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International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2011

Public sitting

held on Tuesday 22 March 2011, at 10 a.m., at the Peace Palace,

President Owada presiding,

***in the case concerning* Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia *v.* Greece)**

VERBATIM RECORD

ANNÉE 2011

Audience publique

tenue le mardi 22 mars 2011, à 10 heures, au Palais de la Paix,

sous la présidence de M. Owada, président,

***en l'affaire relative à l'*Application de l'accord intérimaire du 13 septembre 1995 (ex-République yougoslave de Macédoine c. Grèce)**

COMPTE RENDU

Present:	President	Owada
	Vice-President	Tomka
	Judges	Koroma
		Al-Khasawneh
		Simma
		Abraham
		Keith
		Sepúlveda-Amor
		Bennouna
		Cançado Trindade
		Yusuf
		Greenwood
		Xue
		Donoghue
	Judges *ad hoc*	Roucounas
		Vukas
	Registrar	Couvreur

Présents : M. Owada, président
M. Tomka, vice-président
MM. Koroma
Al-Khasawneh
Simma
Abraham
Keith
Sepúlveda-Amor
Bennouna
Cançado Trindade
Yusuf
Greenwood
Mmes Xue
Donoghue, juges
MM. Roucounas
Vukas, juges *ad hoc*

M. Couvreur, greffier

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The PRESIDENT: Please be seated. The sitting is open. I know that Judge Skotnikov, for reasons made known to me, as yesterday, remains unable to take his seat on the Bench today. The Court meets today for the continuation of the first round of presentation of the former Yugoslav Republic of Macedonia. Thus, let me invite Professor Pierre Klein to take the floor.

M. KLEIN :

LA REQUÊTE EST PLEINEMENT RECEVABLE ET AUCUNE RAISON D'OPPORTUNITÉ NE S'OPPOSE À CE QUE LA COUR RENDE UN ARRÊT DANS LA PRÉSENTE AFFAIRE

1. Je vous remercie Monsieur le président. Monsieur le président, Mesdames et Messieurs les Membres de la Cour, il me revient ce matin de traiter d'un dernier ordre d'argument avancé par l'Etat défendeur pour inviter la Cour à ne pas exercer ses pouvoirs à l'égard du présent différend. Selon la Partie adverse, la demande présentée dans la requête introductive d'instance serait d'une nature telle qu'elle se heurterait aux «limitations inhérentes à l'exercice par la Cour de sa fonction judiciaire»[1]. La Cour devrait de ce fait refuser de se prononcer sur la demande dont elle est saisie. Au fil des développements de l'argumentation de l'Etat défendeur sur cette question, ses arguments se sont articulés sur trois axes principaux. Premièrement, la Cour devrait s'abstenir de rendre une décision qui serait condamnée à être dépourvue de tout effet pratique. En deuxième lieu, la Cour devrait exercer sa «réserve judiciaire» à l'égard du présent différend. A défaut, elle interférerait dans un processus de négociation mené sous la supervision des organes politiques des Nations Unies. Enfin, la réserve de droit formulée par l'Etat requérant en vue d'une modification et d'une extension éventuelle des termes de sa requête serait en tout état de cause irrecevable. On ne s'attardera pas davantage sur cette dernière question dans le cadre de la présente plaidoirie, puisqu'aucune extension de ce type n'a été demandée à ce stade de la procédure.

2. L'argumentation relative aux «limitations inhérentes à l'exercice par la Cour de sa fonction judiciaire» a initialement été avancée par l'Etat défendeur de façon très succincte dans la partie de son contre-mémoire consacrée à la réfutation des mesures de réparation sollicitées par l'Etat requérant[2]. Cette question a ensuite pris une proportion beaucoup plus significative dans

[1] Duplique («RR»), p. 63 et suiv.

[2] Contre-mémoire («RCM»), par. 9.9-9.16.

l'argumentation du défendeur, qui lui a consacré un chapitre entier dans sa duplique, en en faisant une exception — ou plutôt un ensemble d'exceptions — d'irrecevabilité[3]. Ces efforts, pourtant, ne changent pas grand chose au poids de cet argument. Qu'il soit développé en deux, en quatorze, ou en quarante pages, il est loin d'emporter la conviction. Ici encore, l'argumentation de la Partie adverse présente de sérieuses difficultés tant sur le plan factuel que sur le plan juridique. Le même constat s'impose, on va le voir, pour les deux principaux arguments d'irrecevabilité avancés par l'Etat défendeur.

A. Un arrêt rendu par la Cour dans la présente affaire emporterait des effets juridiques concrets

3. Selon le premier de ces arguments, un arrêt rendu par la Cour ne pourrait avoir aucun effet concret. Il en serait ainsi en raison du fait que la requête de l'Etat demandeur viserait, premièrement, à faire déclarer qu'il aurait dû être admis au sein de l'OTAN et, deuxièmement, à faire constater que la décision de cette organisation de ne pas accepter l'adhésion du demandeur en 2008 constituait un acte internationalement illicite engageant la responsabilité de l'Etat défendeur[4]. Ce dernier insiste sur le fait que cette décision est le fruit d'un processus collectif mené au sein de l'organisation, et qu'il ne dispose d'aucun pouvoir de décider lui-même de l'invitation du requérant à devenir membre de l'OTAN[5]. Il serait donc vain pour la Cour de lui adresser une injonction en ce sens[6].

4. De la même façon, selon l'Etat défendeur, la demande de l'Etat requérant de restaurer le *statu quo ante* — c'est-à-dire de le replacer dans la situation où il aurait dû se trouver si l'acte reproché au défendeur n'avait pas été commis — serait tout aussi dépourvue de sens. Le statut du requérant préalablement au sommet de Bucarest était celui d'Etat candidat à l'admission au sein de l'OTAN. Ce statut est demeuré inchangé, et l'Etat requérant reste à l'heure actuelle candidat à

[3] RR, chap. 4 ; pour la qualification, voir par. 4.3.

[4] RCM, par. 9.4.

[5] RR, par. 4.6.

[6] *Ibid.*, par. 9.11.

l'admission au sein de cette organisation[7]. Une décision de la Cour ne changerait dès lors rien à cet état de choses.

5. Il est manifeste que l'objection relative à la portée pratique d'un arrêt de la Cour, telle que cette objection est soulevée par le défendeur, ne saurait avoir de poids que si la description de l'objet de la demande de l'Etat requérant était correcte. Or, ce n'est pas le cas. Une nouvelle fois, ce n'est qu'en livrant une présentation tronquée de l'objet de cette demande que l'Etat défendeur peut prétendre qu'un arrêt de la Cour ne pourrait avoir d'effet concret dès lors que l'Etat défendeur est impuissant à modifier une décision collective de l'OTAN. Mais — on y a déjà insisté hier et on le répétera aujourd'hui — ce n'est pas la décision prise par cette organisation en 2008 qui est visée par la requête. C'est un acte propre au défendeur, autonome et préalable à cette décision, même si ces deux actes sont liés par un lien de cause à effet évident[8]. Le défendeur — et c'est sa stratégie constante — nie tantôt la réalité tantôt la portée juridique de cet acte propre. Il y a pourtant là une vérité à laquelle il ne peut échapper. Cet acte existe, il a été posé et même revendiqué avec beaucoup de fierté par les autorités gouvernementales de l'Etat défendeur, comme nous l'avons vu hier. C'est cet acte qui a conduit à la décision prise par l'OTAN à son sommet de Bucarest. Et c'est cet acte dont l'Etat requérant demande à la Cour de constater l'illicéité au regard de l'article 11 de l'accord intérimaire de 1995. Il n'est pas question — et il n'a jamais été question — de requérir de la Cour qu'elle impose à l'Etat défendeur de faire rapporter la décision prise par l'OTAN en 2008. Il est parfaitement évident que la Cour n'en a pas le pouvoir, et qu'une décision de sa part en ce sens ne saurait produire un effet juridique pratique quelconque. Personne ne le conteste. Et c'est bien pour cette raison que ce n'est *pas* ce que demande l'Etat requérant.

6. Pour autant, ce qu'il demande — le constat d'une violation de l'article 11 de l'accord à la suite d'un acte propre au défendeur et le rétablissement du *statu quo ante* — est-il susceptible d'avoir une portée pratique ? Ou ne s'agirait-il que d'un prononcé purement théorique, comme l'affirme l'Etat défendeur, dès lors que l'Etat requérant était en position de candidat à l'admission en 2008, et se trouve encore exactement dans la même position à l'heure actuelle ? En suggérant que cette situation est inchangée — que le *statu quo ante* a, en quelque sorte, toujours existé —, le

[7] RCM, par. 9.15 ; RR, par. 4.10.

[8] Voir entre autres, dans le contexte des questions abordées ici, réplique («AR»), par. 6.8.

défendeur omet un élément de taille. Le constat d'une violation de l'article 11 de l'accord aurait en effet pour résultat de remettre l'Etat requérant en position de candidat à l'admission au sein de l'OTAN *sans risquer de se voir une nouvelle fois opposer une objection fondée sur des motifs autres que celui prévu dans l'accord intérimaire*[9]. Seuls seraient pris en compte, aux fins d'évaluer les mérites de cette candidature, les critères fixés par l'organisation elle-même pour l'admission de nouveaux membres. Et aucune interférence ne pourrait être exercée dans ce processus par l'Etat défendeur pour des motifs autres que celui permis par l'article 11. La différence, on en conviendra, est loin d'être négligeable. Et elle confirme au-delà de tout doute qu'une décision de la Cour dans la présente instance aurait bien des effets juridiques concrets. Il en serait d'ailleurs d'autant plus ainsi que cette hypothèque — la menace d'une objection de l'Etat défendeur fondée sur des motifs non admissibles — serait levée dans le contexte des demandes d'admission présentées à l'avenir par l'Etat requérant auprès d'autres organisations internationales dont l'Etat défendeur est membre. Si l'on me permet cette image, s'interroger sur l'impact juridique concret d'un prononcé de la Cour dans l'affaire qui lui est soumise aujourd'hui, c'est un peu comme demander à Damoclès si cela a un impact pratique pour lui d'avoir — ou non — une épée suspendue à un crin de cheval au-dessus de sa tête…

7. De façon plus générale, il est manifeste que l'obtention d'un constat de violation d'une disposition d'un accord bilatéral en vigueur entre les Parties à l'instance représente, en soi, un objectif parfaitement légitime et approprié dans le cadre d'une procédure judiciaire. La Cour n'a pas, par ailleurs, à s'exprimer sur les conséquences futures de la décision qu'elle est appelée à rendre.

8. Le fondement juridique de l'argumentation développée par l'Etat défendeur sur ce point ne s'avère pas plus convaincant. Selon cette argumentation, la Cour se trouverait ici dans la même situation que celle à laquelle elle était confrontée dans l'affaire du *Cameroun septentrional*, où elle avait refusé de statuer au fond sur la demande qui lui était soumise[10]. Le motif de ce refus était double. D'une part, la Cour estimait qu'elle ne se trouvait pas dans une situation où, une fois l'arrêt rendu, «l'une ou l'autre partie ou les deux parties s[eraie]nt en fait à même de prendre des

[9] Voir AR, par. 6.22.

[10] *Ibid.*, par. 9.12.

mesures visant le passé ou l'avenir, ou de ne pas en prendre, de sorte qu'il y ait soit exécution de l'arrêt…, soit refus d'exécution» (*Cameroun septentrional (Cameroun c. Royaume-Uni), exceptions préliminaires, arrêt, C.I.J. Recueil 1963*, p. 37-38)[11]. La Cour avait alors estimé devoir sauvegarder sa fonction judiciaire en refusant de rendre une décision sans objet (*ibid.,* p. 38). Tel serait également le cas dans la présente instance, puisque la Cour ne pourrait imposer à l'Etat défendeur des mesures qu'il ne serait pas habilité à prendre — en l'occurrence modifier la décision de l'OTAN[12]. D'autre part, dans l'affaire du *Cameroun septentrional*, la Cour avait estimé que «ce que le requérant demande à la Cour, c'est d'apprécier certains faits et d'arriver, à l'égard de ces faits, à des conclusions s'écartant de celles qu'a énoncées l'Assemblée générale dans sa résolution 1608 (XV)» (*Cameroun septentrional (Cameroun c. Royaume-Uni), exceptions préliminaires, arrêt*, p. 32)[13]. Or, la Cour avait indiqué à cet égard qu'un arrêt rendu par elle ne pourrait «infirm[er] … les décisions de l'Assemblée générale» (*ibid.,* p. 33)[14]. Selon la Partie adverse, la même conclusion s'imposerait ici, puisque le but ultime de l'Etat requérant serait en fait de réformer la décision prise par l'OTAN en 2008[15]. On se trouverait donc là confronté à un précédent judiciaire bien lourd de conséquences. Qu'en est-il vraiment ?

9. En réalité, la situation à laquelle la Cour se trouvait confrontée dans le précédent du *Cameroun septentrional* est fondamentalement différente de celle qui lui est soumise aujourd'hui. L'objet central du différend entre le Royaume-Uni et le Cameroun était constitué par une allégation de l'Etat requérant, le Cameroun, selon laquelle le défendeur avait manqué à des obligations que lui imposait l'accord de tutelle qui le liait à l'Organisation des Nations Unies (*Cameroun septentrional (Cameroun c. Royaume-Uni), exceptions préliminaires, arrêt*, *C.I.J. Recueil 1963*, p. 26). En vertu de la résolution 1608 (XV) de l'Assemblée générale, cet accord de tutelle avait pris fin le 1er juillet 1961, soit deux jours après le dépôt de sa requête par l'Etat demandeur (*ibid.*, p. 25-26). Ces seuls faits suffisent évidemment à expliquer pleinement la conclusion atteinte par la Cour en l'espèce, selon laquelle, même si elle «devait poursuivre l'affaire et déclarer toutes les allégations

[11] Cité *in* RCM, par. 9.12.

[12] RCM, par. 9.15 ; duplique, par. 4.12.

[13] Cité *in* RR, par. 4.14.

[14] Cité *in* RR, par. 4.15.

[15] RR, par. 4.16.

du demandeur justifiées au fond, elle n'en serait pas moins dans l'impossibilité de rendre un arrêt effectivement applicable» (*ibid.*, p. 33). La raison fondamentale de cette impossibilité est exposée en des termes très simples par la Cour : «[l']arrêt ne remettrait pas en vigueur et ne ferait pas revivre l'accord de tutelle» *(ibid.)*. On ne retrouve à l'évidence nullement ce type de circonstances dans la présente espèce. Il ne s'agit aucunement ici de «faire revivre» d'une manière ou d'une autre un instrument juridique qui aurait cessé de produire des effets de droit. Il s'agit au contraire pour la Cour de se prononcer sur l'interprétation et la portée d'une disposition d'un accord bilatéral qui lie les Parties à l'instance et dont nul ne conteste qu'il est bien en vigueur.

10. Comme l'indiquait encore la Cour dans son arrêt de 1963, «[l']arrêt de la Cour doit avoir des conséquences pratiques en ce sens qu'il doit pouvoir affecter les droits ou obligations juridiques existants des parties, dissipant ainsi toute incertitude dans leurs relations juridiques» (*ibid.,* p. 34). N'est-ce pas exactement à ce résultat que nous serions confrontés en la présente instance ? L'arrêt que rendra la Cour affectera indéniablement les droits de l'Etat requérant de demander son admission au sein d'organisations internationales sans que l'Etat défendeur puisse y faire objection, si ce n'est dans le seul cas prévu à l'article 11 de l'accord intérimaire. Et cet arrêt aura un effet pour l'Etat défendeur, en précisant qu'il ne peut émettre d'objection en dehors de la seule hypothèse visée dans cette disposition.

11. L'arrêt rendu par la Cour dans l'affaire du *Cameroun septentrional* est donc loin d'être dépourvu de pertinence dans la présente instance. Mais s'il montre une chose, ce n'est certainement pas que la Cour serait en l'espèce dans l'incapacité de rendre un arrêt qui aurait des conséquences juridiques concrètes. Tout au contraire, les critères mêmes qui ont été énoncés par la Cour en 1963 pour définir les situations dans lesquelles ses prononcés entraient bien dans le cadre de l'exercice de ses fonctions judiciaires sont pleinement rencontrés ici, comme on vient de le voir. On voit donc décidément très mal quelles «limitations inhérentes à l'exercice par la Cour de ses fonctions judiciaires» l'empêcheraient de rendre un arrêt dans la présente affaire.

B. En exerçant ses pouvoirs dans le cadre de la présente instance, la Cour n'interférerait en rien dans le processus de négociation diplomatique visant à résoudre le différend relatif au nom

12. Selon la deuxième exception d'irrecevabilité soulevée par l'Etat défendeur, la Cour ne pourrait rendre une décision en l'espèce car cela la conduirait à ignorer le devoir qui lui incomberait de faire preuve de «réserve judiciaire» à l'égard de la demande dont elle est saisie. L'Etat défendeur affirme à cet égard qu'un arrêt par lequel la Cour accepterait de se prononcer sur la requête portée devant elle interférerait avec le processus de négociation diplomatique requis par le Conseil de sécurité dans la résolution 817 (1993) et accepté par les Parties dans l'accord intérimaire de 1995[16]. Si elle acceptait l'une quelconque des demandes de l'Etat requérant, la Cour imposerait de ce fait aux Parties — et spécialement à l'Etat défendeur — une position dont le Conseil de sécurité a indiqué qu'elle devrait être atteinte par un processus de négociation[17]. En rendant par hypothèse une décision favorable à l'Etat requérant, la Cour apporterait son appui aux tentatives de cet Etat d'imposer sur le plan international un nom qui n'aurait pas fait l'objet de négociation ni été accepté par l'Etat défendeur[18].

13. Il convient tout d'abord de relever que ce dernier argument n'a été avancé pour la première fois par le défendeur que dans sa duplique, au stade ultime de la procédure écrite. On peut certainement s'interroger sur la conformité de cette façon de procéder aux règles relatives à la présentation des exceptions préliminaires devant la Cour et l'Etat requérant réserve tous ses droits à cet égard. En tout état de cause, le procédé apparaît une nouvelle fois symptomatique du caractère fluctuant de l'argumentation de l'Etat défendeur et de sa volonté de faire feu de tout bois, en recourant, à tous les stades de la procédure, aux arguments les plus divers pour échapper aux conséquences de ses actes.

14. Quoi qu'il en soit, même si la Cour accepte d'examiner cet argument, il s'avère lui aussi bien léger, tant sur le plan des faits que sur celui du droit. En évoquant de prétendues «interférences» entre la demande présentée par l'Etat requérant et le processus de négociation sur le nom, l'Etat défendeur entretient une fois encore délibérément la confusion quant à la portée de la

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[16] RR, par. 4.23.

[17] *Ibid.*

[18] *Ibid.*, par. 4.26.

demande initiale. La Cour n'est nullement appelée à se prononcer sur le différend relatif au nom de l'Etat demandeur. Comme l'exposera de façon détaillée dans quelques instants mon collègue le professeur Sean Murphy, la seule chose que prétend l'Etat requérant, c'est que pas plus l'article 11 de l'accord intérimaire de 1995 que la résolution 817 (1993) ne l'empêchent de se référer à lui-même par son nom constitutionnel, y compris dans les enceintes des organisations internationales dont il fait partie. Que la Cour tranche cette question ne reviendrait nullement à priver de leur objet les négociations visant à régler le différend sur le nom, ni à défavoriser la Partie adverse dans ce processus de négociation. L'objet de la demande de l'Etat requérant, et celui du processus de négociation, sont entièrement distincts. Se prononcer sur la première n'implique nullement de trancher la «divergence» sur le nom, que les Parties ont été invitées à régler par la voie des négociations. Si la Cour accueille la prétention de l'Etat requérant, cela signifiera simplement qu'aucune violation de la résolution 817 (1993) et de l'accord intérimaire ne peut lui être reprochée au titre de la pratique qui consiste pour cet Etat à utiliser son nom constitutionnel dans ses relations avec des tiers. Cela ne reviendra pas à imposer pour autant l'usage de ce nom à ces tiers. L'objet des négociations — c'est-à-dire, la recherche d'un accord sur la façon dont les deux Parties pourront s'entendre pour désigner l'Etat requérant — sera de ce fait laissé parfaitement intact.

15. Sur le plan plus strictement juridique, il convient sans doute de rappeler à ce stade que la Cour s'est déjà prononcée en des termes très nets sur le fait que l'existence d'un processus de négociation entre les Parties à l'instance n'était nullement de nature à l'empêcher d'exercer ses fonctions judiciaires. En particulier, dans l'affaire *Nicaragua*, la Cour a souligné que «l'existence même de négociations actives auxquelles les deux Parties pourraient participer ne doit empêcher ni le Conseil de sécurité ni la Cour d'exercer les fonctions distinctes qui leur sont conférées par la Charte et par le Statut» (*Activités militaires et paramilitaires au Nicaragua et contre celui-ci (Nicaragua c. Etats-Unis d'Amérique), compétence et recevabilité, arrêt, C.I.J. Recueil 1984*,

p. 440, par. 106). Dès lors, la thèse de l'interférence qu'entraînerait un prononcé de la Cour sur le processus de négociation sur le nom s'avère manifestement aussi dépourvue de fondement sur le plan juridique qu'elle l'était sur le plan factuel.

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16. On voit donc qu'il n'existe aucune «limitation inhérente à l'exercice par la Cour de ses fonctions judiciaires» qui l'empêcherait de rendre un arrêt au fond dans la présente affaire. Contrairement à ce qu'affirme l'Etat défendeur, une décision de la Cour aurait bel et bien des effets juridiques concrets et serait loin de constituer un prononcé purement théorique. Par ailleurs, la Cour, en exerçant sa compétence, n'«interférerait» nullement dans le processus de négociation sur la question du nom, qui possède un objet clairement distinct de celui du différend porté devant la Cour. La Cour est donc pleinement en mesure de se prononcer sur le fond du litige et aucun des arguments avancés par le défendeur, que ce soit au titre de la compétence à proprement parler ou des limites à l'exercice de sa fonction judiciaire, n'y fait obstacle.

17. En réalité, ce que l'Etat défendeur tente manifestement de faire par les différentes exceptions qu'il invoque, c'est d'agiter devant la Cour le risque d'interférence avec des processus politiques, comme un chiffon rouge. Processus — éminemment — politique d'admission au sein d'une organisation internationale telle que l'OTAN, tout d'abord. Processus — clairement — politique de négociation et de médiation sur la question du nom ensuite. La ficelle, permettez-moi de le dire, est un peu grosse. L'argument a été invoqué — en vain, faut-il le rappeler ? — dans un nombre considérable d'affaires portées devant la Cour. Et s'il a si souvent été rejeté, c'est parce que la ligne de démarcation entre ce qui relève de la fonction judiciaire et ce qui lui échappe — en particulier ce qui relève du «politique» — a été tracée avec netteté, et il y a déjà bien longtemps déjà. En témoigne par exemple l'analyse que faisait de cette question, il y a près de quarante-cinq ans, un auteur particulièrement éminent que je suis personnellement très heureux de retrouver parmi nos contradicteurs aujourd'hui :

> «si la Cour considère que ce qui lui est demandé dépasse ou est incompatible avec sa fonction judiciaire, notamment lorsqu'il lui est demandé d'effectuer un choix politique ou de rendre un jugement qui ne peut donner lieu qu'à des effets politiques, la Cour déclinera d'accéder à de telles demandes»[19].

Sommes-nous, Monsieur le président, Mesdames et Messieurs les Membres de la Cour, confrontés à une telle situation dans la présente instance ? Le dossier, me semble-t-il, parle de lui-même. Rien de ce qui est demandé à la Cour dans la présente affaire ne lui impose de sortir de son rôle judiciaire, ni d'interférer dans des processus politiques, quels qu'ils soient. Seul un prononcé sur une question juridique, clairement identifiée et clairement circonscrite, est sollicité en l'espèce par l'Etat requérant.

Monsieur le président, Mesdames et Messieurs les Membres de la Cour, je vous remercie pour votre attention. Je vous prie, Monsieur le président, de bien vouloir maintenant céder la parole à mon collègue, le professeur Sean Murphy.

The PRESIDENT: I thank Professor Pierre Klein for his statement. Now I invite Professor Sean Murphy to take the floor.

Mr. MURPHY:

THE RESPONDENT HAS BREACHED ARTICLE 11 OF THE INTERIM ACCORD

INTRODUCTION

1. Thank you, Mr. President.

2. Members of the Court, yesterday I presented to you in some depth a factual account of the events leading up to the Bucharest Summit in April 2008. The purpose of my presentation today is to explain why the Respondent's conduct violated its obligation under Article 11 (1) of the 1995 Interim Accord. To do so, my presentation will focus on three points.

3. First, under Article 11 (1) of the Interim Accord, the Respondent had an unequivocal obligation not to object to the Applicant's accession to international organizations. The relevant language there is simple, direct, and unadorned. By its conduct with respect to the Applicant's accession to NATO, the Respondent deliberately violated that obligation.

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[19] Georges Abi-Saab, *Les exceptions préliminaires dans la procédure de la Cour internationale*, Paris, Pedone, 1967, p. 165.

4. Second, Article 11 (1) carves out one — and only one — circumstance where the Respondent is allowed to object: the Respondent may object to the Applicant's membership in an international organization if 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)". In this instance, the Applicant's membership in NATO would have been on the same terms as its membership in the United Nations under resolution 817; indeed, the Applicant was already participating in NATO programmes on the basis of that provisional reference. Consequently, the Respondent had no basis under Article 11 (1) to object and should have declined to object just as it has in many other international organizations since 1995.

5. Third, the Respondent occasionally lapses into arguing certain other reasons for why it was entitled to object under Article 11 (1). One of those reasons — the lack of the resolution of the name difference on terms acceptable to the Respondent — is the true reason for the Respondent's objection. Other reasons, such as the Applicant's alleged "lack of good neighborliness" or "irredentism", have no basis in any facts or evidence before this Court. Yet, most importantly for this Court, *none* of those other reasons is a permitted basis in Article 11 (1) for objecting to the Respondent's membership in NATO.

I. THE RESPONDENT DID "OBJECT" TO THE APPLICANT'S MEMBERSHIP IN NATO WITHIN THE MEANING OF THE FIRST CLAUSE OF ARTICLE 11 (1)

6. Mr. President, I turn to the first part of my argument, which is to demonstrate that, under Article 11 (1) of the 1995 Interim Accord, the Respondent had an unequivocal obligation not to object to the Applicant's accession to international organizations and, further, that the Respondent violated that obligation with respect to the Applicant's pursuit of membership in NATO.

7. As Professor Sands indicated in his presentation yesterday, the 1995 Interim Accord was a major diplomatic and legal achievement, in which the two States presently before you agreed to set aside their difference over the name in order to resolve certain key issues in their bilateral relationship. While both States would continue to seek a good faith resolution of the name issue, they agreed in 1995 that they would, in the interim, not allow that unresolved dispute to preclude diplomatic relations and co-operation in certain key areas.

8. One of those key areas concerned the ability of the Applicant to join international organizations. In 1993, as the Court knows, the Respondent had objected to the Applicant joining the United Nations under its constitutional name. Consequently, a provisional solution was devised by the three European Community members on the Security Council at that time[20]. Under the solution, the Applicant was able to join the United Nations in 1993, but was to be referred to in that organization by the provisional reference "the former Yugoslav Republic of Macedonia".

9. After the Applicant's admission to the United Nations, the Respondent continued to object to the Applicant's admission to other international organizations of which the Respondent was already a member, notably the Council of Europe and the Organization for Security and Co-operation in Europe (OSCE), claiming that, before the Applicant could join, the Respondent's position on the name difference had to be accepted. The Respondent's objections succeeded in blocking the Applicant's admission in all non-United Nations organizations of which the Respondent was a member, where unanimity or consensus was required for admission. This stance by the Respondent in the early 1990s was a major problem for a fledgling State that sought full entry into the community of nations, including those international organizations that could assist the Applicant in building democratic institutions and the rule of law.

10. Against that backdrop, the Applicant's ability to secure membership in international organizations formed a particularly important part of the negotiations in 1994 and 1995 that ultimately led to the signing of the Interim Accord. The various drafts of the agreement that ultimately became the Interim Accord contained formulations that spoke to this problem[21]. For the Applicant, this was a critical issue in 1995 and it remains a critical issue before you today.

11. Ultimately, the issue was addressed in Part C of the Interim Accord, which is entitled "International, Multilateral and Regional Institutions". I direct the Court's attention to tab 1 of the judges' folder, where you do find the 1995 Interim Accord, and on pages 4 and 5 you will find Part C. Within Part C, there is a single article, Article 11. The fact that Article 11 was granted by the drafters an entire "Part" to itself, of a six-part agreement, makes clear that this was one of the key components of the agreement. Now the Respondent at times mischaracterizes our position by

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[20]AM, para. 2.17.

[21]RCM, Ann. 148.

saying that we view Article 11 as the *only* important component of the Interim Accord or the only part that must be fulfilled. That is not our position; the entire Interim Accord is binding and contains a number of important elements. But it *is* our position that Article 11 was *one* of the important elements of the Interim Accord.

12. [Plate 1 on] Turning to the text of Article 11, the first paragraph contains two clauses, which the Respondent characterizes as the "non-objection" clause and the "safeguard" clause. The first clause of Article 11 (1) reads as follows:

> "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 . . ."

13. There are several points about this first clause upon which the Parties agree. Both Parties agree that the Interim Accord entered into force, thus activating the obligation set forth in this clause. Both Parties agree that, since entry into force, Article 11 (1) has not been terminated or suspended. Both Parties agree that since the Interim Accord was registered with the United Nations[22] Article 11 (1) may be invoked by the Applicant before this Court. Further both Parties both accept that the references in Article 11 (1) to "Party of the First Part" means the Respondent, while references to "Party of the Second Part" means the Applicant.

14. Both Parties also agree, or at least the Respondent does not dispute, that the term "international, multilateral and regional organizations and institutions" includes NATO and the European Union, of which the Respondent is a member of both. The Parties also agree that the text imposes an obligation on the Respondent. And consequently, both Parties agree that this clause established an obligation upon the Respondent not to object to the application or membership of the Applicant in NATO.

15. Where the Parties differ on this first clause of Article 11 (1) is that the Respondent contends that its conduct in 2007 and 2008 did not constitute an "objection" within the meaning of the clause. The Respondent's argument here is not always clear and has shifted a bit in its written pleadings. However, we believe it can be distilled into three basic assertions: first, that the word "object" in Article 11 (1) is extremely narrow and essentially limited to an obligation upon the

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[22]United Nations doc. S/1995/794 (1995), *UNTS, Series No. 32193*; see also United Nations Charter, Art. 102.

Respondent not to vote against admission as a part of a formal voting procedure; second, that the Applicant's interpretation of this clause must be wrong because it would encompass "vast and ill-defined" conduct by the Respondent; and third that, in any event, the inability of the Applicant to join NATO was due to conduct by NATO, not conduct by the Respondent. Allow me to address each of those propositions in turn.

16. First, the Respondent looks at this initial clause of Article 11 (1) and sees a phrase — "not to object" — that requires very specific actions, such as — and here I quote from some of the Respondent's language — a "formal protest[]" or "*démarche[]* adopted in unambiguous language and joined with [an] actual vote[] under the parliamentary procedures of [the] organization . . ."[23]. Since accession decisions at NATO are determined on the basis of consensus, rather than a formal vote — as we discussed yesterday — the Respondent asserts that "Greece was never put in a position of having to lodge an objection."[24] Indeed, the Respondent goes so far as to characterize the obligation "not to object" as comparable to an obligation not to cast a negative vote at the United Nations Security Council, and references incidents involving such votes[25].

17. In our view, that is not the standard set by Article 11 (1). But *even if* it were the standard set by Article 11 (1), the Respondent without question violated that standard. As we established yesterday, the Respondent *did* formally protest against the Applicant's accession to NATO. The Respondent *did* formally *démarche* NATO members in opposition to the Applicant's accession. Indeed, as I indicated yesterday, the Respondent sent an *aide mémoire* to all NATO members saying that, in addition to the normal accession criteria, satisfactory resolution of the name was a *sine qua non* for the Respondent's support. The Respondent is repeatedly on the record as saying that it "contacted foreign leaders" and engaged in "Greek diplomacy" for the purpose of blocking the Applicant's entry into NATO[26]. The facts before this Court, as we discussed yesterday, show that the Respondent formally presented its position to NATO members, in Brussels, in Bucharest[27], that they fought hard for many months and during the Bucharest meeting itself, with strong

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[23]RR, para. 5.31.

[24]*Ibid.*, para. 6.27.

[25]RCM, para. 7.13; RR, paras. 5.27, 5.31.

[26]See AR, para. 2.8.

[27]*Ibid*.

arguments that were clearly stating their positions and intentions[28]. As I indicated yesterday, these were not "casual expressions of dissatisfaction or political declarations for atmospherics"[29]; they were official communications by senior officials of the Respondent.

18. Moreover, those steps were directly "joined" with the formal decision process of NATO on accession. Indeed, in numerous of those public statements by senior officials of the Respondent, those officials trumpeted the fact that the Respondent had "vetoed" the Applicant's accession to NATO. Now, that is another way of saying that the Respondent single-handedly prevented a consensus decision in favour of that accession. The matter did not reach a point where the Respondent formally cast a "no" vote but, as we explained yesterday, NATO's procedures *never* result in such a vote[30]. Instead, matters are decided by consensus, and the historical record makes absolutely clear that the Respondent refused to join that consensus. It did so by objecting to the Applicant's membership in the months leading up to Bucharest, and it did so by maintaining that objection at the Summit itself.

19. But the narrow standard that the Respondent advocates for Article 11 (1) — one that limits it to conduct solely taken as part of a formal parliamentary-style vote — is wrong. The text contains no limiting language that says "object" means casting a negative vote or even filing a formal *démarche*. No such language appears in this clause. The language is simple, straightforward, unrestricted. The term "not to object" may not require the Respondent to lobby in favour of the Applicant's admission to international organizations, nor require the Respondent to refrain from publicly stating that the name difference has not been resolved[31]. But it clearly encompasses the vigorous campaigning, bilaterally and multilaterally, against the Applicant's admission to the relevant international organization. It certainly precludes informing other States that the Respondent will not join in a consensus in favour of the Applicant's admission. Especially when read in context, this first clause of Article 11 (1) has a clear and plain meaning: the Respondent is not to use its position as a member of an international organization to oppose

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[28]See AR, para. 2.9.

[29]RR, para. 5.31.

[30]AR, para. 2.37.

[31]RR, para. 6.34.

admission by the Applicant. Yet the Respondent's conduct — I outlined it in detail yesterday and it is also in our pleadings — did just that.

20. Moving beyond the text of Article 11 (1), the Respondent's extreme and narrow interpretation would defeat Article 11 (1)'s very object and purpose. Under the Respondent's interpretation, the Respondent is entitled to lobby strenuously all members of NATO in bilateral and multilateral settings, signalling vehemently its opposition and unwillingness to join a consensus in favour of the Applicant's admission to NATO. If that is so, then what did the Applicant gain by entry into force of Article 11 (1)? Nothing. Under the Respondent's theory, all that the Applicant gained was the Respondent's obligation to abstain from voting or to vote "yes" when the Applicant's request for admission was formally voted on at NATO, *as a part of a process in which no such voting occurs*[32]. Thus, for one of the key international organizations that the Applicant wished to join, Article 11 (1) has absolutely no meaning. Such an interpretation is, we submit, nonsensical.

21. In our Reply, we pointed to the practice of the Parties before and after the 1995 Interim Accord, in which the Respondent first opposed the Applicant's admission to certain key international organizations, notably the Council of Europe and the OSCE, and then, after conclusion of the Interim Accord, stopped doing so[33]. To us, that practice demonstrates the purpose of Article 11 (1). The purpose was not merely to avoid a negative vote by the Respondent before, for example, the Council of Europe's Committee of Ministers. The point was to have the Respondent stop lobbying within the Council of Europe and other international organizations against the Applicant's admission; to stand down from its vigorous and systematic efforts in that regard, even though the name dispute had not yet been resolved, because Greece's efforts were stymieing accessions by the Applicant to those organizations.

22. And in the aftermath of the entry into force of the Interim Accord, that is exactly what happened. The Respondent stopped objecting to the Applicant's admission to international organizations, allowing the Applicant to accede, for example, to the OSCE on 12 October 1995, to the Council of Europe on 9 November 1995, and to enter into NATO's PfP Programme on

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[32]AR, para. 2.36.

[33]*Ibid.*, para. 4.19.

15 November 1995; all happening right in the aftermath of the entry into force of the Interim Accord on 13 October 1995. That practice confirms the meaning and purpose of the first clause of Article 11 (1).

23. The Respondent seeks to draw support for its theory from the negotiating history of Article 11[34]. Different language was indeed used in different drafts of what became the Interim Accord, but none of the formulations, such as not to "hamper" or not to "impede", indicates any intention that the term "not to object" means exclusively something like "not to formally vote against". Rather, the different formulations are all designed to capture the simple and effective idea that the Respondent is not to use its position as a member of an international organization to oppose admission of the Applicant.

24. Second, in advancing its implausible theory of Article 11 (1), the Respondent maintains that the ordinary meaning of Article 11 (1) must be wrong because it would encompass "vast and ill-defined" conduct by the Respondent[35]. Here, the Respondent shows some desperation by wholly mischaracterizing our position. We are not asserting that Article 11 (1) imposes upon the Respondent an "open-ended obligation" to support the Applicant's admission to international organizations, if by that is meant an obligation to lobby in favour of such admission or to "bring about the concrete result" of such admission[36]. Likewise, we are not asserting that the failure of the Applicant to be admitted to NATO, standing alone, means that Article 11 (1) was violated[37]. And we are not maintaining that "inactivity" by the Respondent with respect to admission by the Applicant violates Article 11 (1)[38], unless inactivity alone is capable of directly blocking admission.

25. We do maintain, however, that the actual conduct by the Respondent in 2007 and 2008, involving a vigorous, active campaign — bilaterally, multilaterally, publicly, against the Applicant's admission to NATO — unambiguously falls within the scope of Article 11 (1). Such conduct does not constitute "inactivity", it certainly does not constitute a simple "failure to

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[34]RR, para. 5.21.

[35]*Ibid.*, para. 5.29.

[36]*Ibid.*, paras. 5.20, 5.22, 5.27.

[37]*Ibid*., para. 5.20.

[38]*Ibid*., para. 5.29.

support" the Applicant's accession. Rather, it constitutes a blatant, unambiguous, systematic diplomatic effort to prevent the Applicant's accession.

26. The Respondent appears to be arguing that, in order to apply Article 11 (1), this Court must establish its exact contours — must determine exactly what kinds of conduct by the Respondent are permissible and what kinds are not. Because of the alleged difficulty in doing so, the ordinary meaning of Article 11 (1) should be set aside in favour of the Respondent's much more restricted interpretation[39].

27. This Court, of course, has never proceeded in that fashion. It has never felt obliged when interpreting a provision of a treaty, in a contentious case or in an advisory opinion, to consider and decide upon the entire range of conduct that might arise with respect to a particular provision, and to then opine upon which conduct is permissible and which is not. Rather, the Court takes the facts in the case before it, and applies the treaty at hand to those facts, with a strong emphasis on the importance of maintaining the stability of treaty relations *(Gabčíkovo-Nagymaros Project (HungarylSlovakia), Judgment, I.C.J. Reports 1997,* p. 65, para. 104). Doing so in this case leads to an inescapable conclusion: the Respondent's conduct in 2007-2008 violated its obligation under Article 11 (1) not to object.

28. The third way that the Respondent tries to press its interpretation of this first clause, is that it says the first clause could not be violated because the conduct at issue is NATO's conduct, not the conduct of the Respondent. The Respondent argues that this "case at heart concerns the requirements for NATO expansion and the application of those requirements in 2008"[40].

29. The Respondent is entirely wrong[41]. This case is, at its heart, about the *Respondent's* conduct and about the *Respondent's* obligation under Article 11 (1) of the Interim Accord. Though the Respondent points repeatedly to a statement by the Applicant's President that Europe gave a "cold shoulder" to the Applicant at Bucharest[42], that statement is simply acknowledging that the Respondent's objection actually worked; other NATO member States allowed the objection to

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[39]RR, para. 5.29.

[40]*Ibid.*, para. 6.3.

[41]See, e.g., AR, paras. 4.28-4.31.

[42]See, e.g., RR, para. 6.23.

preclude the Applicant's admission to NATO. It does not mean that there was no objection by the Respondent. What matters here is the Respondent's conduct, not the conduct of third States, not the conduct of NATO as an organization.

30. Even after the Bucharest Summit[43], it is commonly accepted among NATO members that the invitation for the Applicant's accession does not have to wait for another summit; it can be extended at any North Atlantic Council meeting, which meets weekly in Brussels, as soon as the Respondent agrees[44]. In other words, the problem for the Applicant in joining NATO does not lie with NATO members generally or with NATO as an institution or even with the continuing inability to resolve the name difference[45]; the problem lies with the Respondent's objection.

31. If the Respondent's argument on this point is accepted, Article 11 (1) becomes entirely meaningless. For, reduced to its core, the argument is that the Respondent's objection cannot possibly violate Article 11 when it successfully convinces an international organization not to admit the Applicant, since that transforms the conduct into conduct not of the Respondent but of the international organization. If that were true, then the Respondent would only violate Article 11 (1) when its objection does *not* succeed, which makes no sense at all. Article 11 (1) simply cannot be regarded as a meaningful obligation only in situations where its violation has no effect. Consequently, we submit that, when assessing Article 11 (1) — the first clause — the Court's focus should be on the conduct of the Respondent, not the conduct of NATO or of other NATO members. [Plate 1 off]

32. In sum, the Respondent had an unequivocal obligation in Article 11 (1) — first clause — not to object to the Applicant's accession to international organizations, an obligation that the Respondent violated in 2007-2008 with respect to the Applicant's pursuit of membership in NATO.

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[43]The Respondent points to two post-Bucharest Summit statements at RR, para. 6.10.

[44]Cable from US Embassy London to US Dept. of State, entitled "HMG Looking Forward to Building on Gains of NATO Bucharest Summit," 9 Apr. 2009, cable No. 08LONDON1017, para.1, available at http://www.telegraph.co.uk/news/wikileaks-files/london-wikileaks/8305019/HMG-LOOKING-FORWARD-TO-BUILDING-ON-GAINS-OF-NATO-BUCHAREST-SUMMIT.html (reporting that:

> "PM Brown was deeply disappointed that the Greeks would not move on a compromise name, and wants to re-energize UN, Brussels and bilateral processes. The UK agrees with the U.S. position that the invitation does not have to wait for another summit; it can be extended at any NAC as soon as the Greeks agree. HMG is also determined not to let the name issue interfere with Macedonian progress towards EU membership.").

[45]RR, paras. 6.11-6.13.

II. SINCE THE APPLICANT WAS NOT TO BE REFERRED TO IN NATO DIFFERENTLY THAN PROVIDED FOR IN RESOLUTION 817, THE RESPONDENT'S OBJECTION CANNOT BE JUSTIFIED UNDER THE SECOND CLAUSE OF ARTICLE 11 (1)

33. Mr. President, I now turn to the second part of my presentation, which addresses the second clause of Article 11 (1). That clause carves out one — and only one — circumstance where the Respondent is allowed to object to the Applicant's admission to international organizations. [Plate 2 on] The second clause of Article 11 (1) reads as follows:

> "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)".

34. Like the first clause of Article 11 (1), this clause has a straightforward meaning. The Respondent can object to the Applicant's admission to an international organization if the Applicant is to be admitted under conditions other than those that applied in its admission to the United Nations. So long as the Applicant is to join an international organization under the same conditions as it was admitted to the United Nations, there is no lawful basis for the Respondent to object.

35. In fact, the Applicant pursued membership in NATO in circumstances involving exactly the same conditions as exist for the Applicant at the United Nations. As I noted yesterday, for both the PfP and MAP programmes at NATO, the Applicant's communications to NATO consistently used the constitutional name, while NATO uses the provisional reference of "the former Yugoslav Republic of Macedonia.[46]

36. In pursuing full-fledged NATO membership, the Applicant has never sought to change that approach, nor has the Respondent itself alleged that the Applicant sought to change that approach. As such, there was and is no basis for the Respondent to invoke the second clause of Article 11 (1) as a means of avoiding its obligation under the first clause.

37. What, then, is the Respondent's argument for why it may invoke the second clause of Article 11 (1)? The Respondent maintains in its pleadings that it could object to the Applicant's accession to NATO because the Applicant, when itself communicating with NATO as a NATO member State, will call itself "Republic of Macedonia" rather than using the provisional reference

[46] See AM, para. 2.50.

"the former Yugoslav Republic of Macedonia". In other words, it is the Respondent's contention that the phrase here "is to be referred to in such organization or institution" encompasses not just the manner in which NATO will refer to the Applicant as a member State, such as in communications by the NATO Secretariat, but also encompasses the Applicant's own self-description when it communicates with NATO[47].

38. Even more remarkably, if one reads the Respondent's pleadings closely, it becomes apparent that the Respondent asserts that its ability to object is triggered by *any* anticipated use of the constitutional name, including in bilateral communications between the Applicant and other States, even when they occur wholly outside the context of NATO[48]. For the Respondent, the second clause "covers all cases of practice which would tend to undermine the negotiations on the name difference"[49] and in all circumstances requires the Applicant to "support the use of the Security Council name pending an agreed resolution of the difference"[50].

39. This is an astoundingly broad theory, which pervades all of the Respondent's pleadings before the Court, and it finds absolutely no support in the facts or in the law. So allow me to address each of those in turn.

A. The Respondent's theory as to the meaning of the second clause of Article 11 (1), even if correct, has no relation to the actual facts of the Respondent's objection

40. With respect to the facts, one searches in vain for *any* indication in 2007 or 2008 that the Respondent objected to the Applicant's accession to NATO because of a concern about how the Applicant would call itself in communications with NATO. The Respondent made many statements — I reviewed them for you yesterday — many statements where it objected to and even "vetoed" the Applicant's accession to NATO, but none of them even begins to link that objection to any concern that the Applicant would call itself "Republic of Macedonia" in its dealings with

[47]RR, para. 5.40.

[48]*Ibid.*, para. 5.36 ("The FYROM has insisted in virtually all of its relations that the non-agreed name be used, and, as a result, that name has proliferated, notwithstanding the FYROM's continuing obligation to settled the difference over the name through the agreed modality of bilateral negotiation.").

[49]*Ibid*., para. 5.40.

[50]RR, para. 6.34.

NATO, as it had been doing for over a decade[51]. Instead, the Respondent's numerous statements show a quite consistent pattern of linking its objection to the inability to conclude the "name dispute" on terms acceptable to the Respondent, precisely the basis for objecting that Article 11 was designed to prevent[52].

41. In response, the Respondent asserts that all of its diverse statements "identified factors supporting the judgment that" the Applicant would be referred to in NATO differently than stipulated in Article 11 (1)[53]. That simply is not true. None of this Respondent's statements in 2007-2008 say anything at all about the Applicant's use of its constitutional name in relations with NATO. None of those statements by the Respondent says, in effect, "if you agree to stop using your constitutional name, [in communications with NATO] we will not object", or something to that effect. Rather, these statements are best summarized as saying "agree to our preferred name for you and then we won't object to your admission to NATO". Those are the facts.

42. So, on the factual basis alone, there is no reason whatsoever to accept that the Respondent's objection was actually undertaken for the reason now asserted, a reason only asserted after this case was filed with the Court. The Respondent laments that we are trying to impose a "procedural requirement" on its ability to invoke the second clause of Article 11 (1), by insisting that the Respondent issue a "formal declaration" that it is invoking the clause[54]. Well, certainly there is reason to argue that any time a State plans to transgress an express obligation under a treaty by invoking an exception in that treaty, the State should inform the other party to that effect, as doing so coheres with good faith performance of the treaty[55].

43. But we do not raise this factual point as a means of implying a procedural requirement in Article 11 (1). We raise it because the failure at the time to assert that the objection was for the reason permitted in Article 11 (1), in conjunction with the Respondent's assertion at that time of an entirely different reason for the objection, unequivocally demonstrates that the Respondent was not objecting to the Applicant's admission to NATO for the reasons it now maintains before this Court.

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[51]AR, paras. 4.38-4.39.

[52]*Ibid.*, paras. 4.70-4.72.

[53]RR, para. 6.29.

[54]*Ibid.*, para. 5.34.

[55]Vienna Convention on the Law of Treaties, Art. 26, *1155 UNTS 331*.

The Respondent has latched onto this reason — this other reason — as a means of trying to meet a contorted interpretation of the second clause of Article 11 (1), because the real reason for the objection cannot fit even that contorted interpretation. Yet, in its prior decisions, this Court has used the failure of a party, at the time of the wrongful conduct, to explain its behaviour by reference to a justification — or "safeguard" — under a treaty, as a means of doubting that the purported justification is credible.

> "At no time, up to the present, has the United States Government addressed to the Security Council . . . the report which is required by Article 51 of the United Nations Charter . . . [T]he Court is justified in observing that this conduct of the United States hardly conforms with the latter's avowed conviction that it was acting in the context of collective self-defence as consecrated by Article 51 of the Charter." (*Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 121, para. 235.)

We ask the Court in this case to do no less.

B. The ordinary meaning of the second clause of Article 11 (1) allows the Respondent to use its constitutional name before international organizations

44. In addition to the lack of any factual predicate, for using the second clause of Article 11 (1), the Respondent's legal theory as to the meaning of that clause, also has no basis.

45. First, the ordinary meaning of the second clause of Article 11 (1) does not support the contention that the Applicant must call itself by the provisional reference in dealings with NATO or any other international organization. The Respondent, in its pleadings, has much to say about syntax and the passive voice and the verb tenses used in this second clause[56], but all of its points are remarkably strained and unable to sustain the weight of its preferred interpretation[57].

46. It is certainly not evident that the phrase in this clause "is to be referred to in" must cover, as the Respondent puts it, the manner in which "all possible actors" refer to the Applicant[58]. The absurdity of that interpretation is readily apparent given that the Respondent is essentially reading the text to say that the Respondent may object if it predicts that any NATO member State, any non-NATO member State, any other international organization, any non-governmental organization, or indeed any person, in its communications with NATO, might call the Applicant the

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[56]RR, para. 5.35.

[57]AR, paras. 4.52-4.53.

[58]RR, para. 5.35 (i).

"Republic of Macedonia" or, more accurately, might refer to the Applicant by something other than "the former Yugoslav Republic of Macedonia". That is reading a lot into a relatively simple phrase, especially given the basic legal principle that international agreements do not create obligations or rights for third States without their consent[59]. Given that the Respondent itself did not refer to the Applicant in the Interim Accord by use of the provisional reference, using instead the "Party of the Second Part", I suppose we should be thankful that the Respondent is unlikely to base an objection upon its own allegedly deviant conduct!

47. A much more natural interpretation of the phrase is that it is addressing the manner in which the Applicant will be referred to "in" the organization itself — meaning the way the Applicant will be listed by NATO as a member of the organization, the way representatives from the Applicant will be credentialed by NATO, the term NATO will use in all official NATO documents when referring to the Applicant, and so on. That, of course, is precisely how it has been interpreted — this clause has been interpreted — by all those associated with the negotiations of the Interim Accord, including Ambassador Nimetz.

48. A particular problem for the Respondent's interpretation of the phrase here, is that it detaches the second clause from the immediate circumstances of the Applicant's request for membership in the international organization. The second clause makes sense and works well in the context of the Respondent being allowed to object if the Applicant is to be admitted to NATO as the "Republic of Macedonia". If NATO were moving toward membership for the Applicant on those terms, then the Respondent could object and insist that NATO only accord membership through NATO's use of the provisional reference. Thus, the Respondent is wrong when it charges that we see "virtually no situation as triggering the right to object"[60], for we do see such a situation. On a proper interpretation of this clause of Article 11 (1), that situation is when the Applicant is to be known in the international organization as "Republic of Macedonia". If that happens, the Respondent can object. To avoid the objection, the organization would need to make clear that the Applicant will be referred to within the organization as "the former Yugoslav Republic of

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[59]Vienna Convention on the Law of Treaties, Art. 34, *1155 UNTS 331*.

[60]RR, para. 6.27.

Macedonia", and then the Applicant would have to agree or acquiesce to that approach. If it did, then the Respondent would have to refrain from further objecting. All of that makes good sense.

49. By contrast, the Respondent's interpretation of the second clause totally detaches the ability to object from the circumstances of the Applicant's impending membership. Rather than look at the conditions under which the organization will actually grant membership to the Applicant, the Respondent would give itself wide-ranging discretion to peer far into the future so as to, as the Respondent puts it, "form an appreciation"[61] as to whether the Applicant *might* be referred to by "all possible actors" as the "Republic of Macedonia". So, if the Respondent thinks that, five years after the Applicant joins NATO, it is possible that France or Botswana or Turkey — or for that matter the Hague Rotary Club — might, in a communication with NATO, call the Applicant the "Republic of Macedonia", then the Respondent is entitled to object. It is a breathtaking and utterly unconvincing interpretation of Article 11 (1).

50. In its Rejoinder, the Respondent characterizes this wide-ranging discretion as a "margin of appreciation" to which it is entitled, and in doing so makes reference to this Court's Advisory Opinion on the *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter)*[62]. Yet, such arguments really are little more than smoke-and-mirrors, designed to generate confusion and obfuscate a demonstrably weak set of arguments. The notion of "margin of appreciation" in international law has never been construed as a licence for States to auto-interpret the obligations they owe to other States under bilateral treaties. Moreover, the issue before this Court is not the discretion that should be accorded to the Respondent in applying general criteria for admission of new members of international organizations, such as those set forth in Article 4 of the United Nations Charter. Rather, if there is a lesson to be taken from the *Conditions of Admission* Advisory Opinion, it is that States should not create new conditions for admission beyond those set forth in the treaty instrument. By analogy to this case, the Respondent should not be creating a new condition for a permissible objection not found in Article 11 (1).

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[61] *Advisory Opinion, 1948, I.C.J. Reports 1947-1948*; RR, para. 5.35 (iii).

[62] *Ibid.*, paras. 5.44-5.46, 6.27, 6.30.

51. In Article 11 (1) of the Interim Accord, the Respondent expressly and unambiguously agreed to restrict its ability to object, subject to a single express and unambiguous exception. Article 11 (1) *does* allow the Respondent to assess whether the Applicant is to be granted membership in an international organization in circumstances where it will be known in that organization as "Republic of Macedonia" and, if so, *does* allow the Respondent to object. Article 11 (1), however, *does not* allow the Respondent to object for whatever other reasons the Respondent believes fall within a "margin of appreciation" dictated by the Respondent itself.

52. Mr. President, it is now my intention to turn to the practice at the United Nations that preceded the entry into force of Article 11 (1), which sheds considerable light on the meaning of the clause, but I note this may be a convenient time for the morning coffee break, if the Court so pleases.

The PRESIDENT: Thank you, Professor Murphy, for your suggestion. I think it is an appropriate moment. We will have a coffee break of 15 minutes.

Mr. MURPHY: Thank you, Mr. President.

The PRESIDENT: We resume the session at 11.30 a.m.

The Court adjourned from 11.15 a.m. to 11.30 a.m.

The PRESIDENT: Please be seated. Now, Professor Murphy, you can continue.

Mr. MURPHY:

C. Practice at the United Nations under resolution 817 prior to the Interim Accord does not support the Respondent's theory as to the meaning of the second clause of Article 11 (1)

53. Thank you, Mr. President, I was in the midst of discussing the interpretation of the second clause of Article 11 (1) and, if all this Court had were the bald assertions by the two Parties as to the meaning of this clause, your task might be harder. But there is much more before you than just this, and all of it weighs against the Respondent's interpretation.

54. Perhaps the most obvious place to look for further illumination as to the meaning of the second clause of Article 11 (1) is the practice associated with the Applicant's membership at the

United Nations under resolution 817. You will have noted that the second clause expressly cross-references to resolution 817, saying that the Respondent may object to new membership in an international organization if the Applicant is referred therein "differently than in paragraph 2" of resolution 817.

55. Resolution 817 appears at tab 5 in your judges' folder, in the event you wish to refer to it. Paragraph 2 of that resolution recommends that the General Assembly vote to admit the Applicant as a United Nations Member State, but with the State "being 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".

56. So, the second clause of Article 11 (1) refers directly to the approach taken with respect to the Applicant's admission to the United Nations. In effect, it says that the Respondent can object if the Applicant is to be admitted to an international organization, such as NATO, under conditions different than those applied at the United Nations under resolution 817. So, the solution that was employed was to allow the Applicant to join the United Nations and its specialized agencies and now this is to be employed under the Interim Accord which respect to whether or not the Respondent can object for membership in other international organizations.

57. The Respondent appears to believe that resolution 817 prohibited any use of the name "Republic of Macedonia"; in various parts of its pleadings it refers to this as the "prohibited name"[63]. Yet the text of resolution 817 contains no prohibition on the use of "Republic of Macedonia", it contains no requirement that the provisional reference be the "name" of the Applicant, and it contains no requirement that the Applicant use the provisional reference in its communications with the United Nations[64]. The resolution simply does not say any of those things. Had the resolution prohibited use of the Applicant's name, all sorts of consequences would have followed, such as the need to amend the Applicant's Constitution, yet no such steps were either expected or taken[65].

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[63]See, e.g., RR, para. 7.23.

[64]AM, para. 2.20; AR, paras. 4.40-4.41 and 4.45.

[65]*Ibid.*, para. 4.40.

58. In fact, the resolution is not even in the form of a Chapter VII decision; it is a *recommendation* to the General Assembly relating to the admission of a new Member State[66]. In issuing that recommendation, the Council proceeded on the basis of an Application that had been submitted to the United Nations *using the name* "Republic of Macedonia", which the Security Council "examined" and acted upon favourably. There is no evidence that the Members of the Security Council believed they were imposing a name upon the Applicant. When the President of the Security Council circulated the draft of resolution 817 containing the provisional reference, he specifically stated that this "is not a matter of imposing a name on a new State, or conditions for its admission to the UN, but it merely concerns the manner in which it will be provisionally referred to in its activity in the United Nations (plaque, official documents, 'bluebook' . . .)"[67]. As Professor Sands noted yesterday, United Kingdom Ambassador Jeremy Greenstock confirms that resolution 817 did not mean that the Applicant had to call itself by the provisional reference, either generally or in its communications to the United Nations[68].

59. Ever since admission to the United Nations, the Applicant has regularly sent communications to the United Nations on letterhead entitled "Republic of Macedonia." Those communications have not been returned or rejected by the Secretariat or in any fashion treated as a breach of resolution 817[69]. To the contrary, the Secretariat regularly circulates those communications to all United Nations member States under cover of a United Nations document that uses the provisional reference[70]. The Applicant's Permanent Mission to the United Nations, located at 866 United Nations Plaza in New York, has always been "the Permanent Mission of the Republic of Macedonia". That mission and its staff have always been fully accredited to the United Nations; they have not been shooed out of the building by the Secretariat when they show up with identification papers or passports saying "Republic of Macedonia".

60. Nor has the Security Council rejected or commented upon the wrongfulness of the Applicant's communications; in the immediate aftermath of the adoption of resolution 817, the

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[66]AM, para. 4.41.

[67]AR, para. 4.42 and Ann. 12.

[68]*Ibid.*, para. 4.43.

[69]AM, para. 2.20.

[70]AR, paras. 4.47-4.48.

Applicant continued sending communications to the United Nations using its constitutional name, which elicited *no* adverse reaction whatsoever from the Security Council[71].

61. In short, no one — other than the Respondent — regards the provisional reference as the name of the Applicant. Rather, the provisional reference is exactly that: a "reference" to the Applicant that is employed provisionally in the United Nations and other international organizations.

62. From 1993 to 1995, the Applicant's communications to the United Nations consistently used "Republic of Macedonia" rather than the provisional reference. In 1995, when they concluded the Interim Accord, both the Applicant and the Respondent were well aware of this practice at the United Nations. They were well aware of the basic compromise and logic that had emerged in resolution 817. They expressly agreed in Article 5 of the Interim Accord to reserve all of their rights relating to the name difference consistent with the obligations undertaken in the Interim Accord. The language of the second clause of Article 11 (1) clearly seeks to extend the resolution 817 compromise to the Applicant's membership in other international organizations. There is absolutely nothing in the second clause to suggest that the Parties to the Interim Accord agreed to diverge radically from the approach at the United Nations, and to go down the path envisaged by the astoundingly broad theory now advanced by the Respondent. Indeed, if the purpose of the second clause were to embark on a wholly new path, it would be ludicrous to cross-reference to resolution 817, or at least to do so without clear and unambiguous language that the United Nations practice was an unacceptable benchmark for Article 11 (1)[72].

63. Moreover, while the Respondent attempts to draw great significance from the use of the word "in" as a part of the second clause of Article 11 (1)[73], the Respondent ignores the obvious parallel to the language of resolution 817. In resolution 817, the Security Council said the Applicant would be referred to for all purposes "within" the United Nations by the provisional reference. Similarly, the second clause of Article 11 (1) says the Respondent can object if the Applicant is to be referred to "in" an international organization by something other than the

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[71]AR, para. 4.46.

[72]*Ibid.*, para. 4.55.

[73]RR, paras. 5.35 (ii), 5.38.

provisional reference. There is simply no basis for arguing that the practice generated by the first preposition — "within" — in which the Applicant is allowed to use its constitutional name, somehow changes due to the use of the second preposition — "in" — so as to preclude communications when joining other international organizations. We submit the language strongly indicates continuity with the past, not a break from the past.

64. Now the practice of the United Nations is the most relevant for present purposes. Nevertheless, it should be noted that after admission to the United Nations, the same approach was taken throughout the United Nations system at all the specialized agencies and at other international organizations, including Unesco, the World Health Organization, the International Labour Organization, the World Trade Organization, the Permanent Court of Arbitration, and the Organization for the Prohibition of Chemical Weapons[74]. There is not a single international organization anywhere in the world that requires the Applicant, in its communications with that organization, to use the provisional reference. Not a single one. And there is no State, other than the Respondent, that has raised any concerns regarding the Applicant's use of its constitutional name in communications with international organizations. Again, not a single one.

D. The Interim Accord negotiating history does not support the Respondent's theory as to the meaning of the second clause

65. Likewise, the negotiating history of the Interim Accord provides no support for the Respondent's theory as to the meaning of the second clause. None of the drafts that eventually became the Interim Accord give any hint that the goal here was to prevent the Applicant from calling itself by its constitutional name before international organizations. On the contrary, both States expressly reserved their rights on such issues in Article 5 of the Interim Accord.

66. Nor do any of the statements made at the time of the Interim Accord suggest a movement away from the practice that had developed with respect to the Applicant's membership in the United Nations. We have previously referenced the Nimetz statement, let me give you just a little more context: at the press conference held at the time the Interim Accord was concluded, Ambassador Nimitz, the Special Envoy of the United States to these negotiations, who was

[74] AR, para. 4.49.

intimately involved in the negotiations of the Interim Accord, said exactly the opposite of what the Respondent would have predicted, based on their theory. Mr. Nimetz reiterated his understanding that "the United Nations refers to the country as the former Yugoslavia Republic of Macedonia", and he goes on to say the country itself uses "the constitutional name"[75]. If the Respondent was correct in its theory, you would have expected Ambassador Nimetz to say something like "from now on", "from here forward, the country must call itself by the provisional reference in its communications with international organizations if it wishes to join new international organizations" or some such thing as that, but those sorts of statements are nowhere to be found in the record. Nor is there any statement by the Respondent contemporaneous objecting to Ambassador Nimetz's characterization of the situation.

E. Practice subsequent to the Interim Accord does not support the Respondent's theory as to the meaning of the second clause

67. With no support for its theory in the actual text of the second clause of Article 11 (1), nor in the United Nations practice to which it cross-references, nor in the practice of other international organizations, nor in the negotiating history of the Interim Accord, one might have expected the Respondent to demonstrate through practice *subsequent* to the Interim Accord that the clause was intended to foreclose the use by the Applicant of its constitutional name in dealings with international organizations.

68. Yet no such practice exists. In the immediate aftermath of the entry into force of the Interim Accord, the Applicant was admitted to the OSCE in circumstances where it did use its constitutional name in communications with that organization. One month later, it was admitted to the Council of Europe in circumstances where it used its constitutional name in communications with that organization. Within days after that, it joins NATO's PfP Programme, again using its constitutional name in communications with NATO. In none of those instances did the Respondent invoke the second clause of Article 11 (1) and object to the Applicant's admission. Perhaps the Respondent would have us believe that it was simply choosing to look the other way rather than exercise a right it was allowed to take under Article 11 (1). However, the far more plausible

[75] AR, para. 4.57.

interpretation is that the Respondent itself fully understood what the second clause meant, and understood that it did not allow for an objection based solely on the Applicant's own use of its constitutional name in relations with the organization.

F. Even in their bilateral relations, the Respondent accepts that the Applicant is entitled to use its constitutional name

69. The Respondent's theory as to the meaning of the second clause is especially odd when one considers the way the two States have structured their bilateral relationship.

70. One month after the conclusion of the Interim Accord, the two States concluded a Memorandum on "Practical Measures" related to the Interim Accord, including measures allowing them to engage in diplomatic relations. In that Memorandum, the two States agreed that the Applicant would call itself by its constitutional name in correspondence with the Respondent. Thus, when the Applicant sends diplomatic Notes to the Respondent, it does so from the "Republic of Macedonia". The Respondent has agreed to accept and not to return such diplomatic Notes. Conversely, when the Respondent sends its official correspondence to the Applicant, it refers to the Applicant by the provisional reference. And the Applicant agrees to accept and not to return such correspondence[76]. That approach, of course, is completely analogous to the approach taken at the United Nations under resolution 817 and is completely consistent with the ordinary meaning of the second clause of Article 11 (1). The same general approach is taken by the two States with respect to legal and judicial documents of each government relating to citizens or authorities of the other government, and for ordinary mail, bills of lading, invoices and other trade documents[77].

71. Under the Respondent's theory of the second clause, we are to believe that the Respondent can receive communications from the Applicant in which the Applicant uses its constitutional name, but the rest of the world cannot. Indeed, the Respondent would apparently have us believe that the Security Council in resolution 817 ordered the Applicant to use the provisional reference in all of its external relations, but that the Respondent was then entitled to set aside the Council's order through a bilateral agreement, apparently in casual disregard of

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[76]AM, para. 2.36; AM, Ann. 3, p. 3; AR, paras. 4.59-4.60.

[77]AM, Ann. 3, pp. 3-5.

Articles 25 and 103 of the United Nations Charter. Again, all this renders the Respondent's theory yet more and more fantastic.

72. The Respondent's arguments often revert to complaining about a "creeping use of the non-agreed name"[78], which has somehow "changed" things in recent years[79] such that the Respondent may now object under Article 11 (1). Yet there is nothing "creeping" about the Applicant's use of its constitutional name. In complete continuity with its long-standing name as a republic of the Yugoslav federation, the Applicant in 1991 adopted the name "Republic of Macedonia"[80]. The Applicant has used that name in all its bilateral and multilateral communications for the past 20 years. The Applicant has used the constitutional name in its bilateral relations with the Respondent for 16 years. There is nothing "creeping" about the use of the constitutional name.

73. Now, in apparent recognition of this, the Respondent ultimately identifies the relevant "change" as being the fact that many States now recognize the Applicant by the constitutional name[81]. There are, indeed, a very large number of States that recognize and use the constitutional name in their bilateral relations with the Applicant. In our view, that fact reinforces the ordinary meaning of Article 11 (1), which is that it is focused on the manner in which the relevant international organization refers to the Applicant, not on the manner in which "all possible actors" refer to the Applicant. Moreover, it highlights the extremity of the Respondent's position; the Respondent is saying that it is entitled to object under Article 11 (1) not because of anything to do with the Applicant's entry into the international organization, but because the Respondent is unhappy about political decisions reached by third States in recent years in their diplomatic relations with the Applicant.

74. Allow me to conclude this second part of my presentation by noting that, in its Rejoinder, the Respondent argues that our interpretation of Article 11 (1) results in a "fool's bargain" for the Respondent — a *marché de dupes*[82]. Article 11 (1), however, was hardly a fool's bargain. In it,

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[78]RR, para. 6.34.

[79]*Ibid.*, paras. 6.35, 6.38.

[80]AM, para. 2.3.

[81]RR, para. 6.36.

[82]*Ibid.*, para. 5.43.

the Respondent preserved its ability to object to the Applicant's membership in any international organization as the "Republic of Macedonia". Rather than a "fool's bargain", this approach replicated the approach that was adopted by the Security Council, the General Assembly, and the Secretariat in the context of the Applicant's admission to the United Nations. It was the approach adopted by a wide range of United Nations specialized agencies and other international organizations in the context of the Applicant's admission to those organizations, and it was the approach that was promoted by third-party mediators closely associated with the drafting and conclusion of the Interim Accord. Even the Respondent expressly accepted in its bilateral relations with the Applicant the basic terms that underlie what it now calls a "fool's bargain". With all due respect, we suggest that there may be some "fooling" going on here, but it is not coming from the Applicant.

III. OTHER REASONS ASSERTED BY THE RESPONDENT FOR WHY IT OBJECTED ALSO DO NOT FALL WITHIN THE SCOPE OF THE SECOND CLAUSE OF ARTICLE 11 (1)

75. Mr. President, I turn to the third and final part of my presentation, which is to very briefly address certain other reasons asserted by the Respondent for why it objected to the Applicant's admission to NATO.

76. Notably, the Respondent asserts that its "margin of appreciation" under Article 11 (1) allows it to object because of the Applicant's alleged "efforts to entrench a non-agreed name despite its commitment to negotiate an agreed resolution of the [name] difference"[83]. Similarly, the Respondent says it may object because of the Applicant's "creeping use of a non-agreed name which is in violation of the obligation to negotiate" and because the Applicant is "going through the motions of a diplomatic process, while vigorously pursuing a *fait accompli* in a manner which is intended to render that process irrelevant and nugatory"[84]. Or, more simply, the Respondent candidly asserts at paragraph 6.30 of its Rejoinder that it is allowed to object under Article 11 (1) because of the "failure to date to settle the name difference"[85]. So, to put it another way, the

[83] RR, para. 5.46.

[84] *Ibid.*, para. 6.34.

[85] *Ibid.*, para. 6.30.

Respondent can object because the Applicant has not agreed to use a name in its diplomatic relations that is acceptable to the Respondent.

77. In fact, this is the real reason that the Respondent objected to the Applicant's admission to NATO; the Respondent is upset that the name difference has not yet been resolved on its terms. Yet that is exactly what Article 11 (1) is designed to prevent; the two States agreed in Article 11 (1) that, *while* the name difference persists, the Respondent would refrain from taking certain steps. To the extent that this is the real reason for the Respondent's objection, it is manifestly not a reason embraced by the second clause of Article 11 (1)[86].

78. Now in order to try to connect its legal theory about the meaning of the second clause of Article 11 (1) to what it actually did, the best the Respondent can come up with is that its so-called "margin of appreciation" theory allows it to "consider 'any factor' bearing a rational connection to the specified condition" found in the second clause of Article 11 (1)[87]. So, if we understand this theory correctly, even though Article 11 (1) was designed precisely to take the name difference off the table for the purposes of the Applicant's admission to international organizations, the Respondent is now able to put it back on the table because the name difference has some connection to Article 11 (1), a connection that also conveniently serves to deprive this Court of jurisdiction. Again, this makes no sense, and it turns Article 11 (1) into meaningless gibberish.

79. Alternatively, the Respondent sometimes asserts that its objection occurred because of the Applicant's lack of "good-neighbourly relations"[88], which allegedly exist because the constitutional name has "irredentist potential in a region long-plagued by irredentist conflict"[89]. Lacking any factual proof of irredentism today other than its own self-serving statements, the Respondent is reduced to pointing to certain statements from 1992 to 1993[90]. It is certainly true that in the early 1990s, as this Court is well aware, there was considerable concern about stability in the Balkans, and further true that everyone, the Applicant included, wished that the name difference could be resolved. But it is a complete distortion of that history to assert that the

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[86] AR, paras. 4.70-4.72.

[87] RR, para. 6.31.

[88] *Ibid.*, para. 5.46.

[89] *Ibid.*, para. 6.19; see also *ibid..*, para. 6.30.

[90] *Ibid.*, paras. 6.14-6.20.

Applicant has ever advanced any territorial claims beyond its present borders; there is simply no evidence of any kind to that effect[91]. And as this Court will recall, the Badinter Commission found, in its Opinion No. 6 of 14 January 1992, that "the Republic of Macedonia has, moreover, renounced all territorial claims of any kind", and then it further found that "the use of the name 'Macedonia' cannot therefore imply any territorial claim against another State"[92].

80. Moreover, the compromise reached when the Applicant was admitted to the United Nations, and the compromise that was enshrined in Article 11 (1), was to agree that the outstanding name difference, as well as the Applicant's own use of its constitutional name, whatever might or might not be its effects, was *not* an obstacle to the Applicant's admission to international organizations, even those — such as the United Nations — that expressly call for admission by peace-loving States. The Respondent may believe that the existence of the constitutional name suggests irredentism and should be changed; but that was not a basis for precluding the Applicant's admission to the United Nations in 1993, not a basis for precluding the Applicant's admission to the OSCE and the Council of Europe in 1995, and not a basis for precluding the Applicant's admission to numerous other international organizations within the United Nations family and outside of it. It was also not a basis for precluding the Applicant's admission to NATO in 2008.

81. In any event, regardless of the factual accuracy of those allegations, justifying an objection based on a lack of "good neighborliness" gets the Respondent nowhere, for such a reason is not envisaged in the second clause of Article 11 (1).

82. So to summarize my third point, the Respondent occasionally lapses into arguing certain other reasons for why it was entitled to object under Article 11 (1), such as this "lack of good neighborliness" or "irredentism". Regardless of the factual accuracy of those types of allegations, none of those reasons has any basis in Article 11 (1), and therefore cannot justify the Respondent's objection.

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[91] AR, paras. 4.80-4.88.

[92] See Arbitration Commission on the Conference on Yugoslavia, Opinion No. 6 on the Recognition of the Socialist Republic of Macedonia by the European Community and its Member States, 14 Jan. 1992, United Nations doc. S/25855, Ann. III, para. 5, 28 May 1993; see also AM, paras. 2.13-2.14; AR, para. 4.81.

IV. CONCLUSION

83. Mr. President, I now conclude by making one final point.

84. In various parts of its pleadings, the Respondent maintains that the Applicant has disrupted the status quo or the "balance of interests" of the Interim Accord by "unilaterally" using and imposing its constitutional name without consent[93]. No doubt we will hear from the Respondent at great length along those lines.

85. But as we have tried to explain in our pleadings, our position on Article 11 (1) is not a disruption of a balance of interests; rather, it is a straightforward effort to re-establish the balance agreed upon by the Parties in 1995. Indeed, the interpretation and application of Article 11 (1) that *we* are urging upon the Court is hardly a one-sided victory for the Applicant. In Article 11 (1), the Applicant is essentially being forced to become a member and participate in international organizations in circumstances where it is to be referred to therein by a reference that is not the name chosen by the Applicant. The Applicant, a fully sovereign State, has been placed in a position where it must be designated in international organizations by a reference everyone agrees is not the Applicant's constitutional name and is only provisional in nature, pending resolution of the difference over the name.

86. Mr. President, this is like being invited to join a club here in The Hague, but being told that you cannot use your given name and instead must use the temporary label "Mr. X". Why is that the case? Because an existing club member does not like your name and wants you to change it. When you show up at the club, you call yourself "Sean Murphy", because it is your name, but when they call out the names of the members at the club, you are known as "Mr. X", or "Member X", which appears as well on the card at your dinner table and in the note that the club sends you at Christmas time or holiday time. That is hardly a unilateral victory for you.

87. The truth is that the Applicant, as we stand before you today, simply asks that the Court keep the two States on the path they set for themselves in the Interim Accord. The bargain struck in Article 11 (1) was fairly simple. The Respondent partially succeeded because the Applicant cannot be known or referred to in international organizations under its constitutional name. Until the name difference is resolved, the Applicant remains "Member X". At the same time, the

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[93] See, e.g., RR, paras. 6.30, 6.32.

Applicant partially succeeded because it *does* get to join international organizations; the Respondent cannot take steps to prevent the Applicant from joining the club or paying its dues on a cheque on which its constitutional name appears. Moreover, the Applicant is not forced to entirely jettison its constitutional name in relations with international organizations or member States; for if that were the case, it would be a wholesale victory for the Respondent.

88. That is the bargain we struck in Article 11 (1), and that, Mr. President, is the bargain to which the Court should hold us.

The PRESIDENT: Thank you, Professor Sean Murphy, for your presentation. Now, I call Professor Philippe Sands to take the floor.

Mr. SANDS:

THE RESPONDENT'S BREACH OF ARTICLE 11 (1) CANNOT BE EXCUSED

Introduction

1. Mr. President, Members of the Court, you have just heard from my colleague Professor Murphy on the meaning and effect of Article 11 (1). The obligation there imposed not to object, we say, is clear. It is equally clear that the Respondent did object, and clear also that it did so for a reason not permitted by Article 11 (1).

2. Mr. President, there is one — and only one — circumstance in which the Respondent may lawfully object: if the Applicant sought to join NATO under circumstances in which it would be referred to in that organization differently than as provided in Security Council resolution 817. This was not the case, and there is no dispute before the Court that the Applicant sought membership in NATO in the expectation that the practice in *that* organization would be the same as that in the United Nations. So, the Respondent has had to go the extra mile. It has had to find other ways to excuse its actions in law. And my task this morning is to address the three excuses that it has raised, and I will, with your permission, Mr. President, indicate a convenient moment perhaps for a slightly early lunch today as we are well within time which, you will, I am sure, be very pleased to hear

3. First, the Respondent argues that there was no breach of Article 11 because Article 22 of the Interim Accord protects and preserves its rights as a NATO member and the duties it owes to that organization and to all other NATO members. The argument is that these rights and duties trump the obligations in Article 11. The second argument is that its breach can be justified on the basis of the *exceptio non adimpleti contractus.* And the third argument, although it disclaimed any intention of raising it in its Counter-Memorial, is that its objection can be excused as a lawful countermeasure to a wrongful act by the Applicant. Now, I am going to address each of these in turn, the first one perhaps before lunch, the other two after lunch. But, you will note immediately that none of these justifications was raised before April 2008: they are all new, they are all *ex post facto* explanations; they are all invented in the course of this litigation to justify patently unlawful actions.

I. The Respondent's breach of Article 11 (1) of the Interim Accord cannot be justified on the basis of Article 22

4. So, let us turn to the first justification. The Respondent claims to be entitled to invoke Article 22 of the Interim Accord[94]. We responded fully to this argument in Chapter V of our Reply[95], and they have come back with a great deal more, so please excuse me if we have to spend a little more time on this than we think is necessary. For the Respondent, this argument is a sort of "get out of jail free" card; it enables the Respondent to avoid an international obligation that has become inconvenient. So let us look at what Article 22 actually says. Words matter, Mr. President. [Plate 1 on] It is part of the "Final Clauses". It says:

> "[t]he 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"[96].

5. So, the Respondent argues that even if it had made an objection that violates Article 11, the objection is nevertheless made permissible — sort of legalized — because Article 22 preserves

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[94]RCM, paras. 7.26 *et seq*. and GR, paras. 5.7 *et seq*.

[95]AR, paras. 5.8-5.45.

[96]Judges' folder, tab 7, plate 1. For the complete text of the Interim Accord see judges' folder, tab 1 and Memorial, Vol. II, Ann. 1.

the Respondent's rights under other international agreements, including the right to object to a new member in NATO. This approach, of course, renders Article 11 a dead letter, as we will see.

6. The Respondent's argument is premised on two related contentions: the first is that Article 22 preserves the rights and duties *of the Respondent* resulting from agreements in force with third parties and other entities; the second is that the non-objection clause in Article 11 (1) is *subordinate* to the Respondent's rights and obligations which are allegedly protected by Article 22. We say that both claims are patently without merit; that they run contrary to the plain meaning of the text and to the principles and rules of treaty interpretation and the principle of *pacta sunt servanda*.

A. Article 22 does not speak to the Respondent's rights and duties

7. Article 22, as you will recall, appears towards the end of the Interim Accord, it is in the "Final Clauses" section. It does have a purpose, and that is to protect the rights and duties of "any other State or entity". It is, in effect, an expression of the rule set forth in Article 34 of the Vienna Convention, which confirms that "[a] treaty does not create either obligations or rights for a third State without its consent". Article 22 does not on its face create or reserve rights for the Respondent, and it certainly does not alter or otherwise affect other obligations set forth in the Accord, including Article 11.

8. The Respondent claims that Article 22 speaks to the rights and duties of the Respondent. Well, perhaps if the Respondent had invoked Article 22 at the time it acted in 2007 and 2008, or at any time before, it could at least be said that the argument was made in a timely manner, even if erroneously. But it did not do so; it never invoked any rights under Article 22: it raised the argument for the first time in 2009, more than a year after it had violated Article 11 and some 15 years after the Interim Accord was adopted. Now, we have already heard, the Respondent's Foreign Minister of the time — Ms Bayokannis — was very conscious of the fact that her Government's act of objection was motivated by overt political considerations and she recognized

that those actions would be inconsistent with the Interim Accord: the Accord — and in particular its Article 22 — does not encompass a "political cowardice" exception, in the sense evoked by the Foreign Minister, to limit the scope of obligations that would otherwise allow the Applicant to join NATO[97].

9. The Respondent claims that Article 22 itself can be broken down into two elements: the first is an assurance that the Interim Accord "is not directed against any other State or entity"[98]. Now that is straightforward and not in dispute, and it provides no assistance to the Respondent. It is the second element, however, that the Respondent claims is of — as it puts it — "critical importance"[99], the Respondent says that it is a "lethal"[100] argument, lethal to the Applicant's case — so lethal, it must be said, but not obviously lethal, since neither Ms Bayokannis or any other official of the Respondent or any of its legal advisers at any point before 2009 actually noticed it, and it was not until this case was up and running that it suddenly came to be found — so its "lethal-ness" or "lethality" only then became apparent. The component, the element of the argument here, is supposedly that the Interim Accord "does not infringe" on the Respondent's pre-existing rights and duties, including in relation to the North Atlantic Treaty. So the Respondent claims that by Article 22, the Applicant "acknowledges and accepts the fact that [the Respondent] has prior rights and obligations" with third parties, and that this provision "super-ordinates" — that is the word they use, I have personally not come across it before — rights and obligations in relation to the Article 11 obligation not to object[101]. This curious interpretation cannot be said to lack Alexandrian imagination.

10. On its face, it is difficult to see how the text of Article 22 could possibly be twisted and strained in this way. Article 31 (1) of the Vienna Convention provides, as you know very well, that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose". The ordinary

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[97]Embassy of the Respondent in Washington, D.C., Interview of FM Ms Bakoyannis in Athens daily *Kathimerini*, with journalist Ms D. Antoniou (Sunday, 14 October 2007), 15 October 2007, at AM, para. 2.60, footnote 121; and AM, Ann. 73.

[98]RCM, para. 6.61.

[99]*Ibid*.

[100]RR, para. 3.26

[101]RCM, para. 6.61.

meaning is clear. Article 22 does not address the rights and duties of the Respondent: it merely declares that the Interim Accord as a whole does not infringe on the rights and duties of third States or other entities. Article 22 declares as a fact that the Accord is to operate consistently with rights and duties in third party agreements; nothing more and nothing less. That is plain meaning.

11. What about object and purpose? This points in exactly the same direction. Yesterday I addressed the object and purpose of the Accord as a whole[102]. As you know, it was intended to provide for the immediate normalization of relations between the two Parties, and to allow the Applicant to join international organizations. The very purpose of Article 11 (1) was for the Respondent to relinquish its right to object, subject to the one, single, stated exception. Interpreting Article 22 to restore that right to object for any other reason defeats a core object and purpose of the Interim Accord.

12. But the argument is undermined by other provisions of the Accord that expressly address the Respondent's rights, conditioning the Respondent's obligations under the Interim Accord. [Plate 2 on] Let us have a look at some examples. Article 14 provides for the "development of friendly and good-neighbourly relations" between the Parties and the promotion on a reciprocal basis of, *inter alia,* road, rail, maritime and air transport and communication links. The Parties recognized that this provision could conflict with the Respondent's pre-existing obligations as a member of the European Union. So the drafters addressed that issue in Article 14 (2) — you can see it highlighted in bold — which provides that negotiations shall "tak[e] into account the obligations of [the Respondent] deriving from its membership of the European Union and other international instruments . . .".[103]

So, in this way, Article 14 does reserve and protect the rights and duties of the Respondent that arise from its membership of the European Union, and from other international instruments. The Respondent's approach to Article 22 renders Article 14 (2) completely superfluous, it has no practical meaning or effect. [Plate 2 off — plate 3 on] Now, the same is true of Article 19, which conditions co-operation on business and tourist travel — you see the words in bold — so that it will

[102]CR 2011/5, 21 March 2011 (Sands), especially paras. 16-17.

[103]Judges folder, tab 7, plate 2.

be "consistent with the obligations of [the Respondent] arising from its membership in the European Union and from relevant instruments of the Union . . .".[104]

So this provision too becomes a total irrelevance on the Respondent's approach to Article 22. These provisions would simply not be necessary if the Respondent's interpretation of Article 22 was correct. If indeed Article 22 is designed to protect the Respondent's rights and obligations under other international agreements, why did the drafters include the clauses I have just referred you to in Articles 14 and 19? And we look forward to hearing something on that from the other side. They would be completely meaningless. When Article 22 is read in this context, these provisions confirm what we say is the true meaning of Article 22: it addresses the rights and obligations of third States, not of the Respondent. [Plate 3 off]

13. I have already noted that Article 11 contains no similar proviso to that found in Articles 14 and 19, one that explicitly addresses the Respondent's obligations under other agreements. If the parties had wanted to draft Article 22 so as to allow the Respondent to be able to invoke its "rights" or "duties" under third party agreements — sorry, I meant Article 11 — then they could easily have included a similar clause. They did not do so, and the Respondent cannot just read these provisos into the text by Article 22. We raised all of these points in our Reply. We expected a response. We did not get one. Nothing of substance. All they have to say is that Articles 14 and 19 are "special provisions" dealing with the EU and EU competence issues, and that they have nothing to say "about Article 11 . . . [or] about Article 22"[105]. On the Respondent's argument, then, it seems that Article 22 does not apply to EU matters at all, and an EU exclusion is somehow to be read into Article 22. So, if that is true, one wonders whether exclusions of other multilateral organizations, such as the OSCE, or the Council of Europe or NATO might not also be read into Article 22. Yet again our good friends read into the text words that are just not there. And in that technique at least it may be said that they have finally achieved some degree of consistency. Article 22 simply does not address their rights and obligations.

14. The subsequent practice of the Parties confirms that our interpretation has got to be the correct one. Until 1995, the Respondent systematically objected to the Applicant's efforts to join a

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[104]Judges' folder, tab 7, plate 3.

[105]RR, para. 5.14.

large number of organizations. The Accord was intended to bring that practice to an end, and it did so efficiently, effectively and completely until April 2008. That was the purpose of Article 11, the reason why the Applicant insisted on the inclusion of the non-objection provision. As soon as the Interim Accord came into force in October 1995, the Respondent's conduct changed, and it then remained constant for 13 years. That would hardly be expected if the Respondent could invoke Article 22 to exercise its own "rights" and "obligations" under treaties establishing international organizations. There is no evidence before this Court that it ever sought to do so. That it ever sought even the possibility of doing so. Instead, the Respondent, by its behaviour, gave effect to the plain meaning of the Article 11 obligation; it complied, and we respect that, with the treaty rule. That could not have occurred because the Respondent recognized and accepted that by signing the Interim Accord it had greatly fettered its right to object. And in return, the Applicant agreed to be referred to in the organization by the provisional designation. The *quid pro quo* and practice makes clear that Article 22, never invoked before the pleadings, never regarded as addressing rights and obligations of the Respondent.

15. Article 22 was there for a reason. To confirm that the Accord does not affect the rights and obligations of third parties. That is what it says, and that is what it means.

B. Interpreting Article 22 as speaking to the Respondent's rights and obligations would undermine the *raison d'être* of Article 11 (1)

16. Now, the Respondent's approach to Article 22 is erroneous for another reason; if accepted, the argument would render Article 11 (1) meaningless, as the Respondent could object to any membership of any organization at any time, simply by invoking an alleged right or obligation of the Respondent under another agreement. That would undermine the raison d'être of Article 11 (1), and arguably many of the core provisions of the Interim Accord.

17. To achieve the purpose it seeks by this interpretation, what the Respondent has had to do is to rewrite the text of the Interim Accord — Literally rewrite it. Not just once, but on three occasions in its written pleadings the Respondent goes through the exercise of taking parts of the first paragraph of Article 11 — see that on the screen — then connecting it to parts of Article 22,

and then inserting the word "but" between the extracts on the two Articles[106]. This exercise has just been shown on the screen[107]: [plate 4 on] so you start with the first part, the text of Article 11, and then you add the relevant text of Article 22 at the bottom, whilst taking care to leave a gap and then you insert the word "but". Check the Counter-Memorial and the Reply for yourselves. The word "but" doesn't actually feature in the negotiated text, so one marvels at the creativity of the Respondent, and one is almost reminded of the variation on the theme of the relationship between the words "or" and "and" and what they may or may not mean: you just take the text of the treaty as negotiated and adopted, but noticing that something is missing, you claim the right to be free to insert the word that completes the meaning you seek. Now we are not aware of any provision of the 1969 Vienna Convention that allows you to insert — at your own instance — extra words. One can think of how to do it, perhaps an addition to Article 31 (3), on interpretation, could read as follows: "There shall be taken into account, together with context . . . *(d)* . . . the odd word or two that has been inserted at the instance of any party even if it contradicts or undermines the plain meaning of the text." Mr. President, the word "but" is not to be found in Article 11 and it is not to be found in Article 22. We look forward to hearing an explanation as to why this word has been inserted. The effect of inserting it leads to the argument that the combined effect of Articles 11 and 22 is that the Respondent's rights under the North Atlantic Treaty and the obligations it owes to NATO and its member States are to prevail over all other provisions in the Interim Accord, most notably, in this case, the obligation not to object. But of course remove the word "but" and the argument falls away. It is unjustifiable and unsupported also by the object and purpose of Article 22. [Plate 4 off]

18. Let us now look more carefully at the practical effect of the Respondent's approach of its argument on Article 11 (1). All international organizations prescribe conditions for membership. A prospective member State has to meet these conditions in order for it to be able to join the organization. Most commonly, it is the members of the organization that, through their votes or by other means as described to you by Professor Murphy, decide whether or not to admit the aspiring member State. If we are to take the Respondent's interpretation of Article 22 *at face value*, acting

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[106]RCM, paras. 6.27 and 7.29; RR, para. 3.25.

[107]Judges' folder, tab 7, plate 4.

on its own it would *always* be entitled to circumvent Article 11 (1) by a unilateral decision that the conditions of membership of a particular organization had not been met: that is all it would have to do. Such an interpretation is patently absurd. That is all the more so where the Applicant plainly does meet the requirements of NATO membership: as recently disclosed and publicly available documents make clear, key NATO States have agreed that a decision to invite the Applicant to join NATO does not have to wait another summit; it can be extended as soon as the Respondent agrees[108]. For each and every international organization that the Applicant has joined — and there are many since 1995 and hopefully more to come — as well as for all those future applications, for example and most significantly for the European Union — assuming Article 22 applies to that organization even though the Respondent seems today at least to believe that it may not — the Respondent can simply assert that membership conditions have not been met and in this way Article 11 just becomes an irrelevance.

19. Article 11 is not an irrelevance. Until April 2008 it worked, and it worked well. Nothing changed in the essential obligation, except that the Respondent grew *tired* of protracted negotiations over the name issue. As Ms Bakoyannis put it, in explaining the objection to the Applicant's desire for NATO membership "our goal is for an issue that dates back 15 years . . . to be resolved"[109]. When it objected, the Respondent repeatedly said it did so because there was no "solution" to the name difference; it said nothing about the need to exercise a right under NATO that superseded its obligation under the Interim Accord: the interview that Ms Bakoyannis gave to the journalist in October 2007 makes that abundantly clear, as do all the other statements we have referred to you and the many more listed in our pleadings[110].

20. In support of its argument, therefore, the Respondent is forced to conjure up yet another new distinction, between various categories of international organizations: so we learn that there are *organisations fermées*, to which Article 22 does apply, and then there are organizations of

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[108]Cable from United States Embassy London to United States Dept. of State, entitled "HMG Looking Forward to Building on Gains of NATO Bucharest Summit", 9 Apr. 2009, Cable No. 08LONDON1017, para.1, available at: http://www.telegraph.co.uk/news/wikileaks-files/london-wikileaks/8305019/HMG-LOOKING-FORWARD-TO-BUILDING-ON-GAINS-OF-NATO-BUCHAREST-SUMMIT.html (accessed 16 Mar. 2011).

[109]Embassy of the Respondent in Washington, D.C., Interview of FM Ms Bakoyannis in Athens daily *Kathimerini*, with journalist Ms D. Antoniou (Sunday, 14 Oct. 2007), 15 Oct. 2007, at AM, para. 2.60, footnote 121; and AM, Ann. 73.

[110]*Ibid.*

universal membership, to which it does not apply. So on the Respondent's approach, really not clearly explained, Article 22 applies to none of the universal organizations and to some, but not all, *organisations fermées*, since it appears now that it does not apply to the European Union. Is there any support for these distinctions in the text of Article 22? No, there is not. Does the Respondent offer any criteria for the distinctions? No, it does not. Again, the Respondent is simply entitled to insert exceptions into the text. So for those institutions that remain subject to Article 22 — the category of unspecified *organisations fermées* that conveniently includes NATO — the admission of a new member requires "active participation of the existing members" so that the Respondent, as a NATO member, has "legal obligations to both the other members of the organization and the organization itself with respect to discharge of its rights and duties in the membership process"[111]. In other words, these NATO rules allow it, no require it, to exercise a veto to object.

21. The Respondent maintains that it is simply for it — it alone, acting unilaterally, without notice, according to criteria that it has completely invented out of the air and that are nowhere reduced into written form or otherwise available — to decide which organization falls into this category. Now the argument suffers from many difficulties, but let me just mention three. First, Article 11 makes no distinction between different categories of international organizations. Second, as I have already said, at no point before April 2008 did the Respondent make or invoke such a distinction — it is an invention and it dates to 2009. Third, the distinction leads to a manifestly absurd conclusion. On its approach, the Respondent cannot object to the Applicant's membership of a "universal" international organization in which the Respondent plays virtually no role in the membership process, but it can always object in the case of some, but not all, "closed" international organizations — where, conveniently, it has a role to play in the admissions process. So, to put it simply, the Respondent has no right to object in situations where its objection would have no effect, but it has a right to object where the objection would be effective. Now, in many parts of the world — in particular, in the East End of London — this is known as a bootstraps argument: you are prohibited from doing something, except in situations where you can do something, because doing something would be effective. In other words, the right exists because it

[111]RCM, para. 6.59.

can be effectively applied. This is a very curious way to interpret Articles 11 and 22 of the Interim Accord or, indeed, of any treaty provision. And the implications for treaty law are clear, and I do not need to spell them out.

22. One might ask, then, what effect would the Respondent's approach have on yet other provisions of the Interim Accord? The Applicant would have negotiated and adopted an agreement that would potentially be devoid of practical effect. *All* of the substantive obligations would have to be read subject to the Respondent's perverse approach to Article 22 because, presumably, it applies across the board.

23. Let us take an example. Article 8 (1) of the Interim Accord requires that both Parties must "refrain from imposing any impediment to the movement of people or goods between their territories . . .". On the Respondent's approach, it is perfectly free to assert — on a unilateral basis — that it retains a "right" under Article 224 of the Treaty of Rome to impose a unilateral trade embargo on the Applicant, a non-EU member, and therefore it can do so pursuant to Article 22, assuming it to be applicable, even though such conduct is clearly prohibited by Article 8 (1) of the Accord. Now that would be an astonishing result, yet that is what they are arguing for. In short, the Respondent's approach to interpreting Article 22 as protecting the Respondent's rights renders Article 11 meaningless. It introduces manifest instability into the bilateral relationship under the Interim Accord, the very thing it sought to avoid.

C. The Respondent has identified no relevant "rights and duties" that may be invoked under Article 22

24. The Respondent's reasons for invoking Article 22, it says, is that its "rights" and "duties" under the North Atlantic Treaty are protected by that provision, and this allows it to object to the Applicant's admission to NATO notwithstanding its Article 11 obligation. So, this is the Respondent's argument:

> "If we assume for purposes of argument that [the Respondent], as a member of NATO, had concluded that it was bound 'to object' to the FYROM's application because of the unresolved 'difference', its judgment in this matter could not possibly constitute a violation of the Interim Accord."[112]

Very clearly put, supporting all of the arguments I have just summarized.

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[112]RCM, para. 6.63.

25. But, curiously, the Respondent has failed to identify any "rights" or "duties" under the North Atlantic Treaty that entitled it to veto the Applicant's NATO membership aspirations. The only treaty provision invoked by the Respondent is Article 10 of the North Atlantic Treaty. What does Article 10 of the Treaty actually say? Let us have another look at it. This is what it says in its entirety: [plate 5 on]

> "The Parties may, by unanimous agreement, invite any other European State in a position to further the principles of this Treaty and to contribute to the security of the North Atlantic area to accede to this Treaty. Any State so invited may become a Party to the Treaty by depositing its instrument of accession with the Government of the United States of America. The Government of the United States of America will inform each of the Parties of the deposit of each such instrument of accession."[113]

26. So, this is the provision that the Respondent relies on to justify its breach of Article 11 of the Interim Accord. It argues that Article 10 of the North Atlantic Treaty imposes a "right" or a "duty" for the Respondent to "express [its] views"[114] with respect to the accession of new NATO members, and that this right or duty was exercised when the Respondent objected to the Applicant's NATO accession. But it is plain that Article 10, by its terms, says no such thing; it simply indicates that a particular condition — unanimous agreement — must be met before a State may join NATO. The text says nothing about a "right" or a "duty" of the Respondent. And so, once again, the Respondent's creative propensities allow it to insert text where none exists.

27. The Respondent does identify a basis for raising criteria for NATO membership. It refers to the "requirement" that candidate States "settle ethnic disputes or external territorial disputes including irredentist claims or international jurisdiction disputes by peaceful means in accordance with OSCE principles and . . . pursue good neighborly relations"[115]. That is the criteria they invoke. But wait a second; ask yourselves the question. From where is this "requirement" drawn? It is not in Article 10. In fact, it is not anywhere in the North Atlantic Treaty. So, where did they find it? Well, they obviously had to look far and wide because what they dug up to justify it is a 1999 NATO press release that sets out the Membership Action Plan through which aspiring NATO candidate States may eventually accede to the North Atlantic Treaty. And this states that

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[113]Judges' folder, tab 7, plate 5.

[114]RCM, paras. 7.33-7.34.

[115]*Ibid.*, para. 7.36; Press Release NAC-S(99)66, Membership Action Plan (MAP), 24 Apr. 1999; RCM., Ann. 21.

"[a]spirants *would also be expected* . . . to settle ethnic disputes"[116]. Is this a substantive criterion of NATO membership, that the Respondent was bound by virtue of Article 10 of the North Atlantic Treaty to invoke? The Respondent never explains how this might be, and we fail to see how a press release can in this way create the basis for new criteria. [Plate 5 off]

28. Now, there is actually a very simple way that you can cut through this entire argument, and that is by dealing with it on the facts. You do not even have to address any of these issues if you do not want to. Why? Because the Respondent, on its own admission made the objection on the basis of a factor that it says was "in addition to" — and I emphasize the words "in addition to" — NATO accession criteria. In other words, the Respondent has conceded that the objection was not a part of the NATO criteria themselves[117]. It did the same thing in the run-up to Bucharest. Look carefully at the *aide mémoire* circulated prior to the Bucharest Summit — you saw some of it on the screen yesterday — the Respondent made clear in that document that the act of objection was motivated by the need to bring to a satisfactory conclusion the name issue, and that this is "in addition to any accession criteria"[118]. In other words, you do not even have to decide all of these legal issues because they, on their own case, were not relying on NATO admission criteria, they were relying on something else. The Article 22 argument in this way just falls away completely and very simply. [Plate 5 off]

29. Moreover, by agreeing not to object to Article 11, the Respondent accepted that the failure to resolve by negotiation the name difference was not a basis for excluding the Applicant from membership to international, multilateral and regional organizations; that such a dispute was not, by itself, of a nature that should preclude the Applicant from joining organizations, including those concerned with matters of peace and security. What reasons did the Respondent give in the period before April 2008 for objecting to NATO membership? [Plate 6 on] Well, let us remember again, what the then Prime Minister said on the very day of the Bucharest Summit:

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[116]RCM., Ann. 21

[117]*Ibid.*, para. 7.35.

[118]Respondent's *aide mémoire,* Memorial, Ann. 129.

> "I had said to everyone — in every possible tone and in every direction — that 'a failure to solve the name issue will impede their invitation' to join the Alliance. And that is what I did. Skopje will be able to become a member of NATO only after the name issue has been resolved."[119]

Did the Prime Minister raise any other factors? Did he invoke legal arguments or legal advice in getting around Article 11 of the Interim Accord? Did he raise rights under Article 22? He did none of these things. The Respondent is a well-functioning democracy with plenty of legal advisers. One assumes they would have turned their mind to this issue. Is there *any* evidence before the Court that Article 22 was ever considered as being of any relevance before 2009? No Mr. President, there is not. [Plate 6 off]

30. The Respondent itself has gone on the record, on numerous occasions, to state publicly that the Applicant will be able to join NATO once the name issue is resolved[120]. This has also been recognized by other members of NATO[121] and by the organization itself[122].

31. The evidence confirms that the Respondent's objection was political — political. It had nothing to do with a "right" or "duty" arising under the North Atlantic Treaty, and nothing to do with membership criteria for NATO. For the reasons set out in our written pleadings, Article 10 of the North Atlantic Treaty does not assist the Respondent an iota. Article 10 of the NATO Agreement does not accord to the Respondent any "right" — or impose any "duty" — to object to the Applicant's membership. By agreeing to Article 11 of the Interim Accord it recognized that it no longer had a right to object to membership of international organizations provided the one condition set forth in Article 11 was met. It cannot now get around that undertaking by invoking Article 22.

Mr. President, that may be a good moment for a lunch break, with your permission.

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[119]AM, Ann. 99; judges' folder, tab 4.

[120]See generally: CR 2011/5 (Murphy).

[121]AM, para. 2.53.

[122]*Ibid.*, para. 2.55.

The PRESIDENT: Thank you. Thank you, Professor Philippe Sands, for your presentation. As Professor Sands made quite clear, he is still in the middle of his statement and we will continue to hear his presentation this afternoon. The former Yugoslav Republic of Macedonia will conclude its first round of oral argument this afternoon. The time given to the former Yugoslav Republic of Macedonia is from 3.00 p.m. to 4.30 p.m. With that understanding, the sitting is closed.

The Court rose at 12.50 p.m.

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