DECLARATION OF JUDGE AURESCU

1. I voted in favour of all the subparagraphs of the operative part of the present Judgment. I agree with the Court's reasoning, for the large part, and with the Court's conclusions in this case. However, there are two points that I find important and on which, in my view, the Court did not elaborate enough in the present Judgment. The first point refers to the somewhat inconsistent language used in the Judgment regarding the existence of the "Bata Convention". The second point refers to the high standard that is required from States when they modify *by conduct* treaties establishing State borders and, in general, when they modify *by conduct* State borders.

Existence of the "Bata Convention" Has Not Been Established

2. In my view, the Court should have been clearer and more consistent in expressing, throughout the text of the Judgment, that the existence of the so-called "Bata Convention" is not certain and that, *even if it exists*, it does not constitute a legally binding instrument (a treaty). The Court begins its analysis regarding the binding character of the "Bata Convention" in paragraph 57 where it states that "[f]or the present purposes, the Court will assume, *without deciding*, that a text was signed in Bata" (emphasis added). However, it does not reiterate this point — as it should have done — at the closure of this analysis, in paragraph 98. This may create, in a way, the perception that the Court has abandoned the argument that the existence of the "Bata Convention" has not been established, which is not the case. Also, in its analysis of whether the "Bata Convention" — if it exists — constitutes a treaty, the Court refers to the *signing* or *signature* of that document on numerous occasions in the Judgment. I believe that it would have been more accurate to add the term "alleged" before *signing* or *signature* in order to make it clearer that it has not been established that the "Bata Convention" exists.

3. On a related aspect, the text of the Judgment seems to introduce a requirement to present the original text of a treaty in order to prove its existence; in paragraph 54 the Court says that "[a] particular difficulty arises from the fact that no original of the 'Bata Convention' was presented to the Court". However, in paragraph 57 the Court underlines that "the absence of a text accepted as authentic by both parties is no proof of a treaty's inexistence". This is correct. There is no requirement in international law (or in the

Rules of Court or in the Practice Directions) to present the original of a treaty in order to prove its existence. Therefore, there was no need to include the above-mentioned reference to paragraph 54 in the Court's analysis regarding the "Bata Convention".

Particularly High Threshold Applies to Treaty Modification by Conduct

4. With regard to the Utamboni River area, the Parties disagree as to whether the proposal made by the 1901 Commission to modify the border set by Article IV of the 1900 Convention was approved, explicitly or by conduct, by Spain and France. First, the Court finds, in paragraph 136, that "the proposal made by the 1901 Commission was not approved through *formal* decisions" (emphasis added) by the respective Spanish and French Governments, a reference to the fact that the respective proposal was not *expressly* approved (in fact, it was expressly rejected by the letter of 20 April 1907 from the Spanish Minister of State to the French Ambassador to Spain). The Court then observes, in paragraph 137, in a very succinct formulation, that "approval could be inferred from the conduct of Spain and France". The Court further evaluates, in paragraphs 139-140, Spain's acts of administration and the conduct of France in the relevant area. Finally, it looks at the internal documents of the French Government which confirm that France did not approve the proposal of the 1901 Commission (para. 141). The Court then concludes, in paragraph 142, that "the proposal made by the 1901 Commission was not approved through the conduct of Spain and France". In general, I agree with the methodology applied by the Court and the resulting finding.

5. At the same time, I am convinced that the Court should have underlined that the standard for modification by conduct of a treaty, especially of a boundary treaty, is particularly high. In order to modify a treaty, something more than a mere subsequent practice is required[1]. As explained by the International Law Commission ("ILC"),

> "[i]t is *presumed* that the parties to a treaty, by an agreement or a practice in the application of the treaty, *intend* to interpret the treaty, *not to amend or to modify it*. The *possibility of amending or modifying a treaty by subsequent practice of the parties has not been generally recognized*."[2]

[1] M. G. Kohen, "Keeping Subsequent Agreements and Practice in Their Right Limits", in G. Nolte (ed.), *Treaties and Subsequent Practice*, Oxford University Press, 2013, p. 37.

[2] United Nations, Report of the International Law Commission, Seventieth Session (30 April-1 June and 2 July-10 August 2018), Chap. IV, "Subsequent agreements and

The Vienna Convention on the Law of Treaties equally gives limited role to subsequent practice, in so far as that practice reflects an agreement between the parties. Article 31 (3) *(b)* allows to take subsequent practice into consideration only for the purpose of treaty *interpretation*. Draft Article 38, that would have explicitly allowed the modification of a treaty by subsequent practice, was rejected by the Vienna Conference[3]. Moreover, as explained by the Court in *Gabčíkovo-Nagymaros*, non-compliance with the treaty terms, even if reciprocal, does not modify the treaty terms and obligations arising from it[4].

6. This demonstrates that the potential treaty modification by conduct should not be taken or inferred lightly. The usual way to modify treaty terms is in the same way the treaty was concluded — in writing and by following the modification procedure set forth by the treaty itself, and in accordance with the domestic requirements in place to formally and expressly approve such modification. Indeed, as put by the ILC in the Commentary to the Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, "the actual occurrence" of a modification of a treaty by an "agreed subsequent practice of the parties" "is *not to be presumed*"[5]. So, even if modification by subsequent conduct is possible, the party invoking it needs to prove, in a convincing, unequivocal manner, that the parties did intend to modify the treaty terms through their conduct. That means that the standard is high in this regard. This is particularly relevant when the treaty in question is a treaty establishing a State border. Even if it may be argued that in a certain case, including in the present one, the issue is not the modification of the treaty as such, but the modification of the border, it can be equally argued that any modification of the border as defined by the treaty represents a modification of the treaty itself, since the very substance of the treaty — which is the definition of the respective border — is changed once the border is changed by subsequent conduct or practice. But even if one only considers the modification of the border, State borders must enjoy stability in relations between

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subsequent practice in relation to the interpretation of treaties", Draft Conclusion 7 ("Possible effects of subsequent agreements and subsequent practice in interpretation"), UN doc. A/73/10, p. 51, para. 3 (emphasis added).

[3] United Nations Conference on the Law of Treaties, First and Second Sessions (Vienna, 26 March-24 May 1968 and 9 April-22 May 1969), *Official Records*, Documents of the Conference, Sec. B, "Draft Articles on the Law of Treaties with Commentaries, adopted by the International Law Commission at its Eighteenth Session", Art. 38 ("Modification of treaties by subsequent practice"), UN doc. A/CONF.39/11/Add.2, p. 55.

[4] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 68, para. 114.

[5] United Nations, Report of the International Law Commission, Seventieth Session (30 April-1 June and 2 July-10 August 2018), Chap. IV, "Subsequent agreements and subsequent practice in relation to the interpretation of treaties", Comment 38 to Draft Conclusion 7, para. 3, UN doc. A/73/10, p. 63 (emphasis added).

neighbouring States[6], and border modifications by subsequent conduct cannot be either presumed or inferred lightly: a high standard should be required for their occurrence.

7. To conclude, the Court was correct in deciding that the proposal made by the 1901 Commission to modify Article IV of the 1900 Convention had not been approved by conduct. However, I regret that the Court, by not clarifying the particularly high threshold required for treaty or border modification by conduct, may give a wrong impression that such type of modification can easily be performed in international law.

(Signed) Bogdan AURESCU.

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[6] *Temple of Preah Vihear (Cambodia* v. *Thailand), Merits, Judgment, I.C.J. Reports 1962*, p. 34 ("In general, when two countries establish a frontier between them, one of the primary objects is to achieve stability and finality."); *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994*, p. 37, para. 72 ("Once agreed, the boundary stands, for any other approach would vitiate the fundamental principle of the stability of boundaries, the importance of which has been repeatedly emphasized by the Court").