DISSENTING OPINION OF JUDGE *AD HOC* ROUCOUNAS

[Translation]

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

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

INTRODUCTION AND BRIEF HISTORY

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

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

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

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

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

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

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

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

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

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

[5] *Ibid.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II. The Object and Purpose of the Interim Accord

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

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

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

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

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

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

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

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

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

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

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

III. The Court Lacks Jurisdiction to Settle this Dispute

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[29] This refers to a draft submitted to the Parties by Matthew Nimetz, United Nations mediator.

[30] Counter-Memorial of Greece, Vol. II, Part B, Ann. 128.

[31] *Ibid.*, Part A, Ann. 5.

[32] Rejoinder of Greece, Vol. II, Ann. 50.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Jaap de Hoop Scheffer (NATO Secretary-General):

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

Nikola Gruevski (Prime Minister of the FYROM):

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

James Appathurai (NATO Spokesperson):

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

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

Nikola Gruevski (Prime Minister):

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

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

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

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

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

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

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

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

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

VII. The Scope of the Obligations Assumed by the Parties

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

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

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

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

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

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

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

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

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

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

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

IX. Good Neighbourliness

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

XII. Countermeasures

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

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

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

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

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

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

70. Moreover, as the ILC has stated:

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

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

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

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

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

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

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

(*Signed*) Emmanuel ROUCOUNAS.

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