty embodied in Article 60, let me emphasize once again that this provision constitutes an exhaustive treatment of the matter. Thus, there is no place left besides it, so to speak, for the *exception* — Article 60 and the régime provided by the Vienna Convention to complete its operation embodies it.

22. I do not want to conceal that in my first publication on the legal régime of treaty breach, I took the view that it would have been advisable for the ILC to leave a — modest — place for the *exceptio* on the side of Article 60, in the sense that an extra-conventional *exceptio* would remain applicable (only) to non-material or immaterial breaches, with Article 60 comprehensively covering the suspension of performance of treaty obligations as a consequence of "material" breaches as defined in that Article. I thus pleaded for some limited room in general international law left for qualitatively proportional responses by a State in the sense that they may be applied in the form of suspension of the reacting State's own performance if, when and as long as that obligation's counterpart duty is violated. This kind of suspension, while constituting a protective measure or remedy with its *sedes materiae* also in the law of treaties, i.e., in the realm

[18] Cf. the writings referred to *supra* in note 1.

of primary rules, would not be covered by Article 60 because Article 60 *de minimis non curat*[19]. As I mentioned in my description of the arguments of the Parties to our case (cf. *supra* paragraph 9), Greece put forward this view, but in effect did not profit from it because it regarded the treaty breaches allegedly committed by the FYROM as "material". As I regard the matter now, I am not convinced that the solution I considered desirable 40 years ago would be constructive and I do not maintain it. I doubt that it would make sense to let reactions to lesser, immaterial breaches off the leash set up by Article 60, particularly its procedural conditions. Rather, I now join the ranks of those who regard Article 60 as truly exhaustive, that is, totally eclipsing the earlier non-written law on the functional synallagma operating behind treaties. But of course a look across the fence into the realm of State responsibility would still show that the impression of a general *de minimis non curat lex* possibly created by the Vienna Convention's lack of consideration of breaches not fulfilling the conditions laid down in Article 60 is misleading because if a breach not "material" enough to trigger the responses codified in that Article were nevertheless to constitute an internationally wrongful act under the law of State responsibility, it would still entitle another affected contracting party, as an injured State, to resort to countermeasures, within the limits of proportionality.

23. Article 60 of the Vienna Convention has received the imprimatur by our Court at two earlier occasions, in both instances in ways which confirm that the provision is to be understood as an exhaustive treatment of the consequences of treaty breach under the primary rules of the law of treaties.

[19] Cf. my 1970 article, *op. cit. supra* note 1, pp. 59-60. I was not alone with this concern; it was shared 13 years later by the ILC's Special Rapporteur, W. Riphagen; cf. his fourth report on the content, forms and degrees of international responsibility, *YBILC*, 1983, Vol. II (Part One), p. 18, para. 98:

> "Since Article 60 of the Vienna Convention applies only to material breaches, it would be necessary to cover other cases of reciprocity of the performance of treaty obligations. Indeed, if it appears from the treaty or is otherwise established that the performance of an obligation by a State party is the counterpart *(quid pro quo)* of the performance of the same or another obligation by another State party, the non-performance by the first mentioned State need not be a material breach in order to justify non-performance by the other State."

On Professor Riphagen's subsequent proposal of "reciprocal countermeasures", see *infra* note 28.

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24. The first instance was the 1971 Advisory Opinion on *Namibia* in which the Court, among many other issues, dealt with the declaration by the United Nations General Assembly in its resolution 2145 (XXI) of 1966 to the effect that South Africa's mandate over South West Africa/Namibia was to be regarded as terminated due to material breach by the former mandatory[20]. The Court set out by referring rather broadly to the "fundamental principl[e] . . . that a party which disowns or does not fulfil its own obligations cannot be recognized as retaining the rights which it claims to derive from the relationship"[21], as well as to its own earlier jurisprudence according to which the mandate constituted an international treaty[22]. It then stated that Article 60 of the Vienna Convention (at the time of the rendering of the Opinion still nine years away from its entry into force) "may in many respects be considered as a codification of existing customary law on the subject"[23]. Subsequently, the Court applied the law thus presented to the facts of the case and found that the action of the General Assembly had been justified and had reached the desired effect.

25. The second occasion on which the Court applied Article 60 was in its 1997 Judgment in the case of the *Gabčikovo-Nagymaros Project* between Hungary and Slovakia, in which one of Hungary's arguments was to the effect that it was entitled to terminate the 1977 Treaty on the hydro-electric project on the ground that Czechoslovakia had committed a number of breaches of that treaty[24]. The Court took the view that only material breaches gave an affected State a right to terminate an agreement while

> "[t]he violation of other treaty rules or of rules of general international law may justify the taking of certain measures, including countermeasures, by the injured State, but it does not constitute a ground for termination under the law of treaties"[25].

Following this statement on the relationship between Article 60 and the law of State responsibility, the Court investigated the breaches alleged by the claimant, in particular Czechoslovakia's Ersatz construction of "Variant C", and arrived at the conclusion that the conditions for the invocation of Article 60-type termination were not fulfilled[26].

26. In the light of the foregoing, the pre-Vienna Convention *exceptio* is to be declared dead. But I do not want to conclude my opinion without

[20] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, pp. 46-50, paras. 91-104.

[21] *Ibid.*, p. 46, para. 91.

[22] *Ibid.*, pp. 46-47, para. 94.

[23] *Ibid.*

[24] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, pp. 65-67, paras. 105-110.

[25] *Ibid.*, p. 65, para. 106.

[26] *Ibid.*, pp. 66-67, paras. 108-110.

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mentioning a recent attempt to resuscitate it, in another legal incarnation, as it were. In the context of the ILC's work on State responsibility and in the course of the second reading of the Commission's draft articles on the subject, Special Rapporteur James Crawford, when dealing with the so-called "Circumstances precluding wrongfulness", proposed a provision, draft article 30*bis*, which had no predecessor in the first-reading text. The proposal read as follows:

> "*Article 30*bis. *Non-compliance caused by prior non-compliance by another State*
>
> The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the State has been prevented from acting in conformity with the obligation as a direct result of a prior breach of the same or a related international obligation by another State."[27]

27. Professor Crawford expressly wanted draft article 30*bis* to restate the *exceptio*, recognition of which he thought to find in the PCIJ's *Factory at Chorzów (Jurisdiction)* Judgment as well as in later decisions. In order to provide a further foundation for his proposal, the Special Rapporteur referred to the ILC's prior codification efforts both relating to the law of treaties and on State responsibility; in the context of the latter to proposals made by Special Rapporteur W. Riphagen introducing so-called "reciprocal countermeasures"[28].

Professor Crawford pleaded for recognition of the *exceptio* as a distinct circumstance precluding wrongfulness because in his view, it was not enough to deal with it under the law relating to the suspension of treaties because that law required a material breach, which was narrowly defined[29]. What we thus see is that the Special Rapporteur wanted to fill what he considered to be a gap in the primary rules of the law of treaties

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[27] For a comprehensive analysis of this article by the Special Rapporteur, see his Second report on State responsibility, *YBILC*, 1999, Vol. II (Part One), paras. 316-329.

[28] *YBILC*, 1999, Vol. II (Part Two), pp. 78-79. Professor Riphagen's concept of "reciprocal countermeasures" is to be found in his fifth report on the content, forms and degrees of international responsibility (Part Two of the draft articles), *YBILC*, 1984, Vol. II (Part One), p. 3. In draft Article 8, Riphagen proposed to express this concept as follows:

> "Subject to . . . [certain other provisions governing countermeasures], the injured State is entitled, by way of reciprocity, to suspend the performance of its obligations towards the State which has committed an internationally wrongful act, if such obligations correspond to, or are directly connected with, the obligation breached." *(Ibid.)*

This proposal was not discussed by the Commission until 1992, when it was rejected; see, *YBILC*, 1992, Vol. II (Part Two), p. 23, para. 151. For a critique, see B. Simma, "Grundfragen der Staatenverantwortlichkeit in der Arbeit der *International Law Commission*", 24 *Archiv des Völkerrechts*, pp. 393-395 (1986).

[29] *YBILC*, 1999, Vol. II (Part Two), p. 79.

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(Art. 60) by a secondary rule belonging to the realm of State responsibility.

28. Draft article 30*bis* got a mixed reception in the Commission, to put it mildly[30]. As was to be expected, criticism focused on the relationship between the State-responsibility re-appearance of the *exceptio* now proposed and its expression in the Vienna Convention on the Law of Treaties; the point was made that the proposed article brought together several concepts that were only partially interrelated[31]. Overall, the debate was quite confused; for instance, while according to one suggestion, the content of article 30*bis* really belonged to the concept of *force majeure* — an idea which not only the Special Rapporteur found rather odd —, another member regarded the provision as "reflecting a special department of impossibility"; again others were reminded of the "clean hands" principle[32] and so forth. In light of this, the Commission did well in finally scrapping this doctrinal cross-breed. In its final report upon adoption of the 2001 Articles on State responsibility, it waved goodbye to the proposal made in draft article 30*bis* by confirming once again that "the exception of non-performance *(exceptio inadimpleti contractus)* is best seen as a specific feature of certain mutual or synallagmatic obligations and not a circumstance precluding wrongfulness"[33].

29. Let me summarize: in the present case, the Court would have had the opportunity to clarify a number of legal issues arising from the Respondent's "defences" against the Applicant's accusation of treaty breach, in particular, by giving an authoritative answer to the question whether Article 60 of the Vienna Convention on the Law of Treaties still leaves some place for the so-called *exceptio non adimpleti contractus.* For some reason, the Court avoided touching upon these issues. In my view, the correct answer would have to be negative: on the plane of international law's primary rules, Article 60 regulates the legal consequences of treaty breach in an exhaustive way; thus no version of the *exceptio* has survived the codification of the law of treaties — may it rest in peace.

(Signed) Bruno SIMMA.

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[30] Cf. *YBILC*, 1999, Vol. I, pp. 165-171, and the summary of the discussion; *ibid.*, 1999, Vol. II (Part Two), p. 79.

[31] *Ibid.*

[32] Cf. *ibid.*

[33] Report of the Commission to the General Assembly on the Work of its Fifty-Third Session, *YBILC*, 2001, Vol. II (Part Two), p. 72, para. 9.

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DECLARATION OF JUDGE BENNOUNA

[English Original Text]

Exceptio non adimpleti contractus — *Synallagmatic obligations — Countermeasures — Role of the judge — Dynamic analysis of international law.*

My aim, in this declaration, is simply to point out that the Court has chosen to evade certain key legal issues raised and discussed at length by the Parties, sheltering behind its assessment of the facts relied on in support of the Parties' arguments, in order to conclude that it need not address those issues.

Thus the Court, after recalling the arguments of the Parties concerning the application to this case of the *exceptio non adimpleti contractus*, is content to conclude that "[t]he Respondent has thus failed to establish that the conditions which it has itself asserted would be necessary for the application of the *exceptio* have been satisfied in this case", adding: "It is, therefore, unnecessary for the Court to determine whether that doctrine forms part of contemporary international law." (Judgment, para. 161.)

First, the issue is not about determining whether or not a given theory is recognized by general international law, but rather of ascertaining the scope, in general international law, of the principle of reciprocity, presented as *exceptio non adimpleti contractus*, with regard to the obligations of the Parties under the Interim Accord and, specifically, Article 11 thereof.

Even if the status of the exception in general international law remains uncertain, as noted by certain scholars (J. Crawford and S. Olleson, "The Exception of Non-Performance: Links between the Law of Treaties and the Law of State Responsibility", *Australian Year Book of International Law*, 2000, Vol. 21), the fact is that, in the past, the Court has frequently revisited concepts, institutions or norms, by taking into account the process of their evolution over time in accordance with the needs of the international community.

The Court has thus demonstrated that its role, as a world court with general jurisdiction, goes beyond the resolution, on a case-by-case basis, of the disputes submitted to it.

The Court could accordingly have taken the opportunity in the present case to emphasize that the *exceptio* can only be contemplated, in general international law, under a strict construction of reciprocity in the implementation of certain international obligations, where the implementation of one is inconceivable without the other. These are obligations of a strictly interdependent nature. The Court thus considered in the case of *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti* v. *France)* that: "Djibouti cannot rely on the principle of reciprocity", because the Convention on Mutual Assistance in Criminal Matters con-

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cluded with France does not provide that "the granting of assistance by one State in respect of one matter imposes on the other State the obligation to do likewise when assistance is requested of it in turn" (*Certain Questions of Mutual Assistance in Criminal Matters (Djibouti* v. *France), Judgment, I.C.J. Reports 2008*, p. 221, para. 119).

In the present case, the Court could have reached the same conclusion in addressing the *exceptio*, since Greece's obligation not to oppose the admission of the FYROM to NATO does not depend on the latter's implementation of some other obligation included in the Interim Accord, with the exception of that laid down in the second clause of Article 11, paragraph 1, namely its agreement to join NATO under its provisional name. Both obligations can be considered as synallagmatic: accession under its provisional name on the one side, and the non-objection to admission on the other. The scope of the exception stops there, and cannot concern the entire Interim Accord, presented by Greece as a legal transaction, a *negotium*, or a balanced exchange of reciprocal obligations in the context of a *modus vivendi* (CR 2011/8, Abi-Saab).

In the alternative, Greece argued that its objection to the admission of the FYROM to membership of NATO can be justified as a countermeasure, proportional to the breaches of the Interim Accord allegedly committed by the FYROM. Once again, the Court provided an account of the Parties' arguments and then concluded that it "rejects the Respondent's claim that its objection could be justified as a countermeasure precluding the wrongfulness of the Respondent's objection to the Applicant's admission to NATO", basing itself on a factual finding, namely that there had been no violation of the Interim Accord as alleged against the Applicant. The Court adds that: "there is no reason for [it] to consider any of the additional arguments advanced by the Parties with respect to the law governing countermeasures" (Judgment, para. 164).

I believe that, after recalling that, even if it is yet to be established that the legal régime of countermeasures, as set forth in Articles 49 to 54 of the International Law Commission's Draft Articles on the Responsibility of States for Internationally Wrongful Acts (annexed to resolution 56/83 of 12 December 2001 of the General Assembly of the United Nations) is of a customary nature, the Court could have pointed out that that régime nonetheless provides certain procedural conditions for its implementation (Art. 52), which were not met in this case, notably the duty to "notify the responsible State of any decision to take countermeasures and offer to negotiate with that State". Since Greece never fulfilled this obligation, it cannot, in any case, invoke the right to take countermeasures in the present case.

Of course, whenever the Court considers a particular legal régime, it must bear in mind the overall legal context in which such a régime operates. The Vienna Convention on the Law of Treaties, in providing, in Article 31.3 *(c)*, concerning the general rule of interpretation, that "[t]here shall be taken into account, together with the context . . . any

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relevant rules of international law applicable in the relations between the parties", thus underlines the existing interconnection, not only between different obligations of States, but also between the different areas of international law. In considering this interconnection, the Court cannot ignore the general architecture of this branch of the law, including the values that underpin it.

In a fragmented community, governed by a law which contains many lacunae, as is the case for the international community, the judge owes it to himself to engage in a dynamic analysis of international law, taking account of its temporal and material evolution, and thus to go beyond the resolution on a case-by-case basis of the disputes submitted to him.

(Signed) Mohamed BENNOUNA.

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DISSENTING OPINION OF JUDGE XUE

To my deep regret, I dissent from the decision of the majority of the Court to exercise jurisdiction in this case. Since the matter bears on treaty interpretation and judicial propriety, I shall explain my position.

I. Relationship between Article 11, Paragraph 1, and Article 5, Paragraph 1, of the Interim Accord

The dispute before the Court between the former Yugoslav Republic of Macedonia (the Applicant) and Greece (the Respondent) over the name of the Applicant involves a long history of negotiations between the Parties under the auspices of the United Nations. The Parties' respective positions on the name issue during that period, both before and after the conclusion of the Interim Accord, constitute a substantial bulk of the evidence submitted to the Court. Any interpretation of the provisions of the Interim Accord in relation to the name issue should give due consideration to the interim nature of the Accord and the ongoing negotiations between the Parties aimed at the settlement of the name difference.

Under Article 21, paragraph 2, of the Interim Accord, "[a]ny difference or dispute that arises between the Parties concerning the interpretation or implementation of this Interim Accord may be submitted by either of them to the International Court of Justice, except for the difference referred to in Article 5, paragraph 1". The "difference" referred to there relates to the dispute between the Parties over the Applicant's name, as addressed in United Nations Security Council resolutions 817 (1993) and 845 (1993). The essential issue for the Court, therefore, in determining its jurisdiction, is whether the Respondent's disputed objection to the Applicant's membership in the North Atlantic Treaty Organization (NATO) at the 2008 Bucharest Summit relates to the interpretation or implementation of Article 11, paragraph 1, of the Interim Accord, or whether it is an issue precluded from the jurisdiction of the Court by virtue of Article 21, paragraph 2, of that treaty.

In its Judgment in the case, the Court, in establishing its jurisdiction, adopts a rather narrow interpretation of the term "difference" in Article 5, paragraph 1. In that regard, paragraph 35 of the Judgment reads:

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> "Resolutions 817 and 845 (1993) distinguished between the name of the Applicant, in respect of which they recognized the existence of a difference between the Parties who were urged to resolve that difference by negotiation (hereinafter the 'definitive name'), and the provisional designation by which the Applicant was to be referred to for all purposes within the United Nations pending settlement of that difference. The Interim Accord adopts the same approach and extends it to the Applicant's application to, and membership in, other international organizations. Thus Article 5, paragraph 1, of the Interim Accord requires the Parties to negotiate regarding the difference over the Applicant's definitive name, while Article 11, paragraph 1, imposes upon the Respondent the obligation not to object to the Applicant's application to, and membership in, international organizations, unless the Applicant is to be referred to in the organization in question differently than in resolution 817 (1993)."

The Court further takes the view that the "difference" referred to therein, and which the Parties intended to exclude from the jurisdiction of the Court, is the difference over the permanent name of the Applicant, and not disputes regarding the Respondent's obligation under Article 11, paragraph 1.

It is based on this reading of Article 21, paragraph 2, of the Interim Accord that the Court finds that any connection which a dispute may have with the name difference is not sufficient to exclude that dispute from the jurisdiction of the Court. The Court concludes that "[o]nly if the Court were called upon to resolve specifically the name difference, or to express any views on this particular matter, would the exception under Article 21, paragraph 2, come into play" (Judgment, para. 37). Thus, the "difference" under Article 5, paragraph 1, is reduced to the *solution* of the final name, to be agreed on by the Parties at the end of the negotiations. Such an interpretation treats Article 11, paragraph 1, and Article 5, paragraph 1, as entirely separate issues, with no substantive connection to each other as regards the implementation of the Interim Accord. This interpretation, in my view, is questionable.

Given the nature of the dispute between the Parties over the name issue and the object and purpose of the Interim Accord, Article 11, paragraph 1, and Article 5, paragraph 1, constitute two of the key provisions in the agreement.

The Court's view on the scope of the term "difference" is, to a large extent, determined by its reading of Article 11, paragraph 1, which provides that:

> "Upon entry into force of this Interim Accord, the Party of the First Part [the Respondent] agrees not to object to the application by or membership of the Party of the Second Part [the Applicant] in

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> international, multilateral and regional organizations and institutions of which the Party of the First Part is a member; however, the Party of the First Part reserves the right to object to any membership referred to above if and to the extent the Party of the Second Part is to be referred to in such organization or institution differently than in paragraph 2 of United Nations Security Council resolution 817 (1993)."

From the evidence before the Court, it is clear that the central issue of the dispute between the Parties on this Article lies in the so-called "dual formula", as allegedly pursued by the Applicant. In accordance with Article 11, paragraph 1, the Respondent agrees that, so long as the Applicant is provisionally referred to as "the former Yugoslav Republic of Macedonia" for all purposes in international organizations, it is obliged not to raise any objection to the application by or membership of the Applicant in such international organizations. The conditional terms in the second part of the clause, which allow the Respondent to raise objections, such as "if and to the extent" and "be referred to in such organization or institution", however, are the subject of different interpretations by the Parties; they particularly disagree as to whether the Applicant may use its constitutional name when referring to itself or when dealing with third States in international organizations.

In the years after the conclusion of the Interim Accord, the Parties, in maintaining their respective positions on the name issue, have consistently held different interpretations of the terms of Article 11, paragraph 1. As demonstrated by the evidence submitted by both Parties, the Applicant has insisted on using its constitutional name when referring to itself and when dealing with third States, while the Respondent has developed a general pattern of protests against such use, alleging that it is a breach of resolution 817 and of the Interim Accord.

The conclusion of the Interim Accord between the Parties, together with Security Council resolutions 817 and 845, recognizes the legal interests of both Parties in connection with the name issue. The temporary arrangement in respect of the name difference, under Article 11, paragraph 1, provides a means of ending the impasse between the Parties over the Applicant's membership in international organizations. The ambiguity of the conditional terms in Article 11, paragraph 1, with regard to whether, or to what extent, the Applicant's constitutional name can be used by the Applicant and third States in international organizations, shows that the Interim Accord, as a temporary measure for maintaining peace and good-neighbourly relations both in the region and between the Parties, requires a great deal of good faith and mutual trust from both

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Parties in its implementation. Such uncertainty can only be explained and justified by the interim nature of the treaty and the pending settlement of the name issue. Therefore, the implementation of Article 11, paragraph 1, is intrinsically linked to the duty of the two Parties to settle the name dispute through negotiations, as required by Article 5, paragraph 1. Any issue relating to the negotiation process should fall within the scope of Article 5, paragraph 1.

Resolution 817 and the Interim Accord originally envisaged, or at least encouraged, a speedy settlement of the name difference between the Parties. In the 13 years from the conclusion of the Interim Accord to the 2008 Bucharest Summit, however, negotiations had still not come to fruition. Meanwhile, tensions between the Parties over the dual-name practice, particularly the so-called "dual formula", were on the rise.

The so-called "dual formula", as revealed in the proceedings, refers to the formula whereby, ultimately, the provisional name will be used only between the Respondent and the Applicant, while the Applicant's constitutional name is used with all other States. Although the Court rightly concludes that, by virtue of Article 11, paragraph 1, the Applicant is not precluded from using its constitutional name when referring to itself in international organizations under resolution 817 and the Interim Accord, such a "dual formula", whose implication for the pending negotiations does not seem immaterial, was obviously not contemplated by the Parties when they concluded the Interim Accord. Furthermore, when such a formula is allegedly pursued intentionally, the matter clearly has a bearing on the final settlement of the name issue. The question in the present case, therefore, is in essence not about the Respondent's position regarding the Applicant's membership in NATO under Article 11, paragraph 1, but about the difference in the negotiation process.

In the Judgment, the Court states that:

> "If the Parties had intended to entrust to the Court only the limited jurisdiction suggested by the Respondent, they could have expressly excluded the subject-matter of Article 11, paragraph 1, from the grant of jurisdiction in Article 21, paragraph 2." (Para. 35.)

This assumption is logical, but not persuasive. As stated above, the terms of Article 11, paragraph 1, are not as certain as they sound. The inherent ambiguity lies in the complexity of the name issue. This does not mean that the Respondent could unilaterally invoke any excuse and block at will the Applicant's membership in an international organization. The matter is subject to the determination of the Court, which decides whether

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it falls within its jurisdiction or not: in other words, whether it falls under Article 11, paragraph 1, or Article 5, paragraph 1. In the present case, without looking into the so-called "dual formula", it would be impossible to examine fully the Respondent's actions at the Bucharest Summit in light of the object and purpose of the Interim Accord. If conducted, however, such an examination would inevitably have to address the "difference" under Article 5, paragraph 1, thereby going beyond the jurisdiction of the Court.

The Court confines its examination to the act of objection by the Respondent to the Applicant's membership in NATO. In doing so, it isolates Article 11, paragraph 1, from the context of the treaty as a whole, and from its object and purpose.

The intrinsic links between Article 11, paragraph 1, and the final settlement of the name dispute, the subject-matter of Article 5, paragraph 1, is unmistakeably confirmed by Mr. Nimetz, the Special Envoy of the United Nations Secretary-General, who was responsible for mediating the bilateral talks on the name issue for many years. In 2007, following an objection by the Respondent to the use of the Applicant's constitutional name by the President of the General Assembly, who happened to be a national of the Applicant, Mr. Nimetz was asked for his opinion on the incident. In reply, he made the remark that "what happened in the General Assembly yesterday demonstrates why a permanent solution is needed". This is telling. What seems to be purely a question of Article 11, paragraph 1, concerning the use of the Applicant's name in an international organization, cannot be examined in isolation. Article 11, paragraph 1, cannot be separated from Article 5, paragraph 1, when the settlement of the final name is involved. Indeed, in my view, paragraphs 133-138 of the Judgment touch on matters falling under Article 5, paragraph 1, of the Interim Accord.

II. Judicial Propriety

Even if, by a strict interpretation of Article 21, paragraph 2, the Court finds that it has jurisdiction in the case, in my view there are still good reasons for the Court to refrain from exercising it, since it bears on the question of judicial propriety. As the Court pointed out in the *Northern Cameroons* case, even if the Court, "when seised, finds that it has jurisdiction, the Court is not compelled in every case to exercise that jurisdiction. There are inherent limitations on the exercise of the judicial function which the Court, as a court of justice, can never ignore." (*Northern Cameroons (Cameroon* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1963*, p. 29.)

I agree with the Court's position that the issue before it is not whether NATO's decision may be attributed to the Respondent, but rather whether the Respondent has breached its obligation under the Interim Accord as a result of its own conduct. The Court's decision to pronounce only on the lawfulness of the single act of the Respondent, and to reject all the other submissions of the Applicant, renders the Judgment devoid of any effect on NATO's decision to defer its invitation to the Applicant to become a member of NATO. In its reasoning for this decision, the Court relies on two considerations, among others. First, it gives a narrow construction of the Applicant's request. It states in paragraph 50 of the Judgment that: "The Applicant is not requesting the Court to reverse NATO's decision in the Bucharest Summit or to modify the conditions for membership in the Alliance." Notwithstanding that statement, the Applicant, in its third submission, makes it clear that it is requesting the Court to

> "order that the Respondent immediately take all necessary steps to comply with its obligations under Article 11, paragraph 1, of the Interim Accord, and to cease and desist from objecting in any way, whether directly or indirectly, to the Applicant's membership of the North Atlantic Treaty Organization . . .".

From the proceedings, it is evident to the Court that the Applicant's major concern relates to NATO's decision of "no settlement, no invitation". As far as the Applicant's membership in NATO is concerned, with NATO's decision unchanged, there are only two possible ways for the Applicant to regain its status as a candidate for NATO: one is the settlement of the name issue between the Parties; the other is a reversal of NATO's decision. The Court's declaratory Judgment is apparently intended to eschew the latter.

The second consideration is a general one with regard to declaratory judgments. As the Court explained in the *Navigational and Related Rights* case, "[a]s a general rule, there is no reason to suppose that a State whose act or conduct has been declared wrongful by the Court will repeat that act or conduct in the future, since its good faith must be presumed" (*Dispute regarding Navigational and Related Rights (Costa Rica* v. *Nicaragua), Judgment, I.C.J. Reports 2009*, p. 267, para. 150). Therefore, the Court does not consider it necessary to order the Respondent, as requested in the Applicant's third submission, to refrain from any future conduct that violates its obligation under Article 11, paragraph 1, of the Interim Accord. Its pronouncement that the Respondent has breached its obligation constitutes appropriate satisfaction.

With regard to declaratory judgments, the Court states in its jurisprudence that such a judgment serves to ensure "recognition of a situation at law, once and for all and with binding force as between the Parties; so

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that the legal position thus established cannot again be called in question in so far as the legal effects ensuing therefrom are concerned" (*Interpretation of Judgments Nos. 7 and 8 (Factory at Chorzów), Judgment No. 11, 1927, P.C.I.J., Series A, No. 13*, p. 20). In the present case, it is doubtful that such a judgment would be able to fulfil that goal. In so far as NATO's decision remains valid, the Court's decision will have no practical effect on the future conduct of the Parties with respect to the Applicant's membership in that organization. In the *Northern Cameroons* case, the Court stated that its decision "must have some practical consequence in the sense that it can affect existing legal rights or obligations of the parties, thus removing uncertainty from their legal relations" (case concerning the *Northern Cameroons (Cameroon* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1963*, p. 34). That requirement does not seem to have been met in the present case.

The above point leads me to a second aspect of the judicial function in the settlement of international disputes, namely, the potential effect of the Judgment on the negotiation process between the Parties. By virtue of the Bucharest Declaration, the Parties' obligations in respect of the Applicant's application to and membership in NATO are no longer the same as those under Article 11, paragraph 1, of the Interim Accord. In refraining from granting the additional remedies requested by the Applicant, the Court is apparently aware of the potential effect of its Judgment on the negotiation process. Even so, the Court's decision is still likely to be used by the Parties to harden their positions in the negotiations.

Referring to the name issue, Mr. Nimetz pointed out in a press conference, following a meeting with the negotiators of the two Parties on the name issue in March 2008, "it's a very important question for the region . . . it affects the people of both countries and has a deep history . . . it's a very deep issue and a serious issue". The Court could not have failed to observe that an essential aspect of the case is that both Parties should negotiate and act in good faith, and that the current state of affairs should not jeopardize the negotiation process. Under the Interim Accord, and as also required by the Security Council resolutions, the Parties committed themselves to finding a solution to this name difference in a speedy manner. The imposition of a solution by a third party, or any direct or indirect involvement, even from this Court, is undesirable in this regard. As the Court pointed out long ago,

> "the judicial settlement of international disputes, with a view to which the Court has been established, is simply an alternative to the direct and friendly settlement of such disputes between the Parties; as consequently it is for the Court to facilitate, so far as is compatible with its Statute, such direct and friendly settlement" (case of the *Free Zones of Upper Savoy and the District of Gex, Order of 19 August 1929, P.C.I.J., Series A, No. 22*, p. 13).

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While a speedy settlement of the name issue serves the best interests of both Parties, this judicial exercise, in my view, might render a service which is not conducive to the achievement of this objective.

(Signed) Xue Hanqin.

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DISSENTING OPINION OF JUDGE *AD HOC* ROUCOUNAS

[Translation]

Brief history — The need to determine the name through negotiations and common consent — The object and purpose of the Interim Accord — Disagreement with the Court over its jurisdiction to settle this dispute — Article 5 and the obligation to negotiate in good faith — Admission to international organizations: NATO is a special case — Article 11: agreeing not to object if the other Party fulfils its obligations under Article 5, which precedes Article 11 — The scope of the obligations assumed by the Parties — The "practice of the organization", the violations of resolution 817 and of the Interim Accord and the protests of the Respondent — Good neighbourliness — Rights and obligations in relation to third parties under Article 22 — Reliance, in the alternative, on the principle of exceptio non adimpleti contractus *— Countermeasures.*

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To my regret, I voted against points 1 and 2 of the operative part of the Judgment; I did so for the following reasons.

Introduction and Brief History

1. Both Parties accept that the Interim Accord of 13 September 1995 is an international treaty with full legal effect. Nonetheless, it does have a number of significant unusual features. First, it may be asked whether, in the history of contemporary international relations, there have been other treaties in which the States parties are not referred to by name. The text is signed by two individuals, who represent respectively the "Party of the First Part" and the "Party of the Second Part", and one has to deduce from this that those individuals represent Greece and the former Yugoslav Republic of Macedonia (FYROM). Why was the Treaty concluded between unnamed States? The reason for this curious, uniform way in which the Parties are designated resides in the Parties' "difference" over the name of the "Party of the Second Part". That difference is omnipresent in this case, and the other actions of the Applicant and reactions of the Respondent revolve around it.

2. The Interim Accord was concluded amid the tumult of the Balkan crises of the 1990s and the events taking place in Europe at that time. However, it is well known that the "Macedonian Question", which marked the rivalry between Greece, Serbia and Bulgaria, dates back to the final decades of the nineteenth century and, in particular, to the 1880s, when the demands raised by the peoples of that region against the Ottoman Empire (of which Macedonia was a part) gave rise to armed conflicts, not only against the Turkish occupier, but also among the local peoples. Since then, Macedonia has not escaped a single conflict or regional or global crisis unscathed, enduring two Balkan Wars (1912-1913) and two World Wars (1914-1918 and 1939-1945). The Treaty of Bucharest of 10 August 1913, which brought an end to the second Balkan War, recognized Greece's sovereignty over an area of Macedonia which includes the greater part of the territory of historical Macedonia and which, since then, has constituted a region of Greece. Following the dissolution of the Austro-Hungarian Empire, the 1919 Treaty of Saint-Germain-en-Laye created the Kingdom of the Serbs, Croats and Slovenes (without mention of the Macedonians), a Kingdom which in 1923 adopted the name of Yugoslavia. After the end of the Second World War (1945), Yugoslavia directed its policy towards incorporating both Greek and Bul-

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garian Macedonia and lent substantial support to the rebels during the Greek Civil War (1946-1949). At the Paris Peace Conference (1947), Yugoslavia called for the annexation of provinces of northern Greece. The rebel movements which Greece confronted on its northern border during the Civil War led to the creation, in 1946, of the first Commission of Inquiry of the United Nations.

3. According to the census of 2000, Greek Macedonia, which extends across almost 90 per cent of historical Macedonia, has around 2,625,000 inhabitants[1]; the population of the FYROM is approximately 2,022,547 inhabitants (2002)[2].

4. In his book *To End a War*, Richard Holbrooke, Assistant Secretary of State of the United States and Special Envoy for the Balkans, describes the circumstances in which, in the midst of one of the Balkan crises — namely, the armed conflict in Bosnia-Herzegovina —, he met with his colleagues in Athens and Skopje "to tackle the bitter dispute between Greece and the former Yugoslav Republic of Macedonia (FYROM) over the name of the country and its national flag"[3]. He explains how, on 4 September 1995, the American envoys convinced Andreas Papandreou, then Greek Prime Minister, to agree to the Accord which had been negotiated over a two-year period thanks to the mediation of Cyrus Vance and Matthew Nimetz, while he himself met on the same matter with President Kiro Gligorov, "once Tito's Finance Minister [who] had almost literally invented his country in late 1991 and early 1992"[4]. Holbrooke adds that the *New York Times* had hailed the Interim Accord as marking the end "of a four year dispute that had threatened to break into war"[5]. It is important to recall here that, immediately after its independence, the new State embarked upon a series of actions with irredentist aims and acts contesting the Greek cultural heritage, which were considered unacceptable by Greece.

5. The Applicant refers to the economic embargo which, against that backdrop, was imposed by Greece in 1994 against its northern neighbour. It should be borne in mind that the economic sanctions taken by Greece against its northern neighbour occurred after the adoption of resolution 817 by the Security Council, meaning that the Respondent's objection to the FYROM's conduct took concrete form very quickly, in any event during the period between the adoption of resolution 817 (1993) and the conclusion of the Interim Accord (1995). I would add that, in 1994, the Commission of the European Communities referred Greece to the European Court of Justice, asking the Court to indicate provisional measures in respect of

[1] According to Eurostat figures (20 Oct. 2010); see http://epp.eurostat.ec.europa.eu.

[2] Memorial of the former Yugoslav Republic of Macedonia, Vol. I, para. 2.2.

[3] R. Holbrooke, *To End a War* (revised edition), New York, The Modern Library, 1998, pp. 121-127.

[4] *Ibid*., p. 125.

[5] *Ibid*.

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Greece and to rule on whether the measures taken by that country were in accordance with Articles 224 and 133 of the Treaty of Rome. The Court rejected the Commission's request concerning the indication of provisional measures and the case on the merits was later removed from the list. In respect of the merits, however, it is also important to note that, in his opinion to the Court, the Court's Advocate General (Francis Jacobs) found that the measures taken by Greece were legitimate and recommended that the Commission's request and application against Greece be dismissed[6].

6. In order to facilitate the conclusion of the Interim Accord, and trusting in the safeguards for the normalization of relations with its northern neighbour, in 1995 Greece consented to substantial concessions, in return for the reciprocal obligations provided by the Accord, and agreed to lift the embargo. I would point out that, for the FYROM, those reciprocal obligations amounted to no more than behaving in accordance with the rules of good neighbourliness. The Judgment refers to the opinion of the Badinter Commission, which, on the basis of declarations by the countries of the former Yugoslavia (simple declarations of intention whose correspondence with reality was not verified), ruled in favour of the recognition of the FYROM[7]. The European Union also attempted to mediate between the two Parties. Those attempts were unsuccessful and, at the Lisbon Summit of June 1992, the European Council made known that the Applicant would only be recognized by the European Union under a name which did not include the word "Macedonia"[8].

I. To Resolve the Name Issue through Negotiations and Common Consent, or to Maintain the "Difference" at the Cost of Frustration, Insecurity and Confusion

7. For several years, political, legal and cultural relations between the two countries have been clouded by the problem of the Applicant's name. That problem, like many others, surfaced in 1991, and ever since Greece has been asking its northern neighbour *not to monopolize*, in its capacity as a State, the name of Macedonia and to adopt a name which distinguishes it from Greek Macedonia. I could mention at least five cases in Northern Europe, Central Europe, the Balkans, Africa and the Pacific in which, on the protests of neighbouring States or of their own accord, new States adopted names or symbols designed to differentiate them from their neighbours. Since 1995, negotiations aimed at settling "the difference" over the name have been conducted between the Parties under the auspices of the United Nations Secretary-General and with the mediation

[6] European Court of Justice, case C-120/94, paras. 61-73 in particular.

[7] Memorial of the former Yugoslav Republic of Macedonia, Vol. I, para. 2.13.

[8] *Ibid*., para. 2.13, footnote 37.

of Matthew Nimetz. However, the dispute remains unresolved and raises a number of concerns for the stability of relations in the Balkans, which extend beyond the scope of the two countries' official representations, press or other public and private institutions.

8. During the written stage of the proceedings, the Applicant contended that in the Interim Accord "[n]either Party is referred to by its constitutional name nor is the provisional reference of 'the former Yugoslav Republic of Macedonia', as set out in resolution 817, used to refer to the Applicant"[9]. That reading, upheld by the Court, is erroneous, because Articles 5 and 11 of the Interim Accord transpose and legally reinforce Security Council resolutions 817 and 845, the first of which clearly advocates the use of the provisional reference FYROM "for all purposes within the organization". If the Applicant was itself not also required to use the provisional name, then it would have been sufficient to refer to resolution 845 in the Interim Accord. For its part, paragraph 2 of resolution 817 states that, pending the settlement by common consent of the difference over the name, the Applicant is to be "referred to for all purposes" as the former Yugoslav Republic of Macedonia. However, by using the name which appears in its Constitution ("the Republic of Macedonia") in its dealings with and within international organizations, as well as creating confusion among the members of the international community, the Applicant is failing to comply with its obligation in two ways. Firstly, it is unilaterally claiming for itself an exception to the formula "[is to be] referred to for all purposes", even though there is nothing in resolutions 817 and 845 to allow it such an exception; use of the reference name is binding for all, without exception, within the international organization. The two resolutions in question (and the Accord) use the word "name" in the singular, and not in the plural, which makes perfect sense, since they reflect the willingness of the United Nations to strive for the normalization of relations between two member States of the international community. Furthermore, the phrase "for all purposes" emphasizes the object of the negotiations, which are intended to achieve agreement on one name (and one name only), which will no longer be provisional.

9. With respect to the "difference over the name", the Applicant adopts — according to the circumstances and sometimes simultaneously — at least two different positions: it claims sometimes that resolution 817 refers to the negotiations over the name and that, accordingly, the provisional name does not concern it, and sometimes that the negotiations concern the provisional name and that, therefore, its constitutional name is not at issue. The Applicant thus contends that the purpose of the bilateral negotiations conducted under the auspices of the United Nations, which have been ongoing for more than 16 years, is simply to reach agreement on the name which will replace the provisional appellation of FYROM, and which is intended solely for use by the Respondent, while the Applicant, for its part, will continue to

[9] Memorial of the former Yugoslav Republic of Macedonia, Vol. I, para. 2.35.

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refer to itself and to have itself referred to, as "Macedonia". This is what the Applicant calls the "dual formula", an interpretation which fails to take account of its treaty obligations. It is sufficient to note that the two Parties have already agreed, without any intermediary and by means of the two memoranda concluded between them in 1995, that they will each use, in the interim, the name of their preference. Therefore, what would be the point of the lengthy negotiations under the auspices of the United Nations if the Parties have already reached a temporary understanding, without an intermediary, in respect of their mutual relations?

10. As regards the Applicant's use of its constitutional name, anyone who has been witness to the activities of international organizations over the past 20 years will no doubt recall the countless points of order raised by Greek representatives against the use of that name, as well as the Applicant's responses. While voicing its opposition orally and in writing, Greece took account of the fact that that conflict could not be pursued *ad nauseum*. Through its repeated objections, it nevertheless made its position perfectly clear in the face of the Applicant's shift towards a "dual formula" not contemplated by the Interim Accord. For international organs and organizations to function smoothly, it is not necessary for those with objections to voice those objections at all times and on every occasion.

11. As regards the negotiations over the name, the written and oral proceedings in this case demonstrate to the Court that Greece's position has changed substantially over the years. Initially, Greece's policy consisted of objecting to any name of the Applicant which contained the term "Macedonia". Subsequently, and in any event before the Bucharest Conference of 3 April 2008, Greece altered its position and made known that it would accept a name that included the term "Macedonia" — on the condition that it was accompanied by a qualifier and that that name should be used *erga omnes*. The Applicant, on the other hand — speaking through its President or Prime Minister — declared that the international use of a name which differed from its constitutional name was unacceptable (see paras. 32-33 *infra*). That position has remained — unchanged for 16 years — the position of the Applicant's successive governments. I do not propose to examine the potential long-term effects of the usurpation of a name.

II. The Object and Purpose of the Interim Accord

12. From the various interpretations given in both jurisprudence and doctrine to the notions of the object and the purpose of a treaty, it can be taken as a working hypothesis that the object is stable whereas the purpose is evolving[10]. According to the Vienna Convention, the object and

[10] Cf. M. K. Yasseen, "L'interprétation des traités d'après la convention de Vienne sur le droit des traités", *Collected Courses of the Hague Academy of International Law*, Vol. 151-III, 1976, p. 3 *et seq.*, p. 55.

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purpose of the treaty are considered as a whole and not in reference to the individual provisions of the instrument in question. After that, each individual provision may be considered by applying the interpretation which gives it a useful effect. The object of the Interim Accord is to normalize the relations between the Parties and its purpose is the use by those Parties of the various means it offers (most notably, effective negotiations) to reach a *lasting solution* to the "difference" between them, and not to "find a way to allow for pragmatic co-operation bilaterally and multilaterally *on an interim basis*"[11].

13. It is generally recognized that a treaty is no longer characterized in a rigid fashion for the purposes of its interpretation and application[12]. The notion of synallagmatic agreement[13] is, however, referred to in the interpretation of a great number of *bilateral* treaties, because it can be found in every national legal system and serves to clarify the rights and obligations of both States in their contractual relations. Nowadays, agreements are characterized as synallagmatic primarily in order to distinguish them from certain so-called "normative" or "integral" multilateral treaties, for which the methods of interpretation and implementation are still evolving.

14. At the heart of any synallagmatic agreement is *reciprocity*, a fundamental notion in international relations. In effect, reciprocity plays both a constructive and stabilizing role; it is linked to the degree of organization within the international community. It is reflected in equivalent or identical treatment in law. Further, a treaty does not have to include a specific clause to that effect for reciprocity to apply: it operates even outside the framework of the treaty in order to strengthen it. That is why there is a distinction between formal reciprocity, which is a specific legal provision, and actual reciprocity, two notions which, furthermore, are not mutually exclusive. In my opinion, a synallagmatic treaty which does not reflect reciprocity could be considered as unequal. Finally, it would be wrong to conclude that a synallagmatic treaty cannot contain provisions which doctrine and jurisprudence call "normative" or "integral"; it is the construction of the treaty as a whole and not by artificial sections which enables its essential nature to be determined. In that connection, I would point out that the ILC's Special Rapporteur on the Law of Treaties distinguished between "reciprocal" or "concessionary" and "integral" obligations in all treaties, bilateral and multilateral. Even in multilateral treaties, reciprocal obligations are those which "provid[e] for a mutual interchange of benefits between the parties, with rights and obligations

[11] See the Reply of the former Yugoslav Republic of Macedonia, para. 4.63; emphasis added.

[12] A/CN.4/L.682, p. 338.

[13] In "Le principe de réciprocité dans le droit international contemporain", *Collected Courses of the Hague Academy of International Law*, Vol. 122, 1967-III, Virally writes that "reciprocity expresses the idea of an exchange, of a link between that which is given on either side", p. 100.

for each involving specific treatment at the hands of and towards each the others individually"; by way of an example, the Rapporteur cited the 1961 Vienna Convention on Diplomatic Relations[14].

15. In the context of treaty rights and obligations, the *pacta sunt servanda* rule is often invoked (and the Applicant is no exception in that respect). In effect, it is well established that that rule is a fundamental principle of the law of treaties and, as Milan Bartoš explained before the International Law Commission, "the rule *pacta sunt servanda* is linked to the rule *do ut des*"[15].

16. The Interim Accord is synallagmatic in the sense usually attributed to that category of treaties, meaning that its provisions are closely inter-connected, and that the rights and obligations of the two Parties are legally dependent on one another. In fact, it is difficult to see what benefit the Respondent would derive from the Interim Accord, other than the regularization of its relations with its northern neighbour by joint acceptance of a name which would distinguish one from the other. Therefore, the Court should strive to make the object and purpose of the Interim Accord realizable by emphasizing the need for effective negotiations conducted in good faith, and take care not to prejudice those negotiations directly or indirectly.

III. The Court Lacks Jurisdiction to Settle this Dispute

17. Paragraph 2 of Article 21 excludes from the Court's jurisdiction "the difference referred to in Article 5, paragraph 1". That phrase does not simply refer to the fact that the Court does not have jurisdiction to determine the name of the Applicant, which is self-evident; it goes further and refers to "the difference". We are all familiar with the "difference", ever present in the written and oral pleadings.

18. It follows that paragraph 2 of Article 21 excludes from the Court's jurisdiction not only the question of the attribution of a name for the Applicant (which is self-evident), but also, by the terms used therein, "the difference referred to in Article 5, paragraph 1"; that is to say, it prohibits the Court's intervention on any question which, according to the Applicant itself, relates "directly or indirectly" to the question of the name. I would add that the exclusion under Article 21 is also linked to Article 22, which reflects Articles 8 and 10 of the North Atlantic Treaty[16], the Court having no jurisdiction to interpret that instrument. By finding that it lacked jurisdiction, the Court would have helped to ensure that the nego-

[14] See the *Third Report on the Law of Treaties* by Gerald Fitzmaurice, UN doc. A/CN.4/115, *YBILC*, Vol. II, p. 27.

[15] *YBILC*, 1963, Vol. I, p. 124.

[16] See paragraphs 37 and 61 *infra*.

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tiations carried out under the auspices of the United Nations Secretary-General (paragraph 3 of resolution 845) were meaningful and resulted in the adoption of a name for the Applicant by common consent. It is regrettable that the Court assumed a position capable of being interpreted as contributing to "faits accomplis", or which might lead to renewed deterioration of the negotiations. To arrive at that position, it adopted a restrictive interpretation of Article 5, a broad interpretation of the first clause of Article 11 and a restrictive interpretation of the second clause of the same Article.

19. The Applicant (changing its position) contended that the Respondent's interpretation of the Court's jurisdiction would render the Accord wholly or partially ineffective. On that point, it presented a reasoning which would render inapplicable in whole or in part the provisions it finds inconvenient, namely paragraph 1 of Article 5, the second clause of paragraph 1 of Article 11, paragraph 2 of Article 21 and Article 22.

20. Arguing (to varying degrees) that a broad interpretation of the "difference" over the name would restrict or diminish the Court's jurisdiction is tantamount to neutralizing the effect of Article 21, paragraph 2. But before considering the possible impact of the name issue on individual provisions of the Accord, it should first be noted that it is precisely because of the unilateral interpretation which the Applicant attempts to apply to its own obligations that the "difference over the name" has, over time, taken on a dimension which could not have been envisaged when the Accord was concluded in 1995.

21. In order to understand the catalysing role played by the name in the present case, and its significance for the Court's jurisdiction under Article 21, paragraph 1, it is not necessary to venture into an examination of which of the Accord's provisions are to be interpreted broadly and which restrictively. The "name" of the Applicant is indicated referentially and in a legally binding manner in two of the Accord's key provisions, namely Article 5, paragraph 1, and Article 11, paragraph 1, each *taken as a whole*. It is in considering the effect accorded to those two provisions since 1995, and the manner in which they have been implemented, that the Court's jurisdiction and the admissibility of the Application can be determined.

22. The Court's lack of jurisdiction is also corroborated by the fact that NATO's decision of 3 April 2008 is an act of that international organization, and Greece does not have to answer for the acts of the organizations of which it is a member. Furthermore, it is not the first time that an applicant is seeking to obtain from the Court a ruling on the lawfulness of certain acts of an international organization which is not a party to the dispute. To uphold the Applicant's thesis means that, for the first time, the highest international court is ruling through a member State on the lawfulness of an act of a third-party international organization.

23. I will now consider to what extent the Court's finding that it has jurisdiction will influence the effective resumption of meaningful negotia-

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tions aimed at achieving agreement between the Parties on the issue of the name, which represents an obstacle with significant political and cultural consequences not only to the FYROM's admission to specific international organizations, but also to bilateral relations. By upholding the Applicant's claim and finding that it has jurisdiction, the Court has involved itself in the intricacies of the Parties' political and cultural relations with each other and with the international organization in question. Furthermore, in finding that the Applicant's sustained violations of the Interim Accord within and outside of international organizations have had no decisive effect on the implementation of the Accord, the Judgment implies that the way in which the Applicant interprets the Accord has no connection with "the difference over the name", which is excluded from the Court's jurisdiction under Article 21. Instead of formulating a repetitive series of reasons which could undermine the negotiations, the Court should have contented itself with the appeal set out so clearly in paragraph 166 of the Judgment. Recalling the prudent terms employed by the Permanent Court of International Justice: "the judicial settlement of international disputes . . . is simply an alternative to the direct and friendly settlement of such disputes between the Parties; as consequently it is for the Court to facilitate, so far as is compatible with its Statute, such direct and friendly settlement" (case concerning the *Free Zones of Upper Savoy and the District of Gex, Order of 19 August 1929, P.C.I.J., Series A, No. 22*, p. 13).

24. A composite reading of the Accord would have enabled the Court to discern in the text the need to take account of the historical and cultural elements which loom large over the case and to distance itself from the reactions, both political and on the popular psychological level, which are liable to be aroused on either side by the Judgment. In finding that the Applicant may use its constitutional name within international organizations, the Court exceeds its jurisdiction under Article 21 of the Accord.

IV. Article 5 and the Obligation to Negotiate in Good Faith

25. The Court reduces the interpretation of the scope of Article 5, paragraph 1, of the Interim Accord to its simplest form. That provision stipulates that:

> "[t]he Parties agree to continue negotiations under the auspices of the Secretary-General of the United Nations pursuant to Security Council resolution 845 (1993) with a view to reaching agreement on the difference described in that resolution and in Security Council resolution 817 (1993)".

26. In the two above-mentioned resolutions, the Security Council urges the Parties to continue to co-operate in order to arrive at a speedy settlement "of their difference" (resolution 817) and "of the remaining issues between them" (resolution 845). The discrepancy in the wording of these

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two texts demonstrates that, between 1993 and 1995, the "issues to be resolved" multiplied.

27. When addressing the question of international negotiations, it is often tempting to make a distinction between obligations of means and obligations of result. In my opinion, that distinction is valid in other areas of international relations. In respect of international negotiations, however, it belongs to a time past, when diplomacy was first and foremost an exercise in, or art of, intelligence, deceit, semantic subtlety and prevarication. Nowadays, however, we live in an era of openness and candour. Thus, at a minimum, two States to a dispute are expected to negotiate with a view to reaching a settlement, especially when peace, security and good neighbourliness are at stake. Such is the scope of the now classic phrase "meaningful negotiations". According to the Court's *locus classicus* in the case concerning the *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)* (*Judgment, I.C.J. Reports 1969*, pp. 46-47, para. 85), there are various notions as to what the phrase "meaningful negotiations" covers, but all agree that "[t]he duty seems to consist in an obligation on States so to conduct themselves that their negotiations are meaningful, and there is no genuine (good faith) negotiation if each party, or either one, insists on its position and refuses to compromise on any point"[17].

28. The principle of good faith, invoked by the Parties on a number of occasions, and on the virtues of which the Court does not dwell in the Judgment, is a normative and general principle of international law[18], a legal institution requiring harmony between the expressed intention and the true intention, as the Court has repeatedly confirmed. Doctrine and practice (including during the drafting of resolution 2625 (XXV) on "friendly relations") have clearly underlined the moral aspect of good faith and, in arbitral jurisprudence, it has also recently been recognized as having a "fundamental role and [a] paramount character . . . in the interpretation . . . of all international law and not just in the interpretation of treaties"[19]. In the context of treaty law, good faith operates on three levels: first, in the negotiation of the agreement, second, in its interpretation and, finally, in its implementation[20]. If the agreement makes provision for

[17] G. White, "The Principle of Good Faith", in M. B. Akehurst, V. Lowe and C. Warbrick, *The United Nations and the Principles of International Law*, London/New York, Routledge, 1994, p. 233.

[18] M. Virally, "Review Essay: Good Faith in International Law", *American Journal of International Law*, Vol. 77, 1983, pp. 130-132.

[19] Case concerning the audit of accounts between the Netherlands and France in application of the Protocol of 25 September 1991 Additional to the Convention for the Protection of the Rhine from Pollution by Chlorides of 3 December 1976, decision of 12 March 2004, *Reports of International Arbitral Awards (RIAA)*, Vol. XXV, p. 267, paras. 65-66.

[20] Panel Report, *United States — Continued Suspension of Obligations in the EC — Hormones Dispute*, WT/DS320/R, adopted 14 November 2008 (as modified by the Report of the Appellate Body, WT/DS320/AB/R), para. 7.313; Panel Report, *Canada —*

negotiations aimed at settling issues which have not been resolved by the agreement, good faith becomes the catalyst which enables that settlement to be achieved. Further, the concept of reasonableness must govern throughout the life of a treaty[21]. Thus, in the *Gabčíkovo-Nagymaros* case, the Court made it clear that "[t]he principle of good faith obliges the Parties to apply it in a reasonable way and in such a manner that its purpose can be realized" (*Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 79, para. 142). Finally, good faith protects parties which have legitimate expectations and justifiably trust in the appearances created by the conduct of the other parties to the treaty[22]. Since the theory of the abuse of right is closely linked to good faith[23], it follows that acts flowing from wrongful conduct can have no legitimate effects[24]. In this connection, it has been stated that: "to negotiate otherwise than in good faith is surely not to negotiate at all"[25] and that "good faith is consubstantial with the idea of negotiations"[26].

29. All negotiations are thus founded on the parties' obligation to carry them out in good faith, a principle which the Applicant has constantly invoked. But it is difficult to discern the good faith in its intransigence over the "dual formula" — the issue at the heart of the dispute — which is compromising the negotiations.

30. Article 5 establishes a balance between the Parties' rights and obligations. Right from the outset, its first paragraph addresses the crux of the matter: the requirement of negotiations "with a view to reaching agreement on the difference" — in other words, the adoption of a name ("the name of the Party of the Second Part") by common consent — firstly over what is meant by "name" and secondly over who should use it (clearly *erga omnes*). It should be noted that Article 5, paragraph 1, refers first to Security Council resolution 845 (1993), which places the emphasis on negotiations (para. 2), and then to resolution 817 (1993).

31. The second paragraph of Article 5 reinforces the first, without prejudice to the difference over the name, by stipulating that the Parties must facilitate their mutual relations, in particular their economic and com-

Continued Suspension of Obligations in the EC — Hormones Dispute, WT/DS321/R, adopted 14 November 2008 (as modified by Report of the Appellate Body WT/DS321/AB/R), para. 7.313.

[21] Cf. *Oppenheim's International Law* (Sir R. Jennings and Sir A. Watts, eds.), Vol. I, 9th edition, London, 1996, p. 1272; J. Salmon, "Le concept de raisonnable en droit international public", *Mélanges offerts à Paul Reuter*, Paris, Pedone, 1981, p. 447 *et seq*.

[22] M. Virally, *op. cit. supra* note 18, p. 133.

[23] See Article 300 of the United Nations Convention on the Law of the Sea of 10 December 1982.

[24] *Ex injuria non oritur jus*, cf. *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 76. See also Article 61, paragraph 2, and Article 62, paragraph 2 *(b)*, of the Vienna Convention on the Law of Treaties.

[25] H. Thirlway, "The Law and Procedure of the International Court of Justice: 1960-1989", 60 *British Yearbook of International Law (BYIL)*, 1989, p. 25.

[26] R. Kolb, *La bonne foi en droit international public*, Paris, PUF, 2000, p. 588.

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mercial relations (bearing in mind that the Accord was signed following the imposition of an embargo by the Respondent) and "shall take practical measures" to that end. It is well known that, in accordance with paragraph 2, in the period which followed the conclusion of the Interim Accord, Greece made a significant contribution to the FYROM's economy[27] and facilitated the free movement of goods to and from that country.

32. I will now address the facts: in his speech of 3 November 2008 before the Parliament of the Applicant, the President of the Republic, Branko Crvenkovski, set out as follows a policy which could be described as a "road map" for all heads of State and Government of that country:

> "in recent years the Republic of Macedonia had a strategy which, due to understandable reasons, was never publicly announced, but it was a strategy that all Governments and Chiefs of State have stuck to so far, regardless of their political orientation. A strategy which was functional and which gave results.
>
> What were the basic principles of that concept?
>
> First of all, in the negotiations under the UN auspices we participated actively, but our position was always the same and unchanged. And that was the so-called dual formula. That means the use of the constitutional name of the Republic of Macedonia for the entire world, in all international organizations, and in bilateral relations with all countries, with a compromise solution to be found only for the bilateral relations with the Republic of Greece.
>
> Secondly, to work simultaneously on constant increase of the number of countries which recognize our constitutional name and thus strengthen our proper political capital in the international field which will be needed for the next phases of the process."[28]

33. Moreover, on 2 November 2007, i.e., well before NATO's decision of 3 April 2008, Nikola Gruevski, the Applicant's Prime Minister, made the following statement:

> "However, there is one point, which we definitely cannot accept: the one that says that the Republic of Macedonia should accept a name different from its constitutional one for international use. This

[27] According to the statistics of the FYROM's National Bank, commercial relations with Greece are substantial: thus, in 2010, Greece was the fourth largest importer of goods from the FYROM and the third largest exporter of goods to the FYROM. The same statistics show that, in the area of foreign direct investment flows, Greece has repeatedly featured among the top five investors in the FYROM and in fact occupied the No. 2 spot on that list in 2004, 2005 and 2006. See http://www.nbrm.mk/.

[28] Statement by President of the Republic Branko Crvenkovski to the FYROM's Parliament on 3 November 2008. Counter-Memorial of Greece, Vol. II, Part B, Ann. 104.

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provision of the document[29] is unacceptable to the Republic of Macedonia and we cannot discuss it."[30]

The Judgment remains silent on the potentially destructive character of those statements of the FYROM's Prime Minister. I would recall the interpretation given by the Court to a very similar situation:

> "The material before the Court also includes statements by representatives of States, sometimes at the highest political level. Some of these statements were made before official organs of the State or of an international or regional organization, and appear in the official records of those bodies. Others, made during press conferences or interviews, were reported by the local or international press. The Court takes the view that statements of this kind, emanating from high-ranking official political figures, sometimes indeed of the highest rank, are of particular probative value when they acknowledge facts or conduct unfavourable to the State represented by the person who made them. They may then be construed as a form of admission." (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 41, para. 64.)

That jurisprudence is clear and applies independently of when the statements are made (before or after such and such an event), of whether the Respondent should have denounced the violation beforehand, or of any other pretext which would deprive it of its decisive character. The statements of the President of the Republic and the Prime Minister of the FYROM are directly governed by that jurisprudence of the Court. I would add that the Judgment fails to cite the statements in question, although it does cite *verbatim* those of the Prime Minister and the Minister for Foreign Affairs of Greece. What happened to equality of arms?

34. The Respondent officially stated that it had altered its position and was willing to accept a name for the Applicant which included the term "Macedonia", but which differentiated it from Greek Macedonia. In view of that substantial concession, it is permissible to question whether the Applicant's actions were in compliance with the generally recognized conditions for the proper conduct of "meaningful" negotiations, and its good faith in a process which has been ongoing for 16 years without success.

35. Two examples show how far the Applicant goes in the way it refers to itself: when assuming the presidency of the United Nations General Assembly in 2007[31] and that of the Committee of Ministers of the Council of Europe in 2010[32], the FYROM's representatives, in their

[29] This refers to a draft submitted to the Parties by Matthew Nimetz, United Nations mediator.
[30] Counter-Memorial of Greece, Vol. II, Part B, Ann. 128.
[31] *Ibid.*, Part A, Ann. 5.
[32] Rejoinder of Greece, Vol. II, Ann. 50.

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capacity not simply as members, but *as organs of those international organizations*, referred to themselves as the "Republic of Macedonia" and the "Macedonian Chairmanship"[33]. Greece of course protested against those violations — which are of differing orders of gravity — of the Interim Accord and of the two Security Council resolutions, but in vain.

V. Admission to International Organizations: NATO Is by Its very Nature a Special Case

36. Admission to global international organizations is dependent on the general and special conditions imposed by the founding States in the constituent treaty[34]. It should be noted that international organizations are never completely open to all States[35] and that, at the Vienna Conference on the Law of Treaties (1968-1969), a proposal that "every State should be entitled as of right to become a party to a . . . multilateral treaty"[36] was rejected. In "closed" or "regional" organizations (like NATO or the Council of Europe), the competent organ can also later lay down additional conditions for admission. Admission is linked to the candidate's capacity to contribute to what doctrine terms "essentiality or functionality"[37]. Political factors, relating as much to the qualities of the candidate State as to its relations with the member States, also come into play during the admissions process[38], and it is for each member State to determine subjectively whether all the necessary criteria have been met before giving its assent[39]. The consideration of political factors can also be added to the legal conditions set forth by the organization's constituent treaty[40], "the vote signif[ying] in effect whether or not there is recognition of the existence of the legally imposed conditions and whether there is political willingness to admit the candidate State"[41]. Moreover, in its Opinion on *Conditions of Admission* (*Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter), Advisory Opinion, 1948, I.C.J. Reports 1947-1948*, p. 57), the Court did not find that every member State had to explain the reasons behind its decision

[33] See Counter-Memorial of Greece, Vol. II, Part A, Ann. 5.

[34] I. Brownlie, *Principles of Public International Law*, 7th ed., Oxford University Press, 2008, p. 79.

[35] P. Sands and P. Klein, *Bowett's Law of International Institutions*, 5th ed., London, Sweet & Maxwell, 2001, p. 534.

[36] H. Waldock, *Collected Courses of the Hague Academy of International Law*, Vol. 106, 1962-II, pp. 81-82; *UN Secretariat Working Paper*, A.CN.4/245 (23 April 1971), pp. 131-134.

[37] H. Schermers and N. Blokker, *International Institutional Law*, 3rd ed., 1995, p. 64, citing the classic work of Inis Claude, *Swords into Plowshares*, 4th ed., 1971, pp. 85-86.

[38] H. Schermers and N. Blokker, *op. cit. supra* note 37, p. 65.

[39] P. Sands and P. Klein, *op. cit. supra* note 35, p. 538.

[40] I. Brownlie, *op. cit. supra* note 34.

[41] J. P. Cot and A. Pellet (eds.), *La Charte des Nations Unies*, Paris/Brussels, Economica, Bruylant, 1985, p. 172.

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(*I.C.J. Reports 1947-1948*, p. 61)[42]. Since even the so-called "global" organizations are not completely "open", it follows *a fortiori* that a candidate State cannot be admitted to a military organization for defence and security "unconditionally".

37. In that respect, NATO is entirely typical: it is a military alliance which, by definition, carries out peacekeeping and security operations and ensures the legitimate defence of its members in case of attack. To admit a new member, the member States — once they have determined whether the European candidate State is in a position to further the principles of the Treaty and to contribute to the security of the North Atlantic area — decide by unanimous agreement to invite that State to accede to the Organization (Art. 10). It follows that all member States, without exception, have the right — the obligation even — to decide whether the candidate State meets the necessary conditions for its admission to the Organization. If the member State whose relations with the candidate State are a source of direct concern is prevented from expressing its opinion, how will the other member States be informed of the real state of those relations, which are, nevertheless, fundamental to their decision? It should be recalled that the well-known rules of NATO, adopted by the heads of State and Government at the 1999 Washington Summit, subordinate, and for good reason, the accession of Balkan States to good neighbourliness and the settlement of the disputes between those States.

38. Since 1999, in the context of NATO's enlargement to include countries from Central and Eastern Europe, the heads of State and Government have sent a clear message to all accession candidates[43].

39. With respect to the present case, and on several occasions, for example in 2006[44] and in 2007[45] — thus, well before 3 April 2008 —, the organs of NATO more specifically indicated to the Applicant, by means of an equally standard formula, that,

> "[i]n the Western Balkans, Euro-Atlantic integration, based on solidarity and democratic values, remains necessary for long-term stability. This requires co-operation in the region, good-neighbourly relations, and working towards mutually acceptable solutions to outstanding issues."

40. The calls for "mutually acceptable solutions to outstanding issues" were diplomatic warnings, which confirm that NATO's decision did not come "out of the blue". In order to attribute a reasonable meaning to Article 5, it must, therefore, at the very least be considered in its context (Article 31 of the Vienna Convention).

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[42] See C. F. Amerasinghe, *Principles of the International Law of International Organizations*, Cambridge University Press, 1966, p. 109.

[43] See Counter-Memorial of Greece, Vol. II, Part A, Ann. 21 (Political and Economic Issues, paras. 2-3). NATO, Membership Action Plan (MAP), http://www.nato.int/docu/pr/1999/p99-066e.htm.

[44] NATO, Riga Summit Declaration, 29 November 2006, para. 28.

[45] *Ibid.*, Final Communiqué of the North Atlantic Council, 7 December 2007, para. 14.

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VI. Article 11: Agreeing not to Object if the other Party Fulfils Its Obligations under Article 5, which Precedes Article 11

41. In addition to its omission of the names of the States parties, the Interim Accord has another unusual feature, namely the phrase "agrees not to object", which appears in Article 11. If this phrase is not interpreted cautiously, it can have unreasonable, even harmful, consequences. It would be in vain to scour international relations for a treaty which obliges one of the contracting parties "not to object" to the admission and participation of another party in international organizations. When considering this unusual feature (the explanation for which — if there is one — does not readily come to hand), the Court is undoubtedly bound to assess the effect of that formula on the legal status of members of international organizations, and to bear in mind the risk that a broad interpretation of it might encroach on the operational autonomy of international organizations. The Court advocates a "clinical" interpretation, according priority to the first clause of Article 11, paragraph 1, not only over the second clause of the same paragraph, but also over the rights and obligations of the other Party in relation to third parties.

42. Thus, excessive weight is attached to the first clause of Article 11, paragraph 1, to the point of rendering it unintelligible. The idea that the second clause of Article 11, paragraph 1, would only apply were the organization to admit the Applicant under a name other than FYROM is completely misconceived. It is not legally tenable, in light both of the treaty and of the specific nature of NATO, to draw a distinction between what happens before admission to the international organization and what happens afterwards.

43. In short, the interpretation adopted by the Judgment would require the Respondent *to neutralize itself*: to say nothing, to do nothing and to remain a spectator to the Applicant's admission to and participation in international organizations, irrespective of the latter's conduct in relation to the dispute between the two States. Furthermore, that interpretation, through its "ricochet" effect, amounts to denying the other members of the international organization to which the FYROM is seeking admission the right to be informed of the facts concerning the state of relations in terms of security and good-neighbourliness between their partner, Greece, a member State of the Organization since 1954, and the FYROM, a candidate State. It should be recalled that the Applicant's Minister for Foreign Affairs was clear in his admission that his country's position would not alter, and that this consisted in the dual formula.

44. The Applicant argued that the first clause of Article 11, paragraph 1, establishes an obligation "solely upon Greece". However, that text embodies two rights and obligations which are reciprocally binding on both Parties. It provides that the Party of the First Part agrees not to object, etc., *but* on the condition that, pending the settlement of the differ-

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ence, the Party of the Second Part respects its obligation to refer to itself as the former Yugoslav Republic of Macedonia (FYROM). That is, perfectly logically, the reciprocal balance between the two Parties. The "clinical" interpretation, on the other hand, amounts quite simply to removing all meaning from the second clause of paragraph 1. Article 11 cannot be read as establishing an obligation solely on the Respondent.

45. The two clauses of Article 11, paragraph 1, are of equal weight: the first is dependent on the second. It is not possible to isolate the first clause and, moreover, allow it to stand independently of the Interim Accord as a whole. The first clause of Article 11, paragraph 1, imposes a constraint on the Respondent, but at the same time it offers the Applicant the opportunity to demonstrate co-operation and good faith with a view to resolving the difference between the two States. The first clause of Article 11, paragraph 1, cannot therefore be dissociated from the rest of that same paragraph, or from the Interim Accord as a whole, and neither can it relate, as the Applicant contends in its Memorial, solely to the "legality of the Respondent's objection, no more and no less"[46], which — again according to the Applicant — is irrespective of "the merits or demerits of either Party's position in respect of the negotiations taking place pursuant to Article 5 (1) of the Interim Accord relating to the difference concerning the Applicant's name"[47].

46. In accordance with resolution 817, Greece did not object to the FYROM's admission to the specialized organs and institutions of the United Nations and, in the years following the conclusion of the Interim Accord (from 1995 to 2006), the Applicant became a member of several other international, multilateral and regional organizations and institutions. Each time, the Applicant adopted the same attitude: although the international organization or organ concerned admitted it under the name the "former Yugoslav Republic of Macedonia" (FYROM), the Applicant, once admitted, called itself either the "Republic of Macedonia" or simply "Macedonia", and continued to refer to itself in that way despite the protests of the Greek representatives. In the case of NATO more specifically, the Applicant submitted its application using its disputed name.

47. In respect of the Applicant's admission, it should also be noted that the Alliance's decision was taken in accordance with the usual practice, following consultation within and outside the Organization. Since individual views are absorbed into the Organization's decision, it is impossible to distinguish Greece's position from that of the Organization. That the decision resulting from that consultation was collective can also be seen in the statement made by the President of the Republic before the Applicant's Parliament:

> "as regards the dual formula as a possible compromise for solving the dispute we do not have either the understanding or the support of any

[46] Memorial of the former Yugoslav Republic of Macedonia, Vol. I, para. 1.11.
[47] *Ibid.*

> Member State of the Alliance or the [European] Union. On the contrary, that position is considered by everyone, including our major supporters and friends, as a position which obstructs or interrupts the negotiations from our side. That was fully publicly, clearly and explicitly announced to us . . . Also, no one in the international community had and has an understanding about a series of our acts and moves made in the past couple of years, which were of no benefit to us, and the Greeks were using them against us as a justification for their violation of the Interim Agreement. In other words, we unnecessarily lost sympathies and the support that we had up to that moment."[48]

48. That statement ("we do not have either the understanding or the support of any Member State of the Alliance") is further confirmation that the Applicant knew that the above-mentioned concerns represented the collective position of the Alliance and not simply the views of Greece.

49. The following remarks made during the press conference of 23 January 2008 by NATO's Secretary-General, the Applicant's Prime Minister and a NATO spokesperson are also significant.

Jaap de Hoop Scheffer (NATO Secretary-General):

> "So that is how I can describe the atmosphere. That is what is important. Euro-Atlantic integration of course also demands and requires good neighbourly relations and it is crystal clear that there were a lot of pleas from around the table to find a solution for the name issue, which is not a NATO affair. This is Mr. Nimetz, Ambassador Nimetz, under the UN roof . . . But I would not give you a complete report if I would not say referring to the communiqué by the way of the NATO Foreign Ministers last December where there is this line on good neighbourly relations and the name issue."

Nikola Gruevski (Prime Minister of the FYROM):

> "The discussion of the Ambassador of Greece was with many elements. He also recognized the progress that Macedonia did in the last period and of course he stressed the positions where it is necessary for more progress in the future. And I would say again of course, looking from his position, he stressed the issue connected with the name."

James Appathurai (NATO Spokesperson):

> "[T]he name has to be changed . . . compromise means a change in the name."

[48] Statement by President of the Republic Branko Crvenkovski to the Parliament of the FYROM on 3 November 2008 (mentioned above). Counter-Memorial of Greece, Vol. II, Part B, Ann. 104.

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Nikola Gruevski (Prime Minister):

> "About the compromise. We have [the] feeling that when Greece is talking about compromise, they are actually talking about changing of the name and we believe that there are better approach[es] for solving of this issue."[49]

50. If Article 11 is considered as a whole rather than in separate sections, whether there was an "objection" or not becomes a false dilemma. NATO has its own procedures, which are based, in all respects, on the consensus of its member States. The officials of the Organization have repeatedly stated that there was no veto within NATO. Paragraph 20 of the Bucharest Summit Declaration of 3 April 2008 states, among other things:

> "Within the framework of the UN, many actors have worked hard to resolve the name issue, but the Alliance has noted with regret that these talks have not produced a successful outcome. Therefore we agreed that an invitation to the former Yugoslav Republic of Macedonia will be extended as soon as a mutually acceptable solution to the name issue has been reached. We encourage the negotiations to be resumed without delay and expect them to be concluded as soon as possible."[50]

51. The Organization has thus left the invitation open until the question of the name is resolved. It is therefore permissible to ask how, in accepting the arguments of the Applicant, which has taken no steps towards settling the difference over the name, the Court would be helping to pave the way towards its participation in NATO. The Court was right to reject the FYROM's request for reparation (point 3 of the operative part of the Judgment).

52. A State, unless it has designs on other States, protects its identity by distinguishing itself from others. As far as NATO is concerned, the adoption by each member State of a unique name protects the unity of the Alliance and avoids any unnecessary confusion or conflicts of identity for the members of the armed forces, not only when they are on peacekeeping missions, but in particular in times of combat and when the "rules of engagement"[51] apply, when it is imperative that there be trust between the members of participating States' armed forces. As I have already pointed out, NATO is not one of many intergovernmental orga-

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[49] Counter-Memorial of Greece, Vol. II, Part A, Ann. 26.

[50] Bucharest Summit Declaration, 3 April 2008, para. 20.

[51] I experienced first-hand the need for unity within NATO in the years following the adoption of the First Additional Protocol of 1977 to the 1949 Geneva Conventions, when an article by Bernhard Graefrath, "Zum Anwendungsbereich der Ergänzungsprotokolle zu den Genfer Abkommen vom 12 August 1949", published in *Staat und Recht*, Vol. 29, 1980, p. 133 *et seq*., sparked a discussion within the Alliance on the scope of Article 35, paragraph 3, of that Protocol concerning the use of nuclear weapons and the extent to which it was applicable to the Alliance's member States, parties and non-parties to the Protocol. The Alliance presented a united front on that subject.

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nizations. It is a *military alliance* and its specific nature weighs heavily on the mutual relations between its member States.

VII. The Scope of the Obligations Assumed by the Parties

53. The Court's reading of the phrase "agrees not to object" compromises the Respondent's established international competencies. This is another reason to repeat that Article 11 must be interpreted as a whole, and not in a fragmented fashion. A balanced reading of Article 11 does not infringe on any entity's sovereignty or competences. It would also have enabled the Court to find that the Respondent was not prohibited, legally or politically, from making public (which implies that the Applicant was aware of the Respondent's position) the reasons why, in its view, the Applicant's deliberate attitude was in breach of the Interim Accord and failed to meet the conditions of Article 10 of the North Atlantic Treaty, despite the repeated calls from the Alliance's organs for settlement of the dispute over the name. The warnings issued by the North Atlantic Council and other organization officials to the Applicant did not change its unilaterally established road map, which confirms that it has no intention of modifying its conduct. The Applicant is thus seeking acceptance of the idea that, irrespective of its conduct, the Respondent should not object to its candidature.

VIII. The "Practice of the Organization", the Violations of Resolution 817 and of the Interim Accord and the Protests of the Respondent

54. The Judgment refers in several places to the practice "of" the Organization. What it should refer to, however, is the practice "within" the Organization, that is to say, not simply the conduct of the organs and other components of the organization, but also that of its member States. Moreover, the Court shows a particular predilection, which is difficult to explain, for resolution 817. However that may be, resolution 817 is only incorporated into Article 5 of the Interim Accord to the extent that it invokes "the difference over the name". Thus, independently of resolution 817, which is clearly binding on the Applicant within the United Nations, the latter is also bound by the same obligation to use only the name FYROM in any international organization in which it participates or will participate in the future, pending the settlement of the question of the definitive name by mutual agreement.

55. It goes without saying that "practice" implies common consent, without which there can be no "practice". Although this is mentioned only fleetingly in the Judgment, anyone who has had dealings with international organizations since 1991 will be aware of the endless disputes,

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both written and oral, between the representatives of the Parties on the subject of the name, as well as Greece's ongoing and repeated opposition to the Applicant's use of its constitutional name.

56. International protest is a legal concept of customary law, whereby a subject of international law objects to an official act or the conduct of another subject, which it considers to be in breach of international law[52]. Protest acquires greater weight when it opposes an act or conduct which is inconsistent with the international obligations of the other subject of international law. It has the effect of preserving the rights of the protesting subject and bringing to the fore the unlawful nature of the official act or conduct at issue. It is further strengthened by and becomes indisputable through its repetition.

57. The legal character and effects of protest have long been confirmed by international jurisprudence. In the *Chamizal* Arbitral Award (1911), as well as in the decisions of the Permanent Court and of this Court in the cases concerning *Jaworzina* (1923), *Interpretation of Peace Treaties* (1950), *Fisheries* (1951), *Minquiers and Ecrehos* (1953), *Continental Shelf* (1982), *Military and Paramilitary Activities in and against Nicaragua* (1984), *Land, Island and Maritime Frontier Dispute* (1992), *Land and Maritime Boundary between Cameroon and Nigeria* (2002) and *Certain Questions of Mutual Assistance in Criminal Matters* (2008), account was taken either of the protests actually carried out by one or both Parties to the dispute, or of the absence of protest in respect of a given act or situation. The world's highest Court has never relied on *the number* of protests at issue in order to determine their legal effect. In the present Judgment, however, it finds eight (8) protests to be insufficient; moreover, it contests the many other protests carried out by Greece against the use by the FYROM of its constitutional name within international organizations in the period from the conclusion of the Interim Accord to the FYROM's application to join NATO. By introducing a quantitative measure in this way in order to determine the legal status of an international act, the Court undermines the very concept of international protest[53].

58. Furthermore, I cannot understand why the Court was not satisfied by Greece's repeated protests against the use by the Applicant of a name other than the FYROM within international organizations, and against other violations of the Accord, all of which relate, directly or indirectly, to the question of the name. I conducted a *rough* count, based solely on

[52] See E. Suy, *Les actes juridiques unilatéraux en droit international public*, Paris, LGDJ, 1962, p. 79; Ch. Eick "Protest", *Max Planck Encyclopedia of Public International Law* (accessed on 29 September 2011).

[53] It is true that, in its Advisory Opinion on the *Reparation for Injuries Suffered in the Service of the United Nations* (*Advisory Opinion, I.C.J. Reports 1949*, p. 185), the Court invoked a quantitative measure ("fifty States"), but that measure had no legal effect on the creation by the States of an organization possessing objective international personality.

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the documents produced by the Respondent, and was able to find some 85 protests on its part[54]. In seeking to demonstrate the Respondent's purported approval of the Applicant's use of its constitutional name within the United Nations, the Judgment invokes an internal document (non-paper) and a letter sent to the Secretary-General by a representative of the Respondent, both of which date from 1993[55]. The internal document (non-paper), however, focuses on the technical arrangements for the FYROM's participation in the day-to-day activities of the United Nations; the letter from the Respondent's Minister for Foreign Affairs refers to the question of the name in its very first sentence following the introductory paragraph, with the body of the text listing a number of other measures which the Applicant was required to take.

IX. Good Neighbourliness

59. Legally, the notion of good neighbourliness does not play a major role in the area of international relations. One author of a detailed study on the subject states that "it is in the State's interest to respect the general obligations vis-à-vis other States, because each obligation presupposes the right to claim reciprocity from the other party"[56]. A distinction is made between the right of neighbourliness and the right of *good* neighbourliness, the borders of which are not always clearly defined. Nevertheless, both are evolving concepts, and when good neighbourliness is embodied in an international treaty, it becomes a legal principle, to be read in conjunction with the fundamental principles laid down by the United Nations Charter, among which good faith features prominently. I would add that, although that principle is normally applied in the political domain, commentaries on the Charter of the United Nations generally accord it a legal sense, namely the mutual right of neighbouring States to the protection of their legitimate interests. It should be stated, moreover, that the principle of good neighbourliness is not binding on States alone. To the extent that its non-observance may compromise the actions of the organs of the international community, it is also an obligation incumbent on international organizations, which must ensure that it is respected. The importance of good neighbourliness (which limits the Parties' freedom of action in seven places in the Interim Accord[57], and with good

[54] Protests within international organizations: Counter-Memorial of Greece, Vol. II, Part A, Anns. 2, 3, 6, 11, 12; Counter-Memorial, Vol. II, Part B, Ann. 146; Rejoinder of Greece, Vol. II, Anns. 3, 4, 5, 6, 7, 8, 9, 10, 11, 13, 14, 15, 16, 17, 18, 19, 20, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 35, 36, 37, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 59 and 60. TOTAL: 50.

Protests to the FYROM: Counter-Memorial of Greece, Vol. II, Part A, Anns. 40, 41, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 55, 56, 57, 58, 59, 60, 61, 63, 65, 66, 67, 70, 71, 72, 73, 74, 75, 76, 77, 79 and 80; Rejoinder of Greece, Vol. II, Ann. 63. TOTAL: 35.

[55] Memorial of the former Yugoslav Republic of Macedonia, Vol. II, Ann. 30.

[56] I. Pop, *Voisinage et bon voisinage en droit international*, Paris, Pedone, 1980, p. 333.

[57] Articles 2, 3, 4, 6, 7, 9 and 10.

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reason) is apparent *a contrario* from the Court's finding in the *Oil Platforms* case that "the object and purpose of the Treaty of 1955 was not to regulate peaceful and friendly relations between the two States in a general sense" (*Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996 (II)*, p. 814, para. 28). The object and purpose of the Interim Accord is precisely to regulate peaceful relations between the Parties, and that is why provision was made for the Applicant to be referred to provisionally and for all purposes as the FYROM within international organizations, pending the settlement of the difference by negotiation.

60. Most notably, the question of good neighbourliness was rekindled in the 1980s in the Balkans by Romania, supported in particular by Yugoslavia[58]. Furthermore, it is not by chance that both Security Council resolutions, the Interim Accord and NATO's communiqués all mention good neighbourliness. Nor is it by chance that Articles 2, 3, 4, 6, 7, 9 and 10 of the Accord contain provisions in that regard and, for the most part, are directed at the Applicant. It should be recalled that immediately after the FYROM achieved independence in 1991, its constitution, its national flag, and a cascade of actions and statements by its authorities and non-governmental elements triggered a wave of hostility towards Greece, which was also expressed by irredentist agitators, and through demands aimed at the Greek historical and cultural heritage. The repeated protests of Greece in 1991, 1993 and 1995 forced the new State to modify its constitution and change its national flag, so that it no longer featured the Sun of Vergina (Vergina, the capital of classical Macedonia, is in Greece and has been a part of the territory of Greece since 1913), and obliged its authorities to take further measures considered necessary in order for Greece to recognize it. The acts of provocation continued in various forms: irredentist claims concerning the geographical and ethnic frontiers of the FYROM, extending to areas beyond its political borders, school books, maps, official encyclopedias and inflammatory speeches[59].

X. Rights and Obligations in relation to Third Parties under Article 22

61. Article 22 reads as follows: "The Interim Accord is not directed against any other State or entity and it does not infringe on the rights and duties resulting from bilateral and multilateral agreements already in force that the parties have concluded with other States or international organizations." Article 8 of the North Atlantic Treaty provides, for its

[58] S. Sucharitkul, "The Principles of Good-Neighbourliness in International Law", *Jugoslovenska revija za međunarodno pravo*, Vol. 43, 1996, p. 395 *et seq*., p. 399.

[59] Counter-Memorial of Greece, Vol. II, Part B, Ann. 81 *et seq*.

part: "Each party declares that none of the international engagements now in force between it and any other of the parties or any third State is in conflict with the provisions of this Treaty, and undertakes not to enter into any international engagement in conflict with this Treaty." I would recall that the Court does not have jurisdiction to interpret this Article.

62. Article 22 is not a "standard clause". This is evidenced by the fact that when such a safeguard clause is included in a treaty, its wording differs according to the parties' objective[60]. Article 22 is a response to the concern expressed by those who study the law of treaties and who, taking account of the problems of interpretation and uncertainties caused by the silence of international agreements on the relationship between those agreements and other earlier or subsequent treaties, ask the drafters of such instruments to take care to include specific provisions in that connection, so as to avoid any potential doubt resulting from the interpretation of Article 30 of the Vienna Convention on the Law of Treaties[61]. In the present case, the relevant provision is Article 30, paragraph 2, which states that: "[w]hen a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail".

63. Provisions such as those contained in Article 22 are designed to cover the whole of the treaty in which they are incorporated. That Article therefore applies to the Accord as a whole and to Article 11, paragraph 1, in particular. NATO is clearly an international organization as referred to in Article 22 and that Article should therefore be read in conjunction with Article 8 of the North Atlantic Treaty, which prevents a member State from waiving its rights and duties towards the Alliance. Moreover, by including Article 22 in the Interim Accord, both Parties were deemed to be aware of its scope in light of the specific military and defence-related nature of NATO's constituent treaty.

64. In support of its interpretation of the scope of Article 22 — which differs from that which I have just given — the Court invokes a decision of the Court of Justice of the European Communities in its Judgment (see paragraph 109). I would question the weight of that decision, since it is well known that the organs of the European Union regularly go beyond the notion of "fragmentation" in distinguishing themselves from general international law. Moreover, the European Commission constantly points out that it is a "general interpretation" in the Union's "judicial practice" that "its internal order is separate from international law"[62].

[60] See the various examples given in E. Roucounas, "Engagements parallèles et contradictoires", *Collected Courses of the Hague Academy of International Law*, Vol. 206, 1987, pp. 90-92.

[61] See Sir I. Sinclair, "Problems Arising from a Succession of Codification Conventions on a Particular Subject", Provisional Report, *Yearbook of the Institute of International Law*, Lisbon Session, Vol. 66-I, 1995, pp. 195-214, p. 207.

[62] United Nations General Assembly, A/CN.4/637, 14 February 2011, International Law Commission, Sixty-Third Session, "Responsibility of International Organizations. Comments and Observations Received from International Organizations", p. 19, para. 1.

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65. The fact that the Interim Accord also contains provisions relating to the European Union can be explained not only by the *sui generis* character of that Union (whether or not it is an international organization in the classic sense), but also by the economic and commercial integration that participation in the Union entails for its member States and by the fact that the matters in question fall within the Union's jurisdiction. Further, the 1957 Treaty of Rome, as amended, provides procedural mechanisms for any instances of incompatibility with obligations towards third States; the Interim Accord, on the other hand, like other treaties with provisions similar to Article 22, does not include any such procedural mechanism to deal with incompatibility.

XI. Reliance, in the Alternative, on the Principle of *Exceptio Non Adimpleti Contractus*

66. Latin terms are not always well chosen. However, the *exceptio* in question expresses a principle so just and so equitable (*Diversion of Water from the Meuse, Judgment, 1937, P.C.I.J., Series A/B, No. 70*, dissenting opinion of Judge Anzilotti, p. 50; *ibid*., dissenting opinion of Judge Hudson, pp. 75-78) that it can be found in one form or another in every legal system. It is the corollary of reciprocity and synallagmatic agreements. It follows that Article 60 of the Vienna Convention on the Law of Treaties is not the sole form of expression of the *exceptio*. As a defence to the non-performance of an obligation, it is a general principle of law, as enshrined in Article 38, paragraph 1 *(c)*, of the Statute of the Court. Yet, as the Court found in the case concerning *Military and Paramilitary Activities in and against Nicaragua*, general international law and treaty law constantly overlap. Article 60 does not deprive the injured party of the right to invoke the *exceptio*. In particular, it does not make provision for every scenario in which the injured party reacts to the non-performance by the other contracting party of its obligations. It is true that the Court[63] has not had occasion to rule in detail on the issue. Over a period of several decades, it is, however, possible to find references to it not only in the opinions of Judges Dionisio Anzilotti (who should be credited for taking a pedagogical view of the role of the international judge) and Hudson of the Permanent Court, but also in those of Judges de Castro and Schwebel of the present Court (*Diversion of Water from the Meuse, Judgment, 1937, P.C.I.J., Series A/B, No. 70*, dissenting opinion of Judge Hudson, p. 77; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, separate opinion of Judge de Castro, p. 213; *Appeal Relating to the Jurisdiction of the ICAO Council (India* v. *Pakistan), Judgment, I.C.J. Reports*

[63] See, however, W. Jenks's comments concerning the PCIJ in *The Prospects of International Adjudication*, 1964, p. 326, note 30.

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1972, separate opinion of Judge de Castro, p. 129; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, dissenting opinion of Judge Schwebel, p. 380).

67. In respect, more specifically, of paragraph 3 *(b)* of Article 60 of the Vienna Convention on the Law of Treaties, Paul Reuter, who attended the Vienna Conference of 1968-1969 and was Special Rapporteur of the International Law Commission on the Law of Treaties between States and International Organizations, stated that, during the drafting of that provision, the term "or" (and not "and") between the words "object" and "purpose" had been chosen, so as to give the party claiming injury a greater freedom of action[64]. For 16 years, Greece has responded mildly to the Applicant's practices and, in the case of the latter's application to join NATO, it did not seek a suspension or termination of the Accord as such. In so doing, it made its position widely known, but without invoking specific articles of the Interim Accord. We should not allow unthinking formalism to take us back to ancient Roman times, where certain formal procedures determined the precise rights and obligations of the parties. It is, however, important not to lose sight of the wording of Article 65, paragraph 5, of the Vienna Convention on the Law of Treaties, which provides that: "[w]ithout prejudice to Article 45, the fact that a State has not previously made the notification prescribed in paragraph 1 shall not prevent it from making such notification in answer to another party claiming performance of the treaty or alleging its violation".

XII. Countermeasures

68. Also in the alternative, the Respondent invokes countermeasures as a circumstance precluding wrongfulness. As we know, that circumstance has been codified, together with certain aspects of progressive development of international law, in the ILC Articles on the "Responsibility of States for Internationally Wrongful Acts"[65]. In regard to the role of circumstances precluding wrongfulness, the ILC observed that invoking such a circumstance does not "annul or terminate the [underlying] obligation". Rather, circumstances precluding wrongfulness "provide a justification or excuse for non-performance"; they "operate as a shield rather than a sword"[66].

69. As the Court has noted on several occasions, the adoption of countermeasures presupposes, first of all, the prior existence of an inter-

[64] P. Reuter, "Solidarité et divisibilité des engagements conventionnels", in Y. Dinstein and M. Tabory (eds.), *International Law at a Time of Perplexity. Essays in Honour of Shabtai Rosenne*, Dordrecht, 1989, pp. 623-634, p. 628, note 9.

[65] See the Report of the ILC, Fifty-Third Session, UN doc. A/56/10, Art. 22 and Arts. 49-54.

[66] *Op. cit. supra* note 65, p. 71.

nationally wrongful act (see in particular *United States Diplomatic and Consular Staff in Tehran (United States of America* v. *Iran), Judgment, I.C.J. Reports 1980*, pp. 27-28, para. 53; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 106, para. 201; *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, pp. 55-56, para. 83). In that connection, the Respondent invokes a series of violations of the Interim Accord by the FYROM, and in particular violations of Articles 5, 6, 7, and 11 of that Accord, which occurred before the Bucharest Summit. It has, therefore, satisfied the substantive conditions for the implementation of countermeasures.

70. Moreover, as the ILC has stated:

> "Countermeasures are limited to the non-performance for the time being of international obligations of the State taking the measures towards the responsible State. Countermeasures shall, as far as possible, be taken in such a way as to permit the resumption of performance of the obligations in question."[67]

71. The Court reaffirmed the principle of the reversibility of countermeasures in the *Gabčíkovo-Nagymaros* case. According to the Court, the purpose of a countermeasure "must be to induce the wrongdoing State to comply with its obligations under international law, and . . . the measure must therefore be reversible" (see *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, pp. 56-57, para. 87). In the present case, and assuming that the Respondent's attitude to the subject of the Applicant's admission to NATO constitutes a countermeasure, that countermeasure is, by its nature, reversible at any time.

72. As far as the procedural conditions governing recourse to countermeasures are concerned, the ILC proposed a provision which constitutes a mix of codification and progressive development of international law. Article 52, paragraph 1, of the Draft Articles on the Responsibility of States provides that "[b]efore taking countermeasures, an injured State shall: *(a)* call upon the responsible State . . . to fulfil its obligations". To that first condition, the ILC adds a second, according to which the injured State must "notify the responsible State of any decision to take countermeasures and offer to negotiate with that State" (Art. 52, para. 1 *(b)*). It will be noted in this respect that an attempt to resolve the difference by friendly means — and not the failure of negotiations — is the norm required by customary law. On the other hand, international custom does not appear to demand notification of the decision to adopt countermeasures. It is also necessary to point out that neither the Court nor the ILC have specified the exact form of the steps to be taken before the adoption of countermeasures. This lack of precision reflects customary law, which is characterized by a certain flexibility in that respect.

[67] *Op. cit. supra* note 65, Art. 49, paras. 2 and 3, p. 58.

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73. That leaves the substantive condition governing the adoption of countermeasures, namely proportionality. That principle has long been accepted in State practice and jurisprudence. Its positive formulation has been confirmed by the Court, first in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 127, para. 249 (see also the Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons, I.C.J. Reports 1996*, para. 41 *et seq*., on the application of the principle of proportionality to self-defence), then in the *Gabčíkovo-Nagymaros* case; Article 51 of the ILC text on the Responsibility of States provides that "[c]ountermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question".

74. In its written and oral pleadings, the Applicant does not respond, or responds only generally, or even selectively, to the concrete examples of violations of the Interim Accord complained of by the Respondent[68]. Whatever the current state of international law relating to countermeasures, the measure adopted by the Respondent satisfies the condition of proportionality, taking into account the full extent of the injury suffered on account of the violations of Articles 5, 6, 7 and 11 of the Interim Accord. Yet, in its assessment of those violations, the Court fails to address the substance of the issues.

75. In conclusion, many of those who read the Judgment will certainly wonder how — whether by deduction or induction — the Court reached its decision.

(Signed) Emmanuel ROUCOUNAS.

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[68] See the protests by Greece in the Counter-Memorial, Vol. II, Part A, Ann. 62; Counter-Memorial, Part B, Anns. 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 109, 118 and 124. Total: 26. The Applicant responds to the violations of diplomatic and consular law, but not to those concerning school books, maps and official encyclopedias.

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DECLARATION OF JUDGE *AD HOC* VUKAS

1. I share the view of the Court concerning its finding that it has jurisdiction to entertain the Application filed by the former Yugoslav Republic of Macedonia on 17 November 2008 and that the Application is admissible.

2. I also agree with the conclusion of the Court

> "that the Hellenic Republic, by objecting to the admission of the former Yugoslav Republic of Macedonia to NATO, has breached its obligation under Article 11, paragraph 1, of the Interim Accord of 13 September 1995" (paragraph 2 of the operative clause).

3. However, I cannot subscribe to the conclusion of the Court to reject "all other submissions made by the former Yugoslav Republic of Macedonia" (paragraph 3 of the operative clause). This finding relates specifically to the Applicant's request that the Court orders

> "that the Respondent immediately take all necessary steps to comply with its obligations under Article 11, paragraph 1, of the Interim Accord, and to cease and desist from objecting in any way, whether directly or indirectly, to the Applicant's membership of the North Atlantic Treaty Organization and/or of any other 'international, multilateral and regional organizations and institutions' of which the Respondent is a member, in circumstances where the Applicant is to be referred to in such organization or institution by the designation provided for in paragraph 2 of United Nations Security Council resolution 817 (1993)" (paragraph 2 of the final submissions).

4. The reason in support of this request of the former Yugoslav Republic of Macedonia is that there exists a clear necessity of that State to become a member of various "international, multilateral and regional organizations and institutions". An action of the former Yugoslav Republic of Macedonia in that direction was supported, also by Greece. Namely, the Memorandum of Understanding between the Ministry of Defence of the Party of the Second Part and the Ministry of National Defence of the Party of the First Part concerning Support to the Combined Medical Team for Participation in NATO-led Operation ISAF in Afghanistan which was concluded in Athens on 27 July 2005.

5. However, contrary to Greece's earlier support, the trend of the former Yugoslav Republic of Macedonia to become a member of international organizations is seriously endangered by Greece in connection with

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the 2008 Bucharest meeting. The condemnation of Greece by the Court of her actions preventing the membership of the former Yugoslav Republic of Macedonia in NATO is not sufficient in order to fulfil the obligation of Greece under the Interim Accord. The duty of Greece as a member of the European Union, in supporting the relations of Macedonia with the European States is clear from the text of Article 11, paragraph 2, of the Interim Accord:

> "The Parties agree that the ongoing economic development of the Party of the Second Part should be supported through international co-operation, as far as possible by a close relationship of the Party of the Second Part with the European Economic Area and the European Union."

6. According to that text, Greece has not only the duty stated in Article 11, paragraph 1, of the Interim Accord, but is also under the obligation to support actively the international co-operation of the former Yugoslav Republic of Macedonia. The conclusion of the Court to reject the Applicant's request concerning the future Respondent's activities does not correspond to the Court's conclusion that its Judgment "would affect existing rights and obligations of the Parties under the Interim Accord and would be capable of being applied effectively by them" (paragraph 53 of the Judgment).

(Signed) Budislav Vukas.