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International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2011

Public sitting

held on Friday 25 March 2011, at 10 a.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 vendredi 25 mars 2011, à 10 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,

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M. Kosmas Triantafyllidis, attaché d'ambassade,

comme personnel administratif.

The PRESIDENT: Please be seated. The Court meets today to hear the continuation of the first round presentation of Greece. I shall now invite Professor Alain Pellet to continue his statement that he started yesterday.

M. PELLET : Merci Monsieur le président.

LES LIMITES INHÉRENTES À L'EXERCICE DE LA FONCTION JUDICIAIRE (SUITE)

I. Un arrêt dépourvu de toute portée effective (suite)

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

12. Monsieur le président, Mesdames et Messieurs les juges, lorsque je me suis arrêté hier soir, un peu abruptement, j'avais entrepris de montrer que l'arrêt que l'ex-République yougoslave de Macédoine vous appelle à rendre serait dépourvu de toute portée. Ou bien le demandeur vous appelle à décider qu'il peut continuer à demander son admission à l'OTAN, et il n'y a pas de différend ; ou bien il vous demande que la décision prise au sommet de Bucarest est irrégulière et vous ne sauriez le faire sans vous prononcer sur l'attitude de l'OTAN et de ses Etats membres, absents de l'instance. En outre et de toute manière, pour ce faire, il vous faudrait prendre en considération non pas l'article 11 seul, comme le demandeur vous l'enjoint, mais l'ensemble de l'accord — notamment l'article 22, dont le texte est projeté en ce moment.

13. Or, de deux choses l'une, Monsieur le président :

— ou bien, la déclaration de Bucarest, qui diffère l'admission de l'ARYM, est une décision licite de l'organisation, conforme au traité de l'Atlantique Nord, et il s'ensuit que toute position de la Grèce prise en tant que membre de l'OTAN rentre dans les prévisions de cet article 22, relatifs aux «droits et aux devoirs découlant d'accords ... multilatéraux» ; par voie de conséquence, cette position ne saurait violer l'accord intérimaire, la Grèce n'ayant fait que s'acquitter des obligations conventionnelles qu'elle a envers les autres membres de l'Alliance et envers l'organisation elle-même ; ces obligations sont préservées par l'article 22 ; le professeur Reisman reviendra sur ce point tout à l'heure ;

— ou bien, si la position prêtée à la Grèce durant le sommet de Bucarest n'était pas en conformité avec ses droits et obligations en vertu du traité de l'Atlantique Nord, elle ne serait alors pas couverte par l'article 22 mais pour le déterminer, la Cour devrait nécessairement se prononcer d'abord sur la licéité de la position collective, le position commune, prise par l'ensemble des Etats membres et de la décision de l'organisation elle-même. Une telle appréciation ne pourrait être faite sur la base de l'accord intérimaire ; elle devrait l'être en fonction des règles en vigueur à l'OTAN ; ce faisant, la Cour outrepasserait tout aussi clairement sa compétence.

[Fin de la projection n° 1.]

14. Mais un prononcé de la haute juridiction sur le fond aurait une autre conséquence : si la Cour passait outre son incompétence manifeste et rendait tout de même un arrêt, celui-ci serait *res inter alios acta* pour l'OTAN, pourtant seule à même de donner satisfaction à l'ARYM. Pour cette raison, l'arrêt ne serait pas susceptible de produire d'effets et il serait contraire au caractère exclusivement judiciaire de vos fonctions que vous le rendiez, Mesdames et Messieurs les juges : «Si la Cour devait poursuivre l'affaire et déclarer toutes les allégations du demandeur justifiées au fond, elle n'en serait pas moins dans l'impossibilité de rendre un arrêt effectivement applicable.» (*Cameroun septentrional (Cameroun c. Royaume-Uni), exceptions préliminaires, arrêt, C.I.J. Recueil 1963*, p. 33.) C'était vrai dans l'affaire du *Cameroun septentrional* que je viens de citer ; ce l'est dans celle qui nous occupe. Dans son arrêt de 1963, la Cour a refusé de se prononcer sur une violation imputée au Royaume-Uni du fait que ceci n'aurait pu avoir aucun effet sur la situation qui avait résulté de la violation alléguée[1]. Il en va de même ici : un arrêt faisant droit aux demandes de l'Etat requérant n'aurait pas la moindre conséquence sur la situation de celui-ci au sein de l'OTAN à laquelle il est toujours candidat — avec le soutien de la Grèce dès lors que la condition rappelée par le sommet de Bucarest aura été satisfaite.

15. Le président de l'ex-République yougoslave de Macédoine lui-même était arrivé à ce constat avant même que la Cour soit saisie :

> «we can initiate certain procedures in front of the United Nations or the international courts… But, at the same time we should be fully aware that it is not going to solve our problem with the blockade for our joining NATO and repeating the same scenario

[1] Voir affaire du *Cameroun septentrional*, *ibid.* ; passage cité *in* CR 2011/6, p. 17, par. 9 (Klein).

> with the European Union. These organizations cannot be joined with an UN resolution *or with a court decision*, but with a consensual decision by all their members, including the Republic of Greece.»[2]

16. Il y a à ceci une autre — et deuxième raison : en s'efforçant désespérément de limiter ses demandes à la seule position supposée de la Grèce, le demandeur tente de soustraire à votre examen le différend global qui l'oppose à l'OTAN (et, d'ailleurs aussi à la Grèce) puisqu'il veut restreindre votre compétence à un seul aspect, non décisif, de ses griefs. Mais il ne peut pas vous priver ainsi, artificiellement, de la connaissance et de l'appréciation de pans essentiels du dossier. Comme la Cour l'a rappelé avec force dans son avis consultatif dans l'affaire de l'*Accord de siège de l'OMS* :

> «une règle du droit international, coutumier ou conventionnel, ne s'applique pas dans le vide ; elle s'applique par rapport à des faits et dans le cadre d'un ensemble plus large de règles juridiques dont elle n'est qu'une partie. Par conséquent, pour qu'une question présentée dans les termes hypothétiques de la requête puisse recevoir une réponse pertinente et utile, la Cour doit d'abord s'assurer de sa signification et en mesurer toute la portée dans la situation de fait et de droit où il convient de l'examiner.» (*Interprétation de l'accord du 25 mars 1951 entre l'OMS et l'Egypte, avis consultatif, C.I.J. Recueil 1980,* p. 76, par. 10.)

17. Ce qui vaut en matière consultative s'applique tout autant au contentieux : vous ne sauriez, dans notre affaire, prendre position sur les actions prêtées à la Grèce sans vous interroger aussi sur le contexte global dans lequel celles-ci sont intervenues et sur l'attitude et des autres Etats membres et de l'OTAN elle-même. Or cela, de l'aveu même de l'Etat demandeur, vous ne pouvez le faire : «Any decisions by NATO following that objection are not and cannot be the subject of these proceedings.»[3]

18. Le problème pour l'ARYM est qu'elle a beau s'obstiner à vouloir limiter l'objet de sa requête, elle ne peut pas obliger la Cour à l'examiner ainsi en tout autisme contextuel. Nos contradicteurs martèlent que «c'est un acte séparé, clairement individualisable et clairement attribuable à l'Etat défendeur qui se trouve à la base de la requête. C'est cet acte qui constitue l'objet de la requête, indépendamment, disent-ils, des conséquences ultérieures qu'il a eues au sein

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[2] *Compte rendu sténographique de la septième séance de la vingt-septième session du Parlement de la République de Macédoine, tenue le 3 novembre 2008*, p. 1 et p. 10-17, contre-mémoire, annexe 104 ; les italiques sont de nous.

[3] Réplique, p. 78, par. 3.31, CR 2011/5, p. 63, par. 13 (Klein).

de l'OTAN»[4]. Mais, Monsieur le président, quel est donc «cet acte» que l'on nous présente comme séparé et clairement individualisable sans jamais le citer et le dater ? Et on comprend pourquoi : parce qu'il n'existe pas ; la Grèce a pris toute sa part — la part qu'exigeait sa qualité de membre de l'organisation et le respect des règles de celle-ci — toute sa part au processus complexe et long de consultation qui a abouti à la décision du sommet de Bucarest. Comme l'a dit à juste titre le professeur Murphy, «those steps were directly «joined» with the formal decision process of NATO on accession»[5]. Et la décision résultant de ce processus est, elle, bien un «acte» reconnaissable et individualisable ; mais d'«acte» de la Grèce, après deux ans et demi de procédure, le demandeur n'en a toujours individualisé aucun. Au surplus, il est tout à fait clair, Mesdames et Messieurs de la Cour, que vous ne pourriez déterminer si la décision de l'OTAN est la conséquence du comportement prêté au défendeur sans vous prononcer sur les actes et de l'organisation elle-même et des autres Etats membres, qui ont tous concouru à la décision prise au sommet de Bucarest et constamment réaffirmée depuis lors. Or une telle détermination est indispensable pour apprécier l'existence ou non d'une objection de la part de la Grèce.

19. Dès lors, les conclusions du demandeur tombent sous le coup du principe de l'*Or monétaire*[6] tel que mon contradicteur et ami, le professeur Klein, l'a lui-même défini lundi dernier[7]. Ce faisant en effet, l'ARYM, qui ne peut individualiser un acte quelconque attribuable à la Grèce, demande bien à la Cour de se prononcer sur une décision de l'OTAN, ce que la haute juridiction ne saurait faire — pas davantage qu'elle n'aurait pu admettre «un appel devant [elle] d'une décision défavorable du Conseil de sécurité» (*Activités militaires et paramilitaires au Nicaragua et contre celui-ci (Nicaragua c. Etats-Unis d'Amérique), compétence et recevabilité, arrêt, C.I.J. Recueil 1984*, p. 436, par 98).

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[4] CR 2011/5, p. 63, par. 13 (Klein) ; note de renvoi omise ; voir aussi CR 2011/6, p. 14, par. 5 (Klein) ; p. 29, par. 29 (Murphy) ; ou réplique, p. 79, par. 3.33.

[5] CR 2011/6, p. 26, par. 18 (Murphy).

[6] Voir également contre-mémoire, p. 122-123, par. 6.95-6.98 ou duplique, p. 56-58, par. 3.36.

[7] CR 2011/5, p. 64-65, par. 15-16. Voir *Or monétaire pris à Rome en 1943, question préliminaire, arrêt, C.I.J. Recueil 1954*, p. 19 ; *Certaines terres à phosphates à Nauru (Nauru c. Australie), exceptions préliminaires, arrêt, C.I.J. Recueil 1992*, p. 259, par. 50, *Timor oriental (Portugal c. Australie), arrêt, C.I.J. Recueil 1995*, p. 101, par. 26 et *Activités armées sur le territoire du Congo (République démocratique du Congo c. Ouganda), arrêt, C.I.J. Recueil 2005*, p. 238, par. 203.

20. Je sais bien, Monsieur le président, qu'il est arrivé que la Cour considère qu'un différend global peut être divisible en plusieurs éléments aux fins de l'établissement de sa compétence[8]. Mais le différend dont l'ARYM prétend l'avoir saisie ne peut être dissocié ni de celui qui oppose cet Etat à l'OTAN et à l'ensemble de ses Etats membres, ni — et c'est mon troisième point — du différend sur le nom, dont les Parties s'accordent à considérer qu'il ne relève pas de votre compétence[9].

21. Certes, comme elle l'a déclaré dans l'affaire du *Droit d'asile* et rappelé plus récemment dans celle du *Mandat d'arrêt*, la Cour a «le devoir de répondre aux demandes des parties telles qu'elles s'expriment dans leurs conclusions finales, mais aussi celui de s'abstenir de statuer sur des points non compris dans lesdites demandes ainsi exprimées» (*Demande d'interprétation de l'arrêt du 20 novembre 1950 en l'affaire du droit d'asile (Colombie c. Pérou), arrêt, C.I.J. Recueil 1950*, p. 402)[10]. Mais, en la présente occurrence, malgré l'insistance de l'ARYM, vous ne *pouvez pas* contourner la question du différend sur le nom : elle est le passage obligé de tout raisonnement pouvant vous conduire à accueillir ou à rejeter les conclusions du demandeur. Comment pourriez-vous déterminer (comme l'ARYM vous le demande) si la Grèce a violé l'obligation lui incombant en vertu de l'article 11 de l'accord intérimaire

— sans, par exemple, vous prononcer sur la question de savoir si le demandeur a respecté, et est prêt à respecter, ses propres obligations en vertu du paragraphe 2 de la résolution 817 (1993) du Conseil de sécurité et de l'article 5, paragraphe 1, de l'accord intérimaire lui-même[11] ? et

— plus généralement, sans fournir l'interprétation — d'ailleurs réclamée par le demandeur lui-même[12] — de la résolution 817 (1993) du Conseil de sécurité à laquelle renvoient les articles 5, paragraphe 1, et 11, paragraphe 1, de l'accord intérimaire, qui fixent les obligations transitoires des Parties dans l'attente du règlement de leur divergence ; ou

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[8] Voir *Différend territorial et maritime (Nicaragua c. Colombie), exceptions préliminaires, arrêt, C.I.J. Recueil 2007 (II)*, p. 860, par. 45, et la jurisprudence citée.

[9] Mémoire, p. 85, par. 5.1 ; réplique, p. 69-74, par. 3.9-3.21 ; contre-mémoire, p. 98-104, par. 6.32-6.51 ; duplique, p. 44-47, par. 3.16-3.20.

[10] Voir aussi : *Mandat d'arrêt du 11 avril 2000 (République démocratique du Congo c. Belgique), arrêt, C.I.J. Recueil 2002*, p. 18-19, par. 43.

[11] Voir notamment duplique, p. 166-170, par. 7.53-7.70.

[12] Voir CR 2011/7, p. 31-37, par. 33-52 (Murphy).

— sans déterminer si l'obligation prévue à l'article 5 — toujours — interdit au demandeur d'user dans les instances internationales d'un nom ou autre que la désignation provisoire ou de poursuivre activement une politique de reconnaissance incompatible avec le processus de négociation ;

et comment pourriez-vous décider si les conditions de la clause de sauvegarde de l'article 11 sont remplies,

— sans établir quelles étaient les obligations respectives des Parties dans le processus de règlement du différend sur le nom, auquel l'article 5 fait justement référence ?

En somme, comme Michael Reisman l'a montré de manière plus précise hier après-midi, à l'exact opposé de ce que prétend l'ARYM[13], même si le différend sur le nom n'est pas l'objet avoué de la requête, la Cour ne peut tout simplement pas éviter de se prononcer sur ce différend — ce qu'exclut l'article 21.

22. Ainsi, quelle que soit la définition de l'objet de la requête que l'on retient, on se trouve devant l'une des branches de l'alternative qui doivent conduire la Cour à refuser de se prononcer, conformément au *dictum* de 1974 dans les affaires des *Essais nucléaires* que j'ai citées tout à l'heure[14] :

— si la question est de savoir si l'ARYM peut, avec des chances raisonnables de succès, persister dans sa demande d'admission à l'OTAN, une réponse affirmative ne fait aucun doute : il serait contraire à la fonction exclusivement judiciaire de la Cour de se prononcer sur ce point en l'absence de tout différend entre les Parties ;

— si la question soumise à la Cour est celle de l'admission de l'ARYM à l'OTAN, elle ne pourrait, de toute manière exercer sa compétence — en admettant que celle-ci soit établie — car elle ne serait pas à même d'«assurer le règlement régulier de tous les points en litige ainsi que le respect des «limitations inhérentes à l'exercice de la fonction judiciaire»» et elle devrait décliner l'exercice d'une compétence douteuse qui, de toute manière, se révélerait vain ; et,

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[13] Cf. réplique, p. 71, par. 3.14. CR 2011/5, p. 59-60, par. 7-8 (Klein).

[14] Voir *supra*, par. 2.

— si la question était réellement de déterminer si la Grèce s'est opposée à cette admission, la Cour n'en devrait pas moins, toujours, refuser d'exercer sa compétence car, pour la trancher, elle devrait nécessairement se prononcer sur divers aspects du différend que l'ARYM entend lui dissimuler et sur lesquels elle n'a, au demeurant, pas compétence.

Référence pour référence à la Grèce classique : ce n'est pas d'une épée de Damoclès qu'il s'agit[15] mais d'un nœud gordien ; et ce nœud, pour cause d'article 21, vous ne pouvez pas le trancher.

II. Une interférence irrecevable dans un processus politique

23. Il y a, Mesdames et Messieurs les juges, une autre raison pour laquelle les demandes de l'ex-République yougoslave de Macédoine sont incompatibles avec l'exercice des fonctions judiciaires de la Cour. En effet, si vous les examiniez pour, finalement, les rejeter, vous vous ingéreriez dans un processus éminemment politique dont vous compromettriez, voire risqueriez d'empêcher, l'aboutissement heureux.

24. J'ai appris avec étonnement mardi, en écoutant le professeur Klein que nous aurions invoqué un motif d'irrecevabilité qu'il a appelé la «réserve judiciaire»[16]. Il le caricature considérablement. Nous sommes évidemment conscients que ce n'est pas «parce qu'un différend juridique soumis à la Cour ne constitue qu'un aspect d'un différend politique, [que] la Cour doit se refuser à résoudre dans l'intérêt des parties les questions juridiques qui les opposent» (*Personnel diplomatique et consulaire des Etats-Unis à Téhéran (Etats-Unis d'Amérique c. Iran), arrêt, C.I.J. Recueil 1980*, p. 20, par. 37)[17]. Mais l'objection que nous soulevons est différente : nous ne prétendons pas que vous ne pouvez pas vous prononcer car le problème dont l'ARYM vous a saisi est politique (même s'il l'est éminemment), mais nous disons — ce qui est fort différent — que, si vous vous prononciez, même sur les seuls aspects juridiques qu'il comporte, vous tiendriez en échec une décision du Conseil de sécurité et compromettriez les chances de succès des négociations entre les Parties que le Conseil a ordonnées et auxquelles elles se sont engagées par l'article 5 de l'accord intérimaire du 13 septembre 1995.

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[15] Voir CR 2011/6, p. 15, par. 6 (Klein).

[16] *Ibid.*, p. 18, par. 12.

[17] Voir aussi *Activités militaires et paramilitaires au Nicaragua et contre celui-ci (Nicaragua c. Etats-Unis d'Amérique), compétence et recevabilité, arrêt, C.I.J. Recueil 1984*, p. 439, par. 105.

[Projection n° 2 — Article 5, paragraphe 1, de l'accord intérimaire.]

25. Cette disposition est ainsi rédigée :

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

[Fin de la projection n° 2. Projection n° 3 — Résolution 817.]

26. Dans cette résolution, reproduite dans le dossier des juges, à l'onglet n° 2, le Conseil de sécurité, notant «qu'une divergence a surgi au sujet du nom» de l'ARYM, divergence «qu'il faudrait régler dans l'intérêt du maintien de relations pacifiques et de bon voisinage dans la région», prie instamment la Grèce et l'ex-République yougoslave de Macédoine de coopérer pour arriver à un règlement rapide de ce problème. Il réitère cette demande — dont le professeur Reisman a analysé la portée hier après-midi — dans la résolution 845 de la même année.

27. L'obligation de négocier sur le nom du demandeur résulte donc à la fois d'une décision du Conseil de sécurité et de l'engagement conventionnel pris par les Parties dans l'article 5 de l'accord intérimaire.

[Fin de la projection 3. Projection n° 4 — Extrait de la déclaration de Bucarest.]

La déclaration adoptée par les pays de l'OTAN lors du sommet de Bucarest — qui est projetée à l'écran et se trouve à l'onglet n° 17 du dossier des juges — se borne à réitérer cette obligation.

28. Avec tout le respect dû à la Cour, il n'est surement pas abusif de penser qu'il n'appartient pas à l'«organe judiciaire principal» des Nations Unies de délier l'ARYM de cette obligation, dont l'origine remonte aux résolutions du Conseil de sécurité de 1993, qu'elle a expressément acceptée par l'accord intérimaire et que rappelle la déclaration de Bucarest.

[Fin de la projection n° 4.]

29. Comme en matière consultative[18], il est essentiel que la Cour veille, dans l'exercice de sa fonction contentieuse, à ne pas se laisser instrumentaliser par le demandeur.

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[18] Voir *Conformité au droit international de la déclaration unilatérale d'indépendance relative au Kosovo*, avis consultatif du 22 juillet 2010, opinion dissidente de M. le juge Bennouna, par. 15.

30. Or c'est à l'évidence ce qui se produirait si la haute juridiction faisait droit aux conclusions de l'ARYM : celle-ci obtiendrait, par un arrêt de la Cour, la consécration de la politique du fait accompli qu'elle mène avec obstination depuis 1993 et qu'elle n'a pu arracher par la négociation ou plutôt qu'elle n'a pu arracher par sa politique constante d'obstruction aux négociations[19], que Mme Telalian a rappelée hier.

31. Non seulement la solution du différend ne relève pas de la compétence de la Cour, mais en outre, en l'occurrence, en cautionnant la politique du fait accompli du demandeur en lieu et place d'un règlement négocié, elle serait contraire à l'intégrité de la fonction judiciaire. Ainsi que la Cour l'a expliqué dans *Nicaragua*, elle «doit s'abstenir de tout acte qui risquerait de faire inutilement obstacle à un règlement négocié» (*Activités militaires et paramilitaires au Nicaragua et contre celui-ci (Nicaragua c. Etats-Unis d'Amérique), fond, arrêt, C.I.J. Recueil 1986*, p. 143, par. 285)[20].

Mesdames et Messieurs de la Cour, je vous remercie de m'avoir écouté avec votre bienveillance habituelle. Et je vous prie, Monsieur le président, de bien vouloir autoriser le professeur Crawford à me succéder à la barre.

The PRESIDENT: I thank Professor Alain Pellet for his statement. Now I invite Professor James Crawford to the Bar.

Mr. CRAWFORD:

Interpretation of Article 11 of the Interim Accord

Introduction

Mr. President, Members of the Court, it is an honour to appear before you this morning on behalf of Greece.

[19] Voir contre-mémoire, p. 33-36, par. 4.2-4.13 et duplique, p. 166-177, par. 7.53-7.70.

[20] Voir aussi *Zones franches de la Haute-Savoie et du Pays de Gex, ordonnance du 19 août 1929, C.P.J.I. série A n° 22*, p. 13 (extrait cité dans l'arrêt de 1986).

1. My purpose is to open Greece's case on the merits. I do this not as a concession on any point already made by my colleagues in their discussion of jurisdiction and admissibility. But it is necessary to respond to the Applicant's singular claim, if you should nevertheless decide that you have jurisdiction over the claim and that it is admissible.

2. Mr. President, Members of the Court, the key interpretative issue in this case concerns Article 11 (1) of the Interim Accord, read as it must be in the context of the treaty as a whole, including Article 22.

3. The Applicant's presentation of Article 11 (1) had a number of remarkable features.

— The first feature is that Article 11 (1) was treated in antiseptic separation from the rest of the Interim Accord[21]. On this view Article 11 (1) is a free-standing unilateral obligation — binding only on Greece. Indeed, it is a self-contained régime in which Greece is manacled while the Applicant is free. It is a clause which, they say, has its own object and purpose, yet the Applicant is free to subvert that object and purpose provided only that it maintains the appearance of negotiations for a universal, singular name.

— The second feature is that even within the confines of the so-called régime of Article 11 (1), the first limb — the obligation not to object — gets all the airspace, all the attention. Yet Article 11 (1) walks on two feet and it walks upright. For the first limb of Article 11 cannot be dissociated from the second limb — the second limb is a condition for the operation of the first, which Greece would otherwise never have consented to.

4. As to this second feature, counsel opposite had considerable difficulty in grasping the character of a condition. For example, Professor Murphy made much of the third-party principle. He says that the safeguard clause cannot create rights and obligations for third States, because there is no obligation for them to breach[22]. But this is not the point, for the safeguard clause is triggered irrespective of the legal characterization of the acts in question. The issue is simply whether the Applicant is to be referred to in the future differently than as stipulated in Security Council resolution 817 — "for all purposes". The safeguard clause, on its plain language, is triggered in

[21]CR 2011/6, pp. 50-62, paras. 4-31 (Sands).

[22]CR 2011/6, p. 35, para. 46 (Murphy).

that event, and in the first instance it is for Greece as the acting State to determine whether the condition is satisfied. It is a provision in a bilateral treaty: to say that it does not bind third States is to say nothing about its operation as a condition. Indeed *because* it does not bind third States — and may not even oblige the Applicant — it is more important as a safeguard for Greece.

5. That takes me back to the first feature which I have mentioned. In this presentation, for the purposes of argument, I propose to assume that Article 11 (1) is indeed a unilateral promise by Greece, and that it imposes no new obligation on the Applicant, nor, of course, on any third State. I will also assume, again for the purposes of argument, that Article 11 (1) is self-contained, and that what goes on or does not go on in the rest of the Interim Agreement can have — short of the outright termination of the Agreement — no consequences for the interpretation or application of Article 11 (1). In that way, I will be meeting the Applicant's argument on its own ground. But even so — even on these assumptions — the conclusion must be that Greece did not breach Article 11 (1), and that even if the first limb of Article 11 (1) is engaged, Greece was entitled to rely on the second equal limb, the safeguard clause.

6. One final preliminary remark on the Applicant's approach to interpretation. To determine the meaning of Security Council resolution 817 (1993), the Respondent spends remarkably little time on the text of the resolution. Instead, it produces an affidavit which it took from Sir Jeremy Greenstock, a distinguished British diplomat, but one who was not based at the United Nations at the time the resolution was adopted. Professor Sands asks rhetorically — he was in a remarkably rhetorical mode — "Has the Respondent produced any evidence — any evidence whatsoever — other than its own statements, to promote a contrary view to that expressed by Ambassador Greenstock? No, Mr. President, [he rhetorically answered] it has not."[23] It is true that Greece, in response to Sir Jeremy, has secured no affidavit, whether based on the recollections of a diplomat about events that took place 18 years ago, whether in the form of hearsay and whether qualified by the affiant himself as based solely on his recollections and as reflecting no more than an "informal" understanding about what the Applicant, and I quote, "would be likely to" do[24]. I hope we may be forgiven for having had to rely on the actual text of Security Council

[23]CR 2011/5, p. 27 para. 10 (Sands).

[24]Statement by Sir Jeremy Greenstock, 29 May 2010. Reply, Ann. 59; emphasis added.

resolution 817, as of the Interim Accord, read of course in accordance with Articles 31-33 of the Vienna Convention. Professor Sands seemed rather to rely on a new rule of interpretation: perhaps we should call it Article 33*bis*: "when the recollections of retired diplomats are ambiguous or obscure, it is permissible to turn, for the purposes of clarification only, to the text itself".

The Component Elements of Article 11, paragraph 1: an overview

7. Mr. President, Members of the Court, I turn to an overview of Article 11, paragraph 1, of the Interim Accord, in order to recall its overall structure and to consider some general issues of interpretation that it presents. I will then turn to the two clauses of the Article, to examine each in greater depth.

8. Article 11, paragraph 1, of the Interim Accord gives the Applicant a valuable new opportunity. It is an opportunity it certainly did not and does not have under general international law. It was a major concession by Greece when it promised, under the first clause of Article 11, paragraph 1, "not to object".

9. When a State qualifies or curtails a right which it holds, such as the right not to object to another State's admission to an international organization, it would be surprising if the State did not exercise considerable care in the negotiations. So it was with Greece when accepting Article 11, paragraph 1. The promise is in specific, negative terms. It is a promise "not to object". The drafting history reveals that these were words deliberately selected to confer a particular, limited right on the other party, and, correspondingly, to oblige Greece in a particular, limited way.

10. Then there is the safeguard clause — the second clause of Article 11, paragraph 1. The Applicant talks about the second clause as "granting" a right to Greece. It says that "the Parties have strictly limited the conditions in which *the grant of the Respondent's right* to object may be exercised"[25]. But it is quite wrong to begin one's analysis of the second clause as a "grant" of something to Greece. It is not a clause telling Greece what Greece is to get. To the contrary, it is a clause telling the Applicant what it is *not* to get. The safeguard clause is an indispensable limiting term in the bargain which Greece entered into, when *Greece* gave something, but was careful not to

[25]Memorial, para. 4.30; emphasis added.

give *everything*. What Greece gave was the promise "not to object" — limited by the plain meaning of those words and, moreover, limited by the safeguard clause.

11. How does the safeguard clause limit the scope of Greece's obligation? It does so by making clear that Greece retains and preserves that which Greece already had — the right to object — in the event that the Applicant is to be referred to differently than as required under Security Council resolution 817 in any organization of which Greece is a member. The safeguard clause protects Greece's interest in a negotiated settlement of the difference concerning the name. It does so by making clear that, under Article 11, paragraph 1, Greece's promise meets its limit, "if and to the extent the Party of the second part is to be referred to in such organization or institution differently" than as stipulated. In other words, if the Applicant is to attempt to impose another name, in disregard of the negotiation process, it forfeits the benefit of Greece's promise.

Article 11, paragraph 1: specific issues of interpretation

12. Mr. President, Members of the Court, I turn now to some specific issues of interpretation of Article 11, paragraph 1.

The obligation "not to object"

13. The first issue concerns the scope of the obligation "not to object":

> "the Party of the First Part agrees not to object to the application by or the membership of the Party of the Second Part in international, multilateral and regional organizations and institutions of which the Party of the First Part is a member". [PP]

14. The Applicant does not agree that those words mean what they say. In its pleadings it says:

> "The obligation encompasses any implicit or explicit act or expression of disapproval or opposition in word or deed to the Applicant's application to or membership of an organization or institution. An act of objection may be expressed in different forms, including in writing and orally, by silence or in some other form."[26] [PP]

And it goes on: "The formulation encompasses positive acts, such as a vote, as well as a failure to act, such as the failure to attend a meeting where participation is necessary in order to express a required view."[27]

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[26]Memorial, para. 4.25.

[27]*Ibid.*, para. 4.26. See also Reply, para. 4.16.

15. Now it is worth considering exactly what these statements could mean. They potentially encompass a wide variety of conduct. In the Applicant's words, "*any* implicit or explicit act or expression of disapproval or opposition in word or deed" could fall within the prohibition of Article 11, paragraph 1. What is an "implicit" expression? To cover expressions as well as their "implicit" counterparts goes a very long way. A raised eyebrow? A resigned sigh? An outright grimace? An unreconciled groan? What is an "implicit" act? Greece would have accepted not only a wide obligation, but an obligation exceedingly difficult to interpret, if it really had agreed to avoid "implicitly" acting in a certain way. Whatever these terms might mean, the implication is that *any* example of such act or such an expression can constitute a breach — treaty breaches fall off the trees like leaves in autumn. According to the Applicant, "[a]n *act* of objection may be expressed in different forms, including in writing and orally, by silence or in some other form". So too does the act of objection include, in its view, "a failure to act, such as the failure to attend a meeting where participation is necessary in order to express a required view".

16. Now these are remarkable assertions. An obligation, to be meaningful, should be expressed in terms that an allegation of breach is susceptible to ordinary methods of proof. In his presentation, Professor Murphy said as follows:

> "Under the Respondent's theory, all that the Applicant gained was the Respondent's obligation to abstain from voting or to vote 'yes' when the Applicant's request for admission was formally voted on at NATO, *as a part of a process in which no such voting occurs*. Thus, for one of the key international organizations that the Applicant wished to join, Article 11 (1) has absolutely no meaning. Such an interpretation is, we submit, nonsensical."[28] (Emphasis in the original.)

But there is nothing nonsensical, in a system governed by the rule of law, in requiring that an Applicant adduce the evidence of the specific breach it alleges. Not all international organizations are alike. The decision-making processes of some organizations produce a record of votes, vetoes, abstentions, objections, and all the other incidents of their procedure. In NATO, there is no record of a vote, as the organization takes no vote. But the Applicant, alleging that Greece objected and thus prevented NATO from inviting it to membership, offers no NATO record in any form whatever to substantiate its claim of an alleged objection, and it offers no explanation of the omission. I am afraid that as a non-member, the Applicant must take NATO as it finds it.

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[28]CR 2011/6, p. 27, para. 20 (Murphy).

17. In any event, a single, precise and negative obligation is what the Parties to the Interim Accord actually agreed. But the Applicant seeks a new and far-reaching interpretation of the phrase "not to object". According to it, Greece is in breach for failing to attend meetings, for failing to express a required view. Article 11, paragraph 1, says nothing about attending meetings. It is an obligation "not to object". Under this interpretation not showing up would be a breach.

18. But even the mildly affirmative act of showing up is not enough. Greece is supposed to "express a required view". The minutes of prospective NATO meetings are secreted in the interstices of Article 11 (1). To say that Greece has an obligation to participate and to "express a required view", implies that the Agreement should stipulate what the "required view" might be. But, in respect of this interpolated requirement, the Interim Accord says nothing at all.

The drafting history

19. The Applicant seeks to draw the Court into the drafting history of the Interim Accord, in an effort to expand the scope and meaning of Greece's obligation. But the drafting history confirms the plain meaning of the text.

20. One draft proposed that: "The Parties will not hamper each other's participation in international organizations."[29] This would have been reciprocal, and it would have been, if vague, certainly far-reaching. On 23 April 1994, the Parties considered a draft which retained the "not hamper" clause, and made the obligation even further-reaching. The draft would have required Greece to "support the full participation of [the Applicant] in the CSCE and other European and international organizations"[30]. A State carrying out such terms in good faith could expect to be asked to do a good deal — not just to refrain from objecting. It must have been prepared to do any of the various things which might "support" the other State's participation. This draft was rejected.

21. Another draft, dated 15 March 1995, would have obliged Greece "not to object" but also "not to impede"[31]. This, arguably, was a wider formulation still. It would have concerned not only admission, but co-operative arrangements, arrangements like NATO's Membership Action Plan. The 15 March 1995 draft also illustrates that the Parties understood an obligation "not to object" as

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[29]See Counter-Memorial, Ann. 148.

[30]*Ibid.*

[31]*Ibid.*

something distinct from an obligation "not to impede". The draft included both obligations. The text adopted includes only the former. The drafting history, far from supporting the expansive interpretation of the first clause of Article 11, paragraph 1, contended for by the Applicant, shows that the Parties considered texts which would have established an expansive meaning but rejected them. Greece agreed "not to object" and nothing else. That is the *maximum* possible scope of the commitment contained in Article 11, paragraph 1.

Obligation of conduct or result

22. The Applicant frequently describes the obligation in Article 11 (1) as if it were an obligation of result: according to it, the provision must be understood in light of the importance to it of gaining admission to all the international organizations "it wished to join"[32]. Recall Professor Murphy's statement that the Interim Accord establishes the Applicant's "ability to secure membership in international organizations"[33] and his further statement that the admission of the Applicant to the Council of Europe and the OSCE "demonstrates" the meaning of Article 11 (1) as applied to NATO[34]. Greece does not contest that membership is an important goal for the Applicant. Greece agreed to a special obligation, in connection with that goal — but it did not warrant that the Applicant, in every case, would fulfil the goal. Nor, of course, could Greece have done so: it is for each organization to decide each candidacy in accordance with its own rules of procedure; and specialized, closed organizations each have their own rules of substance governing admission of new members. Yet Professor Murphy says it is "nonsensical" to consider these procedures when applying Article 11 (1). My colleague Professor Reisman will explain how Article 22 confirms and establishes that the rules of NATO cannot be occluded by the Parties' bilateral undertaking in Article 11. I would only add this: taken on its own, the text of Article 11 (1), in light of the purpose of assisting the Applicant to gain admission — a purpose so important to the Applicant — specifies a particular operation in international institutions which Greece is obliged to refrain from using — Greece is not to object. It hardly makes a nonsense of the clause to say that this is what the Parties agreed in 1995. Indeed, they had to negotiate long and

[32]CR 2011/6, p. 27, para. 20 (Murphy).

[33]*Ibid.*, p. 23, para. 10 (Murphy).

[34]*Ibid.*, p. 27, para. 21 (Murphy).

hard to agree to so much. It is a perfectly natural interpretation of the words, that they are concerned with the rules and procedures of the relevant organizations. This is an interpretation consistent with Greece's interest in avoiding an omnibus commitment of indefinite scope, possibly beyond Greece's competence to fulfil; and it is consistent with the Applicant's interest in assuring that vetoes and objections do not block its admission.

23. The Applicant insists that Article 11 (1) establishes an obligation of result, when it serves its purpose, but it switches to saying that the obligation is purely one of conduct, when that is needed to advance its case. Thus, for example, we are told that the admission of the Applicant to the Council of Europe and the OSCE "demonstrates" the meaning of Article 11 (1)[35]. Then we are told that this case "is, at its heart, about the *Respondent's* conduct"[36]. What the Applicant really wants Article 11 (1) to say is that Greece is responsible for every instance in which the Applicant's candidacy to an international organization of which Greece is a member is denied or delayed. No such standard was stipulated by the Parties to the Interim Accord.

Conclusion on the first limb of Article 11 (1)

24. A final word on the first limb of Article 11 (1). It applies generally to all international organizations, but this does not mean it applies in precisely the same way to different organizations, or that no account is to be taken of the differences between them. According to Professor Murphy,

> "[b]oth Parties also agree, or at least the Respondent does not dispute, that the term 'international, multilateral and regional organizations and institutions' includes NATO and the European Union . . . consequently, both Parties agree that this clause established an obligation upon the Respondent not to object to the application or membership of the Applicant in NATO"[37].

Now I say nothing at all about the European Union (EU) — whether or not it is an international organization or institution may be debated. The Court may think it is international on some occasions and not international on others, but the EU is not at issue in these proceedings. No doubt NATO is an international organization but if by this the Applicant wishes to equate a military

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[35]CR 2011/6, p. 27, para. 21 (Murphy).

[36]*Ibid.*, p. 29, para. 29 (Murphy).

[37]*Ibid.*, p. 24, para. 14 (Murphy).

alliance to a regional meteorological organization, then it is off the mark. Article 11 (1) must be read in conjunction with Article 22. As Professor Reisman will explain, the obligation which Article 11 (1) established cannot be stated without considering the "rights and duties" of Greece under each organization's constitutive instrument.

The safeguard of Greece's existing rights

25. Mr. President, Members of the Court, I turn to the second limb of Article 11 (1), the safeguard clause. To understand Greece's obligation — the extent of that obligation — under Article 11, paragraph 1, it is imperative to consider the second half of the provision as well. This is one paragraph consisting of two clauses of equal weight and co-ordinate authority.

26. The safeguard clause exists to protect Greece's legal right to negotiate a settlement of the difference concerning the name. It accomplishes this by assuring continued use of the provisional name for all purposes — for all purposes — within international organizations, until the Parties can agree a permanent name. So for the Applicant to make its own, chosen name a *fait accompli* and thus to evade the inconvenience of real negotiations, it must convince the Court that the safeguard clause is trivial. But the safeguard clause is an operative clause of the Interim Accord. So long as it still functions as intended, the Applicant must face the possibility, like it or not, that Greece will meet attempts to thwart the negotiated settlement of the difference with an appropriate response.

Issues of syntax

27. As I said a moment ago, the safeguard clause defines the situation in which Greece has *not* obliged itself in respect of a candidacy in an international organization. The definition is simple enough, and the words which the Parties agreed express it clearly enough. Greece is under no obligation under Article 11, paragraph 1 — no obligation — "if and to the extent the Party of the Second Part is to be referred to in such organization or institution differently than in paragraph 2 of United Nations Security Council resolution 817 (1993)". [PP]

28. These are the words the Parties chose. The Applicant here has contested almost every element of their syntax.

29. First, this is an expression in the passive voice, it designates no particular actor. It is inclusive. The definition includes situations in which the organization is to refer to the Applicant differently than as stipulated. It includes situations in which member States are to do so or in which officers or organs of the organization are to do so. This is the result of the chosen grammatical function — "is to be referred to".

30. Earlier drafts, which the Parties rejected, would have taken a different approach. For example, the drafts of 21 July 1995 and 21 August 1995 would have read as follows:

> "however, [Greece] reserves the right to object to any membership referred to above if, and to the extent, *the provisional reference under which the Party of the second part is to be admitted to* such organization or institution differs from that in paragraph 2 of . . . Resolution 817 (1993)" (emphasis added). [PP]

Is to be admitted. Only the organization admits a candidate. To limit the situation to cases where the Applicant has been admitted under another name would have limited the safeguard clause to a very particular case. The Parties rejected this restricted formulation. Professor Murphy apparently wishes they had accepted it. He says, "the second clause of Article 11 (1) . . . [i]n effect . . . says that the Respondent can object if the Applicant is to be admitted to an international organization"[38]. But the actual text provides that the Respondent can object "if and to the extent that [the Applicant] is *to be referred to*" differently.

31. This is not the only occasion the Applicant has sought to revert to phrasing which the Parties plainly rejected. In its Reply, the Applicant said as follows:

> "The text does not reserve a right to object if the Applicant 'is to be referred to in such organization or institution, *or intends to call itself in its relations with the organization or institution,* differently than' the provisional reference. The clause might have been written that way, but it was not. Instead, the language addresses how the Applicant is to be 'referred to in such organization or institution', not how it is to call itself."[39] [PP]

The emphasis is in the original.

32. The Applicant means that the phrase "intends to call itself in its relations with the organization or institution" adds to and extends the meaning of the phrase "is to be referred to in such organization or institution". But the problem is that the phrase "is to be referred to" already, self-evidently, includes the putative additional phrase. The phrase "is to be referred to", absent any

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[38]CR 2011/6, p. 38, para. 56 (Murphy).

[39]Reply, para. 4.53; (emphasis in the original).

indication of who or what is making the reference, includes all possible actors. The Reply goes on to say: "[the] language addresses how the Applicant is to be 'referred to in such organization or institution', *not how it is to call itself*"[40]. [PP] Note the positioning of the internal inverted comma, the word "to be" is outside it. Repeating the point whether with "to be" or without "to be" — to be or not to be — does not however change the syntax. The verb "to be" remains part of the play and part of the Interim Accord as adopted. The passive voice remains all-inclusive. Even moving the inverted comma, so as to exclude the verb "to be" does not alter its meaning. [PP — with corrected version]

33. The Applicant also switches prepositions. In several paragraphs in its Reply, the Applicant says that the question, under the safeguard clause, is whether the Applicant is to be referred to *by* NATO differently than stipulated[41]. But the words of the safeguard clause are "to be referred to *in*" the organization or institution. The Applicant says that the safeguard clause "allows the Respondent to object to the Applicant's 'membership' if the Applicant is to be referred to 'in' the organization or institution differently . . ."[42]. [PP]

34. I draw your attention again to the use of inverted commas. Putting the word "in" inside inverted commas may demonstrate unease, but it does not make the safeguard clause go away; nor does it transform the word "in" to the word "by".

35. The phrase "if and to the extent" is also consistent with the Parties' intention that the definition in the safeguard clause includes the conduct of actors within international organizations, not just the organizations themselves. A clause stipulating the condition simply "if" the Applicant is to be referred to differently might be susceptible to the interpretation that this is an on/off switch, an either/or. As the Applicant would have it, if the organization itself admits it under a different name or officially adopts the use of a different name, the switch is on; Greece may object. But this is not how the clause works, because it is not how it is written. I am sorry for the Applicant in having to descend so far into the text, but the textual interpretation is what this is about. The clause as written says "if and *to the extent*" the Applicant is to be referred to differently. The words "to

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[40]AR, para. 4.53; emphasis added.

[41]*Ibid.*, paras. 4.33-4.36.

[42]*Ibid.*, para. 4.33.

the extent" would lack *effet utile* if the Applicant's interpretation were imposed on the clause as a whole: the words "to the extent" are inconsistent with an on/off switch. To the extent the condition may be satisfied — for example, because some States members of an organization may defect from the stipulated provisional name. To that extent, the safeguard clause is triggered, to the extent the organization itself might use a different name, without doing so for all purposes — for example, when its officers are instigated to use a different name, the safeguard clause is triggered. The condition in the safeguard clause is triggered "if and to the extent" the Applicant is to be referred to differently. This is consistent with the object and purpose of the Interim Accord to protect Greece's interest in the negotiation process: if, even to an extent, the Applicant instigates the use of a different name, the risk is presented of the entrenchment of that name, and, measure by measure, the negotiation process would become irrelevant. Indeed, as we shall see, that is precisely the plan.

36. Furthermore the safeguard clause denotes a future situation — the Applicant "is to be referred to" differently than as stipulated. As with Hamlet, the "to be" is a "to be" of the future. This too is clear from the syntax. The Applicant argues that only an existing practice of an organization establishes the situation[43]. But the Parties chose the words of the safeguard clause carefully. If they had said that the situation triggering the safeguard clause can exist only *after* an organization admits the Applicant under a different name, or *after* that State, as a member, manages to entrench a different name in the practice of the organization, then the safeguard clause would have safeguarded nothing at all. Greece agreed to confer a special right, expressed as an obligation not to object. It did not give a licence to undermine the interim arrangement. If Greece reasonably foresees that the Applicant is to be referred to differently than as stipulated, then Greece retains the right to object.

37. It is contended that Greece' interpretation "totally detaches the ability to object from the circumstances of the Applicant's impending membership"[44]. But it is precisely the "circumstances of the Applicant's impending membership" which the safeguard clause is concerned with. Professor Murphy says that the result of the safeguard clause is that "if the Respondent thinks that,

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[43]AR, paras. 4.33-4.36.

[44]CR 2011/6, p. 36, para. 49 (Murphy).

five years later the Applicant joins NATO, it is possible that France or Botswana or Turkey — or for that matter the Hague Rotary Club — might, in a communication with NATO, call the Applicant the 'Republic of Macedonia', then the Respondent is entitled to object"[45]. This calls for two remarks. First, on behalf of the stalwarts of The Hague Rotary Club, I object to their being dragged into the case — but I give you the web reference to the membership rules of The Hague Rotary Club[46]. Secondly, Professor Murphy has already accepted that there is a future element in the safeguard clause: it preserves Greece's right to act, before the situation has so deteriorated that Greece has lost its right to a negotiated settlement of the difference. The reservation of right under Article 11 (1), second limb, has a purpose. It is not a mere legalistic ploy to claw back or, as Professor Murphy has put it, to "carve out"[47], rights as against the Applicant's interests. It is a vital provision, agreed to protect Greece's interest in the balancing arrangement of the Interim Accord, and in particular to assure that the Applicant lives up to the obligation to negotiate, with Greece, a final definitive name. When I return later this morning to consider the Applicant's rendition of the facts, I will recall that Greece had more than good reason to believe that the Applicant, "given the circumstances of its impending membership", was not living up to the obligation to negotiate. Indeed, in a stunning admission of *realpolitik* trumping agreed commitments under international law, we have the Applicant's word for it.

Procedural issues

38. Faced with these difficulties, the Applicant takes refuge in procedure. It attempts to introduce a requirement of notice, as a precondition of Greece exercising its pre-existing right. It complains that: "At no time did the Respondent seek to justify its objection on the ground that the Applicant would be referred to in NATO differently than in paragraph 2 of . . . Security Council resolution 817"[48].

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[45]CR 2011/6, p. 36, para. 49 (Murphy).

[46]See http://www.rcthm.org/membership.html.

[47]CR 2011/6, p. 22, para. 4 (Murphy).

[48]AM, para. 1.5.

39. But the safeguard clause contains no procedural requirement[49], it is a pure condition, it is a pure limit on the extent of an obligation. You may contrast Article 7, paragraph 3, of the Interim Accord, which expressly requires the Party complaining of a breach of that provision to "bring such alleged use to the attention of the other Party"[50]. The safeguard clause is silent on the point. If the first limb of Article 11 (1) operates automatically, as the Applicant affirms, then so too does the second limb which is the condition on the extent of the first limb.

Greece's margin of appreciation

40. It follows from these elements of syntax, as well as from the actual language and purpose of Article 11, paragraph 1, that Greece has a margin of appreciation to consider relevant factors when judging whether the Applicant "is to be referred to" differently than as stipulated. It is true that this gives Greece an important function in carrying out the terms of Article 11, paragraph 1. But it is consistent with that paragraph as a whole, and with the Interim Accord as a whole, that Greece's agreement not to object is carefully balanced. This considerable concession was made in the hope that the Applicant would do its part to maintain a stable relationship with Greece pending the definitive settlement of the difference. In particular, it is made in the hope that Greece would be engaged in negotiations in good faith to achieve that definitive settlement.

Evidence which Greece in good faith interprets to show that the Applicant has failed in its obligations in this regard is relevant to Greece's determination under the safeguard clause. Indeed, it is relevant even if they are not obligations, even if they are simply triggers for the exercise of a conditional right. If the evidence is that the Applicant, in relevant organizations, at least to an extent, "is to be referred to" differently, then Greece may exercise its retained right.

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[49]RCM, paras. 7.75-7.77.

[50]Art. 7, para. 3, reads in full:

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

41. Later this morning, I will return to address the application of Article 11, paragraph 1, to the events of 2008, with your permission, Mr. President. For present purposes, all I need to say is that the evidence, as at April 2008, was more than sufficient for a State to say, in good faith, that the Applicant was not to be referred to consistently with the provisions of the Interim Accord.

42. Moreover, if the Applicant were correct to deny that Greece has any right to consider the circumstances of its conduct, the question would arise: whose function is it to decide whether the safeguard clause condition is triggered? The organization is not a party to the Interim Accord and, in any event, the question is not a simple matter of the organization's present official policy: the question concerns practice by States within the organization, as well as anticipated future conduct of the Applicant. To say that it is for the Applicant to decide would be strange indeed: the discretion in that case would be all on one side.

Subsequent practice of the Parties

43. Mr. President, the Applicant relies heavily on what it calls the subsequent practice of the Parties, in an attempt to characterize the safeguard clause as applying only where an international organization has admitted the Applicant under a name other than that stipulated. The Applicant notes the many organizations in which it has used another name, and observes, correctly, that Greece did not invoke the safeguard clause in those cases[51]. According to Professor Murphy:

> "In none of those instances did the Respondent invoke the [safeguard] clause . . . Perhaps the Respondent would have us believe that it was simply choosing to look the other way . . . However, the far more plausible interpretation is that the Respondent itself fully understood what the second clause meant, and understood that it did not allow for an objection based solely on the Applicant's own use of its constitutional name in relations with the organization."[52]

Professor Sands, though referring to Article 22 rather than the safeguard clause, also relied on subsequent practice of the Parties: "The subsequent practice of the Parties confirms that our interpretation has got to be the correct one."[53]

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[51] CR 2011/6, pp. 42-43, para. 68 (Murphy).

[52] *Ibid.*

[53] *Ibid.*, p. 54, para. 14 (Sands).

44. Now Article 31, paragraph 3 *(b)*, of the Vienna Convention provides that one of the factors which shall be taken into account in interpreting a treaty is "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation"[54]. That a practice exists — that something does or does not happen — is not dispositive in interpreting the treaty. The "subsequent practice . . . of the parties" is not dispositive. It must be such as "establishes [their] agreement". This requires a detailed study of the practice, and of the reasons for it.[55]

45. Such a study is always subject to context. A bilateral accord adopted to normalize relations between parties which have had considerable differences over a range of issues is a very specific context. An objection falling squarely within the letter of such a treaty may well not be in its spirit. It would be strange to say to the party that its rights begin to drop away as a result of its decision to pursue the objects and purposes of the treaty above and beyond the strict provisions of its plain language. And it is certainly not the case that a breach by one party establishes the "agreement of the parties" regarding the interpretation of the provision breached. That would give any treaty party a right of unilateral revision. It would not be interpretation; it would be the end of the law of treaties.

46. The Applicant deprecates the idea that a party might forebear and refrain from exercising an available right — "perhaps the Respondent would have us believe that it was simply choosing to look the other way . . ."[56]. But it scarcely examines the practice. As Professor Reisman explained yesterday, the Applicant's conduct in the several years before the Bucharest Summit gave rise to serious concerns. I will consider the Applicant's conduct further when I return to address the application of Article 11 (1) to the facts of 2008.

47. In fact Greece has shown that the arrangement, in truth, was not problem-free. The Applicant's conduct attracted protests from Greece on a number of occasions. Not on every occasion. Not in every possible forum. But the purpose of the Interim Accord was to normalize relations, on the understanding that the Parties were committed to finding a solution to the

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[54] 1155 *UNTS* 331.

[55] E.g. in case concerning *Kasikili/Sedudu Island (Botswana/Namibia)*, *Judgment, I.C.J. Reports 1999 (II)*, pp. 1076-1087, paras. 52-63.

[56] CR 2011/6, pp. 42-43, para. 68 (Murphy).

difference, not more differences to overwhelm the solution. My colleague Professor Pellet will recall some of the instances, before 2008, in which Greece protested the Applicant's failure to fulfil its part of the bargain under the Interim Accord.

How the Applicant would rewrite Article 11, paragraph 1

48. Mr. President, Members of the Court, the Applicant would like to re-write Article 11, paragraph 1. According to its reconstruction, there was no reservation by Greece of a pre-existing right: the promise of the Applicant is no promise at all but merely an acknowledgment of a supposed entitlement which it has graciously accepted to forego under a particular, narrow exception. On this interpretation, Greece gave nothing, the Applicant a great deal.

49. And Greece, under this interpretation, would only hold the privilege when an organization has already voted to admit the Applicant other than under the stipulated designation. That is not what the Parties agreed.

50. Professor Murphy concluded his presentation with a story about the lamentations of Mr. X[57] — a bit like the lamentations of Jeremiah! Mr. X cannot use his given name because the club requires him to go by the provisional name of "Member X". Saying that you should see the present case in light of that example, Professor Murphy says that Article 11 (1) is a trade of rights and obligations between the Parties. But Professor Abi-Saab has recalled the long series of substantive concessions given to the Applicant and placing constraints on Greece. What the Applicant gave in return was simple: it had to use a provisional designation, "the former Yugoslav Republic of Macedonia", or Greece's promise under Article 11 (1) lapsed. And even this concession had limits. The Applicant did not agree that it had to be called "Mr. X". It did not agree to go by the name "Republic X", or for that matter, "X of the Second Part". The former Yugoslav Republic of Macedonia received the promise to negotiate a final, definitive name. To make the process of negotiation meaningful, both Parties had to accept that situation and both Parties had to act in good faith. But the Applicant has not negotiated in good faith. Moreover,

[57]CR 2011/6, pp. 48-49, paras. 86-87 (Murphy).

Mr. President, Members of the Court, the present case is not about an individual joining a private members' club, even a rotary club. It is a case about States, and their rights and obligations under bilateral and multilateral treaties over the long run.

51. The Applicant forgets that it never had a "right" to be admitted to every organization or, indeed, to any organization. Professor Reisman will address that problem in a moment.

52. The point for present purposes is that the Parties agreed a particular text, carefully negotiated to establish certain obligations. The Applicant not only would have you overturn that text; but, in doing so, the new bargain that this would impose would be oblivious to the actual legal relations that existed beforehand between the Parties. This is the interim situation in which the Applicant is to be referred to for all purposes as stipulated, until the Parties agree on a final settlement of that difference. The Parties have pledged to negotiate that settlement, not to impose it unilaterally. These are legal obligations. They are the necessary background to Article 11, paragraph 1. Greece's interest in preserving the interim situation is an essential one, because if it is ignored, the pledge to negotiate will be empty of all meaning. Greece accepted a conditional obligation "not to object". It did not capitulate to a global settlement in disregard of the Security Council resolution, and reaffirmed in Article 5, paragraph 1, of the Interim Accord, that the only settlement is to be the one mutually agreed.

Conclusion

53. Mr. President, Members of the Court, the Applicant would have the Court interpret Article 11 (1) as if its first part says more than the plain meaning of the words; and if its safeguard clause, its second part, means nothing at all. With your permission, I will come back to the application of Article 11 (1) to our facts in a while. In the meantime, in a sort of *entr'acte*, Professor Reisman hopes to say something about Article 22.

Thank you, Mr. President, Members of the Court.

The PRESIDENT: I thank Professor James Crawford for his statement. I now invite Professor Michael Reisman to take the floor.

Mr. REISMAN: Thank you, Mr. President.

ARTICLE 22 OF THE INTERIM ACCORD

1. Mr. President, yesterday I had the privilege of addressing the Court on Greece's objections to jurisdiction. My colleague, Professor Pellet, considering other objections, treated Article 22 of the Interim Accord. I would now like to explain why, should the Court determine that it has jurisdiction and that the case is admissible and should it further determine that Greece contravened Article 11, why Article 22 defeats the Applicant's claims.

2. Article 22 is something of a latecomer to this case. The 125 page Memorial did not discuss it and in its single accurate reference, the Applicant blandly summarized it as "the Accord's effect on third states and international organizations"[58]. It was only after the Counter-Memorial addressed the centrality of Article 22 to the claim that the Applicant expressed its views on it.

[Slide 2]

3. Article 22 provides, as you can see:

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

4. First, Article 22 is a *legal* provision of a treaty. It is not, as the Applicant would have it, "simply a factual statement", apparently absentmindedly misplaced in the body of a treaty. Neither is it an explanatory, background or aspirational provision, of the sort one might find in a preamble[59]. Nor is it, as the Applicant argues, a "routine provision directed at declaring as a matter of fact, the effect of the Interim Accord on third parties"[60]. As a legal provision in an international instrument, it was inserted to add and to mean something, not to restate a general principle and certainly not to mean nothing.

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[58]Memorial, para. 4.12.

[59]Reply, para. 5.12.

[60]*Ibid.*, para. 5.14.

5. Second, placement of Article 22 in the section entitled "Final Clauses" is not an accident. Provisions located in "Final Clauses" are there because their applicability is generally not confined to a particular part of the treaty. On Monday, counsel recited the chapter headings and explained how the Interim Accord's provisions were grouped. Final Clauses relate to many of these chapters. Thus, Article 21, paragraph 2, establishing jurisdiction, is in the Final Clauses because it applies to many chapters of the Interim Accord, rather than to any one particular chapter. Mr. President, *Article 22 is set in the Final Clauses because the range of issues which contemporary treaties and international organizations address, potentially relate Article 22 to every provision in the Interim Accord that prescribes an obligation whose performance might infringe on rights and duties of Greece (or the Applicant) under a treaty then in force.*

6. Third point: Article 22 does not prescribe a mandatory procedure for its application. If an obligation arising from the Interim Accord infringes an obligation arising from a prior treaty, Article 22 establishes that the obligation arising from the prior treaty prevails.

7. Article 22 is comprised of two distinct components. Its first [slide 3] is a general interpretive directive: the treaty is not to be understood as directed *against* any other State or entity; now, given the history of the Balkans, as reviewed by Ms Telalian and already well known to the Court, that was a prudent inclusion. As can be seen in the highlighted section, this component is expressly directed to "any other state or entity".

8. The second clause states that the Interim Accord does not infringe on the rights and duties of the Parties to the Interim Accord resulting from their agreements in force at the time of the conclusion of the Interim Accord. The Applicant contends that Article 22 "is concerned with the rights and duties of *third* parties, not the rights and duties of the Applicant or the Respondent"[61]. In other words, as counsel argued on Tuesday, Article 22 simply restates the *pacta tertiis* rule: *pacta tertiis nec nocent nec prosunt*, a principle codified as a "General Rule" in the Vienna Convention[62].

9. The Applicant does not explain why a general rule, which applies in any case, would have to be restated or what would be the *effet utile* of restating it. The Applicant's interpretation would render Article 22 essentially an exercise in redundancy. But the Applicant's interpretation cannot

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[61]Reply, para. 5.18.

[62]Vienna Convention on the Law of Treaties, Art. 34.

even be supported textually. Yesterday, I observed the Applicant's propensity to imply words in both the Interim Accord and resolution 817 to make their texts read as it would prefer. Here, too, words have been conjured: the words "of third parties" must be slipped into Article 22 after the word "duties" in order to sustain the meaning which the Applicant seeks. [Slide 4] But the words, "of third parties" are not there, while the capitalized word "Parties", referring to the parties in the treaty is there. If one accepted the Applicant's phantom words, the words "that the Parties have concluded" would become redundant. Even imagining those phantom words were actually there, the Applicant does not explain, if the second clause of Article 22 refers to third parties and not to Greece and the Applicant, how the Interim Accord could, on this reading, infringe on "the duties" of third parties.

10. The Applicant tries to further interpret Article 22 into redundancy by contrasting it with Article 14, paragraph 2, and Article 19, paragraph 2. These provisions deal with issues such as road, rail, maritime and air transport as well as transit of persons and goods, customs matters and the issuance of visas. As the Applicant was not party to the European Union, it may have been unaware that these are all areas in which European Union member States have delegated their competences to the European Commission. It was therefore natural, at least for the Greek drafters of the Interim Accord, to provide explicitly for such provisions, so as not to infringe upon the exclusive competences assigned to the European Commission in these fields. But Article 22, by its terms, addresses all bilateral and multilateral treaties of the Parties then in force.

11. The two clauses comprising Article 22 share a general concern with consequences outside the treaty, but they deal with distinctly different issues; and that is why they are redacted in separate clauses. The first clause, as I said, affirms that it is not directed *against* "any other State or entity". The second clause of Article 22 relates to the effect which the Parties' prior rights and obligations from previous treaties will have on the obligations assumed in the Interim Accord. This is, I should emphasize, not an unusual concern of treaty makers fashioning agreements, especially those that have existential implications. Consider Article 8 of the North Atlantic Treaty: [slide 6]

> "Each Party declares that none of the international engagements now in force between it and any other of the parties or any third State is in conflict with the provisions of this Treaty, *and undertakes not to enter into any international engagement in conflict with this Treaty*."

The North Atlantic Treaty [slide 7] underlines the problem and highlights the role of the second clause of Article 22.

12. Without Article 22 in Final Clauses, one might have assumed that the Parties had intended to privilege and give priority to some or all of the rights and obligations in the Interim Accord over rights and obligations deriving from earlier international agreements, which either of the Parties had concluded or at least have left the question open for negotiation or decision by a court or tribunal. Lest there be an assumption that the Parties were adopting such an approach, the second component of Article 22 explicitly subordinates in case of infringements the rights and obligations which Greece assumed in the Interim Accord to the prior "rights and duties" which Greece owed as a result of other bilateral and multilateral treaties, already in force, including rights and duties owed to international organizations.

13. I turn, Mr. President, to the relation between the second part of Article 22 and the relevant part of Article 11 of the Interim Accord; it may be usefully illustrated graphically, as Greece showed in its Counter-Memorial. To avoid shifting back and forth between slides, let me link, in a single slide, the relevant parts of the two provisions of the Interim Accord. I am going to edit out the safeguard clause at the end of Article 11, paragraph 1, but only in order to focus more sharply on the role of Article 22, and I will indicate that it is I who joined the two separate elements by inserting a bracketed conjunction; brackets, of course, being the conventional means of indicating that a word, not originally in the text, has been interpolated. On Tuesday, learned counsel protested that Greece is rewriting the Interim Accord. We trust the Court will appreciate that this entirely transparent exercise, which was clearly explained in Greece's written submissions, is for purposes of facilitating analysis. As you can see, it says in relevant parts: [slide 8]

> "the Party of the First Part agrees not to object to the application by or the membership of the Party of the Second Part in international, multilateral and regional organizations and institutions of which the Party of the First Part is a member . . . [but] this Interim Accord . . . does not infringe on the rights and duties resulting from the bilateral and multilateral agreements already in force that the parties have concluded with other States or international organizations".

Mr. President, the graphic juxtaposition of the relevant components of Article 22 with the relevant components of Article 11 shows that the obligation assumed in Article 11 is subordinated to prior rights and duties of Greece and the Applicant resulting from agreements with other international

organizations. Now, this is not, as the Applicant argues in its Reply and in its argument on Tuesday, an interpretation that allows Greece to "violate" Article 11. That is circular, positing that an application of Article 22 constitutes a per se violation of any provision to which it might apply. In the régime of the Interim Accord, every obligation in the treaty is potentially contingent on Article 22. When Article 22 does apply, the obligation in Article 11 yields. In so far as Greece has rights or duties — and that includes, Greece submits, the duty to exercise lawful judgment in decisions in certain other types of organizations — rights and duties in an organization under a treaty existing prior to the entry into force of the Interim Accord and an obligation of the Interim Accord could infringe those rights or duties, the obligation in the Interim Accord yields to the right or duty arising under the treaty already in force. [Slide 9]

14. I turn to those rights and duties. It is not, Mr. President, Greece's argument that the rights and duties of every organization to which it belongs at the entry into force of the Interim Accord necessarily prevails over the Interim Accord by operation of Article 22. But the inclusion of Article 22 in the treaty shows that the drafters intended that some might. In order to analyse which ones might, Greece distinguished two general categories of organization: organizations that aspire to universality or, as our French colleagues call them, *organisations à vocation universelle,* and limited-membership organizations or *organisations fermées*. In the first category, the presumption is in favour of membership, which may often be secured by little more than adherence; essentially, new members are added by a process of membership application and almost pro forma approval. Entities that aspire to universality are usually technical organizations. Many of them, by their nature, need as many members as possible to be optimally effective and they rely for their effectiveness on what economists call "the network" effect: whether it is a fax machine, a telephone or a universal organization, scarcity does not, as it usually does, correlate with value. To the contrary: the more members and users there are, the more valuable the machine or organization becomes. In these types of organizations, duties of members in such organizations with respect to new admission applications would not likely present conflicts with duties arising from the Interim Accord to which Article 22 would apply.

15. The second category of international organization, limited-member organizations, is comprised of organizations with confined membership. By contrast to organizations which aspire to universality, limited-membership organizations accomplish their specific missions by restricting membership to those States which not only are able to fulfil the formal entry and performance requirements, but whose admission is believed necessary to further the shared purposes of the organization. Membership in these organizations characteristically entails substantial commitments and corresponding dependencies. Thus, the admission of each new member has the potential for affecting the commitments and obligations of prior members. Hence, the criteria for membership and the procedures for decision about it tend to be more stringent. In each membership decision, every existing member bears a heavy responsibility to other members and to the organization as a whole. Duties of members with respect to applications for membership could present a conflict with the duties of the Interim Accord to which Article 22 applies.

16. Military alliances, Mr. President, are quintessential limited-member organizations. They involve commitments fundamental to the security and even existence of the members, so decisions about who may accede to membership and contribute — and not detract from — the central purpose of the alliance are fraught with especially heavy responsibility.

17. Now, one can argue over whether a particular organization aspires to universality or is a limited-membership organization or whether some organizations have changed. But there is only one thing over which one cannot argue. NATO, a mutual defence organization, can in no way be confused with an *organisation à vocation universelle.* It is obviously a limited-membership organization and its membership admission practice, as detailed in Greece's written submissions and recalled yesterday by Ambassador Savvaides, is, consequently, careful and stringent. Every member bears obligations to other members to exercise plenary judgment in each membership decision, lest the candidate be inducted into the Alliance burdened by unresolved conflicts with a member or pursuing policies and practices that could cause dissension within a region of concern to the Alliance. No surprise, then, that the NATO "Membership Action Plan" — the MAP plan that several of my colleagues mentioned — prescribes that in instructions to those who would become members of NATO, that: [slide 10]

> "Aspirants would also be expected to . . . settle ethnic disputes or external territorial disputes including irredentist claims or internal jurisdictional disputes by peaceful means in accordance with OSCE principles and to pursue good neighbourly relations."[63] [End slide 11]

In argument on Tuesday, the Applicant's counsel mocked these criteria, on their merits and for having been disseminated by electronic press release. In doing so, he unintentionally betrayed profound misunderstanding of the gravity of decision-making in the councils of the military alliance, faced with life and death choices about the use of military force. As for the MAP criteria, they represent a policy commitment of NATO; their mode of dissemination turns on the selection of the most efficacious means of reaching a desired audience. Nor, as Ambassador Savvaides said yesterday, are the MAP standards the only articulation of the criteria to be deployed in judging membership applications. The point of emphasis is that if a NATO member were to believe that a candidate did not fulfil those requirements, would it not owe it to the Alliance community to raise the issue in the membership process? The expectation that it might have to do so is why Article 22 and Article 11 intersect.

18. But the Applicant argues that Article 22 could not have meant this because "[t]he whole point of the Applicant's insistence on securing the commitment of the respondent in Article 11 (1) was to overcome such objections"[64]. Immediately after this myopic and one-sided view of Article 11, the Applicant says something, repeated twice on Tuesday, that is so revealing of its blind spot in this entire case that it must be quoted verbatim: [slide 12]

> "When Article 11 (1) entered into force on 13 October 1995 the Respondent [Greece] immediately dropped its objections to the Applicant's membership in such organizations. Objections were dropped in relation to the Council of Europe, and then with respect to the Organization for Security and Co-operation in Europe, and membership in numerous other organizations became open to the Applicant *in the immediate aftermath of concluding the Interim Accord.*"[65] [Slide 13]

Exactly! Exactly! "In the immediate aftermath of concluding the Interim Accord", Greece had no reason not to count on the Applicant's good-faith performance of its obligations under the Interim Accord with respect especially to the sensitive issue of the name. The Applicant had yet to reveal its counter-strategy, secretly practiced over a period of years but only publicly revealed by

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[63]NATO, Membership Action Plan (MAP), 24 Apr. 1999, Counter-Memorial, Ann. 21, p. 3.

[64]Reply, para. 5.19.

[65]*Ibid*.

President Crvenkovski in 2008. As long as Greece had no reason to apprehend conflicts between, on the one hand, the obligations of the Interim Accord — especially those relating to the settlement of ethnic disputes, respect for national symbols, irredentist claims, good-neighbourly relations and the good-faith negotiation of the name issue — no conflict between them and, on the other hand, Greece's obligations to NATO with respect to membership decisions, Article 22 was not applicable and would not have come into operation. Only after the Applicant's strategy of persistent violation of resolution 817 and Article 11, became clear, could Article 22 have become operative for purposes of the Applicant's NATO application. Greece's actions, which the Applicant invokes in its effort to demonstrate the vacuity of Article 22, proves exactly the opposite: they show how and why and when Article 22 was designed to work.

19. Yet, the Applicant argues, if Article 22 is meaningful, then "the Respondent would have been entitled, even after the conclusion of the Interim Accord, to object to the Applicant's membership in such organizations"[66]. Exactly. Moreover, even if Article 11, paragraph 1, were not being intentionally violated, as I think we have shown that it is, yet some action or characteristic of the Applicant raised questions about the propriety of its membership in a limited-membership organization in which Greece was a member, Article 22 recognizes that Greece might have a duty to object consistent with the Interim Accord.

20. Mr. President, Members of the Court, Greece submits that the Applicant's claim on the merits fails because of Article 22.

21. Mr. President, I see that we are close to the habitual pause. May I ask you to call on my colleague Professor Crawford immediately afterwards. Thank you.

The PRESIDENT: Thank you, Professor Michael Reisman for your statement. And as has been suggested by the Respondent, I think this is an appropriate moment for us to have a short coffee-break. We resume our session in ten minutes at 11.45 a.m. The Court is adjourned.

The Court adjourned from 11.35 to 11.50 a.m.

[66] Reply, para. 5.20.

The PRESIDENT: Please be seated. Now the Court resumes the session, the continuation of the pleadings on the Respondent's side. I now invite Professor James Crawford to take the floor. But before, Professor James Crawford, you start your presentation, I have one small request, transmitting the request from the interpreters, that in your last intervention you spoke too fast and the interpreters could not really catch up with what you were saying and that, I guess, is to your disadvantage. So I hope that you will keep that point in mind. Thank you.

Mr. CRAWFORD: I will do my best, Sir. The excitement of The Hague Rotary Club got too much for me.

APPLICATION OF ARTICLE 11 OF THE INTERIM ACCORD TO THE EVENTS OF 2008

Introduction

1. Mr. President, Members of the Court, I return now to address the application of Article 11, paragraph 1, and in particular of the safeguard clause, to the events of 2008.

I. Applying the non-objection clause

2. On Tuesday Professor Murphy gave you the Applicant's interpretation of paragraph 1. He said: "[t]he language is simple [and] straightforward"[67]. So far so good. But he also said that the language was "unrestricted"[68]. In fact, the Applicant's interpretation is without limit and, as I have already explained, not supported by the text. It refers to one thing and one thing only — an obligation not to object.

3. And, in fact, the Applicant makes a very specific claim. It alleges a particular objection at the Bucharest Summit of the North Atlantic Treaty Organization as a result of which a particular outcome was reached on a particular day. But it is completely unable to specify the particular act in question.

4. The Applicant is plainly trying to plead a claim falling within Article 11 (1). The obligation in Article 11 (1) is not an obligation not to "talk about an application", not to "express views about an application". It is not an obligation "not to object . . . in [the] parliament" or "in the streets outside [the] parliament"; or, for that matter, in the margins of the NATO. As my friend

[67] CR 2011/6, p. 26, para. 19.

[68] *Ibid*.

Professor Bastid-Burdeau — whose accession to the Bar we all celebrate — noted, the obligation accepted by Greece under Article 11 (1) was "certes tout à fait inhabituelle en droit international . . . peut-être même sans précédent . . ."[69]. Greece accepted the language of Article 11 (1) because the constraint it places on Greece, is not boundless or vague, however unprecedented. All Greece promised to do was not to object — and that can only be done in and in relation to the organization in question.

5. The Applicant has adduced certain factual evidence, consisting of statements of various officials of the respondent State. The fact that these statements were made is uncontested. They are mostly in the public record — indeed, most of them were formulated and delivered for wide public consumption through major print and broadcast channels. In no way do we resile from them. The difference between the Parties is to the relevance of those statements to what actually took place at the Bucharest Summit in the light of paragraph 1.

6. Indeed Professor Murphy set out a dossier of public statements. To quote from his presentation, "This evidence arises from the Respondent's own written and oral diplomatic communications, and from statements by its senior officials made publicly and within its own formal governmental institutions."[70] But governmental institutions of Greece are not the same as NATO. As for "written and oral diplomatic communications", important as they are, this is only a very general description. In agreeing not to object, Greece did not become voiceless or mute. More is needed before one can say that these communications constituted an "objection" in the context of NATO.

7. Now what the Applicant offers in evidence certainly reflects the general position that had emerged in 2008. It is a fact that Greece had become deeply concerned by the conduct of the Applicant, and especially its attitude toward the negotiations over the name difference. But the Applicant's case is, and has to be, that there was an objection in a particular sense, so as to give rise to international responsibility under paragraph 1. It is not enough for the evidence to show that the Applicant's conduct had irritated Greece, or, for that matter, driven Greek officials to distraction, in

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[69]CR 2011/7, p. 32, para. 19 (Bastid-Burdeau).

[70]CR 2011/5, p. 44, para. 21 (Murphy).

the context of the negotiated settlement. The evidence has to be measured against the Article 11 (1) obligation.

8. To give one example from Professor Murphy's presentation, the then Foreign Minister of Greece, Ms Bakoyannis, said, and I quote, "The Greek side sees good neighbourly relations and the resolution of problems as a prerequisite for membership in the Alliance."[71] This stated briefly one of NATO's accession criteria, but it was not an objection. The Foreign Minister was speaking with a journalist.

9. Then there was Prime Minister Kostas Karamanlis's statement of 22 February 2008. He said "without a mutually accepted solution to the main issue, there can be no invitation to participate in the Alliance"[72]. This was a statement, one might call it a prediction, in the Parliament of Greece, not in NATO. Another statement by the Prime Minister, a little later in 2008, said,

> "The philosophy, the strategic goal, the framework, the basic elements of our policy are well-known. The strategy we mapped out is clear. Our will for a mutually acceptable solution [to the name difference] is genuine. Our position, 'no solution — no invitation,' is clear. If there is no solution, our neighbouring state's aspirations to participate in NATO will remain unrealised."[73]

This was a speech in Parliament as well; it was not a vote or objection under the rules of NATO.

10. Professor Murphy refers to a further speech of the Prime Minister, this time from the end of March 2008. He said: "These past few months, we have responsibly made it clear that without a mutually acceptable solution the road to NATO cannot be opened for our neighbouring country. It cannot be invited to join."[74] This was a speech to the governing party's Parliamentary Group on 27 March 2008 — a statement in a national political forum. Professor Murphy also refers to an article by the Foreign Minister in the *International Herald Tribune* on 31 March 2008, saying that Greece would not be able to "strongly back" the Applicant's NATO candidacy[75]. This would, perhaps, have established a breach, if the obligation had been "to strongly back the Applicant's

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[71]AM, Ann. 73, quoted CR 2011/5, p. 44, para. 23.

[72]Video available at www.youtube.com/watch?v=JrWBlzCQahQ&feature=related, quoted at CR 2011/5, p. 45, para. 26.

[73]Applicant's Reply, Ann. 97, quoted at CR 2011/5, p. 45, para. 27 (Murphy).

[74]AM, Ann. 88, quoted at CR 2011/5, p. 46, para. 30.

[75]AM, Ann. 90, quoted at CR 2011/5, pp. 46-47, para. 31.

candidacies in the international media". But first the obligation is not one of active support. And secondly, however much the media may shape our impressions, and shape the actions of politicians, legally, and fortunately, these are not the forums that count.

11. The Applicant talks about an aide mémoire of Greece "for use in discussion with all NATO member States"[76]. The aide mémoire stated, amongst other things: "The satisfactory conclusion of the [name] negotiations is a *sine qua non* in order to enable Greece to continue to support the Euro-Atlantic aspirations of Skopje."[77] Giving this document the interpretation most favourable to the Applicant, it might perhaps be called a "NATO document", in the limited sense that it was intended for NATO member States. But it is impossible to see how it constituted an "objection", when Greece simply reiterated a criterion of the organization that must be fulfilled if the member States are "to continue to support" the Applicant's membership goals.

12. In short, the Applicant is at some loss to show an objection in NATO. Indeed, Professor Murphy conceded a crucial point. He said: "The consensus procedure means that 'there is no voting or decision by the majority', and no formal 'veto' procedure."[78] Now, this may seem a rather formal point. But in international organizations, as in international law, formalities matter. It is a putative act of Greece in the NATO organization which is central to the Applicant's claim.

13. Professor Murphy sought to fill the gap by sheer assertion. Thus, he said, "those steps were directly 'joined' with the formal decision process of NATO on accession"[79]. By "steps" he meant the statements various Greek officials made about the Applicant's NATO aspirations. He seems to equate those statements to formal *démarches* in the form of, for example, explanations of vote. They were nothing of the sort, as I have shown: there was no record of a vote to explain; there were no explanations of vote, such as member States adopt in United Nations organs and other multilateral bodies.

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[76]AM, Ann. 129, quoted at CR 2011/5, p. 44, para. 24.

[77]*Ibid*.

[78]CR 2011/5, p. 53, para. 53 (Murphy).

[79]CR 2011/6, p. 26, para. 18 (Murphy).

14. To speak of events within an international organization, it is necessary to speak rather precisely about the rules of the organization. Ambassador Savvaides yesterday spoke to you about those. His conclusions may be summarized as follows[80]:

(i) NATO is an Alliance established for defence and the political consolidation of peace in Europe;

(ii) within NATO, consultation and consensus are not only indispensable principles, they are the mechanisms by which the Alliance reaches decisions;

(iii) NATO's chief decision-making body, the North Atlantic Council, does not take roll-call votes on draft resolutions; it contains no procedure for a veto;

(iv) NATO admits new members through a multi-step process, under which the Alliance sets requirements, in accordance with Article 10 of the Treaty[81];

(v) as with other organizations whose constitutive instruments limit membership to chosen States, admission is by NATO's choice. It is an act of the organization and not of any member State;

(vi) because all decisions in NATO are the product of consensus, the act of admitting a new member is the product of consensus of all the member States; correspondingly, the act of continuing a State's candidacy is the product of consensus as well.

15. Ambassador Savvaides' main points have been confirmed by statements of NATO ambassadors; by authoritative NATO documents; and by NATO's highest-ranking official. This material is set out in the written pleadings[82]. I will briefly recall here the statements of the Secretary General.

16. There was the occasion on which a reporter asked about a veto in NATO. The Secretary General responded as follows: "Th[is] last remark I do not understand and I'll not comment on. NATO does not know the word veto. We operate by consensus . . ."[83] [PP] Now

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[80]CR 2011/8, pp. 21-26, paras. 2-18 (Savvaides).

[81]See RCM, para. 7.41, for the details of the process.

[82]RCM, para. 7.46; RR, para. 3.41.

[83]Press Conference by NATO Secretary General Jaap De Hoop Scheffer after the informal Meeting of NATO Defense Ministers, with Invitees with non NATO ISAF Contributing Nations, Cracow, Poland, dated 19 Feb. 2009, available at: http://www.nato.int/docu/speech/2009/s090219c.html; Respondent's Ann. 33.

true, this was an off-the-cuff remark to a reporter. But the Secretary General said the following some months later in a press conference with the Foreign Minister of Greece in Athens:

> "NATO does[not] know the word veto. NATO does know the word consensus. And although some people might have been disappointed, there was a consensus in Bucharest last year, and there was a consensus again in Strasbourg-Kehl. So there is no veto. NATO doesn't know the word veto, and no nation has ever vetoed anything in NATO."[84] [PP — add sequentially to previous PP]

This was the decision of the Bucharest Summit, as characterized by the senior official of the Alliance, its Secretary General.

17. Mr. President, Members of the Court, you heard the Applicant on Monday refer to the statement of the Prime Minister of Greece of 3 April 2008. The Prime Minister said: "Due to Greece's veto, FYROM is not joining NATO."[85] [PP — add sequentially to previous two PP]. This was the central piece of evidence in support of the Applicant's contention that there was a breach of paragraph 1.

18. After mentioning this statement, Professor Murphy went on to refer to the *Armed Activities* case (*Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Judgment, I.C.J. Reports 2005*, p. 201, para. 61), where you said that you would "give particular attention to reliable evidence acknowledging facts or conduct unfavourable to the State represented by the person making them". But not all evidentiary disputes are alike. The *Armed Activities* case did not entail a dispute as to the character of the decision-making rules of a closed multilateral organization; far from it. You also considered, in respect of the Porter Report in that case, and I quote, "since its publication, there has been no challenge to the credibility of this Report, which has been accepted by both Parties" (*ibid.*). The purpose for which the Applicant introduces the Prime Minister's statement into evidence is to support the contention that Greece used a NATO procedure to object to the Applicant's candidacy. But however much the Prime Minister might have liked to take credit for a so-called "veto" — Prime Ministers tend to like to take credit for what are perceived as favourable outcomes — that did not change the rules of

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[84]Statements of Foreign Minister of Greece Ms Bakoyannis and NATO Secretary General Scheffer following their meeting, Athens, 14 May 2009, available at: http://www.mfa.gr/www.mfa.gr/Articles/en-US/140509_H1918.htm; Respondent's Ann. 141.

[85]AM, Ann. 99, quoted at CR 2011/5, p. 47, para. 33 (Murphy).

NATO. As you have heard, from the senior officer of NATO, that is not the reality of the organization — Prime Minister, or no Prime Minister.

19. It is worthwhile here, following an Application, two complete rounds of written submissions and an oral round, to note exactly what the Applicant has omitted to say. As much as it locates an alleged breach of paragraph 1 at the Bucharest Summit, the Applicant does not produce any evidence, in the form of NATO authority, concerning any act carried out by Greece under NATO procedures, to support the contention — the contention at the very foundation of its claim — that Greece vetoed the admission of the Applicant to NATO. There are references to remarks by political leaders, directed for public consumption. There are suggestions that Greece somehow commandeered a consensus and supplanted the NATO process by an individual act of will — a modern *Athanasius contra mundum* — or at least the world of NATO. The allegation which the Applicant makes at the base of its claim is that Greece "objected to" and thus defeated a motion to admit the Applicant forthwith. If it had existed, the simplest thing of all would have been to show, by some formal record, by some official statement of the Alliance, or in some other way, that Greece had objected, and, thus objecting, had caused the Applicant not to be admitted. The Applicant produces nothing of the sort, and for a simple reason: nothing of the sort exists.

II. The Applicant's continuing campaign to be referred to differently than as stipulated

21. Mr. President, Members of the Court, I turn now to the second clause of paragraph 1, the safeguard clause. The Applicant has attempted to dismiss the safeguard clause by reference to legal arguments, which I have already addressed. It also attempts to dismiss it on the factual record. It is important that the safeguard clause be applied properly to the factual record — and to the factual record as a whole.

22. Professor Murphy on Monday noticed that Greece's appreciation of the Applicant's conduct has changed over time, and that is true. He said that "[f]or at least ten years following the adoption of the Interim Accord, the Respondent accepted that . . . it could not object to the Applicant's admission to international organizations, so long as the provisional reference would be used in that organization"[86]. I don't think the evidence goes quite so far. The position is that for

[86]CR 2011/5, p. 43, para. 19.

the first ten years the Applicant did not object — no acceptance of *opinion juris* is shown in the record. But Professor Murphy, as he did so often, paraphrased the safeguard clause condition, and again I emphasize the need to consider the clause as actually adopted. Greece did not object, that is the fact, to the Applicant's admission to various organizations. Professor Murphy pointed out that, "as late as 2005", the Respondent accepted and even supported the Applicant's candidacy. I would only note in passing that he omitted to draw attention to the legal situation, that the support rendered by Greece was over and above the obligation in Article 11, paragraph 1. But that is not the important point for present purposes.

23. The important point is the timing, and the fact that paragraph 1 is a reservation of rights. Those rights remain whether or not they are exercised on particular occasions. Professor Murphy says, "the position appears to have begun changing in 2004 to 2005 . . ."[87]. Though he says that "the evidence does not pinpoint with laser precision the exact moment when the Respondent changed its position . . ."[88]. He refers also to "the formal recognition by various countries, including the United States, of the Applicant under its constitutional name"[89]. He does not develop the point and instead passes directly to an account of how Greece's position "hardened"[90] — as of around 2004 to 2005, Greece no longer gave active support to the candidacies and the reason is that something had gone wrong. He does not say *what* had gone wrong.

24. Mr. President, Members of the Court, on Monday my friend Professor Sands was kind enough not to call me the elephant in the room, perhaps this was because, pachydermatous or not, I was not in the room[91]. This was in connection with one of the Respondent's tertiary arguments, put forward in the alternative as a defence. There is however an elephant in the room, and nobody on the Applicant's side has dared to mention it. This is the stratagem, which the Applicant adopted in the mid-2000s covertly, which the Applicant implemented for several years with readily observable results, and which the Applicant finally articulated publicly through its President, President Crvenkovski. The Respondent already has set out that statement, in which the President

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[87]CR 2011/5, p. 43, para. 20.

[88]*Ibid.*, para. 19.

[89]*Ibid.*, para. 20.

[90]*Ibid.*, para. 20.

[91]*Ibid.*, p. 36, para. 26.

explained the stratagem and gave a report as to its progress in 2008[92]. [PP] In addition to points made by my colleagues, a number of further points need to be made in respect of this statement.

25. First, there is the timing of the statement, and the timing of the strategy it finally articulates. So when was this strategy — which up to 2008 "due to understandable reasons, was never publicly announced" — originally put into effect? It was a strategy, which the President described in 2008 as having been in effect "in recent years". The recognition of the Applicant's preferred designation by the United States, to which Professor Murphy referred, was in November 2004. The multiple recognitions of the name to which the President referred accumulated in particular at that time and in the several years afterwards. Greece hardly needed the President of the applicant State to alert it to what was happening. It was perfectly clear that the Applicant has been, as the President would eventually publicly admit, at "work simultaneously on constant increase of the number of countries which recognize [its] constitutional name and thus [to] strengthen our proper political capital in international field which will be needed for the next phases of the process".

26. What was the "next phase" to which the President referred? Evidently, it would establish the so-called "constitutional name" so far and so wide, that the Applicant would have rendered the agreed process of negotiation utterly irrelevant to the real world. That strategy began in or around 2004. The fact that Professor Murphy did not mention the President's statement of 2008 does not make the strategy disappear. Its effect was very much in evidence — from the Applicant's point of view, the strategy was by that time "exceptionally successful" and the prospects for its further success gave the Applicant considerable encouragement.

27. Meanwhile, until the Applicant's strategy renders the negotiation process a nullity, the Applicant will pay lip service to the obligation to negotiate — but by no means will it let that obligation get in the way of the pursuit of its final goal. It may be that it is entitled to have that final goal; it is not entitled to hold us to our promise in Article 11 whilst sustaining the campaign for that final goal: that is the fundamental point. To come to the table but maintain a position which was, and I quote the President, "always the same and unchanged" is the very definition of

[92]Rejoinder, para. 7.62.

bad faith in negotiations. You have been clear, for example in your Advisory Opinion on *Threat or Use of Nuclear Weapons*, that an obligation to negotiate entails considerably more than that (*Legality of Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 264, para. 99).

28. Greece has an interest, which was of paramount importance in 1995, and continues today, to secure an agreed and mutually acceptable settlement of the difference by the adoption of a name *erga omnes*; a name for the applicant State which is neither a provocation nor a threat. The Interim Accord was the instrument to which Greece agreed in 1995 in order to protect that interest. It was willing to accept an unusual constraint on its autonomy as a State. But that was part of the larger bargain.

29. Counsel for the Applicant have said that Greece asserts that the safeguard clause is triggered simply "because the Respondent is unhappy about political decisions reached by third States in recent years in their diplomatic relations with the Applicant"[93]. This is a reference to the mounting practice, instigated by the Applicant, of third States not using the stipulated general designation as per Security Council resolution 817 (1993). It does not matter whether that resolution establishes obligations for other States. The reference to the resolution in the Interim Accord does not, as I have already said, establish obligations on third States. A bilateral treaty by definition cannot do so. What matters is that Greece agreed to a serious and unusual constraint on its own conduct, when it accepted Article 11, paragraph 1. The second clause protects Greece from a limitless application of that constraint. President Crvenkovski foresees the "next phases" of the Applicant's strategy opening even broader horizons for the Applicant. In his words, that will lead States generally to "recognize and use our constitutional name on [a] bilateral and multilateral plan[e]." Note the words —"on [a] bilateral and multilateral plan[e]". Greece does not for one moment challenge the axiomatic position that, absent a special direction, for example from the Security Council, every State makes its own decision as to what States to recognize, what States to have diplomatic relations with, what name to call States by and other such political questions; the question of the name is a political question. Even if the Applicant and the Respondent had

[93]CR 2011/6, p. 44, para. 73 (Murphy).

attempted, bilaterally, to place a new limit on third State rights, they could not have done so. The question here is not about the rights of third States. In so far as the Applicant has raised their rights as an objection, this is a distraction. The matter really at issue here is the scope and continuing character of the constraint on Greece under Article 11, paragraph 1 – under a bilateral treaty.

29. If the Applicant's strategy is succeeding, as the President claims, then since it extends to the "multilateral plan[e]", it is obvious that the Applicant soon "is to be referred to" not only in, but also probably by, international organizations — not as designated in Security Council resolution 817 (1993) — but as the Applicant would prefer. This is truly a "multilateral plan". At this point, what is left of the guarantee under the Interim Accord on which Greece relies? The negotiation process will be a dead letter. The so-called "constitutional name" will be entrenched. One does not have to share the view that that name is unacceptable, and that question is expressly reserved from this Court. We have heard already from the other side about dead parrots, horse-drawn coaches, elephants and pebbles: no doubt Professor Sands will explain what these have in common. But the parties to the Interim Accord stipulated that the matters it addressed on a bilateral level are not trivial. To the parties, or at least to Greece, the subject-matter of the Interim Accord is entirely serious. With all respect, having regard to Article 21, paragraph 2, it is not for this Court to say otherwise.

30. But, worse still, even if the Applicant's interpretation and application of Article 11 is correct, Greece will still be obliged "not to object". This is an absurd result. It does not follow from the plain language of the safeguard clause. That clause was intended to protect Greece, precisely in circumstances which began to emerge in the mid-2000s under the Applicant's strategy to entrench a name, marginalize the negotiations, and seize the benefits, while casting off the burdens, of the Interim Accord. *Pacta sunt servanda*, say our opponents, repeatedly[94]. But they are selective not only in their interpretation of their agreements, but also in those they keep: the others they dismiss with sarcasm and frivolity — mere pebbles on the route to realizing their multilateral plan.

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[94]CR 2011/5, pp. 21, 22, paras. 14, 20 (Miloshoski); *ibid.*, p. 28, para. 12 (Sands); CR 2011/6, p. 51, para. 6 (Sands).

Mr. President, Members of the Court, the facts in evidence in 2008 already had triggered the safeguard clause. There was no longer any legal basis to constrain Greece from objecting, if it did object.

31. As I noted earlier, the Applicant contends that the safeguard clause operates, only on the procedural precondition that Greece, beforehand, has articulated a justification. Foreign Minister Miloshoski, as the Co-Agent, made a similar point in his opening statement on Monday[95]. But there is nothing in Article 11, paragraph 1, to make prior notification a requirement for invoking the safeguard clause. This is a classical case of a party seeking to change a rule to fit inconvenient facts. But the problem here for the Applicant is worse than that, for the Applicant not only introduces a procedural requirement which does not exist; it also seeks to *change* the facts. Greece made it very clear, before the Bucharest Summit, that it recognized what the Applicant was trying to do. That is to say, Greece protested that the Applicant "is to be referred to differently" in various organizations than as stipulated. Professor Pellet will set out the record of the Applicant's disregard for the provisional name in the General Assembly and other international institutions — practice which clearly indicated to Greece that the conditions satisfying the safeguard clause were met. He will do so in the context of breaches of the Interim Accord and of the exception of non-performance. For my purpose, however, it does not matter whether the Applicant's conduct was a breach or not. What matters is that it had not obtained from Greece a guarantee of support or abstention independent of its own adherence to the Interim Agreement. If the Applicant was free to undermine that Agreement and acted to do so, all bets were off. If the Applicant was at liberty then so was Greece.

Conclusion

32. Mr. President, Members of the Court. To conclude: from the facts, it is clear that the Applicant is, and will continue to be, referred to by a different name in international organizations than that stipulated: its diplomats will see to that, even when serving in rotational roles as the chairmen of United Nations committees and sub-committees. It is well within Greece's margin of appreciation to recognize that the safeguard clause condition, as at April 2008, was satisfied.

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[95]CR 2011/5, p. 21, para. 15.

33. Even if Greece may seem to have "objected" in the sense of the first clause, the first limb of Article 11, paragraph 1, it did so in circumstances which the Interim Accord expressly provides that Greece may retain the right to object, and in response to the Applicant's attempts to disrupt the balancing arrangement in the Interim Accord to which it had committed itself, Greece had the right to act. The Applicant has sought in every available quarter to secure the use of a name not agreed with Greece. That amounts to an attempt to derail, admittedly in slow-motion, the agreed process of negotiation. It does not matter for Greece what caused the train to leave the tracks: whether it was deliberate acts of the Applicant itself; mistakes by others manning the switches, or whatever. The result has been clear: instead of accepting a name agreed by both Parties through negotiation, the Applicant has sought to deprive Greece of its right, under the bilateral treaty, to a negotiated settlement. NATO accordingly made a judgment that the Applicant had not satisfied the requirements of good neighbourly relations incumbent on all member States. That was not a breach of the first limb of Article 11, but if it was, or if it was of the occasion of such a breach, the safeguard clause amply covered the situation.

Mr. President, Members of the Court, I thank you for your attention. May I invite you, Mr. President, to call on the next speaker for Greece, Professor Alain Pellet, who has, in single-handed combat, won the right to argue for the *exceptio*.

The PRESIDENT: Thank you, Professor James Crawford, for your statement. I now invite Professor Alain Pellet to take the floor.

M. PELLET :

LES VIOLATIONS PAR L'EX-RÉPUBLIQUE YOUGOSLAVE DE MACÉDOINE DE SES OBLIGATIONS RELATIVES AU NOM

1. Monsieur le président, Mesdames et Messieurs les juges, l'ARYM s'évertue à corseter l'objet du différend dont la Cour de céans est saisie en le limitant à l'interprétation et à l'application d'une disposition, une seule, de l'accord intérimaire : l'article 11, paragraphe 1 (voire, si l'on se fie à la lecture manifestement biaisée que le demandeur en fait, à la première phrase de ce

paragraphe…)[96]. En réalité, les faits soumis à la Cour par le demandeur portent sur le seul aspect de l'accord intérimaire que l'article 21 soustrait à votre compétence — comme le professeur Reisman et moi l'avons montré auparavant. Si toutefois la Cour acceptait d'exercer sa compétence — ce qu'elle ne devrait sûrement pas faire —, force lui serait d'admettre que le différend qui oppose les Parties est plus large que ce que prétendent nos contradicteurs.

2. Il ne saurait faire de doute que c'est à la Cour

> «de définir elle-même, sur une base objective, le différend qui oppose les parties, en examinant la position de l'une et de l'autre :
>
> > «C'est donc le devoir de la Cour de circonscrire le véritable problème en cause et de préciser l'objet de la demande.»». (*Compétence en matière de pêcheries (Espagne c. Canada), compétence de la Cour, arrêt, C.I.J. Recueil 1998*, p. 447-448, par. 28-30.)

3. En la présente espèce, la Cour ne saurait se prononcer sur les demandes de l'ARYM, sans les resituer dans leur contexte : la décision prise par le sommet de Bucarest des pays membres de l'OTAN n'a pas été prise tout à trac, telle une tempête apparaissant soudain dans un ciel serein. Elle est la conséquence d'une longue série de manquements par l'ARYM à ses obligations en vertu de l'accord intérimaire. La Grèce a protesté de plus en plus fermement au fil des années contre ces violations, qui font peser une menace grave sur «les relations pacifiques et de bon voisinage dans la région» comme le Conseil de sécurité l'avait pressenti dans sa résolution 817 (1993)[97]. Du reste, la Cour ne s'y est pas trompée ; elle a donné à la présente affaire le nom qui convient : «*Application de l'accord intérimaire du 13 septembre 1995*» sans en limiter l'objet à l'application de l'article 11, paragraphe 1, moins encore à sa première phrase.

4. Et on le comprend : le splendide isolement dans lequel nos contradicteurs tentent d'enfermer le différend en répétant *ad nauseam* qu'il s'agit d'«un cas tout simple et limité d'application de *pacta sunt servanda*» («a simple and narrow case of *pacta sunt servanda*»[98]), eût non seulement été contraire à tous les canons de l'interprétation, mais aurait en outre privé la Cour de toute possibilité de comprendre les circonstances dans lesquelles la décision contestée est

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[96] Voir notamment réplique, p. 8, par. 1.3, citant le mémoire, par. 1.1. Voir aussi CR 2011/5, p. 21, par. 14 (Miloshoski).

[97] Voir aussi la lettre datée du 19 août 1994, adressée au Secrétaire général par le président du Conseil de sécurité, S/1994/979.

[98] CR 2011/5, p. 21, par. 14 (Miloshoski) ; voir aussi *ibid.*, p. 28, par. 12 (Sands).

intervenue et donc d'en apprécier la licéité. Cette décision n'est en effet qu'une réponse aux manquements répétés de l'ARYM à ses obligations en vertu non seulement de l'article 11 lui-même, mais aussi de plusieurs autres dispositions de l'accord intérimaire — l'article 5, qui en est d'ailleurs indissociable ; mais aussi d'autres, et en particulier les articles 6 et 7.

5. Je vais, ce matin — si on peut encore parler de matin —, revenir sur le mépris total dans lequel l'Etat demandeur tient les obligations lui incombant qui sont liées à la recherche d'un nom mutuellement acceptable et conforme au principe de bon voisinage et Mme Telalian traitera ensuite cet après-midi des autres violations attribuables à l'ARYM qui témoignent de l'attitude irrédentiste de ce pays et qui menacent également les relations de bon voisinage et le maintien de la paix dans la région.

I. Les violations de l'article 5 de l'accord intérimaire

6. Avec votre permission, Monsieur le président, je commencerai par les violations par le demandeur de l'article 5 de l'accord intérimaire. Cette disposition constitue l'une des premières et des principales dispositions organisant les «relations amicales et mesures de confiance» entre les Parties et c'est dans ce cadre général que leurs autres obligations doivent être lues. Comme l'a montré mon maître et ami Georges Abi-Saab, il s'agit d'un élément fondamental du *quid pro quo* sur lequel repose l'accord dans son ensemble ; la Grèce n'aurait jamais accepté de ne pas «élever des objections» à l'encontre de la candidature du demandeur dans les organisations internationales dont elle est membre — une concession «sans précédent» comme on l'a souligné[99] — si elle avait pu penser que les négociations sur le nom ne seraient pas poursuivies de bonne foi par l'ARYM. Et ce sont les tentatives d'enterrement des négociations par celle-ci qui ont dissipé les illusions de la Grèce.

[Projection n° 1 — Résolution 817 (1993), par. 1 et 2.]

7. Une telle attitude est directement et indiscutablement contraire aux conditions posées par la résolution 817 (1993) par laquelle le Conseil de sécurité recommandait à l'Assemblée générale d'admettre le demandeur aux Nations Unies étant entendu qu'il devait «être désigné provisoirement, à toutes fins utiles *(for all purposes)* à l'Organisation, sous le nom

[99] CR 2011/7, p. 32, par. 19 (Bastid-Burdeau).

d'«ex-République yougoslave de Macédoine» en attendant que soit réglée la divergence qui a surgi au sujet de son nom», étant entendu aussi que cette divergence devait être réglée par des négociations menées sous les auspices de la conférence internationale sur l'ex-Yougoslavie.

8. Lors de la conclusion de l'accord intérimaire, la Grèce a cependant voulu croire à la bonne foi de l'ARYM qui s'est engagée directement à son égard, par un traité en bonne et due forme, à

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

[Fin de la projection n° 1.]

9. Ces espoirs ont été déçus : malgré cet engagement formel de l'Etat demandeur, qui reconnaissait la force obligatoire des directives du Conseil de sécurité, l'attitude constante de ce pays a consisté à vider les négociations auxquelles il s'était engagé de toute substance. Et l'on ne peut douter que, ce faisant, il a gravement manqué à ses engagements conventionnels.

10. Avant de montrer que tel est, sans aucun doute, le cas en l'espèce, quelques mots, Monsieur le président, si vous le voulez bien, sur la portée de cet engagement de négocier dont on a déjà parlé.

[Projection n° 2 — Article 5 de l'accord intérimaire.]

A. La portée de l'obligation de l'article 5

11. L'obligation de négociation découlant du premier paragraphe de l'article 5 de l'accord intérimaire, qui est projeté derrière moi, présente les caractéristiques suivantes :

1) il s'agit d'une obligation de négocier de bonne foi[100] ;
2) elle doit aboutir à un résultat («*régler* le différend» mentionné dans les résolutions 817 et 845 (1993) du Conseil de sécurité)[101] ; et
3) le différend en question porte indiscutablement sur le nom de l'Etat demandeur dans la présente instance[102].

De brefs commentaires sur chacun de ces aspects suffisent.

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[100] Contre-mémoire, p. 180-184, par. 8.35-8.39 ; duplique, p. 166-175, par. 7.53-7.66.

[101] Duplique, p. 175-176, par. 7.67-7.68.

[102] Duplique, p. 167-170, par. 7.54-7.60.

12. Il existe une riche jurisprudence sur la signification que revêt l'obligation de négocier. Elle peut se résumer en une formule : les Parties doivent négocier de bonne foi avec la volonté d'aboutir et sans priver la négociation de son objet[103].

13. Au surplus, en l'espèce, l'obligation assumée par l'ARYM va plus loin : elle est de négocier, certes, mais à ce *pactum de negociando* s'ajoute une obligation d'aboutir à un accord — *pactum de contrahendo*.

> «La portée juridique de l'obligation considérée dépasse celle d'une simple obligation de comportement ; l'obligation en cause ici est celle de parvenir à un résultat précis … par l'adoption d'un comportement déterminé, à savoir la poursuite de bonne foi de négociations en la matière.» (*Licéité de la menace ou de l'emploi d'armes nucléaires, avis consultatif, C.I.J. Recueil 1996 (I)*, p. 264, par. 99.)

14. Il s'agit là d'une obligation non de simple comportement mais bien de résultat. Il ne suffit pas que l'ARYM se présente à la table de négociations, il faut encore qu'elle y participe de bonne foi avec la volonté d'aboutir *et que, finalement, l'accord se fasse*.

15. Quant à l'objet de cette obligation, l'article 5 est limpide. Il s'agit «de parvenir à régler le différend mentionné dans» les résolutions 817 et 845 (1993) du Conseil de sécurité, résolutions qui, elles-mêmes, renvoient à la «divergence qui a surgi au sujet du nom de l'Etat» dont le Conseil a recommandé l'admission aux Nations Unies, c'est-à-dire l'ex-République yougoslave de Macédoine. Du reste, si le moindre doute pouvait subsister à cet égard, le paragraphe 2 de l'article 5 mentionne expressément le «différend qui … oppose [les Parties] en ce qui concerne *le nom* de la seconde Partie», c'est-à-dire l'ARYM.

[Fin de la projection nº 2 — Projection n° 3 — Résolution 817 (1993) (extraits).]

16. Et j'y insiste, Monsieur le président : «le» nom, *son* nom pour tous usages ; pas «un» nom à vocation spécifique, fonctionnelle ou limitée, dont l'utilisation serait restreinte aux relations bilatérales entre les deux pays.

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[103] Voir notamment : *Plateau continental de la mer du Nord (République fédérale d'Allemagne/Danemark) (République fédérale d'Allemagne/Pays-Bas), arrêt, C.I.J. Recueil 1969*, p. 47, par. 85. Voir aussi *Trafic ferroviaire entre la Lithuanie et la Pologne, avis consultatif, 1931, C.P.J.I. série A/B n° 42*, p. 116 ou, *Compétence en matière de pêcheries (Royaume-Uni c. Islande), fond, arrêt, C.I.J. Recueil 1974*, p. 33, par. 78 ; *Interprétation de l'accord du 25 mars 1951 entre l'OMS et l'Egypte, avis consultatif, C.I.J. Recueil 1980*, p. 95, par. 49 ; *Délimitation de la frontière maritime dans la région du golfe du Maine (Canada/Etats-Unis d'Amérique), arrêt, C.I.J. Recueil 1984*, p. 299, par. 112 ; ou sentences arbitrales, 16 novembre 1957, *Affaire du lac Lanoux (Espagne c. France), RSA*, vol. XII, p. 306-307 ; 26 janvier 1972, *Affaire concernant des réclamations consécutives à des décisions du Tribunal arbitral mixte gréco-allemand établi en vertu de l'article 304 figurant à la Partie X du Traité de Versailles (entre la Grèce et la République fédérale d'Allemagne), RSANU*, vol. XIX, p. 64.

17. Ceci ressortait on ne peut plus clairement de la position très solennellement prise par la Grèce dans le cadre des discussions qui ont conduit à l'admission de l'ex-République yougoslave de Macédoine aux Nations Unies et qui sont à l'origine du compromis qui a permis de débloquer la situation, et de l'article 5 de l'accord intérimaire :

> «les trois aspects principaux de cette résolution, à savoir le règlement de la divergence dont fait l'objet *le nom de l'Etat demandeur*, l'adoption de mesures de confiance voulues et la procédure d'admission du nouvel Etat à l'Organisation des Nations Unies sous un nom provisoire, forment *un ensemble intégré et indivisible*, seul susceptible de résoudre les litiges existant encore entre la Grèce et la nouvelle République»[104].

18. C'est sur cette base — et parce qu'il était entendu que l'ARYM acceptait cette condition reprise dans la résolution 817 (1993) — que celle-ci a été admise aux Nations Unies. C'est sur cette base que l'accord intérimaire de 1995 a été conclu et c'est sur cette base que son article 5 a été rédigé.

[Fin de la projection nº 3.]

B. L'ARYM a vidé l'article 5 de toute substance

19. L'ARYM s'est employée à vider cette obligation, pourtant clairement définie, de toute substance. Elle l'a fait principalement de deux manières :

— d'une part, en redéfinissant unilatéralement l'objet même de la négociation ;

— d'autre part, en s'efforçant de créer un fait accompli donnant l'impression que toute négociation serait superflue.

a) *La redéfinition unilatérale par l'ARYM de l'objet de la négociation*

20. Le premier stratagème utilisé par l'ex-République yougoslave de Macédoine pour vider son obligation de négociation de toute portée a consisté à inventer un objet de négociation ne correspondant nullement à ce qui avait été convenu tant lors de son admission aux Nations Unies que dans l'accord intérimaire. Cette «trouvaille» est couramment appelée la «formule double» («the dual formula») ; elle consiste à considérer que le seul objet des négociations porte sur le nom qui s'appliquerait dans les seuls rapports bilatéraux entre les Parties à l'exclusion de tout autre

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[104] Lettre du 6 avril 1993 adressée au président du Conseil de sécurité par le représentant permanent de la Grèce auprès de l'Organisation des Nations Unies, document des Nations Unies S/25543 ; les italiques sont de nous. Voir aussi le mémorandum transmis au Conseil de sécurité par la Grèce : A/47/877-S/25158, 25 janvier 1993 ; les italiques sont de nous ; version anglaise dans le contre-mémoire, annexe 146.

usage dans les relations internationales et, *a fortiori*, dans l'ordre juridique national de l'ARYM. Ceci est, à l'évidence, incompatible avec les engagements pris en 1993 et en 1995.

[Projection n° 4 — Déclaration du premier ministre.]

21. Et pourtant, Monsieur le président, telle est la position, obstinément constante et cyniquement assumée, adoptée par le demandeur. C'est celle qu'a affichée en 1997 le président de l'ARYM de l'époque, M. Gligorov[105], et qui a été réitérée en 1998[106] et en 2002[107] par ses ministres des affaires étrangères successifs et en 2007, en pleine discussion préalable au sommet de l'OTAN, par la voix de son premier ministre qui a écarté d'un revers de la main toute proposition du médiateur qui proposerait un nom différent pour son Etat de celui qu'il avait choisi et sur lequel il s'était pourtant engagé à négocier :

> «there is one point, which definitely we cannot accept — the one that says that the Republic of Macedonia should accept a name different from its constitutional one for international use. This provision of the document is unacceptable for the Republic of Macedonia and we cannot discuss it. Hence it may be considered that the Macedonian Government is rejecting this provision.»[108] (2 novembre 2007)

M. Gruevski ne pouvait mieux résumer la position — parfaitement constante — de l'ARYM dans les «négociations» (mais il faut assortir le mot de guillemets…) : «nous voulons bien «négocier» [traduisez : nous asseoir à une table de négociation pour «faire comme si» l'on négociait»], à condition de ne pas envisager un quelconque changement du nom qui est précisément l'objet convenu de la négociation à laquelle nous nous sommes engagés…».

22. Et ce n'est pas parce que le demandeur se targue d'avoir accepté une des propositions du médiateur à la veille du sommet de l'OTAN, en mars 2008[109] — ce qu'il n'a d'ailleurs pas fait — qu'il peut convaincre qu'il a négocié de bonne foi. Skopje s'est toujours efforcée d'entretenir la confusion sur la réalité et l'étendue de ses soi-disant acceptations ; ainsi, s'agissant de celle que le

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[105] «Kiro Gligorov: The Neighbour» *o Vima*, 29.6.1997, cité dans Aristotle Tziampiris, «The Name Dispute in the Former Yugoslav Republic of Macedonia After the Signing of the Interim accord» in *Athens-Skopje: An Uneasy Symbiosis*, Hellenic Foundation for European and Foreign Policy (ELIAMEP), Athens, 2005, p. 234 (disponible : http://www.isn.ethz.ch/isn/Digital-Library/Publications/Detail/?ots591=cab359a3-9328-19cc-a1d2-8023e646b22c&lng=en&id=13760).

[106] *Idem*, p. 234-235.

[107] *Idem*, p. 248-249.

[108] «Prime Minister Gruevski's Statement on Nimetz's Draft-Framework of Understanding» Macedonian Information Agency, dated 2 November 2007, disponible : http://www.mia.com.mk/default.aspx?vId+29113595&lId=2, visited on 16 November 2009 ; contre-mémoire, annexe 128.

[109] Réplique, par. 2.63-2.64 ou 5.87 ; CR 2011/5 (Miloshoski), p. 19, par. 10.

demandeur aurait donnée en 2008, la cacophonie règne toujours aujourd'hui au plus haut sommet de l'Etat : ainsi dans une lettre adressée au Secrétaire général des Nations Unies en février 2011, le ministre des affaires étrangères, M. Miloshoski écrivait :

> «Au cours de ces négociations, la République de Macédoine *[sic]* a accepté des propositions formulées par M. Nimetz qui serviraient de point de départ à un règlement, y compris celle de mars 2008 («République de Macédoine (Skopje)») que la République hellénique a malheureusement rejetée»[110].

Suite à cette lettre, le premier ministre Gruevski a aussitôt tenu à faire une mise au point, en précisant que : «In 2008, even before Bucharest, we did not accept the name's amending, but for the Nimetz proposal to be put on referendum» (ces deux déclarations figurent à l'onglet n° 19 du dossier des juges). Il est clair que cette «concession» de pure façade, que le demandeur tente aujourd'hui de parer des vertus de la bonne foi, n'a été faite que pour conforter sa position à Bucarest. Du reste, début mars 2008, Skopje maintenait que toute concession de sa part ne pouvait se faire que dans le cadre de la formule double et que son négociateur, l'ambassadeur Nikola Dimitrov, présentait cette formule comme «une ligne rouge que nous ne pouvons dépasser» : «Skopje insists on using its constitutional name «Republic of Macedonia» on the international stage and agreed to adopt a mutually acceptable name strictly for relations with Greece.»[111]

23. Vous ne devez pas vous y tromper, Mesdames et Messieurs les juges : qu'il s'agisse du premier ministre Gruevski ou de l'ambassadeur Dimitrov, nous ne sommes pas en présence d'écarts de langage dus à l'inadvertance ou inspirés par des considérations politiques conjoncturelles, mais bien de l'expression délibérée d'une stratégie soigneusement murie.

[Fin de la projection n° 4. Projection n° 5 — Discours du président Crvenkovski.]

Comme l'a admis le président de l'ex-République yougoslave de Macédoine lui-même, dans un discours au Parlement de ce pays[112], que Mme Telalian, M. Reisman et M. Crawford, il ya quelques instants encore, ont déjà cité, mais qui est suffisamment important pour que j'y revienne

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[110] Lettre datée du 15 février 2011, adressée au Secrétaire général par le représentant permanent de l'ex-République yougoslave de Macédoine auprès des l'Organisation des Nations Unies**,** document des Nations Unies A/65/735–S/2011/76, p. 3.

[111] «NATO Urges Macedonia Solution», Balkan Insight.com (3 March 2008) ; réplique, annexe 98.

[112] *Stenography Notes from the 7th Sequel of the 27th Session of the Parliament of the Republic of Macedonia, held on 3 November 2008* ; contre-mémoire, annexe 104, p. 1.

trois minutes, il s'est agi là d'une stratégie systématique revenant à s'arc-bouter sur la double formule — ce qui revient, en réalité, à vider les négociations de toute substance. Ce que, du reste, le president Crvenkovski a reconnu non sans quelque cynisme : «that position is considered by everyone … as a means for repealing the negotiations, or at least freezing them for a longer period»[113]. L'aveu, Monsieur le président, se suffit à lui-même sans qu'il soit nécessaire d'épiloguer et établit à suffisance que le demandeur n'a pas respecté l'obligation de négocier de bonne foi que lui imposent l'article 5 de l'accord intérimaire et les résolutions 817 et 845 (1993) du Conseil de sécurité auxquelles cette disposition renvoie. Et j'aurais pu parler de double aveu car il est frappant qu'à aucun moment durant les plaidoiries orales les avocats du demandeur n'ont fait la moindre allusion à cette question de la formule double, pourtant largement analysée dans nos écritures[114]. Il y a des silences éloquents et qui sonnent comme des confessions ou des *non possumus*…

[Fin de la projection n° 5.]

b) ***La poursuite du «fait accompli»***

24. Mais il y a autre chose, Monsieur le président. Dans ce même discours au Parlement du 3 novembre 2008 — le président Crvenkovski a ajouté que la stratégie de l'ARYM comportait un second volet consistant :

> «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 of the process.
>
> It must be stated that in this field we were exceptionally successful.»[115]

25. Ce «triomphalisme» n'est pas totalement infondé puisque, à l'instigation insistante de l'ARYM, un grand nombre d'Etats se sont en effet laissé convaincre de reconnaître celle-ci sous le

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[113] *Stenography Notes from the 7th Sequel of the 27th Session of the Parliament of the Republic of Macedonia, held on 3 November 2008 ;* contre-mémoire, annexe 104, p. 5. Voir aussi Annual Address of Branko Crvenkovski, President of the FYROM in Parliament, *Stenography Notes from the 37th Session of the Parliament of the Republic of Macedonia,* held on 18 December 2008 ; contre-mémoire, annexe 105, p. 4.

[114] Voir duplique, p. 167-173, par. 7.54-7.63.

[115] *Stenography notes from the 7th sequel of the 27th session of the Parliament of the Republic of Macedonia*, held on 3 November 2008 (emphasis added), p. 27-7/10 and 27-7/ 11 ; contre-mémoire, annexe 104. Voir aussi Statement of the Minister for Foreign Affairs of the FYROM, Verbal Note of the Permanent Mission of the FYROM to the United Nations, addressed to all Permanent Missions to the United Nations, No. 63/2005, dated 15 Apr 2005 ; duplique, annexe 21.

nom qu'elle revendique. Mais, comme juristes — et nous sommes tous (et ne pouvons être que) juristes dans cette enceinte dédiée à Thémis… — comme juristes donc, nous ne pouvons que nous poser une question : «Et alors ?». Et alors ? ... Rien ! Les Etats qui ont jugé bon de reconnaître le demandeur sous ce nom ne sont pas liés par l'accord intérimaire — le demandeur est lié par l'accord intérimaire. En cédant aux sollicitations de l'ARYM — ce que la Grèce regrette, ces Etats n'ont pas manqué à une obligation leur incombant. En menant cette politique systématique de sollicitations, et en s'efforçant de créer ainsi, non sans cynisme, un fait accompli, le demandeur, lui, a violé son obligation de négocier de bonne foi.

26. Mesdames et Messieurs les juges, vous ne sauriez accepter d'être placés ainsi devant un tel fait accompli et admettre que, «par des moyens détournés», l'ARYM réussisse «à éluder les obligations» (*Oscar Chinn, arrêt, 1934, C.P.J.I. série A/B n° 63*, p. 86) que lui imposent l'article 5 de l'accord intérimaire et les résolutions 817 et 845 (1993). Ces obligations ne sont pas modifiées par les tentatives du demandeur visant à les redéfinir unilatéralement en les limitant à la «formule double» qu'il prétend imposer, et que ni la Grèce, ni le médiateur des Nations Unies n'ont jamais acceptée. Elles ne sont pas rendues obsolètes par le fait accompli politique que l'ARYM tente de créer mais qui demeure sans incidence juridique. En ne respectant pas ces obligations, celle-ci a manqué gravement à l'une des obligations qui constituent la contrepartie la plus essentielle de l'engagement pris par la Grèce de ne pas s'opposer à la demande d'admission de l'Etat demandeur dans des organisations dont elle est membre — un engagement dont le professeur Bastid-Burdeau a souligné avec raison qu'il n'était «pas courant et peut-être même sans précédent»[116].

[Projection n° 6 — Article 11, paragraphe 1, de l'accord intérimaire.]

II. Les violations de l'article 11 de l'accord intérimaire

27. Monsieur le président, cet engagement, qui figure dans l'article 11, paragraphe 1, de l'accord intérimaire constitue, avec la reconnaissance de l'ARYM, l'une des concessions majeures consenties par la Grèce en faveur de la «seconde Partie». Mais il était évidemment conditionné au respect par celle-ci de ses propres obligations conventionnelles — à la fois, celles découlant de

[116] CR 2011/7, p. 32, par. 19 (Bastid-Burdeau).

l'accord de 1995 dans son ensemble et celle figurant plus précisément dans l'article 11 lui-même, qui comporte sa propre clause de sauvegarde :

> «however, the Party of the First Part [Greece] reserves the right to object to any membership referred to above if and to the extent the Party of the Second Part [the FYROM] is to be referred to in such organization or institution differently than in paragraph 2 of United Nations Security Council resolution 817 (1993)».

28. Mes collègues Michael Reisman, hier, et James Crawford, ce matin, ont déjà consacré une partie de leurs interventions à analyser minutieusement le contenu et la portée de cette disposition. Je m'en voudrais de répéter — inévitablement moins bien — ce qu'ils ont dit. Qu'il me suffise de résumer pour les besoins de ma présentation :

1) le droit dont se prévaut le demandeur n'est pas inconditionnel : il est subordonné à une appellation particulière au sein de l'organisation dans laquelle il aspire à être admis ;
2) il résulte de la résolution 817 (1993) du Conseil de sécurité, à laquelle renvoie l'article 11, que ce nom est celui d'«ex-République yougoslave de Macédoine» ;
3) ceci, «à toutes fins utiles à l'organisation» (c'est plus clair en anglais : «for all purposes» — mais, d'une façon générale, la traduction française effectuée par les Nations Unies est étrange — pour le dire poliment !) ; et
4) cela s'applique «en attendant que soit réglée la divergence qui a surgi au sujet du nom» de la «seconde Partie» — divergence qui, nous le savons, n'est toujours pas réglée du fait de l'obstruction à laquelle se livre le demandeur ; et,
5) il va de soi que cette appréciation doit être faite *ex ante :* une fois l'admission acquise, elle est irréversible.

[Fin de la projection n° 6.]

29. La litanie des violations par l'ARYM de cette disposition ainsi définie est longue — elles sont systématiques, massives et délibérées. J'en retiens deux exemples, significatifs car ils montrent que, pour atteindre ses buts, le demandeur n'hésite pas à abuser des fonctions qu'il occupe dans ces organisations. Ainsi, en septembre 2007, M. Kerim, l'ambassadeur de l'ARYM à l'ONU, qui avait été élu président de la soixante-deuxième session de l'Assemblée générale, a ouvertement ignoré les obligations qui lui incombaient à la fois comme représentant de son pays et comme organe des Nations Unies, en introduisant et présentant obstinément le président

Crvenkovski comme «président de la République de Macédoine»[117]. Il en fut de même au sein du Conseil de l'Europe : l'ARYM y a exploité sa présidence du comité des ministres pour imposer, dans cette enceinte aussi, l'usage du nom contesté[118].

30. Le demandeur se prévaut de sa propre pratique dans les organisations dans lesquelles il a été admis grâce à la non-objection du défendeur : «the Applicant has *always* used its constitutional name in written and oral communications with the United Nations, its members and officials : and the same has been the case in all other international organizations»[119].

31. Mais cette pratique — qui émane du demandeur lui-même — n'a en aucune manière le sens que celui-ci lui prête : loin d'établir l'existence d'une prétendue «exception» en sa faveur à la règle posée par la deuxième phrase du paragraphe premier de l'article 11 de l'accord intérimaire, son énoncé constitue un aveu, une «admission against interest». Il montre que l'ARYM a constamment violé son engagement, résultant de cette disposition et des résolutions l'admettant dans les organisations en question, de ne pas s'appeler, ni se faire appeler, autrement que par son nom provisoire au sein de celles-ci. De même, le demandeur ne saurait s'abriter derrière le memorandum du 13 septembre 1995 sur les «mesures pratiques» liées à l'accord intérimaire[120] : d'abord, il ne concerne pas l'attitude à suivre au sein des organisations internationales dont l'ARYM est membre ; ensuite, il n'en résulte nullement que celle-ci puisse s'autodésigner par son nom proclamé : il y est au contraire prévu que, si cela advient, la Grèce n'y donnera suite qu'une fois que le nom résultant de la résolution 817 (1993) lui aura été surimposé[121].

32. Ces précédents, malheureusement nombreux et concordants, établissent surabondamment que la Grèce et les autres Etats membres de l'OTAN avaient — et ont toujours — d'amples motifs à penser que l'invitation adressée au demandeur de joindre l'Alliance produirait inévitablement les mêmes effets : une fois admise, l'ARYM s'empresserait de faire fi de ses engagements et d'imposer à nouveau le fait accompli de sa présence en se prévalant du nom dont elle se refuse à

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[117] Voir contre-mémoire, p. 61, par. 4.67, ou duplique, p. 150-151, par. 7.28-7.29.

[118] Duplique, p. 157-158, par. 7.37.

[119] CR 2011/5, p. 26, par. 9 (Sands) ; les italiques sont de nous ; voir aussi *ibid.*, p. 21, par. 16 (Miloshoski), p. 41, par. 13 (Murphy) ; CR 2011/6, p. 39, par. 59 et p. 41, par. 64 (Murphy) ou réplique, par. 4.61.

[120] Mémoire, vol. III, annexe 3 ; voir CR 2011/5, p. 21, par. 16 (Miloshoski) ou *ibid.*, p. 28, par. 11 (Sands).

[121] Voir notamment le contre-mémoire de la Grèce, p. 27-28, par. 3.31-3.37.

négocier de bonne foi le changement en dépit des obligations résultant de l'accord intérimaire et de la résolution 817 (1993) du Conseil de sécurité.

33. Le professeur Murphy s'est demandé quand le défendeur a décidé de se rallier au consensus de Bucarest. Il présente les choses autrement, mais à tort : il n'y a pas de droit de veto au sein de l'OTAN — il en convient[122] ; et il est tout de même extraordinaire de prétendre que le défendeur a refusé de participer au consensus — «the Respondent refused to join [the] consensus»[123] — alors qu'il s'y est complètement rallié ! Mais notre contradicteur a raison de dire que «[t]he evidence does not pinpoint with laser precision the exact moment when»[124] this occurred — car je pense qu'il n'y a pas de moment précis. Simplement, petit à petit, la Grèce a pris conscience que l'obstination de l'ARYM à ne pas respecter l'article 11 sur l'utilisation de son nom agréé au sein des organisations internationales dont elle était devenue membre, son refus de négocier de bonne foi, sa persévérance dans la volonté de créer un fait accompli, éloignaient un peu plus chaque jour la perspective d'un règlement du différend sur le nom du demandeur, et ont fini par avoir raison de la longue patience du défendeur. Du même coup, les références à l'avant-accord intérimaire ou à la période qui a immédiatement suivi sa conclusion n'ont pas grand sens[125] : qu'il s'agisse de l'avis n° 6 de la commission Badinter, de l'admission de l'ex-République yougoslave de Macédoine (sous cette appellation) aux Nations Unies, au Conseil de l'Europe ou à l'OSCE, tout cela s'est produit lorsque tout donnait à penser que le demandeur se plierait aux injonctions du Conseil de sécurité et respecterait ses engagements en vertu de l'accord. On ne peut plus, aujourd'hui, le penser raisonnablement.

34. Monsieur le président, «[l]'un des principes de base qui président à la création et à l'exécution d'obligations juridiques, quelle qu'en soit la source, est celui de la bonne foi. La confiance réciproque est une condition inhérente de la coopération internationale.» (*Essais nucléaires (Nouvelle-Zélande c. France), arrêt, C.I.J. Recueil 1974*, p. 473, par. 49.) La Grèce n'est pas convaincue que l'ex-République yougoslave de Macédoine ait fait siens ces sages

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[122] Voir CR 2011/6, p. 26, par. 18 (Murphy).

[123] *Ibid.*

[124] CR 2011/5, p. 43, par. 19 (Murphy).

[125] Voir CR 2011/6, p. 46-47, par. 79-80.

principes. Son attitude remet complètement en cause l'équilibre entre les obligations des Parties que réalise l'accord intérimaire, dont le professeur Abi-Saab a décrit le caractère fondamentalement synallagmatique — j'y reviendrai tout à l'heure.

Auparavant, Monsieur le président, si vous le voulez bien, Mme Telalian présentera à la reprise de l'audience cet après-midi les autres violations de l'accord intérimaire commises par le demandeur. Mesdames et Messieurs de la Cour, je vous remercie vivement de l'attention que vous m'avez prêtée et je vous souhaite un très bon appétit.

The PRESIDENT: I thank Professor Alain Pellet for his statement. Greece will conclude this round of oral argument at this afternoon's sitting from 3 p.m. to 4.30 p.m. The Court is adjourned.

The Court rose at 1.00 p.m.