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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 3 p.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 15 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. This afternoon the Court continues the first round presentation of the former Yugoslav Republic of Macedonia. Professor Phillipe Sands will continue his presentation, so, let me invite Professor Phillipe Sands to take the floor and continue his presentation.

Mr. SANDS:

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

32. Thank you very much, Mr. President. I now turn to address the Respondent's second excuse, the purported role of the *exceptio non adimpleti contractus*. Now, this too appeared, out of the blue, in January 2010, in the Respondent's first written pleading. It might be called the mouse that roared[1]. The Respondent describes it as an "exception of non-performance" which is derived from a so-called "general principle of reciprocity"[2]. It suffers from, it might be said, a number of problems: there is the minor difficulty that it has never before been invoked by this Court for the purposes sought by the Respondent; there is the little matter of the fact that the International Law Commission declined to follow the approach for which the Respondent argues; there is the not inconsequential consideration that the use of the *exceptio* for which the Respondent argues would entirely rewrite the law of treaties and the law of State responsibility; and — last but not least — there is the observable fact that where it does feature in the writings of leading commentators — including some in this room — it does so exclusively on the basis that it is reflected and applicable exclusively in the law of treaties, in Article 60 of the Vienna Convention on the Law of Treaties[3]. To the extent the principle does exist, it can do so only in the detailed and conditional rules that have developed within the law of treaties and perhaps also the law of State responsibility, as reflected in the view put by the former Special Rapporteur to the International Law Commission, to which I made reference yesterday[4]. Yet it is clear to all in this room that the Respondent failed to

[1]RCM, paras. 8.1-8.62; AR, paras. 5.46-5.83; RR, paras. 8.6-8.23.

[2]CM, para. 8.3.

[3]See, e.g., P. Daillier, M. Forteau and A. Pellet, *Droit International Public*, 8e éd., 2009, at pp. 339-341.

[4]CR 2011/5 (Sands), especially para. 26. See also judges' folder, tab 2, plate 6.

adhere to the law of treaties or to the law of State responsibilities in its conduct: and that is what has forced it to rely heavily on a broad principle that is novel, unsupported in practice, lacking the support of the International Law Commission, and deeply damaging to well-established rules of international law.

33. As with the Article 22 argument, the Respondent raised the "exception of non-performance" for the first time almost two years after it objected to the Applicant's NATO membership. So, this too is an *ex post facto* justification of a breach of Article 11, concocted by the lawyers, or maybe just some of them, since it seems to us pretty clear that they do not all agree with it.

34. The *exceptio* is invoked by the Respondent in the following way: it claims that "as long as [the Applicant] does not comply with its obligations under the 1995 Accord, [the Respondent] is entitled not to comply with its own obligations under the same instrument"[5]. Now, this principle, it has to be said, offers the Respondent a number of convenient advantages. First, "the *exceptio* defence can be invoked at any time"[6], as the Respondent says; second, "no procedural requirements"[7] need be complied with in order to invoke it, the Respondent says; third, it requires no prior notice — and indeed the Respondent gave no prior notice — and; fourth, it is capable of being applied unilaterally with no objective criteria having to be satisfied. One might say what a terrific new rule of international law — one wonders why it took so long — until 2010 — for it to be discovered? It has marvellous consequences. A State does not like the way a treaty partner is acting, and all it has to do is allege some sort of non-performance and — hey presto! — all the safeguards carefully put in place by States in the law of treaties and in the law of State responsibility just melt away.

35. The Respondent cannot rely on the law of treaties, as it knows, and we say it cannot rely on the law of State responsibility. It never raised this particular version of the *exceptio* with the Applicant, and obviously none of the Respondent's legal advisers thought to alert the Foreign Minister, or the Prime Minister, or the Ambassador to the United Nations of its existence and of its

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[5]RCM, para. 8.3.

[6]*Ibid.*, para. 8.3.

[7]*Ibid.*, para. 8.26.

role. It has been invoked at a late stage for the purpose of enabling the Respondent to defend itself against a claim that it violated Article 11. To be able to succeed, even on its own case, the Respondent has got to show two things: first, that the "exception of non-performance" is a recognized principle of general international law; and second, that the Applicant has failed to perform an obligation that is relevant under the Accord. The Respondent manifestly fails on both counts on its own case.

36. Mr. President, the *exceptio* is not a principle of international law applicable to treaty relations between States in the way it has been argued for. It does not appear in the Vienna Convention on the Law of Treaties — at least not in the form the Respondent would like — and it is nowhere to be found in the International Law Commission Articles on State Responsibility[8]. It exists, according to the pleading of the Respondent, as a "[g]eneral principle[] of law recognized by civilized nations" which falls to be applied by the Court under Article 38 (1) *(c)* of its Statute[9].

37. This claim is entirely without merit. The Respondent seeks to rely on a principle that has *never* been recognized by any international court or tribunal in modern times. What case law does it rely on? Well, it has managed to find the dissenting opinions of two judges in a single Permanent Court of International Justice case that dated back to 1937[10], long before the adoption of the superseding Vienna Convention. Beyond that, the Respondent has also found a couple of academic articles — but if you read them carefully, you will see that they do not support the proposition upon which they seek reliance, and it has also found a single, 1983 arbitral award under the rules of the International Centre for the Settlement of Investment Disputes — but they seem not to have read it very carefully because *that* award applied the *exceptio* as a principle of national law, of French law, and in any event — as we all know — that award was later annulled[11]. The Respondent simply has no support for its version of the *exceptio* as a principle of general international law.

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[8]Responsibility of States for Internationally Wrongful Acts, *Yearbook of the International Law Commission,* 2001, Vol. II, Part Two.

[9]RCM, para. 8.9.

[10]*Diversion of Water from the Meuse, Judgment, 1937, P.C.I.J., Series A/B, No. 70*; *ibid*.; RR para. 8.7.

[11]*Klöckner* v. *Cameroon*, Award of 21 October 1983, *ILR*, Vol. 114, p. 211.

38. The Respondent has sought recourse to a legal fiction, and it has done so because it cannot meet the requirements of the Vienna Convention on the Law of Treaties. The Respondent has not even tried to justify its actions under the 1969 Convention, and in particular its Article 60[12].

39. Article 60 is obviously relevant, in circumstances in which the Respondent now, belatedly, claims that the Applicant has "materially breached" the Interim Accord[13]; yet another claim, as we know, that only saw the light of day after April 2008. Article 60 sets out a complete set of rules regulating the permissible responses to a material breach by one party to a treaty; it provides that "[a] material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty *or suspending its operation in whole or in part*". However, as the Court will know, for very good reasons this rule is subject to strict procedural requirements. They are set out in Articles 65 to 68 of the Convention. At no point before April 2008, *after* it had breached its Article 11 obligations, did the Respondent even formally assert in writing the Applicant was in material breach of the Interim Accord as the Convention requires. And it has not formally invoked Article 60 to suspend the operation of the obligation not to object in Article 11 as it is required to do under Articles 65 and 67 of the Vienna Convention on the Law of Treaties.

40. So, the Respondent is left with what one might call the Athenian version of the *exceptio* because it did not follow the requirements of Article 60. So it claims that the exception of non-performance is "rooted in the law of State responsibility and not in the law of treaties"[14]. Now, this argument may perhaps best be described as a lonely one, it is utterly bereft of any obvious support. Indeed, I would say with great respect to them, there are a number of colleagues on the other side of the room, and before me, who know a thing or two about the law of State responsibility. Yet there is nothing in the efforts, in the 1990s in particular, of the International Law Commission to provide any support whatsoever for the proposition that the Athenian version of the *exceptio* is a general principle of international law, applicable in the manner identified by the Respondent. The International Law Commission's Special Rapporteur on State Responsibility

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[12]See, for example, RCM, para 8.12: "Greece does not argue the suspension of the Accord".

[13]See RCM, paras. 4.44; 4.73; 4.82; 8.27 (f); 8.29; 8.32; 8.41; 8.43; 8.51; 8.59; 8.61; 9.3; 9.6 and RR, paras. 1.22; 6.32; 7.4; 7.16; 7.81; 8.3; 9.1; and 9.6.

[14]RCM, para. 8.13.

returned to this concept in 2001, in an academic article. What did the Special Rapporteur conclude? Well, he expressed the view that "uncertainty remains as to the status of the exception of non-performance in international law". That seems to open a possible door. But then he adds, perhaps for good measure: "it has not established an independent place as a rule or principle of international law"[15]. And finally, lest we had not quite got the message, he put in a warm Australian boot and said that the *exceptio* could not be categorized as a principle of international law "in the sense of Article 38 (1) *(c)* of the Statute of the International Court of Justice"[16].

41. Now, it is true that in preparing the ILC Draft Articles, some Members of that distinguished body did indeed give some attention to a more narrowly-defined version of the exception of non-performance. There was debate, for example, as to whether this narrow version could preclude wrongfulness resulting from the failure to perform a conventional obligation "if the State has been *prevented* from acting in conformity with the obligation *as a direct result* of a prior breach of the same or a related international obligation"[17]. It is abundantly clear that this disputed version does not assist the Respondent. Why? Because it was not *prevented* from performing the obligation of non-objection by a prior breach of the Accord by the Applicant; the reality, as the evidence makes very clear, is that the Respondent *chose* not to perform its obligation. The Respondent's Foreign Minister, Ms Bakoyannis, made this very clear in the interview of October 2007. But in any event, even this version will not assist the Respondent. Why? Because it was rejected by the International Law Commission and it does not figure in the final text. This is not an *exceptio* or principle that is resting or sleeping, or stunned, or even comatose. It is dead.

42. The *exceptio* on which the Respondent now purports to rely to justify its breach of Article 11 is broader and more far-reaching than the limited version rejected by the Commission. The Respondent invokes the concept of reciprocity[18]. It claims that it is only because the Applicant undertook to "reform its antagonistic and irredentist behaviour, to be referred to as the FYROM in

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[15]J. Crawford and S. Olleson, "The Exception of Non-Performance: Links between the Law of Treaties and the Law of State Responsibility", 21 *Australian Yearbook of International Law*, 2001, pp. 56 and 73.

[16]*Ibid*., p. 73.

[17]International Law Commission, Second Report on State Responsibility, Mr. James Crawford, Special Rapporteur, A/CN.4/498/Add.2, Article 30*bis*, pp. 57-58; emphasis added.

[18]RCM, para. 8.19.

international organisations, and to negotiate in good faith, *that Greece accepted* '*not to object*'"[19]. Professor Murphy dealt with the facts earlier this day.

43. But this argument is self-serving and unsustainable as a matter of law and fact. First, the Respondent has mischaracterized Article 11 of the Interim Accord. Article 11 does not create a self-standing *obligation* on the Applicant to be referred to as "the former Yugoslav Republic of Macedonia" in international organizations; rather, it creates a *condition* that, if not fulfilled, allows an objection to be made. Second, the other two obligations to which the Respondent refers, in this respect, are enumerated in Article 5 of the Accord, that is to say the obligation to continue negotiations on the dispute over the Applicant's name in good faith, and Article 7, to refrain from hostile activities. These obligations, unlike Article 11, apply to *both* Parties and cannot by their nature be given by the Applicant *in exchange* for an obligation undertaken solely by the Respondent.

44. The Respondent now claims that the Applicant has somehow breached Articles 5 and 7 of the Interim Accord — although it has not brought a claim; it has not brought a counter-claim to that effect — and also Article 6 (2) of the Interim Accord. Now, you are obviously going to hear a huge amount on Thursday and Friday about our appalling behaviour — far more, I suspect, in a day and a half, than we heard in 13 years between 1995 and 2008, when the notion did not seem to figure much in the consciousness of the Respondent. But in our written pleadings we have explained why the factual allegations are simply without foundation. And, they were not raised in any way to justify the act of objection: we do not see how they can now support the Respondent's reliance on the exception of non-performance.

45. For the Respondent's *exceptio* defence is premised on the assertion of a principle that where one party to a treaty has breached one or more obligations, then the injured party will be able to withhold the execution of its own obligations, "which are *synallagmatic* to the ones not performed by the other Party"[20]. Now, I emphasize the word *synallagmatic*, for that is at the heart of the Respondent's claim.

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[19]RCM, para. 8.20.

[20]*Ibid.*, para. 8.15.

46. And I do so because the obligations set forth in Articles 5, 6 and 7 of the Interim Accord are not, as claimed by the Respondent, synallagmatically connected to Article 11: the Respondent has provided no argument or evidence to support the claim that the obligation set forth in Article 11 falls to be performed on a *quid pro quo* basis as the Respondent is claiming. These obligations enumerated in the Interim Accord are not causally linked in this way. Even if the Applicant had breached any of the obligations to which the Respondent refers — which it has not done and is not the case — it would not be relevant to these proceedings because the breach of one or more provisions of the Interim Accord by the Applicant cannot justify the breach of Article 11 by the Respondent. That is why States negotiated and adopted Article 60 of the Vienna Convention on the Law of Treaties: that is the process to be followed in circumstances in which a material breach of a treaty is alleged to have occurred.

47. This case is not about material breaches of Articles 5, 6 and 7. If it were about material breaches of Articles 5, 6 and 7, the Respondent would have brought a case to this Court alleging such violations, but it has not done so. And it might be the case if the Respondent had brought a counter-claim, but it has not done so. Indeed, in its Counter-Memorial, the Respondent confirmed that it did not seek to argue that any portion of the Interim Accord had been suspended or terminated due to a material breach[21]. At no point did the Respondent pursue the procedures set forth in Article 60 and it would be wholly improper now to seek to raise such a defence. Instead, the Respondent is proceeding off the back of a novel, unprecedented and invented principle for which no authority has been found, and which was rejected by our distinguished friends and colleagues on the other side of the room when they were wearing their International Law Commission hats.

48. In any event, and for the avoidance of doubt, there is no credible evidence of material breaches by the Applicant. We have dealt with this very fully in the written pleadings and we do not intend to repeat the points here. I will refer you simply to paragraphs 5.12-5.20 of the Memorial and 5.84-5.99 of the Reply[22]. Specifically, the claim that the Applicant has somehow violated its obligation to continue good faith negotiations on the dispute over the name, as required

[21]RCM, para. 8.2.

[22]AM, paras. 5.12-5.20; AR, paras. 5.84-5.99.

by Article 5, is patently unarguable — it does not get off the ground — in circumstances in which the United Nations Special Envoy, Mr. Matthew Nimetz, has commended both Parties for their efforts. His latest statement was given on 9 February 2011, just a month ago. Did he criticize the Respondent? No. Did he criticize the Applicant? No. He commended both Parties for their "positive attitude towards moving forward on [the name] issue"[23].

49. Mr. President, if this Court is a court of law, as it surely is, if it is to promote the law of treaties, this defence should be given very short shrift. It seeks to replace a system designed to ensure the stability of treaty relations with arrangements that allow a State party to a treaty to circumvent its obligations on a whim, without giving notice, without being required to meet any procedural requirement or without being based on any standards capable of objective application. We made all these arguments in our Reply, responding to this new line of argument made in the Respondent's Counter-Memorial. The Respondent's Rejoinder does not respond to any of these points, a clear sign, we say, that its authors recognize the hopelessness of the argument. We trust that you will reject this claim, and do so very firmly.

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

50. Let me turn then, finally, to the Respondent's third excuse, a "defence" it is described, although, with respect, it is rather generous to give it that nomenclature: the claim is that it was entitled to act by way of lawful countermeasures[24]. Now this is very curious. In its Counter-Memorial, the Respondent says that it "does not rely" on countermeasures[25]. But then in its Rejoinder — presumably confronted with the appalling reality of the limited prospects of its arguments on Article 22 and the *exceptio* — the argument on countermeasures comes roaring back into life — well, roaring is probably a bit generous, whimpering back into life. On the other hand, it has to be said, walking into Court this morning with my colleague Professor Sean Murphy, he said to me as I was thinking and preparing, at least it is a legal argument.

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[23] "Nimetz — No New Proposal", *VOA News*, 9 February 2011.

[24] AM, paras. 5.41-5.54; RCM, para. 8.29; AR, para. 5.3; RR, paras. 8.24-8.40.

[25] RCM, para. 8.3; see also para. 8.1.

51. We pre-empted this argument in our Memorial[26]. The legal régime governing countermeasures under the Law of State Responsibility is well established. The Commission's Draft Articles establish a comprehensive régime regulating the use of countermeasures in international law, as set out in its Articles 49-54. These rules reflect general international law[27].

52. Three conditions have to be met for a State to be able to exercise lawful countermeasures. First, the measures can only be taken in response to a *previously* committed wrong. Second, countermeasures can only be taken *after* the injured State has given notice to the State committing the allegedly wrongful act and calls upon it to discontinue the wrongful conduct in question. And third, countermeasures must be proportionate. The Respondent has failed to establish that *any* of these three conditions has been met.

53. In relation to the first condition, there was no *previous* breach of the Interim Accord by the Applicant. The Respondent's new claims of material breach are part of its overall strategy to divert attention from its violation of Article 11, yet another *ex post facto* attempt to justify unlawful conduct. This is patently obvious from the steady stream of diplomatic Notes Verbales sent to Applicant *after* the Bucharest Summit. Count the number of Notes Verbales sent between 1995 and April 2008 in the Respondent's pleadings and then count the number that have been sent, landed on our desks, it has to be said very sadly, after that date of April 2008. If you look at the dates of the Notes Verbales set forth in the annexes of these pleadings, it is readily apparent that there is a correlation between the filing of this case in November 2008 and the catalytic effect this seems to have had on the need to create a proper paper trail that would justify the allegations of material breach. The fact is that the Respondent has got a real evidentiary problem: we know that some international lawyers do not like dealing with evidence, but the evidence is there. The Court has to look at the facts. The Respondent has not been able to identify a single occasion, not one, prior to its acts of objection in April 2008 when it confronted the Applicant with a claim that it had acted in material breach, a substantial violation of the Interim Accord.

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[26]AM, paras. 5.41-5.54.

[27]Bodansky and Crook, "Symposium: the ILC's State Responsibility Articles", *AJIL*, Vol. 96, p. 786: "Articles 49–54 attempt to steer a middle course: they accept the lawfulness of countermeasures but make them subject to significant substantive and procedural qualifications that seem largely to reflect existing customary law."

54. The first Note Verbale that does this is dated 15 May 2008, more than a month after the Respondent objected at the Bucharest Summit to the Applicant's membership of NATO. But, and it is a big but, this was only sent in response to a Note Verbale that *we* sent in which we raised the Respondent's conduct as being a violation of the Interim Accord; a violation by objecting to NATO membership on a ground not permitted by Article 11 (1). In its Note Verbale, the Respondent accuses the Applicant of "materially breaching the Interim Accord *since its conclusion*"[28] — the Respondent alleges violations of various provisions of the Accord. Where is the evidence of allegations of material breach before April 2008 brought to the attention of the Applicant? There is none. These allegations of the Respondent, like all of those which were to follow after 15 May 2008, are factually baseless and they are incapable — incapable — of amounting to a "internationally wrongful act" within the meaning of Article 49 of the Law Commission's Articles. More to the point, the allegations post-date the Bucharest Summit for the most part, so it is really difficult to see how they could be invoked by the Respondent to justify its own earlier act of objection. None of the Respondent's allegations amount to breaches of the Interim Accord, and the Respondent is in no way an "injured State" entitled to exercise lawful countermeasures.

55. In addition, as is the case in relation to Article 60 of the Vienna Convention, the Respondent has not met any of the procedural requirements necessary to justify countermeasures. Article 52 (1) of the Law Commission's Articles stipulates that "before taking countermeasures, an injured State shall . . . call upon the responsible State . . . to fulfil its obligations under Part Two" and "notify the responsible State of any decision to take countermeasures and offer to negotiate with that State". There is no evidence, none, before this Court that at any time before the Respondent's conduct amounting to breach of Article 11 that it notified the Applicant of its decision to take countermeasures. Nor is there any evidence to show that the Respondent offered to negotiate with the Applicant with regard to its decision to object to the Applicant's membership to NATO. The Applicant raised all of these points in the Memorial, but once again the Respondent has failed to address them in its replies.

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[28]RCM, para. 8.32; emphasis added.

56. The Respondent claims then that it "fulfills the requirements for countermeasures"[29]. But it is only able to do so because it believes that the requirements do not actually apply in this case[30]. The Respondent quotes this passage from the ILC's Commentary to Article 52 (1):

> "In practice, however, there are usually quite extensive and detailed negotiations over a dispute before the point is reached where some countermeasures are contemplated. In such cases the injured State will already have notified the responsible State of its claim in accordance with Article 43, and it will not have to do it again in order to comply with [Article 52] paragraph 1 *(a)*."[31]

From this passage the Respondent concludes: "[i]n the present case, the Parties have been engaged in a negotiation process since the signature of the Interim Accord. No formalistic condition of *sommation* applies in this case."[32]

57. That conclusion is plainly wrong. First, the Commentary says that notice does not have to be given again *if previously given* in the course of negotiations. The Respondent did not give *any* notice to the Applicant as to its intention to invoke countermeasures. And then there is the passage in the Commentary immediately preceding the one quoted by the Respondent — what does that say — this is what it says: "[t]he principle underlying the notification requirement is that, considering the exceptional nature and potentially serious consequences of countermeasures, *they should not be taken before the other State is given notice of a claim and some opportunity to present a response*"[33]. The second point is that although negotiations between the Respondent and the Applicant on the name issue were ongoing since the signing of the Interim Accord, the process of negotiation required by Article 52 has to be in relation to the countermeasures. The Respondent has never made an offer to negotiate with the Applicant with regard to its application to NATO or in respect of countermeasures.

58. The Respondent has also failed — it has to be said — to meet the third condition of lawful countermeasures, mainly, proportionality. Article 51 of the Article requires that a countermeasure has to be "commensurate with the injury suffered, taking into account the gravity

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[29]RR, para. 8.29.

[30]*Ibid.*, para. 8.38.

[31]*Ibid.* (citing ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, *YILC*, 2001, Vol. II, Part Two, p. 136, para. 4 of the Commentaries to Article 52).

[32]*Ibid.*

[33]Report of the Commission to the General Assembly on the Work of its Fifty-Third Session, *Yearbook of the International Law Commission*, Vol. II, Part Two, 2001, p. 136; emphasis added.

of the internationally wrongful act and the rights in question". Now this principle was of course addressed by the Court in the *Gabcikovo-Nagymaros* case, when it emphasized that "the effects of a countermeasure must be commensurate with the injury suffered, taking account of the rights in question" (*Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 56, paras. 85 and 87, citing *Territorial Jurisdiction of the International Commission of the River Oder, Judgment No. 16, 1929, P.C.I.J., Series A, No. 23*, p. 27; see CR 2011/6, footnote 130). In that case, it will be recalled, the Court concluded that Czechoslovakia's unilateral assumption of control of a shared resource that deprived Hungary of its right to an equitable and reasonable share of the natural resources of the Danube failed to respect the proportionality which is required by international law. Against that background, can the Respondent's act of objecting to the Applicant's membership of NATO reasonably be said to be proportionate to the alleged act of wrongdoing attributed by the Respondent to the Applicant? We do not possibly see how that could be said, even assuming these acts to have been established and in any way contrary to the requirements of the Interim Accord, which they are not, and which we strongly deny. The Court can simply make up its own mind; we invite you to look at the record in the pleadings as set out in the Notes Verbales and other communications that are set out in the Respondent's own written pleadings. You will note again, first, that on no occasion before April 2008 did the Respondent make an allegation to the Applicant of material breach. And then, you are *bound* to note the extraordinary triviality of the allegations: the renaming of Skopje's international airport of Alexander the Great, for example, or the renaming of a highway — Pan-European Corridor highway — also named after Alexander the Great. How on earth can it seriously be argued that these acts are incompatible with the Interim Accord, or with any rule of international law? How can it plausibly be argued that such acts caused the Respondent an injury, in any reasonable sense of the word? How can the publication on a government website of a photograph that shows a crowd of spectators at a basketball match in which one dimly observable spectator is seen to be waving a prohibited flag: how can that *possibly* contribute to a justification to object to membership of NATO[34]? Let us get real here. How can it seriously be argued that an incident in

[34]See Note Verbale dated 15 April 2009 from the Respondent's Liaison Office in Skopje to the Applicant's Ministry of Foreign Affairs, No. F. 141.1/49/AS 489: AM, Ann. 60.

which a group of *schoolchildren* who throw eight pebbles at the residence of the Respondent's Ambassador in Skopje is of a nature to justify the NATO objection — eight pebbles that caused no physical damage, no harm and one that was promptly investigated by the Applicant's local police force[35]? These are the acts that the Respondent invokes to support an argument justifying countermeasures. Objecting to the Applicant's NATO membership on the basis of these kinds of allegations — even if well-founded, which they are not — cannot reasonably be said to be proportionate.

59. Mr. President, the Respondent knows that it does not meet the requirement of proportionality or any of the requirements for lawful countermeasures. In its Counter-Memorial it said it was not going to rely on the argument[36]. It is readily apparent why it initially adopted that wise position. One might now ask oneself, why later in the proceedings they have sought to bring it back to life. The only possible explanation for the abandonment of the earlier position, is a recognition of the paramount weaknesses of the other two arguments on which it relies. This is an act of sheer desperation.

IV. Conclusion

60. To conclude, none of the Respondent's three arguments to justify its wrongdoing comes close to crossing a line of plausibility. Article 22 does not trump the obligation not to object that is set forth in Article 11. The violation cannot be justified on the basis of an *Athenean exceptio*. The objection cannot be excused as a lawful countermeasure to the throwing of pebbles. We look forward to hearing what the Respondent will conjure up on Thursday and Friday; which of these arguments it might still maintain, or whether, yet again, new arguments or new variations of old arguments will somehow emerge. But we look forward with particular interest to seeing which of its distinguished counsel will feel able to be associated with any of these three arguments.

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[35]Note Verbale of the Hellenic Republic Liaison Office in Skopje, No. F. 010.GS/23/AS 720, dated 1 June 2009 and Note Verbale No. 93-1741/4 of the Ministry of Foreign Affairs of the FYROM dated 10 July 2009 in reply, AR, Ann. 73.

[36]RCM, para. 8.3; see also para. 8.1.

61. Mr. President, with your permission, my colleague Professor Bastid Burdeau will now address the remedies sought by the Applicant and bring our first round submissions to a close. I thank you, Mr. President, Members of the Court, for your very kind attention.

The PRESIDENT: I thank Professor Philippe Sands for his presentation. I now invite Professor Geneviève Bastid Burdeau to make her presentation. I understand that the former Yugoslav Republic of Macedonia will conclude its first round of oral argument with this statement. You have the floor, Madam.

Mme BASTID-BURDEAU :

LES CONCLUSIONS PRÉSENTÉES PAR L'ETAT REQUÉRANT SONT FONDÉES ET RENTRENT DANS LA FONCTION JUDICIAIRE DE LA COUR

Introduction

1. Monsieur le président, Mesdames, Messieurs les juges, c'est un grand honneur d'apparaître pour la première fois devant la Cour et d'intervenir pour l'Etat requérant dans la présente affaire.

2. L'objet de ma plaidoirie sera d'exposer et de préciser les conclusions présentées par l'Etat requérant. Pour mesurer leur enjeu, il n'est pas inutile de rappeler que l'objectif essentiel de l'accord intérimaire du 13 septembre 1995 était de mettre un terme à des relations de méfiance et d'hostilité entre des Etats voisins en normalisant leurs relations. Il s'agissait également de permettre au requérant de s'insérer pleinement dans les relations internationales, comme tout Etat souverain est en droit d'y prétendre, notamment par sa participation aux organisations et institutions internationales.

3. La résolution 817 du Conseil de sécurité a constitué à cet égard une première ouverture en rendant possible l'admission du requérant dans les organisations du système des Nations Unies, et en ouvrant la voie à une vague de reconnaissances qui jusqu'alors n'avaient été que parcimonieusement accordées. Dans ce mouvement rendant enfin possible une véritable insertion de l'Etat demandeur dans la communauté internationale, l'article 11 de l'accord intérimaire devait ouvrir définitivement la voie en rendant désormais possible, sous la seule réserve énoncée dans ce

même article, l'admission et la pleine participation de celui-ci dans toute organisation internationale de son choix dans le respect des règles de cette organisation.

4. C'est dans ce contexte juridique qu'il convient de situer les conclusions de l'Etat requérant. Par sa première conclusion, le requérant prie la Cour : «de dire et juger que le défendeur, par ses organes et agents de l'Etat, a violé ses obligations résultant de l'article 11, paragraphe 1, de l'accord intérimaire»[37]. Par ailleurs, la seconde conclusion vise à obtenir de l'Etat défendeur qu'il revienne au respect de l'article 11, paragraphe 1, en s'abstenant désormais de toute objection aux demandes d'admission du requérant dans les organisations internationales dès lors que la condition énoncée par cette disposition serait respectée[38]. Enfin, le requérant se réservait le droit de modifier et d'étendre les termes de sa requête. Aucune demande nouvelle n'ayant été présentée à ce titre, la question est à ce jour sans objet. Le défendeur n'a plus insisté sur ce point dans sa duplique. Il n'y a donc pas lieu de s'y attarder.

5. L'Etat défendeur a contesté l'objet, la pertinence et l'utilité des deux demandes principales. La présente plaidoirie s'attachera à démontrer que ces conclusions sont appropriées à la solution du litige qui oppose les Parties et qu'elles rentrent dans la fonction judiciaire de la Cour.

6. Les arguments relatifs à la recevabilité de la requête et à sa pleine compatibilité avec la fonction judiciaire de la Cour ont été exposés ce matin par le professeur Klein. Il vous a démontré que la Cour est bien compétente pour connaître de la requête, et que les demandes sont recevables. Je ne reviendrai donc plus sur ces questions. Quant aux contestations par la Partie adverse des deux demandes formulées par l'Etat requérant sur le fond, je vous propose de les examiner maintenant au regard de chacune de ces conclusions.

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[37] AM, p. 123.

[38] AM, p. 123 : le requérant prie la Cour :

«d'ordonner au défendeur de prendre immédiatement toutes les mesures nécessaires pour se conformer à ses obligations résultant de l'article 11, paragraphe 1, de l'accord intérimaire et de mettre fin et de renoncer à son objection quelle qu'en soit la forme, directe ou indirecte, aux demandes d'admission comme membre de l'Organisation du Traité de l'Atlantique Nord et/ou de toutes autres organisations et institutions internationales, multilatérales et régionales dont l'Etat défendeur est membre, dès lors que la désignation de la demanderesse au sein de ces organisations et institutions est conforme à la désignation fournie par le paragraphe 2 de la résolution 817 (1993) du Conseil de sécurité».

A. La première conclusion au fond

7. Par sa première conclusion, l'Etat demandeur sollicite la Cour de dire et juger que l'Etat défendeur a violé son obligation résultant de l'article 11, paragraphe 1, de l'accord intérimaire[39].

8. Comme cela vous a été amplement démontré, la portée de cette disposition a été considérable pour le requérant depuis 1995 : elle a mis fin à une situation de blocage et d'isolement sur la scène internationale et a rétabli une situation normale pour un Etat souverain : celle dans laquelle celui-ci peut légitimement espérer devenir membre d'organisations et d'institutions internationales dès lors qu'il en remplit les conditions d'admission. De plus, la pratique constante suivie par les deux Etats dans l'application de cette disposition depuis 1995 jusqu'au 3 avril 2008, soit pendant près de treize ans, a permis l'instauration, dans les relations entre les Parties, d'une sécurité juridique qui avait fait défaut jusque-là. Outre la violation flagrante de ses droits, c'est aussi l'atteinte portée à cette situation de prévisibilité et le retour à l'incertitude qui ont porté préjudice au requérant.

9. En demandant à la Cour de constater la violation par l'Etat défendeur de son obligation résultant de l'article 11, paragraphe 1, le requérant entend obtenir confirmation de l'interprétation qu'il défend de cette disposition et faire établir la contrariété du comportement du défendeur avec les termes de celle-ci. Par le biais d'une telle déclaration de responsabilité, il vise également à obtenir réparation sous la forme d'une mesure de satisfaction. Il n'y a là rien de bien extravagant. La satisfaction est un mode habituel de réparation. Comme l'énonce l'article 37 des articles de la Commission du droit international sur la responsabilité de l'Etat pour fait internationalement illicite : «L'Etat responsable d'un fait internationalement illicite est tenu de donner satisfaction pour le préjudice causé par ce fait dans la mesure où il ne peut pas être réparé par la restitution ou l'indemnisation.» Ce texte prévoit également que «[l]a satisfaction peut consister en une reconnaissance de la violation». C'est ce que sollicite l'Etat requérant en l'espèce, et l'on voit bien mal pourquoi la Cour ne serait pas en position de faire droit à une telle demande.

10. L'Etat défendeur avance par ailleurs un autre type d'argument pour s'opposer à cette demande. Il affirme que si la Cour était amenée à statuer sur la seule demande de constatation de violation présentée par le requérant, sans prendre en compte en même temps le comportement de ce

[39] AM, p. 116, par. 6.12 et suiv.

dernier, sa décision serait, si l'on comprend bien, incomplète et «injuste»[40]. L'argument est surprenant. Si l'Etat défendeur entendait que la Cour se prononce sur la responsabilité du requérant pour d'éventuelles violations de l'accord intérimaire, il lui revenait de mettre cette responsabilité en cause de façon formelle devant la Cour. Il pouvait le faire de deux manières : en introduisant une requête sur la base de l'article 21 de l'accord intérimaire, ou en formulant une ou plusieurs demandes reconventionnelles. Il n'en a rien fait, sachant fort bien que de telles actions étaient vouées à l'échec. L'Etat défendeur a, certes, tenté d'excuser la violation de l'article 11, paragraphe 1, de l'accord dont il s'est rendu responsable, en invoquant de prétendues violations de l'accord par le requérant. Il s'est fondé à cette fin, comme on vient de le voir, à la fois sur le principe de l'*exceptio non adimpleti contractus* et sur la théorie des contre-mesures. Mon collègue le professeur Philippe Sands vous a toutefois amplement démontré il y a quelques instants que les conditions d'invocation de ces deux institutions ne sont nullement remplies en l'espèce. Dès lors, on ne voit pas en quoi la fonction juridictionnelle de la Cour serait affectée par une déclaration de sa part sur l'objet principal de la requête, à savoir l'existence d'une violation par le défendeur de son obligation résultant de l'article 11, paragraphe 1.

11. Monsieur le président, Mesdames et Messieurs les juges, la déclaration de responsabilité que sollicite l'Etat requérant est loin d'être purement symbolique. Elle est au contraire extrêmement importante pour rétablir la situation d'équilibre qu'avait instaurée l'accord de 1995. En constatant la violation de l'article 11, paragraphe 1, vous préciserez l'interprétation de cette dernière disposition qu'il convient de retenir et vous mettrez par là même un terme à la période d'incertitude et d'insécurité juridique ouverte par la décision du défendeur d'empêcher l'admission du requérant au sein de l'OTAN. Par là même, la Cour remplira sa fonction judiciaire qui est, aux termes de l'article 36 de son Statut, d'exercer sa juridiction «sur tous les différends d'ordre juridique ayant pour objet : *a)* l'interprétation d'un traité…, *b)* la réalité d'un fait qui, s'il était établi, constituerait la violation d'un engagement international».

12. Quant à la mesure de satisfaction que requiert l'Etat demandeur, elle constituera une forme de réparation pour le préjudice que celui-ci a subi du fait de l'atteinte à sa dignité en tant

[40] RCM, p. 197, par. 9.6 et AR, p. 185, par. 9.6.

qu'Etat souverain et de la discrimination publique dont il a été l'objet par rapport aux autres Etats candidats à l'admission dans l'OTAN en même temps que lui. Ainsi, la constatation demandée à la Cour dans la première conclusion aura trois effets juridiques importants : l'interprétation d'une disposition clé de l'accord intérimaire ; l'établissement de la responsabilité de l'Etat défendeur pour violation de cette disposition ; et le prononcé de la mesure de réparation qui en découle. J'en viens, Monsieur le président, à la deuxième conclusion au fond.

B. La seconde conclusion au fond

13. Dès son mémoire[41], l'Etat requérant a demandé à la Cour non seulement de se prononcer sur le passé, mais également de prendre des mesures concernant l'avenir. En effet, dans la seconde conclusion, il est demandé à la Cour de juger que l'Etat défendeur doit revenir au respect de l'article 11, paragraphe 1, en s'abstenant désormais de toute objection aux demandes d'admission du requérant dans les organisations internationales dont le défendeur est membre dès lors que les termes de cette disposition sont respectés.

14. La décision demandée à la Cour est donc double et répond à la dualité de nature du comportement de l'Etat défendeur. D'un premier point de vue, en effet, on peut considérer que la décision de l'Etat défendeur d'objecter à l'admission du demandeur à l'OTAN lors du sommet d'avril 2008 est une décision qui constitue une violation ponctuelle d'une obligation internationale. En conséquence, il est demandé à la Cour d'ordonner au défendeur la non-répétition de son acte, que ce soit à l'occasion d'un futur sommet de l'OTAN où l'admission de l'Etat requérant serait à nouveau débattue, ou à l'occasion de toute autre procédure d'admission dans n'importe quelle organisation ou institution internationale dont le défendeur est membre. Il est donc demandé à la Cour qu'elle ordonne à l'Etat défendeur de prendre immédiatement toutes les mesures nécessaires pour se conformer à ses obligations découlant de l'article 11, paragraphe 1, de l'accord intérimaire.

15. Mais le comportement de l'Etat défendeur peut être aussi être analysé comme une violation continue de l'obligation résultant de cette disposition. En effet, le requérant demeure candidat à l'admission comme membre de l'OTAN et il a été établi qu'aux yeux de l'ensemble des Etats membres, il remplit toutes les conditions de participation prévues par la charte constitutive de

[41] AM, par. 6.18 et suiv.

cette organisation. Seul le maintien d'une objection persistante de la part de l'Etat défendeur, dont ce dernier ne fait pas mystère, y compris dans les déclarations récentes de ses autorités officielles[42], dissuade le requérant de réitérer sa demande d'admission. En persistant de manière constante dans son attitude de blocage, le défendeur se rend responsable d'une violation continue de son obligation résultant de l'article 11, paragraphe 1, de l'accord intérimaire.

16. Face à cette dualité de violations, ponctuelle et continue, l'Etat requérant demande respectueusement à la Cour à la fois d'ordonner la non-répétition de la violation et sa cessation. La demande portant sur la non-répétition du fait illicite concerne le comportement qui devrait être observé par le défendeur à l'occasion de décisions sur des candidatures présentées par le requérant dans certaines organisations internationales, y compris l'Union européenne, ou lors d'un nouvel examen de sa candidature organisé dans le cadre d'un sommet de l'OTAN. A cet égard, l'argument développé par l'Etat défendeur dans son mémoire en duplique[43], selon lequel l'injonction de non-répétition prononcée par la Cour interférerait avec l'examen des conditions d'admission prévues par les chartes constitutives des organisations internationales est sans aucun fondement. Il s'agit là de deux questions entièrement distinctes. Il est clair qu'en posant sa candidature à l'admission comme membre d'une organisation ou d'une institution internationale, le requérant est bien conscient qu'il doit, comme n'importe quel Etat candidat, satisfaire aux conditions posées par l'acte constitutif de l'organisation concernée. Il n'a jamais prétendu que l'article 11 de l'accord intérimaire pouvait, à cet égard, faire office de passe-droit. En demandant à la Cour d'ordonner la non-répétition, l'Etat requérant entend simplement obtenir le retour à la situation qui prévalait en ce domaine dans les relations entre les Parties avant 2008.

17. S'agissant maintenant de la demande de cessation de la violation continue, il est clair que des circonstances spéciales existent en l'espèce, qui justifient cette mention expresse. Certes, le défendeur indique dans sa duplique que «[l]'obligation d'observer l'accord intérimaire est évidente, et la Grèce ne la conteste pas». Cette affirmation ne permet toutefois en aucune façon de garantir que l'Etat défendeur se conformera à l'avenir au prescrit de l'article 11, paragraphe 1, compte tenu

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[42] AR, vol. II, annexe 164.

[43] RR, par. 9.12.

de son comportement depuis avril 2008[44]. La Cour a souligné, dans l'affaire du *Différend relatif à des droits de navigation* en 2009[45], que «du seul fait que la Cour constate l'existence d'une violation qui présente un caractère continu, il découle de plein droit l'obligation de la faire cesser, à la charge de l'Etat concerné». Néanmoins la Cour a admis également que, dans des circonstances spéciales, il pourrait être opportun que l'arrêt mentionne expressément l'obligation de faire cesser la violation.

18. Si de telles circonstances ne paraissaient pas réunies dans l'affaire précitée, s'agissant de droits de navigation et de pêche qui n'avaient pas dans le passé donné lieu à un différend entre les parties, la situation est tout à fait différente dans la présente affaire. Ici, par contre, l'historique des relations entre les Parties, depuis l'accession du requérant à la qualité d'Etat en 1991, montre les obstacles multiples qui ont été élevés par le défendeur à l'exercice normal par l'Etat requérant d'un certain nombre de ses droits fondamentaux en tant qu'Etat souverain. Il fait apparaître également les efforts considérables qui ont été accomplis pour permettre l'exercice normal de ces droits. Telles sont les circonstances spéciales qui appellent de la part de la Cour une mention expresse dans son arrêt à intervenir de l'obligation pour le défendeur de faire cesser la violation de l'article 11, paragraphe 1. Compte tenu de toutes les difficultés rencontrées avant l'accord de 1995 par l'Etat requérant et qui ont ressurgi en force depuis trois ans du fait de la violation par l'Etat défendeur de son obligation énoncée dans l'article 11, paragraphe 1, le rappel par la Cour de l'obligation découlant pour ce dernier de cette disposition, non seulement n'est pas superflu, mais indispensable pour clore ce différend.

19. Il est inexact de prétendre, comme le fait l'Etat défendeur, qu'il soit demandé pour autant à la Cour d'ordonner «une mesure dépendant entièrement de l'OTAN»[46]. La mise en œuvre de cette obligation de cessation appartient naturellement au défendeur qui peut informer l'Organisation du Traité de l'Atlantique Nord et ses membres de la levée de son objection. Il ne s'agit en aucune façon de préjuger de la décision qui pourrait être prise par cette organisation.

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[44] Voir par. 9.15, dernière phrase.

[45] Affaire du *Différend relatif à des droits de navigation et des droits connexes (Costa Rica c. Nicaragua)*, arrêt du 13 juillet 2009, par. 148.

[46] RR, par. 9.15.

L'obligation contenue dans l'article 11, paragraphe 1, de l'accord intérimaire est certes tout à fait inhabituelle en droit international. Il n'est pas courant et peut-être même sans précédent, qu'un Etat accepte de limiter son pouvoir discrétionnaire de se prononcer sur l'admission d'un nouvel Etat dans une organisation internationale à laquelle il appartient. Mais, comme cela vous a été démontré ce matin par le professeur Sean Murphy, il s'agit là d'un engagement conventionnel entièrement distinct et détachable des règles propres de l'organisation internationale en question, et il doit, comme tout engagement international, être respecté par son titulaire.

20. Dans le même ordre d'idée, on observera qu'il est déjà arrivé dans le contentieux international qu'une autorité chargée de régler un différend ordonne à un Etat de ne pas s'opposer à une certaine prise de position dans une organisation internationale dont il est membre. C'est ainsi que dans la médiation dans l'affaire du *Rainbow Warrior* en 1986, le Secrétaire général des Nations Unies a décidé, à la demande de la Nouvelle-Zélande, que la France ne devait pas s'opposer à une décision de la Communauté européenne concernant les importations de beurre néo-zélandais au Royaume-Uni[47]. Aucune interférence avec les règles de l'organisation internationale n'a été avancée à ce sujet.

21. L'Etat demandeur prie donc respectueusement la Cour de lui adjuger les deux conclusions qu'il a présentées. Ces demandes sont l'une et l'autre parfaitement justifiées, compte tenu, d'une part, de l'objection formée par l'Etat défendeur à l'occasion du sommet de l'OTAN d'avril 2008, en violation de son obligation résultant de l'article 11, paragraphe 1, de l'accord intérimaire. Elles sont pareillement fondées, d'autre part, au regard de l'intention manifestée publiquement par les autorités de l'Etat défendeur de ne pas modifier sa position de blocage tant que la divergence sur le nom de l'Etat requérant n'aura pas été résolue. Ces demandes n'ont rien que de très classique et elles rentrent parfaitement dans la fonction judiciaire telle qu'elle a été définie et exercée à de nombreuses reprises par la Cour.

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[47] *Affaire concernant les problèmes nés entre la France et la Nouvelle-Zélande de l'incident du Rainbow Warrior*, règlement du 6 juillet 1986 opéré par le Secrétaire général de l'ONU, *RSA*, vol. XIX, p. 199-221, spéc. p. 203 et 214.

22. Cette présentation concluait le premier tour de plaidoiries au nom de l'Etat requérant. Je vous remercie, Monsieur le président, Mesdames et Messieurs les juges, pour votre aimable attention.

The PRESIDENT: I thank Professor Geneviève Bastid-Burdeau for her statement of conclusions presented by the Applicant State. Now, this concludes the first round of oral argument of the former Yugoslav Republic of Macedonia. Greece will begin its first round of oral argument on Thursday 24 March from 3 p.m. to 6 p.m. The sitting is now closed.

The Court rose at 4.05 p.m.

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