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International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2011

Public sitting

held on Monday 21 March 2011, at 3 p.m., at the Peace Palace,

President Owada presiding,

***in the case concerning* Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia *v.* Greece)**

VERBATIM RECORD

ANNÉE 2011

Audience publique

tenue le lundi 21 mars 2011, à 15 heures, au Palais de la Paix,

sous la présidence de M. Owada, président,

***en l'affaire relative à l'*Application de l'accord intérimaire du 13 septembre 1995 (ex-République yougoslave de Macédoine c. Grèce)**

COMPTE RENDU

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

Présents : M. Owada, président
M. Tomka, vice-président
MM. Koroma
Al-Khasawneh
Simma
Abraham
Keith
Sepúlveda-Amor
Bennouna
Cançado Trindade
Yusuf
Greenwood
Mmes Xue
Donoghue, juges
MM. Roucounas
Vukas, juges *ad hoc*

M. Couvreur, greffier

The Government of the former Yugoslav Republic of Macedonia is represented by:

H.E. Mr. Antonio Miloshoski, Minister for Foreign Affairs of the former Yugoslav Republic of Macedonia,

as Agent;

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,

Mrs. 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,

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

Mr. Igor Djundev, Ambassador, State Counsellor, Ministry of Foreign Affairs,

Mr. Goran Stevcevski, State Counsellor, International Law Directorate, Ministry of Foreign Affairs,

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,

as Advisers;

Mr. Mile Prangoski, Research Assistant, Cabinet of Minister for Foreign Affairs,

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

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Mr. Ilija Kasaposki, Security Officer of the Foreign Minister.

Mme Elena Bodeva, troisième secrétaire à l'ambassade de l'ex-République yougoslave de Macédoine au Royaume des Pays-Bas,

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Mr. Michael Reisman, Myres S. McDougal Professor of International Law, Yale Law School, member of the Institut de droit international,

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Mr. Linos-Alexandre Sicilianos, Professor of International Law, University of Athens,

Mr. Evangelos Kofos, former Minister-Counsellor, Ministry of Foreign Affairs, specialist on Balkan affairs,

as Counsel;

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Mr. Michael Stellakatos-Loverdos, Assistant Legal Adviser, Public International Law Section of the Legal Department, Ministry of Foreign Affairs,

Ms Alina Miron, Researcher, Centre de droit international de Nanterre (CEDIN), University of Paris Ouest, Nanterre-La Défense,

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M. Linos-Alexandre Sicilianos, professeur de droit international à l'Université nationale d'Athènes,

M. Evangelos Kofos, ancien ministre-conseiller au ministère des affaires étrangères, spécialiste des Balkans,

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M. Alexandros Kolliopoulos, conseiller juridique adjoint à la section de droit international public du département juridique au ministère des affaires étrangères,

M. Michael Stellakatos-Loverdos, conseiller juridique adjoint à la section de droit international public du département juridique au ministère des affaires étrangères,

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Mme Alexandra Papadopoulou, ministre plénipotentiaire, chef du bureau de liaison de la Grèce à 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,

Mr. Konstantinos Kodellas, Embassy Secretary,

as Diplomatic Advisers;

Mr. Ioannis Korovilas, Embassy attaché,

Mr. Kosmas Triantafyllidis, Embassy attaché,

as Administrative Staff.

M. Efstathios Paizis Paradellis, premier conseiller à l'ambassade de Grèce au Royaume des Pays-Bas,

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M. Konstantinos Kodellas, secrétaire d'ambassade,

comme conseillers diplomatiques ;

M. Ioannis Korovilas, attaché d'ambassade,

M. Kosmas Triantafyllidis, attaché d'ambassade,

comme personnel administratif.

The PRESIDENT: Please be seated. The sitting is open.

Before we start our judicial proceedings today, I would first like to express, on behalf of the Court, our deepest sympathy to the Japanese people who have had to face the devastating impact of last week's earthquake and subsequent tsunami. It is with particular sorrow that I have seen the images of utter destruction caused in my homeland by this natural calamity and learnt of the appalling loss of life — with over 20,000 fatalities and missing people. It is a cruel and shocking death toll. The Court extends its heartfelt condolences to the families of the victims, and to the people and Government of Japan. We place our sincere hope in the success of the recovery efforts and the resilience of the Japanese people in finding a way to overcome this terrifying ordeal.

I would like to invite you to stand and observe a minute's silence in memory of the many earthquake victims.

The Court observes a minute's silence.

The PRESIDENT: Thank you. Please be seated. The Court now meets to hear the oral arguments of the Parties in the case concerning *Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia* v. *Greece).*

I note initially that Judge Skotnikov, for reasons made known to me, is unable to take his seat on the Bench today.

I further note that, since the Court does not include upon the Bench a judge of the nationality of either of the Parties, both Parties have availed themselves of the right, under Article 31, paragraph 2, of the Statute, to choose a judge *ad hoc*. The former Yugoslav Republic of Macedonia chose Mr. Budislav Vukas and Greece Mr. Emmanuel Roucounas.

Article 20 of the Statute provides that "[e]very Member of the Court shall, before taking up his duties, make a solemn declaration in open court that he will exercise his powers impartially and conscientiously". Pursuant to Article 31, paragraph 6, of the Statute, that same provision applies to judges *ad hoc*. Notwithstanding that Mr. Vukas is currently serving as a judge *ad hoc* in another case and has made a solemn declaration for the purposes of those proceedings, Article 8, paragraph 3, of the Rules of Court provides that he must make a further solemn declaration in the present case.

In accordance with custom, I shall first say a few words about the career and qualifications of each judge *ad hoc* before inviting him to make his solemn declaration.

Mr. Budislav Vukas, of Croatian nationality, was professor of public international law at the University of Zagreb from 1977 until 2008. He has held numerous other teaching positions around the world including at the Universities of Boston, Paris, Rome, Split and Tilburg and has also taught a course at the Hague Academy of International Law. Mr. Vukas has represented his Government on various occasions including in the Sixth Committee of the United Nations General Assembly, at the Third United Nations Conference on the Law of the Sea and at the World Conference on Human Rights in Vienna. Mr. Vukas has combined his academic and diplomatic achievements with a career as an international judge. He was a member of the International Tribunal for the Law of the Sea during almost a decade and, as such, its Vice-President from 2002 until 2005. He is currently Judge *ad hoc* before the Court in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia and Montenegro)*. He is also a member of the Court of Conciliation and Arbitration within the Organization for Security and Co-operation in Europe. Mr. Vukas is further a member of numerous academic institutions including the Croatian Society of International Law and the Institut de droit international. In addition, he has published numerous works and articles on different aspects of public international law, particularly in the field of the law of the sea, environmental law and international human rights law.

Mr. Emmanuel Roucounas, of Greek nationality, is Honorary Professor of International Law at Athens University, where he has taught since 1970. He has given lectures at numerous other academic institutions around the world including at the Universities of Thessaloniki, Paris, London, San Sebastián, Berkeley and Yale. Mr. Roucounas has also taught a course at the Hague Academy of International Law. He is a former Member of the International Law Commission and is a member of the Institut de droit international and a member of the Permanent Court of Arbitration. In addition, Mr. Roucounas has served as a member of the United Nations Committee for the Elimination of Racial Discrimination, as a member of the Group of Experts of the Conference on Security and Co-operation in Europe for the Balkans and as a member of various committees within the Council of Europe. Mr. Roucounas has represented his Government on a number of

occasions including as delegate at the General Assembly from 1980 to 1999 and as part of the Greek delegation at a number of international diplomatic conferences. He has appeared before this Court as counsel to the Greek Government in the *Aegean Sea Continental Shelf (Greece* v. *Turkey)* case. Mr. Roucounas has published numerous works and articles in diverse fields of international law, ranging from the law of the sea, human rights and humanitarian law to bioethics and European unification.

In accordance with the order of precedence fixed by Article 7, paragraph 3, of the Rules of Court, I shall first invite Mr. Roucounas to make the solemn declaration prescribed by the Statute, and I would request all those present to rise.

Mr. ROUCOUNAS:

> "I solemnly declare that I will perform my duties and exercise my powers as judge honourably, faithfully, impartially and conscientiously."

> «Je déclare solennellement que je remplirai mes devoirs et exercerai mes attributions de juge en tout honneur et dévouement, en pleine et parfaite impartialité et en toute conscience.»

The PRESIDENT: Thank you. I shall now invite Mr. Vukas to make the solemn declaration prescribed by the Statute. Mr. Vukas.

M. VUKAS :

> «Je déclare solennellement que je remplirai mes devoirs et exercerai mes attributions de juge en tout honneur et dévouement, en pleine et parfaite impartialité et en toute conscience.»

The PRESIDENT: Thank you. Please be seated. I take note of the solemn declarations made by Mr. Roucounas and Mr. Vukas and declare them duly installed as judges *ad hoc* in the case concerning *Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia* v. *Greece).*

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I shall now recall the principal steps of the procedure so far followed in this case.

On 17 November 2008, the Government of the former Yugoslav Republic of Macedonia filed in the Registry of the Court an Application instituting proceedings against the Government of Greece contending that Greece has acted in violation of its legal obligations under Article 11, paragraph 1, of the Interim Accord signed by the Parties on 13 September 1995 and which entered into force on 13 October 1995.

In its Application, the former Yugoslav Republic of Macedonia, 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.

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 former Yugoslav Republic of Macedonia and the Counter-Memorial of Greece. The Memorial of the former Yugoslav Republic of Macedonia was duly filed within the time-limit so prescribed.

By a letter dated 5 August 2009, Greece 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 Counter-Memorial of Greece, 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.

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 former Yugoslav Republic of Macedonia indicated that his Government wished to be able to respond to the Counter-Memorial of Greece, including the objections to jurisdiction and admissibility contained therein, by means of a Reply. At the same meeting, the Agent of Greece stated that her Government had no objection to the granting of this request, in so far as Greece could in turn submit a Rejoinder.

By an Order of 12 March 2010, the Court authorized the submission of a Reply by the former Yugoslav Republic of Macedonia and a Rejoinder by Greece, 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.

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Having ascertained the views of the Parties, the Court decided, pursuant to Article 53, paragraph 2, of the Rules, that copies of the pleadings and the documents annexed would be made accessible to the public on the opening of the oral proceedings. Further, in accordance with the Court's practice, the pleadings without their annexes will be put on the Court's website from today.

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I note the presence at the hearing of the Agents, counsel and advocates of both Parties. In accordance with the arrangements on the organization of the procedure which have been decided by the Court, the hearings will comprise a first and second round of oral argument.

*

The first round of oral argument will begin today and will close on Friday 25 March 2011. For the purposes of today's sitting, due to the length of the opening speech, additional time will be allocated to the former Yugoslav Republic of Macedonia after 6 p.m. as needed. The second round of oral argument will begin on Monday 28 March 2011 and will close on Wednesday 30 March 2011.

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The former Yugoslav Republic of Macedonia, which is the Applicant in the case, will be heard first. I now give the floor to His Excellency Mr. Antonio Miloshoski, Agent of the former Yugoslav Republic of Macedonia.

Mr. MILOSHOSKI: Distinguished President, first allow me on behalf of my Government to associate with the condolences and the sympathies that you have presented for the people of Japan. All our countries will give its contribution to support in this tragedy.

1. Distinguished President, distinguished Members of the Court, my Government is exceptionally honoured to appear for the first time before this Court — the principal judicial organ of the United Nations — which serves as the paramount guardian of international justice. At the outset, I hope you might allow me to express my deepest respect to the Members of the Court, availing myself of this opportunity also to congratulate Professor Emmanuel Roucounas and Professor Budislav Vukas on their appointments as *ad hoc* judges in this case. I should also like to express my appreciation to you, Mr. President, and Members of the Court, for the flexibility you have shown in scheduling this hearing. We are fully aware of the Court's case-load and the time constraints that you are dealing with.

2. If you allow me, Mr. President, Members of the Court, at the very outset of this case I would like to pay my respect and express my profound appreciation to the late Professor Thomas Franck. He appeared before you on a number of occasions, with great distinction, and he served also as an *ad hoc* Judge. He was an invaluable part of our legal team and in the very last days of his life we were privileged and honoured to draw inspiration from his sharp thought, iron logic and noble spirit.

3. Mr. President, since winning its independence peacefully in 1991, 20 years ago, the Republic of Macedonia has been committed to peace, the rule of law, respect for human rights and peaceful resolution of international disputes. We are a multi-ethnic democracy pursuing a policy of good neighbourliness and regional co-operation. We have joined the international community in its efforts to bring lasting peace, stability and prosperity in the Balkans and in integrating the Balkans into the European Union and North Atlantic Treaty Organization.

4. Indeed, at key moments during the last two turbulent decades in the Balkans, my country has been an important part of the solution, not part of the problem. In the early 1990s, during the break-up of the former Yugoslavia, we were fully aware of the danger of an armed conflict spreading to our country, so that as early as 1992, upon our request, we hosted the first

"preventive" deployment mission in United Nations history. This mission, aptly titled the United Nations Preventive Deployment Force or UNPREDEP, helped stabilize our security situation.

5. Further, through the 1990s, we built a multi-ethnic society, developing a strong system for protection of human and minority rights. In 2001, when my country faced severe internal crisis, it was the maturity of the Macedonian citizens and the moderation of our leaders, supported by the European Union, the North Atlantic Treaty Organization, and the other international actors, that brought about a political solution to this crisis.

6. The conclusion and implementation of the Ohrid Framework Agreement, along with NATO and EU-oriented reforms, additionally contributed to my country's role as an active provider of security. In the spirit of the good-neighbourly relations, my country has regulated its borders with all our neighbours, in a peaceful way, respecting international law.

7. Today, we participate in several peace missions in other countries. For example, we participate in the European Union's ALTHEA mission in Bosnia and Herzegovina, charged with implementing the Dayton Agreement. We participate in the International Security Assistance Force (ISAF) mission in Afghanistan, working closely with the North Atlantic Treaty Organization. For nearly two years our military medical staff in Afghanistan has had a joint mission with our Greek colleagues. Given our constructive policies and performances at home but also abroad, we had been well on track to be invited to join NATO at the Summit in Bucharest 2008, together with Croatia and Albania.

8. Mr. President, the Republic of Macedonia has a strong interest in and continues to develop friendly relations with all countries, including the Hellenic Republic, the Respondent in this case. Regretfully, our bilateral relations are burdened with the unfortunate issue of the difference over the name of my country. Though resolution of this issue is not before the Court in this case, let me provide you some background. The Respondent raised concerns about my country's name following our peaceful proclamation of independence, in 1991. This difference caused the serious delays in the process of international recognition by other States, in the integration of my country into the United Nations and other international organizations, and in the development of our relations with the Respondent. The Greek-Macedonian dialogue on the difference over the name started in 1993. Since then, we have actively engaged in good faith negotiations with the

Respondent under the auspices of the United Nations, in an effort to resolve that difference. We regretted that, in 1994, our neighbour decided to introduce a unilateral embargo on trade and transit of goods between our countries, and sought to obstruct international recognition by other States and impede our membership in international organizations.

9. It was the Interim Accord that both Parties signed on 13 September 1995, that created the legal basis for normalization of relations between our two countries[1]. Today, after more than 15 years, we can say that, in general, the Interim Accord has worked successfully. It has largely enabled both Parties to put behind them a period of tension, and to open a new chapter of bilateral co-operation, and providing an impetus to good-neighbourly relations and understanding. In particular, the Interim Accord contributed to the removal of the Respondent's economic embargo and — for a period of 13 years — removed the impediments to our successful integration in the international community, allowing us to join international organizations such as the Organization for Security and Co-operation in Europe and the Council of Europe.

10. In recent years of negotiations, as previously, the Parties and the Personal Envoy of the United Nations Secretary-General, Mr. Matthew Nimetz, have tabled various proposals, which have been accepted as a basis for a solution, or rejected by the one or the other Party. In October 2005, we accepted a proposal by Mr. Nimetz which, according to his correspondence to both Parties, meets the minimum requirements of both sides, and thus should be the basis of an honourable and acceptable solution. Previously the same year, the Respondent accepted a different proposal by Mr. Nimetz. In March 2008, immediately before the NATO Summit in Bucharest my country accepted a proposal by Mr. Nimetz and we expressed the readiness to put it for a vote before the Macedonian citizens on a referendum. Unfortunately, the proposal was rejected by the Respondent. Instead, and in contravention of the 1995 Interim Accord, the Respondent resorted to objecting to the extension of an invitation to my country to join NATO.

11. In the period from November 2009, the Greek-Macedonian dialogue concerning the name difference has continued in parallel with high-level leadership meetings between the two

[1]Interim Accord between the Applicant and the Respondent (New York, 13 September 1995), in force on 13 October 1995; tab 1.

countries. As recently as last month, Ambassador Nimetz commended both countries in the ongoing name negotiations, stating:

> "both sides expressed a positive attitude towards moving forward on this issue. I think the biggest development of the last year has been the dialogue of the two Prime Ministers — eight meetings between them. In my view, this has had a positive effect, starting to build trust and understanding at the highest levels."[2]

12. Mr. President, Members of the Court, I convey that information simply as background, for your understanding of the present situation. Contrary to what the Respondent may say, in this case before you, we do not seek that resolution of the name difference, either directly or indirectly. This is and remains the object of the mediation process under the auspices of the United Nations.

13. What do we seek in bringing this case? This case has been brought to ensure that the Respondent upholds one of its key obligations under the 1995 Interim Accord, nothing more and nothing less. Our Application concerns the Respondent's violation of one aspect of the provisional régime established under the Accord, an obligation that has enabled the normalization of bilateral relations pending resolution of the name difference. Specifically, our Application concerns the Respondent's obligation under Article 11 (1) of the Interim Accord, which had been respected for nearly 13 years, following the entry into force of that agreement. By its conduct in the period leading up to and at the Bucharest Summit in April 2008, the Respondent violated Article 11 (1) by objecting to our accession to NATO, even though it was clear and not in dispute that we were to be provisionally referred to in that organization as the "former Yugoslav Republic of Macedonia". Indeed, that is the reference by which we are known in our contribution to NATO's efforts in Afghanistan since 2002. Yet in 2007-2008 the Respondent reverted to its pre-1995 practice, bringing to an end our ability to join international organizations of which the Respondent is already a member. We very much regret this action, and hope that the Court will assist the Parties in returning to the system that was envisaged by the Interim Accord. This would enable us to continue to pursue membership in NATO and the European Union, a goal that we have had since 1993 and this is of tremendous importance for the internal stability of the Macedonian multi-ethnic

[2] "Nimetz: No New Proposal", *VOA News*, 9 Feb. 2011, available at: http://www.voanews.com/macedonian/news/Macedonian-VOA-Macedonia-Greece-UN-Negotiations-Mathew-Niemitz-115695 309.html.

democracy. The European and Euro-Atlantic integration has and will contribute to the stability in the region.

14. Mr. President and Members of the Court, this is a simple and narrow case of *pacta sunt servanda*. For a reason not permitted under the Interim Accord, the Respondent objected to our membership in NATO. The Respondent seeks to present this case as a complex one, and advances a series of strained or irrelevant assertions, as well as novel legal and factual assertions that were not raised before April 2008. Its arguments appear to be designed to obfuscate what is a rather straightforward violation of a straightforward obligation in the Interim Accord.

15. In its pleadings, the Respondent pursues four central arguments. First, the Respondent insists that it may object if my country uses its constitutional name when communicating with international organizations or other countries, or even when other countries use the name of my country. The Interim Accord, however, allows no objection on that basis. In any event, there are no facts supporting that basis as the true reason for the Respondent's objection.

16. Indeed, the Respondent goes so far as to claim that the reference "former Yugoslav Republic of Macedonia" is the provisional name of my country and that there is an obligation *erga omnes* for its use, including by my country. Yet, such a claim is fully contradicted by the text of Security Council resolution 817 (1993) and the statements of those who drafted that resolution. Such a claim is also contrary to the long-time understanding of this resolution as applied in the practice of the United Nations, of other international organizations and of third States. This understanding was even confirmed by Mr. Nimetz himself upon the conclusion of the Interim Accord in 1995. We note that the Hellenic Republic itself has agreed to accept official correspondence from the Republic of Macedonia in one of the bilateral agreements concluded to put into effect the Interim Accord.

17. Second, the Respondent attempts to justify its breach by creating the impression that there have been violations of the Interim Accord on our side. This is a false assertion, to which we have responded in our pleadings. Yet, more importantly, it is an argument concocted *ex post facto*. At no point before April 2008 did the Respondent inform us that it considered us to have been in material breach of the Interim Accord, and that it intended to suspend in whole or in part the Interim Accord, nor did it inform us that it intended to pursue countermeasures if any alleged

breaches on our part were not remedied. In this way, the Respondent seeks to sidestep the law of treaties and the law of State responsibility, and to replace one stable system of treaty relations with rights unilaterally accorded and determined.

18. Third, the Respondent repeatedly mischaracterizes our claim by insisting that this case is about NATO's conduct, over which the Court has no jurisdiction. Let me be clear: we are not asking the Court to issue any declaration or order in respect of NATO or any other international organization. We ask only for an assessment of the actions of the Respondent, undertaken at the time when NATO was deciding on the extension of an invitation for membership to my country. We ask for a declaration that the acts of the Respondent represent a violation of its obligation under Article 11 (1), together with an order that the Respondent must in the future abide by this obligation in respect to our accession to NATO, to the European Union and to other international organizations of which the Respondent is a member, so long as we are to be referred to in such organizations as provided in Security Council resolution 817 (1993).

19. Fourth, the Respondent seeks to justify its breach of Article 11 by pointing to a different article of the Interim Accord, Article 22, which the Respondent says allows it to object when exercising rights under the North Atlantic Treaty. While I will leave the legal arguments in this respect to our legal counsel, allow me to make one observation. If one accepts this reasoning, which is contrary to the plain meaning of the provision, Article 22 would completely eviscerate Article 11, denying to my country one of the central reasons why it agreed to the Interim Accord.

20. By granting the relief sought in our Application, the Court will reaffirm the fundamental principle of *pacta sunt servanda* and ensure respect for the provisions of the Interim Accord. Our ability to secure membership of international organizations must not be an instrument for the Respondent to impose its preferred solution for overcoming the name difference. This is exactly what Article 11 of the Interim Accord was meant to prevent, and did prevent for 13 years.

21. Mr. President, our decision to institute proceedings with the Court was not an easy one, nor was it taken without serious consideration. However, we were left with no other choice. We followed the path that the Respondent should have taken: if it truly believed that we were in material breach of the Interim Accord it could have instituted proceedings against us under Article 21 of the Interim Accord, or invoked the procedures provided by the 1969 Vienna

Convention on the Law of Treaties, or the procedures envisaged under the rules applying to countermeasures. It did none of these things. Instead, it took matters into its own hands and acted outside the law. By contrast, we have followed the prescripts of the Interim Accord and initiated these proceedings. When the Parties concluded the Interim Accord, they agreed on the jurisdiction of the Court to settle issues deriving from the Accord, with the exception of the name difference itself. The Applicant asks the Court to hold the Respondent to its obligations under this extremely important bilateral instrument, concluded exactly for the purpose of ensuring the legal framework for the development of good-neighbourly relations.

22. I am pleased now, Mr. President, to let you know how the case will proceed. I will be followed to the Bar by Professor Philippe Sands, who will deal with a number of legal and factual matters predating the actions of April 2008. Professor Sean Murphy will then address the NATO membership process and the events leading up to and including April 2008, and the Respondent's objection to our membership of NATO. Professor Pierre Klein will then deal with the first part of our arguments explaining why the Respondent is wrong to assert that the Court lacks jurisdiction and that our claim is inadmissible, an argument he will conclude tomorrow morning. Following on from there, we will address in detail the circumstances in which the Respondent has violated Article 11 (1) of the Interim Accord. We will then conclude the morning with submissions on why the Respondent's violations of Article 11 (1) cannot be excused by the law of treaties, or the law of State responsibility, or any other newly-embraced rules or principles of international law. We will also address the remedies that we seek. Finally, we will bring our presentation to an end with some brief concluding remarks. I take the opportunity to express my thanks to Ms Blinne Ní Ghrálaigh for her important contribution. She expresses her regret for being absent this week due to personal family reasons.

23. Mr. President, Members of the Court, it is truly a privilege for me and for my country on the occasion of its first appearance before this Court. I will remain available to provide such assistance to you as you may need from us throughout these proceedings, and I now invite you to call on Professor Sands. Thank you for your attention.

The PRESIDENT: I thank His Excellency Mr. Antonio Miloshoski, Agent of the former Yugoslav Republic of Macedonia for his opening statement. Now I invite Professor Philippe Sands to take the floor.

Mr. SANDS:

THE FACTUAL BACKGROUND: 1991 TO THE INTERIM ACCORD

1. Good afternoon, Mr. President, Members of this Court, on this first day of Spring I am privileged to appear before you on behalf of the Applicant in this important case. Whilst the issues in the case may be discrete, the stakes are high: the case is about holding the Respondent to its treaty obligations under a bilateral treaty, so that it is no longer allowed to object to the Applicant's entry into NATO and other international organizations. The case is of evident significance for the country's internal stability, and also for regional well-being. This Court, of course, has extensive knowledge about the Balkans region, and by its judgments has contributed to the processes of reconciliation and renewal that underpin future developments and stability. At the heart the Court's approach has always been the recognition that stability and respect for treaties are closely connected.

2. The 1995 Interim Accord has played a key role in providing conditions of stability between the Applicant and the Respondent. For 13 years, until the Respondent's actions leading up to April 2008, the Interim Accord has functioned without difficulty. There was no claim by the Respondent to the Applicant that it was in material breach of any of the obligations imposed by the Interim Accord.

3. And so my task this afternoon is to provide a brief overview of the period from the Applicant's emergence as a State in 1991 to the conclusion of the Interim Accord in 1995. And I am going to focus in particular on the circumstances that led to the adoption of the Interim Accord; the deal that it reflected; on its objectives and terms; and the manner in which it functioned between 1995 and the period that will then be taken over by my colleague Professor Sean Murphy.

4. Before I turn to these matters, I hope you might allow me, Mr. President, if I take a single moment to express my personal, deep regret and sadness that Professor Thomas Franck is not with us today. His professional contribution to our preparation was very far-reaching, but beyond that I

owe Tom the greatest debt of personal gratitude for his constant support and friendship to me over many years, benefiting from a desire that many of you yourselves recognize to foster the development of new generations from every continent, and for inspiring us in the vital significance of principle and integrity in the face of a troubled and very cruel world. His beloved partner Martin Daley continues to follow the case from New York, and to him, through you, I express the condolence of our entire team, our deep sense of sadness, and also our very great appreciation to him for his support.

5. Mr. President, in August 1944, the Macedonian people proclaimed their State as "Democratic Macedonia". In 1946, the State became the "Peoples Republic of Macedonia", and in 1946 it became one of the six constituent republics of the Federal People's Republic of Yugoslavia (FPRY). From 1963 to 1991 it was the "Socialist Republic of Macedonia"[3].

6. Then, on 25 January 1991, the Applicant adopted a declaration of sovereignty. On 7 June of that year, the Applicant's Parliament changed the constitutional name to the "Republic of Macedonia", *Republika Makedonija*. And on 25 September 1991, following a referendum, the Parliament adopted a declaration of independence of the "Republic of Macedonia", and on 17 November 1991 a new constitution[4].

7. Over five decades, 50 or more years, the Applicant's name elicited no objection from the Respondent. And we note that in its *Opinion No. 6* of 14 January 1992, the Badinter Committee expressed the view "that the use of the name Macedonia" *did not* imply any territorial claim against the Respondent[5]. What was true in 1992 is evidently also true today in 2011. That said, the difference between the Applicant and the Respondent as to the name is *not* before this Court. This case is about the Respondent's objection to the Applicant's membership of NATO, in blatant violation of a bilateral treaty.

8. From late 1991 until 1993, following the Applicant's declaration of independence, increasing numbers of States recognized the Applicant's statehood. In July 1992 the Applicant

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[3] AM, para. 2.3.

[4] *Ibid*., para. 2.6.

[5] *Ibid*., para. 2.13; Arbitration Commission on the Conference on Yugoslavia, Opinion No. 6 on the Recognition of the Socialist Republic of Macedonia by the European Community and its Member States (14 Jan. 1992) annexed at Ann. III to the letter dated 26 May 1993 from the United Nations Secretary-General to the President of the Security Council, United Nations doc. S/25855 (28 May 1993): AM, Vol. II, Ann. 33.

applied for membership of the United Nations. Regrettably, because the Respondent objected to the Applicant's constitutional name, it lobbied United Nations Members not to support admission. Faced with the necessity of enabling the Applicant's admission in the United Nations, a compromise solution was developed: and on 7 April 1993 the Security Council adopted resolution 817. [Plate 1 on] You can see that now in relevant part on the screen, Mr. President and Members of the Court; and you will also find it — together with all other materials that we will show on the screen during today and tomorrow — also in your judges' folder, tab 2; Mr. President, resolution 817 recommended membership of the United Nations, on the basis of the Applicant "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". And the following day, with the adoption of United Nations General Assembly resolution 47/225, the Applicant was admitted to United Nations membership[6]. [Plate 1 off]

9. Now a central aspect of the Respondent's arguments in this case is whether the Applicant is itself required to use that provisional reference in communications with the United Nations, with NATO and with other international organizations, or whether the resolution 817 compromise, which is also reflected in the Interim Accord, allows it to call itself by its constitutional name, the Republic of Macedonia. In that regard, it must be noted that resolution 817 did not require the Applicant *to call itself* by the provisional reference of "the former Yugoslav Republic of Macedonia". Indeed, has never called itself in that way, and that has raised no difficulties whatsoever with the United Nations Secretariat or with any other United Nations organ: the Applicant has *always* used its constitutional name in written and oral communications with the United Nations, its members and officials: and the same has been the case in all other international organizations[7]. Nor did, for the avoidance of doubt, resolution 817 on its face or otherwise require any other State to refer to the Applicant by the provisional reference.

10. This understanding was recognized by participants in the 1993 decision-making process that resulted in the adoption of resolution 817, it was led by the troika comprising of France, Spain and the United Kingdom. In our Reply, for example, we referred to a statement prepared by

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[6] *Ibid.*, para. 2.19.

[7] *Ibid.*, paras. 2.20 and 5.66. See also AR, paras. 4.51-4.61.

Ambassador Jeremy Greenstock, who was involved in the drafting of resolution 817. He states that the provisional designation "meant, for example, that the nameplate and all official UN documents would refer to the member only by that name, until such time as the difference over the name had been resolved". [Plate 2] "However", he continues,

> "*this did not mean that the new member was required to refer to itself orally or in writing by that provisional designation.* It was, as I recall, informally recognized that *the new member would be likely to continue to refer to itself by its own constitutional name, the Republic of Macedonia.* Similarly, it was understood that any third state might also refer to the new United Nations member as it considered appropriate, whether by the country's own preferred name or by the agreed provisional reference that was determined by UN Security Council resolution 817."[8]

Now the Respondent has made no effort whatsoever in its pleadings to challenge the veracity of Ambassador Greenstock's statement that is before you in evidence; what it does is merely to complain that Mr. Greenstock's statement was not made contemporaneously[9]. Has the Respondent introduced any evidence — any evidence whatsoever — other than its own statements, to promote a contrary view to that expressed by Ambassador Greenstock? No, Mr. President, it has not. [Plate 2 off]

11. Nor has the Respondent sought to rebut the statement made in similar terms by Mr. Matthew Nimetz, to which we drew the Court's attention in our Reply[10]. Given what the Respondent had to say about the lack of contemporaneity of Ambassador Greenstock's statement, the Respondent's silence on this is rather curious: Mr. Nimetz's statement was made in *September 1995*, at the very time the Interim Accord was adopted. Mr. Nimetz is not just anybody: at the time he was the Special Envoy of the United States to the negotiations on the Interim Accord, and he was therefore intimately involved in the negotiations, and deeply knowledgeable about what was involved. Today, he is the Special Representative of the United Nations Secretary-General on the name difference between the Parties, so it is rather difficult to imagine a more authoritative or independent voice on this issue. [Plate 3 on] So let us look at what he said in 1995:

> "[T]he people from [the Applicant's] country, when they talk about themselves, use their constitutional name, Republic of Macedonia. And we have found this to be

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[8]AR, para. 4.43, and Ann. 59; judges' folder, tab 2; emphasis added.

[9]RR, para. 7.18.

[10]AR, paras. 2.26-2.33.

> the case, that there is no requirement for them to use a name that they don't accept. But that doesn't mean that the organization accepts the name."[11]

The Respondent's silence on this evidence is very telling. Mr. President, our point is a very simple one: whilst organizations to which the Applicant becomes a member are required to refer to it by the provisional designation, the Applicant is entirely free to call itself as it wishes, as are other States, as a great many of them do.[12] If the Applicant wishes to call itself the Republic of South Australia, in honour of a professor who might occasionally aspire to such a presidency, it is perfectly entitled to do so[13]. If it wishes to call itself by its constitutional name, there is nothing in resolution 817 or in the Interim Accord to prevent itself from doing so: to the contrary, such a practice is entirely consistent with and preserved and authorized by paragraph 2 of United Nations Security Council resolution 817. [Plate 3 off] Now, curiously, the approach outlined by Mr. Nimetz is one that the Respondent itself accepted and signed off on in writing: a month after the Interim Accord was signed, on 13 October 1995, the Parties adopted two Memoranda, one on Practical Measures and the other related to the Interim Accord and the establishment of liaison offices. These Memoranda and the practical measures explicitly confirmed that the Applicant reserved the right to call itself by its constitutional name, and that the Respondent did not object to it doing so[14].

12. So allow me now to turn to the conclusion of the Interim Accord, the treaty that lies at the heart of this case, a case that is squarely about *pacta sunt servanda* and the need to ensure respect for the law of treaties. Having read the Respondent's written pleadings, you really could be excused for concluding that this is a really difficult and complex case that raises a multitude of factual and interconnecting legal issues. It is not. It is a very straightforward case about respect for

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[11]AR, para. 4.57.

[12] The States that have agreements or diplomatic relations with the Applicant by its constitutional name include Republic of Austria, Republic of Albania, the Federative Republic of Brazil, Republic of Bulgaria, Canada, the People's Republic of China, Republic of Croatia, Czech Republic, Kingdom of Denmark, Republic of Estonia, Republic of Finland, French Republic, Republic of Hungary, Ireland, the Hashemite Kingdom of Jordan, Italian Republic, Republic of Lithuania, Grand Duchy of Luxembourg, Kingdom of the Netherlands, Kingdom of Norway, Republic of Poland, Kingdom of Morocco, the United Mexican States, Romania, the Russian Federation, Slovak Republic, Republic of Slovenia, Republic of Sierra Leone, the Somali Democratic Republic, Kingdom of Sweden, Republic of Turkey, the United Kingdom of Great Britain and Northern Ireland, United States of America.

[13]The Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo (Request for Advisory Opinion submitted by the General Assembly of the United Nations), Statement by Professor James Crawford on behalf of the United Kingdom, 10 Dec. 2009, CR 2009/32, p. 48, para. 5.

[14]AM, para. 5.67, and Anns. 3 and 4.

a treaty. Our distinguished friends and colleagues on the other side of the room have had to embrace complexity. Why? The fog they have sought to create is, in this case, their only hope. Yet the Court is bound to have noticed, even at this stage of the dispute, how much the Respondent's case has changed: the arguments made in April 2008 have just disappeared in the face of the rather obvious difficulties that they raise when confronted with the text of the Interim Accord. Indeed, it cannot be said that the Respondent was unaware of the implications of the Interim Accord back in 2007 and 2008, or its deeply constraining consequences. [Plate 4 on] Rather helpfully, in October 2007 the Respondent's Embassy in Washington DC put out a press release containing an interview between a Greek journalist and Ms Dora Bakoyannis, the Respondent's then Foreign Minister; and you will be able to find the entire text at Annex 73 of our Memorial. The journalist asks Ms Bakoyannis why does not her Government just adopt the "painless solution" to "invoke the Interim Accord" and "consent to accession to NATO under the name FYROM". Did Ms Bakoyannis say that the Interim Accord was not pertinent? No, she did not. Did she say that the actions of objecting to NATO membership were permitted by the Interim Accord? No, she did not. What she said was: "Politically painless solutions are not in the national interest. Hiding one's head in the sand always has a cost, as does political cowardice."[15] So there you have it — there you have it, Mr. President — a clear admission on the part of the Respondent that it knew about its legal obligations and that it simply chose to ignore them, to avoid a charge of "political cowardice". [Plate 4 off]

13. Did the Respondent assert to the Applicant at that time that it was in material breach of the Interim Accord? No, it did not. That is a new, *ex post facto* claim, a claim of material breach that was made to the Applicant only *after* the objection by the Respondent at NATO, and then only as a response to our side characterizing the NATO objection as a material breach of the Accord. And then, as these proceedings got under way, all the new arguments came tumbling out — magically, no doubt, as new lawyers joined the team, and there are quite a few of them; in the face of the evident chronological and juridical weaknesses the argument on material breach gave way to another new argument, this time we got the sight of the *exceptio*; and then came an entirely new

[15] Embassy of the Respondent in Washington, DC, Interview of FM Ms. Bakoyannis in Athens daily Kathimerini, with journalist Ms D. Antoniou (Sunday, 14 Oct. 2007) (15 Oct. 2007), at AM, para. 2.60, footnote 121; and AM, Ann. 73; judges' folder, tab 2, plate 4.

doctrine in international law, concerning the right of immediate and unilateral action for special "stop-gap" treaties; and then — that is not good enough — yet another new argument in relation to Article 22; and then, *having said in their Counter-Memorial* that they are not going to argue countermeasures, what do they do in their Rejoinder? They argue countermeasures. Now, Mr. President, I ask our distinguished friends, with the greatest respect: what was your case in April 2008? What is your case today? And I might also ask, given the ever-changing arguments on that side of the room: what is your case going to be on Thursday, and then what is your case going to be next Wednesday?

14. Resolution 817 opened the door to the Applicant's membership of other United Nations bodies and agencies. But the Respondent continued to object to the Applicant's constitutional name and just took matters into its own hands: in February 1994 it imposed a comprehensive embargo on trade: that dealt a serious blow to the Applicant's already weak economy. And then it moved to object to the Applicant's membership of important international organizations of which the Respondent was a member[16]. Against this background Lord Owen and Mr. Cyrus Vance began the process of bringing the Parties into agreement on the way forward, under the auspices of the United Nations[17]. Now, initially, the process sought to resolve the name difference itself, but as that proved difficult the process shifted to an agreement to resolve key issues on an interim basis. For present purpose the central point I want to make to you is this: the evolving drafts that became the Interim Accord had as a core objective ensuring that the Applicant could join any international organization provided that it followed the approach required by the United Nations in resolution 817. In those circumstances, the Respondent would be prohibited as a matter of law — so as to force, for example, a resolution of the difference as to the name — to object or to threaten to object. Until the Interim Accord, the Respondent was under no specific legal obligation not to make any such objection; after the conclusion of the Interim Accord, however, any right to object was severely limited. Professor Murphy will say more about this in due course.

15. You can find the Interim Accord at tab 1 of your folder: it is widely recognized as a singular diplomatic and legal achievement of the mid-1990s. The Court, as I have mentioned

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[16]AM, para. 2.25.

[17]*Ibid.*, paras. 2.21-2.22.

already, is acutely aware of the great and many difficulties that were faced in the Balkans between 1991 and 1995. Wisely, very wisely, the Applicant and the Respondent adopted another route, we might call it the "rule of law" route. They negotiated and — on 13 September 1995 — adopted a treaty. It entered into force a month later and it has now been in force for 16 years; neither Party has ever taken any steps to suspend the treaty in whole or in part, or to seek to withdraw. Indeed, at no point before the Bucharest Summit of April 2008 did the Respondent assert to the Applicant that it had acted in material breach. And that is an important point in this case because both States are bound by the rules expressed in the 1969 Vienna Convention on the Law of Treaties, and thereby well aware of the detailed procedural steps and other rules they must follow if they wish to raise concerns about the other party's alleged action in relation to the Interim Accord. The law of treaties establishes a complete régime, yet the Respondent is now asking the Court — asking you — to legislate new rules for this treaty and for its actions. And that is what this case is really about: whether the Respondent can avoid the requirement of the law of treaties. In our view, if the Court accedes to the Respondent's invitation to rewrite the law of treaties it risks doing grave damage to the stability of the international system. We are going to say more about that tomorrow. In the meantime it is appropriate to consider the Interim Accord briefly and in the round.

16. The Accord was largely drawn from a draft Treaty proposed by Cyrus Vance and Lord Owen in May 1993, in an effort to normalize relations between the two States. This draft was forwarded by the United Nations Secretary-General to the Security Council and it served as the basis for the negotiation of the 1995 Interim Accord. The 1993 draft and the 1995 Accord share a common structure and elements — and we have described this in detail in the Memorial. The 1993 draft Treaty was divided into six sections, Sections A to F, each of which was adopted without change in the final text subject to one exception: in the 1993 draft, Section C relating to the Applicant's organizational and institutional membership, had been entitled "European Institutions", but the Parties eventually agreed that the section should cover all "International, Multilateral and Regional Institutions".

17. The Interim Accord as adopted comprises a preamble and 23 articles, divided into six sections. Section A addresses "Friendly Relations and Confidence-Building Measures", and consists of eight articles addressing matters such as diplomatic relations, the inviolability of the

existing frontier and respect for sovereignty and territorial integrity, and political independence. The Section also includes the agreement in Article 5 to continue negotiations under the auspices of the Secretary-General of the United Nations on the Applicant's name, and the commitments in Article 7 to prohibit certain activities or propaganda and avoid the use of a particular symbol. And it creates for that purpose specific procedures to address concerns relating to that article.

18. Section B then addresses "Human and Cultural Rights", and it provides for respect for human rights and for the rule of law, by reference to eight instruments, including the United Nations Charter, as well as the encouragement of contact between the Parties. As I have just noted, Section C relates to "International, Multilateral and Regional Institutions" and it consists of a single provision — Article 11. That provision lies at the heart of this dispute. The fact that this obligation merits a specific section is not without significance, as Professor Murphy will explain. Section D comprises three articles that are intended to normalize the treaty relations between the Parties, including both bilateral and multilateral arrangements. Section E then addresses "Economic, Commercial, Environmental and Legal Relations", comprising six articles intended to enhance co-operation between the two States. Section F contains some "Final Clauses", addressing the settlement of disputes (Article 21 that provides for the jurisdiction of this Court), the Accord's effect on third States and international organizations (Article 22, to which we will refer in due course), and the Accord's entry into force.

19. The object and purpose of the Interim Accord is readily apparent from these provisions. It was intended to provide for the *immediate* normalization of relations between the Applicant and the Respondent — and this is an objective that it achieved. It was also to provide for future co-operation, notwithstanding the continuing difference concerning the Applicant's name — an objective that was also achieved over the next 13 years. In particular, having regard to the mutual interest of the Parties "in the maintenance of international peace and security", reflected in the Preamble of the Accord, it provided for the recognition of the Applicant by the Respondent, for the establishment of diplomatic relations, for the adoption of practical measures in those relations, for a commitment to the free movement of persons and goods, including requiring the lifting of the economic embargo that had still been maintained by the Respondent and, significantly, the confirmation of "the existing frontier" between the Parties as "an enduring international border".

The Accord reaffirmed the Applicant's lack of territorial claims against the Respondent, and provided for the Applicant to join the family of nations and to become an active member of the international community.

20. In short, the adoption of the Accord confirmed that the Respondent recognized the Applicant's commitment to the purposes and principles of the United Nations Charter, to the promotion of democracy, to individual liberty and the rule of law, and to stability in relations between the two countries. That, Mr. President and Members of the Court, is why the Accord includes right at its heart the binding and clear commitment in Article 11, by which the Applicant would be able to join regional and global international organizations, notwithstanding the difference over the name.

21. Against this background, there are certain points of agreement between the Parties. They may be obvious, but they are not without significance. The Parties agree that the Interim Accord is a treaty. They agree that the Interim Accord, as such, is governed by the law of treaties, as reflected in the 1969 Vienna Convention to which they are both parties. And they agree that from 1995 until the beginning of 2008 the Interim Accord operated without any particular difficulties: as I have mentioned, at no point before April 2008 did the Respondent invoke any rights under the law of treaties to challenge the Applicant's performance of its obligations under the Interim Accord. The evidence before you, on the record, is absolutely clear on that point. They also agree that the Respondent had withdrawn all of its objections, and had ceased to make any further objections, to the Applicant's membership in any of the organizations and institutions the Applicant was then able to join between 1995 and 2008.

22. So Article 11 has worked very well. Since 1995, the Applicant has joined a great number of international organizations — beginning with the Council of Europe in November 1995 until, most recently, the European Patent Office a couple of years ago — without facing any objection on the part of the Respondent[18]. In 1995, following the adoption of the Interim Accord, the Applicant was even offered — and accepted — membership of NATO's Partnership for Peace programme, under the provisional reference provided for by resolution 817, and in 1999, the

[18] See list at AM, para. 2.40.

Applicant was invited — and accepted — to participate in the NATO Membership Action Plan (MAP), also under the provisional reference. The Applicant's military forces have since participated in numerous NATO exercises and contributed to a number of NATO campaigns, including the NATO-led Kosovo Force (KFOR) mission[19]. The Applicant has contributed to the NATO-led operation in Afghanistan since 2002, and currently has approximately 170 personnel operating under NATO command — coincidently a significant number more than the Respondent.

23. Throughout this period the Applicant was referred to by the organization in the manner provided by resolution 817, but it called itself by its constitutional name. Did this cause any difficulties? It did not. [Plate 5 on] On the screen you can see an image that shows clearly an ISAF officer giving an award to a soldier on whose outfit one can read the word "Macedonia"[20]. The uniform does not have an insignia with the words "the former Yugoslav Republic of Macedonia". Nor does it say "Party of the Second Part". Nor does it say "Applicant". It says "Macedonia". If there had been a difficulty one would assume that the ISAF officer who is to be seen in the photograph would not be engaging in the friendly act with which he seems to be engaging. Did the Respondent raise concerns about the Applicant's contributions to NATO? It did not. Did it raise concerns about the manner in which the Applicant was referred to within NATO? It did not. So the curiosity is, it is good enough for Macedonian men and women to risk loosing their lives in Afghanistan but the country is not entitled to join the organization. Now that is not to say that there were never any issues: a few years back, for example, at an end of year party in Kabul, Afghanistan, contributing forces to the ISAF were invited to bring a national dish. I understand that the Applicant's offering was presented as "Macedonian Moussaka". This did not garner universal Hellenic appreciation. Gastronomic matters aside — and I for one can certainly attest to the delights of a good Macedonian moussaka served with a decent Greek salad and a good bottle of Retsina, perhaps even a 2008 Ritinitis Nobilis produced by the excellent Gaia winery on Santorini — never once did the Respondent raise with the Applicant any formal allegation of material breach of the Interim Accord for putting Macedonia on its uniforms or indeed in relation

[19] See AM, para. 2.50.

[20] The photograph is available at: http://www.morm.gov.mk/morm/mk/pr/news/svecenost_ispr_ ISAF.htm; judges' folder, tab 2, Plate 5.

to any other matter whatsoever. There is no evidence before the Court to the contrary. Nothing. These are facts, not the subject of disagreement. [Plate 5 off]

24. Yet since April 2008 the Parties have disagreed about how the Interim Accord is to be interpreted. And these differences arise from the Respondent's conduct leading up to the Bucharest Summit in April 2008, as set out in Chapter 2 of the Memorial and Reply. To justify its conduct, the Respondent has identified four principal lines of argument, as we are able to work them out, relating to the Interim Accord, around which it has woven its legal case.

25. First, the Respondent says the objection was permissible under Article 11 because it anticipated that at some point in the future the Applicant would use its constitutional name in communications with NATO[21]. Professor Murphy is going to address this in greater detail tomorrow, but for present purposes let me simply note that in the period between 1995 and April 2008 the Respondent never — not once — asserted that such practice by the Applicant was wrongful so as to justify an objection by the Respondent under the Interim Accord as a violation of the Treaty. In its application to join NATO, the Applicant made clear that it would follow the same practice in NATO as it has followed in every other organization it has joined since 1995. There is no dispute as to that fact, as Professor Murphy will explain.

26. Second, the Respondent claims that the Accord is a "synallagmatic agreement", so that the fulfillment of the Article 11 obligation not to object to the Applicant's membership of NATO is somehow linked to the Applicant's fulfillment of each and every other obligation under the Accord[22]. Now according to the Respondent the consequence of this is that it, the Respondent, is perfectly entitled to decide unilaterally — without giving any notice and avoiding all of the constraints imposed by the law of treaties — that it is not going to give effect to the Article 11 obligation because of a purported violation by the Applicant of some other part of the agreement. Now this, as you will recognize, is a novel argument and it suffers from a key difficulty: putting aside the question of whether this is a "synallagmatic" agreement or not of the kind identified by the Respondent, on which we make no concession whatsoever, the Respondent has not been able to find a single authority from this Court — or indeed from any other international court or

[21]RCM, para. 4.72

[22]RCM, paras. 3.41-3.49.

tribunal — that supports the novel argument on which it now relies. And the Court, of course, will recognize that if accepted, the argument would just drive a coach and horses through the law of treaties: it is a régime that provides for stability and predictability and it would be replaced with a system of unilateral acts adopted without notice by reference to no objective criteria. And we made all of these points in our Reply, making clear why we do not accept that the Interim Accord is a "synallagmatic agreement", in the way proposed by the Respondent, or that the obligation under Article 11 (1) of the Accord is somehow conditional upon fulfillment of each and every other obligation being met. But *even if* Article 11 (1) or the Interim Agreement as a whole *were* to be regarded as "synallagmatic", what would be the consequences of such a finding? Let us take their case at the highest. Well let us consider what was said by the Special Rapporteur of the International Law Commission in his Second Report on State Responsibility, in 1999 [Plate 6 on]. This is what he said:

> "the Special Rapporteur is firmly of the view that the justification for non-compliance with synallagmatic obligations should be resolved *(a)* by the law relating to the suspension or termination of those obligations (which is sufficient to deal with most problems of treaty obligations), and *(b)* by the law of countermeasures"[23].

Now that view — which in our submission is perfectly correct — did not find disfavour with the International Law Commission at that time, as a number of individuals present in the Great Hall today will be well aware. In other words, if there is a violation of a synallagmatic obligation, this does not lead to some sort of specialized legal régime; it just leads you to the standard rules that arise with respect to either breach of treaty or countermeasures, the latter of which the Respondent had said in its Counter-Memorial it did not seek to invoke in this case[24]. The Respondent had nothing to say about this statement by the Special Rapporteur in its Rejoinder. Again, it is a big and notable silence. Far be it for me to refer to my good friend Professor Crawford as an elephant, but it is the elephant in the room. And we look forward very much to hearing from counsel for the Respondent on this point later in this week, and we particularly look forward to hearing who on behalf of the Respondent might be willing to stand at this Bar and say that the Special Rapporteur just got it wrong. Nothing has changed in law or practice since his self-evidently correct view was

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[23]AR, para. 5.77, citing International Law Commission, Second Report on State Responsibility, Mr. James Crawford, Special Rapporteur, United Nations doc A/CN.4/498/Add.2, at para. 329; judges' folder, tab 5.

[24]RCM, para. 8.3; see also para. 8.1.

set out. And that is why, we assume, the "synallagmatic" argument has been reduced to just a small number of pages in the Rejoinder and no longer really seems to be at the heart of the Respondent's case. Frankly, it is hopeless. [Plate 6 off]

27. The Respondent's third argument on the character of the Interim Accord is that it is merely, as it puts it, "a provisional protective framework"[25]. So, the Respondent puts this rather creatively. How can I put it, it is a "stop-gap" treaty, it is a "holding operation"; and somehow from this they segue into the argument that this gives the Article 11 obligation a totally different, more conditional character. So we searched and looked high and far in the Vienna Convention on the Law of Treaties, the entire text, every article, every line, for the section that deals with "stop-gap" treaties. We looked for the special rule on which the Respondent seems to rely to be able to act entirely as it wishes, when it wishes — this is what the Respondent calls the right of "immediate action"[26] — once *it* has decided to characterize the Accord as falling within this particular category of international legal instruments. Now this argument is as hopeless as the previous one, as every student of international law who is in this room, this Great Hall today, will immediately recognize. It is entirely without merit. It is unsupported by any authority whatsoever, a characteristic feature of the Respondent's written pleadings.

It is not immediately apparent to us what more remains to be said about the doctrine of "immediate, unilateral action for stop-gap treaties". For the British among us, it reminds one of Monty Python and the "dead parrot" of issues. It is a dead argument; it is not a stunned argument; it is not a sleeping argument; it is a dead argument[27]. The Respondent's fourth treaty argument is that the meaning and effect of Article 11 has to be read in the context of Article 22[28]. According to the Respondent, while it was barred from objecting to the Applicant's membership of an international organization under Article 11, somehow it is nevertheless entitled to object to the Applicant's membership under Article 22 due to purported rights or obligations arising under the constituent instrument of that organization. This claim will be addressed by Professor Klein later, and we are

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[25]RR, paras. 2.32-2.38.

[26]RR, para. 2.39 *(v)*.

[27]The sketch may be viewed at: http://www.youtube.com/watch?v=npjOSLCR2hE.

[28]RCM, paras. 6.52-6.63 and 7.26-7.31.

going to return to it tomorrow. For the time being we simply invite you to ask yourself this question: in the context of its desire to join international organizations, and having regard to the practice that was followed over the next 13 years, why on earth would the Applicant have agreed to a provision that would, on the Respondent's approach, deprive Article 11 of any practical meaning and effect? You give with one hand, and you take back with the other. It just makes no sense. It is nonsensical.

28. Mr. President, this short submission sets out the context of the adoption of the Interim Accord. It is intended to provide you with a "road map" to the arguments that lie ahead. And you are going to pick and find a theme running through our presentations, and it is this: against a background of facts that are clear, that are unambiguous and that are hardly in dispute, the task for the Court becomes an essentially legal one, namely to interpret and apply the Interim Accord by reference to those pertinent facts and the system of international rules within which it finds itself and to which this Court has contributed so significantly. It will be clear to all that the Respondent's position is one of constant flux, in which a totally evolving set of new and novel legal arguments — sometimes based on facts that do not even exist and are not in the record — is brought to bear in support of a totally unjustifiable action. But the simple point is this: if you take yourselves back to 2007 and 2008, and you look at the facts in evidence, at the record that is before this Court in the two rounds of pleadings, we invite you to ask yourselves two questions: first, what did the Respondent do in 2007 and 2008? What did the Respondent do? And, second, when it was doing it, what did it say was the reason for its actions? Why? Those two simple questions lie at the heart of this straightforward case, and to assist the Court in answering them, perhaps after a short break, Mr. President, I would ask you to invite Professor Murphy to the Bar. Thank you very much for your kind attention.

The PRESIDENT: I thank Professor Philippe Sands for his presentation. Before I invite Professor Murphy to the floor, I think it is an appropriate moment to have a short coffee break for 15 minutes.

The Court adjourned from 4.40 p.m. to 4.55 p.m.

The PRESIDENT: Please be seated. The sitting is resumed and I now invite Professor Murphy to take the floor.

Mr. MURPHY:

THE FACTUAL BACKGROUND: THE RESPONDENT'S OPPOSITION TO THE APPLICANT'S NATO MEMBERSHIP

Introduction

1. Thank you very much, Mr. President, Members of the Court, it is a privilege once again to appear before you, and to do so on behalf of the Applicant in this case.

2. As our Agent and Professor Sands underscored in their presentations, this case generally is not legally or factually complex. And, indeed, there is little complexity in the central facts upon which the case rests, which concern the Respondent's conduct in 2007 to 2008, with respect to the Applicant's bid for membership in NATO. My task today is to recount that conduct on the basis of the evidence set out in the pleadings and publicly available. Tomorrow, we will explain why that conduct constitutes an unlawful "objection" within the meaning of Article 11 (1) of the 1995 Interim Accord.

3. While our written pleadings provide much more detail on these facts, this presentation highlights four key points upon which we ask the Court to focus.

4. First, from 1995 to 2007, the Applicant engaged in all the steps necessary to be considered for admission to NATO and, by early 2008, was approaching the final stage of that admission process. A decision to invite the Applicant to join NATO required a consensus of the existing NATO membership at NATO's April 2008 Summit in Bucharest; opposition by *any* one NATO member State would preclude the Applicant from being so invited.

5. Second, in 2007 and 2008, the Respondent engaged in a vigorous, systematic, and public campaign against the Applicant's admission to NATO, a position maintained throughout the months leading up to the Bucharest Summit, and at the Summit itself. At that Summit, two other Adriatic States were invited to join NATO, but the Applicant was not.

6. Third, all of the evidence shows that the Respondent's opposition in this period was based upon its concern about the non-resolution of the difference over the name. The evidence does not

show that the Respondent's opposition was based upon a concern that NATO would refer to the Applicant by anything other than the provisional reference. The evidence also does not show that the Respondent's opposition was based upon a concern that, in communications with NATO, the Applicant would call itself by its constitutional name or that third States would do so.

7. And fourth, there is nothing about the admission process at NATO that makes it impossible for a member State to oppose admission of a new member. Indeed, the process is predicated upon the idea that any member State can, by its opposition, preclude admission of a new member. Moreover, while the ultimate decision reached by NATO is not at issue in this case, the Respondent is simply wrong that, even in the absence of the Respondent's objection, NATO member States would have denied membership to the Applicant.

I. During 1995 to 2007 the Applicant pursued the NATO admission process

8. Mr. President, allow me to return to my first point, which is that from 1995 to 2007, the Applicant engaged in the requisite steps to be considered for admission to NATO.

9. As the Court is no doubt aware, NATO was founded in 1949 by 12 States, but it has adopted an "open door policy" for the admission of new members. Today, NATO has more than doubled in size, so as to now consist of 28 member States. For example, the Respondent in this case joined NATO in 1952, while Albania and Croatia were invited to join at the Bucharest Summit in April 2008[29].

10. This expansion has proceeded in accordance with Article 10 of the North Atlantic Treaty. [Plate 1 on] Article 10 provides in part:

> "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 . . ."[30]

Due to that requirement of "unanimous" consent, opposition from any single NATO member State is sufficient to prevent agreement and thereby block the applicant State from successfully joining NATO. [Plate 1 off]

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[29]AM, para. 2.44.

[30]North Atlantic Treaty, Art. 10, 4 Apr. 1949, 34 *UNTS* 243.

11. As Professor Sands noted, in the immediate aftermath of the conclusion of the Interim Accord in 1995, the Applicant was offered and accepted membership in NATO's Partnership for Peace programme, without any opposition from the Respondent. Now that programme, also known also as "PfP", is designed to promote practical co-operation between the partnership countries and NATO; it allows the partner country to train with NATO forces and to participate in NATO peacekeeping missions, which the Applicant proceeded to do and continues to do today in Afghanistan[31].

12. In 1999, NATO launched a different programme, called the "Membership Action Plan" or "MAP". This programme is specifically created to assist those countries that wish to join NATO by providing them with tailored advice and practical support on the different requirements for NATO membership. Again, the Applicant accepted membership in this programme without any opposition from the Respondent. Of the ten countries that have participated in this programme since 1999, the Applicant is the only one not to have been offered membership in NATO[32].

13. During its participation in both of these programmes, and continuing to the present, the Applicant has always been referred to in NATO as "the former Yugoslav Republic of Macedonia". That is the reference used by the NATO Secretariat in communications with the Applicant, it is the reference used in official NATO documents and reports, and so on. At the same time, the Applicant has always — ever since 1995 — used the constitutional name in official correspondence with NATO, it has used it when signing NATO documents, and so on. For example, it uses "Macedonia" on its uniform in exercises and missions with NATO forces, as the photograph that Professor Sands presented to you made clear. This practice has been consistent and has never been viewed by NATO or NATO member States, other than perhaps the Respondent, as inappropriate[33].

14. NATO periodically holds a "summit" meeting attended by the Heads of State or Government of the NATO members; the purpose of these summits is to provide strategic direction for the Alliance. Moreover, the final stage of the admission process begins with a decision made at a NATO summit, at which the members agree to invite a country to begin accession talks. Those

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[31]AM, paras. 2.47, 2.50.

[32]*Ibid.*

[33]AR, paras. 2.29-2.32.

accession talks ensure that the country takes final steps so that it can uphold all of its political, legal, and military obligations as a NATO member. Once those talks are completed, an accession protocol is signed and ratified by all NATO members, and the Applicant country deposits an instrument of accession, whereupon it formally becomes a NATO member. The important point for purposes of this case is that in the absence of an invitation at the NATO summit for a country to become a member, the final process cannot go forward[34].

15. By mid-2007, it became apparent that three countries were on the verge of being invited to join NATO at the next NATO summit, to be held in Bucharest in early April of 2008. Those countries were: Albania, Croatia, and the Applicant. The Applicant made it known that, if it became a NATO member, it fully accepted that the existing situation of NATO's use of the provisional reference would continue. [Plate 2 on] Indeed, the Applicant's President, in June 2007, stated as follows:

> "Naturally, our accession to NATO under our constitutional name would be the most satisfactory for us. Nevertheless, if no solution to the dispute is found before we join NATO, we are ready to become a full member with the name with which we are currently referred to at the UN, as a temporary solution."[35]

[Plate 2 off]

16. Consequently, with the next NATO summit at Bucharest approaching, NATO member States appeared poised to invite the Applicant to accede to NATO, as reflected in several statements by NATO members in this time period, which we have included in our pleadings[36]. And by way of example, the Defence Minister of the Czech Republic, during a visit to Skopje in September of 2007, said: "My visit is a symbol of our support to Macedonia on its path to Euro-Atlantic organizations. I hope that Macedonia will be invited to join NATO at its summit in Bucharest in April 2008."[37]

17. To conclude this first point, the information and evidence before you shows that from 1995 to 2007, the Applicant was fully engaged in the process that would normally result in admission to NATO, was one of the three countries that were to be considered for admission at the

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[34]AM, para. 2.48; AR, paras. 2.37-2.43.

[35]AM, Ann. 69, p. 2.

[36]See, e.g., AM, para. 2.53.

[37]AM, Ann. 72.

Bucharest Summit, and was prepared to join NATO in circumstances where it would be referred to in NATO by the provisional reference.

II. In 2007-2008, the Respondent vigorously and systematically opposed the Applicant's NATO Membership

18. Mr. President, I turn now to my second point, which concerns the evidence of the Respondent's conduct in 2007 to 2008 with respect to the impending invitation for the Applicant to join NATO.

19. The evidence does not pinpoint with laser precision the exact moment when the Respondent changed its position with respect to the Applicant's ability to join NATO. For at least ten years following the adoption of the Interim Accord, the Respondent accepted that, under the Interim Accord, it could not object to the Applicant's admission to international organizations, so long as the provisional reference would be used in that organization. Statements by the Respondent's officials as late as 2005 seem to continue to accept that obligation[38] and to support the Applicant's accession to NATO[39].

20. Yet that position appears to have begun changing in 2004 to 2005 following the formal recognition by various countries, including the United States, of the Applicant under its constitutional name[40]. Over the next two years the Respondent's position hardened, so that by the summer of 2007, the Respondent made a new "strategy" decision on how to handle the Applicant's accession to NATO. The Respondent's former Foreign Minister, Dora Bakoyannis, reflecting upon this period, has stated that: "We knew what strategy we would pursue on the Skopje issue even before the summer of 2007. The decision had been made."[41]

21. What was the decision? The evidence before this Court, discussed in Chapter II of both our Memorial and our Reply, and reproduced in our Annexes[42], is extensive, clear, and unequivocal: it has not been challenged in any serious way by the Respondent. In late 2007 and

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[38]AR, paras. 2.50-2.51.

[39]AR, para. 2.49.

[40]AM, para. 2.60, No 121; AR, para. 2.52.

[41]AR, para. 2.53; Ann. 189, p. 5.

[42]See generally AM, Anns. 65-106 and 123-135; AR, Anns 5-7, 75-82 and 89-153.

early 2008, the Respondent engaged in a vigorous and systematic campaign in opposition to the Applicant's membership in NATO solely because the name difference had not yet been resolved. This evidence arises from the Respondent's own written and oral diplomatic communications, and from statements by its senior officials made publicly and within its own formal governmental institutions.

22. Now I will not repeat this afternoon all the evidence we have placed before you, but allow me to highlight a few examples.

23. First, in the fall of 2007, the Respondent began making clear and unambiguous public statements about its intention to use the Bucharest Summit as a tool for advancing its foreign policy interests. [Plate 3 on] Consider again the interview of the Respondent's Foreign Minister, Ms Bakoyannis, which Professor Sands previously mentioned. In the course of discussing how the Respondent intended to proceed in the negotiations over the name difference, the following exchange occurred:

> "Journalist: Is the Greek side willing to go to extremes, to exploit Skopje's prospects of accession to NATO, to use all the means and options at its disposal?
>
> Ms Bakoyannis: Yes. The answer is yes. The Greek side sees good neighbourly relations and the resolution of problems as a prerequisite for membership in the Alliance."[43]

[Plate 3 off]

24. Now, behind the scenes, the Respondent fully made known its opposition to the other NATO member States. The Respondent developed a lengthy Aide Memoire for use in discussion with all NATO member States. [Plate 4 on] We place that Aide Memoire in evidence before you. In the conclusions that appear on pages 3 and 4, the Respondent asserts that: "The satisfactory conclusion of the [name] negotiations is a *sine qua non* in order to enable Greece to continue to support the Euro-atlantic aspirations of Skopje."[44] Then, in a final bullet point, the Respondent maintains: "It is therefore to everybody's interest that this important issue is resolved before any

[43]AM, Ann. 73.

[44]AM, Ann. 129.

upcoming Euro-atlantic enlargement decisions. This is going to be the decisive criterion for Greece to accept an invitation to FYROM to start the NATO accession negotiations."[45]

25. Thus, the Respondent was communicating in writing to other NATO Member States — through formal diplomatic channels — the Respondent's intention not to accept a NATO decision favouring admission for the Applicant. Moreover, the "decisive criterion" for the Respondent — indeed, the evidence shows that it was the only criterion for the Respondent — but the "decisive criterion" for the Respondent in agreeing to the Applicant's admission to NATO was whether the name negotiations had been concluded on terms acceptable to the Respondent. [Plate 4 off]

26. This opposition was expressed publicly and repeatedly at the most senior level of the Respondent's Government, by its Prime Minister, Kostas Karamanlis. For example, Mr. Karamanlis made a speech before Parliament on 22 February 2008, which is reflected in Annex 80 or our Memorial. Among other things, he states in that speech "our positions, arguments and the means at our disposal are well known" and then he goes on to say, "without a mutually accepted solution to the main issue, there can be no invitation to participate in the Alliance"[46]. [Video 1 run]

27. In a similar speech, the same month, in fact just a week later, the Prime Minister made clear that opposing the Applicant's membership in NATO was a "strategic goal" for the Respondent. [Plate 5 on] In that speech, he said:

> "The philosophy, the strategic goal, the framework, the basic elements of our policy are well-known. The strategy we mapped out is clear. Our will for a mutually acceptable solution [to the name difference] is genuine. Our position, 'no solution — no invitation,' is clear. If there is no solution, our neighbouring state's aspirations to participate in NATO will remain unrealised."[47]

[Plate 5 off]

28. The Respondent remained unwavering in implementing this strategic goal. In mid-March 2008, one month before the Bucharest Summit, the Respondent's Foreign Minister attended an Informal Meeting of NATO Foreign Ministers in Brussels, which was called for the

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[45] *Ibid*.

[46] Video Excerpt of Speech by Kostas Karamanlis, Respondent's Prime Minister, Session of the Greek Parliament, 22 February 2008, reprinted in part at AM, Ann. 80. The video is available at: www.youtube.com/watch?v=JrWBlzCQahQ&feature=related.

[47] AR, Ann. 97.

purpose of previewing and preparing the decisions that were to come at Bucharest. On that occasion, she made a public statement indicating the position that was taken by the Respondent at the Informal Meeting of the NATO Minister. [Plate 6 on] Among other things, Ms Bakoyannis stated: "Greece was therefore unable to provide its consent to the invitation, as I stressed to my fellow colleagues in the Council. We are not happy about that. Nobody likes 'vetoes'."[48]

29. Mr. President, we submit the words admit of no doubt, she says "Greece was unable to provide . . . consent to the invitation". The Respondent's Foreign Minister herself refers to Greece's position with the alliance as akin to a "veto" which, of course, is not a technical term, but certainly conveys the role and effect of the Respondent's opposition. Moreover, although not done in this particular statement, the Foreign Minister would later characterize the "position . . . presented" at Brussels as "essentially the first veto on sending an invitation to Skopje at the Bucharest Summit"[49]. [Plate 6 off]

30. In late March 2008, as the time for Bucharest is rapidly approaching, the Respondent's Prime Minister made a speech to his governing party's parliamentary group. [Plate 7 on] Here the Prime Minister reflected upon the path taken by the Respondent in the months leading up to Bucharest. He said: "These past few months, we have responsibly made it clear that without a mutually acceptable solution the road to NATO cannot be opened for our neighbouring country. It cannot be invited to join."[50] [Plate 7 off]

31. Two days before the Bucharest Summit, the Respondent's Foreign Minister published an article in the *International Herald Tribune* entitled "The View From Athens". [Plate 8 on] In the article, Ms Bakoyannis was crystal clear as to the Respondent's intentions, stating in the second and third paragraphs: "We will strongly back the inclusion of Albania and Croatia in NATO. We will not be able to do the same for FYROM, however, as long as its leaders refuse to settle the issue of its name." The final paragraph of the article concludes by saying: "As long as the problem

[48]AM, Ann. 83.

[49]AM, Ann. 89.

[50]AM, Ann. 88.

persists we cannot and will not endorse FYROM joining NATO or the European Union. No Greek government will ever agree to it. No Greek parliament will ever approve it."[51] [Plate 8 off]

32. This takes us to the Bucharest Summit itself in April 2008, there was, of course, considerable public interest as to whether the Respondent would maintain its opposition to the Applicant's membership.

33. While the Respondent's Prime Minister, in a speech that he made after the announcement that NATO would not extend an invitation to the Applicant was quite clear about the Respondent's position at the Bucharest Summit. The speech, which was directed to "the men and women of Greece", is included at tab 4 of your judges' folder, in case you wish to refer to it. Since the speech captures the overall approach the Respondent took in the months leading up to Bucharest, allow me to read just the first few paragraphs of the speech. The Respondent's Prime Minister, on the 3 April 2008, stated as follows:

> "Men and women of Greece,
>
> United, with confidence in our abilities, we fought a successful battle. With firmness and resolve, we are moving toward our ultimate goal: A definitive solution to the problem.
>
> At the NATO Summit Meeting here in Bucharest, we discussed the applications of three countries that want to become new members of the North Atlantic Alliance: Albania, Croatia and the former Yugoslav Republic of Macedonia. 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."[52]

34. I will stop reading from tab 4 at that point. You can continue to look at other aspects of that speech, but I do think that captures the gist of the Respondent's position at the Bucharest Summit itself. From that I think it is clear that the Respondent's Prime Minister is stating that they did "fight a successful battle", which in our view is full recognition that the Respondent's opposition was aggressive, sustained, and strategic. As stated in this statement, the decision not to invite the Applicant to join NATO was due to one factor — "Greece's veto". And how was that

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[51] AM, Ann. 90.

[52] AM, Ann. 99.

"veto" undertaken? The Prime Minister says that he said to everyone "in every possible tone and in every direction" that in the absence of a resolution to the name issue, there could be no invitation.

35. Now rather curiously, in the Rejoinder of the Respondent they say that we have "adduced no evidence that Greece made an objection during the proceedings of the Bucharest Summit"[53]. If you look at the fifth full paragraph of the speech that was made by the Respondent's Prime Minister, the Prime Minister actually seems rather keen to convey to the "men and women of Greece" that: "Today and yesterday, *during the meeting*, we reiterated our strong arguments, clearly stating our positions and intentions."[54] So we submit that the fact of the Respondent's opposition, conveyed in the "strongest" terms by its highest officials at Bucharest, is beyond doubt. [Plate 9 off]

36. Immediately after the Bucharest Summit, on 14 April 2008, the Respondent's Permanent Representative to the United Nations sent a letter to the United Nations Secretary General and to all United Nations member States. [Plate 10 on] In it, the Respondent confirmed to the entire United Nations membership its opposition at Bucharest. They stated:

> "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."[55]

[Plate 10 off]

37. Mr. President, Members of the Court, these are all official statements. They are all unequivocal. They are contemporaneous admissions on the part of the Respondent of the fact of — and the reason for — the Respondent's opposition to the Applicant's admission to NATO. We submit that, because of the nature and circumstances of these statements, they are of the highest evidentiary value[56]. Indeed, this Court has recently confirmed that it prefers "contemporaneous evidence from persons with direct knowledge". And you said that you will "give particular

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[53]RR, para. 6.23.

[54]AM, Ann. 99; emphasis added.

[55]AM, Ann. 132.

[56]AR, para. 2.17 (citing *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).

attention to reliable evidence acknowledging facts or conduct unfavourable to the State represented by the person making them" (case concerning *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Judgment, I.C.J. Reports 2005*, p. 201, para. 61).

38. Significantly, the Respondent does not challenge the fact of these statements, and there is no dispute between the Parties as to the authenticity of the evidence we have placed before you. The Respondent does not deny that the Respondent's senior representatives — Prime Minister, Foreign Minister, Permanent Representative to the United Nations — made these statements. The Respondent makes no claim that the words have been misrepresented or inaccurately transcribed, or even taken out of context.

39. Instead, the Respondent denigrates their significance by saying that these statements are "unilateral acts," that they make no "attempt accurately to describe Greece's conduct"[57], and that "they are casual expressions of dissatisfaction or political declarations for atmospherics"[58].

40. Yet, Mr. President, with all due respect, when a Prime Minister speaks in the parliament of his own country, as the head of government, he does not speak lightly or cavalierly, and certainly does not speak in a personal or unofficial capacity. When a Foreign Minister issues a public statement after concluding a major NATO meeting, she does not do so flippantly or without regard to her State's international legal obligations. And when a State's Ambassador to the United Nations communicates a letter for distribution to all United Nations member States, this is not done for atmospherics or for personal reasons unconnected to the interests of the State.

41. We do not have to look only at the Respondent's own official statements. Officials of NATO confirmed the opposition of the Respondent. For example, the evening before the final meeting at the Bucharest Summit at which consensus could not be reached, NATO's spokesman, Mr. James Appathurai, explained to the media what had happened. He said — and the entire statement he gave is in our Annexes at Annex 30 of the Respondent's Counter-Memorial. But he said in part: [Video 3 run]

> "The Greek government has been very clear, including in this evening's discussions, that until and unless the name issue is resolved, there cannot be consensus

[57]RCM, para. 5.55.

[58]RR, para. 5.31.

> on an invitation for the former Yugoslav Republic of Macedonia to begin accession talks."[59]

It is NATO's own spokesman, contemporaneous at the Bucharest Summit, saying that the Greek Government has been very clear and unless the name issue is resolved there can be no consensus on an invitation.

42. Other NATO member States that participated in the accession negotiations also confirmed the opposition of the Respondent, including Spain, Slovenia, and the United States[60]. Contemporaneous reports from a wide variety of media sources tell the same story, as reflected in the more than 150 press reports annexed to our pleadings.

43. Put all of this together, and the evidence shows, without any doubt or ambiguity, that the Respondent vigorously and systematically opposed the Applicant's NATO membership before and at the Bucharest Summit. The Respondent's officials have themselves characterized this opposition as a "methodical and well-organised"[61] "battle"[62], involving oral and written "contact[s with] foreign leaders"[63], "constant meetings"[64] and "intensive"[65] and "painstaking negotiations"[66]. In the Respondent's own words, this campaign was intended "to convince . . . allies and friends on the soundness of [its] positions"[67].

44. In summary of this point, it is a plain fact that the Respondent's opposition to the Applicant's membership existed. And as will be explained tomorrow, that opposition constituted an "objection" within the meaning of Article 11 (1) of the Interim Accord.

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[59]Video Excerpt of Remarks by NATO Spokesman James Appathurai, Bucharest Summit, 3 Apr. 2008, reprinted in full at RCM, Ann. 30. The video is available at: http://www.youtube.com/watch?v=sF4fD5g9dco&feature=related.

[60]AM, para. 2.61; AR, para. 2.22.

[61]See, e.g., AM, Ann. 99 and AR, Ann. 147.

[62]AR, Ann. 121.

[63]AR, Anns. 143 and 145.

[64]*Ibid.*

[65]AR, Ann. 189.

[66]*Ibid.*

[67]*Ibid.*

III. The basis of the Respondent's objection was not because the Applicant would be referred to in NATO differently than it is referred to in the United Nations

45. Mr. President, I now turn to my third point, which is that none of the evidence shows that the Respondent's opposition in this period was based upon a concern that the Applicant would be referred to in NATO differently than it is referred to in the United Nations.

46. Within the numerous examples of contemporaneous statements and communiqués by the Respondent's senior representatives, the Court will find *no mention* that the Respondent opposed membership because the Applicant would be known in NATO by something other than the provisional reference. In particular, there is no evidence before you that the Respondent's opposition was due to a concern about how NATO would refer to the Applicant, how other States would refer to the Applicant, or how the Applicant would call itself, either within or outside NATO. The Respondent has adduced nothing in support of such a claim.

47. Rather, the evidence points inevitably in one direction and one direction only: the Respondent objected to NATO membership because a solution had not yet been reached over the name difference. The basic mantra in the statements we have placed before you today and in the written pleadings is "no solution to the name difference, then no invitation to join NATO". That is what the Respondent's Prime Minister said in his statement to the Parliament in February 2008[68], that is what he said in the press statement in mid-March 2008[69], and that is what he said to his governing party's parliamentary group in late March 2008[70]. There is absolute consistency in the evidence; no solution to the name difference, then no invitation to join NATO. The Respondent may not like those facts, but it is stuck with them.

48. Indeed, *everyone* in the process understood that this was the reason for the Respondent's opposition, because the Respondent communicated it loudly and clearly. As the Respondent's own Foreign Minister put it less than a week before the Bucharest Summit: "No solution — no invitation. We said it, we mean it, and *everyone* knows it."[71] NATO certainly got the message, as

[68] AR, Ann. 97.

[69] *Ibid.*, Ann. 109.

[70] AM, Ann. 88.

[71] *Ibid.*, Ann. 89.

is evident in the statement of its spokesperson at Bucharest[72]. And, as the United States Congressional Research Service put it: "Although the alliance determined that Macedonia met the qualifications for NATO membership, Greece blocked the invitation due to an enduring dispute over Macedonia's name."[73]

49. To sum up this point, although the Respondent has produced a prolific catalogue of its complaints to various United Nations bodies and international organizations concerning the Applicant, the Respondent has not produced a shred of evidence in support of its new and post-litigation contention that it objected to the Applicant's NATO membership because of the way the Applicant would be known in NATO.

IV. Although NATO's decision is not at issue before this Court, the Respondent mischaracterizes that decision and its relationship to the Respondent's opposition

50. Mr. President, I turn to my fourth and final point, which addresses two aspects of NATO's decision process that are misrepresented by the Respondent.

51. First, in its pleadings, the Respondent seeks to argue that because NATO requires consensus for a membership invitation to be extended, then there is no individual position taken by each NATO member State either in favour or against such membership. In other words, the Respondent attempts to portray a NATO consensus decision as emerging out of thin air, without any input, in the form of acceptance or rejection, by individual member States. It asserts "given that the NATO decision of 3 April 2008 was a consensus decision . . . Greece was . . . never put in a position of having to lodge an objection"[74].

52. In our Reply, we demonstrated that such assertions are wholly without foundation[75]. Through reference to several official NATO sources, we explained the lengthy process that occurs pursuant to Article 10 of the North Atlantic Treaty. Though final decisions are taken at summit

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[72]RCM, Ann. 30.

[73]AM, Ann. 135; see also AR, Ann. 82.

[74]RR, para. 6.27.

[75]AR, paras. 2.34-2.47.

meetings, such as the Bucharest Summit, the process itself spans many months, involving "frank and direct"[76] discussions amongst member States as to their respective positions.

53. The consensus procedure means that "there is no voting or decision by the majority"[77], and no formal "veto" procedure. However, that does not mean that there is "no mechanism of objection"[78], as the Respondent puts it, within NATO. Quite to the contrary. Consensus can *only* be reached where there is no explicit objection by any NATO member State to the decision in question. The mechanism of objection is therefore central to the consensus-building process: where one or more member States explicitly objects to a decision, that objection serves to block consensus. Although this is not technically termed a "veto" within NATO, *"il peut conduire a un veto de fait dans la pratique des choses"*, as NATO itself makes clear[79].

54. The Respondent could have chosen *not* to oppose formally and explicitly the Applicant's NATO membership, just as it could have chosen *not* to formally *démarche* other NATO members in an attempt to garner support for its position. However, rather than adopt such an approach, the Respondent chose to vigorously and systematically oppose the Applicant's NATO membership.

55. A second point on NATO's decision-making process: the Respondent attempts to argue that its opposition was irrelevant since there already existed a consensus within NATO that the Applicant had not met the accession criteria[80]. We respond to that contention, in the first instance, by noting that the ultimate position taken by NATO, as well as the positions by the other NATO member States at Bucharest, are totally irrelevant to this case. This case concerns exclusively the legality of the Respondent's conduct in 2007 to 2008 under the Interim Accord; that conduct can be either lawful or unlawful regardless of the positions taken by other NATO member States.

56. Nevertheless, we feel compelled to note that prior to the Bucharest Summit NATO *never* considered the resolution of the name difference to be a *"sine qua non"*[81] for the Applicant to accede to NATO membership. Over the 15 years of the Applicant's involvement with NATO,

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[76]RCM, Ann. 22, p. 8.

[77]*Ibid.*

[78]*Ibid.*, para. 1.6.

[79]*Ibid.*, Ann. 15.

[80]RR, paras. 6.3-6.24.

[81]*Ibid.*, para. 6.6.

prior to the meetings leading up to the Bucharest Summit, resolution of the name difference had never been identified by NATO as a condition-precedent or an accession criterion for its membership in the Alliance[82]. The simple reason is that the difference over the name was, in the words of NATO's Secretary General, "not NATO's business . . . not NATO's affair"[83]. Rather, it was "a bilateral dispute . . . between Skopje and Athens"[84], one that had "been kept on a separate track from Macedonia's Euro-Atlantic Ambitions", "the two issues" only "becoming inextricably linked in the run-up to the Bucharest Summit"[85], because of the Respondent's actions. That view was repeatedly confirmed by NATO member States, who underscored that "the name issue is not one of NATO's membership criteria"[86], and that the Applicant "met the qualifications for NATO membership"[87].

57. Now, the Respondent, in this regard, tries to point to various statements at NATO as supporting the views that the name difference barred the Applicant's accession, but in doing so the Respondent is compelled to deliberately redact words from[88] or add words to[89] NATO's statements, twisting their meaning. Certainly NATO has regarded stability and friendly relations in the region, as well as working towards the resolution of the name difference, as important to NATO, but it has never said, prior to the Bucharest Summit, that the *existence* of the difference was a bar to the Applicant's admission[90].

58. Indeed, contrary to the Respondent's claims, "NATO rules" do *not* preclude the accession to membership of States that have an ongoing bilateral dispute with another State[91]. This is evidenced by the accession to membership of both the Respondent and Turkey, of the United

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[82]AR, para. 2.58.

[83]AR, Ann. 4.

[84]AR, Ann. 5.

[85]AM, Ann. 135.

[86]AR, Ann. 96; see also AM, paras. 2.63-2.65; AR, paras. 2.58-2.59.

[87]AM, Ann. 135.

[88]RCM, para. 5.38; AR, para. 2.57.

[89]RR, para. 6.8.

[90]AR, paras. 2.54-2.65.

[91]RR, para. 6.5.

Kingdom and Spain, and of Croatia and Slovenia, despite ongoing bilateral disputes, including disputes of a territorial nature, between those States[92].

59. To summarize this point, the process for accession to NATO does not preclude or make impossible positions being taken by individual member States of NATO, who are able to support or oppose inviting a new State to join NATO. While the ultimate decision reached by NATO at Bucharest is not actually at issue before this Court, the Respondent misrepresents that it was a requirement of NATO, in the lead-up to Bucharest, that the name difference be resolved. No such requirement existed and all the evidence indicates that, but for the opposition of the Respondent, there would have been no difficulty for NATO in extending an invitation to the Applicant.

V. Conclusion

60. Mr. President, allow me to conclude by briefly reiterating my central points. From 1995 to 2007, the Applicant undertook all the necessary steps on the road to admission to NATO, including participation in NATO's PfP and MAP programmes. By 2007, it appeared likely that three countries would be invited to join NATO at the Bucharest Summit in April 2008, including the Applicant.

61. However, in 2007 and 2008, the Respondent engaged in a vigorous and systematic campaign in opposition to the Applicant's membership in NATO. This campaign was not subtle; it was not discreet; it was a "battle" waged openly and aggressively in various ways. Moreover, the reason for the campaign, as repeatedly articulated by the Respondent, had nothing to do with the manner in which NATO would refer to the Applicant were it to become a member or the manner in which the Applicant would call itself in relations with NATO. And further, contrary to the Respondent's assertions, there is nothing about this consensus process at NATO that precludes individualized decision making, nor any evidence that the existence of the name difference constituted a NATO membership criterion which the Applicant had failed to meet.

62. Mr. President, before I finish, allow me to note that senior leaders of the Respondent continue to refer to its opposition to the Applicant's admission in the same way as they did in 2007

[92] AR, para. 2.65.

and 2008, although they try to do so only among themselves since it complicates their case before this Court.

63. I hope that in the course of the proceedings before the Court this week and next week, the Court will allow us to present some of the material of these recent statements by the Respondent's senior officials, which are publicly available, and indeed available on an official website of the Respondent itself — statements that arose prior to the filing of our Reply.

64. Mr. President, that concludes my presentation. You may wish to invite Professor Klein to continue our case. Thank you very much.

The PRESIDENT: I thank Professor Sean Murphy for his statement. Now I invite Professor Klein to take the floor.

M. KLEIN : Je vous remercie, Monsieur le président.

LA COUR EST PLEINEMENT COMPÉTENTE À L'ÉGARD DU PRÉSENT DIFFÉREND

1. Monsieur le président, Mesdames et Messieurs les Membres de la Cour, c'est un honneur pour moi d'intervenir dans la présente procédure au nom de l'Etat requérant. Il me revient, dans un premier temps, de traiter des questions de compétence que soulève la présente instance. Il est sans doute à peine besoin de rappeler à cet égard que l'Etat requérant fonde la compétence de la Cour sur la clause de juridiction obligatoire contenue dans l'accord intérimaire de 1995, dont l'interprétation et l'application se trouvent à la base du différend qui vous est aujourd'hui soumis. [Projection] Selon les termes de l'article 21, paragraphe 2, de cet accord — dont vous trouverez le texte sous l'onglet n° 1 du dossier des juges,

> «[à] l'exception de la divergence visée au paragraphe 1 de l'article 5, l'une ou l'autre des Parties peut saisir la Cour internationale de Justice de toute divergence ou de tout différend qui s'élèvent entre elles en ce qui concerne l'interprétation ou l'exécution du présent accord intérimaire»[93].

Sous réserve du membre de phrase par lequel il débute — et sur lequel on reviendra tout à l'heure beaucoup plus en détail —, ce texte apparaît parfaitement clair. Il permet à chaque partie de soumettre à la Cour «toute divergence ou … tout différend … en ce qui concerne l'interprétation ou

[93] *Recueil des traités des Nations Unies (RTNU)*, n° 32193, vol. 1891, p. 42.

l'exécution [de l'] accord intérimaire». Cet énoncé est particulièrement large. Il couvre — je répète encore ses termes — toute *divergence ou* tout *différend* relatif à l'interprétation *ou* à l'exécution de l'accord. [Fin de projection]

2. Dans son argumentation écrite, l'Etat défendeur a cependant contesté que la Cour soit compétente pour connaître du litige. Il a avancé trois arguments à cet effet. Tout d'abord, le différend porté devant la Cour entrerait dans le champ de la clause d'exclusion par laquelle débute le second paragraphe de l'article 21. En d'autres termes, la Cour ne pourrait se prononcer sur ce différend car il s'agirait d'un différend qui porte sur le nom de l'Etat requérant. Deuxièmement, la Cour ne pourrait exercer sa compétence en l'espèce car cela la conduirait inévitablement à se prononcer sur une décision prise par une organisation internationale — l'OTAN — tierce à la présente instance. Cela reviendrait à soumettre cette organisation — voire l'ensemble de ses membres — à la juridiction de la Cour en l'absence de leur consentement. Enfin, l'application de l'article 22 de l'accord intérimaire aurait pour effet de priver la Cour de toute compétence à l'égard du litige qui lui est soumis. Ces trois arguments sont tous dépourvus de fondement.

A. La clause d'exclusion contenue dans l'article 21 doit se comprendre de manière restrictive et ne fait pas obstacle à l'exercice par la Cour de sa compétence

3. La première objection formulée par l'Etat défendeur pour contester la compétence de la Cour consiste dans l'affirmation selon laquelle le présent litige porterait en réalité sur la question du nom de l'Etat requérant. Ce différend n'entrerait de ce fait pas dans le champ de la clause compromissoire contenue dans l'article 21, paragraphe 2, de l'accord de 1995. On rappellera que cette disposition permet de soumettre les différends relatifs à l'interprétation ou à l'exécution de ce traité, «[à] l'exception de la divergence [«*difference*», dans le texte authentique anglais] visée au paragraphe 1 de l'article 5». [Projection] Aux termes de l'article 5 — dont le texte est lui aussi reproduit à l'onglet n° 1 du dossier des juges,

> «[l]es Parties conviennent de poursuivre les négociations sous les auspices du Secrétaire général de l'Organisation des Nations Unies, conformément à la résolution 845 (1993) du Conseil de sécurité, en vue de parvenir à régler le différend mentionné dans cette résolution et dans la résolution 817 (1993) du Conseil».

C'est donc à ce dernier texte qu'il faut se référer pour savoir — enfin — quelle est la divergence — le différend — en question. [Fin de la projection] La résolution 817 (1993) est reproduite dans le dossier des juges, sous l'onglet n° 5. Dans le troisième paragraphe de son préambule, cette résolution mentionne la «divergence [qui] a surgi au sujet du nom de l'Etat, qu'il faudrait régler dans l'intérêt du maintien des relations pacifiques et de bon voisinage dans la région».

4. La question centrale est donc ici de déterminer quel est l'objet du différend visé à l'article 21, paragraphe 2, de l'accord intérimaire, et que cette disposition exclut du champ de la clause compromissoire. Les Parties expriment à cet égard des vues diamétralement opposées. L'une et l'autre invoquent pourtant à l'appui de leur position des principes d'interprétation qui sont essentiellement identiques : ceux de l'article 31 de la convention de Vienne de 1969 sur le droit des traités, et en particulier le renvoi au sens ordinaire des termes[94]. Les deux Etats s'accordent aussi — cela vaut la peine d'être relevé — sur le fait que la Cour est appelée à jouer un rôle «central» dans l'interprétation et le contrôle de l'exécution de l'accord intérimaire[95]. Les convergences de vues s'arrêtent néanmoins là.

5. Au-delà de ces points d'entente, l'Etat défendeur propose une lecture de la clause compromissoire qui revient en réalité à priver cette disposition d'une part considérable de son effet pratique. Selon l'Etat défendeur, en effet, l'exclusion de la compétence de la Cour à l'égard du différend relatif au nom doit se comprendre de manière particulièrement large. Cette notion de «différend» devrait inclure — je cite les écritures du défendeur — «tout litige dont le règlement préjugerait, directement ou indirectement, du différend relatif au nom»[96]. Pour l'Etat défendeur, tel serait le cas, en particulier, de tout litige relatif à l'interprétation ou à l'application de l'article 11 de l'accord intérimaire. Le défendeur affirme sur ce point que les faits soumis à la Cour sont indissolublement liés au différend sur le nom[97]. Et il conclut à cet égard que toute décision de la Cour sur la question de savoir si les conditions d'application de la seconde clause de l'article 11, paragraphe premier, de l'accord intérimaire étaient réunies en l'espèce — et en particulier le fait de

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[94] Duplique («RR»), par. 3.19.

[95] Réplique («AR»), par. 3.12 ; duplique, par. 3.13.

[96] RR, par. 3.13 ; voir aussi contre-mémoire («RCM»), par. 6.43.

[97] RR, par. 3.3.

savoir si cette disposition autorisait ou empêchait l'Etat requérant d'utiliser son nom constitutionnel — impliquerait forcément que la Cour se prononce sur la question du nom[98].

6. Cette interprétation de la clause compromissoire est indéfendable. Les textes mêmes qui sont en cause — l'accord intérimaire, bien sûr, mais aussi la résolution 817 (1993) — imposent manifestement une lecture plus restrictive de la clause d'exclusion contenue dans l'article 21 de l'accord[99]. La «divergence» évoquée par la résolution 817 (1993), à laquelle renvoie l'article 21, par le biais de l'article 5 de l'accord intérimaire, est celle qui — je cite le texte de la résolution — «a surgi au sujet du nom de l'Etat». C'est ce différend que les Parties sont invitées par le Conseil de sécurité à régler. C'est à l'égard de ce différend — et de ce différend seulement — que la compétence de la Cour est écartée par le premier membre de phrase de l'article 21, paragraphe 2. Que cette question soit clairement différente — et différenciable — de celle de l'usage de la «désignation provisoire» de l'Etat requérant sous la dénomination d'«ex-République yougoslave de Macédoine» ressort très clairement des termes mêmes et de la structure de la résolution 817 (1993). La «divergence au sujet du nom» est la seule question qui est identifiée dans la résolution comme faisant l'objet d'un différend entre les Parties, que celles-ci sont appelées à régler.

7. La question de l'utilisation de la dénomination provisoire — pour sa part — y est simplement évoquée comme solution temporaire dans l'attente d'un règlement de la «divergence au sujet du nom». Il n'y avait, pas plus au moment de l'adoption de la résolution 817 (1993) que de celle de la résolution 845 (1993), l'ombre d'un différend entre les Parties sur la portée de l'obligation de désigner l'Etat requérant sous le nom d'«ex-République yougoslave de Macédoine». Il est donc tout à fait évident que cette dernière question — sur laquelle la Cour aura en effet à se prononcer dans son interprétation de l'article 11 — n'était nullement celle visée par l'article 5 de l'accord intérimaire. Ce que la première phrase de l'article 21, paragraphe 2, vise manifestement à éviter, c'est qu'il revienne à un tiers — et en l'occurrence plus spécialement à la Cour — d'imposer aux Parties une solution au différend relatif au nom. C'est cette question, et cette question seulement, que les deux Etats ont entendu mettre hors d'atteinte d'une procédure de règlement juridictionnel, en raison de son extrême sensibilité. Que ce soit dans les textes pertinents ou dans la

[98] RR, par. 3.10.

[99] AR, par. 3.12.

logique qui sous-tend la clause d'exclusion contenue dans l'article 21, rien, absolument rien ne vient donc appuyer l'allégation du défendeur selon laquelle la notion de «différend relatif au nom» au sens de l'article 21, paragraphe 2, et de l'article 5, paragraphe premier, devrait inclure, pour reprendre encore ces termes, «tout litige dont le règlement préjugerait, directement ou indirectement, du différend relatif au nom».

8. L'Etat requérant a par ailleurs mis en évidence dans ses écritures le fait que l'interprétation particulièrement large de l'article 21, paragraphe 2, soutenue par le défendeur aurait pour effet de réduire considérablement l'étendue de la compétence de la Cour à l'égard de l'accord intérimaire. Dès lors que l'objet même de l'accord est de permettre aux Parties d'éviter les difficultés soulevées par la poursuite du différend relatif au nom, tout litige concernant n'importe quelle disposition de l'accord serait nécessairement, s'il fallait suivre l'interprétation avancée par le défendeur, liée à la question du nom[100]. L'Etat défendeur, dans l'espoir de contrer cet argument, s'est aventuré dans un exercice qui se révèle particulièrement périlleux pour ses propres thèses. Il a en l'occurrence identifié les clauses de l'accord à l'égard desquelles, selon sa propre lecture, la compétence de la Cour ne serait pas exclue par le jeu combiné de l'article 21, paragraphe 2, et de l'article 5, paragraphe premier. Le bilan — c'est le moins qu'on puisse dire — est parlant.

9. Je vous propose de le visualiser, en ne retenant que les clauses «opératives» de l'accord, c'est-à-dire en mettant de côté son préambule et ses clauses finales, les articles 21 à 23. [Projection] Selon la vision proposée par le défendeur, l'article 21 ne s'opposerait pas à ce que la Cour exerce sa compétence à l'égard de litiges — potentiels — concernant treize clauses de l'accord[101]. *A contrario*, la compétence de la Cour se trouverait donc exclue, au terme de l'exercice même mené par l'Etat défendeur, à l'égard de pas moins de onze clauses du traité — soit près de la moitié. Selon cette lecture, la Cour ne pourrait donc connaître de différends relatifs aux articles 1, 2, 5, paragraphe 1), 8 , paragraphe 2), 9, 10, 11, 15, 16, 18 et 19. [Disparition successive] Il reviendrait donc aux Parties — et à elles seules — d'apprécier la conformité des comportements de chacune d'elles à ces différentes clauses. Tout contrôle extérieur — en particulier juridictionnel — serait exclu. Cet exercice — mené par le défendeur lui-même, il faut le

[100] AR, par. 3.15.

[101] RR, par. 3.21.

rappeler — montre bien à quel point l'interprétation qu'il propose de la clause d'exclusion contenue dans l'article 21, paragraphe 2, est indéfendable.

10. Mais il y a plus. Si l'on devait suivre l'interprétation large de la première phrase de l'article 21, paragraphe 2, avancée par l'Etat défendeur, il n'est pas du tout exclu que la Cour se trouve en fin de compte dans l'impossibilité d'exercer sa compétence, même à l'égard d'un différend portant sur une des dispositions de l'accord que le défendeur identifie comme n'étant pas affectée par cette clause d'exclusion. Permettez-moi, Monsieur le président, de donner une illustration de ceci. L'Etat défendeur inclut dans la liste des dispositions dont l'interprétation ou l'application entrerait dans le champ de compétence de la Cour l'article 8, paragraphe premier, de l'accord[102]. Aux termes de cette disposition, «[l]es Parties s'abstiendront de faire obstacle de quelque façon que ce soit au mouvement de personnes et de biens entre leurs territoires ou à travers le territoire de l'une d'entre elles en direction du territoire de l'autre».

Supposons — pour les seuls mérites de l'argumentation, bien entendu — que l'Etat défendeur adopte des mesures contraires à cette disposition en vue de faire pression sur l'Etat requérant pour qu'il adopte tel ou tel nom. Dès lors que ce scénario soulèverait — même de façon lointaine et indirecte — la question du nom, tout différend au sujet du respect de l'article 8, paragraphe premier, en pareil cas d'espèce échapperait également à la compétence de la Cour. Et ceci pourrait tout aussi bien être le cas pour toute violation des autres dispositions restantes de l'accord. Il suffirait que leur violation soit motivée d'une façon ou d'une autre par la volonté d'imposer une solution au différend sur le nom pour que la compétence de la Cour à l'égard de tout litige concernant l'interprétation ou l'application de ces dispositions s'évanouisse. [Fin de la projection.]

11. Le résultat de l'interprétation de la première phrase de l'article 21, paragraphe 2, de l'accord de 1995 soutenue par l'Etat défendeur est donc de réduire la compétence de la Cour à l'égard de cet instrument à très peu de chose. De son propre aveu, près de la moitié des dispositions de l'accord serait d'office exclue du champ de la clause compromissoire. Et même à l'égard des autres dispositions de cet instrument, la Cour pourrait se trouver privée de compétence

[102] RR, par. 3.21.

dès l'instant où un litige qui y serait relatif soulèverait, même de très loin, une question touchant au nom de l'Etat requérant. On se demande où a bien pu passer le sens ordinaire des termes dont l'Etat défendeur prétendait se faire le héraut. Et si tous les Etats parties au Statut de la Cour avaient la même approche de son «rôle central» dans le règlement des différends que celle soutenue par l'Etat défendeur, il serait sans doute grand temps pour la Fondation Carnegie de trouver un autre locataire pour le Palais de la Paix. Plus sérieusement, tout ceci montre bien qu'en réalité, seul le différend ayant pour objet le nom de l'Etat requérant au sens strict est visé par cette clause. Dès lors que la demande soumise à la Cour en la présente instance n'a nullement pour objet de faire trancher ce différend-là, il ne fait aucun doute que la Cour est pleinement compétente pour se prononcer sur ce litige.

B. L'exercice par la Cour de sa compétence ne la contraindrait pas à se prononcer sur les droits ou obligations d'Etats ou d'entités tiers à l'instance

12. La deuxième exception d'incompétence soulevée par l'Etat défendeur est fondée sur l'allégation selon laquelle l'exercice de sa compétence par la Cour dans la présente affaire la contraindrait forcément à se prononcer sur les droits et obligations d'Etats ou d'entités tiers à l'instance. Selon la Partie adverse, l'objet de la réclamation de l'Etat requérant serait le suivant. Le requérant prétendrait avoir subi un dommage résultant de la décision prise à l'unanimité par l'OTAN, à l'occasion du sommet de Bucarest de 2008, de ne pas l'inviter à accéder à cette organisation[103]. L'objet même de cette réclamation entraînerait de ce fait d'importantes conséquences procédurales. Dès lors que l'acte incriminé constitue une décision collective d'une organisation internationale, il serait exclusivement attribuable à cette dernière, et non à ses Etats membres — et particulièrement à l'Etat défendeur[104]. La personnalité juridique propre que possède cette organisation génèrerait un «effet de voile» qui mettrait ses membres à l'abri de toute réclamation relative à un tel acte collectif[105]. Et ceci aurait pour conséquence ultime que la Cour ne pourrait exercer sa compétence à l'égard du différend dont elle est aujourd'hui saisie, puisque cela la contraindrait à se prononcer sur les actes d'Etats ou d'entités tiers à l'instance. La

[103] RCM, par. 6.1.

[104] *Ibid.*, par. 6.67 et suiv.

[105] *Ibid*., par. 6.85 et suiv.

jurisprudence de l'*Or monétaire* s'appliquerait pleinement ici, dès lors que les intérêts juridiques d'Etats tiers «seraient non seulement touchés par une décision, mais constitueraient l'objet même de ladite décision»[106].

13. Cette exception est en réalité basée sur des prémisses factuelles incorrectes. Elle repose par ailleurs sur des fondements juridiques tout aussi erronés. Permettez-moi de détailler successivement ces deux points. Tout d'abord, il est manifeste que l'exception formée par l'Etat défendeur ne peut avoir de sens que si sa description de l'objet de la demande portée devant la Cour est exacte. Or, il n'en est rien. Contrairement à ce qu'affirme le défendeur, la requête de l'Etat requérant ne vise nullement la décision prise par l'Organisation du Traité de l'Atlantique Nord lors de son sommet de 2008. Ainsi que l'Etat requérant l'a exposé très clairement dans ses écritures, c'est un acte séparé, clairement individualisable et clairement attribuable à l'Etat défendeur qui se trouve à la base de la requête[107]. C'est cet acte qui constitue l'objet de la requête, indépendamment des conséquences ultérieures qu'il a eues au sein de l'OTAN. Le requérant ne conteste nullement — pas plus maintenant qu'à un quelconque stade antérieur de la procédure — la décision prise par l'OTAN lors du sommet de Bucarest. Et pas plus maintenant qu'à un quelconque stade antérieur de la procédure, il ne demande à la Cour de se prononcer sur la conformité de cette décision aux règles mêmes de l'organisation ou au droit international général. Le seul objet de sa requête est — et a toujours été — d'obtenir un prononcé de la Cour sur la conformité à l'article 11 de l'accord intérimaire de 1995 d'une action spécifique posée par l'Etat défendeur préalablement à la décision de Bucarest.

14. Il n'est sans doute pas inutile de rappeler à ce stade les termes mêmes des conclusions présentées par l'Etat requérant. Le premier élément de sa demande est, très clairement, de solliciter de la Cour qu'elle «juge et déclare que le défendeur, par le biais de ses organes et agents étatiques, a violé ses obligations en vertu de l'article 11, paragraphe premier, de l'accord intérimaire»[108]. Que cette action présente des liens avec la décision atteinte au sommet de Bucarest, qu'elle en ait

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[106] Affaire de l'*Or monétaire pris à Rome en 1943 (Italie c. France, Royaume-Uni et Etats-Unis d'Amérique), question préliminaire, arrêt, C.I.J. Recueil 1954*, p. 32, tel que cité *in* RCM, par. 6.95.

[107] AR, par. 3.17.

[108] Mémoire («AM»), p. 123.

même en l'occurrence été à la base, n'y change rien. C'est bien un acte individuel, propre à l'Etat défendeur, qui est visé par la requête. L'existence même de cet acte, ainsi que sa portée, ont été amplement détaillées par mon collègue le professeur Sean Murphy il y a quelques instants. Ce n'est donc qu'au prix d'un travestissement pur et simple de l'objet de la requête que l'Etat défendeur peut donner un semblant d'assise à l'exception qu'il prétend avancer[109]. Une fois la demande rapportée à son objet exact, la construction élaborée par le défendeur tombe en poussière.

15. Son argumentation ne s'avère d'ailleurs pas plus convaincante sur le plan strictement juridique. La Partie adverse stigmatise à cet égard le refus de l'Etat requérant de s'engager dans un véritable débat juridique sur l'argument de l'atteinte aux droits d'Etats ou d'entités tiers à l'instance qui résulterait de l'exercice par la Cour de sa compétence en l'espèce[110]. Que nos estimés contradicteurs se rassurent : il n'entre nullement dans notre intention d'esquiver un tel débat. Tout au contraire. On l'a dit, l'Etat défendeur appuie son argumentation sur ce point sur les décisions d'incompétence atteintes par la Cour dans les affaires de l'*Or monétaire* et du *Timor oriental*. Mais il passe soigneusement sous silence les autres décisions dans lesquelles la Cour s'est prononcée sur la question des limites éventuelles à sa compétence susceptibles de résulter de l'absence de certains Etats tiers à l'instance.

Tant dans l'affaire de *Certaines terres à phosphates à Nauru (Nauru c. Australie)* que dans celle des *Activités armées sur le territoire du Congo (République démocratique du Congo c. Ouganda)*, la Cour énonce très clairement les critères qu'il convient d'appliquer pour déterminer si elle peut exercer sa juridiction en pareille situation. Il ne fait pourtant aucun doute que l'affaire aujourd'hui soumise à la Cour correspond très exactement aux situations dont la Cour était saisie dans ces deux instances.

16. Qu'il me soit permis de rappeler les conclusions que la Cour a atteintes en l'espèce. Dans son arrêt de 2005, la Cour se réfère à l'affaire *Nauru* en ces termes :

> «la Cour a fait observer qu'il ne lui est pas interdit de statuer sur les prétentions qui lui sont soumises dans un différend [où un Etat tiers a] un intérêt d'ordre juridique … en

[109] Voir déjà AR, par. 3.19.

[110] RR, par. 3.37.

> cause pour autant que les intérêts juridiques de l'Etat tiers éventuellement affectés ne constituent pas l'objet même de la décision sollicitée»[111].

Dans l'affaire *Nauru*, la Cour relève à cet égard que dans l'affaire de l'*Or monétaire*, «la détermination de la responsabilité de l'Albanie était une condition préalable pour qu'il puisse être statué sur les prétentions de l'Italie». La Cour a estimé, tant dans l'affaire de *Certaines terres à phosphates à Nauru* que dans celle des *Activités armées en territoire du Congo*, qu'elle n'était pas confrontée à une situation de ce type[112]. Rien ne lui imposait de se prononcer préalablement sur la responsabilité d'un Etat *tiers* à l'instance pour pouvoir trancher la question de la responsabilité d'un Etat *partie* à l'instance.

17. A l'évidence, il en va de même dans la présente affaire. Rien n'impose à la Cour de se prononcer sur la conformité de la décision prise par l'OTAN au sommet de Bucarest à l'égard du droit de cette organisation ou du droit international général comme préalable à la position que la Cour est appelée à prendre sur la licéité de l'acte posé par l'Etat défendeur dans les jours qui ont précédé ce sommet. Et s'il faut aborder cette question en termes de préalables, il est évident que c'est l'acte de l'Etat défendeur qui constitue un préalable à la décision de l'OTAN, et non l'inverse. A cet égard encore, on est donc très loin de la séquence envisagée dans l'affaire de *l'Or monétaire*.

Voilà donc comblé le silence que regrettait l'Etat défendeur.

C. L'article 22 n'exerce aucune influence sur l'étendue de la compétence de la Cour dans la présente instance

18. Le troisième argument d'incompétence avancé par l'Etat défendeur est certainement celui qui appelle le moins de développements. Selon cette argumentation, une clause de l'accord intérimaire autre que la clause compromissoire aurait en l'espèce pour effet de faire échapper le présent litige à la compétence de la Cour. Il s'agit en l'occurrence de l'article 22 de l'accord, que vous trouverez dans le dossier des juges toujours sous l'onglet n° 1, et qui se lit comme suit :

> «Le présent accord intérimaire n'est dirigé contre aucun autre Etat ou entité et il ne porte pas atteinte aux droits et aux devoirs découlant d'accords bilatéraux et

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[111] Affaire des *Activités armées sur le territoire du Congo (République démocratique du Congo c. Ouganda), arrêt, C.I.J. Recueil 2005*, p. 238, par. 203, citant l'affaire de *Certaines terres à phosphates à Nauru (Nauru c. Australie)*.

[112] Affaire de *Certaines terres à phosphates à Nauru (Nauru c. Australie), exceptions préliminaires, arrêt, C.I.J. Recueil 1992*, p. 262, par. 55 ; affaire des *Activités armées sur le territoire du Congo (République démocratique du Congo c. Ouganda), arrêt, C.I.J. Recueil 2005*, p. 238, par. 204.

> multilatéraux déjà en vigueur que les Etats parties ont conclus avec d'autres Etats ou organisations internationales.»[113]

L'Etat défendeur affirme que cette clause neutraliserait en quelque sorte l'article 11. Les engagements pris par le défendeur au terme de cette dernière disposition seraient, selon cette argumentation, subordonnés à la nécessité, pour cet Etat, de préserver les droits et obligations découlant pour lui de sa participation à l'Organisation du Traité de l'Atlantique Nord[114]. Dès lors que l'article 11 de l'accord serait, à suivre ce raisonnement, «mis entre parenthèses» par l'effet de l'article 22, l'application de cette disposition aurait aussi pour conséquence de priver la Cour de toute compétence à l'égard d'un différend portant, précisément, sur l'interprétation et l'application de l'article 11.

19. Il est évidemment impossible pour la Cour de se prononcer sur l'incidence potentielle qu'aurait l'article 22 de l'accord intérimaire sur sa compétence sans examiner dans un premier temps la pertinence de l'argumentation de la Partie adverse au fond. Cette disposition a-t-elle bien pour effet, comme l'Etat défendeur le prétend, de subordonner l'application de l'article 11 de l'accord aux droits et obligations qui découleraient du traité de l'Atlantique Nord pour le défendeur, en particulier en ce qui concerne l'admission de nouveaux membres au sein de l'OTAN ? L'Etat requérant montrera demain qu'il n'en est rien. L'article 22 n'exerce de ce fait aucune influence sur la compétence de la Cour. Et il s'agit de plus d'une question qui n'a rien de préliminaire. Tout au contraire, comme l'Etat requérant l'a déjà observé à plusieurs reprises dans ses exposés écrits, cette argumentation renvoie avant tout à un débat de fond[115]. On ne s'étendra donc pas davantage sur cet argument à ce stade. La portée exacte de l'article 22 de l'accord intérimaire et son absence d'impact sur l'application de l'article 11 de l'accord seront pour leur part analysées de manière détaillée demain par mon collègue, le professeur Philippe Sands.

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20. L'ensemble des exceptions d'incompétence invoquées par l'Etat défendeur s'avère donc dépourvu de fondement. La première d'entre elles, selon laquelle le présent différend porte sur le

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[113] *RTNU*, n° 32193, vol. 1891, p. 42.

[114] Voir, entre autres, RCM, par. 6.25 et suiv. et 6.52 et suiv.

[115] Voir, entre autres, AR, par. 3.22 et suiv. (et sp 3.25 et 3.26).

nom de l'Etat requérant et est à ce titre exclu de la clause compromissoire attribuant compétence à la Cour, ne peut être retenue. L'interprétation de la première phrase de l'article 21, paragraphe 2, de l'accord intérimaire sur laquelle le défendeur s'appuie pour atteindre cette conclusion s'est avérée totalement déraisonnable et contraire au sens ordinaire des termes de cette disposition. La deuxième exception soulevée par l'Etat défendeur, selon laquelle l'exercice de sa compétence par la Cour à l'égard du présent différend aurait pour conséquence de porter atteinte aux droits d'Etats et d'entités tiers à l'instance, doit elle aussi être rejetée. Elle est en effet basée sur une interprétation erronée tant de la situation de fait qui se trouve à la base de la demande dont la Cour est aujourd'hui saisie, que des principes juridiques applicables en l'espèce. Rien n'impose en effet à la Cour de se prononcer sur la situation juridique de tiers à la présente instance en tant que préalable à l'examen de la demande formulée par l'Etat requérant. Enfin, la troisième exception, fondée sur l'article 22 de l'accord intérimaire n'est pas davantage de nature à faire obstacle à la compétence de la Cour. Il ne pourrait éventuellement en être ainsi que si cette disposition avait pour conséquence de priver l'article 11 de l'accord de ses effets juridiques. Or, comme on le verra demain, tel n'est pas le cas. Le débat est en tout état de cause un débat de fond, et non de compétence à proprement parler.

21. Ce bilan d'ensemble n'est, en fin de compte, guère surprenant. L'Etat défendeur est en effet toujours apparu lui-même peu assuré du succès des arguments qu'il a avancés à titre d'exceptions préliminaires. Le fait qu'il n'a jamais envisagé de faire traiter de ces exceptions par la Cour dans une phase séparée de la procédure est en soi particulièrement révélateur à cet égard. En conclusion, Monsieur le président, Mesdames et Messieurs les Membres de la Cour, l'Etat requérant demande respectueusement à la Cour de rejeter l'ensemble des exceptions d'incompétence formées par l'Etat défendeur.

22. La Partie adverse a par ailleurs soulevé dans sa duplique un autre type d'argument qui s'opposerait à l'exercice par la Cour de ses pouvoirs en l'espèce. Il s'agit des limites inhérentes à l'exercice par la Cour de sa fonction judiciaire, qui feraient en l'occurrence obstacle à la recevabilité de la demande. J'y reviendrai, si vous me le permettez, demain matin. Pour l'heure, il ne me reste qu'à vous remercier, Monsieur le président, Mesdames et Messieurs les Membres de la Cour, pour votre aimable attention.

The PRESIDENT: I thank Professor Pierre Klein for his statement. This marks the end of today's sitting. Oral argument in the case will resume tomorrow at 10 a.m. in order for the former Yugoslav Republic of Macedonia to continue its first round of oral argument. The former Yugoslav Republic of Macedonia will then conclude its first round of oral argument tomorrow, from 3 p.m. to 4.30 p.m. The sitting is closed.

The Court rose at 6.20 p.m.