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International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2011

Public sitting

held on Thursday 24 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 jeudi 24 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
		Skotnikov
		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
Skotnikov
Cançado Trindade
Yusuf
Greenwood
Mmes Xue
Donoghue, juges
MM. Roucounas
Vukas, juges *ad hoc*

M. Couvreur, greffier

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

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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,

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M. Kosmas Triantafyllidis, attaché d'ambassade,

comme personnel administratif.

The PRESIDENT: Please be seated. The sitting is open. The Court meets today to hear the first round of oral arguments of Greece. I shall now give the floor to the first speaker, the Agent of Greece, Ms Maria Telalian, the Legal Adviser at the Ministry.

Mme TELALIAN :

Introduction

1. Monsieur le président, Mesdames et Messieurs les juges, avant toute chose, permettez-moi de m'associer, au nom de mon gouvernement et de la délégation grecque, aux mots de sympathie de la Cour pour le peuple japonais dans l'épreuve terrible qu'il subit et d'exprimer notre admiration pour sa dignité et son courage dans l'adversité.

2. Monsieur le président, c'est un grand honneur, pour M. l'Ambassadeur Georges Savvaides, ainsi que pour moi même, de représenter mon pays aujourd'hui devant votre Cour, même si nous regrettons vivement les circonstances qui l'y conduisent.

3. Monsieur le président, la Grèce a toujours participé à la vie internationale dans le respect du droit international et s'est toujours abstenue de faire primer ses intérêts immédiats sur les engagements contractés ou les règles élémentaires de la bonne foi. Il ne saurait en aller autrement de la part d'un pays qui a connu lors de son histoire l'agression, l'occupation militaire, ainsi que des tentatives d'amputation de son territoire. Du même coup, elle est profondément attachée au principe du règlement pacifique des différends internationaux comme en témoignent ses nombreuses comparutions devant votre Cour comme devant la Cour permanente de Justice internationale, ainsi que sa déclaration au titre de l'article 36, paragraphe 2, du Statut de la Cour. En souscrivant la clause compromissoire figurant à l'article 21 de l'accord intérimaire conclu avec l'ex-République yougoslave de Macédoine, la Grèce a de nouveau fait preuve de sa confiance dans votre sagesse et dans la justice de vos décisions. Elle se présente devant vous, convaincue que vous prendrez la juste mesure de cette clause, dans le contexte global de l'accord intérimaire. Nous sommes également confiants que vous saurez interpréter les autres dispositions pertinentes de l'accord et les faits qui sont en cause dans le présent différend, sans vous laisser abuser par la présentation pernicieuse qu'en fait l'Etat demandeur.

4. Dans cet esprit, permettez-moi, Monsieur le président, de formuler quelques remarques liminaires, au nom de ma délégation, afin de mieux cerner le différend dont vous êtes saisis et le contexte général dans lequel il s'inscrit. Je souhaite, en particulier, insister sur le différend relatif au nom du demandeur, dont l'importance pour notre pays et la région toute entière est cruciale, ce qui est d'ailleurs reconnu dans la résolution 817 (1993) du Conseil de sécurité. Monsieur le président, je traiterai d'abord de l'objet du différend (A), ensuite de ses enjeux (B), avant de conclure par un bref aperçu des circonstances dans lesquelles il est né et a évolué (C).

A. L'objet du différend

5. Le demandeur présente cette affaire comme une question d'engagement de la responsabilité internationale de la Grèce pour violation d'une disposition conventionnelle précise, l'article 11, paragraphe 1, de l'accord intérimaire de 1995.

6. L'allégation de l'Etat demandeur selon laquelle la Grèce a violé cette disposition en s'opposant à son admission à l'OTAN, tout particulièrement lors du sommet de Bucarest en avril 2008, repose sur une vision réductrice des faits, sur une lecture abusivement restrictive de l'article 11 et sur une déconnexion de celui-ci du reste de l'accord, notamment son article 22.

7. Pour ce qui est des faits, c'est la décision du sommet de l'OTAN à Bucarest, qui a subordonné l'invitation du demandeur à accéder au traité de l'Atlantique Nord à la résolution du différend relatif au nom de ce pays, et c'est cette décision, et elle seule, qui fait obstacle à son admission immédiate au sein de l'Alliance. Or, il s'agit d'un acte de l'OTAN adopté par le consensus de *tous* ses membres, qui n'est point imputable à la Grèce et dont cette dernière ne saurait être rendue responsable.

8. Pour ce qui est du droit, je souligne que l'article 11 contient une clause de sauvegarde en faveur de la Grèce, sur laquelle le demandeur préfère ne pas s'attarder : il résulte clairement de son libellé que la Grèce peut s'opposer à l'admission ou à la participation de l'Etat demandeur dans une organisation internationale si celui-ci y est mentionné par une appellation différente de celle prévue dans la résolution 817 (1993) du Conseil de sécurité. Or, le fait que l'ex-République yougoslave de Macédoine ait posé sa candidature à l'OTAN sous son nom contesté, ainsi que sa pratique constante d'utiliser ce nom dans toutes les organisations internationales dont elle est membre au

mépris des engagements pris, montrent que les conditions prévues par la clause de sauvegarde de l'article 11 sont bien réunies en l'espèce.

9. Au surplus, la Grèce, que ce soit lors du sommet de Bucarest ou avant ce dernier, a agi au sein de l'Alliance en sa seule qualité d'Etat membre de celle-ci, et était dans l'obligation juridique de donner son avis sur la question de savoir si les critères posés par l'OTAN pour inviter un Etat à accéder au traité, y compris celui des relations de bon voisinage, étaient remplies dans le cas de l'Etat demandeur. L'article 22 de l'accord intérimaire prévoit d'ailleurs très exactement ce cas de figure, en réservant les droits et obligations découlant d'autres traités auxquels la Grèce ou l'ex-République yougoslave de Macédoine sont parties.

B. L'étendue du différend

10. Monsieur le président, l'agent du demandeur a présenté, dans sa plaidoirie orale, le différend que son pays a choisi de porter devant la Cour, comme une affaire bien circonscrite de non-respect d'une disposition particulière de l'accord intérimaire, en l'occurrence l'article 11. De ce fait, il tente de présenter le litige comme s'il pouvait être détaché du différend sur le nom, du reste des dispositions de l'accord intérimaire, et des autres obligations assumées par les Parties, en particulier celles qui découlent, pour la Grèce, du traité de l'Atlantique Nord. Cette approche réductrice vise à occulter le fait que la présente affaire concerne en réalité une décision de l'Alliance atlantique qui est indissociable du différend sur le nom de l'Etat demandeur, ainsi que d'une cohorte de violations par l'Etat demandeur touchant tout un éventail d'autres dispositions de l'accord intérimaire.

11. En premier lieu, Monsieur le président, l'affaire dont l'ex-République yougoslave de Macédoine a saisi la Cour revient, en réalité, pour l'Etat demandeur, à contester la décision de l'Alliance adoptée lors du sommet de Bucarest, décision imputable à l'OTAN, qui ne participe pas à cette procédure. Il en résulte que la Cour n'est pas compétente en l'absence de cette organisation et, même si elle se reconnaissait compétente, une décision faisant droit aux conclusions du demandeur ne serait pas susceptible d'application effective, car elle reviendrait à réviser — ou à ordonner de réviser — un acte non de la Grèce, mais de l'Alliance elle-même. Il est en fait sans

précédent dans l'histoire de la Cour qu'un Etat lui demande de s'immiscer à un tel degré dans la vie interne d'une organisation internationale absente de la procédure contentieuse.

12. En second lieu, cette affaire ne peut être dissociée du différend sur le nom du demandeur, lequel, on le sait, est exclu de la compétence de la Cour en vertu de l'article 21, paragraphe 2, de l'accord intérimaire.

13. Le lien inextricable entre l'admission du demandeur à l'OTAN et la solution du différend sur le nom ressort clairement, tout d'abord, du communiqué du sommet de Bucarest lui-même, lequel, selon le demandeur, ne serait que le résultat du prétendu comportement illicite de la Grèce. Or, ce communiqué, dans son passage relatif à l'Etat demandeur, en l'occurrence le paragraphe 20, prévoit expressément qu'«une invitation serait faite à l'ex-République yougoslave de Macédoine dès qu'une solution mutuellement acceptable aura été trouvée à la question du nom». De surcroît, le demandeur lui-même, reconnaît que la raison pour laquelle la Grèce n'aurait pas consenti à son admission à l'OTAN était la non-résolution du différend sur le nom[1].

14. Le lien entre le différend sur le nom et l'article 11 est également avéré dans la clause de sauvegarde de cette disposition, laquelle réserve le droit qu'a la Grèce de s'opposer à l'admission de l'ex-République yougoslave de Macédoine dans une organisation internationale si cet Etat doit y être mentionné par un nom différent de celui prévu au paragraphe 2 de la résolution 817 (1993) du Conseil de sécurité des Nations Unies. Ceci montre que l'article 11 lui-même, loin d'être déconnecté du différend sur le nom comme le prétend le demandeur, a été conçu pour s'appliquer pleinement en cas de persistance du différend sur le nom, car c'est uniquement dans ce cas que la clause de sauvegarde a vocation à s'appliquer.

15. Monsieur le président, bien évidemment la non-résolution du différend sur le nom n'est pas une fatalité repoussant *sine die* et à l'infini l'admission du demandeur à l'OTAN. En revanche, et contrairement à ce que l'agent du demandeur a dit lors de sa plaidoirie orale, c'est en raison de l'attitude intransigeante de cet Etat que nous en sommes là aujourd'hui. Depuis le début, l'Etat demandeur a fait traîner les négociations sur le nom, avec pour seul objectif d'imposer l'usage international du nom contesté, en envisageant comme seule concession la «double formule». Selon

[1] Voir le paragraphe 20 de la requête introductive d'instance de l'ex-République yougoslave de Macédoine, et le paragraphe 4.39 de la réplique.

les déclarations expresses de ses dirigeants[2], la trouvaille de la «double formule», consiste dans l'adoption de son nom contesté pour l'ensemble de ses relations internationales et un autre nom, négocié, uniquement pour ses relations bilatérales avec la Grèce.

16. [Projection n° 1.] Il suffit de renvoyer aux déclarations en ce sens du président de la République de l'Etat demandeur, M. Crnvenkovski, qui sont projetées sur l'écran. Je cite en anglais les passages les plus pertinents :

> «in the recent years Republic of Macedonia had a strategy . . . What were the principles of that concept ? First of all, in the negotiations under the UN auspice we participated actively, but our position was always the same and unchanged. And this was the so called dual formula. That means use of the Republic of Macedonia constitutional name for the entire world, for all international organizations and in the bilateral relations with all countries, and to find a compromise solution only for the bilateral relations with the Republic of Greece . . . that position is considered by everyone including our major supporters and friends, as a position which obstructs or interrupts the negotiations from our side.»[3]

Or, il s'agit là d'une vision des choses qui ne cadre ni avec la résolution 817 (1993) du Conseil de sécurité, ni avec l'article 5 de l'accord intérimaire. En effet, selon cette déclaration, les négociations sous l'égide des Nations Unies pour le règlement du différend sur le nom sont dépourvues de toute substance.

17. En fait le demandeur, tout au long de ces années, a essayé de conduire les négociations, menées sous l'égide du médiateur des Nations Unies, M. Matthew Nimetz, à un point mort en méprisant l'obligation de négocier de bonne foi, alors que la Grèce s'est montrée flexible, par exemple en acceptant, en septembre 2007, un nom composite qui pouvait inclure le terme «Macédoine» accompagné d'une qualification géographique, comme base pour une solution mutuellement acceptable[4]. Par contre, l'ex-République yougoslave de Macédoine s'est montrée

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[2] Voir le discours prononcé par le président de l'ex-République yougoslave de Macédoine le 3 novembre 2008 devant le Parlement de son pays, *compte rendu sténographique de la septième séance de la vingt-septième session*, p. 27-7/10-12, contre-mémoire, annexe 104 ; voir également la déclaration du premier ministre M. Gruevski au cours de cette même séance du Parlement, *ibid.*, p. 27-7/14 et 27-7/17, contre-mémoire, annexe 104.

[3] Discours prononcé par le président de l'ex-République yougoslave de Macédoine le 3 novembre 2008 devant le Parlement de son pays, *compte rendu sténographique de la septième séance de la vingt-septième session*, p. 27-7/10-11 et 12, contre-mémoire, annexe 104.

[4] Voir la lettre du 14 avril 2008 adressée au Secrétaire général de l'Organisation des Nations Unies par le premier ministre de la Grèce, sous le couvert d'une lettre en date du 15 avril 2008 adressée sous la référence F.4608/434/AS1121 à l'Organisation des Nations Unies par M. John Mourikis, représentant permanent de la Grèce auprès de l'Organisation, contre-mémoire, annexe 9 ; voir également la lettre en date du 14 avril 2008 adressée, sous la référence F.4608/450/ AS 1161, à M. Wang Guangya, représentant permanent de la Chine auprès de l'Organisation des Nations Unies, par M. John Mourikis, représentant permanent de la Grèce auprès de l'Organisation des Nations Unies. La même lettre a été adressée aux quatorze autres représentants des membres permanents du Conseil de sécurité, contre-mémoire, annexe 54.

intransigeante, en insistant sur sa position initiale et en n'acceptant en pratique aucune autre appellation pour ses relations internationales que son nom contesté.

18. En même temps que le demandeur faisait traîner les négociations, il développait toute une stratégie visant à instaurer une situation de fait accompli. A cette fin, il a essayé, que ce soit au sein des organisations internationales dont il est membre ou dans ses relations bilatérales, de consolider l'usage de son nom contesté, dans l'objectif de priver la procédure de médiation de tout effet utile. De ce fait, et au mépris des obligations qu'il a assumées en vertu des articles 5 et 11 de l'accord intérimaire, il a tenté d'obtenir en fait ce qu'il ne peut avoir en droit : amener la Grèce ainsi que les instances des organisations internationales qui ne reconnaissent que le nom prévu dans la résolution 817 (1993) du Conseil de sécurité, à jeter l'éponge et à s'incliner devant une pseudo-évidence, ayant pour seule origine le comportement du demandeur, qui est contraire aux obligations qu'il a assumées dans l'accord intérimaire ainsi qu'à toutes les résolutions d'admission de celui-ci dans les organisations internationales dont il est membre. Toutefois, la Grèce ne saurait accepter une pareille tentative : la question du nom ainsi que la propagande irrédentiste de notre voisin constituent un enjeu majeur pour notre pays, tant les territoires macédoniens grecs ont été l'objet de convoitises lors du XX^{e} siècle.

C. Naissance et évolution du différend

19. Monsieur le président, même si la Cour n'est pas ouvertement appelée à trancher la question du nom de l'Etat demandeur, il nous paraît indispensable d'exposer brièvement son origine et son importance pour la Grèce. En fait, les enjeux que celle-ci génère pour la sécurité de la région ont été au cœur de la décision de l'OTAN, lors du sommet de Bucarest, de reporter l'invitation à ce pays pour accéder au traité de l'Atlantique Nord, jusqu'à la résolution de ce différend.

20. Monsieur le président, les Balkans ont connu, tout au long de leur histoire, des conflits sanglants dus à des affrontements ethniques qui restent gravés dans notre mémoire. Il est donc évident que la peur de leur recrudescence reste une préoccupation constante. C'est dans cet esprit que l'accord intérimaire avait comme objectif principal de contenir l'irrédentisme manifesté par l'appropriation par le demandeur du terme géographique «Macédoine» ainsi que des symboles de

l'histoire grecque y afférente. De cette façon, l'accord intérimaire faisait en sorte que ces éléments ne soient pas utilisés pour promouvoir les ambitions irrédentistes et expansionnistes de l'ex-République yougoslave de Macédoine aux dépens de l'héritage historique et culturel de notre pays, ainsi que de son intégrité territoriale.

21. La région connue comme «Macédoine historique» se réfère à l'ancien royaume grec de Macédoine à l'époque du roi Philippe II (IV^{e} siècle avant Jésus-Christ). Son fils, Alexandre le Grand, élève du philosophe Aristote et figure emblématique de l'histoire de notre pays, a rallié les cités grecques dans une expédition vers l'Orient, qui a été à l'origine d'une nouvelle ère pour l'antiquité, connue sous le terme de «période hellénistique». Cette «Macédoine historique» comprenait des territoires qui font aujourd'hui partie, à environ 90 %, de la région macédonienne grecque.

22. La «Macédoine géographique» telle qu'elle était conçue durant la période ottomane et surtout à partir de la dernière moitié du XIX^{e} siècle couvrait une étendue plus vaste. Pendant cette période, les Grecs, les Serbes et les Bulgares se sont disputés cette région, au fur et à mesure que l'autorité de l'Empire ottoman sur ces territoires présentait des signes grandissants de déclin. C'est ainsi que la «question macédonienne» a vu le jour. Suite aux guerres balkaniques de 1912-1913 et à la défaite militaire de l'Empire ottoman, la Macédoine géographique, ainsi que la majeure partie des possessions européennes de l'Empire, a été cédée, par le traité de Bucarest de 1913, à la Grèce, la Serbie et la Bulgarie. De tous ces pays, la Grèce a été le premier à utiliser le terme «Macédoine», dès 1914, pour désigner une large unité administrative de ses nouveaux territoires.

23. Tel n'a été le cas ni de la Serbie ni du Royaume de Yougoslavie. Le territoire de l'actuelle ex-République yougoslave de Macédoine ne portait pas le nom de «Macédoine» avant la deuxième guerre mondiale. Ce n'est qu'en 1946 que la portion serbe de la Macédoine géographique a été nommée la «République populaire de la Macédoine», comme composante de la République populaire fédérale de Yougoslavie de Tito. En même temps, la Yougoslavie aspirait à annexer dans la Fédération les territoires macédoniens des pays limitrophes, y compris les territoires macédoniens grecs. C'est à cette fin qu'elle a activement soutenu l'insurrection armée en Grèce qui éclata en 1946. La victoire des forces gouvernementales grecques en 1949, qui a mis

un terme à la guerre civile dans notre pays, ainsi que la rupture de Tito avec Staline, ont freiné les ambitions yougoslaves.

24. Pendant les années qui ont précédé la dissolution de la Yougoslavie, un nationalisme slavo-macédonien, prônant l'unification sous un Etat indépendant, de toute la «Macédoine», y compris ses territoires soi-disant «occupés» par la Grèce ainsi que par d'autres pays limitrophes, s'est manifesté avec de plus en plus de force dans cette république. Très légitimement, quand, en septembre 1991, celle-ci a proclamé son indépendance sous le nom de «Republika Makedonija», la Grèce a contesté cette tentative de s'approprier le nom de la Macédoine et s'est inquiétée des ambitions irrédentistes que son usage impliquait. En effet, ce pays ne s'est jamais privé de recourir à une propagande irrédentiste, que ce soit par le biais de livres d'histoire à l'école cultivant des sentiments expansionnistes au sein de la jeunesse, par l'appropriation du soleil de Vergina, symbole de la dynastie macédonienne dans l'Antiquité, qu'il avait même apposé sur son drapeau national jusqu'en 1995, ou par les déclarations de ses dirigeants.

25. Monsieur le président, le souci principal de la Grèce est que le terme «Macédoine» désigne une région géographique beaucoup plus vaste que le territoire de l'ex-République yougoslave de Macédoine. La plus grande partie de cette région est sous la souveraineté de la Grèce. L'appropriation du terme «Macédoine» par un pays indépendant dont le territoire ne couvre qu'environ un tiers de cette région concourt à engendrer un sentiment d'injustice historique : les territoires macédoniens des Etats limitrophes et surtout de la Grèce feraient partie inaliénable de l'ex-République yougoslave de Macédoine considérée comme leur mère patrie, ce qui implique qu'ils devraient dans le futur se rattacher à elle.

26. C'est pour cette raison que la Grèce a demandé à ses partenaires de l'Union européenne de ne pas reconnaître le nouvel Etat sous son nom constitutionnel. Le Conseil européen, soucieux de préserver la stabilité de la région, a décidé dans sa sagesse, lors du sommet de Lisbonne de juin 1992, de reconnaître cet Etat dans ses frontières existantes mais sous un nom ne comportant pas le terme «Macédoine». Dans le même ordre d'idées, le Conseil de sécurité, sensible aux préoccupations légitimes de la Grèce, a recommandé à l'Assemblée générale, par sa résolution 817 (1993), que le nouvel Etat soit admis aux Nations Unies, et soit «désigné provisoirement, à toutes fins utiles à l'Organisation, sous le nom d'«ex-République yougoslave de Macédoine»…». Puis,

par la résolution 845 (1993), il a encouragé la Grèce et l'ex-République yougoslave de Macédoine à continuer leurs efforts, sous les auspices du Secrétaire général, en vue de régler les questions en suspens entre elles.

27. C'est ainsi que les Nations Unies ont facilité les négociations entre les deux pays, pour régler le différend au sujet du nom, «dans l'intérêt du maintien de relations pacifiques et de bon voisinage dans la région», selon les termes de la résolution 817 (1993) du Conseil de sécurité. Le Secrétaire général, qui avait été chargé de la médiation, a nommé Cyrus Vance et lord Owen comme ses représentants. Ceux-ci ont présenté un projet d'accord couvrant toute la gamme des points litigieux, dont quelques éléments ont été repris dans l'accord intérimaire conclu en 1995.

28. Cet accord, tout en laissant en suspens la question du nom, aspirait à normaliser les relations bilatérales. L'Etat demandeur y a assumé des obligations juridiques concrètes et précises, portant sur l'interdiction de s'immiscer dans les affaires internes de la Grèce, de recourir à une propagande hostile, d'usurper des symboles historiques, autant d'actes qui visent à susciter et encourager des aspirations irrédentistes. Il est évident que toutes ces activités ne s'inscrivent pas uniquement dans le cadre d'un débat historique ; elles mettent en danger la sécurité et la stabilité dans la région, ainsi que les relations amicales et de bon voisinage entre les deux pays. C'est pourquoi elles ont fait l'objet d'une réglementation contraignante par le biais d'un instrument international, l'accord intérimaire. Dans ce contexte, la Grèce, tout en se montrant flexible lors des négociations sur le nom, a également adopté une attitude de la main tendue envers son voisin en lui offrant son assistance, à la fois politique et matérielle, et a même soutenu la perspective européenne du demandeur ainsi que son statut de pays participant au partenariat pour la paix et au plan d'action pour l'adhésion (MAP) à l'OTAN. Parallèlement la Grèce a soutenu le processus de développement et la mise en place de structures d'Etat de droit dans ce pays. Celui-ci, par contre, a adopté ces dernières années et surtout à partir de 2006, un ton nationaliste, bloquant toute perspective de compromis. De surcroît, il a multiplié les provocations, entre autres en accentuant l'utilisation de symboles de notre patrimoine historique et culturel, au mépris des obligations assumées au titre de l'accord intérimaire. On ne peut donc prétendre, comme l'a fait l'agent de l'Etat demandeur, que cet accord ait fonctionné sans entraves pendant quinze ans. Ce qui est vrai, Monsieur le président, est que l'Etat demandeur a tiré un grand bénéfice de l'accord, tout en violant

à plusieurs reprises ses engagements envers la Grèce, malgré nos protestations qui s'étalent au long de ces années, pour lesquelles je me permets de renvoyer aux paragraphes 4.73 à 4.81 de notre contre-mémoire ainsi qu'aux paragraphes 7.42 à 7.52 de notre duplique.

29. Monsieur le président, Mesdames et Messieurs les juges, l'attitude attentatoire de l'Etat demandeur aux règles du bon voisinage et le fait que le différend sur le nom perdure par sa faute affectent la sécurité régionale et sont à l'origine de la décision adoptée par l'Alliance lors du sommet de Bucarest. La Grèce se présente donc devant vous avec le confiant espoir que vous rejetterez les griefs du demandeur. Il reviendra à l'ambassadeur M. Georges Savvaides, agent de la Grèce, de vous présenter les procédures et les critères de l'OTAN quant à l'admission de nouveaux Etats membres ainsi que leur application impeccable par l'Alliance dans le cas de l'ex-République yougoslave de Macédoine et de tirer les conclusions qui en découlent pour notre affaire.

30. Je vous remercie Monsieur le président, et je vous prie de bien vouloir donner la parole à l'ambassadeur Georges Savvaides, en sa qualité d'agent de la Grèce dans la présente affaire.

The PRESIDENT: I thank Ms Maria Telalian, the Agent of Greece, for her statement. I now invite Ambassador Georges Savvaides, the Agent of Greece, to make his presentation.

Mr. SAVVAIDES:

THE NATO MEMBERSHIP PROCESS

1. Mr. President, distinguished Members of the Court, it is an honour to appear before you in a matter so vital for my country. The honour is the greater in that, though trained as a jurist, my career has been in the diplomatic service of Greece, often in international organizations and for an extended time in NATO in various capacities including that of Ambassador — Permanent Representative of my country. I approach the Court with all the more awe.

I. THE SPECIAL CHARACTER OF NATO AS AN ALLIANCE

2. It is my task this afternoon to outline the process by which NATO collectively invites new members to accede to the North Atlantic Treaty of 4 April 1949, and to show how the character of NATO as an alliance weighs decisively in that process.

3. NATO is an intergovernmental military alliance based on the North Atlantic Treaty. As a system of collective defence, its member States agree that they will come to one another's defence, should there be an armed attack by an outside party. The North Atlantic Treaty is a closed multilateral treaty which commits the member States, by the terms of Article 3, "separately and jointly, by means of continuous and effective self-help and mutual aid", to "maintain and develop their individual and collective capacity to resist armed attack"[5]. The Treaty prescribes that the Parties "will consult together whenever, in the opinion of any of them, the territorial integrity, political independence or security of any of the Parties is threatened"[6]. Under Article 5, if an armed attack has occurred against any member State, it "shall be considered an attack against them all", and each party undertakes to assist, "by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area"[7].

4. Embodied in Article 5, the process of collective defence is at the heart of NATO's founding treaty. It is a principle that binds its members together, committing them to protect one another through concerted action. Collective defence is the raison d'être of the Alliance. It would have little meaning — and thus the Alliance would have little meaning — if complete solidarity within the Alliance were not maintained. Solidarity, in turn, entails a close alignment of all the member States in their foreign and security policy. To ensure that this alignment is preserved, NATO considers the policies espoused, and actually pursued, by every prospective new member, before it extends an invitation to accede to its Treaty. The Alliance must be convinced that the prospective new member is truly aligned with the other member States, so that its accession will enhance, rather than impede, the necessary solidarity of the Alliance.

II. NATO'S CONSULTATION PROCESS

5. Mr. President, Members of the Court, the requirement of solidarity among NATO member States is no mere formality. The rules and procedures under which NATO operates are designed expressly to effectuate its mission as a military alliance. Its purpose is to guarantee the collective

[5]North Atlantic Treaty, Art. 3, 34 *UNTS* 242, 246.

[6]*Ibid.*, Art. 4.

[7]*Ibid.*, Art. 5.

defence, security and territorial integrity of its members. As such, it operates under a strict system of collective decision-making at all its levels. NATO's decision-making system, in turn, is predicated on consensus. In order to build consensus on every single issue there exists one single methodology, that of the consultation process.

6. Consultation between member States is a key part of the decision-making process in NATO. Consultation allows the Allies to exchange views and information prior to reaching agreement and taking action. The process is continuous. It takes place within the North Atlantic Council — the NAC — where "matters concerning the implementation" of the Treaty are considered[8]. It takes place also among the member States communicating with one another at NATO headquarters and in preparation for Alliance summits. Consultation is a real, thorough, energetic and compelling function — I repeat, consultation is a real, thorough, energetic and compelling function. It is the means by which the Allies put their consensus rule into practice.

III. NATO DECISION MAKING

7. The principle of consultation and consensus is embodied concretely in the procedures by which NATO reaches decisions. In NATO there is no provision for majority voting. When a "NATO decision" is announced, it is the expression of the collective will of all the members of the Alliance. Under consensus decision-making, no formal votes are taken. Instead, consultations take place until a decision acceptable to all is reached. Where there are disagreements between Allies, efforts will be made to reconcile their differences. Once taken, any decision by NATO represents the common determination of all member States to implement it in full[9].

8. I stress that the rationale of the consensus rule is not to provide each member State with the power to *block* organizational decisions. It exists, instead, to instigate mutually agreed solutions among the member States, satisfactory to all the member States, and thereby ensuring the solidarity of the Alliance[10]. "Blocking" or "vetoing" a NATO decision is out of the question: the Alliance knows no such negative procedure, which would introduce the possibility of dissent foreign to NATO's purpose as an integrated military organization.

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[8] As provided under Article 9 of the Washington Treaty, 32 *UNTS* 242.

[9] *NATO Handbook*, Public Diplomacy Division, NATO, 2006, p. 39.

[10] *Ibid.*, p. 33.

IV. THE NATO ENLARGEMENT PROCESS

9. I turn to the enlargement process. Decisions on enlargement are of great importance to the Alliance, and the rationale for the consensus rule applies with special strength to enlargement decisions. A central characteristic of NATO enlargement is that, to be invited to accede to the North Atlantic Treaty, the candidate State must satisfy certain prescribed criteria. In part, these are set out in the Treaty; in part, they are specified by decisions of the Council and may be refined or augmented in respect of particular States.

10. Article 10 of the Treaty provides as follows: "The Parties may, by unanimous agreement, invite any other European State in a position to further the principles of this Treaty and to contribute to the security of the North Atlantic area to accede to this Treaty." As the text of Article 10 makes clear, the member States may invite any other State meeting these criteria. But they will decline an invitation to a candidate State which does *not* satisfy the criteria specified.

11. The Study on NATO Enlargement, adopted on 3 September 1995[11] by the Heads of State and Government, deals with the question of maintaining the effectiveness of the Alliance to perform its core functions[12]. New members must accept the full obligations of the North Atlantic Treaty. This includes "participation in the consultation process within the Alliance and the principle of decision making by consensus, which requires a commitment to build consensus within the Alliance on all issues of concern to it"[13].

12. NATO has thus controlled its membership process in view of its character as a closed multilateral treaty and an integrated military alliance. NATO does not apply an identical accession process to every candidate for membership. Instead, it sets out individually tailored requirements in view of the conditions prevailing with respect to a given candidate country.

13. At the Washington Summit in April 1999[14], NATO launched the Membership Action Plan (MAP) to assist further countries wishing to join the Alliance. The Action Plan provides advice, assistance and technical support to aspirant countries. Nine countries, including the former

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[11] *Study on NATO Enlargement, issued by the Heads of State and Government participating in the meeting of the North Atlantic Council,* Brussels, 3 Sep. 1995 (published *in NATO Handbook Documentation*, NATO Office of Information and Press, 1999, p. 335.

[12] *Ibid.*, Chap. 4, paras. 42 *et seq.*

[13] *Ibid.*, para. 43.

[14] Press Release NAC-S (99)64, *An Alliance for the 21st Century. Washington Summit Communiqué issued by the Heads of State and Government in the meeting of the North Atlantic Council in Washington D.C.*, 24 Apr. 1999, para. 7.

Yugoslav Republic of Macedonia, initially adhered to the Plan[15]. The Plan is not however simply a check-list for aspirants, and participation in the MAP does not guarantee future membership. Instead the MAP sets the criteria which the aspirant should fulfil. One such criterion is the commitment to [PP slide 2] "settle ethnic disputes or external territorial disputes including irredentist claims . . . and to pursue good neighbourly relations"[16]. In short, the MAP, implementing Article 10 of the Treaty, entails an ongoing process of evaluation and engagement. Decisions to invite candidate States to start accession talks are taken by consensus among NATO members and on a case-by-case basis[17].

14. Since the end of the Cold War, the Parties have invited 12 countries to join NATO. In 1997, the Alliance invited the Czech Republic, Hungary, and Poland to accede. Seven further States acceded to the Treaty in 2004: Bulgaria, Estonia, Latvia, Lithuania, Romania, Slovakia and Slovenia. Albania and Croatia acceded in 2009.

15. The requirement of Article 10 of the Treaty for a unanimous agreement is fulfilled once all member States notify the Depository of their acceptance of the Accession Protocol. The Depository — or the Secretary-General in more recent Accession Protocols — is then mandated to communicate to the invited State the invitation to accede.

16. The Study on Enlargement stresses that [PP slide 3]:

> "Decisions on enlargement will be for NATO itself . . . Ultimately Allies will decide by consensus whether to invite each new member to join according to their judgment of whether doing so will contribute to security and stability in the North Atlantic area at the time such decision is made . . . No country outside the Alliance should be given a veto or *droit de regard* over the process of decisions."[18] [PP slide 4]

17. Consistent with the rule of decision-making in the Alliance, bilateral agreements of NATO members with third States of whatever kind are in no way opposable to decision-making in NATO. If it were otherwise, the treaty practice of a NATO member could destabilize the Alliance and impede the conduct of its business and a third State could readily obtain unilateral influence

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[15]*NATO Handbook, ibid.,* p. 189.

[16]Press Release NAC-S(99)66, *Membership Action Plan (MAP),* dated 24 Apr. 1999, Chap. I, para. 2 *(c).*

[17]*NATO Handbook, idem,* p. 189.

[18]*NATO Handbook Documentation, idem,* p. 339.

over collective NATO decisions, in effect exercising the very *"droit de regard"* which the Alliance has explicitly excluded.

18. Admission to membership requires multiple affirmative steps by NATO allies. Each step is performed either by consensus in its initial phases — for example, preparation for invitation for accession negotiations as dealt with under the MAP — or by unanimity at a later stage — for example, signature and acceptance of ratification of the Accession Protocol. The Alliance continues to consider the candidacy until an affirmative decision can be reached.

V. THE APPLICANT'S PARTICIPATION IN THE MAP

19. Let me now turn to the Applicant's participation in the MAP. In 1999, the Applicant began its participation in the MAP. In the various MAP Progress Reports on its candidature, the Alliance stressed the need for full compliance with the undertakings required for membership in NATO, including "good neighbourly relations" with all NATO members and the need to resolve any "outstanding issues".

20. From the beginning of this process, it was well known that the Applicant's difference with Greece over its name was an "outstanding issue" that would have to be resolved before it would receive an invitation to accede.

21. In early 1999 Prime Minister Georgievski in a letter sent to the Foreign Minister of Greece stated that [PP slide 5]:

> "the upgrading of our relations with the European Union and NATO aiming at the integration of my country to both organizations depends to a large extent on the support of the Hellenic Republic and the solution of pending issues".

The Prime Minister continued: "The only existing bilateral difference between our countries is referred to Article 5 of the said Accord." Accordingly, at that time when the Applicant began its participation in the MAP, it understood that the resolution of pending issues, specifically the difference over the name, was a necessary condition for its integration into NATO.

22. The NATO Riga Summit Declaration of 29 November 2006 provided that [PP slide 6]:

> "In the Western Balkans Euro-Atlantic Integration, based on solidarity and democratic values remains necessary for long-term stability . . . This requires co-operation in the region, good-neighbourly relations, and working towards mutually acceptable solutions to outstanding issues."[19]

The Declaration, which was carefully drafted, made it clear that good-neighbourly relations and the resolution of outstanding issues was a condition for Euro-Atlantic integration.

23. In its Final Communiqué at the Ministerial Meeting in Brussels on 7 December 2007, the North Atlantic Council stated, in relation to the Applicant, that [PP slide 7]: "In the Western Balkans, Euro-Atlantic integration . . . involves . . . good-neighbourly relations, and mutually acceptable, timely solutions to outstanding issues . . ."[20].

24. The Applicant should have noticed the insertion of the word "timely" before the word "solutions" in the NATO Ministerial Communiqué. This was the last public Ministerial document to be issued before the NATO Bucharest Summit. It was not a mere coincidence but it served as a strong warning if the Applicant really wished to be invited for accession negotiations at the forthcoming NATO summit.

25. The Applicant could have also been under no misapprehension that the "resolution of outstanding issues" as a condition to join the Alliance included the resolution of the name issue. During a joint press conference with Prime Minister Gruevski, the then Secretary General of NATO Mr. Scheffer referred to the Communiqué as follows [PP slide 8]:

> "Euro-Atlantic integration . . . demands and requires good neighbourly relations and it is crystal clear that there were a lot of pleas around the table to find a solution to the name issue . . . I would not give you a complete report if I would not say referring to the communiqué by the way of the NATO Foreign Ministers last December where there is this line on good neighbourly relations and the name issue."[21] [PP slide 9]

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[19]NATO Press Release (2006) 150, *Riga Summit Declaration, Issued by the Heads of State and Government participating in the meeting of the North Atlantic Council in Riga on 29 November 2006*, para. 28.

[20]NATO Press Release (2007) 130, *Final Communiqué. Ministerial meeting of the North Atlantic Council held at NATO Headquarters Brussels*, 7 Dec. 2007, para. 14.

[21]Joint Press Point with NATO Secretary General Jaap de Hoop Scheffer and the Prime Minister of the former Yugoslav Republic of Macedonia, Nikola Gruevski, 23 Jan. 2008, available at: www.nato.int/cps/en/natolive/opinions_7381.htm.

26. In other words, NATO considered the resolution of the name issue to be a "performance-based standard"[22] in the context of good-neighbourliness, which the Applicant would have to satisfy before being invited to join the Alliance. This was the collective position of NATO Foreign Ministers at the Brussels meeting on 7 December 2007. It was maintained throughout their consideration of the Applicant's candidacy.

27. On 23 January 2008, the Permanent Representatives of NATO discussed the most recent MAP Progress Report with Prime Minister Gruevski. The Applicant was given a full opportunity to present to the North Atlantic Council its progress in fulfilling the MAP criteria. Numerous delegations intervening at that Council meeting made reference to the need to resolve the name issue before the Applicant would be invited to accede.

28. Prime Minister Gruevski, responding to the Ambassadors, admitted the need to resolve the name issue with Greece. In a Joint Press Conference with the Secretary General of NATO he declared publicly that: "the main issue that many of the Ambassadors mentioned is potential risks and the issue that has to be solved is the name issue with Greece where many of them said that it's necessary to intensify the discussions"[23].

Thus resolution of the name issue would be a determining factor; moreover, this was a requirement set forth by NATO as a whole.

VI. THE BUCHAREST DECISION

29. Let me now turn to the Bucharest decision. On 2-4 April 2008, NATO member States met in Bucharest. The Applicant would have the Court believe that, by that time, it had fulfilled all NATO accession criteria and that it was only the intransigent insistence of one NATO member, based on what the former Yugoslav Republic of Macedonia dismisses as a "trivial" issue, which prevented it from receiving an invitation to accede. The Bucharest Summit decision, however, was clear as to what prevented the Applicant from immediate accession to membership. The Alliance

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[22]Statements of Foreign Minister of Greece Ms Bakoyannis and NATO Secretary General Mr. Scheffer following their meeting, dated 3 Mar. 2008, available at http://www.mfa.gr/www.mfa.gr/Articles/en-US/04032008_ALK1539.htm: Counter-Memorial, Ann. 133: "This is a performance-based process."

[23]Joint Press Point with NATO Secretary General Jaap de Hoop Scheffer and the Prime Minister of the former Yugoslav Republic of Macedonia, Nikola Gruevski, 23 Jan. 2008, available at: www.nato.int/cps/en/natolive/opinions_7381.htm.

at Bucharest applied its own well-known criteria under its own long-standing procedures. The NATO decision of 2008 reflected the Allies' concern that the continuation of the name issue was an impediment to good-neighbourly relations in the region; and that, if brought within NATO, that issue would interfere in the decision-making procedures of the Alliance and jeopardize the solidarity necessary to its functions as an integrated military organization.

30. NATO's decision at Bucharest did not close the door to the Applicant's future membership. On the contrary, the decision made clear that an invitation "will be extended" to the former Yugoslav Republic of Macedonia once the name issue has been resolved, and there is no longer any doubt as to the Applicant's ability to maintain "good neighbourly relations", in accordance with the duties of all member States and with the operational necessities of the Alliance.

VII. NATO'S DECISIONS AFTER BUCHAREST AND THE RELEVANCE OF THE DIFFERENCE TO PEACE AND SECURITY

31. Mr. President, since Bucharest, Greece and other NATO Allies have continued to work toward an eventual integration of the Applicant into the Alliance. At its meeting in Brussels on 3 December 2008, the North Atlantic Council again discussed the possibility of extending an invitation to it[24]. Paragraph 17 of the Final Communiqué reiterates: "the agreement of Heads of State and Government at the Bucharest Summit to extend an invitation to the former Yugoslav Republic of Macedonia as soon as a mutually acceptable solution to the name issue has been reached . . .".

32. This position was restated in the NATO Strasbourg/Kehl Summit Declaration of 4 April 2009[25], and again in the NATO Lisbon Summit Declaration of 20 November 2010.

33. The unchanged wording repeatedly adopted by the Council at its highest level is telling. The Allies recognize that the difference over the name and its security-related ramifications would impede the life of the Alliance, if accession came before a resolution of the difference was achieved. NATO is clear that an aspiring State must adhere to all Alliance principles, including the

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[24]NATO Press Release (2008) 153, *Final Communiqué, meeting of the North Atlantic Council at the level of Foreign Ministers held at NATO Headquarters, Brussels,* 3 Dec. 2008.

[25]NATO Press Release (2009) 044, *Strasbourg/Kehl Summit Declaration Issued by the Head of State and Government participating in the meeting of the North Atlantic Council in Strasbourg/Kehl on 4 Apr. 2009*, para. 22.

principle of good-neighbourly relations. The Applicant, by indefinitely postponing the resolution of an important bilateral difference, has failed to demonstrate fealty to the principle.

34. The future of the Applicant in NATO and the necessity of the resolution of the outstanding difference has been recognized and properly understood since 2008 within the Alliance and without. For example, as recently as last month, the Vice President of the United States and the Secretary-General of the United Nations, independently, articulated that the settlement of the difference is central to further progress in the Applicant's Euro-Atlantic integration, including membership in NATO. Vice President Biden said that he hoped: "that Macedonia and Greece resolve together the longstanding 'name issue' so that Macedonia can move forward on seeking NATO membership and fulfilling its Euro-Atlantic aspirations"[26].

Secretary-General of the United Nations Ban Ki-moon noted [PP slide 10] that Mr. Matthew Nimetz, the Secretary-General's Personal Envoy, "is continuing to meet with the parties to have a mutually agreeable solution of this name issue"[27].

The Secretary-General further noted that he has been

> "urging both government leaders that this name issue should be resolved as soon as possible, [for] their own national government aspirations and also their agendas to join the European Union and NATO. There are many important issues, therefore all these issues should be addressed as soon as possible for peace and stability in the region"[28].

These senior officials have been clear that the name issue is connected inseparably to peace and stability in the region, and its resolution is the *sine qua non* of the further progress which the Applicant seeks. [PP slide 11]

VIII. CONCLUDING REMARKS

35. To conclude, Mr. President, the NATO Bucharest Summit decision regarding the deferment of the Applicant invitation to begin the accession process until a mutually acceptable solution to the name issue has been reached was a unanimous decision taken by the Allied Heads of State and Government. In that decision, the Allies reiterated by consensus that the continuation of

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[26]Readout of the Vice President's Meeting with Prime Minister Gruevski — 16 Feb. 2011: http://www.whitehouse.gov/the-press-office/2011/02/16/readout-vice-presidents-meeting-prime-minister-gruevski-macedonia.

[27]Secretary-General's remarks to the press following his briefing of the Security Council —8 Feb. 2011: http://www.un.org/apps/sg/offthecuff.asp?nid=1719.

[28]*Ibid*.

the dispute over the name issue was a substantive impediment to the admission of the Applicant to NATO. This collective decision of the Alliance was in accordance with the specific character of the Washington Treaty as a closed multilateral treaty and the specific character of NATO as an integrated military alliance whose primary objective is to enhance and maintain the military and political security of a particular region, through preparedness and solidarity among its member States. At the Bucharest Summit NATO's member States said, collectively, as they had said before, that "a mutually acceptable solution to the name issue"[29] is a basic condition which must be fulfilled, if the Alliance is to invite the Applicant to assume the full obligations of a NATO member State.

36. Mr. President, distinguished Members of the Court, the Applicant attempts to convince the Court that Greece had given its consent in advance to the Applicant to become a full member of a closed military Alliance by concluding a bilateral agreement in 1995, irrespective of intervening events in the 13 years before Bucharest, irrespective of criteria expressly articulated by the Alliance, irrespective of the general requirement of solidarity of the Allies, irrespective of the long-established modes of selection of candidates, irrespective of the *modus operandi* of NATO for reaching unanimous and collective agreements. This reflects neither the letter nor the spirit of the Interim Accord of 1995 — much less the letter or the spirit of the rules governing admission to NATO.

37. The reality is that all that Greece did before or during Bucharest was to fulfil its role as a NATO member in accordance with the principles, provisions and practices of the consultation process which is the single tool of the Alliance to arrive at collective decisions, decisions which can be neither preordained nor imposed by third parties.

IX. OUTLINE OF PLEADINGS

38. Mr. President, distinguished Members of the Court, may I conclude my presentation by briefly outlining the oral pleadings now to be presented on behalf of Greece.

39. First, Professor Georges Abi-Saab will appear before you to consider the contents and the overall characteristics of the Interim Accord. He will be followed by

[29] Memorial, Ann. 65: Bucharest Summit Declaration, 3 Apr. 2008, para. 20.

Professor Michael Reisman, who will address the question of the jurisdiction of the Court in the present case. Finally today, Professor Alain Pellet will start with our observations concerning the admissibility of the Applicant's request and the judicial function of the Court.

40. Tomorrow morning after Professor Pellet, Professor James Crawford will present our position in respect of the interpretation of Article 11, paragraph 1, of the Interim Accord; and Professor Reisman, in respect of the meaning of Article 22 of the Interim Accord, and its relevance to Article 11. Then, Professor Crawford will address you again, to consider the application of Article 11, paragraph 1, to the facts in the present dispute. Professor Pellet then will address breaches by the Applicant of Articles 5 and 11 of the Interim Accord.

41. Tomorrow afternoon, Ms Telalian will address breaches by the Applicant of Article 6, paragraph 2, and Article 7 of the Interim Accord; Professor Pellet will then set out the legal consequences which follow from these breaches. He will be the last of our counsel to speak during the first round of oral arguments by Greece.

42. Mr. President, Members of the Court, thank you very much for your attention.

The PRESIDENT: I thank Ambassador Georges Savvaides, Agent of Greece, for his statement. Now I give the floor to Professor Georges Abi-Saab to make his presentation.

Mr. ABI-SAAB:

THE INTERIM ACCORD

1. Mr. President, Members of the Court, it is a great honour and privilege for me to appear before you once again to present the Hellenic Republic's views in the present case, and more particularly as concerns the Interim Accord concluded between Greece and the Applicant on 13 September 1995; an agreement that largely governs the dispute before you.

The road to the Interim Accord

2. The Applicant portrays a dispute before you as being exclusively limited to the interpretation and implementation of Article 11 (1) of the Interim Accord.

However, this text cannot be properly interpreted in clinical isolation, that is in total detachment from its immediate context, which is the other provisions of the Interim Accord and related instruments, as well as the larger context that surrounded its conclusion.

3. Ms Telalian, the Agent of the Hellenic Republic, has explained in some length, in her introductory remarks, the importance and real dimensions of the name issue to Greece.

I would like to relate briefly what she said to the circumstances that led to the conclusion of the Interim Accord, which would shed light on the object and purpose of that agreement and the legal functions the Parties expected it to perform.

4. First of all, one has to recall that most of the historical and geographic Macedonia lies within the present Greek boundaries and constitutes a sizeable part of Greece's national territory; its inhabitants being an important component of the Greek national community; and that the historic and cultural heritage and symbols of Macedonia form an essential part of Greece's historic and cultural patrimony and defining elements of its national identity.

5. With the disintegration of Yugoslavia, the emergence of the Applicant as an independent State, in September 1991, was fraught with strong irredentist tendencies and pretentions, which were expressed, not only by words and deeds both on the official and the popular levels, but went as far as being enshrined in its own constitution and its flag. These pretentions were epitomized in the name that the Applicant chose for itself.

6**.** In these circumstances, it was natural for Greece to feel alarmed by these irredentist tendencies and pretentions, and to seek effective guarantees of their termination and non-recurrence, before recognizing the Applicant in its new status and establishing normal diplomatic and good-neighbourly relations with it. The first and foremost such guarantee was for the new State to have a name that does not convey on its face the pretention of englobing the whole geographic and historical Macedonia.

7. These concerns were clearly expressed in the letter of the Permanent Representative of Greece to the President of the Security Council on the eve of the adoption of resolution 817 on 7 April 1993.

8. In his letter, the Greek Permanent Representative wrote:

> "My Government considers the three main elements of the resolution, namely the settlement of the difference over the name of the Applicant State, the adoption of appropriate confidence-building measures and the procedure for admitting the new State to the UN under a provisional name, an integral and indivisible package which alone can resolve the outstanding difference between Greece and the new Republic." (Rejoinder, Ann. 59.)

9. Security Council resolution 817 addressed these concerns. Thus, while recognizing that the "dispute . . . over the name of the State . . . needs to be resolved in the interest of the maintenance of peaceful and good neighbourly relations in the region", it urged the Parties to continue co-operating with the Co-Chairmen of the Steering Committee of the International Conference of the former Yugoslavia, Mr. Cyrus Vance and Lord Owen; and directed the Secretary-General to report to it on the results of their efforts.

10. Just over a month later, Mr. Vance and Lord Owen submitted to the Parties a draft treaty which would have settled the dispute between them by resolving the name issue, but the two Parties rejected the proposed name.

11. Thereafter, the United Nations Secretary-General, pursuant to Security Council resolution 845 (1993), appointed Mr. Vance as his Special Representative, who continued his intermediation for another two years before the Parties finally reached an agreement on the Interim Accord.

The structure and functions of the Interim Accord

12. This brings me to the structure and functions of the Interim Accord.

In the absence still of an agreement between the Parties on the name, the Interim Accord's more modest purpose was to bring them to agree at least on a strategy for the resolution of this issue, while providing a provisional formula that allows, in the meantime, for normalization of their relations to the extent possible in these circumstances, until a mutually acceptable final solution to the name issue is reached.

13. Accordingly, the provisions of the Interim Accord fall, from a substantive point of view, into three categories, which I shall review very briefly.

14. The first category consists of *provisions concerning the obligation to settle and the modalities of settling the dispute over the name:* these are mainly Article 5 (1), which imposes on the Parties a positive obligation to continue negotiating under the auspices of the Secretary-General of the United Nations, with a view to reaching a final agreement to the name issue. And whilst it is an obligation of "means" or "best efforts" — *une obligation de moyen* — it is a "hard" obligation. An obligation to engage in good faith in "meaningful negotiations" as defined by this Court in the *North Sea Continental Shelf* cases.

15. This category of provisions also includes the exception, at the end of Article 21 (2), that establishes the jurisdiction of the Court over disputes on the interpretation or implementation of the Interim Accord, which reads, "except for the difference referred to in Article 5, paragraph 1". This exception highlights the exclusive character of the procedure provided for in Article 5 (1) for the settlement of the dispute over the name; excluding even its judicial settlement by this august Court — whether directly or indirectly —; and *a fortiori* by unilateral acts or conduct, in order to create a fait accompli, pre-empting the outcome of any meaningful negotiations.

16. The *second category* of provisions, are those relating to the normalization of the relations between the two Parties to the extent possible, given the persistence of the difference over the name. These provisions are taken almost literally from the Vance-Owen draft, and cover a wide range of subjects, including confidence-building measures and assurances, given the tensions between the Parties. Some of these provisions are of a general nature, whilst others are specially geared to the particular circumstances of the situation.

17. Thus, by Article 1, Greece recognizes the Applicant, under the acronym FYROM or Former Yugoslav Republic of Macedonia and the Parties undertake to establish diplomatic representations.

18. Articles 2 to 4 confirm the existing boundary between the Parties as enduring and inviolable, and express their respect of the sovereignty, territorial integrity and political integrity of each other, as well as their commitment to refrain from the threat or use of force, or the assertion of any claims to change the frontier, or claims to any part of the territory of the other. In the same

vein, Article 9, paragraph 2 states that no provision in the relevant human rights instruments shall be interpreted as giving a right to take any action contrary to the aims and principles of the United Nations Charter, including the principle of territorial integrity of States.

These are in fact restatements of obligations under general international law, addressed to the particular concerns of the Parties, more particularly those of Greece, about irredentism and intervention.

19. Other provisions contain assurances related to the particular circumstances of the situation. Thus, Article 6 is a declaration by the FYROM that nothing in its constitution, and in particular the Preamble and Article 3, as well as Article 49 as amended, can or should be interpreted as laying claim on territories beyond its existing borders; or as constituting a base for the FYROM to intervene in the internal affairs of another State to protect persons who are not citizens of the FYROM; and that this interpretation of the constitution in the Interim Accord will not be superseded by any other.

20. Article 7, also of special importance to Greece, bears, in its first paragraph, the obligation of the Parties to prohibit hostile activities and propaganda by State-controlled agencies and to discourage acts of incitement to violence, hatred or hostility by private entities. The second paragraph of this Article bears a prohibition for the FYROM "to use in any way the symbol that was" displayed in its national flag prior to the entry into force of the interim agreement, which is in fact the Sun of Vergina. Finally, the third paragraph of Article 7 institutes a proceeding for handling claims of violations of the preceding paragraph, i.e., claims that "one or more symbols constituting part of its historic or cultural patrimony is being used by the other Party". But this procedure is limited to these claims only under Article 7 and does not concern claims of violations under any other provisions of the Interim Accord.

21. Finally, in this sub-category of special assurances, the Parties undertake, in Article 8, not to impede the movement of people or goods between their territories or through their territory to the territory of the other Party. This is a crucial guarantee given by Greece to the FYROM, which is a land-locked State.

22**.** The *third category* of provisions of the Interim Accord are those which are "provisional", in the sense that they are contingent on the resolution of the name issue.

23 These are: Article 1, paragraph 1, the recognition by Greece of the FYROM under this acronym; Article 23, paragraph 2 concerning the duration of the Accord, "until superseded by a definitive agreement". But foremost among these provisional Articles are Articles 5, paragraph 2, and 11, paragraph 1 which is at the heart of the present case.

24 These two provisions provide the formula that allows relations between the Parties to take place in spite of the persistence of the difference over the name, through the device of the provisional designation or name, by regulating its use both in the purely *inter-se* bilateral relations, i.e., Article 5, paragraph 2 or in multilateral settings, i.e., Article 11, paragraph 1.

It is particularly through these two Articles that the Interim Accord functions as a *modus vivendi*, a provisional arrangement serving as a stop-gap, and at the same time, as a "holding operation" preserving the positions and interests of the Parties in the state in which they were at the time of the adoption of the Interim Accord, until the dispute is definitively resolved through the exclusive procedures provided for in that Accord itself.

25. This protective function of the interests and positions of the Parties is exercised, however, in different ways depending on the setting. In the exclusively *inter-se* relations of the Parties, pursuant to Article 5, paragraph 2 and the two complementary Memoranda which were negotiated a month or so later, each Party agreed to refer to the Applicant by the name of its choice within its territorial jurisdiction and diplomatic premisses; but the other Party, beyond these limits, or when he is at the receiving end of communications, can revert to the other name. By contrast, in the purely multilateral settings, the preservation of the position of the Parties operates through the exclusive use of the provisional name in these settings, as is clear from the comparison of the texts of Article 5, paragraph 2 and 11, paragraph 1. This is why the analogy that counsel of the Applicant draws from Article 5, paragraph 2 to justify the use by the Applicant of its preferred name in international organizations, is patently wrong.

26**.** These three categories of provisions, though fulfilling different functions, are all intimately linked together as part of a single legal transaction, conveying an integrated legal strategy.

27. This strategy can be described as follows — it is a little bit complicated: that through the use of the device of provisional name, to normalize the relations between the Parties to the extent possible, given the persistence of the difference over the name; this being a means of buying time, while waiting for the obligation that the Parties undertook to negotiate in good faith, to be fully discharged, leading to an agreed solution over the name that is satisfactory to both Parties.

28. In order to fully implement this strategy, which thus reflects the object and purpose of the agreement, it becomes clear that the Accord had to fulfil simultaneously three functions:

29. First, a *modus vivendi* function, as a temporary or provisional arrangement, bridging a time-gap in the regulation of the controverted subject-matter between the Parties; and this by papering over it through the device of provisional name or denomination, allowing for relations between them to take place, to the extent possible before, and in the wait for a final settlement of the issue, through the exclusive procedure provided by the Interim Accord.

This characterization particularly applies to the third category of provisions of the Interim Accord — I just described those contingent on the resolution of the name issue. But in a way, all of the Interim Accord is provisional as, pursuant to Article 23 (2), its whole existence is contingent on reaching a final solution to the name issue.

Mr. President, characterizing the Interim Accord as a *modus vivendi* does not mean — and Greece has already written that in the Counter-Memorial — that it is less binding or not subject to the law of treaties, as my good friend Professor Sands contended and repeatedly said so, that we are saying that it is not subject to the law of treaties or exempt from the application of the law of treaties. *On the contrary*, as a *modus vivendi* the Interim Accord has to preserve and protect the delicate balance between all the rights, obligations and positions of the Parties throughout the interim period; rather than sanctuarizing one obligation and immunizing it from the consequences of circumventing and flouting the rest of the Interim Accord, and thus perturbing the balance of the whole legal transaction, as the FYROM has been doing all the time.

30. I come now to the second function that the Interim Accord is to fulfil, and this is the *settlement of disputes*' function, through the obligation of the Parties, pursuant to Article 5 (1) to engage in good-faith and *meaningful* negotiations as defined by the Court, with a view to reaching a final and mutually satisfactory agreement on the name issue.

31. Finally, there is the *protective* or *holding operation* function, that underlies and sustains the two others. This is because for the *modus vivendi* to be able to sustain a significant degree of normalization in the relations between the Parties notwithstanding and before the settlement of the controverted subject-matter between them, and to buy time for the dispute settlement function to produce its expected effect, it has to be "without prejudice" to the position of the Parties over that controverted subject-matter. In other words, it has to ensure that normalization does not undermine the possibilities of reaching a negotiated settlement or work itself out — or facilitate action — in favour of the position of one party to the detriment of the other.

32. Whence, the protective function of such a provisional arrangement — partaking of the same rationale as the *interim measures of protection* or more expressively in French "les mesures conservatoires", because they conserve — which is to maintain or preserve the subject-matter of the dispute in the state in which it was at the time of the adoption of the arrangement or measure, so that it neither evolves through accretion of practice, nor is deliberately changed through unilateral action or otherwise in favour of one party or the other; particularly under the guise of saying we are implementing the provisional arrangement; and this until the final settlement of the controversy is reached.

33. These three functions of the Interim Accord are highly interdependent. Particularly, the "holding operation" or "protective" function, is a *sine qua non* and a condition precedent, for the proper performance of the other two functions.

34. This functional analysis of the Interim Accord is very relevant to its interpretation. It sheds light on the close inter-connection between its various provisions in spite of their different functions within the agreement, and hence informs their interpretation. But this conclusion is strongly contested by the Applicant, which brings me to the FYROM's method of interpreting the Interim Accord.

Mr. President, Members of the Court.

The PRESIDENT: Mr. George Abi-Saab, I think that it is about the time when we should have a short coffee break. As you are still continuing, I think there is a sizeable amount of time that you would need for your presentation. If that is acceptable to your side ?

Mr. ABI-SAAB: I am in the middle, and this is a good way of stopping. And I would also appreciate a cup of coffee. Thank you, Mr. President.

The PRESIDENT: The Court adjourns for 10 minutes, until a quarter to five.

The Court adjourned from 4.35 to 4.50 p.m.

The PRESIDENT: Please be seated. Now the Court resumes its session and I invite Professor Georges Abi-Saab to continue his presentation.

Mr. ABI-SAAB:

The FYROM's method of interpreting the Interim Accord

35. Thank you, Mr. President. I was going to speak about the FYROM's method of interpretation. In its efforts to represent Greece's obligation under Article 11, paragraph 1, as "absolute" and totally isolated from the rest of the Interim Accord, the FYROM follows a method of interpretation radically at variance from the general rule of interpretation codified in Article 31, paragraph 1, of the Vienna Convention.

36. First, in the textual interpretation of Greece's obligation "not to object" under the first clause of that paragraph, it adopts a very extensive approach that it then abandons completely for a very restrictive one when it comes to the interpretation of the suspensive condition of that obligation, prescribed in the second clause of the same sentence. But that is a subject which will be treated at length by my colleague Professor Crawford.

37. Secondly, it insists on interpreting the obligation not to object and the provision prescribing it, in total isolation from the rest of the treaty, purporting to disconnect it from its immediate context, which is the other provisions of the treaty; in other words jumping over the context consisting of the terms of the treaty itself, to land on its own truncated rendering of the object and purpose of the Interim Accord.

38. Finally, and for the same reasons, the FYROM strongly attacks Greece's characterization of the Interim Accord as a synallagmatic agreement. But first, I turn to the object and purpose of the Interim Accord.

The object and purpose of the Interim Accord

39. To start with a preliminary remark, I seem to have heard someone from the other side, on Monday or Tuesday, speak of the "object and purpose" of Article 11 (CR 2011/6, p. 27, para. 20), which would be a legal aberration. For a single provision, we can speak of its function or *effet utile* within the treaty, but not of the object and purpose which belong to the treaty as a whole, providing its diverse provisions with a common sense of direction and informing their coherent interpretation.

But this goes down well with the FYROM's strategy of "carving out" — I am borrowing the term from Professor Murphy — carving out Article 11 (1) from the Interim Accord and sanctuarizing it from being infected by the fate of the other provisions, a strategy I will come back to later on.

40. Thus, according to the FYROM, the object and purpose of the Interim Accord as a whole was "to find a way to allow for pragmatic cooperation bilaterally and multilaterally on an interim basis" (Reply, para. 4.63); as if the sole purpose of the Interim Accord was to enable the FYROM to obtain recognition and co-operation from Greece and clear access to international organizations, with nothing given in return.

In fact, Professor Sands on Tuesday used almost the same terms when he said that the Interim Accord "was intended to provide for the immediate normalization of relations between the two Parties, and to allow the Applicant to join international organizations" (CR 2011/6, p. 53, para. 11. Cf. CR 2011/5, p. 30, para. 14; p. 32, para. 32; Prof. Murphy, CR 2011/6, p. 22, para. 6).

41. Elsewhere, in the Reply, the FYROM writes:

> "The whole point of the Interim Agreement was to create certain rights and obligations of the Parties that would operate even in the absence of a negotiated settlement of the difference over the name." (Reply, para. 4.2.)

Again, this formulation suggests that the Interim Accord is based on the premise that, in order to be able to operate, it must neutralize, that is, set aside, the question of reaching "a negotiated settlement of the difference over the name"; or, in other words, that this question lies outside the ambit and the concerns of the Interim Accord. But as we have seen, the very text of the agreement clearly shows, on the contrary, that the future negotiated settlement lies at the heart of the concerns of the Interim Accord and constitutes one of its main functions.

42. Far from being an accurate description of the object and purpose of the Interim Accord, these formulations by the FYROM are truncated renderings of the objectives of the agreement, limiting them to the benefits the FYROM expected to draw from it, while ignoring the benefits, in terms of commitments and obligations, it had to concede in exchange, to make the legal transaction acceptable to Greece.

43. For the FYROM, what counted most was to obtain recognition and the normalization of its relations with Greece, both bilaterally — Greece being its biggest neighbour and, as a land-locked State, its bridge to the sea — and multilaterally, in order to facilitate its access to international and regional organizations and institutions.

44. For Greece, what counted most, was to secure the abandonment by the FYROM of its irredentist tendencies and pretentions, not only by formal statements in the treaty — concerning territorial integrity, hostile propaganda, the appropriation of national symbols, etc. — but first and foremost by guaranteeing in the treaty itself that a satisfactory agreement would be reached over the name; that name would stop serving as a beacon beaming continuously the same irredentist ambitions; and this through meaningful good faith negotiations.

45. It was thus essential to accommodate simultaneously these concerns and interests: the normalization of relations sought by the FYROM through the *modus vivendi* function, and the negotiated final settlement sought by Greece through the dispute settlement function; both functions being guaranteed by the "holding operation" or "protection function", barring the way in the interim to unilateral action and fait accompli.

46. These three functions constitute together the object and purpose of the Interim Accord, not only the first, as contended by the FYROM. And it is their combination that made the conclusion of the Interim Accord possible, and also explains its synallagmatic character.

The synallagmatic character of the Interim Accord

47. I had alluded briefly before to the question of synallagmatic character, a characterization which the FYROM strongly attacks.

It first attacked the concept itself by describing it sarcastically — together with "holding operation" — as a "talismanic characterization".

Yet, this is an elementary classification known in all legal systems. It simply designates agreements by which parties exchange commitments and considerations; by contrast to "unilateral contracts", by which one party only assumes an obligation towards the other. In other words, these are agreements based on reciprocity and, as we all know, reciprocity is at the basis of the law of contracts and the law of treaties.

48. In a course given in the Academy in 2002, my former colleague Hugh Thirlway, who is very well-known in this Court, explains the municipal law origins of the concept as follow:

> "In national systems of law, a legal obligation of non-delictual nature normally arises from a synallagmatic contract. In English law, the general rule is that a contractual obligation is not recognized as enforceable in the absence of a 'consideration', that is to say what the International Court refers to as a '*quid pro quo*' . . . French law arrives at a very similar position by a different route: every contractual obligation must have a '*cause*', and in a synallagmatic contract, the obligation of each party is the *cause* of the obligation of the other." (H. Thirlway, "Concepts, Principles, Rules and Analogies: International and Municipal Legal Reasoning", in *RCADI*, Vol. 294, 2002, p. 340).]

Very simple notions.

49. Unable to undermine the concept, the FYROM uses a whole range of arguments to go around it, starting by denying the synallagmatic character of the Interim Accord. It then retreats to claiming that Article 11, paragraph 1, is a self-contained régime — or what can be called a self-contained régime — that does not allow for the suspension of Greece's obligations "not to object", except in the unique contingency provided for in the second clause of this provision, which is that "if and to the extent [the Applicant] is to be referred to … differently than" as FYROM. We heard the same on Monday and Tuesday from both Professors Sands and Murphy. And if I can borrow again from Professor Murphy, the Applicant thus neatly "carves out" Article 11 (1) — "out" of the Interim Accord, thus immunizing it from all other possible grounds of stay of execution, suspension or termination under the law of treaties or general international law that may attain or originate from the rest of the Interim Accord.

50. Finally, the FYROM argues that the obligations allegedly violated by the FYROM are not synallagmatic, or are "unconnected to each other" (Reply, para. 5.52) or not directly linked as *"quid pro quo"* (Reply, para. 5.81). Elsewhere, the argument is more explicit, and I quote from the Reply:

> "While the Interim Agreement as a whole obviously imposes obligations on both Parties in different ways, in no sense are these obligations 'synallagmatic', if by that it is meant that the obligation is dependent upon the other Party's fulfilling of some other obligation." (Reply, para. 4.74.)

However, in a footnote at the end of this statement, the Applicant qualifies it as follows — I quote again:

> "Of course, if one Party were to commit material breach of a provision, the other Party might be able to suspend or terminate its obligations under that or a different provision, provided relevant steps are taken under the law of treaties . . ." (Reply, p. 116, para. 4.74, footnote 255.)

51. First, two remarks on this footnote. The first is that it confuses substantive grounds justifying a claim of suspension or termination and the procedure to be followed to prosecute such a claim. A substantive ground either exists or it does not exist, regardless whether the claim is prosecuted or not. And if by "relevant steps" is meant the prior notification requirement by Article 65 (1) of the Vienna Convention, and as my colleague Professor Pellet will demonstrate later on, this is not required when the claim is put forward as a defence or a shield, pursuant to Article 65, paragraph 5, of the same Vienna Convention. A point we have already raised twice in our written pleadings, and which also takes care of all the noise the Applicant makes about *ex post facto* protests, but which it chose to ignore — not to say anything about it.

Secondly, and more importantly, the footnote constitutes a clear admission of the synallagmatic character of the agreement. For what can be the legal basis and rationale, in case "one party were to commit material breach of a provision", for the claim of the other party "to suspend or terminate its obligations under that or a different provision" of the treaty; what can be the rationale if not reciprocal interdependence and community of destiny of these obligations and the provisions from which they flow, in sum, the synallagmatic character of the agreement?

52. However, the most serious legal flaw in this whole line of argument by the FYROM, that the obligations allegedly violated by it are not "synallagmatic", is precisely that it uses this characterization as if it were the description of a particular right, obligation or commitment; that which is legally and conceptually wrong.

53. This is because what is synallagmatic is the agreement itself as such or as a whole, and not the individualized rights and obligations that flow from its provisions. And what makes it synallagmatic is not that the rights and obligations it establishes and the provisions from which

they flow, are explicitly related by their own terms, or refer to each other. It is rather the fact that the agreement constitutes a legal act or a transaction, a *negotium* by which each party assumes its bundle of commitments or obligations, which constitutes the *quid*, in exchange for the commitments assumed by the other party, the *quo*. For each party, the bundle of commitments it receives by the operation of the agreement constitutes the "cause" or the "consideration", in the technical sense, of the commitments and obligations it assumes by virtue of the same obligation towards the other party.

54. What ties the two bundles together is the legal transaction itself that confers legal sanction on the exchange of considerations and establishes a community of legal destiny between the components of the two bundles. Thus, the violation of a significant obligation, in the bundle assumed by one party, leads to the frustration of the legal transaction as a whole, and cannot but affect, by feed-back as it were, the commitments assumed by the aggrieved party vis-à-vis the party responsible for the violation.

55. The Interim Accord provides a clear example of such legal transaction, whereby Greece recognized the FYROM and accepted to establish diplomatic relations with it, in spite of the persistence of the dispute over the name, and undertook to guarantee the freedom of movement of persons and goods, as well as "not to object" to the admission of the FYROM in international organizations, as long as it is referred to therein, for all purposes, under the provisional name. These are substantial concessions offered by Greece to the FYROM.

56. The FYROM, on its part, undertook to change its flag, renounce irredentist claims, repress all related activities. But above all, it undertook to negotiate in good faith with a view to reaching a final solution to the name issue. These were concessions that the FYROM agreed to make to Greece in exchange of the ones it received.

57. The Interim Accord, while purporting to satisfy these legal interests through its *modus vivendi* function for normalization, and its dispute settlement function for the meaningful good faith negotiations, had to guarantee their simultaneous and stable performance through its third "protective" function of "holding operation", or interim measure of protection. This function was thus meant to keep the name issue in suspense, not so much in the inter-State relations between the Parties, where each was allowed, pursuant to Article 5, paragraph 2, to maintain its position until

reaching agreement, but on the multilateral level, by the exclusive use of the provisional name or designation until reaching, through "meaningful negotiations", a mutually satisfactory solution.

58 That was the balance struck by Article 11 (1) of the Interim Accord, and the condition under which Greece accepted that Accord and the obligations that came with it. And it was that balance that the Interim Accord had to keep and guarantee until a final agreement on the name issue is reached.

59. The attempt to use the Interim Accord, and more particularly Article 11 (1), as a shield, behind which to subvert that balance, destroys the very object and purpose of the Interim Accord. And, as my colleagues will show, this is exactly what the FYROM has been trying to do all along, through the flouting and systematic violation of the diverse articles of the Interim Accord, particularly Article 5, paragraph 1 and even the second clause of Article 11 (1) itself, while claiming that the obligation of Greece under the first clause of that same Article is absolute and totally detached from the fate of the rest.

I thank you, Mr. President and Members of the Court and, if I may, ask you to call on my colleague, Professor Reisman.

The PRESIDENT: I thank Professor George Abi-Saab for his statement. Now I invite Professor Michael Reisman to give his statement.

Mr. REISMAN:

JURISDICTION

1. Mr. President, Members of the Court, it is an honour to appear before you on behalf of Greece. I have the privilege of explaining why the claim which the Applicant has submitted falls outside the jurisdictional régime of the Interim Accord. Charged with analysing objections to jurisdiction, I will assume that Greece *did* object to Applicant's petition for membership in NATO. This is not an admission, but an assumption for purposes of analysis.

2. Two preliminary but related observations: first, counsel have suggested that had Greece been serious about its objections, it would have insisted on a separate, preliminary phase. Mr. President, Greece is entirely serious that this case is without jurisdiction and is inadmissible.

The decision to forego a separate phase was strategic. By not seeking a bifurcated procedure, with a separate, preliminary phase dedicated only to jurisdiction, neither Greece nor the Court is precluded from examining any part of the substantive record that could illuminate issues of jurisdiction and admissibility.

3. Second, and related to the previous observation, opposing agent and counsel have insisted, on more than one occasion, that this is a simple case. It is not a simple case. It is complex, as should be clear merely by looking at the jurisdictional clause, a provision which refers obliquely to an exception which is supposedly expressed in another provision which, rather than explaining the exception, refers, in turn, to a Security Council resolution, which itself was the outcome of a complex political process. Not simple.

The jurisdictional clause

4. I turn to the jurisdictional clause which is found in Article 21, paragraph 2. [Slide 2]

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

5. It is that last emphasized phrase, [slide 3] "except for the difference referred to in Article 5, paragraph 1" that is the starting-point of *jurisdictional* analysis. The "except for" phrase refers to Article 5 but when we turn to it, we find another allusion [slide 4]

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

6. Allusion again. Article 5, rather than defining the "difference" which is excluded by the "except for" phrase, effects a renvoi to Security Council resolutions 817 and 845. [Slide 5] In the third considerandum of resolution 817, the Council, before prescribing the condition under which the Applicant's bid for membership in the United Nations was to be forwarded to the General Assembly, notes [slide 6] "that a difference has arisen over the name of the State which needs to be resolved in the interest of the maintenance of peaceful and good-neighbourly relations in the region". That difference is to be negotiated but pending settlement of the difference over the name, the Security Council, in operative paragraph 2 of resolution 817, [slide 7]

> "*Recommends* to the General Assembly that the State whose application is contained in document S/25147 be admitted to membership in the United Nations, this State being provisionally referred to for all purposes within the United Nations as 'the former Yugoslav Republic of Macedonia' pending settlement of the difference that has arisen over the name."

[Slide 8] So, Mr. President, this supposedly "simple" clause requires a virtual odyssey to other parts of the treaty and, beyond it, to a resolution of the Security Council. The construction of this "simple" clause must take account, not only of the law of treaties but also the constitutional law of the United Nations.

7. Before I turn to those interpretations, I ask you, Mr. President, Members of the Court, to reflect on the threshold question: the trigger for the operation of the "except for" phrase. On Monday, Professor Klein argued for a contradictory approach: interpret half the clause broadly, the other half narrowly, rather than, as the Court has said, avoid both extensive and restrictive readings of jurisdictional clauses and interpret them correctly. The contradictory approach proposed by Professor Klein is not what the Applicant had said earlier. In its Application [slide 9] in 2008, it stated:

> "Upon the filing of the present Application, any matters in dispute between the Parties concerning the interpretation or application of Article 11 of the Interim Accord of 1995 are plainly subject to the compulsory jurisdiction of the Court. [Slide 10] *The subject of the dispute does not concern* — either directly or indirectly — *the difference referred to in Article 5, paragraph 1 of the Interim Accord* and, accordingly, the exception to jurisdiction provided for in Article 21, paragraph 2, . . . does not apply."

Consider those words. "[T]he subject of the dispute does not concern — either directly or indirectly — the difference referred to in Article 5." On Monday, Professor Klein attributed those words — critically I should say — to Greece[30]. They are, in fact, the Applicant's words, issued at the very outset of the case: but Greece agrees that if the dispute concerns "the difference" referred to in Article 5 "either directly or indirectly", then the "except for" phrase in the jurisdictional submission in Article 21 operates and the Court does not have jurisdiction. [Slide 11]

8. Does this case concern "directly or indirectly", the difference over the name? The Court may have remarked how many times on Monday Agent and counsel, while insisting that this "simple" case did not involve the name difference, were constrained to utter the "name" word: 93 times in some two hours. And could the Applicant have done otherwise? There is no way to say

[30]CR 2011/5, p. 58, para. 5 (Klein).

that the issues which the Applicant raises in this case do not "directly" and certainly "indirectly" concern the difference described in Security Council resolution 817, the difference over the name.

9. The Applicant, in spite of itself, had to acknowledge this fact in its Application. There, it accused Greece of violating Article 11, in that — it alleged — Greece "acted to prevent the Applicant from receiving an invitation to join NATO under the provisional designation of 'the former Yugoslav Republic of Macedonia'"[31]. Then, in the immediately following paragraph, the Applicant stated: [slide 12]

> "The Respondent has made clear, by its actions and subsequent statements, that the sole reason for its objection to the Applicant's membership of NATO was the difference between the Parties as to the Applicant's constitutional name. The Respondent has also made clear that it will continue to object to the Applicant's NATO membership, and prevent it from proceeding, until that difference is resolved permanently to its satisfaction." [Slide 13]

10. Now, as is already clear from our presentations today, this is a distortion of Greece's concerns and actions in the face of the Applicant's repeated violations of the Interim Accord. But the point is that the Applicant, in the very next paragraph, says "the subject of the dispute does not concern — *either directly or indirectly* — the difference referred to in Article 5, paragraph 1, of the Interim Accord".

Applicant's revised theory of jurisdiction

11. Mr. President, Members of the Court, as the Applicant in spite of itself makes clear, one cannot say that the subject of the dispute does not concern either directly or indirectly the difference over the name. And, Mr. President, the Applicant appreciates that fact. Which is why, in its Reply, the words "does not concern — either directly or indirectly", words, we assume, the Applicant had thought necessary in order to be inscribed on the Court's docket, now disappear. In their place, the Applicant introduces an entirely new standard, tailored, it hopes, to rescue it from its acknowledgement in its Application of the actual applicable test.

12. Instead of the words, "concern directly or indirectly", the Applicant now argues that the "except for" phrase relates only to the *resolution* of the difference over the name. In its Reply[32], the Applicant announces that it has "not referred to the Court for resolution of the difference over

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[31] Application, para. 9.

[32] Reply, para. 3.13.

[sic] name", and it advises the Court [slide 14] "the dispute that has been submitted to the Court does not require the Court *to resolve* the difference referred to in Article 5 (1), or to express any view on the matter . . .". [Slide 15] Thus, the standard "does not concern — directly or indirectly — has been hurried away in an embarrassed silence and in its place, the Applicant now prays the Court to read the "except for" phrase in Article 21, as if it said "'except for' *resolution of* the difference referred to in Article 5 (1)".

13. Mr. President, the Court will excuse me if I display once more the precise language of Article 21, paragraph 2. [Slide 16] As you can see, the "except for" phrase does not say "except for [the resolution of the] difference referred". [Slide 17] But those absent words are necessary for the Applicant's argument, if it is to evade the consequences of the "directly or indirectly" test whose authority it acknowledged when it commenced this case. [Slide 18]

14. Alas for the Applicant, those words are not to be found in Article 21. So in its Reply, the Applicant does the only thing it can; it ignores this inconvenient fact. In a most unusual interpretive exercise, the Applicant urges you to ignore the text and go directly to objects and purposes. All right?

15. When we turn to the Applicant's idiosyncratic conception of objects and purposes, we find that even it fails to help the Applicant in its quest for jurisdiction. Greece agrees with the Applicant when it says — and it says twice — "the Parties have established a particular and important role for the Court in assisting them to resolve disputes that might arise"[33]. And Greece agrees with the Applicant when it says: "It is plain that Article 21 (2) gives the Court a central role in ensuring that the parties comply with their obligations in the Interim Accord"[34]. But Greece rejects the Applicant's assertion that the ordinary reading of Article 21, Greece's reading, would have the effect of depriving the Court of jurisdiction over all matters in the Interim Accord because, the Applicant says in its Reply, "any dispute concerning any provision of the Interim Accord is necessarily related to the name issue"[35]. On Monday, counsel retreated from that position; the Applicant's position now is that Greece's interpretation would deprive the

[33]Memorial, para. 3.10; Reply, para. 3.12.

[34]Reply, para. 3.12.

[35]*Ibid.*, para. 3.15.

jurisdictional clause of "a considerable part of its practical effect"[36]. This new position, while at least acknowledging some effect for the "except for" phrase, is still incorrect.

16. Mr. President, Article 21 gives the Court an extensive — but not unlimited — jurisdictional role "in ensuring", and here I use the Applicant's words, "that the parties comply with their obligations in the Interim Accord". Moreover, the Interim Accord accomplishes these objects and purposes most effectively. Greece's interpretation in no way undermines the Court's role. The Applicant is simply wrong when it contends that Greece's interpretation of Article 21 — and again I use the Applicant's words — "would undermine[]" the central role of the Court" because — again, I use its words — "*any* dispute concerning *any* provision of the Interim Accord is necessarily related to the name issue"[37]. That is simply incorrect. The Interim Accord is a comprehensive *modus vivendi* as Professor Abi-Saab has just explained; disputes about compliance with a large number of its obligations which do not concern "the difference", whether "directly or indirectly" were clearly made justiciable. These matters, covering a large number of the provisions of the Interim Accord, have nothing to do with the difference over the name and are completely unaffected by Greece's interpretation.

17. Mr. President, on Monday, counsel used a slide to give the impression that jurisdiction over most of the Interim Accord will disappear if you give effect to the "except for" phrase. That is not correct. The "except for" phrase which the Parties inserted and which Greece submits you should respect, leaves a very substantial jurisdiction over disputes about provisions that do not "necessarily relate to the name issue".

18. Article 3 of the Interim Accord [slide 19] requires each party "to respect the sovereignty, territorial integrity and political independence of the other party". It prohibits each party from supporting "the action of a third party directed against the sovereignty, territorial integrity or political independence of the other Party". Would a dispute about this provision, in the Applicant's words, "necessarily relate[] to the name issue"?

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[36]CR 2011/5, p. 58, para. 5 (Klein).

[37]Reply, para. 3.15.

19. Article 4 [slide 20] requires the parties not to "assert claims to any part of the territory of the other Party or claims for a change of their existing frontier". Would a dispute under this provision "necessarily relate to the name issue"?

20. Article 6 [slide 21] requires the Applicant not to interpret its constitution so as to claim any territory not within its existing borders. Would a dispute about that "necessarily relate[] to the name issue"?

21. Article 7 [slide 22] requires the parties to "take effective measures to prohibit hostile activities or propaganda by State-controlled agencies and to discourage acts by private entities likely to incite violence, hatred or hostility against each other". Does that "relate[] to the name issue"?

22. Article 7, paragraph 2, requires the Applicant to "cease to use in any way the symbol in all its forms displayed on its national flag . . .". Does that "relate[] to the name issue"?

23. Article 8 [slide 23] requires the parties to "refrain from imposing any impediment to the movement of people or goods between their territories . . .". Would a dispute arising under this provision "necessarily relate[] to the name issue"? [Slide 24]

24. Mr. President, I need not review each provision of the Interim Accord over which the Court has jurisdiction. The point is clear. Whether one looks only at the few provisions which I have reviewed or proceeds to examine Articles 12, 13, 14, 17 or 20, respecting the "except for" phrase in Article 21 and declining jurisdiction in this case, does not undermine the Court's central role of ensuring that the Parties comply with those of their obligations which the Interim Accord *does* assign to the Court's jurisdiction. But explicitly and unequivocally, Article 21 does not assign jurisdiction "for the difference referred to in Article 5, paragraph 1". That "difference" is explicitly specified in only two provisions of the Interim Accord: in Article 5, as mentioned, *and, centrally for this case, in Article 11, paragraph 1. Disputes about these provisions will not fall within the Court's jurisdiction. All other disputes, arising under the Interim Accord and not concerning the difference over the name, will.*

25. Mr. President, the "difference" to which Article 21 refers concerned the difference over the name of the Applicant, as my colleagues explained earlier. It was then a matter of such acute political sensitivity to at least one — if not both — of the parties to the Interim Accord that, unlike

the rest of the Interim Accord, matters that concerned it — directly or indirectly — were *not* to be submitted to the decision of the Court. So the question for the Court is whether the Applicant's claim, which the Applicant insists is based only on Article 11, paragraph 1, concerns, in the Applicant's words, "either directly or indirectly — the difference referred to in Article 5, paragraph 1". And the answer to that question, in our view, is unmistakable. The action which the Applicant attributes to Greece in NATO concerns the difference described in resolution 817. The Applicant itself has acknowledged this fact in its Application and despite its efforts to cabin and conjure it away, it is central to this dispute. Accordingly, Greece submits that the Court does not have jurisdiction over the case by operation of Article 21.

Accepting jurisdiction would effectively resolve the name difference and undermine the Interim Accord

26. Mr. President, a moment ago I quoted the Applicant's words: [slide 25] "In short, the dispute that has been submitted to the Court does not require the Court to resolve the difference referred to in Article 5 (1), or to express any view on that matter . . .". I read this as an acknowledgement by the Applicant that if the Court's decision would resolve the difference over the name or would involve expressing any view on the matter, the Court would not have jurisdiction. [Slide 26] Even if one were to accept the Applicant's invention and were to interpolate those absent words into Article 21 so as to allow the "except for" phrase to be read as if it had been designed by the Parties only to limit jurisdiction for actions which would resolve the name issue, the Application would still fall outside the Court's jurisdiction.

27. The reason for this is that the *de facto* resolution of the name issue is precisely the consequence which the Applicant is pursuing in this case. Were the Court to take jurisdiction and were it to accede to the Applicant's prayer, it will have, *ipso facto*, effectively decided the name issue putting an end to any incentive the Applicant might have had to *negotiate* resolution of the difference as required by the Interim Accord and the Security Council. Finding jurisdiction with the Applicant's theory would thus be outcome-determinative of the merits, effectively resolving the name difference in favour of the Applicant.

28. To appreciate why this consequence will follow, we must understand the Applicant's strategy on the dispute over the name. And we have it on the authority of none other than

President Crvenkovski, speaking to his legislature: [Slide 27] Ms Telalian quoted part of it to you; I draw your attention only to two paragraphs. President Crvenkovski said:

> "First of all, in the negotiations under United Nations auspices we participated actively, but our position was always the same and unchanged. And that was the so-called dual formula. That means the use of the constitutional name of the Republic of Macedonia for the entire world, in all international organizations and in bilateral relations with all countries, with a compromise solution to be found only for the bilateral relations with the Republic of Greece.
>
> Secondly, [President Crvenkovski continues] to work simultaneously on constant increase of the number of countries which recognize our constitutional name and thus strengthen our proper political capital in international field which will be needed for the next phases."[38]

29. What does Mr. Crvenkovski tell us? The Applicant's programme on the name issue is to avoid negotiating in good faith, as required by resolution 817, while persuading as many other States as possible to support its campaign for its preferred name. At the same time, to win admission to every international organization, intending, once admitted, to ignore its obligations under resolution 817 and the Interim Accord. Its strategy? Use the provisional name required by the Security Council and the Interim Accord to win admission, then with the impunity which that affords it, use, for all other purposes, the name whose use the Interim Accord precludes. [Slide 28] This case, Mr. President, is one part of the Crvenkovski strategy to circumvent the provisional arrangement and frustrate the required negotiation process which was to resolve the difference and, thus, to accomplish by fait accompli the resolution of the difference over the name in the way the Applicant wants.

30. May I display operative paragraph 2 of resolution 817 once again and just draw your attention to it: [slide 29]

> "*Recommends* to the General Assembly that the State whose application is contained in document S/25147 be admitted to membership in the United Nations, this State being provisionally referred to for all purposes within the United Nations as 'the former Yugoslav Republic of Macedonia' pending settlement of the difference that has arisen over the name."

31. The legal key to the judicial phase of the Crvenkovski strategy is the Applicant's radical reinterpretation of resolution 817 — and remember resolution 817 is incorporated in the Interim Accord — the Applicant avoids focusing on the text but would rely on the "recollection", 17 years

[38] Counter-Memorial, Ann. 104.

later, of Sir Jeremy Greenstock, who was not then Permanent Representative in New York, indeed, not even based in New York at the time, and the recollection of a remark by Mr. Nimetz, who was not in the Security Council and who, moreover, was not even addressing, in his remark, the question of what *the Applicant* was to call itself. Is this how one interprets international instruments?

32. Greece proposes to look at the text. It says "being provisionally referred to *for all purposes* within the United Nations as 'the former Yugoslav Republic of Macedonia'". [Slide 30] The Applicant was admitted to the United Nations on the condition that it be "provisionally referred to *for all purposes within the United Nations* as 'the former Yugoslav Republic of Macedonia'". That condition was to continue "pending settlement of the difference that has arisen over the name". [Slide 31]

33. Mr. President, five points about resolution 817.

34. First, the Applicant's contention that the resolution is only a recommendation, stated in its Reply and repeated on Tuesday[39], is incorrect. The resolution was issued under Article 4, paragraph 2, of the Charter which *requires* the Security Council to recommend the candidate before the General Assembly can admit it. The Court confirmed this in its second *Admissions* opinion (*Competence of the General Assembly for the Admission of a State to the United Nations, Advisory Opinion, I.C.J. Reports 1950*, p. 10). The Applicant's contention in its *aide mémoire* of 2005 that resolution 817 "runs contrary to the United Nations Charter"[40] may explain why the Applicant treats it so dismissively.

35. Second, the obligation in operative paragraph 2 of resolution 817 was *not* extinguished upon the Applicant's admission. It was a continuing obligation to use the name the Former Yugoslav Republic of Macedonia "for all purposes within the United Nations . . . pending settlement of the difference".

36. Third, the condition for the termination of the obligation, "settlement of the difference", has not occurred. The obligation continues.

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[39]Reply, para. 4.41 at p. 98.

[40]Reply, Ann. 24, p. 1.

37. Fourth, compliance with that obligation was, and continues to be, required under international law. Charter Article 2, paragraph 2, reinforces the obligation imposed by Security Council resolution 817. As for the contention that only decisions taken by the Security Council under Chapter VII are binding; I refer counsel to the *Namibia* opinion, where the Court held that "Article 25 is not confined to decisions in regard to enforcement action but applies to 'the decisions of the Security Council' adopted in accordance with the Charter." (*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 53, para. 113.)

38. Fifth, even if, for the sake of argument, resolution 817 were, in terms of its legal effect under the Charter, only a recommendation, the Applicant explicitly affirmed and acknowledged the continuing force of that "Recommendation" as an obligation it owed to Greece in the Interim Accord's Article 5, paragraph 1, Article 11, paragraph 1, and, by necessary implication, Article 21, paragraph 2. In other words, the obligation arising from resolution 817 is also treaty-based.

39. Thus, the binding legal arrangement which governs until there is a settlement of the difference over the name, requires of the Applicant two things:

first, use of the provisional name, the former Yugoslav Republic of Macedonia, "for all purposes within the United Nations", and,

second, good faith negotiation with the objective of securing a resolution of the difference.

40. President Crvenkovski confirms that the Applicant is intentionally violating both of these obligations. In Court, the Applicant has tried to launder the violations by a new interpretation. Consider its elaboration of *its* understanding of its obligations under resolution 817: [slide 32]

> "Significantly, the Resolution [817] did not require the Applicant *to call itself* 'the former Yugoslav Republic of Macedonia', and the Applicant never agreed to refer to itself as such. Consequently, in accordance with resolution 817 and without raising any difficulties with the United Nations Secretariat, [Slide 32A] the Applicant has always used its constitutional name in written and oral communications with the United Nations, its members and officials."[41]

41. This is a violation of the Interim Accord, thinly disguised as an interpretation. But it wreaks havoc with two of the canons of international interpretation: it is unfounded textually and absurd substantively. In order to generate a textually plausible interpretation of the Security

[41] Memorial, para. 2.20.

Council resolution, the Applicant must imply a phrase, which is not there, and make two other phrases, which are there, vanish. Only by doing this, can it defeat both the generality of the passive voice, in which the Security Council chose to cast its words, and the maximum generality achieved by the words "for all purposes".

42. In 2005, the Applicant indicated its conviction that resolution 817 was "contrary to the Charter". What, then, in light of the Crvenkovski strategy is the Applicant's operational reading of resolution 817? As President Crvenkovski explained, while adopting an implacable posture in negotiation, the Applicant has actively sought to persuade other United Nations members to refer to it "for all purposes within the United Nations" as the "Republic of Macedonia". Thus, one can deduce from the Applicant's public statements and behaviour that its conception of resolution 817 is drastically revised and it goes something like this: [Slide 33]

> "*Recommends* to the General Assembly that the State whose application is contained in document S/25147 be admitted to membership in the United Nations, as 'the former Yugoslav Republic of Macedonia' *and thereafter be referred to for all purposes as the Republic of Macedonia*." [Slide 34]

43. Overlooking the profound bad faith in this operational reading of resolution 817, it is obvious that it mangles the text and produces an absurdity. The function of a nominal designation is to clarify reference. But in the Applicant's interpretation, there must be multiple international designations for the same entity within the United Nations and by implication in every other international organization to which the Applicant applies, shifting steadily, thanks to the Applicant's vigorous diplomatic initiatives, toward its preferred version. Aside from the impracticality, the Applicant's reading of the text affords no indication that such an arrangement was the intention of either the Security Council or the parties to the Interim Accord. Why Greece's concerns about the irredentist implications of the Applicant's use of the name "Republic of Macedonia", when so much of Macedonia is in Greece, would be assuaged if this were the intended meaning of resolution 817 is simply never explained. But, then again, the Applicant never explains or takes of account of any accommodation of *Greece's* interests in the Interim Accord.

44. If the Court were to adopt the Applicant's interpolated reading of resolution 817, it would effectively decide the name issue, for the Applicant would secure all its objectives and have neither need nor interest in negotiating. But that is the very thing which even the Applicant,

according to its second jurisdictional theory, says cannot be decided under the jurisdictional clause, as Professor Klein told the Court on Monday[42]. Thus, Mr. President, whether one accepts, as the Applicant originally proposed, the "concerns directly or indirectly" test or whether one accepts the Applicant's later interpolated reading of Article 21 and its neutered reading of resolution 817, Greece respectfully submits that the Court does not have jurisdiction over the case before it. It is paradoxical, Mr. President, but only by rejecting jurisdiction will the Court, if I may quote Professor Murphy, "keep the two States on the path they set for themselves in the Interim Accord[43].

45. I thank the Court for its attention and ask that my colleague, Professor Pellet, be recognized.

The PRESIDENT: I thank Professor Michael Reisman for his statement. Now I invite Professor Alain Pellet to make his statement.

M. PELLET : Merci beaucoup, Monsieur le président.

LES LIMITES INHÉRENTES À L'EXERCICE DE LA FONCTION JUDICIAIRE

Monsieur le président, Mesdames et Messieurs les juges, avant d'en venir à ma plaidoirie proprement dite, permettez-moi, de m'associer à l'hommage que l'agent du demandeur et Philippe Sands ont rendu à mon grand ami Tom Franck. Nous n'étions pas, cette fois, dans la même équipe de plaidoirie ; nous l'avions été parfois. C'était un grand internationaliste, un homme de bien et de cœur, et un ami irremplaçable.

1. Monsieur le président, mon autre collègue et ami, le professeur Reisman a montré que la Cour est incompétente faute de consentement à sa juridiction par la Grèce. En terminant, lorsqu'il vous a demandé de bien vouloir me donner la parole, M. Reisman a indiqué que j'allais présenter d'autres causes d'incompétence. C'est évidemment exact — je n'aurais garde de contredire mon éminent collègue. Mais c'est un peu plus que d'incompétence ou d'irrecevabilité qu'il s'agit puisque c'est l'intégrité même des fonctions judiciaires de la Cour qui est en cause.

2. Comme vous l'avez rappelé dans votre arrêt de 1974 dans l'affaire des *Essais nucléaires* :

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[42]CR 2011/5, pp. 58-59, paras. 4-6 (Klein).

[43]CR 2011/6, p. 48, para. 87 (Murphy).

> «il convient de souligner que la Cour possède un pouvoir inhérent qui l'autorise à prendre toute mesure voulue, d'une part pour faire en sorte que si sa compétence au fond est établie, l'exercice de cette compétence ne se révèle pas vain, d'autre part, pour assurer le règlement régulier de tous les points en litige ainsi que le respect des «limitations inhérentes à l'exercice de la fonction judiciaire» de la Cour et pour «conserver son caractère judiciaire» (*Cameroun septentrional, arrêt, C.I.J. Recueil 1963*, p. 29)» (*Essais nucléaires (Nouvelle-Zélande c. France), arrêt, C.I.J. Recueil 1974*, p. 463, par. 23)[44].

3. Or, en l'espèce, il existe au moins deux «obstacles décisifs au règlement judiciaire» (*Cameroun septentrional (Cameroun c. Royaume-Uni), exceptions préliminaires, arrêt, C.I.J. Recueil 1963*, p. 30) de l'affaire que vous a soumise l'ex-République yougoslave de Macédoine — appelons-la «ARYM» par commodité puisque telle est l'appellation abrégée que retiennent les sites du ministère français des affaires étrangères[45] ou de l'Union européenne[46] — mais je précise que ceci n'a, dans mon esprit, aucune portée juridique particulière. D'une part, l'arrêt que la Cour serait conduite à rendre ne pourrait avoir aucune espèce d'effet concret (I) ; d'autre part, il constituerait une interférence dans un processus éminemment politique (II). Je m'abstiendrai en revanche de revenir sur la discutable «réserve de droit» que le demandeur avait cru pouvoir formuler puisqu'il y a expressément renoncé[47].

I. UN ARRÊT DÉPOURVU DE TOUTE PORTÉE EFFECTIVE

4. Premier point donc, Monsieur le président : si la Cour venait à rendre un arrêt en faveur du demandeur, celui-ci ne pourrait avoir aucun effet sur la situation qui est en cause en l'espèce et qui concerne la non-admission immédiate de l'ARYM dans l'OTAN. Il est en effet patent que, si la Cour constatait une violation par la Grèce de l'article 11, paragraphe 1, de l'accord intérimaire, et ordonnait au défendeur de violer son obligation de consultation loyale au sein de l'organisation (comme, en fait le lui demande le point iii) des conclusions), il n'en résulterait aucune espèce d'effet concret dans la situation du demandeur à l'OTAN : ni l'Alliance, ni ses Etats membres ne seraient liés par l'arrêt à intervenir, la décision de Bucarest (et celles qui la confirment)

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[44] Voir aussi *Cameroun septentrional (Cameroun c. Royaume-Uni), exceptions préliminaires, arrêt, C.I.J. Recueil 1963*, p. 29.

[45] Voir, par exemple : http://www.diplomatie.gouv.fr/fr/conseils-aux-voyageurs_909/pays_12191/arym-ancienne-republique-yougoslave-macedoine_12282/index.html.

[46] Voir, par exemple : http://europa.eu/rapid/pressReleasesAction.do?reference=PESC/08/48&format=HTML&aged=0&language=FR&guiLanguage=en.

[47] Cf. CR 2011/6, p. 12, par. 1 (Klein) et CR 2011/7, p. 26, par. 4 (Bastid-Burdeau).

demeurerai(en)t intacte(s) et l'ARYM ne serait pas admise au sein de l'organisation aussi longtemps que les conditions posées *par celle-ci* ne seraient pas remplies.

5. Le demandeur affirme avec véhémence qu'il a «the right to pursue membership of NATO and other international organizations»[48]. La Grèce ne conteste nullement ceci : l'ARYM est parfaitement en droit de poursuivre cet objectif et il n'existe pas de différend sur ce point entre les Parties. Mais demander à faire partie *(to pursue membership)*, ce n'est pas la même chose qu'«*être admise* à l'OTAN et dans d'autres organisations». Or, Monsieur le président, de deux choses l'une :

— ou bien la Cour est appelée à se prononcer sur le droit de l'ex-République yougoslave de Macédoine de demander son admission au sein de l'OTAN, et elle ne peut que refuser de se prononcer faute de différend sur ce point entre les Parties ;

— ou bien elle doit prendre position non plus sur la demande d'admission de l'ARYM mais sur la décision de l'admettre et elle doit encore s'abstenir de juger. Ce faisant en effet, elle devrait nécessairement se prononcer sur la question du nom — qui est exclue de sa compétence. En outre, de toute manière, un tel arrêt ne pourrait strictement rien changer à la situation dont se plaint le demandeur puisque la décision de l'admettre au sein de l'organisation relève de la compétence collective (et unanime) des Etats membres ; ceux-ci ont collectivement et unanimement subordonné une réponse positive à la demande de l'ARYM à l'issue favorable de la question du nom.

6. Reprenons brièvement chacun de ces aspects, Monsieur le président, si vous le voulez bien, mais je crois que je m'arrêterai en route.

7. Il y a peu à dire sur la première branche de l'alternative (le fait que nul ne conteste que l'ARYM puisse continuer à demander *(pursue)* son admission à l'OTAN), sauf à faire les trois remarques suivantes :

1) S'il faut en croire la Partie demanderesse, tel est bien l'objet même de l'affaire qu'elle a soumise à la Cour puisque, dès le paragraphe premier de sa requête, elle explique : «Le demandeur introduit la présente instance aux fins de protéger les droits qu'il tient de l'accord

[48] Mémoire, p. 5, par. 1.1 ; passage repris dans la réplique, p. 8, par. 1.3. Voir aussi requête, p. 7, par. 1. Voir aussi CR 2011/5, p. 20, par. 13 (Miloshoski).

intérimaire … parmi lesquels le droit de demander son admission à toute organisation internationale pertinente.»

2) Il n'existe aucun désaccord sur ce point entre les Parties : la Grèce a fait savoir à maintes reprises qu'elle était favorable à l'admission de l'ARYM à l'OTAN[49] dès lors que la condition prévue à l'article 11 est remplie ; du reste, l'OTAN elle-même a clairement indiqué dans le communiqué de Bucarest (et plusieurs fois par la suite[50]) que «[N]ous sommes convenus qu'une invitation serait faite à l'ex-République yougoslave de Macédoine dès qu'une solution mutuellement acceptable aura été trouvée à la question du nom.»[51]

3) En l'absence de tout désaccord sur le droit du demandeur de poursuivre le processus d'admission en cours, ce droit revendiqué (et non contesté) ne relève pas de la fonction judiciaire de la Cour, «dont la mission est de régler conformément au droit international les différends qui lui sont soumis». «L'existence d'un différend est donc la condition première de l'exercice de sa fonction judiciaire.» (*Essais nucléaires (Nouvelle-Zélande c. France), arrêt, C.I.J. Recueil 1974*, p. 476, par. 58.)

8. Seconde branche de l'alternative, Monsieur le président : admettons, pour les besoins de la discussion, que, réinterprétant l'objet de la requête tel que l'ARYM l'a pourtant exposé, la Cour estime que ce n'est pas le droit de ce pays de demander son admission à l'OTAN, mais son prétendu droit d'y être admis, qui est en cause. Dans ce cas, il existerait bien un différend, mais il s'élèverait non pas entre la Grèce et l'ARYM, mais entre cette dernière et l'Alliance ; et il serait également contraire à l'intégrité des fonctions judiciaires de la Cour que vous vous prononciez. D'abord vous ne sauriez admettre la substitution d'un défendeur fictif (la Grèce) à celui qui est l'auteur réel de la décision contestée (l'OTAN) ; ensuite, le demandeur ne peut isoler ainsi un

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[49] Voir notamment le discours de la ministre des affaires étrangères de la Grèce, Mme Bakoyannis, contre-mémoire, annexe 119 ; ou la déclaration du porte-parole du ministère grec des affaires étrangères, M. G. Koumoutsakos, contre-mémoire, annexe 120.

[50] Voir notamment OTAN, communiqué de presse (2009) 044, déclaration du sommet de Strasbourg-Kehl publiée par les chefs d'Etat et de gouvernement participant à la réunion du Conseil de l'Atlantique Nord tenue à Strasbourg-Kehl le 4 avril 2009, contre-mémoire, annexe 35 ou OTAN, déclaration du sommet de Lisbonne publiée par les chefs d'Etat et de gouvernement participant à la réunion du Conseil de l'Atlantique Nord tenue à Lisbonne le 20 novembre 2010, communiqué de presse PR/CP(2010) 0155, par. 14, http://www.nato.int/cps/fr/natolive/official_texts_68828.htm ; voir aussi la conférence de presse du secrétaire général de l'OTAN, M. Anders Fogh Rasmussen, 15 novembre 2010, http://www.nato.int/cps/en/natolive/opinions_68225.htm.

[51] OTAN, déclaration du sommet du Bucarest, 3 avril 2008, communiqué de presse (2008)049 ; note de bas de page omise.

élément du différend global et vous priver de la connaissance de celui-ci comme il tente de le faire ; enfin, si, malgré tout, vous le suiviez sur cette voie, votre décision ne pourrait avoir aucun effet sur la solution de ce différend global. Je reprends brièvement chacun de ces trois points, mais je m'arrêterai en temps utile.

9. Premièrement, l'ARYM se plaint de n'avoir pas — pour l'instant — été admise à l'OTAN — et j'insiste : *elle s'en plaint*, ce qui montre bien que tel est effectivement l'enjeu de la présente affaire[52]. Elle en impute la responsabilité à la Grèce. Mais, si responsabilité de la Grèce il y avait, elle serait indissociable de celle de l'ensemble des membres de l'organisation en tant que collectivité.

10. Je sais bien, Monsieur le président, que le demandeur veut à toute force faire accroire que la toute puissante Grèce a pu objecter, seule contre tous, telle une sorte d'Astérix hellénique, à l'invitation que les autres membres de l'Alliance unanimes se seraient apprêtés à lancer à l'ARYM. Mais ceci est clairement démenti par les faits :

— je me réfère, par exemple, à la déclaration de l'ambassadeur tchèque Stefan Füle, pourtant favorable à la demande d'admission de l'ARYM, qui a tenté (en vain d'ailleurs) de dissiper les graves méprises entretenues par les officiels de Skopje sur les événements de Bucarest :

> «what happened in the Summit was that member-states could not reach an agreement and consequently there was no voting procedure. There was no procedure during which one can say that this particular country or group of countries did not agree.»

And the report of Ambassador Füle's speech continued:

> «He [Füle] warned at journalists that, insofar as they will report on the veto to be fully aware that 'this is not in accordance with what really happened in Bucharest.' Ambassador Füle stressed that as long as the name dispute is not resolved, Macedonia cannot expect to become a NATO member.»[53] ;

— je relève également que le fait que les instances de l'Alliance atlantique aient, à plusieurs reprises, réitéré la position collective de *l'ensemble* de ses Etats membres établit à lui seul qu'il est impossible d'imputer la responsabilité de cette situation à la Grèce ; et

— j'attire en outre votre attention, Mesdames et Messieurs les juges, sur le fait que l'on voit mal pourquoi la Grèce aurait entrepris la campagne systématique d'obstruction qu'a prétendu

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[52] Voir, par exemple, CR 2011/5, p. 34, par. 23 (Sands).

[53] «The Czech Republic continues to support Macedonia in NATO», *Utrinski Vesnik*, 22 novembre 2008, disponible sur : http://www.utrinski.com.mk/?ItemID=FCA3114349781142BDFC9200560B889A, duplique, annexe 54.

décrire le professeur Murphy lundi dernier[54], s'il lui avait suffi d'opposer un veto sec à l'admission de l'ARYM au sein de l'OTAN.

11. On conçoit mal aussi comment la Cour pourrait se prononcer sur la position de la seule Grèce sans établir la part relative de chacun des participants à la décision collective et consensuelle dont se plaint le demandeur et dont elle est inséparable. Certes, en tant que membre de l'Alliance, la Grèce y a participé et elle est, à ce titre, arrivée aux mêmes conclusions que l'ensemble des autres participants, elle s'est ralliée au consensus — ni plus, ni moins.

[Projection n° 1 — article 22 de l'accord intérimaire]

12. «Ah, ah», va sans doute dire le professeur Sands, «mais s'agissant de la Grèce, la chose est différente car elle est liée à l'ARYM par un accord spécial». Oui, Monsieur le président, elle est liée par l'accord intérimaire dont, une fois de plus, nos amis de l'autre côté de la barre font une lecture partielle et partiale, en voulant dissocier l'article 11 de cet instrument de son article 22, selon lequel : «Le présent accord intérimaire … ne porte pas atteinte aux droits et aux devoirs découlant d'accords bilatéraux et multilatéraux déjà en vigueur que les Parties ont conclus avec d'autres Etats ou organisations internationales.»

Monsieur le président, je vois l'heure passer et je ne pourrai évidemment pas terminer ma plaidoirie aujourd'hui, sauf à dépasser très abusivement l'horaire, bien que ce soit un peu abrupt et artificiel. Peut-être devrais-je suspendre ma présentation ici.

The PRESIDENT: I thank Professor Alain Pellet for his statement although his statement has not been completed. In any case, Greece will continue its presentation tomorrow at a sitting in the morning from 10.00 a.m. to 1.00 p.m. and conclude its first round of oral argument during the afternoon sitting from 3.00 p.m. to 4.30 p.m. Therefore we will continue to hear the presentation by counsel from Greece tomorrow morning. The Court is adjourned.

The Court rose at 6.00 p.m.

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[54] CR 2011/5, p. 43-47, par. 19-32 (Murphy) ; voir aussi CR 2011/6, p. 28-29, par. 25 (Murphy).