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Summary
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Application of the Interim Accord of 13 September 1995

(the former Yugoslav Republic of Macedonia v. Greece)

Summary of the Judgment of 5 December 2011

I. Factual background of the case (paras. 15-22)

The Court recalls that, on 17 November 2008, the former Yugoslav Republic of Macedonia (hereinafter the "Applicant") filed in the Registry of the Court an Application instituting proceedings against the Hellenic Republic (hereinafter the "Respondent") in respect of a dispute concerning the interpretation and implementation of the Interim Accord of 13 September 1995 (hereinafter the "Interim Accord").

In particular, the Applicant seeks to establish that, by objecting to the Applicant's admission to NATO, the Respondent breached Article 11, paragraph 1, of the said Accord, which provides that:

> "Upon entry into force of this Interim Accord, the Party of the First Part agrees not to object to the application by or the membership of the Party of the Second Part in international, multilateral and regional organizations and institutions of which the Party of the First Part is a member; however, the Party of the First Part reserves the right to object to any membership referred to above if and to the extent 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)."

In paragraph 2 of resolution 817, the Security Council recommended that the Applicant be admitted to membership in the United Nations, being "provisionally referred to for all purposes within the United Nations as 'the former Yugoslav Republic of Macedonia' pending settlement of the difference that has arisen over the name of the State".

In the period following the adoption of the Interim Accord, the Applicant was granted membership in a number of international organizations of which the Respondent was already a member. On the invitation of the North Atlantic Treaty Organization, the Applicant in 1995 joined the organization's Partnership for Peace (a programme that promotes co-operation between NATO and partner countries) and, in 1999, the organization's Membership Action Plan (which assists prospective NATO members). The Applicant's NATO candidacy was considered in a meeting of NATO member States in Bucharest (hereinafter the "Bucharest Summit") on 2 and 3 April 2008 but the Applicant was not invited to begin talks on accession to the organization. The communiqué

issued at the end of the Summit stated that an invitation would be extended to the Applicant "as soon as a mutually acceptable solution to the name issue has been reached".

II. Jurisdiction of the Court and admissibility of the Application (paras. 23-61)

The Court recalls that the Applicant invoked as a basis for the Court's jurisdiction Article 21, paragraph 2, of the Interim Accord, under the terms of which any "difference or dispute" as to the "interpretation or implementation" of the Interim Accord falls within the jurisdiction of the Court, with the exception of the "difference" referred to in Article 5, paragraph 1, of the Interim Accord, which reads as follows:

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

The Respondent claims that the Court has no jurisdiction to entertain the present case and that the Application is inadmissible based on the following reasons. Firstly, the Respondent submits that the dispute concerns the difference over the name of the Applicant referred to in Article 5, paragraph 1, of the Interim Accord and that, consequently, it is excluded from the Court's jurisdiction by virtue of the exception provided in Article 21, paragraph 2. Secondly, the Respondent alleges that the dispute concerns conduct attributable to NATO and its member States, which is not subject to the Court's jurisdiction in the present case. Thirdly, the Respondent claims that the Court's Judgment in the present case would be incapable of effective application because it could not effect the Applicant's admission to NATO or other international, multilateral and regional organizations or institutions. Fourthly, the Respondent submits that the exercise of jurisdiction by the Court would interfere with ongoing diplomatic negotiations mandated by the Security Council concerning the difference over the name and thus would be incompatible with the Court's judicial function.

In respect of the first objection raised by the Respondent, the Court considers it to be clear from the text of Article 5, paragraph 1, and Article 21, paragraph 2, of the Interim Accord, that the "difference" referred to therein is the difference over the definitive name of the Applicant and not disputes regarding the Respondent's obligation not to object to the Applicant's admission to international organizations, unless the Applicant is to be referred to in the organization in question differently than in resolution 817 (1993). Accordingly, the Court decides not to uphold that objection.

With regard to the second objection, the Court considers that the conduct forming the object of the Application is the Respondent's alleged objection to the Applicant's admission to NATO, and that, on the merits, the Court will only have to determine whether or not that conduct demonstrates that the Respondent failed to comply with its obligations under the Interim Accord, irrespective of NATO's final decision on the Applicant's membership application. Accordingly, the Court decides not to uphold that objection.

In respect of the third objection, the Court observes that the Applicant is not requesting it to reverse NATO's decision in the Bucharest Summit, but to determine whether the Respondent violated its obligations under the Interim Accord as a result of its conduct. It concludes that a Judgment of the Court would be capable of being applied effectively, because it would affect the Parties' existing rights and obligations under the Interim Accord. Accordingly, it decides not to uphold that objection.

As regards the fourth objection, the Court notes that the Parties included a provision conferring jurisdiction on the Court (Art. 21) in an agreement that also required them to continue

negotiations on the dispute between them over the name of the Applicant (Art. 5, para. 1). It takes the view that, had the Parties considered that a future ruling by the Court would interfere with diplomatic negotiations mandated by the Security Council, they would not have agreed to refer to it disputes concerning the interpretation or implementation of the Interim Accord. Accordingly, it decides not to uphold that objection.

In light of the foregoing, the Court concludes that it has jurisdiction over the dispute and that the Application is admissible.

III. Whether the Respondent failed to comply with the obligation under Article 11, paragraph 1, of the Interim Accord (paras. 62-113)

The Court then considers whether the Respondent objected to the Applicant's admission to NATO, within the meaning of the first clause of Article 11, paragraph 1, of the Interim Accord.

It begins by examining the meaning of that clause and finds in that connection that the Respondent is under an obligation not to object to "the application by or membership of" the Applicant in NATO. It notes that the Parties agree that the obligation "not to object", which is an obligation of conduct, rather than one of result, does not require the Respondent actively to support the Applicant's admission to international organizations. The Court further observes that nothing in the text of that clause limits the Respondent's obligation not to object to organizations that use a voting procedure to decide on the admission of new members. It considers that there is no indication that the Parties intended to exclude from Article 11, paragraph 1, organizations like NATO which follow procedures which do not require a vote. Moreover, the Court notes that the question before it is not whether the decision taken by NATO at the Bucharest Summit with respect to the Applicant's candidacy was due exclusively, principally, or marginally to the Respondent's objection, but whether the Respondent, by its own conduct, did not comply with the obligation not to object contained in Article 11, paragraph 1, of the Interim Accord. The Court also observes that the Respondent did not take the position that any objection by it at the Bucharest Summit was based on grounds unrelated to the difference over the name. Therefore, it does not consider it necessary to decide whether the Respondent retains a right to object to the Applicant's admission to international organizations on such other grounds.

The Court then considers whether the Respondent "objected" to the Applicant's admission to NATO. To this end, it turns to the evidence submitted to it by the Parties, in order to decide whether the record supports the Applicant's contention that the Respondent objected to the Applicant's membership in NATO. The Court notes that, in support of its position, the Applicant refers to diplomatic correspondence of the Respondent before and after the Bucharest Summit and to statements by senior officials of the Respondent during the same period. The Court observes that the Respondent does not dispute the authenticity of these statements and it examines them as evidence of the Respondent's conduct in connection with the Bucharest Summit, in light of its obligation under Article 11, paragraph 1, of the Interim Accord. In the view of the Court, the evidence submitted to it demonstrates that through formal diplomatic correspondence and through statements of its senior officials, the Respondent made clear before, during and after the Bucharest Summit that the resolution of the difference over the name was the "decisive criterion" for the Respondent to accept the Applicant's admission to NATO. The Court notes that the Respondent manifested its objection to the Applicant's admission to NATO at the Bucharest Summit, citing the fact that the difference regarding the Applicant's name remained unresolved. The Court concludes that the Respondent objected to the Applicant's admission to NATO, within the meaning of the first clause of Article 11, paragraph 1, of the Interim Accord.

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

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

The Court notes that the Parties agree that the Applicant intended to refer to itself within NATO, once admitted, by its constitutional name, not by the provisional designation set forth in resolution 817. Thus, it considers whether the second clause of Article 11, paragraph 1, permits the Respondent to object in that circumstance. The interpretation of that clause in accordance with Articles 31 and 32 of the Vienna Convention on the Law of Treaties leads the Court to conclude that the Respondent does not have the right to object to the Applicant's admission to an organization based on the prospect that the Applicant is to refer to itself in such organization with its constitutional name. It finds, in effect, that the Applicant's intention to refer to itself in an international organization by its constitutional name did not mean that it was "to be referred to" in such organization "differently than in" paragraph 2 of resolution 817.

Finally, the Court considers the Respondent's position that, even assuming that the Court were to conclude that the Respondent had objected to the Applicant's admission to NATO, in contravention of Article 11, paragraph 1, such objection would not breach the Interim Accord, because of the effect of Article 22. Article 22 of the Interim Accord provides:

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

The Court observes that the Respondent's initial interpretation of Article 22, that its "rights" under a prior agreement (in addition to its "duties") take precedence over its obligation not to object to admission by the Applicant to an organization within the terms of Article 11, paragraph 1, would vitiate that obligation, because the Respondent normally can be expected to have a "right" under prior agreements with third States to express a view on membership decisions. The Court, considering that the Parties did not intend Article 22 to render meaningless the first clause of Article 11, paragraph 1, is therefore unable to accept that interpretation advanced by the Respondent. The Court then notes that the Respondent's narrower interpretation of Article 22, which it advanced during the oral proceedings, i.e., that "duties" under a prior treaty would take precedence over obligations in the Interim Accord, would oblige it to determine whether the Respondent has established that the North Atlantic Treaty imposed a duty on it to object to the Applicant's admission to NATO. However, according to the Court, the Respondent offers no persuasive argument that any provision of the North Atlantic Treaty required it to object to the Applicant's membership. The Court concludes that the Respondent's attempt to rely on Article 22 is unsuccessful. Accordingly, it need not decide which of the two Parties' interpretations is the correct one.

In the light of the above, the Court concludes that the Respondent failed to comply with its obligation under Article 11, paragraph 1, of the Interim Accord by objecting to the Applicant's admission to NATO at the Bucharest Summit. It considers that the prospect that the Applicant would refer to itself in NATO using its constitutional name did not render that objection lawful under the exception contained in the second clause of Article 11, paragraph 1. It adds that, in the circumstances of the present case, Article 22 of the Interim Accord does not provide a basis for the Respondent to make an objection that is inconsistent with Article 11, paragraph 1.

IV. Additional justifications invoked by the Respondent (paras. 114-165)

The Court observes that, as an alternative to its main argument that it complied with its obligations under the Interim Accord, the Respondent contends that the wrongfulness of any objection to the admission of the Applicant to NATO is precluded by the doctrine of exceptio non adimpleti contractus. The Respondent also suggests that any failure to comply with its obligations under the Interim Accord could be justified both as a response to a material breach of a treaty and as a countermeasure under the law of State responsibility.

The Court observes that while the Respondent presents separate arguments relating to the exceptio, partial suspension under Article 60 of the 1969 Vienna Convention, and countermeasures, it advances certain minimum conditions that are common to all three arguments, namely that the Applicant breached several provisions of the Interim Accord and that the Respondent's objection to the Applicant's admission to NATO was made in response to those breaches.

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

The Court notes that on its face, the text of the second clause of Article 11, paragraph 1, does not impose an obligation upon the Applicant not to be referred to in an international organization or institution by any reference other than the provisional designation (as "the former Yugoslav Republic of Macedonia"). It further notes that, just as other provisions of the Interim Accord impose obligations only on the Applicant, Article 11, paragraph 1, imposes an obligation only on the Respondent. The second clause contains an important exception to this obligation, but that does not transform it into an obligation upon the Applicant. Accordingly, the Court finds no breach by the Applicant of this provision.

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

At the outset, the Court notes that although Article 5, paragraph 1, contains no express requirement that the Parties negotiate in good faith, such obligation is implicit under this provision. It observes that the failure of the Parties to reach agreement, 16 years after the conclusion of the Interim Accord, does not in itself establish that either Party has breached its obligation to negotiate in good faith. It therefore considers whether the Parties conducted themselves in such a way that negotiations may be meaningful. It notes that during the course of the negotiations pursuant to Article 5, paragraph 1, the Applicant had resisted suggestions that it depart from its constitutional name and that the Respondent had opposed the use of "Macedonia" in the name of the Applicant. It further notes that the political leaders of both Parties at times made public statements that suggested an inflexible position as to the name difference, including in the months prior to the Bucharest Summit. Moreover, it observes that there is also evidence that the United Nations mediator presented the Parties with a range of proposals over the years and, in particular, expressed the view that, in the time period prior to the Bucharest Summit, the Parties were negotiating in earnest. Taken as a whole, the Court considers that the evidence from this period indicates that the Applicant showed a degree of openness to proposals that differed from either the sole use of its constitutional name or the "dual formula", while the Respondent, for its part, apparently changed its initial position and in September 2007 declared that it would agree to the word "Macedonia" being included in the Applicant's name as part of a compound formulation. The Court notes in particular that, in March 2008, the United Nations mediator proposed that the Applicant adopt the name "Republic of Macedonia (Skopje)" for all purposes. According to the record before the Court, the Applicant expressed a willingness to put this name to a referendum. The record also indicates that it was the Respondent who rejected this proposed name. Thus, the Court concludes that the Respondent has not met its burden of demonstrating that the Applicant breached its obligation to negotiate in good faith.

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

Article 6, paragraph 2, provides:

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

The Court considers that the Respondent has presented no convincing evidence to suggest that the Applicant has interpreted its Constitution as providing a right to interfere in the Respondent's internal affairs on behalf of persons not citizens of the Applicant. The Court therefore does not find that the Applicant breached Article 6, paragraph 2, prior to the Bucharest Summit.

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

Article 7, paragraph 1, provides:

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

The Court recalls that, according to the Respondent, the Applicant breached this provision based on its failure to take effective measures to prohibit hostile activities by State-controlled agencies, citing, for example, allegations relating to the content of school textbooks, and its failure to discourage acts by private entities likely to incite violence, hatred or hostility against the Respondent, citing, in particular, an incident on 29 March 2008 (in the days prior to the Bucharest Summit) in which several outdoor billboards in Skopje depicted an altered image of the Respondent's flag. The Court observes that the Respondent also alleges a consistent failure by the Applicant to protect the premises and personnel of the Respondent's Liaison Office in Skopje.

The Court considers that the evidence cannot sustain a finding that the Applicant committed a breach of Article 7, paragraph 1, prior to the Bucharest Summit. It finds that the textbook content in question does not provide a basis to conclude that the Applicant has failed to prohibit "hostile activities or propaganda". Furthermore, the Respondent has not demonstrated convincingly that the Applicant failed "to discourage" acts by private entities likely to incite violence, hatred or hostility towards the Respondent. After recalling the obligation to protect the premises of the diplomatic mission and to protect against any disturbance of the peace or impairment of its dignity contained in Article 22 of the Vienna Convention on Diplomatic Relations, the Court finds that the Applicant introduced evidence demonstrating its efforts to provide adequate protection to the Respondent's diplomatic staff and premises.

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

Article 7, paragraph 2, provides:

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

The Court finds that the record does support the conclusion that there was at least one instance in which the Applicant's army used the symbol prohibited by Article 7, paragraph 2, of the Interim Accord.

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

Article 7, paragraph 3, provides:

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

The Court notes that, in contrast to Article 7, paragraph 2, the text of Article 7, paragraph 3, does not expressly prohibit the Applicant from using the symbols that it describes. Rather, it establishes a procedure for situations in which one Party believes the other Party to be using its historical or cultural symbols. Therefore, according to the Court, the question to consider is whether the Respondent brought its concern "to the attention" of the Applicant before the Bucharest Summit when the latter renamed the airport of the capital. To that end, it notes that although it does not appear that the Respondent did so, the Applicant was aware of the Respondent's concern, and the Applicant's Foreign Minister explained the rationale behind the renaming of the airport in a January 2007 interview to a Greek newspaper. The Court concludes that the Respondent has not discharged its burden to demonstrate a breach of Article 7, paragraph 3, by the Applicant.

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In light of this analysis of the Respondent's allegations that the Applicant breached several of its obligations under the Interim Accord, the Court concludes that the Respondent has established only one such breach. Namely, the Respondent has demonstrated that the Applicant used the symbol prohibited by Article 7, paragraph 2, of the Interim Accord in 2004. After the Respondent raised the matter with the Applicant in 2004, the use of the symbol was discontinued during that same year.

G. Conclusions concerning the Respondent's additional justifications

1. Conclusion concerning the exceptio non adimpleti contractus

Having reviewed the Respondent's allegations of breaches by the Applicant, the Court returns to the Respondent's contention that the exceptio, as it is defined by the Respondent, precludes the Court from finding that the Respondent breached its obligation under Article 11, paragraph 1, of the Interim Accord. The Court recalls that in all but one instance (the use of the symbol prohibited by Article 7, paragraph 2), the Respondent failed to establish any breach of the Interim Accord by the Applicant. In addition, the Respondent has failed to show a connection between the Applicant's use of the symbol in 2004 and the Respondent's objection in 2008 — that is, evidence that when the Respondent raised its objection to the Applicant's admission to NATO, it did so in response to the apparent violation of Article 7, paragraph 2, or, more broadly, on the basis of any belief that the exceptio precluded the wrongfulness of its objection. The Respondent has thus failed to establish that the conditions which it has itself asserted would be necessary for

the application of the exceptio have been satisfied in this case. It is, therefore, unnecessary for the Court to determine whether that doctrine forms part of contemporary international law.

2. Conclusion concerning a response to material breach

The Court recalls that the Respondent also suggested that its objection to the Applicant's admission to NATO could have been regarded as a response, within Article 60 of the 1969 Vienna Convention, to material breaches of the Interim Accord allegedly committed by the Applicant. Article 60, paragraph 3 (b), of the 1969 Vienna Convention provides that a material breach consists in "the violation of a provision essential to the accomplishment of the object or purpose of the treaty". The Court further recalls its conclusion that the only breach which has been established is the display of a symbol in breach of Article 7, paragraph 2, of the Interim Accord, a situation which ended in 2004. The Court considers that this incident cannot be regarded as a material breach within the meaning of Article 60 of the 1969 Vienna Convention. Moreover, the Court considers that the Respondent has failed to establish that the action which it took in 2008 in connection with the Applicant's application to NATO was a response to the breach of Article 7, paragraph 2, approximately four years earlier. Accordingly, the Court does not accept that the Respondent's action was capable of falling within Article 60 of the 1969 Vienna Convention.

3. Conclusion concerning countermeasures

The Court recalls that the Respondent also argues that its objection to the Applicant's admission to NATO could be justified as a proportionate countermeasure in response to breaches of the Interim Accord by the Applicant. As the Court has already made clear, the only breach which has been established by the Respondent is the Applicant's use in 2004 of the symbol prohibited by Article 7, paragraph 2, of the Interim Accord. Having reached that conclusion and in the light of its analysis concerning the reasons given by the Respondent for its objection to the Applicant's admission to NATO, the Court is not persuaded that the Respondent's objection to the Applicant's admission was taken for the purpose of achieving the cessation of the Applicant's use of the symbol prohibited by Article 7, paragraph 2. As the Court noted, the use of the symbol that supports the finding of a breach of Article 7, paragraph 2, by the Applicant had ceased as of 2004. Thus, the Court rejects the Respondent's claim that its objection could be justified as a countermeasure precluding the wrongfulness of the Respondent's objection to the Applicant's admission to NATO. Accordingly, there is no reason for the Court to consider any of the additional arguments advanced by the Parties with respect to the law governing countermeasures.

For the foregoing reasons, the Court finds that the additional justifications submitted by the Respondent fail.

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

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V. Remedies (paras. 167-169)

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

At the end of its consideration, the Court has found a violation by the Respondent of its obligation under Article 11, paragraph 1, of the Interim Accord. As to possible remedies for such a violation, the Court finds that a declaration that the Respondent violated its obligation not to object to the Applicant's admission to or membership in NATO is warranted. Moreover, the Court does not consider it necessary to order the Respondent, as the Applicant requests, to refrain from any future conduct that violates its obligation under Article 11, paragraph 1, of the Interim Accord. As the Court previously explained, "[a]s a general rule, there is no reason to suppose that a State whose act or conduct has been declared wrongful by the Court will repeat that act or conduct in the future, since its good faith must be presumed" (Navigational and Related Rights (Costa Rica v. Nicaragua), Judgment, I.C.J. Reports 2009, p. 267, para. 150).

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

VI. Operative clause (para. 170)

For these reasons,

THE COURT,

(1) By fourteen votes to two,

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

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

AGAINST: Judge Xue; Judge ad hoc Roucounas;

(2) By fifteen votes to one,

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

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

AGAINST: Judge ad hoc Roucounas;

(3) By fifteen votes to one,

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

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

AGAINST: Judge ad hoc Vukas.

Judge Simma appends a separate opinion to the Judgment of the Court; Judge Bennouna appends a declaration to the Judgment of the Court; Judge Xue appends a dissenting opinion to the Judgment of the Court; Judge ad hoc Roucounas appends a dissenting opinion to the Judgment of the Court; Judge ad hoc Vukas appends a declaration to the Judgment of the Court.

Separate opinion Judge Simma

Judge Simma finds himself in agreement with the findings of the Court as regards both jurisdiction and the merits of the case. His concern only relates to the way in which the Judgment treats the so-called exceptio non adimpleti contractus. He begins his analysis by outlining that, according to the Respondent, were the Court to find — as it in fact did — that Greece had violated the 1995 Interim Accord by objecting to the admission of FYROM to NATO in 2008, the wrongfulness of Greece's action would still be precluded. No less than three "defences" are thus advanced, all based on the allegation of prior breaches of the Accord committed by the FYROM: in the first instance, Greece presents the doctrine of the exceptio non adimpleti contractus; secondly, Greece's objection is explained as a response to material breaches of the Accord by the FYROM on the basis of the law of treaties; and thirdly, Greece portrays its behaviour as a countermeasure against the FYROM's preceding breaches recognized as justified by the law of State responsibility.

The Judgment rejects all of these defences, and according to Judge Simma rightly so, even though in his view the Court took care of the matter in too succinct a way. What Judge Simma does take issue with is the treatment by the Court of the exceptio non adimpleti contractus as a justification separate, and different, from the other two "defences" just mentioned. On this matter, the Parties to the case put forward different views. In the face of such conflicting statements about points of law, an authoritative clarification by the Court of the legal status and interrelationship of the exceptio vis-à-vis Article 60 of the Vienna Convention on the Law of Treaties (entitled "Termination or suspension of the operation of a treaty as a consequence of its breach") and the legal régime of countermeasures as developed by the International Law Commission would have been helpful.

Judge Simma's opinion engages in such a clarification. He traces the concept of the exceptio back to the idea of reciprocity, which in fully developed legal systems has been almost totally absorbed and supplanted by specific norms and institutions — "domesticated", as it were. In international law, reciprocity still lies closer to the surface, at the root of various methods of self-help by which States may secure their rights; it has been crystallized into international law's sanctioning mechanisms, among them countermeasures and reciprocal non-performance of an agreement with its sedes materiae in the law of treaties.

Judge Simma firmly states that the exceptio non adimpleti contractus belongs to the second category. It gave legal expression, and was conditioned by, the synallagmatic character of most international agreements — the rule pacta sunt servanda being linked to the rule do ut des. The widespread recognition of this functional synallagma in the law of contracts of the major legal systems allows to accept it as a general principle of law in the sense of Article 38 of the Court's Statute, and thus to apply it also in international legal relations. The question then is to what modifications such a concept developed in foro domestico will have to be subjected at the level of international law in order to secure it to function in an orderly way and not to become prone to abuse absent the judicial control of its application regularly available in domestic law. In the context of responses to treaty breach, unilateral invocation by one and denial of justification by the other side have been the rule to such an extent that it was difficult to give the exceptio a basis in customary international law.

Judge Simma's opinion highlights that it is precisely this circumstance which renders the codification of this principle in Article 60 of the Vienna Convention on the Law of Treaties so important. This provision puts reciprocity in treaty relations on the necessary leash — in particular by allowing the suspension or termination of a treaty only in the case of a material breach by another party and setting up a number of procedural conditions. Furthermore, as confirmed by Article 42, paragraph 2, of the Vienna Convention, Article 60 is meant to regulate the legal

consequences of treaty breach in an exhaustive way. There is thus no place left for the application of the exceptio outside the ambit of Article 60 and free of any procedural requirements to its exercise, as Greece wanted the Court to believe. Judge Simma acknowledges that, according to Article 73 of the Convention, its provisions do not prejudge questions of State responsibility arising in regard to treaty breach. The suspension of treaty provisions as a countermeasure undertaken against prior breaches by another party remains thus untouched by Article 60 and permissible subject to the rather tight régime set up by the ILC code on the matter. However, Judge Simma concludes that since the Respondent drew the necessary distinction in this regard, and the Judgment treats Greece's "defences" other than the exceptio in a satisfactory manner, there remains nothing to be said on the matter.

Declaration of Judge Bennouna

Judge Bennouna concurs in the final conclusions of the Court in the present case, yet he observes that it chose to avoid certain crucial legal questions raised and discussed at length by the Parties, notably the exceptio non adimpleti contractus and the countermeasures, by sheltering behind its assessment of the facts the Parties relied on in support of their arguments. According to Judge Bennouna, the Court could have analysed and pronounced on these questions, in light of their temporal and material evolution.

Dissenting opinion of Judge Xue

Judge Xue dissents from the Court's decision to exercise jurisdiction in the case. She takes the position that the case falls within the scope of Article 5, paragraph 1, rather than that of Article 11, paragraph 1, of the Interim Accord and the Application is not admissible on the ground of judicial propriety.

Judge Xue considers that the essential issue for the Court, in determining its jurisdiction, is whether the disputed objection of the Respondent to the membership of the Applicant to the North Atlantic Treaty Organization (NATO) at the 2008 Bucharest Summit relates to the interpretation or implementation of Article 11, paragraph 1, of the Interim Accord or is an issue under Article 5, paragraph 1, precluded from the jurisdiction of the Court by virtue of Article 21, paragraph 2, of that treaty. In her view, any interpretation of the provisions of the Interim Accord in relation to the name issue should give due consideration to the interim nature of the Accord and the ongoing negotiation between the Parties for the settlement of the name difference.

Judge Xue is of the view that in establishing its jurisdiction, the Court adopts a rather narrow interpretation of the term "difference" under Article 5, paragraph 1. By such interpretation, the "difference" under that article is reduced to the solution of the final name to be agreed on by the Parties in the negotiation and Article 11, paragraph 1, and Article 5, paragraph 1, are thus treated as entirely separate issues without substantive connection to each other in the implementation of the Interim Accord. She questions such treaty interpretation.

In Judge Xue's view, given the nature of the dispute between the Parties over the name issue and the object and purpose of the Interim Accord, Article 11, paragraph 1, and Article 5, paragraph 1, constitute two of the key provisions in the agreement. From the evidence before the Court, it is clear that the central issue of the dispute between the Parties on Article 11, paragraph 1, lies in the so-called "dual formula", as allegedly pursued by the Applicant. The conditional terms of Article 11, paragraph 1, have been subject to different interpretations of the Parties; they particularly disagree as to whether the Applicant could use its constitutional name when referring to itself or dealing with third States in international organizations. In the subsequent years after the conclusion of the Interim Accord, the Applicant has insisted on using its constitutional name when

referring to itself and dealing with third States, while the Respondent has formed a general pattern of protests against such use, alleging it as a breach of resolution 817 and the Interim Accord.

The conclusion of the Interim Accord between the Parties, together with Security Council resolutions 817 and 845, recognizes the legal interests of both Parties in connection with the name issue. The temporary arrangement of the name difference under Article 11, paragraph 1, provides a means of ending the impasse between the Parties over the Applicant's membership in international organizations. The ambiguity of the conditional terms in Article 11, paragraph 1, with regard to whether, or to what extent, the Applicant's constitutional name may be used by the Applicant and third States in international organizations, shows that the Interim Accord, as a temporary measure for maintaining peace and good-neighbourly relations both in the region and between the Parties, requires a great deal of good faith and mutual trust from both Parties in its implementation. Such uncertainty can only be explained and justified by the interim nature of the treaty and the pending settlement of the name issue. Therefore, the implementation of Article 11, paragraph 1, is intrinsically linked with the duty of the two Parties to settle the name dispute through negotiations as required by Article 5, paragraph 1. Any issue relating to the negotiation process should fall within the scope of Article 5, paragraph 1.

The so-called "dual formula", as revealed in the proceedings, refers to the formula whereby, ultimately, the provisional name will be used only between the Respondent and the Applicant, while the Applicant's constitutional name is used with all other States. Judge Xue notes that in the present case, without looking into this so-called "dual formula", it would be impossible to examine fully the Respondent's actions at the Bucharest Summit in light of the object and purpose of the Interim Accord. If conducted, however, such examination would inevitably have to address the "difference" under Article 5, paragraph 1, thus going beyond the jurisdiction of the Court.

In Judge Xue's opinion, the Court's examination of the single act of the Respondent's objection to the Applicant's membership to NATO has isolated Article 11, paragraph 1, from the context of the treaty as a whole, and from its object and purpose. Article 11, paragraph 1, cannot be separated from Article 5, paragraph 1, as long as the settlement of the final name is involved.

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

She agrees with the Court's position that the issue before the Court is not whether NATO's decision may be attributed to the Respondent but rather whether the Respondent has breached its obligation under the Interim Accord as a result of its own conduct. The Court's decision to pronounce only on the lawfulness of the single act of the Respondent and to reject all other submissions of the Applicant, renders the Judgment devoid of any effect on NATO's decision to defer the invitation to the Applicant to become a NATO member.

In so far as NATO's decision remains valid, the Court's decision will have no practical effect on the future conduct of the Parties with respect to the Applicant's membership in that organization. In the Northern Cameroons case, the Court pronounced that its decision "must have some practical consequence in the sense that it can affect existing legal rights or obligations of the parties, thus removing uncertainty from their legal relations" (case concerning the Northern Cameroons (Cameroon v. United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1963, p. 34). In Judge Xue's view, that requirement does not seem to have been met in the present case.

In addition, Judge Xue expresses concerns about the potential effect of the Judgment on the negotiation process, since the Court's decision is likely to be used by the Parties to harden their positions in the negotiation, thus not conducive to a speedy settlement of the name issue.

Dissenting opinion of Judge ad hoc Roucounas

After an introduction and brief history, Judge Roucounas presents the context in which the two Parties concluded the Interim Accord of 13 September 1995, which contains a number of significant "unusual features", in particular the fact that the Parties are not referred to by name, owing to the "difference" over the name of the "Party of the Second Part". That difference is ubiquitous in this case, and the other claims of the Applicant and reactions of the Respondent revolve around it. Judge Roucounas notes that the Interim Accord was concluded amid the tumult of the Balkan crises of the 1990s and describes the efforts of the European institutions between 1992 and 1994, the policies of the United Nations and the mediation by American envoys which led to the adoption of resolutions 817 and 845 and to the Interim Accord.

The judge disagrees with the interpretation upheld by the Court that the Applicant itself was not obliged to use the provisional name within international organizations. He points out that that interpretation is incompatible with the phrase "[is to be] referred to for all purposes", which is used in resolutions 817 and 845 and incorporated in the text of the Accord. 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). Judge Roucounas observes that the "dual formula" advanced by the Applicant, who contends that the purpose of the bilateral negotiations conducted under the auspices of the United Nations 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 refer to itself, and to have itself referred to, as "Macedonia", is in breach of the Applicant's treaty obligations.

The judge points out that, throughout the period from 1993 to 2008, Greece repeatedly voiced its opposition, orally and in writing, to the FYROM's strategy of using its constitutional name in international organizations, and that the Respondent made its position perfectly clear in the face of the Applicant's shift towards a "dual formula". Moreover, it is not necessary, from a legal point of view, for those with objections to voice those objections at all times and on every occasion.

The judge goes on to say that the Interim Accord is synallagmatic, in the sense that it is based on reciprocity. Its provisions are closely inter-connected and the rights and obligations of the two Parties are legally dependent on one another. He states that 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, he believes that 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.

The dissenting opinion questions the Court's jurisdiction to rule on the dispute submitted to it. The judge is of the view that Article 21, paragraph 2, excludes from the Court's jurisdiction not only the question of the attribution of a name for the Applicant, but also "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, relates "directly or indirectly" to the question of the name. He adds that the exclusion under Article 21 is also linked to Article 22, which reflects Articles 8 and 10 of the North Atlantic Treaty, the Court having no jurisdiction to interpret that instrument. He finds it regrettable that the Court adopted a restrictive interpretation of Article 5 and, at the same time, a broad interpretation of the first part of Article 11 and a restrictive interpretation of the second part of that same Article. He believes that the Court has assumed a position capable of

being interpreted as contributing to "faits accomplis", or which might lead to renewed deterioration of the negotiations and relations between the two States. He adds that the Court's lack of jurisdiction is corroborated by the fact that NATO's decision of 3 April 2008 is an act of that international organization, and that Greece does not have to answer for the acts of organizations of which it is a member.

Judge Roucounas then argues that the Applicant's conduct is incompatible with Article 5 of the Interim Accord, which sets out the Parties' obligation to conduct negotiations in good faith. He believes that resolution 817 was incorporated into Article 5 of the Interim Accord precisely because it refers to "the difference . . over the name". Article 5 establishes a balance between the Parties' rights and obligations. Its first paragraph requires negotiations "with a view to reaching agreement on the difference", firstly over what is meant by "name" and secondly over who should use it. 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 relations, in particular their economic and commercial relations and "shall take practical measures" to that end. He believes that the intransigence of the Applicant in respect of the "dual formula" was compromising the negotiations between the Parties, which he considers is clearly illustrated by statements of the President and Prime Minister of the FYROM, which he cites verbatim and which, in his view, have a potentially destructive character, but on which the Judgment remains silent. He recalls that Greece altered its position and made known that it would be willing to accept a name which included the term "Macedonia", on the condition that it was accompanied by a qualifier and that that name should be used erga omnes. The FYROM, on the other hand, declared that the international use of a name which differed from its constitutional name was unacceptable. He adds that 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.

The judge then examines the question of admission to "closed" or "regional" organizations, since NATO differs from the other organizations on account of its military and defence-related nature. He states that the competent organ within the organization can lay down additional conditions for the admission of a new member. 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, and it is for each member State to determine subjectively whether all the necessary criteria have been met before giving its assent. To admit a new member to NATO, 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 of the North Atlantic Treaty). 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. And any member State whose relations with the candidate State are a source of direct concern cannot be prevented from expressing its opinion on the real state of those relations. Stating that it is not entitled to do so prevents that State from exercising its rights. NATO's decision followed calls by the organization directed towards the Applicant for "mutually acceptable solutions to outstanding issues".

The opinion disagrees with the interpretation given by the Court to Article 11 of the Interim Accord, which not only favours the first part of the first paragraph of the Article over the second part of the same paragraph, but also infringes the rights and obligations of the Respondent in relation to third parties. Thus, excessive weight is attached by the Court to the first part of Article 11, paragraph 1 — which contains another "unusual feature" in the phrase "the Party of the First Part agrees not to object" — to the point of rendering it unintelligible. With no decisive argument, the Court minimizes the scope of the second part of paragraph 1, which sets outs the conditions for the use of the name FYROM. According to the judge, the idea that the second part of Article 11, paragraph 1, would only apply were the organization to admit the Applicant under a name other than FYROM is completely misconceived, and the distinction between what happens

before and what happens after admission to the international organizations is not legally tenable, in view of the treaty and of the specific nature of NATO. As regards the admission procedure, Judge Roucounas notes 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. NATO has its own procedures based on the consensus of its member States.

The judge adds that the Court's reading of the phrase "the Party of the First Part agrees not to object" (to the admission to international organizations) results in depriving the Respondent of established international competencies. In contrast, a balanced reading of Article 11 would have enabled the Court to find that the Respondent was not prohibited, legally or politically, from making public 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 repeated calls from the Alliance's organs for the Parties to settle the difference over the name.

As regards international protest, he recalls that this is a legal concept of customary law, whereby a subject of international law objects to an official act or conduct of another subject which it considers to be in breach of international law. 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. Judge Roucounas observes that the Court has never relied on the number of protests in order to determine their legal effect; in the present case, however, the Judgment finds the eight protests by Greece in the period between the adoption of resolution 817 and the conclusion of the Interim Accord to be insufficient, and contests the many others (approximately 85) voiced by Greece since the conclusion of the Interim Accord against the FYROM's use of its constitutional name within international organizations. Judge Roucounas expresses concern that, by using quantitative measures in this way to determine the legal status of an international act, the Court may undermine the very concept of international protest.

Judge Roucounas stresses the notion of good neighbourliness. The right of neighbourliness and the right of good neighbourliness are evolving concepts. 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, which the commentaries on the Charter generally regard as legally enshrining the mutual right of neighbouring States to the protection of their legitimate interests. He adds that the principle of good neighbourliness is not binding on States alone but, 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. Judge Roucounas recalls that good neighbourliness is specifically mentioned in resolutions 817 and 845 and in NATO's communiqués, and that the Interim Accord limits the Parties' freedom of action in seven places, its object being precisely to regulate peaceful relations between the States. That is why provision was made in the Accord 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. According to Judge Roucounas, the Applicant's acts of provocation, which are in breach of those obligations, continue in various forms: irredentist claims concerning the geographical and ethnic frontiers of the FYROM, which extend beyond its political borders, school books, maps, official encyclopaedias and inflammatory speeches.

Article 22 is a response to the concern expressed by those who study the law of treaties regarding 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. It is not simply a standard clause, and is aimed at avoiding any potential doubt arising from the interpretation of Article 30, paragraph 2, of the Vienna Convention on the Law of Treaties. Article 22 applies to the whole of the Interim Accord and should 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, in incorporating 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.

With regard to the Respondent's reliance, in the alternative, on the principle of exceptio non adimpleti contractus, Judge Roucounas concludes that the exceptio expresses a principle so just and so equitable that it can be found in one form or another in every legal system. It is the corollary of reciprocity and of synallagmatic agreements and a general principle of law, independently of Article 60 of the Vienna Convention on the Law of Treaties. For, as the Court made clear 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. Greece has responded mildly to the Applicant's practices. In the case of the latter's application to join NATO, it did not seek a suspension or termination of the Accord as such; it made its position widely known, but without invoking specific articles of the Interim Accord. It is, however, important not to lose sight of the wording of Article 66, 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 on alleging its violation". Greece has satisfied the substantive conditions of proportionality and reversibility. In respect of the procedural conditions, flexibility is permitted, the International Law Commission's draft Articles being a mix of codification and progressive development.

Judge Roucounas then examines the Court's approach to countermeasures. He concludes that, 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, and whatever the current state of international law relating to countermeasures, the measure adopted by the Respondent satisfies the condition of proportionality. He believes that the Court's assessment of those violations fails to address the substance of the issues.

Declaration of Judge ad hoc Vukas

The author agrees with the conclusion of the Court that it has jurisdiction to entertain the Application of the former Yugoslav Republic of Macedonia and that this Application is admissible. He also shares the view of the Court that the Hellenic Republic violated Article 11, paragraph 1, of the Interim Accord signed by the Parties on 13 September 1995. However, he does not agree with the conclusion of the Court to reject the Applicant's request that the Court orders that the Respondent has to comply with its obligations under Article 11, paragraph 1, of the Interim Accord also in the future.

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