INTERNATIONAL COURT OF JUSTICE

CASE CONCERNING
THE APPLICATION OF ARTICLE 11(1)
OF THE INTERIM ACCORD OF 13 SEPTEMBER 1995

(THE FORMER YUGOSLAV REPUBLIC OF MACEDONIA v. GREECE)

COUNTER-MEMORIAL

VOLUME I

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19 JANUARY 2010

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TABLE OF ABBREVIATIONS

Additional Protocol to PfP SOFA	Additional Protocol to the Agreement among the States Parties to the North Atlantic Treaty and the other States Participating in the Partnership for Peace regarding the Status of their Forces
FYROM	Former Yugoslav Republic of Macedonia
CERN	European Organisation for Nuclear Research
ISAF	International Security Assistance Force
KFOR	Kosovo Force
MAP	Membership Action Plan
NAC	North Atlantic Council
NATO	North Atlantic Treaty Organisation
PfP	Partnership for Peace
PfP SOFA	Agreement among the States Parties to the North Atlantic Treaty and the other States participating in the Partnership for Peace regarding the status of their forces

SC res	Security Council resolution
WIPO	International Bureau of the World Intellectual Property Organisation

CHAPTER 1: INTRODUCTION

I. THE AIM OF THE FYROM'S APPLICATION

1.1. This Counter-Memorial is filed in accordance with the Court's order of 20 January 2009. It responds to the Applicant's Memorial dated 20 July 2009.

1.2. It is the position of the former Yugoslav Republic of Macedonia (hereinafter the "FYROM"), as Applicant in the present proceedings, that Greece engaged in certain conduct at the Bucharest Summit of the North Atlantic Treaty Organization (hereinafter "NATO") in April 2008, and that this conduct of Greece "prevented the Applicant from receiving an invitation to proceed with membership of NATO."[1] As that statement suggests, the FYROM's purpose in bringing the present proceedings is nothing less than "to pursue membership of NATO and other international organizations."[2] Having failed to resolve by negotiations the "difference" referred to in Article 5 of the Interim Accord, and having failed to persuade NATO Member States that it should nonetheless be invited to accede to NATO, the FYROM chooses now to pursue its membership aspirations before the Court. On the explicit basis that the FYROM "meets all the requirements for NATO membership,"[3] it calls on the Court to decide that it was only the conduct of Greece that caused NATO not to invite the FYROM to accede. Moreover in the second paragraph of its submissions, the FYROM calls on the Court to make an order that "explicitly addresses membership of NATO and other international organizations,"[4] notably the European Union. The Court is apparently to usher the fully-qualified FYROM into the organisations it seeks to join, implicitly deciding on its eligibility in place of the Member States whose collective function this is.

1.3. This request would be remarkable if considered only in terms of the general legal relation between the Court and international organisations, a relation the Court has so far been exceptionally careful to respect.[5] It implies the Court's making factual and legal findings as to the internal affairs of international organisations to an unprecedented extent. But it is equally remarkable when it is considered in the light of the express provisions of the Interim Accord, notably Article 22, a provision the FYROM virtually ignores. Article 22 expressly preserves from the operation of the other provisions of the Interim Accord, including Article 11(1), "the rights and duties resulting from bilateral and multilateral agreements already in force that the Parties have concluded with other States or international organizations." As will be demonstrated, at Bucharest Greece exercised its rights and

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1 Memorial, para 1.1.

2 *Ibid*.

3 *Ibid*., para 5.63.

4 *Ibid*., para 1.17, and for the terms of the order sought, see *ibid*., p. 123.

5 See e.g. *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom), Provisional Measures, Order of 14 April 1992*, *I.C.J. Reports 1992* p. 3 at p. 15 (paras. 39-42).

fulfilled its duties as a Member of NATO. Its conduct in doing so, having regard to Article 22, cannot possibly constitute a breach of the Interim Accord. This alone provides a sufficient answer to the present Application – both in terms of the jurisdiction of the Court and the merits of the claim of breach of Article 11(1) of the Interim Accord. It does so, quite apart from other issues of the interpretation and application of the Accord, elaborated in this Counter-Memorial.

II. THE DISPUTE BETWEEN THE PARTIES

1.4. At the core of the dispute between the Parties is the "name issue." It is fundamental to an understanding of the case before the Court that that issue is expressly *excluded* from its jurisdiction by Article 21(2) of the Interim Accord. In pursuing its membership aspirations before the Court, the FYROM asks the Court to look behind the decision of NATO taken at Bucharest. By that decision, NATO determined that the membership process for the FYROM should continue, but that an invitation to accede to the North Atlantic Treaty could not be extended to the FYROM immediately. The decision was based on NATO's determination, reached through its own internal processes, that the "name issue" had as at April 2008 not yet been resolved; and the prior determination that the resolution of that issue was a necessary condition for the accession of the FYROM to the Alliance. The FYROM's Application entwines the "name issue," which the Interim Accord expressly excludes from jurisdiction, with the membership decisions of NATO, which, as decisions of a closed, non-universal alliance, are reached under the provisions of a multilateral instrument and are themselves outside the jurisdiction of the Court.

1.5. The FYROM not only asks the Court to adjudicate upon the decision of NATO taken at Bucharest. It also asks the Court to adjudicate upon the conduct of a NATO member State at that meeting. The Court was clear in the 1948 Advisory Opinion that it could not examine the internal processes of a member State which lead to a decision on a question of membership.[6] That case concerned admission of States to the United Nations under the terms of UN Charter Article 4. The criteria for admission there are relatively open—i.e., the substantive conditions are not onerous in comparison to admission criteria under certain other instruments, and the Security Council and General Assembly in practice have applied the criteria so as to achieve maximum participation of States in the Organization. The North Atlantic Treaty of 4 April 1949, under Article 10, requires considerable commitments on the part of acceding States, and NATO, in applying Article 10, has added further substantive requirements that a State must meet before NATO extends an invitation to accede. The principle of deference to internal processes which the Court expressed in 1948 applies at least as strongly to the criteria under a closed, non-universal alliance such as NATO.

1.6. Like other organisations, NATO has its own procedure for determining whether to enlarge its membership. Under the NATO procedure for enlargement, a State aspiring to join

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[6] *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter), Advisory Opinion, 1948, I.C.J. Reports 1947-1948* pp. 57, 60.

the Alliance does not apply; it is invited; and invitation is not a simple, one-step process, but, rather, an on-going series of evaluations and negotiation. The Member States of NATO conduct this process on the basis of consensus: there is no parliamentary vote and no mechanism of objection or veto in the Alliance. The invitation procedure is consistent with the character of NATO as a closed, non-universal alliance, and it has been described and applied by the competent authorities of NATO.

1.7. In its Application to the Court, the FYROM says that it "met its obligations under the Interim Accord not to seek to be designated as a member of NATO with any designation other than 'the former Yugoslav Republic of Macedonia.'"[7] But this rewrites Article 11(1), which does not use the concept of formal "designation" as a member: instead it asks whether the FYROM "is to be referred to" in NATO for any purpose other than as the FYROM. This is the condition at the heart of the Safeguard Clause, deliberately drafted to protect Greece's interests. Greece's chief protected interest is in achieving a mutually agreed settlement of the "name issue." The Interim Accord protects that interest by providing that the obligation in Article 11(1), "not to object" to membership applications of the FYROM, does not operate if the FYROM "is to be referred to" in any organisation other than by the agreed name.

1.8. The FYROM argues that, outside the narrow circumstances of making formal application to international organisations, it is free to use whatever designation it wishes in its international relations. Yet such an argument is hardly consistent with FYROM's statement that its application…

> "has the sole purpose of protecting the Interim Accord from further violations, in light of the fact that this is a key agreement which is of essential importance for the normal relations between Macedonia [*sic*] and Greece. Macedonia is strongly convinced that the respect for and the consistent application of the Interim Accord is beneficial for both Parties…"[8]

The Interim Accord, incorporating and extending the requirement of United Nations Security Council resolution 817 (1993) (hereinafter "SC res 817 (1993)"), establishes a provisional name, mandatory for the FYROM "for all purposes" in international organisations. The FYROM has acted repeatedly in disregard of the Interim Accord. Time and again, when admitted to international organisations, the FYROM has reverted to its "constitutional" name. It seeks now, through the intervention of the Court, to gain admission to yet another organisation, and thereby to entrench its own, unilaterally chosen name. If permitted, this would have the result of overriding the agreed process of settlement and further undermining the Interim Accord.

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[7] Application of 13 November 2008, p 4 para 6.

[8] Aide Memoire annexed to Letter of Slobodan Tasovski, Permanent Representative of the FYROM to the United Nations, addressed to the Secretary-General, dated 17 November 2008: Annex 158.

III. STRUCTURE OF THIS COUNTER-MEMORIAL

1.9. Greece's Counter-Memorial proceeds as follows.

1.10. Chapters 2 – 5 present essential materials for an understanding of the dispute. **Chapter 2** briefly outlines the history of the dispute over the name, and shows its links to the "Macedonian question" as it developed out of the dissolution of Ottoman rule in the region. Against this background, **Chapter 3** describes the Interim Accord of 1995, adopted by the parties as a provisional "holding operation" pending an agreed settlement of the dispute. **Chapter 4** outlines the various breaches of the Interim Accord by the FYROM and the exchanges between the parties in that regard. **Chapter 5** addresses the decision of NATO reached in April 2008 at Bucharest in light of the particular characteristics of that organisation as a closed military alliance.

1.11. Chapters 6 – 8 present Greece's legal arguments. **Chapter 6** shows that the present case, in light of Article 5(1), as an attempt to adjudicate upon the name issue, falls outside the Court's jurisdiction; and, in any event, in light of Article 22, is excluded. It also deals with the *Monetary Gold* problem associated with the effective impleading of NATO and its Member States. In the event that the Court nevertheless determines that it has jurisdiction in the case, **Chapter 7** considers Greece's conduct at the Bucharest NATO Summit and shows that this was consistent with Greece's obligations under Article 11(1) of the Interim Accord, read in the light of Article 22. **Chapter 8** shows that, under the principle of the *exceptio non adimpleti contractus,* the FYROM's breaches of the Interim Accord are conditions which would have permitted non-performance (if non-performance there was) of corresponding obligations.

Chapter 9 addresses in further detail the FYROM's far-reaching requests for remedies.

CHAPTER 2: THE "NAME ISSUE"

I. INTRODUCTION

2.1. Since 1991, when the FYROM emerged as an independent State in the Balkans, the new country's appropriation of the name the "Republic of Macedonia" has raised an issue of security and stability in the region. Below and in Section III, Greece will review its numerous attempts to resolve the issue with the FYROM. But, despite Greece's attempts and significant concessions, the critical issue of the FYROM's name remains unresolved.

2.2. The Court is not the forum for a debate over the name issue *per se*. This is made clear by Article 5 of the Interim Accord, read with Article 21(2). The FYROM's application nevertheless requires an understanding of the importance of the dispute to regional stability, and – of direct relevance to this case – an understanding of NATO's position at the Bucharest Summit that the FYROM cannot be invited to accede to its ranks before the dispute has been resolved.

II. HISTORICAL BACKGROUND TO THE NAME ISSUE

2.3. The area known as "historical Macedonia" refers to the Ancient Kingdom of Macedonia at the time of King Philip (4th century BC), father of Alexander the Great. Almost 90% of that territory is located today within the region of Greek Macedonia. "Geographical Macedonia" in modern times (primarily since the latter part of the 19th century), refers to a wider geographical region in the Southern Balkans which lies today inside Greece, the FYROM, Bulgaria and Albania. The late 20th century breakdown of the Socialist Federal Republic of Yugoslavia and the emergence of the FYROM as an independent State triggered renewed concerns over the constitutional name and, more particularly, over the political purposes for which the Government of the FYROM has employed it.

A. A Chronology of Events Surrounding the Macedonian Question

2.4. The region in which geographical Macedonia is found was under the rule of the Ottoman Empire for some five hundred years. Ottoman control over the Macedonian region was completed with the conquest of the main Byzantine city of Thessaloniki in 1430. Ottoman rule in the Balkans, including the regions of "geographical Macedonia", lasted until the liberation of Thessaloniki in October 1912. Earlier, by a series of uprisings and wars in the 19th century, a number of independent successor States emerged, first with Greece in the 1820s, followed by Serbia, Romania and Bulgaria. The antagonism among the new States over the region of geographical Macedonia gave rise to the so-called

"Macedonian Question",[9] which emerged in the last part of the 19th century following the 1878 Congress of Berlin and the rise of hostilities between Bulgarians, Greeks and Serbs for succession to the Ottomans in their European possessions. Despite the numerous uprisings within geographical Macedonia, the Ottomans retained control over the region until the Balkan Wars of 1912 and 1913.

2.5. In 1912, the Kingdom of Greece, the Kingdom of Bulgaria, the Kingdom of Serbia and the Kingdom of Montenegro joined forces to defeat the Ottoman army in geographical Macedonia.[10] Following the two Balkan Wars of 1912-1913 and the Peace Treaty of Bucharest, signed in August 1913, the Ottoman territories in the geographical Macedonia were apportioned between Greece, Serbia and Bulgaria. Slightly more than half the territory of Macedonia went to Greece, slightly more than one-third to Serbia, and the remainder was divided between Bulgaria and Albania.[11]

2.6. The Serbian part of Macedonia was incorporated into the new Kingdom of the Serbs, Croats, and Slovenes. In 1929 that State changed its name to the Kingdom of Yugoslavia,[12] and the territory that currently constitutes the FYROM was included with South Serbia in the Banovina (province) of Vardar.[13] The Kingdom of Yugoslavia ceased to exist in 1941, a victim of the Second World War; the territory of the present-day FYROM fell under the control of Bulgaria and Albania under Italian control.

2.7. The Macedonian territories which went to Greece correspond to a great extent to the territory of "historical Macedonia". As a result, such territories formed a separate administrative region in Greece designated by the name Macedonia.[14] This region was the only part of "geographical Macedonia" that bore the name "Macedonia" until the Second World War.[15]

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[9] See e.g. N. Dwight Harris, "The Macedonian Question and the Balkan War" (1913) 7 *American Political Science Review* pp. 197-216.

[10] See, e.g., Ernst Christian Helmreich, *The Diplomacy of the Balkan Wars 1912-1913,* Cambridge, Harvard University Press, 1938 pp. 76-8 .

[11] The size of the Macedonian lands in four neighbouring countries is estimated today at approximately 66600 sq. klm, shared by Greece (33850 sq.k.), FYROM (25713 sq. k), Bulgaria (6450sq.k.) and the remaining area in Albania.

[12] Lenard J. Cohen, *Broken Bonds. The Disintegration of Yugoslavia,* Boulder, Westview Press, 1993 p 16.

[13] See Cohen, 18 (map 1.1), p.149; Željan Šuster, *Historical Dictionary of the Federal Republic of Yugoslavia* London, Scarecrow Press, 1999, p.183.

[14] See article 1 of the Law No 524/1914 "on Administrative Division and Administration of the New Countries", published *in Government Gazette of the Kingdom of Greece,* No 404 A of 31 December 1914: Annex 144.

[15] See *infra* para 2.10.

2.8. The 1940s were a decade of strife in Greece.[16] Italy invaded Greece on 28 October 1940, followed by Germany on 6 April 1941. The occupation of Greece was divided among three powers – Italy, Germany and Bulgaria – and this lasted until October 1944.

2.9. The liberation of Greece in 1944 and the withdrawal of the occupying forces afforded Greece only a brief respite from conflict. With the start of the Civil War in 1946, Greek Macedonia was once again threatened – this time by the irredentist ambitions of Yugoslavia under Josef Broz Tito.[17]

2.10. In 1946, the Serbian portion of Macedonia was renamed the People's Republic of Macedonia as a component of the newly proclaimed Federal People's Republic of Yugoslavia.[18] Yugoslavia's ambitions at that time included the incorporation of the Macedonian territories of Greece and Bulgaria into a Yugoslav or South Slav Federation,[19] to which end Yugoslavia undertook both diplomatic and military efforts.[20] Yugoslavia actively supported the armed insurgency in Greece and urged Greek Macedonians to join its ranks.[21] Yugoslav

[16] John S. Koliopoulos, *Plundered Loyalties. Axis Occupation and Civil Strife in Greek West Macedonia, 1941-1949,* London: Hurst & Company, 1999, 158*ff.*

[17] U.S. and UK official observers shared Greece's concern in this regard: Evangelos Kofos, "The Impact of the Macedonian Question on Civil Conflict in Greece, 1943-1949" in John O. Iatrides & Linda Wrigley eds., *Greece at the Crossroads: The Civil War and its Legacy* ,University Park, Pennsylvania, Pennsylvania State University Press, 1995 p.274, citing memoranda of the U.S. State and War Departments (ibid, pp.305-6 n85), and British Foreign Office communications (ibid, p.311 n98). Yugoslavia and Bulgaria conferred with one another about the possibility of annexing and dividing parts of Greek Macedonia: Kofos, 307*ff.*; Edgar O'Ballance, *The Greek Civil War 1944-1949* ,London: Faber and Faber, 1966 p.195; and Turkey considered that Greek Macedonia might be separated to form a new State: Kofos, p.306 n. 87. See also David H. Close, *The origins of the Greek civil war* ,London, Longman, 1995pp. 110-1.

[18] Constitution of Yugoslavia, adopted 30 Jan 1946, Art 2 para 1: reprinted in English translation in Amos J. Peaslee, ed., *Constitutions of Nations* vol III 2nd edn, The Hague: Martinus Nijhoff, 1956, p.757. See also Aleksandar Pavkovic, *The Fragmentation of Yugoslavia: Nationalism in a Multinational State* ,Basingstoke: MacMillan, 1997, p. 46.

[19] Pavkovic, *ibid.,* p. 40.

[20] See Memorandum transmitted to the Security Council by Greece, containing texts of World War II and immediate post-war Yugoslav statements: A/47/877-S/25158, 25 January 1993: Annex 146

[21] Ivo Banac, 'The Tito-Stalin Split and the Greek Civil War' in John O. Iatrides & Linda Wrigley, eds, *Greece at the Crossroads: The Civil War and Its Legacy,* University Park, Pennsylvania, Pennsylvania State University Press, 1995,p.258, p.266. See also Charles R. Shrader, *The Withered Vine. Logistics and the Communist Insurgency in Greece, 1945-1949*,Westport, Connecticut, Praeger, 1999, pp.175-86; Amikam Nachmani, 'Civil War and Foreign Intervention in Greece, 1946-49' (1990) 25 *Journal of Contemporary History* 489, 500-01.

support for the insurgency gave rise to border incidents with Greece, leading to a situation of which the Security Council took note.[22]

2.11. At the Paris Peace Conference of 1946, Yugoslavia, the Soviet Union and Bulgaria advocated the annexation of certain provinces of northern Greece. A year later, at secret meetings in Bled and Euxinograd, Yugoslav and Bulgarian leaders agreed on the foundations of a future federation in the Balkans; it was expected that an outcome to the Civil War favourable to the insurgents would open the way for Greek Macedonia's incorporation in a united Macedonian entity within the planned federation under Yugoslav auspices. The Stalin-Tito feud in 1948 and the victory of the Greek government over the insurgency in 1949 frustrated these plans.[23]

2.12. In 1963 the People's Republic of Macedonia was renamed the "Socialist Republic of Macedonia" and the Federal People's Republic of Yugoslavia was renamed the "Socialist Federal Republic of Yugoslavia". The renaming gave rise to renewed Greek concerns over possible territorial claims by Yugoslavia to the Greek region of Macedonia. The Greek government viewed these measures as the continuation of unfriendly acts. Yugoslavia, as a Non-Aligned State in the Cold War, did not however wish to fall into open conflict with Greece, and the Yugoslav federal government in Belgrade restrained expansionist aspirations in Skopje.

2.13. In the years preceding the collapse of the Yugoslav Federation, a growing Slav Macedonian nationalism began to re-emerge in the Socialist Republic of Macedonia, calling for an independent and "united" Macedonia.

2.14. In September 1991, the former federative unit of the Socialist Republic of Macedonia assumed the name "Republika Makedonija". Immediately following the FYROM's independence and over the years since, Greece has contested the FYROM's attempt to appropriate the Macedonian name and has drawn attention to the irredentist ambitions which the use of the name implies.

2.15. The European Communities/European Union struggled to find a formula responsive to concerns over peace and stability in the region. One of a series of attempts was contained in the reports of the Arbitration Commission of the Conference on Peace in Yugoslavia (hereinafter "Badinter Commission"). Opinion Number 6 of 11 January 1992 stated, *inter alia,* that the FYROM had "renounced all territorial claims of any kind in an unambiguous statement binding

[22] The Security Council by SC res 15, 19 Dec 1946, under Article 34 of the UN Charter established a Commission of Investigation Concerning Greek Frontier Incidents. The Commission presented its Report (in three volumes) in 1947: Report to the Security Council, S/360, 27 May 1947.

[23] Adam B. Ulam, "The Background of the Soviet-Yugoslav Dispute," (1951) 13 *Review of Politics* 39, 55-63.

in international law" and that the constitutional name of the State therefore could not "imply any territorial claim against another State."[24] The difficulty with this particular attempt at settlement was that it was predicated on an assumption that most other relevant parties did not share. The member States of the European Community did not concur that the FYROM could be recognised under its constitutional name.[25] The Security Council, in SC res 817 (1993), understood that settlement of the difference concerning the name is necessary "in the interest of the maintenance of peaceful and good-neighbourly relations in the region." The Secretary-General said that normalisation of relations between Greece and the FYROM was relevant "to peace and stability in the region."[26] The serious difficulties encountered in other parts of the former Socialist Federal Republic of Yugoslavia further drew attention to the delicacy of the situation and the potential of irredentist claims, however stated or implied, to destabilise international relations.

B. The Name as a Problem of Regional Security

2.16. The transformation of the federative Socialist Republic of Macedonia into an independent State with the constitutional name "Republika Makedonija" introduced new elements into the historic Macedonian controversy.

2.17. Greece's primary concern with the FYROM's constitutional name is that, while it formally refers to the new, independent State lying within the borders of the former Yugoslav Republic, the term "Macedonia" is also a reference to a broader geographical region in Southeast Europe – a region that includes substantial territory and population within Greece and other States.

2.18. The use of one and the same name to denote both a broad geographical region in the Balkans and a newly independent State that occupies little over a third of that region inevitably creates confusion and even a sense of historical "injustice". It is the Greek position that the FYROM's constitutional name involves a form of irredentist propaganda threatening to Greece and other States in the region. Because the above constitutional name conveys the impression of a "lost" Macedonian homeland that rightfully belongs to all "Macedonians," its appropriation by the FYROM's authorities and their long-term campaign to entrench its use by others amounts to incitement in a region in which questions of borders, languages and the identity of peoples have repeatedly given rise to strife. The FYROM's actions confirm Greece's position, as will be shown in more detail in Chapter 4.

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[24] Opinion No 6 ("On the Recognition of the Socialist Republic of Macedonia by the European Community and its Member States") (1992) 31 ILM 1507, 1511.
[25] See *infra* paras 2.22-2.24.
[26] *Report of the Secretary-General pursuant to SC res 845 (1993),* 22 Sept 1993, para 8: S/26483.

2.19. The use of the constitutional name "Macedonia" is part and parcel of an overall programme intended to spur claims to "rectify" the settled borders of the region. As a further part of its programme, the FYROM has attempted to appropriate symbols of central importance to Greece and to Greek national identity. A salient example is the Sun of Vergina. In 1977, Greek archaeologists discovered in Vergina the burial complex of the royal dynasty of Philip II the Macedon. The principal burial chamber contained, *inter alia,* a larnax bearing a sixteen-pointed gold star or sun.[27] The recurrence of the symbol on other objects unearthed at the site suggests its particular connection to the royal dynasty. Vergina is a town in the Greek prefecture of Imathia. The significance of the symbol and of the Vergina site was well-recognised in Greece before authorities in the FYROM attempted to appropriate it for their own purposes. Use of the symbol as the main design of the FYROM national flag was a provocation, implying as it did the territorial expansion of the FYROM into northern Greece.

2.20. To the same end, schools and publications use a map depicting a "united Macedonia". On this State-sanctioned map, the official borders between the FYROM and its neighbours are faintly indicated, while the Macedonian regions of Greece are printed in the same colour as the territory of the FYROM. These Greek territories are designated as "[t]he Aegean part of Macedonia under Greece". The word "Greece" is placed south of Mt. Olympus, and, following the same logic, the word "Bulgaria" is placed outside the Bulgarian Pirin region.[28] Moreover, the authorities in Skopje have continued to publish maps of Greek Macedonia using outdated Slav or Turkish names for Greek locations. In short, the FYROM portrays the current borders of Greece as a temporary anomaly and the Macedonian regions of its neighbours as either being under foreign occupation, or simply an inalienable part of the Macedonian "*tatkovina*" or "homeland". Such misuse of history and cartography evokes a nationalist ideology which the UN Charter, the Helsinki Final Act, and the modern system of international law in general should have put to rest.

III. PAST MEDIATION EFFORTS TO RESOLVE THE NAME ISSUE

2.21. The seriousness of the name issue immediately attracted the concern of multilateral institutions, and several efforts have been undertaken to resolve it

[27] See (1977-8) 24 *Archaeological Reports* 3 on the discovery of the Vergina burial complex. For photos of the larnax, see Miriam Ervin Caskey, "News Letter from Greece," (1978) 82 *American Journal of Archaeology* 339, 345 (fig 11); and Memorandum of Greece concerning the application of the FYROM for admission to the United Nations, circulated also as UN doc., A/47/877-S/25158, 25 January 1993: Annex 146.

[28] See school maps of the FYROM, *in*: Svetozar Naumovski, Novica Veljanovski, Simo Mladenovski and Stojan Kiselinovski, *History Textbook, Grade II,* Skopje 1992 at p. 44, Blagoj Cukarski (ed.) *History Atlas for primary school,* Skopje, 1997 at pp 72 and 85: Annex 81.

through mediation and good offices. The main attempts to settle the issue are summarised here in the order they began.

A. Mediation Efforts by the European Union

2.22. Upon the FYROM's independence, the Greek government asked its partners in the EU to refrain from recognising the new State until the name issue was satisfactorily resolved. Greece's concerns were that competing claims to Macedonian identity and heritage, combined with potential irredentist movements, would disrupt the peace process in the Balkans.[29]

2.23. The Council of Foreign Ministers carried out an extensive analysis of the complexities of potential recognition of the former Yugoslav Socialist Republic of Macedonia. An Extraordinary Ministerial Meeting at Brussels on 16 December 1991 set out three requirements that the FYROM would have to meet as conditions of its recognition by the Community and its member States: the FYROM must not put forward territorial claims against its neighbours; it must not engage in hostile propaganda against Greece; and it must not use a name that might entail or imply territorial claims.[30]

2.24. The parties failed to reach an agreement in the negotiations which ensued concerning the name and the European Council of Lisbon issued a resolution in June 1992, stating:

> "The European Council... expresses its readiness to recognise [the former Yugoslav Republic of Macedonia] within its existing borders according to their Declaration on 16 December 1991 under a name which does not include the term Macedonia."[31]

The Government in Skopje rejected EU recognition on these terms.

B. Mediation Efforts by the United Nations

[29] See e.g. letter from President Constantine Karamanlis, dated 3 January 1992, in which he stresses his own identity as a Macedonian and employs historical and cultural arguments to assert that the neighbouring state "has absolutely no right, either historical or ethnological, to use the name ''Macedonia": Memorial, Annex 109. In January 1993, Foreign Minister Michael Papaconstantinou, presented a Memorandum opposing admission of the FYROM to the UN under its constitutional name, on the grounds that Skopje was seeking to *monopolize* the Macedonian name, despite occupying only 38.5% of the Macedonian region. In this way, he asserted: '"the name conveys in itself expansionist visions both over the land and the heritage of Macedonia through the centuries" (para 10): Annex 146.

[30] Declaration on Yugoslavia: Extraordinary EPC Ministerial Meeting, Brussels, 16 Dec 1991: reprinted (1992) 31 ILM 1485, 1486.

[31] European Council in Lisbon, *Conclusions of the Presidency*, doc. SN 3321/ 1/92 Lisbon 26/27 June 1992, available at : http://www.europarl.europa.eu/summits/lisbon/default_en.htm: Annex 1.

2.25. On 7 April 1993, the Security Council adopted SC res 817 (1993), by which it recommended the application for admission of the new State under the provisional name "the former Yugoslav Republic of Macedonia". The provisional name is a major stipulation attached to the admission of the FYROM to the UN. The name is to be employed "for all purposes within the United Nations [...] pending settlement of the difference that has arisen over the name of the State." United Nations Security Council resolution 845 (1993) (hereinafter "SC res 845 (1993)"), was subsequently adopted on 18 June 1993, encouraging the FYROM and Greece "to continue their efforts under the auspices of the Secretary-General to arrive at a speedy settlement of the remaining issues between them."[32] Constitutional amendments were enacted to remove provisions that suggested an official State interest in the status of minority groups and the territories they inhabit in neighbouring States. Also, the new Member State committed itself not to fly the flag bearing the Sun of Vergina and to refrain from the use of certain other historical symbols which tended to express territorial aspirations against neighbouring States. Recognition of the FYROM by Member States of the European Union and its admission as a member State of the United Nations took place in a framework of these commitments and of the provisional name.[33]

2.26. It was understood generally, and accepted specifically by Greece, that the provisional name was subject to a final settlement, to be reached through negotiation between the FYROM and Greece. The UN decided to facilitate the required negotiations with the aim of ending "the difference over the name of the state," which "need[ed] to be resolved in the interest of peaceful and good-neighbourly relations in the region."[34] The task of mediation between the parties was entrusted to the Secretary-General, who appointed Cyrus Vance and Lord Owen as his representatives. A series of intensive negotiations resulted in a text regulating the whole range of bilateral relations and proposing a composite name "Nova Makedonija" for international use.[35] However, because of domestic pressures in both countries, neither party took action regarding the text for about eighteen months. In Athens, the government eventually adopted the position that the neighbouring State could not use the word "Macedonia" or any of its

[32] SC res 845 (1993), 18 June 1993, para 2.

[33] The terms "name" and "designation" are interchangeable and the use of one rather than the other involves no legal distinction. The Security Council in resolution 817 (1993) of 7 Apr 1993 recommended admission of the FYROM, "this State being provisionally referred to for all purposes within the United Nations as 'the former Yugoslav Republic of Macedonia'..." In the French language version, the phrase is "cet Etat devant être désigné provisoirement, à toutes fins utiles à l'Organisation, *sous le nom* d' 'ex-République yougoslave de Macédoine'..." (emphasis added).

[34] SC res 817 (1993), 7 Apr 1993, 3rd preambular para.

[35] *Report of the Secretary-General pursuant to SC res 817 (1993),* 26 May 1993, Annex V: S/25855.

derivatives in its title. This at the time was an absolute position. As will be seen, Greece has since proposed compromise formulae, reflecting a considerable modification of its position and a willingness to take account of the FYROM's views.

C. The Interim Accord

2.27. Eventually, the two countries agreed to normalise their relations. With the references to the name issue removed, the Interim Accord of 13 September 1995 was signed by the foreign ministers of the FYROM, Greece and the UN Secretary General's Representative, and witnessed by Cyrus Vance. The parties' commitment under the Interim Accord to negotiate toward a definitive settlement of the difference was in accordance with SC res 817 (1993) and SC res 845 (1993).

2.28. Under the Accord, Athens was to recognise its neighbour under its provisional name, resume normal economic relations and proceed to facilitate the development of further economic and commercial relations. Skopje, for its part, agreed to amend certain contentious articles in its constitution, to change the national flag by removing the "Sun of Vergina" symbol, and to avoid such actions as the use of symbols comprising part of the historical or cultural heritage of Greece. The parties also undertook to prohibit hostile actions or propaganda by state-controlled agencies or private entities which might incite "violence, hatred or hostility".[36] The Accord was to last for seven years and to be automatically renewable unless one of the parties should decide to terminate it by giving twelve months notice.

2.29. In the first years of the Accord, the Greek government adopted an open-door policy towards its neighbour, offering broad economic support as well as political support within the EU and other international organisations. Particularly striking was the supportive stance Greece took toward the FYROM in stabilising the country during a period of internal disturbances in 2001. These voluntary measures went considerably beyond Greece's obligations under the Interim Accord.

2.30. Meanwhile, negotiations continued regarding the name issue. Athens and Skopje began to hold direct, informal discussions and for the first time, the Greek government considered the possibility of allowing a composite name. Departing from the policies of its former President Gligorov, the FYROM also appeared ready to find and adopt a mutually acceptable name. To support resolution of the issue, Greece had offered the FYROM a package with favourable prospects for economic development, as well as active support for its candidacy to membership

[36] 1891 UNTS 3, entered into force 13 Oct 1995.

in international organisations in which Greece was a member. The FYROM seemed eager to take advantage of the opportunity. Unfortunately, in early 2001, before an agreement could be reached between the parties, a serious conflict erupted in the FYROM. The internal political settlement which resolved the conflict left the FYROM's government with no room to compromise on the name issue. Meanwhile United States attention was distracted by the terrorist attacks of 11 September 2001 and the negotiation process lagged.

D. Recent Greek and International Initiatives

2.31. In November 2004, the executive branch of the United States announced that it henceforth would refer to the FYROM by the constitutional name, "Republic of Macedonia." This strengthened the resolve of the FYROM to reject a negotiated settlement.

2.32. The Greek government made a further gesture of good will towards the FYROM, and recommended negotiations for converting the "Interim" into a "Permanent" Accord. At the EU Council meeting of December 2005, Greece voted in favour of the FYROM's candidate status, under the "provisional" name adopted by the UN twelve years earlier.

2.33. The Government in Skopje made no reciprocal attempt at accommodation. The FYROM's Prime Minister Nikola Gruevski, elected in 2006, palliated, and even encouraged, nationalist sentiments in the FYROM. Particular initiatives appeared calculated to inflame Greek public opinion. For example, streets, highways, stadiums, and airports were stripped of their old titles and given the names of Ancient Macedonian kings; statues of eminent Macedonian historical figures were erected in multiple cities. These and other measures, breaches of the letter and spirit of the Interim Accord, are addressed in Chapter 4 of this Counter-Memorial. The effect of the conduct of the new FYROM government was to undermine the negotiation process.

2.34. In September 2007 Greece decided to favour a mutually acceptable composite name to be negotiated by the UN mediator, Matthew Nimetz.[37]

[37] See Letter of the Prime Minister of Greece to the United Nations Secretary General of 14 April 2008: Annex 9.

CHAPTER 3: THE INTERIM ACCORD AND ITS INTERPRETATION

I. INTRODUCTION

3.1. The FYROM represents the dispute it submitted to the Court as being exclusively limited to the interpretation and implementation of Article 11(1) of the Interim Accord. However, this text cannot be properly interpreted in clinical isolation, i.e. in detachment from the general context of this provision, which is the Interim Accord as a whole; an agreement that needs in turn to be read against its own background in order to be fully understood.

II. NEGOTIATING HISTORY

3.2. It should be recalled that the Interim Accord came in the wake of Security Council resolutions 817 and 845 (1993). The first Resolution, adopted on 7 April 1993, noting that "a dispute has arisen over the name of the State, which needs to be resolved in the interest of the maintenance of peaceful and good neighbouring relations in the region," recommended to the General Assembly that the Applicant "be admitted to membership in the UN, this State provisionally being referred to for all purposes within the UN as 'the former Yugoslav Republic of Macedonia' pending settlement of the difference that has arisen over the name of the State."

3.3. The Resolution also urged the parties to continue to cooperate with the Co-Chairmen of the Steering Committee of the International Conference on the Former Yugoslavia, Mr. Cyrus Vance and Lord Owen, who had been exercising their good offices with a view to settling the dispute and promoting confidence-building measures among the parties, and requested the Secretary-General to report to it on the outcome of their initiative.

3.4. On 14 May 1993, after an intense period of discussions with the parties over successive drafts, Mr. Vance and Lord Owen submitted to Greece and the FYROM their draft "Treaty confirming the Existing Frontier and Establishing Measures for Confidence Building, Friendship and Cooperation" (hereinafter the "Vance-Owen draft").[38]

3.5. This draft was intended to put an end to the dispute, by resolving the name issue (its Article 5 provided, "The Republic of Nova Makedonija hereby agrees to

[38] UN doc. S/25855, Annex V: Memorial, Annex 33

use that name for all official purposes"), and establishing a permanent regime of good neighbourly relations and cooperation between the parties. But both parties rejected the proposed solution to the name issue.

3.6. On 18 June, after receiving a report by the Secretary-General on the Vance-Owen efforts and the rejection of their draft by the parties,[39] the Security Council adopted Resolution 845 (1993), urging the parties to continue their efforts under the auspices of the Secretary-General "to arrive at a speedy settlement of the remaining issues between them," and commending to them the Vance-Owen draft "as a sound basis for the settlement of their difference."

3.7. The Secretary-General subsequently appointed Mr. Cyrus Vance as his special envoy for this matter. After more than two years of difficult and discontinuous negotiations, as well as no fewer than nine drafts, the parties concluded the Interim Accord and signed it in New York on 13 September 1995. The signing was witnessed by Mr. Vance as Special Representative of the Secretary-General of the UN.

III. THE TEXT AND STRUCTURE OF THE INTERIM ACCORD

3.8. The Interim Accord, as the adjective "interim" indicates, has not settled the dispute between the parties, particularly its *fons et origo*, the name issue, as the Vance-Owen draft would have done. Its more modest purpose was to normalise, as much as possible, the relations between the parties, in spite of the persistence of the dispute over the name, while awaiting, and in the expectation of, a final satisfactory solution to be negotiated in good faith by both parties.

3.9. But in order for the Interim Accord to achieve this purpose, it had to be without prejudice to the position of the parties on the name issue, in the sense of not weighing in favour of one position or the other, but acting as a "holding operation" on that issue, until the parties agree on a final resolution.

3.10. The provisions of the Interim Accord thus fall into two categories, corresponding to the double purpose of the Interim Accord: (a) provisions dealing with the normalisation of the relations between the two parties, including confidence-building measures and cooperation, which are literally taken from the Vance-Owen draft with only slight modifications; (b) provisions relating to the enduring dispute over the name, which either did not figure in the Vance-Owen draft (as it would have resolved that dispute), such as Article 5, or which had to be redrafted to adapt them to the persistence of the core dispute over the name

[39] UN doc.S/25 855.: Memorial, Annex 33

and to the purpose and function of the Interim Accord as a "holding operation" on that issue (Arts.1(1); 11(1); 21(2); 23(2)).

3.11. The Interim Accord retains the same titles of the sections of the Vance-Owen draft, with the exception of section C, comprising Article 11, which changes from "European Institutions" in the Vance-Owen draft to "International, Multilateral and Regional Institutions" in the Interim Accord.

3.12. The Interim Accord is composed of a Preamble and 23 articles divided into six sections. They are briefly surveyed in what follows, with special emphasis on the provisions most relevant to the dispute before the Court.

3.13. Section A, "Friendly Relations and Confidence-Building Measures," comprises eight articles.

3.14. Article 1 provides for Greece's recognition of the FYROM as an independent and sovereign State "under the provisional designation" set forth in SC res 817(1993) (which is not mentioned directly but referred to in a side letter); the establishment of diplomatic relations between Greece and the FYROM and the opening in the meantime of liaison offices in their respective capitals.

3.15. Article 2 confirms the existing frontier between the parties as enduring and inviolable. Article 3 expresses the mutual respect of each party for the sovereignty, territorial integrity and political independence of the other. Article 4 registers the commitment of the parties to refrain from the threat or use of force, the violation of the existing frontier or the assertion of claims to change the frontier or to any part of the other's territory.

3.16. Article 5 deals with the crucial and continuing contention over the name. It provides:

> "1. The Parties agree to continue negotiations under the auspices of the Secretary-General of the United Nations pursuant to Security Council resolution 845(1993) with a view to reaching agreement on the difference described in that resolution and in Security Council resolution 817(1993).
>
> 2. Recognizing the difference between them with respect to the name of the Party of the Second Part, each Party reserves all of its rights consistent with the specific obligations undertaken in this Interim Accord. The Parties shall cooperate with a view to facilitating their mutual relations notwithstanding their respective positions as to the name of the Party of the Second Part. In this

> context, the Parties shall take practical measures, including dealing with the matter of documents, to carry out normal trade and commerce between them in a manner consistent with their respective positions in regard to the name of the Party of the Second Part. The Parties shall take practical measures so that the difference about the name of the Party of the Second Part will not obstruct or interfere with normal trade and commerce between the Party of the Second Part and third parties."

3.17. This provision calls for two remarks: Paragraph 1 imposes a positive obligation to continue negotiating under the auspices of the Secretary-General of the UN with a view to reaching a final agreement on the name issue. Whilst it is true, as the FYROM contends, that this is an obligation of means or "best efforts" and not of result, it is nonetheless a "hard" obligation: the expression "best efforts" obliges the parties to engage in good faith in "meaningful negotiations".

3.18. The Court, in the *North Sea Continental Shelf Cases,* said the following about the "obligation to negotiate":

> "(a) The parties are under an obligation to enter into negotiations with a view to arriving at an agreement..... They are under an obligation so to conduct themselves that the negotiations are meaningful, which will not be the case when either of them insists upon its own position without contemplating any modification of it."[40]

As shown in Chapter 4 below, the FYROM has "insist[ed] upon its own position" since the entry into force of the Interim Accord and, notwithstanding significant concessions by Greece, has consistently refused to "contemplat[e] any modification of it [its initial position]."

3.19. Paragraph 2 addresses the bilateral or *inter-se* relations of the parties, in which they undertake to adopt practical measures that would facilitate commerce and communications between them "in a manner consistent with their respective positions in regard to the name" issue. This provision of the Interim Accord functions as "an interim measure of protection", safeguarding the positions of the parties, so that their conduct does not tilt the balance on the outstanding issue (i.e., the difference concerning name) in favour of one party or the other.

3.20. Article 6 constitutes a declaration by the FYROM that nothing in its

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[40] *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969,* p.3, para.85.

constitution can be interpreted as laying claim on territories beyond its existing borders. In particular, it clarifies the meaning of the Preamble and Article 3 of the FYROM's Constitution, and provides a further assurance that Article 49 of that instrument is not to be interpreted as supporting interference in the internal affairs of other States. As will be shown in Chapter 4, events in the 1990s in other parts of the former Yugoslavia, as well as Western Balkan history more generally, had given rise to concern that irredentist policies might be pursued under the guise of protecting the citizens of neighbouring States.

3.21. Article 7 addresses in its first paragraph the prohibition of hostile propaganda and activities, as well as incitement to hatred and violence, whether by State agencies or private entities. In its second paragraph, Article 7 prohibits the FYROM from using "in any way the symbol [the Sun of Vergina] in all its forms displayed on its national flag prior to such entry into force [of the Interim Accord]."

3.22. The third paragraph of Article 7 is of particular interest, as it sets out a procedure for handling claims of violations of the preceding paragraph. It provides:

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

It is to be noted that this procedure is limited specifically to claims of abuse of historic or cultural symbols. This is why the procedure is incorporated in Article 7, immediately after the paragraph on the prohibition of the use by the FYROM of the Sun of Vergina symbol. This procedure is not for the settlement of any other type of claim or dispute under the Interim Accord. For this latter purpose, there is a special provision in the Interim Accord, the compromissory clause of Article 21(2), on the basis of which the present case was instituted.

3.23. Finally, in Article 8 the Parties undertake not to impede the movement of people or goods between their territories or through their territory to that of the other Party. This is a further concession by Greece to the FYROM, which is a land-locked State.

3.24. Section B of the Interim Accord, entitled "Human and Cultural Rights", comprises two articles, Articles 9 and 10. Apart from the affirmation of principles in Article 9(1), Article 9(2) states that no provision in the relevant human rights

instruments shall be interpreted as giving a right to take any action contrary to the aims and principles of the UN Charter including the principle of territorial integrity of States.

3.25. Section C of the Interim Accord is entitled "International, Multilateral and Regional Institutions". It consists solely of Article 11, on which the FYROM bases its case. The first paragraph of Article 11 provides:

> "1. Upon entry into force of the Interim Accord, the Party of the First Part agrees not to object to the application by or the membership of the Party of the Second Part in international, multilateral and regional organizations and institutions of which the Party of the First Part is a member; however, the Party of the First Part reserves the right to object to any membership referred to above if and to the extent the Party of the Second Part is to be referred to in such organization or institution differently than in paragraph 2 of United Nations Security Council resolution 817(1993)."

3.26. The interpretation of this paragraph is the subject of Chapters 6 and 7 below. It suffices to note here that whilst this provision imposes an obligation on Greece in the form of a limitation on a pre-existing right, the obligation is not "absolute" as contended by the FYROM. For its existence depends on the continuous fulfilment and observance of a condition, failing which the obligation ceases to operate and Greece recovers its full liberty to exercise the right whose existence is preserved by the condition. As abundantly demonstrated in Chapters 4 and 7 below, the condition on which the existence of Greece's obligation under Article 11(1) depends has not been met. Moreover, this obligation is part and parcel of a larger bundle of rights and obligations exchanged by the parties in the Interim Accord, and as such cannot be treated in isolation.

3.27. Section D of the Interim Accord entitled "Treaty Relations" (Articles 12 to 14) and Section E entitled "Economic, Commercial, Environmental and Legal Relations" (Articles 15 to 20) are of lesser pertinence to the present case.

3.28. Section F of the Interim Accord contains the "Final Clauses" (Articles 21 to 23). Article 21 deals with the settlement of disputes. Paragraph 2 provides:

> "Any difference or dispute that arises between the Parties concerning the interpretation or implementation of this Interim Accord may be submitted by either of them to the International

> Court of Justice, except for the difference referred to in Article 5, paragraph 1."

The difference excepted from the Court's jurisdiction is the difference over the name. It is discussed in Chapter 6.

3.29. Article 22 is concerned with the consequences of the Interim Accord for third parties, including international organisations and, conversely, the consequences of pre-existing treaty obligations on those of the Interim Accord. The article has two distinct components. The first component, which is not relevant here, is an assurance that the Interim Accord "is not directed against any other State or entity". But the second component of Article 22 reserves the prior rights and obligations of Greece under bilateral and multilateral agreements with other States or international organisations. This provision super-ordinates the obligations which either party to the Interim Accord may have under those other treaties over the obligations flowing from the Interim Accord.

3.30. Article 23 deals with the entry into force and the duration of the Interim Accord. It provides that it "shall remain in force until superseded by a definitive agreement"; but that after seven years a Party can withdraw from it, within twelve months' (written) notice.

IV. THE OTHER AGREEMENTS OF 1995

3.31. Following on the signature of the Interim Accord, on 13 September 1995 two Memoranda on Practical Measures were adopted pursuant to the directive of Article 5(2). One Memorandum, signed in Skopje on 13 October 1995, addresses the Movement of Persons and Goods and official correspondence between the Parties; the second, signed in Athens on 20 October 1995, provides for the Establishment of Liaison Bureaus in the respective capitals of the Parties.

3.32. Both Memoranda address the issue of the use of the name, but only in the mutual or bilateral relations of the Parties, pursuant to the provisions of Article 5(2) of the Interim Accord. This paragraph provides:

> "...the Parties shall take practical measures, including dealing with the matter of documents, to carry out normal trade and commerce between them in a manner consistent with their respective positions in regard to the name [issue]."

3.33. The provisional solution adopted with regard to communications and exchange of documents was as follows: when Greek authorities receive communications or documents bearing the constitutional name of the FYROM

(which Greece does not recognise), they would not refuse them or send them back, but would affix on them a seal bearing the name "the FYROM". In parallel, the latter, when receiving communications or documents bearing the provisional name, would affix on them a seal bearing its constitutional name.

3.34. The second Memorandum establishes a similar procedure with respect to the denomination of the Liaison offices, particularly with regard to the FYROM's office in Athens. Here again, within the premises of the Liaison office, the FYROM would use its constitutional name. But at the entrance of the building or near the entrance of the house "there will be placed an inscription bearing "FYROM" (and "an indication that it was placed by a third party").

3.35. In other words, each State agreed to refer to the FYROM by the name of its choice within its territorial jurisdiction and in its diplomatic premises. This is obviously a conservatory measure of their respective claims, so that relations and exchanges can take place, without prejudice to their respective positions on the name issue, i.e., without tilting the balance in favour of one or the other.

3.36. The two Memoranda are in fact complements to the Interim Accord, concluded pursuant, and in order to give effect, to Article 5(2), which is addressed to the exclusively bilateral relations between the Parties, in an exclusively bilateral setting.

3.37. Article 5(2) as well as the two ensuing Memoranda do not address and have no relevance to the relations of the Parties in multilateral settings such as international and regional organisations, which are subject to a different legal regulation under Article 11 of the Interim Accord.

V. THE LEGAL CLASSIFICATION OF THE INTERIM ACCORD

3.38. The Interim Accord has three salient legal characteristics.

3.39. First, the Interim Accord is a *modus vivendi*. A *modus vivendi* is "an arrangement of a temporary and provisional nature concluded between subjects of international law which gives rise to binding obligations on the parties."[41] As a *modus vivendi*, the Interim Accord is intended to be provisional or temporary, bridging a time-gap in the regulation of the controverted subject-matter between the parties, until it is replaced by a more permanent arrangement. It thus fulfils the function of setting out modalities allowing for the relations between the parties to continue, in spite of persisting disagreement between them, or before

[41] Walter Rudolf, "Modus Vivendi*", in:* R. Bernhardt (ed.), *Encyclopedia of Public International Law,* vol. III (1997), p. 442.

they reach a final agreement on the subject-matter of their relations. A *modus vivendi* can, and usually does, as in the case of the Interim Accord, also have a protective function, as was mentioned before, i.e., as an interim measure of protection or a "holding operation," to maintain or preserve the subject-matter of the dispute in its actual state ("*en l'état*"), so that it neither evolves through accretion of practice nor is deliberately changed in favour of one party or the other, particularly as a result of the continuing relations or activities governed by the *modus vivendi*.

3.40. Second, whilst provisional, the Interim Accord is legally binding as long as it lasts. Its binding character gives it utility, for, by entering into it, the parties seek to establish a sure footing for their relations, pending definitive settlement. Its terms are mandatory and of continuing character. Often a *modus vivendi* is established by a simplified or informal agreement. This is not the case of the Interim Accord, which was negotiated at length and adopted under the auspices of the United Nations. But even when it is the result of an implied agreement (or acquiescence), as in the two cases where the Court found that such a *modus vivendi* existed,[42] it remains a legally binding agreement. The fact that it is intended to be temporary and to be replaced by a more permanent agreement does not make it any less binding or exacting while it lasts. In this respect, a particularity of the Interim Accord should be noted. Notwithstanding Article 23 (according to which, absent a final agreement between the parties, each of them can unilaterally denounce it after seven years, upon twelve months notice), those parts of the Interim Accord deriving from SC res 817 (1993) (imposing on the FYROM the provisional arrangement of being "provisionally referred to for all purposes within the United Nations as the 'Former Yugoslav Republic of Macedonia'") would continue to be in force and binding on the FYROM, on the basis of the Security Council Resolution, even in the case of denunciation of the Interim Accord. Those parts, incorporated by "*renvoi*" to the provisions of SC res 817 (1993), would continue to be in force until the realization of the condition set out by the Security Council for their cessation, namely, the "settlement of the difference that has arisen over the name of that State".

3.41. Third, the Interim Accord is a synallagmatic agreement. Given its subject matter and function as a provisional measure of protection or as a holding operation, and by its terms the Interim Accord cannot be construed as a unilateral

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[42] *Continental Shelf (Tunisia/Lybian Arab Jamahiriya), Judgment, I.C.J. Reports 1982*, p.18,. para. 93-95; *Frontier Dispute (Benin/Niger), Judgment, I.C.J. Reports 2005,* p.90, *para. 84-86* (although in this case, the *modus vivendi* was a document internal to French colonial administration).

contract imposing obligations on one party only. It is necessarily a synallagmatic or reciprocal contract by which both parties exchange engagements or considerations, those of each party being conditioned by those of the other.

3.42. Certain effects of the Interim Accord were immediate and final; others were to be deployed over time, in a continuous manner. Thus, Greece recognised the FYROM as an independent sovereign State, in spite of the persistence of the dispute over the name, and undertook to guarantee the freedom of movement of persons and goods between the two countries and across its territory. Both these effects were important concessions to the FYROM.

3.43. The FYROM, for its part, undertook to change its flag, to renounce any irredentist claim on Greek territory, to abstain from irredentist conduct and repress all related activities, and above all, to negotiate in good faith with a view to reaching a final solution to the name issue. These, particularly the obligation to negotiate, were the concessions the FYROM committed itself to make to Greece in return for recognition, the guarantee of freedom of movement and the normalisation of their relations.

3.44. The Interim Accord as a "holding operation" or interim measure of protection was thus meant to keep the name issue in suspense, not so much in the *inter se* relations between the parties in exclusively bilateral settings (where each was allowed to maintain its position until reaching agreement), but on the multinational level, by permitting the normalisation of multilateral relations through the exclusive use of the FYROM's provisional name or designation until, through "meaningful negotiations," a mutually satisfactory solution would be reached.

3.45. That was the balance struck by Article 11(1) of the Interim Accord, the condition under which Greece accepted that Accord and the obligations that came with it. It is that balance that the Interim Accord has to maintain and guarantee until a final agreement on the name issue is reached.

3.46. The attempt to use the Interim Accord, and more particularly Article 11(1), as a shield behind which to subvert that balance destroys the very object of the agreement.

3.47. This consistent strategy of the FYROM was explicitly described by its President in a debate over the name issue in Parliament on 3 November 2008, in which the President declared:

"…in the recent years Republic of Macedonia had a strategy which, due to understandable reasons, was never publicly announced, but it was a strategy that all governments and chiefs of State stick to so far, regardless of their political orientation. A strategy which was functional and which gave results…

First of all in the negotiations under the UN auspices we participated actively,

But our position was always the same and unchanged, and that was the so-called dual formula. That means the use of the constitutional name of the Republic of Macedonia […] in all international organizations and in bilateral relations with all countries, with a compromise solution to be found only for the bilateral relations with the Republic of Greece […]. In regard to NATO and the European Union, having in mind the Greek membership in these structures and its right to veto in accession of new members, the plan was that our advancement until the full membership should be done with the temporary reference. According this concept, the right moment to solve the dispute with Greece should have happened when Macedonia would be completely integrated in the NATO alliance and the European Union. That means that when we will be fully equal and we will have the same possibilities and mechanisms available as Greece has and when the accession itself cannot be used for blackmails and conditioning."[43]

3.48. The whole debate abundantly demonstrates that at no time was the FYROM willing to engage in "meaningful negotiations," in the sense already explained, with a view to reaching a final agreement on the name issue; rather, it has always been intent on circumventing Article 11(1) through skewed interpretations that purport to reduce its ambit to *inter-se* relations, even within multilateral institutional settings, in violation of the text, the context and the function of this Article.

3.49. In sum, the Interim Accord as a synallagmatic agreement constitutes a single transaction registering an exchange of considerations. No single article or provision, even if it imposes an obligation on one party only, can be treated as

[43] *Stenography notes from the 7th sequel of the 27th session of the Parliament of the Republic of Macedonia*, held on 3 November 2008 : Annex 104.

self-standing, in isolation from the rest. This is because such an obligation is part and parcel of a bundle of rights and obligations, accepted by one party in exchange for a corresponding bundle assumed by the other.

CHAPTER 4: THE FYROM'S VIOLATIONS OF THE INTERIM ACCORD

4.1. The historical review and the analysis of the Interim Accord in the previous chapters would be incomplete without a brief summary of the FYROM's conduct with respect to the obligations which it assumed in the Interim Accord. The summary that follows focuses on the FYROM's actual violations; an analysis of those legal obligations and the significance of the FYROM's violations of them for this case will be undertaken in Chapter 8 below.

I. RECENT EXAMPLES OF THE FYROM'S FAILURE TO CONDUCT GOOD FAITH NEGOTIATIONS

4.2. This section will focus on recent examples of the FYROM's failure to conduct good faith negotiations, which have now led to a deadlock.

4.3. It will be recalled that in its SC res 845 (1993), the Security Council defined the framework of the negotiation process between Greece and the FYROM in urging "the parties to continue their efforts *under the auspices of the Secretary-General* [and] to arrive at a speedy settlement of the remaining issues between them" (emphasis added). This framework was then explicitly adopted by the parties in the Interim Accord itself, as explained in Chapter 3 above.

4.4. Since the adoption of SC res 845 (1993), the UN mediator, Mr. Nimetz, has submitted various proposals to the Parties in an effort to solve the name "difference". This procedure under the auspices of the United Nations continues today. However, the FYROM has failed to engage in good faith negotiations, as the following examples show.

4.5. In September 2007, in contravention of SC res 817 (1993), SC res 845 (1993) and GA Resolution 47/225 (1993), Mr. Crvenkovski declared before the plenary of the General Assembly, "the name of my country is the Republic of Macedonia and will be the Republic of Macedonia."[44]

4.6. Two months later on November 2, 2007, the Prime Minister of the FYROM declared in relation to the Draft Framework Understanding submitted by the UN Mediator Matthew Nimetz that: "[…] there is one point, which definitely we cannot accept –the one that says that the

[44] Statement made by President Crvenkovski in September 2007 before the General Assembly, United Nations, *Official Records of the General Assembly, Sixty Second Session, 4th Plenary Meeting*, doc. A/62/PV.4 at p. 29: Annex 5.

Republic of Macedonia should accept a name different from its constitutional one for international use. This provision of the document is unacceptable for the Republic of Macedonia and we cannot discuss it. Hence it may be considered that the Macedonian Government is rejecting this provision."[45]

4.7. On 3 April, 2008, during the NATO Summit in Bucharest, the FYROM's Minister of Foreign Affairs, Mr. Milošoski, declared in a press conference: "[…] we are Macedonians and our country is the Republic of Macedonia which will be our name for good […]."[46]

4.8. On 3 November 2008, just before the FYROM submitted its application to this Court, its Parliament held a session offering a "Draft Resolution for solving the dispute about the name of the Republic of Macedonia." During the debate, the FYROM's President, Mr. Branko Crvenkovski, made a statement regarding the country's traditional position on the name issue. The following excerpts of that speech are evidence of the FYROM's uncompromising stance.

> "First of all, in the negotiations under the UN auspices we participated actively, but *our position was always the same and unchanged*. And that was the so called dual formula. That means the use of the constitutional name of the Republic of Macedonia […] in all international organizations and in bilateral relations with all countries, with a compromise solution to be found only for the bilateral relations with the Republic of Greece [...]
>
> Fourth, as regards the dual formula as a possible compromise for solving the dispute we do not have either the understanding or the support of any Member State of the Alliance or the [European] Union. On the contrary, *that position is considered by everyone including our major supporters and friends, as a position which obstructs or interrupts the negotiations from our side*. That was fully publicly, clearly and explicitly announced to us and that is

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[45] "Prime Minister Gruevski's statement on Nimetz's draft-framework of understanding" *Macedonian Information Agency*, dated 2 November 2007, available at: http://www.mia.com.mk/default.aspx?vId+29113595&lId=2, visited on 16 November 2009: Annex 128.

[46] "NATO Bucharest 2008-Milososki: No invitation for Macedonia, defeat of NATO principles", *Macedonian Information Agency,* dated 3 April 2008, available at: http://www.mia.mk/default.aspx?vId=40811596&lId=2**,** visited on 20 November 2009: Annex 135.

> something that this Parliament and the entire Macedonian public should be aware of."[47]

4.9. During the same session of Parliament, the FYROM's Prime Minister, Mr. Gruevski, confirmed the intransigence of his country with respect to the so-called "dual formula" throughout the negotiation process following the signature of the Interim Accord:

> "This act [the signature of the Interim Accord of 1995] was triumphantly celebrated at Skopje's 'Macedonia Square,' and we were told that that name will only be used for a couple of months. [...] Since that period [...] the same politicians continually repeated that the maximum Macedonia must concede is that it will use the dual formula, which means the use of one name in its relations with Greece and the use of its constitutional name internationally, and that in no circumstances we cross that red line."[48]

> "Thus, in only a few months those Macedonian politicians who had promoted the dual formula, and up until 2005-2006 considered it the maximum compromise […], drastically changed their position, suddenly calling us, who have now been in power for the last couple of years […], firm, uncompromising politicians who are going to isolate the country with such [hardline] attitudes […]".[49]

Statements such as these show that the FYROM's position on the name issue has undergone no modification whatsoever in spite of the obligations which were imposed by the Security Council. Rather, the FYROM has sought to exploit the formal negotiation process as a way of delaying resolution of the difference in the hope that it could use the time to gradually persuade third party States to recognise its constitutional name. As Mr. Crvenkovski himself said, the FYROM has adopted this "position for repealing the negotiations, or at least freezing them for a longer period."[50] The dual formula was and remains the FYROM's tool for avoiding the negotiation of a name that is satisfactory to both Parties.

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47 *Stenography notes from the 7th sequel of the 27th session of the Parliament of the Republic of Macedonia*, held on 3 November 2008 (emphasis added), pp. 27-7/11 and 27-7/ 12: Annex 104.

48 *Ibid.* at p. 27-7/14.

49 *Ibid.* at p. 27-7/17.

50 *Ibid.* at p. 27-7/13.

4.10. Greece, for its part, has demonstrated a willingness to participate in the negotiation process in good faith by modifying its policy on the name issue in an effort to secure a solution. According to the letter sent by Prime Minister Karamanlis to UN Secretary General Ban Ki-moon on 14 April 2008:

> "In order to revitalize talks, in September 2007, the Greek Government announced in Parliament that it was ready to accept a composite name that could include 'Macedonia' as the basis for a mutually acceptable solution. This represented a major unilateral change in our policy."[51]

4.11. A letter sent by Ambassador Mr. Mourikis to members of the Security Council on 14 April 2008 reiterates Greece's willingness to effect a major change of the Greek position.[52]

4.12. The following examples further illustrate the FYROM's intransigence on the name issue:

- the FYROM's submission of numerous applications for admission to international organisations, including NATO, using its constitutional name rather than that designated in Resolution 817;
- the FYROM's use of its constitutional name both in its official correspondence with international organisations and in the sessions and meetings of their organs; and
- the FYROM's attempts to gain recognition of its constitutional name by third States, pending negotiations under the auspices of the UN.

4.13. A corollary of good faith negotiation is to maintain a cordial relationship. Yet, the FYROM has refused to abstain from actions which exacerbate the dispute. Examples, which will be detailed below, include the propagation of irredentist claims on Greek territory, appropriation of Greek historical symbols, and unwillingness to protect the Greek Liaison

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[51] Letter of the Prime Minister of Greece to the Secretary General of the United Nations, dated 14 April 2008, forwarded to the United Nations Secretary General by Letter of Ambassador John Mourikis, Permanent Representative of Greece to the United Nations under reference F.4608/434/AS1121, dated 15 April 2008: Annex 9.

[52] Letter of Ambassador Mourikis Permanent Representative of Greece to the United Nations to H.E. Ambassador Wang Guangya Permanent Representative of China to the United Nations, dated 14 April 2008, Ref. F.4608/450/AS 1161. The same letter was sent to the other 14 Permanent Representatives of the Security Council: Annex 54.

Office and Greek Consulate in Skopje from ongoing harassment and vandalism.

II. THE FYROM'S INTERVENTION IN GREECE'S INTERNAL AFFAIRS

4.14. Irredentism arising from extreme Macedonian nationalism, such as the concept of a "Greater Macedonia" that includes Greek territory, has expressed itself, *inter alia*, in the FYROM's interventionist policy with respect to what it insists on presenting as a "Macedonian minority" in Northern Greece.

4.15. In spite of its obligations under the Interim Accord, as well as a 1992 amendment to its own Constitution pledging not to interfere in the sovereign rights or internal affairs of other States,[53] the FYROM has persisted in meddling in Greece's internal politics, including purporting to "protect" what it styles "ethnic Macedonians that have never had Macedonian nationality".[54]

4.16. On numerous occasions, the FYROM's political leaders have attended meetings of associations representing so-called "Macedonians from the Aegean Part of Macedonia",[55] which promote irredentist policies and engage in hostile propaganda against Greece. On 24 April 2006, then-Prime Minister Vlado Butskovski was invited by the "Union of Macedonians from Aegean Macedonia" to speak at the 12th Easter Rally, during which he stressed that the Government "had opened up political dialogue for the permanent solution of the problems of Macedonians in

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[53] In January 1992, the FYROM adopted Constitutional Amendment II, which provides: "in the exercise of this concern the Republic will not interfere in the sovereign rights of other states or in their internal affairs."

[54] See the definition of "Diaspora" on the website of the FYROM's Ministry of Foreign Affairs, available at : http://www.mfa.gov.mk/default1.aspx?ItemId=340, visited on 20 November 2009: Annex 110. The FYROM officially proclaimed and gave legal basis to its policy of unilaterally asserting the existence of "ethnic Macedonians" in Article 49 of its 1991 Constitution, which states: "the Republic cares for the status and rights of those persons belonging to the Macedonian people in neighbouring countries, as well as Macedonian expatriates, assists their cultural development and promotes links with them. The Republic cares for the cultural, economic and social rights of the citizens of the Republic abroad."

[55] For instance in 2005 the Minister of Culture Blagoj Stefanovski attended the "25th meeting of Macedonians from the Aegean Part of Macedonia" Petse Stefanovski, "The pan-macedonian meeting in Trnovo", *A1 Television*, dated 31 July 2005, available at: http://www.a1.com.mk/vesti/default.aspx?VestID=49437, visited on 9 December 2009: Annex 115. On 13 April 1999 the then President of the FYROM Kiro Gligorov attended the meeting of the "Association of the expulsed Macedonians from the Aegean Part of Macedonia" held at the Village Tri Tsesmi,. I. Bojadziski, "A humble celebration with non hidden emotions", *Makedonija Denes*, dated 14 April 1999: Annex 112.

the Aegean Part of Macedonia."[56] Prime Minister Gruevski, in a speech to the 26th "Pan-Macedonian Meeting" at Trnovo, held on 31 July 2006, "gave his pledge to the Aegeans that after sixteen years of silence from the Macedonian state, he would try to broach this issue with Greece and the international community."[57] The following year, Prime Minister Gruevski once again addressed the "Aegean Macedonians" at their 27th meeting in Trnovo, stating:

> "Nobody will be in position to make Macedonians, wherever they are, renounce their existence or stop feeling as Macedonians"[58]

and

> "The requests of Macedonians expelled from Aegean Macedonia will be realized after Macedonia becomes full member of the European Union."[59]

4.17. Another example of the FYROM's interference in the internal affairs of Greece can be found in a statement of Prime Minister Gruevski made on 14 October 2008 concerning the arrest of four local residents near the city of Florina, in northwest Greece, following a protest against a military exercise. The FYROM's Prime Minister stated:

> "[…] every country is entitled to organize military exercises, but when they are practically taking place in front of the yards of citizens and are not relocated after numerous demands of the population, it becomes obvious that some other motive is in question. We are talking about a demonstration of power and attempt of spreading fear

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[56] " Prime Minister Butskovski at Brest village. European Standards and Rights for the Children Refugees", *Dnevnik*, dated 25 April 2006, available at: http://www.dnevnik.com.mk/?itemID=4E19A74B492D1643AF7624F6B91F0708&arc=1, visited on 10 December 2009: Annex 116.

[57] "The new government will solve the problem of the Expelled Macedonians", *Utrinski Vesnik*, dated 31 July 2006, available at: http://star.utrinski.com.mk/?pBroj=2145&stID=74115&pR=3: Annex 117.

[58] Petse Stefanovski, "Border Meeting in Trnovo. The Borders will fall down with the Unity of Macedonians", *Vreme*, dated 30 July 2007: Annex 123.

[59] Zanetta Zdravkovska, "Gruevski at the All Macedonian Gathering in Trnovo. The Aegean Macedonians will realize their rights after accession in the EU," *Dnevnik*, dated 30 July 2007: Annex 124.

> among the population, which is far from democratic move of a EU member country […]".[60]

On 15 October 2008, Prime Minister Gruevski referred to "military exercises near the villages in northern Greece, populated with ethnic Macedonians".[61] The FYROM's Defence Minister, Mr. Zoran Konjanovski, expressed his regrets "about the incident between the Greek Army and the local Macedonian citizens which happened yesterday in the village of Zabrdeni, Lerin, Greece."[62] The Defence Minister of the FYROM failed to use the actual Greek topographical names when he made these statements.[63] Just a few days earlier, on 2 October 2008, the Cabinet of the Prime Minister of the FYROM expressed concern "about the situation of the Macedonians in the Northern Part of Greece, who are protesting against the military exercises of the Greek army."[64]

4.18. On 14 October 2008, the Greek Foreign Ministry spokesman responded:

> "Yesterday's statement from the Gruevski government is yet another provocative attempt at utter distortion of reality. It is a new, unacceptable attempt to interfere in Greece's domestic affairs. This conscious policy of cultivating nationalism and intolerance is irresponsible at the very least. Mr. Gruevski needs to accept the fact that Greek citizens do not need self-appointed advocates; advocates who in fact have an obvious motive […]".[65]

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[60] "PM Gruevski condemns detention of Macedonian journalists in Greece", available at the Official site of the Government of the FYROM: http://www.vlada.mk/?q=book/export/html/1319, dated 14 October 2008: Annex 103.

[61] "PM Gruevski raises question on incidents in northern Greece, says name row presents main obstacle to NATO, EU membership", dated 15 October 2008, available at the Official site of the Government of the FYROM :http://www.vlada.mk/?q=book/export/html/1338,: Annex 139.

[62] "Konjanovski: We can cede Krivolak to the Greek Army", *A1TV,* (14 October 2008), available at**:** http://www.a1.com.mk/vesti/default.aspx?VestID=9818,: Annex 143.

[63] *Ibid.*

[64] "Prime Minister's Cabinet concerned about the situation of the Macedonians in the Northern Part of Greece," Sector for Public Relations of the Government of the Republic of Macedonia , 2 October 2008: Annex 137.

[65] Statement of the Foreign Ministry Spokesman Mr. Koumoutsakos regarding yesterday's statement from the Gruevski Government, dated 14 October 2008, available at the Official Site of the Ministry of Foreign Affairs of the Hellenic Republic;

4.19. The FYROM's advocacy on behalf of "Macedonians" living in neighbouring countries has been elevated to a "right and obligation". On 21 December 2006, in a speech before Parliament, the FYROM's then-President Mr. Branko Črvenkovski stated: "looking after the status and rights of the Macedonian national minority in neighbouring countries is our natural right and obligation."[66]

4.20. By Verbal Note No. 140/G/AS 311,[67] dated 24 February 2009, the Ministry of Foreign Affairs of the Hellenic Republic protested a statement made by the FYROM's Foreign Minister regarding a "Macedonian-speaking minority" in Greece. The statement was made by Foreign Minister Milošoski in the context of an interview to the German newspaper *Tageszeitung,* published on 4 February 2009. The Verbal Note described the allegation made by Mr. Milošoski as "a gross violation of article 6(2) of the Interim Accord," which "is not consistent with the fundamental principles of the United Nations which are enshrined in the UN Charter." Responding to the reply[68] of the FYROM's Minister of Foreign Affairs to the above Verbal Note, the Hellenic Republic Liaison Office in Skopje, through Verbal Note No. 141.1.A/151/AS 741,[69] dated 3 June 2009, further elaborated on the reasons why statements made by officials of the FYROM "do not constitute an expression of genuine interests in the protection of fundamental rights and freedoms," but "form part of a long-standing and systematic policy of raising non-existent issues

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http://www.mfa.gr/www.mfa.gr/GoToPrintable.aspx?UICulture=en-US&GUID={A2A464F9-7D22-40AE-B2B8-0B92F85EDA25}: Annex 138.

66 *Stenography notes from the 19th session of the Parliament of the Republic of Macedonia* held on 21 December 2006 at page 19/5: Annex 99. Besides the Foreign Minister of the FYROM stated on 25 October 2006: "The Government's program foresees strengthened activities for improving the position of the Macedonian national minority, especially in the neighbouring countries, which is actually our constitutional obligation". ("Macedonia will strengthen its care of the minorities living in the neighboring countries", *Makfaxonline,* 25 October 2006: Annex 118). The Deputy Minister of Foreign Affairs Zoran Petrov after asserting that 'Macedonians' in neighbouring countries "are in total two million" answered a question about "Macedonians" in Greece stating that: "They are in the most difficult situation from the point of view of their rights and freedoms. They are engaged through 'Rainbow' and they function very successfully at the international level. They are also successful in finding their roots and in denying the Greek statements that they are some 'slavophones'." (Christo Ivanovski, "Interview: Zoran Petrov, Deputy Minister of Foreign Affairs: "We have an obligation towards two million Macedonians in the neighborhood", *Dnevnik*, 15 August 2007: Annex 126).

67 Annex 67.

68 Verbal Note No. 32-2530/1, dated 19 March 2009**:**Annex 69.

69 Annex 75.

aiming at promoting expansionist aspirations and irredentism against Greece and its people" and contravene Article 6 of the Interim Accord.

4.21. During the summer of 2008, the FYROM's Prime Minister addressed a series of letters to the Prime Minister of Greece, as well as to a large number of countries and representatives of the international community, including the Secretary-General of the United Nations.[70] The letters raised claims about the existence of a "Macedonian" minority in Greece. In his letter to the Prime Minister of Greece, dated 10 July 2008, the Prime Minister of the FYROM made specific demands with regard to the "status and the rights" of Greek citizens.[71] Similar demands with regard to the "status of persons belonging to the Macedonian ethnic minority in Greece" were expressed in the letter from the FYROM's Prime Minister to the Secretary-General of the United Nations.[72]

4.22. In both letters, the Prime Minister of the FYROM raised the issue of the "treatment of persons expelled during the Civil War in Greece and their descendants regardless of whether they live in the Republic of Macedonia or in other countries worldwide."[73] The first of the letters stated:

> "These people in the Republic of Macedonia are organized in several citizen's associations and during several meetings with them, they asked me to address you as a Prime Minister of a neighbouring country, where they feel discriminated [against]."[74]

4.23. The FYROM's authorities afford open and active support to associations of so-called "refugees from the Aegean Macedonia", many of which promote irredentism. According to the official website of the FYROM's Foreign Ministry, under the heading "Diaspora":

> "[T]he MFA has undertaken specific measures to afford direct legal and material assistance for their [i.e.

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[70] Letter of the Prime Minister of the FYROM addressed to the Secretary General of the United Nations, dated 24 July 2008, forwarded through Verbal Note No 4/160 of the Permanent Representative of the FYROM to the United Nations: Annex 64.

[71]. Letter of the Prime Minister of the FYROM to the Prime Minister of Greece, dated 10 July 2008**:** Annex 62.

[72] Letter of the Prime Minister of the FYROM addressed to the Secretary General of the United Nations, dated 24 July 2008, forwarded through Verbal Note No 4/160 of the Permanent Representative of the FYROM to the United Nations: Annex 64.

[73] Letter of the Prime Minister of the FYROM addressed to the Secretary General of the United Nations, dated 24 July 2008: Annex 64.

[74] Letter of the Prime Minister of the FYROM to the Prime Minister of Greece, dated 10 July 2008 Annex 62.

> 'Macedonian non-governmental organisations'] activities on issues involving an international element. The best examples are … the support for submitting an application by the Association of Children-Refugees from the Aegean Macedonia with the European Court of Human Rights in Strasbourg for return of their seized properties in the Hellenic Republic."[75]

By mobilising persons who fled Greece after the Civil War and their descendants and officially encouraging their claims of return of property and restoration of their citizenship, the authorities of the FYROM attempt to reopen issues dating back to the Civil War (1946-1949).

4.24. The same website[76] states that the FYROM government offers assistance to members of the "Macedonian diaspora." Such assistance includes "legal counseling … which facilitates encouragement of capacities and self-sustained positioning of the Diaspora vis-à-vis the resident country."[77] A document located at the above-mentioned site named "List of Macedonian language desks and organizations, orderly registered abroad, and the number of the Macedonians in the Diaspora," asserts that the number of "Macedonians" in Greece is "162.506 (1925 Census in Greece); MFA's estimation: 700,000."[78] It is noteworthy that the "'Rainbow' Political Party of the Macedonians in Greece" which the FYROM views as a major Macedonian association in Greece obtained 4,530 votes in the June 2009 election for the European Parliament, meaning that supporters of that Party comprise a mere 0.09% of the voting population.[79]

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[75] Official site of the Ministry of Foreign Affairs of the FYROM, http://www.mfa.gov.mk/default1.aspx?ItemID=340, last visited on 20 November 2009: Annex 110.

[76] Official site of the Ministry of Foreign Affairs of the FYROM, http://www.mfa.gov.mk/default1.aspx?ItemID=340, last visited on 20 November 2009: Annex 110.

[77] *Ibid.*

[78] "List of Macedonian language desks and organizations, orderly registered abroad and the number of the Macedonians in the Diaspora", available at : http://www.mfa.gov.mk/default1.aspx?ItemID=340: Annex 110.

[79] The 'Rainbow' which in the 2009 elections for the European Parliament formed the political alliance 'Eyropaiki Eleytheri Symmachia-Ouranio Toxo' obtained in the 2004 elections for the European Parliament 6.176 votes. See European Elections 2009, Official Results published on the webpage of the Greek Ministry of Interior on 12 June 2009, available at: http://ekloges-prev.singularlogic.eu/e2009/pages/index.html?lang=en, visited on 8 December2009: Annex 167.

4.25. Greek officials have restated Greece's longstanding position that the above allegations constitute an unlawful interference in the internal affairs of the country. Thus, in his reply to the letter of the FYROM's Prime Minister, dated 17 July 2008, the Greek Prime Minister stressed that the FYROM "aims at interfering in the domestic affairs of a neighbouring country and deviates from the objectives of the ongoing negotiations." [80]

4.26. Referring to a letter from the FYROM's Foreign Minister dated 13 March 2009, the Greek Minister for Foreign Affairs recalled that "persistent interference in Greece's domestic affairs under the pretext of alleged 'minority issues' […] clearly contravenes the provisions of the Interim Accord and seriously undermines good neighbourly and friendly relations between our two countries." [81]

III. THE FYROM'S HOSTILE ACTIVITIES AND PROPAGANDA AGAINST GREECE

4.27. The FYROM has violated the commitments undertaken in the Interim Accord by failing to take measures to prohibit hostile activities or propaganda by its government agencies; on the contrary it has engaged in active use of propaganda as part of its official State policy. Moreover, the FYROM has provided financing and other types of support to private entities seeking to incite hostility against Greece. The FYROM has failed to take any measures to prevent and discourage hostile acts of vandalism against the premises of the Greek Liaison Office in Skopje and its personnel, despite numerous Verbal Notes of protest from Greece regarding the matter.

A. Hostile Propaganda against Greece by Public Authorities and State-controlled Agencies of the FYROM

4.28. The FYROM has continued to promote irredentist propaganda through its activities, statements, and even the publication and distribution of school textbooks. Such propaganda presents the territorial settlement of the Treaty of Bucharest as an unjustified partition of the "Macedonian

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[80] Letter of the Prime Minister of Greece to the Prime Minister of the FYROM, dated 17 July 2008: Annex 63.

[81] Letter of the Minister of Foreign Affairs of Greece to the Minister of Foreign Affairs of the FYROM, dated 24 March 2009 under Reference 1024, forwarded through Verbal Note F.141.1/24/AS 378, dated 27 March 2009 of the Liaison Office of the Hellenic Republic in Skopje: Annex 70, in reply to Letter of the Minister of Foreign Affairs of the FYROM to the Minister of Foreign Affairs of Greece, dated 13 March 2009 forwarded through Verbal Note No 01-64/09 dated 16 March 2009 of the Liaison Office of the FYROM in Athens: Annex 68.

Homeland" with the aim of generating public hostility towards Greece by alleging the oppression of a so-called "Macedonian minority" within its territory. This propaganda forms part of the FYROM's systematic attempts to generate support for a "Greater Macedonia."

4.29. To achieve this aim, the ancient Kingdom of Macedonia is deprived of its well known Greek character, thus presenting today's Slavs who form the largest part of the population of the FYROM as descendants of the ancient Macedonians.[82] A significant part of the history of ancient Greece and its historical figures has been usurped so as to create a distorted image of an ancestral "Greater Macedonia". A fifth grade history textbook states:

> "[O]ur fatherland has a long and rich history. In ancient times it was a powerful state. In the reign of Philip II, Macedonia was the most powerful state in the Balkan Peninsula. In the reign of his son, Alexander the Macedon, it spread out over three continents, and was a world power".[83]

4.30. The notion of an historic "Greater Macedonia" is also promoted through maps in school textbooks which represent it as a distinct entity, comprised of parts of the actual province of Greek Macedonia.[84] Several maps distinguish the fatherland of "Greater Macedonia" from Greece, thus

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[82] See para. (c) of the Verbal Note of the Hellenic Republic Liaison Office in Skopje No F. 141.1/48/AS 488, dated 15 April 2009 : "…it is amply known, and not only to the scientific community, that the Slavs, who form the largest part of the population of the actual State of the former Yugoslav Republic of Macedonia, settled in the area in the 6th century A.D., bearing no ethnological or cultural relation whatsoever with ancient Macedonians, who, as Hellenes, were speaking the ancient Greek language, as proved by more that 5000 inscriptions, and shared a common cultural identity with the other Hellenes": Annex 71.

[83] Kosta Atsievski, Darinka Petreska, Violeta Ackoska, Naum Dimovski and Vanco Gjorgjiev, *History Textbook, Grade V,* Skopje 2005, Reprinted 2008, page 4 : Annex 91.

[84] Reference may be made to the map of Macedonia and the Balkans in prehistoric times (Kosta Atsievski, Darinka Petreska, Violeta Ackoska, Naum Dimovski and Vanco Gjorgjiev, *History Textbook, Grade V*, Skopje 2005, p. 20) as well as to the map of Macedonia at the time of the Ilinden uprising (Blaže Ristovski, Shukri Rahimi, Simo Mladenovski, Stojan Kiselinovski and Todor Cepreganov, *History Textbook, Grade VII*, Skopje 2005, Reprinted Skopje 2008, p. 120 : Annex 93.

implying that the latter has no historical title to the northern part of its territory.[85]

4.31. The 1913 Treaty of Bucharest is presented in school textbooks as marking the partition of a previously-unified Macedonia. A seventh grade history textbook states: "The Bucharest Peace Treaty had grave political, ethnic and economic consequences for the Macedonian people. The treaty meant that the territorial and ethnic unity of Macedonia was disrupted".[86] In other textbooks, Greek Macedonia is labeled "Greek occupation"[87] or "part of the region [of Macedonia] under Greek rule",[88] an expression which fails to reflect Greek sovereignty over its northern territories.[89] Moreover, maps of school textbooks, besides indicating international borders, purport to describe the boundaries of the "geographical and ethnic borders of Macedonia", which present an ethnic Macedonia as comprising significant portions of Greek, Bulgarian and Albanian territory.[90]

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[85] See for instance the map of the Roman Empire in Kosta Atsievski, Darinka Petreska, Violeta Ackoska, Naum Dimovski and Vanco Gjorgjiev, *History Textbook, Grade V*, Skopje 2005, p. 79: Annex 92.

[86] Blaže Ristovski, Shukri Rahimi, Simo Mladenovski, Stojan Kiselinovski and Todor Cepreganov, *History Textbook, Grade VII*, Skopje 2005, Reprinted Skopje 2008. p. 131: Annex 94.

[87] See Blaže Ristovski, Shukri Rahimi, Simo Mladenovski, Stojan Kiselinovski and Todor Cepreganov, *History Textbook, Grade VIII*, Skopje 2005, Reprinted Skopje 2006, map of "partitioned Macedonia at the time of the First World War", p. 14 : Annex 90.

[88] Vlado Velkovski, Halid Sejdi, Arijan Aljademi, Dimka Risteska and Gjorgji Pavlovski, , *History Textbook, Grade VIII*, Skopje 2005, map of "the partition of Macedonia", p. 54 :Annex 89.

[89] See also p. 198 of the Milan Boshkoski, Nebi Dervishi, Dimko Popovski, Jordan Iliovski, Natasha Kotlar, Silvana Sidorovski-Chupovska, , *History textbook, Grade II*, Skopje 2006, where we read that "In the occupied parts of Macedonia [after the Bucharest Peace Treaty], the occupation forces introduced a military regime": Annex 97.

[90] See for instance Blaže Ristovski, Shukri Rahimi, Simo Mladenovski, Stojan Kiselinovski and Todor Cepreganov, *History Textbook, Grade VII*, Skopje 2005, Reprint Skopje 2008, map of "Macedonia and her geographical and ethnic borders after partition (1913)", p. 131, where "state borders" are shown with a broken line and "geographical and ethnic boundaries" with a continuous line (Annex 94), as well as Vlado Velkovski, Halid Sejdi, Arijan Aljademi, Dimka Risteska and Gjorgji Pavlovski, *History Textbook, Grade VIII*, Skopje 2005, map of "the partition of Macedonia", p. 54, where "ethnic borders" are marked with a yellow line, including in the fatherland, among others, even the island of Thassos in the Aegean (Annex 89). See also Novica Veljanovski, Simo Mladenovski, Stojan Kiselonovski and Svetozar Naumovski, *History textbook Grade VIII*, Skopje 1998,at p. 38, the map of "Macedonia after the First World War" where "geographical and ethnic borders of Macedonia" are shown with a continuous line, and "state borders" are shown with a broken line **(**Annex 84).

4.32. Consistent with this policy, the Prime Minister of the FYROM, on 4 February 2008, placed a wreath on the monument of the national hero Goce Deltsef. Displayed on the monument is a map which purports to show that "Macedonia" includes within its borders the province of Greek Macedonia.[91]

4.33. Such statements and actions put into question the finality of the territorial settlement achieved by the Bucharest Peace Treaty, despite the fact that the Interim Accord qualifies the border between Greece and the FYROM as an "enduring" international border.

4.34. The irredentist propaganda of the FYROM's State institutions against Greece culminated in the 2009 "Macedonian Encyclopaedia", edited by the Macedonian Academy of Arts and Science, the FYROM's highest cultural institution. An official announcement made on 16 September 2009, available at the FYROM's official government website, welcomed the launching of the Encyclopaedia, stressing also that "the Macedonian Encyclopaedia was published this year with funds from the Government." Moreover, and according to the same announcement, Prime Minister Nikola Gruevski gave his approval to the content of the edition: "[…] it scans *authentically* Macedonia's point of view about its cultural and political past and present and strives to become an objective, integral information about us and our country."[92] Under the heading "Aegean part of Macedonia," the "Macedonian Encyclopaedia" reads:

> "[The Aegean] part of Macedonia is under the administration of Greece. After the Peace treaty of Bucharest (10 August 1913), Greece got 51% of Macedonian territory. According to their mother tongue, in the Aegean part of Macedonia were living the Macedonian people as well as ethnic minorities (Turks, Jews, Greeks, Vlachs and Roma)."[93]

Under the heading "Macedonian ethnic minority in Greece", the Encyclopaedia states:

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[91] See photo of Prime Minister Gruevski on 4 February 2008 in Skopje: Annex 159.

[92] See "MANU promotes Macedonian Encyclopedia", dated 16 September 2009, available at the Official site of the Government of the FYROM http://www.vlada.mk/?q=book/export/html/3978, last visited on 13 October 2009 : Annex 142.

[93] Blaze Ristovski (ed.), *Macedonian Encyclopedia*, Macedonian Academy of Sciences and Arts, Skopje, 2009, vol. I, at p. 514: Annex 108.

> "[T]he Aegean part of Macedonia comprises almost half of the Macedonian ethnic territory. The frontiers of the territory of the Aegean part of Macedonia until 1913 were also in their main part, ethnographical borders."[94]

4.35. The FYROM has also disseminated propaganda regarding the oppression of an alleged "Macedonian minority" in Greece, and portrays Greece as having carried out, after the conclusion of the Peace Treaty of Bucharest, "a policy of assimilation and denationalization of the Macedonian people."[95]

4.36. For example, a second grade geography textbook reads: "according to some data, the total number of Macedonians living in the neighbouring country is 250,000 in Greece,"[96] while a first grade geography textbook states: "the Macedonians are the biggest minority in Greece and they are still fighting for their citizen's rights."[97]

4.37. The FYROM's propaganda regarding the "Macedonian minority" in northern Greece is not confined to school textbooks. In 2004, the FYROM's Parliament, in violation of Article 7(1) of the Interim Accord, voted to celebrate the following anniversaries of major events and important persons:

- 60th Anniversary of the founding of the "Political Committee of Macedonians in Greece;
- 60th Anniversary of the founding of the 1st National Liberation Strike brigade from Aegean Macedonia."[98]

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[94] *Ibid.* vol. II, at p. 891: Annex 109. Greece protested over certain passages contained in the text of the Encyclopedia, through the Verbal Note of the Hellenic Republic Liaison Office in Skopje No F. 141.1/144/AS 1531, dated 12 November 2009: Annex 80.

[95] Blaže Ristovski, Shukri Rahimi, Simo Mladenovski, Stojan Kiselinovski and Todor Cepreganov, *History Textbook, Grade VIII*, p. 47. See also *ibid.,* p. 46: "As a result of the Balkan Wars and the First World War, Greece had territorial expansion northwards (The Aegean Part of Macedonia and Western Thrace). Most of the population was of non-Greek, and mainly Macedonian, origin. After the First World War, Greece started to carry out a policy of expulsion of the Macedonian people and installation of a non-Macedonian population.": Annex 95.

[96] Aleksandar Stojmilov, *Geography Textbook, Grade II*, Skopje 2002, p. 93: Annex 85.

[97] Gjorgii Pavlovski, Atse Milenkovski, Nikola Panov, Risto Mijalov, *Geography Textbook, Grade VII*, Skopje 2003, Reprint Skopje 2008, p. 42: Annex 102.

[98] "Program for Celebration Anniversaries of Major Events and Important Persons for the year 2004", *Official Gazette of the Republic of Macedonia* No 6 (13 February 2004), p.4 : Annex 88.

B. Activities by Private Entities and Persons Inciting Hostility against Greece Financed and/or Supported by the FYROM

4.38. The FYROM's authorities have also energetically supported the dissemination of irredentist propaganda by private entities.

4.39. For example, public authorities of the FYROM fund and actively support the activities of the Union of Societies of "Macedonians from the Aegean Part of Macedonia",[99] as well as those of the Association of "Macedonians from the Aegean Part of Macedonia".[100] Both organisations promote irredentist policies and disseminate hostile propaganda against Greece. Even the use of the term "Aegean Part of Macedonia" leaves no doubt about the territorial intentions of those organisations and gatherings, importing, as it does, an irredentist portion of a mythicised partitioned fatherland.[101] When Greece was hosting the Olympic Games in the summer of 2004, the President of the Association of "Macedonians from the Aegean Part of Macedonia", Mr. Alexsandar Popovski, declared, at a meeting of the Association in Trnovo:

> "Greece is implementing apartheid. There is an ethnical genocide over the Macedonians. Greece destroyed and keeps destroying the cultural and historical heritage and wealth of the Macedonians. With a decree and violence it erased the topography, the hydrography and the entire toponomy of the ethnical Macedonians. It erased the Macedonian mother language and the Cyrillic alphabet. Greece with its laws implements an ethnical, religious, cultural and linguistic discrimination and such a country can not organize Olympics."[102]

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[99] "Decision on Fund Distribution from the Budget of the Republic of Macedonia for the year 2004 to finance Associations and Foundations", *Official Gazette of the Republic of Macedonia,* No 41 (24 July 2004) p.12 : Annex 88.

[100] *Ibid.*, at p. 13.

[101] This term is also used in school textbooks to describe the province of Greek Macedonia, see for instance Blaže Ristovski, Shukri Rahimi, Simo Mladenovski, Stojan Kiselinovski and Todor Cepreganov, *History Textbook, Grade VIII*, Skopje 2005, at p. 151 ; Novica Veljanovski, Simo Mladenovski, Stojan Kiselonovski and Svetozar Naumovski, *History Textbook, Grade VIII*, Skopje 1998, at p. 120: Annex 96.

[102] See Mente Petkovski, "Greece does not deserve Olympics" *Dnevnik,* dated 26 July 2004 : Annex 113.

The official website of the FYROM's Ministry of Foreign Affairs also lists its support for the political party "The Rainbow," which it defines as "the Political Party of the Macedonians in Greece (Lerin)".[103]

4.40. Along the same lines, the FYROM has sponsored the publication of books that promote irredentist visions with respect to Greek territory. For instance, the Ministry of Defence funded Vanče Stojčev's 2004 book "Military History of Macedonia". The book was also edited by a public agency, the "General Mihailo Apostolski".[104]

4.41. The conclusion of that book states:

> "The Macedonian military history is 28 centuries long. During this long period, the Macedonian military idea advanced to the highest possible level and experienced severe falls. The Macedonian state, the Macedonian army and the Macedonian military idea developed simultaneously. There were periods in the history when the Macedonian nation and the Macedonian state reached the peak of the fame. In the ancient period, especially during the rule of Philip II and Alexander II of Macedonia from 359 to 323 B.C., the Macedonian army was the strongest."[105]

4.42. The second volume of the book contains a map bearing the legend "Macedonia occupied and divided among the Serbian the Bulgarian and the Greek armies from October 1912 to June 1913",[106] and a map of Macedonia named "the division of Macedonia based on the Peace Treaty of Bucharest signed on August 10, 1913",[107] which, besides international borders, also marks the boundaries of the "geographical and ethnic borders of Macedonia". This map purports to show ethnic Macedonia as

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[103] "Diaspora" available at : http://www.mfa.gov.mk/default1.aspx?ItemID=340: Annex 110.

[104] The top of the page containing information about the edition states, "Published by the Military Academy "General Mihailo Apostolski"-Skopje".The Preface at page 2 states that "this book is structured according to the syllabus for the subject Military History and will be used as a basic textbook and additional literature at the Military Academy…" Moreover, the page containing information about the edition states that "The author would like to express his utmost gratitude to the Minister of Defense, Mr. Vlado Bučkovski, PhD, for the financial support the Ministry of Defense the Republic of Macedonia has extended for the translation, map design and printing of this book." Vanče Stojčev: *Military History of Macedonia,* volumes I and II, Published by the Military Academy "General Mihailo Apostolksi",Jugoreklam*,* Skopje 2004: Annex 86.

[105] *Ibid.*, page 681.

[106] Map no. 65: Annex 86.

[107] Map no. 70: Annex 86.

comprising significant portions of Greek, Bulgarian and Albanian territory.[108]

4.43. The same distortion is to be found in the maps contained in the book, "The borders of the Republic of Macedonia", edited in 1998 and funded by the FYROM's Military Academy as well as its Ministries of Sciences and National Defence.[109]

4.44. At the time of the publication of the above-mentioned books, the law in force in the FYROM "on Scientific Research Activities", which was abrogated only in 2008, provided in its Article 16 that any research in the field of "historical and cultural identity of the Macedonian people" was reserved exclusively to public institutions.[110] Studies and research on the historical and cultural identity of the "Macedonian people" were in fact forbidden to any domestic or foreign legal entity or persons other than those controlled and financed by the State.[111]

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[108] See pages 65 and 70 of the second volume. This is also the case of map No 75, named "occupation zones in Macedonia (1941-1943), where again the "geographical and ethnic borders of Macedonia" are marked (see page 75 of the second volume). In the seventh preambular paragraph of Resolution 356(2007) of the United States House of Representatives, as well as in the seventh preambular paragraph of Resolution 300(2007) of the United States Senate, it is stated that "…some textbooks, including the Military Academy textbook published in 2004 by the Military Academy "General Mihailo Apostolski" in the FYROM capital city, contain maps showing that a "Greater Macedonia" extends many miles south into Greece to Mount Olympus and miles east to Mount Pirin in Bulgaria". In the ninth preambular paragraph of both Resolutions, this course of action, together with the renaming of Skopje's international airport after "Alexander the Great", is qualified as "breach of FYROM's international obligations deriving from the spirit of the United Nations Interim Accord, which provide that FYROM should abstain from any form of «propaganda» against Greece's historical or cultural heritage". H.Res356[110], May 1, 2007: Annex 156; SRes300[110], August 3, 2007 : Annex 157

[109] Jove Dimitrija Talevski, *Granicite na Republika Makedonije*, Herakli Komerc, Bitola, 1998. see in particular map number 1, 3, 4, 5 and 7 at pp. 22-29: Annex 83.

[110] See "Law on Scientific and Research Activities", *Official Gazette of the Republic of Macedonia*, No 13, 15 March 1996 : Annex 82.

[111] See par. (g) of the Verbal Note of the Hellenic Republic Liaison Office in Skopje No F. 141.1/48/AS 488, dated 15 April 2009 : "It should be recalled in this respect that for almost twelve years in a row, from 1996 until recently, scientific historical research was prohibited by law in the former Yugoslav Republic of Macedonia. The "Law on Scientific Research Activities" (Government Gazette, Vol. 13/96 and 29/02), which was abolished as late as 2008, stipulated, *inter alia,* that studies and research on the historical and cultural identity of the "Macedonian people" were forbidden to any domestic or foreign legal entity and physical person other than those controlled and financed by the State. This piece of legislation contravened Article 10(1) of the European Convention of Human Rights ["*Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart*

4.45. The State-orchestrated propaganda which has been reviewed in the preceding paragraphs has fuelled the development of hostile and irredentist feelings against Greece among the FYROM's citizens.[112] A clear demonstration of such hatred was on display on 29 March 2008, when the Greek flag was desecrated on several billboards in Skopje, its cross being replaced with a swastika.[113] The same type of propaganda recurs in *FORUM*, a magazine owned by Mr. Slobodan Casule, who was the FYROM's Foreign Minister from 2001 until 2002. The magazine published a photograph of the Greek Prime Minister wearing a nazi uniform in the issue of 31 March 2008.[114]

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information and ideas without interference by a public authority and regardless of frontiers"], and, in that sense, constituted a continuous material breach of Article 9(1) of the Interim Accord": Annex 71.

[112] See, for the same conclusion concerning the effects of acts of propaganda against Greece, the eleventh preambular paragraph of Resolution 356(2007) of the United States House of Representatives: "Whereas this information, like that exposed in the media report and elsewhere, being used contrary to the United Nations Interim Accord instills hostility and a rationale for irredentism in portions of the population of the FYROM toward Greece and the history of Greece". See also the identical wording of the eleventh preambular paragraph of Resolution 300(2007) of the United States Senate, as well as the similar wording of the eighth preambular paragraph of Resolution 521(2005) of the United States House of Representatives,H.Res521[109], 27 October 2005 : Annex 154.

[113] See Annex 160. On 30 March 2008, the Spokesman of the Ministry of Foreign Affairs of Greece, Mr. Koumoutsakos, answering to a journalist's question stated, among others, that "This unacceptable poster, which was circulated via a private initiative and raised on Skopje's streets, directly insults our country's national symbol and our struggle against fascism and Nazism. This incident demonstrates the huge mistake made by those who invest in nationalism and bigotry. It also confirms, once again, the correctness of Greece's position that a necessary condition for the establishment of relations of solidarity and allied relations is, in practice, respect of good-neighbourly relations between countries and peoples. Greece's ambassador to the Former Yugoslav Republic of Macedonia, Ms. A. Papadopoulou, has been instructed, within the day, to make a strong demarche to the Foreign Ministry of the neighbouring country, requesting the immediate removal of the offensive billboard" (Spokesman of the Ministry of Foreign Affairs of Greece, Mr. Koumoutsakos, answering to a journalist's question, "Answer of Foreign Ministry Spokesman Mr. G. Koumoutsakos regarding Skopje billboards insulting to the Greek flag", 30 March 2008 available at: http://www.mfa.gr/www.mfa.gr/GoToPrintable.aspx?UICulture=en-US&GUID={D0ACAF24-06AB-41A1-901D-34EFAD4487ED}: Annex 134).

[114] The photo was published on page 76 of the 31 March 2008 issue, Annex: 161.Those acts have already been qualified as contravening the provisions of the Interim Accord by the Greek Foreign Minister Ms. Dora Bakoyannis, in a letter to the Foreign Minister of the former Yugoslav Republic of Macedonia, dated 24 March 2009, Letter of the Minister of Foreign Affairs of Greece to the Minister of Foreign Affairs of the FYROM, dated 24 March 2009 under Reference 1024, forwarded through Verbal Note

C. Persistent Harassment against the Premises of the Greek Liaison Office and its Personnel in Skopje

4.46. In this atmosphere of incitement, the premises of the Greek Liaison Office in Skopje have not been spared. They have often been damaged either by angry mobs during demonstrations or by unknown persons. The cars and residences of Greek diplomatic staff, including the Ambassador's Residence, have also been attacked and vandalised. The FYROM has not only failed to take adequate protective measures to prevent such incidents from recurring, but, in most cases, has not even responded to the Verbal Notes of the Greek Liaison Office, ignoring the obligation of the State of accreditation to guarantee the security of diplomatic missions.

4.47. Among other incidents, on the evening 27 May 2006, the front license plate of the vehicle[115] belonging to Mrs. Konstantina Gyftou, Attaché at the Liaison Office, was stolen and the rear was vandalised.[116] The license plate was again stolen on 4 February 2007,[117] 28 August 2007,[118] and on 14 January 2008.[119]

4.48. On 10 February 2008 at 6:20 am, a group of young men threw empty bottles and heavy stones in the parking space of the Liaison Office and the cars of two Greek police officers, posted in the Liaison Office, were seriously damaged. While the local Police recorded the incident and managed to identify some of the culprits, the FYROM did not improve the security despite requests from the Greek Liaison Office.[120]

F.141.1/24/AS 378, dated 27 March 2009 of the Liaison Office of the Hellenic Republic in Skopje: Annex 70.

[115] The vehicle in question had the licence plate number 27-CD-001**.** Verbal Note of the Hellenic Republic Liaison Office in Skopje No F/050/KG/2/AS 673, dated 29 May 2006: Annex 41.

[116] *Ibid.*

[117] See Verbal Note of the Hellenic Republic Liaison Office in Skopje No F. 050/KG./1/AS 164, dated 5 February 2007: Annex 43.

[118] See Verbal Note of the Hellenic Republic Liaison Office in Skopje No F. 050/KG/8/AS 1245, dated 28 August 2007: Annex 44.

[119] See Verbal Note of the Hellenic Republic Liaison Office in Skopje No F. 050/KG/2/AS 40, dated 14 January 2008: Annex 45.

[120] Verbal Note F. 010.GS/2/AS 218, dated 11 February 2008, Annex 46: The Greek Liaison Office requested the Ministry of Foreign Affairs to consider bolstering the security measures around the premises of the Liaison Office, "taking into account the fact that this incident is not an isolated case, but rather the latest and most grave of a series of similar deliberate actions." In the same Verbal Note, the Liaison Office also noted that its premises were often left unsupervised, since the security guard on duty was repeatedly absent from his post.

4.49. The FYROM's Ministry of Foreign Affairs did not reply to the Verbal Note of 11 February 2008 and supplemental measures of protection requested therein have not been taken.

4.50. On 19 February 2008, a group of roughly one thousand demonstrators gathered outside the Greek Liaison Office and attacked the premises for over an hour, throwing stones and bottles at the building while chanting anti-Greek slogans and insults. The police presence at the Liaison Office was insufficient to protect the premises, despite the fact that the Office's Head had sent a warning to the Ministry of Foreign Affairs earlier that day about the possible danger from the anticipated demonstration and had explicitly requested extra police support. As a result, damage was caused to the premises, to the official car, as well as to two other cars belonging to the staff of the Liaison Office. The Liaison Office responded to those events in a Verbal Note on 20 February 2008,[121] asking for investigation of the events, compensation for damages and reinforced protection in the future. To this date, the FYROM has not responded to this Verbal Note.

4.51. Once again, in a Verbal Note dated 26 February 2008,[122] the Liaison Office requested increased protection of its premises and personnel in preparation for another expected anti-Greek demonstration. The FYROM's Ministry of Foreign Affairs, through its Verbal Note of reply No. 117-543/3 dated 27 February 2008, promised special units and measures to cope with that demonstration and other similar events, though avoiding any reference to the incidents of 19 February 2008.

4.52. Yet on 29 February 2008, the vehicle of Mrs. Alexandra Anthis, spouse of Mr. Alexandros Anthis, Attaché at the Liaison Office, was found vandalised. Two tires had been slashed and both doors had been scratched. Although the Liaison Office communicated the incident to the FYROM in a Verbal Note,[123] just days later, on the morning of 24 March 2008, the rear license plate of another vehicle was stolen in front of the residence of a member of the Greek diplomatic personnel at Skopje.[124]

4.53. Since the NATO summit in Bucharest there has been a considerable intensification of vandalism directed towards the Liaison

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121 Verbal Note No F. 010.GS/7/AS 283: Annex 47.

122 Verbal Note, No F. 010.GS/14/AS 314 : Annex 48.

123 No F. 050.SA/2/AS 340 : Annex 49.

124 The stolen plate was from vehicle number 27-CD-001, belonging to the spouse of Mrs Konstantina Gyftou, Attaché at the Liaison Office. See Verbal Note of the Hellenic Republic Liaison Office in Skopje No F. 050/KG/5/AS 490, dated 24 March 2008: Annex 50.

Office of the Hellenic Republic in Skopje, as well as the Ambassador's Residence and the cars and residences of the Greek diplomatic staff. But, despite Verbal Notes of protest addressed by the Liaison Office to the FYROM's Ministry of Foreign Affairs, no measures of protection have been taken, thus putting the security of the premises and of the staff in increasing danger.

4.54. On 21 April 2008, the Ambassador's Residence was attacked[125] and on 26 April 2008 the Residence of Mr. Markandreou, first Counsellor for the Economic and Commercial Office, was burgled.[126] On 27 June 2008, a crowd of roughly 100 persons gathered outside the Liaison Office's premises and proceeded to harass and intimidate individuals entering the Consular Office.[127] In January 2009, the glass on the entrance door of the Press Office of the Hellenic Republic in Skopje was shattered,[128] and on 29 May 2009 unidentified persons threw rocks at the Ambassador's residence.[129] On 19 June 2009, a group of unknown persons gathered at the gate of the Liaison Office, insulting and threatening the staff, and throwing burning cardboard and pieces of timber in the yard.[130]

4.55. On 15 May 2008, 20 June 2008, and 9 July 2008, while in the parking lot of the Liaison Office, cars of Greek diplomatic staff members were vandalised by graffiti with ethnically motivated messages.[131] On 18 June 2008, unidentified persons entered the courtyard in the residence of

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[125] See Verbal Note of the Hellenic Republic Liaison Office in Skopje, No F. 010.GS/30/AS 672, dated 21 April 2008 **:** Annex 55.

[126] See Verbal Note of the Hellenic Republic Liaison Office in Skopje, No F. 203.AM/3/AS 691, dated 5 May 2008 : Annex 56.

[127] See Verbal Note of the Hellenic Republic Liaison Office in Skopje, No F. 010.GS/42/AS 1012, dated 27 June 2008 : Annex 60.

[128] See Verbal Note of the Hellenic Republic Liaison Office in Skopje, No F. 010.GS/2/AS 3, dated 2 January 2009 : Annex 65.

[129] See Verbal Note of the Hellenic Republic Liaison Office in Skopje, No F. 010.GS/23/AS 720, dated 1 June 2009 and Verbal Note No 93-1741/4 of the Ministry of Foreign Affairs of the former Yugoslav Republic of Macedonia dated 10 July 2009 in reply **:** Annex 73.

[130] See the Verbal Note of the Hellenic Republic Liaison Office in Skopje No F. 010.GS/27/AS 837, dated 22 June 2009, the Verbal Note of the A3 Directorate of the Ministry of Foreign Affairs of the Hellenic Republic No 1178, dated 7 July 2009, and the Verbal Note No 93-1923/4 in reply of the Ministry of Foreign Affairs of the former Yugoslav Republic of Macedonia dated 10 July 2009, whose presentation of the facts is rather unconvincing: Annex 76.

[131] See Verbal Notes of the Hellenic Republic Liaison Office in Skopje, respectively No F. 050.EP/2/AS 784, dated 16 May 2008: Annex 57, No F. 010.GS/40/AS 990 dated 20 June 2008: Annex 59, and No F. 050.BM/1/AS 1082, dated 9 July 2008 : Annex 61.

Mr. Markandreou, the first Counselor for the Economic and Commercial Office, uprooted all the plants and threw mud and dirt on his vehicle.[132] On 29 May 2009, the vehicle of Mr. Georgios Mitropoulos, the Attaché at the Liaison Office, was vandalised.[133] On 10 October 2009, the right window of the vehicle belonging to Mr. Theodoros Petsos, the Attaché at the Liaison Office, was shattered.[134] Other similar acts of vandalism against property belonging to Greek diplomatic staff[135] and to Greek citizens[136] have also been brought to the attention of the FYROM's Ministry of Foreign Affairs by means of Verbal Notes.

4.56. The depressing recurrence of these events, in spite of the Verbal Notes of the Liaison Office of the Hellenic Republic in Skopje describing the facts, requesting investigations and demanding adequate measures of protection of the premises and the staff, is proof of a systematic campaign to intimidate and terrorise the Greek diplomatic staff in Skopje. The public authorities not only failed to take the necessary measures of protection required both by diplomatic law and by the obligation set forth in Article 7 of the Interim Accord to "discourage acts by private entities likely to incite violence, hatred or hostility against each other," but, with very few exceptions mentioned above, did not even reply to the Verbal Notes addressed to them, clearly importing their contempt for the Greek diplomatic representation in their country and their obligations under conventional as well as customary international law.

IV. THE FYROM'S CONTINUED USE OF THE SUN OF VERGINA

4.57. Although it has removed the Sun of Vergina from its official state flag, the FYROM continues to use the symbol. Before the conclusion of

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[132] Verbal Note of the Hellenic Republic Liaison Office in Skopje, No F. 010.GS/40/AS 990, dated 20 June 2008 **:** Annex 59.

[133] See Verbal Note of the Hellenic Republic Liaison Office in Skopje, No F. 010.GS/24/AS 758, dated 2 June 2009 and Verbal Note No 93-1740/4 of the Ministry of Foreign Affairs of the former Yugoslav Republic of Macedonia dated 10 July 2009 in reply, wherein it is accepted that the vehicle of Mr. Mitropoulos has been damaged : Annex 74.

[134] See Verbal Note of the Hellenic Republic Liaison Office in Skopje, No F. 010.GS/44/AS 1356, dated 12 October 2009 : Annex 79.

[135] See Verbal Notes of the Hellenic Republic Liaison Office in Skopje, Nos F. 050/KG/7/AS 556, dated 7 April 2008: Annex 51 and F. 050/KG/15/AS 856, dated 30 May 2008 : Annex 58.

[136] See Verbal Notes of the Hellenic Republic Liaison Office in Skopje, Nos F. 640/2/AS 557, dated 7 April 2008: Annex 52 and F. 640/5/AS 579, dated 10 April 2008: Annex 53.

the Interim Accord, Greece, by virtue of Article 6ter of the Paris Convention for the Protection of Industrial Property of 20 March 1883, revised in Stockholm on 14 July 1967, had deposited within the International Bureau of the World Intellectual Property Organisation (hereinafter "WIPO"), the Sun of Vergina in three forms, as State emblem.[137] The FYROM, by a Verbal Note addressed to WIPO dated 12 August 1995, objected to the Sun of Vergina under its three forms being provided protection as State emblem of Greece, "due to the fact that they are a copy of the state flag of the Republic of Macedonia."[138]

4.58. Fourteen years after the conclusion and the entry into force of the Interim Accord, the FYROM has not yet withdrawn its objection of 12 August 1995.[139] Moreover, in the August 2004 issue of the official magazine of the FYROM's Ministry of Defence, a short article entitled "The emblem of the Technical Regiment of the Army", displayed a photo of the Sun of Vergina.[140] In 2007, during the official celebration of the Ilinden Uprising in Krushevo, which was attended by Prime Minister Gruevski, the program included the use of flags displaying the Sun of

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[137] See letter of the Minister of Foreign Affairs of Greece, Mr. Karolos Papoulias, to the International Bureau of the World Intellectual Property Organization, dated 22 May 1995, and the letter of reply of the Director General of WIPO dated 3 July 1995, together with Note C.5682-551 of WIPO, dated 3 July 1995, addressed to the States Parties to the Paris Convention : Annex 2.

[138] See Verbal Note of the Ministry of Foreign Affairs of the FYROM dated 12 August 1995, communicated through WIPO's Note C-5704-551 dated 30 August 1995 : Annex 2.

[139] The objection still stands on the webpage of WIPO, see, http://www.wipo.int/cgi-6te/guest/ifetch5?ENG+SIXTER+15-00+41276714-KEY+256+0+-1+F-ENG+2+5+1+25+SEP-0/HITNUM,B+CC%2fGR+. The Permanent Mission of Greece in Geneva requested the WIPO through a Verbal Note dated 23 November 2009 whether the objection raised by the FYROM under article 6ter of the 1883 Paris Convention has been withdrawn as of the date of that verbal note. The WIPO informed the Mission of Greece in reply that the objection in question has not been withdrawn. See Verbal Note of the Mission of Greece under Ref. 6778.6/18/AS 2610, dated 23 November 2009, and Verbal Note of the WIPO dated 26 November 2009: Annex 11.

[140] See page 33 of the official magazine "Defense" issue of August 2004: Annex 87. On the 8th of November 2004, the Liaison Office of the Hellenic Republic in Skopje, lodged a verbal demarche to the Ministry of Foreign Affairs as well as a second one to the Cabinet of the Minister of Defense of the Former Yugoslav Republic of Macedonia, for the use of the Sun of Vergina in the issue of August 2004 and for publications with irredentist content in the issues of August 2004 and November 2004 of the official magazine "Defense" of the Ministry of Defense. Greece stressed in this respect that the use of the Sun of Vergina in the emblem of the Technical Regiment of the Army constituted a continuing violation of the Interim Accord, see document of the Hellenic Republic Liaison Office in Skopje, No 141.1A/87/AS 1414, dated 8 November 2004 : Annex 152.

Vergina.[141] In 2007 the Ministry of Sciences financed the edition of a treatise entitled "Macedonian National Minorities in Neighbouring Countries" in the paper cover of which the Sun of Vergina is displayed twice, one of which was in the background of a map of "Greater Macedonia."[142]

4.59. On 11 July 2008, Prime Minister Nikola Gruevksi "welcomed […] a high delegation led by Prince Ghazanfar Ali Khan and princess Rani Atiqa of the Hunza people, who are self-proclaimed Macedonians and descendants of Alexander the Great."[143] The visit was organised by the Macedonian Institute for Strategic Research and the Sun of Vergina was amply displayed during the welcome ceremony.[144] In 2008, the Sun of Vergina was used in a televised program bearing the title "Macedonia Timeless".[145] This spot has been carried on behalf of the FYROM's Government.[146] Recently, the Sun of Vergina was displayed on the pavement of the main square in the municipality of Gazi Baba.[147] It was

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[141] See a copy of the Official Report released by the Prime Minister's Office, dated 2 August 2007, at pp. 1 and 6 : Annex 101; See also photos *in* Monika Taleska, "The persons who participated at the Ilinden uprising encouraged us to open a new Ilinden page" *Utrinski Vesnik*, dated 3 August 2007, available at: http://www.utrinski.com.mk/default.asp?ItemID=46822B95609A8B46B4F95BDD90F0518B, visited on 9 December 2009: Annex 125.

[142] Frosina Tashevski-Remenski, *Macedonian National Minorities in Neighbouring Countries. Current Situation*, Skopje 2007, Editor "2 August C": Annex 100.

[143] The Hunza people are living in Pakistan. See "PM Gruevski, Prince Ghazanfar Ali Khan agree on development of relations between Macedonian and Hunza people", *Macedonian Information Agency*, dated 11 July 2008, available at http://www.mia.mk/default.aspx?vId=52157858&1Id=2: Annex 136.

[144] Prince Ghazanfar Ali Khan declared that he was proud "for being greeted by the army of our Alexander" (See "Hunza, self-proclaimed descendants of Alexander the Great, visit Macedonia", *Macedonian Information Agency*, dated 11 July 2008, available at http://www.mia.mk/default.aspx?vId=52109499&1Id=2). The soldiers of the "army" bore shields and flags displaying the Sun of Vergina, see photos taken on 11 July 2008 : Annex 162.

[145] The program was aired on both the CNN and the Euronews Channels, and is available at www.macedonia-timeless.com : Annex 163.

[146] See Verbal Note of the Hellenic Republic Liaison Office in Skopje, No F. 141.1/48/AS 488, dated 15 April 2009, par. (d) : Annex 71. The video has been presented by the Ministry of Culture of the FYROM on December 24th 2008. Prime Minister Nikola Gruevski said the video was an excellent start by an excellent master as part of a larger project attempting to present Macedonia not only as a tourist destination, but also as a brand, see "Macedonia-Timeless to be aired on CNN, other international channels as of Thursday", available at the Official Site of the Government of the FYROM : http://www.vlada.mk/?=book/export/html/2019, : Annex 140.

[147] See Verbal Note of the Hellenic Republic Liaison Office in Skopje, No F. 141.1/49/AS 489, dated 15 April 2009 and the Verbal Note in reply of the Ministry of

also displayed on the website of the State Agency of Youth and Sport,[148] and in a leaflet published and distributed by the FYROM's Directorate of Culture and Art of the Ministry of Culture.[149]

4.60. The Sun of Vergina is constantly displayed on the shield of the Statue of Alexander the Great built on 15 October 2006 at the city of Prilep as well as on the pavement surrounding the Statue.[150] The Sun of Vergina is also regularly displayed at the entrance of the Special Hospital for surgical diseases "Philip II," founded nine years ago and located at the premises of the military hospital of Skopje as well as on the webpage of the Special Hospital.[151]

V. THE FYROM'S APPROPRIATION OF OTHER GREEK HISTORICAL AND CULTURAL SYMBOLS

4.61. The FYROM continues to appropriate symbols and other elements of the historical and cultural patrimony of Greece. In 2002, the FYROM's State Post Offices issued stamps bearing the images of Alexander the Great and his father, Philip II. Statues of Alexander the Great and Philip II have also been erected in several cities, such as Prilep, Stip, Bitola and even Skopje, as a "tribute to the history of the country."[152] In March 2007,

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Foreign Affairs of the FYROM, No 32-4354/1, dated 1 June 2009, where the fact is not denied : Annex 72.

[148] See Verbal Note of the Hellenic Republic Liaison Office in Skopje, No F. 141.1/49/AS 489, dated 15 April 2009 and the Verbal Note in reply of the Ministry of Foreign Affairs of the FYROM No 32-4354/1, dated 1 June 2009, where the fact is not denied : Annex 72. Recently, the FYROM's Ministry of Foreign Affairs, through its Verbal Note 32-4354/2, dated 26 August 2009, informed the Greek Liaison Office in Skopje that the Sun of Vergina has been removed both from the Gazi Baba square, as well as from the website of the State Agency of Youth and Sport : Annex 78.

[149] See Verbal Note of the Hellenic Republic Liaison Office in Skopje No F. 141.1A/218/AS 1114, dated 25 August 2009 : Annex 77.

[150] See photo available at the site http:/www.panoramio.com/photo/608434, where it is mentioned that the photo was "uploaded on January 28, 2007". See also photo taken on 01 August 2009, available at : http://en.wikipedia.org/wiki/File:Prilep_spomenik_Aleksandar_Makedonski).JPG: Annex 155.

[151] See a) photo of the Sun of Vergina at the entrance of the hospital, b) photo of the building of the special hospital where the Sun of Vergina is also displayed available at : http://www.cardiosurgery.com.mk/00_news_and_events.htm, visited on 26 November 2009 and c) the Sun of Vergina appearing as a logo of the "Special Hospital FILIP VTORI" available at the site http://www.cardiosurgery.com.mk/pdf/kako%20da%20zakazete%20usluga%20vo%20Filip%20Vtori.pdf: Annex 111.

[152] See Verbal Note of the Hellenic Republic Liaison Office in Skopje, No. F. 141.1/48/AS 488, dated 15 April 2009, par. (b) : Annex 71.

an international competition was organised for the building in Skopje of an equestrian sculpture of Alexander the Great.[153]

4.62. In December 2006, the government decided to rename the international airport of Skopje after "Alexander the Great," despite Greece's protests, including in particular the official statement on 28 December 2006 by then Foreign Minister Bakoyannis qualifying the FYROM's conduct as "not consistent with the obligations concerning good neighbourly relations that emanate from the Interim Agreement and Skopje's commitments to the EU."[154] In the same vein, during a speech to the Parliamentary Standing Committee on National Defence and Foreign Affairs of the Greek Parliament, on 20 February 2007, Foreign Minister Bakoyannis stated:

> "the recent decision of the government of the Former Yugoslav Republic of Macedonia to rename Skopje's Petrovac airport 'Alexander the Great' is not an act of good neighbourly relations. It was a breach of the 1995 Interim Agreement. An historically groundless and politically counterproductive action. It rendered even more difficult - as Mr. Nimetz himself stressed publicly during his visit here – the mission that has been undertaken by the UN mediator."[155]

The FYROM's decision to rename its airport after Alexander the Great was also qualified as being "in direct contradiction" to the spirit of the Interim Accord in Resolution 356 (2007) of the United States House of Representatives as well as in Resolution 300 (2007) of the United States Senate.[156]

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[153] "Opening of the Procedure for the construction of the monument of Alexander the Great", *Official Gazette of the Municipality of Skopje*, No 10, 18 December 2006, available at: http://opstinacentar.gov.mk/depo/glasnik_br_10_2006.pdf, visited on 7 December 2009: Annex 98.

[154] See Statement of Foreign Minister of Greece Ms. Bakoyannis regarding Skopje's decision to rename its international airport, Athens, 28 December 2006, available at : http://www.mfa.gr/www.mfa.gr/GoToPrintable.aspx?UICulture=en-US&GUID={EB4A0EB2-CBA2-4378-9E01-FC18367F5028}: Annex 119.

[155] See Speech of Foreign Minister of Greece Ms. Bakoyannis to the Parliamentary Standing Committee on National Defense and Foreign Affairs, Athens, 20 February 2007, available at : http://www.mfa.gr/www.mfa.gr/GoToPrintable.aspx?UICulture=en-US&GUID={C45FA976-9469-4954-B32F-8AC686D588D3}, visited on 24/09/2009 : Annex 120.

[156] "Whereas in direct contradiction of the spirit of the United Nations Interim Accord's section «A» entitled «Friendly Relations and Confidence Building Measures» which attempts to eliminate challenges regarding «historic and cultural patrimony», the

4.63. The FYROM's hostility towards Greece only intensified after the Bucharest Summit, and with that hostility have come continued violations of its international obligations. In December 2008, the new square of Gazi Baba was renamed after "Philip II the Macedon".[157] On 29 December 2008, a decision was published in the Official Gazette, volume 164, naming part of the Pan-European Corridor X after Alexander the Great.[158] It was also decided to name the main stadium of Skopje after "Philip II, the Macedon".[159]

4.64. Greece protested those violations in Verbal Notes dated 15 January 2009 and 15 April 2009.[160] However, the FYROM refused to take any corrective action regarding the matter.

VI. THE FYROM'S BEHAVIOUR BEFORE INTERNATIONAL ORGANISATIONS

4.65. In the Memorial of the FYROM, it is admitted that the latter "has always used its constitutional name in written and oral communications with the United Nations."[161] Reference is also made to the signing of multilateral agreements for which the United Nations is the depository:

> "the practice of the Applicant is and has always been for the person signing on its behalf to insert on the signature page, above his or her signature and below the provisional reference, the words: 'on behalf of the Republic of Macedonia'."[162]

4.66. This way of signing international agreements is rather disdainful of its treaty obligation, taking into account that the name "The former

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Government of the FYROM recently renamed the capital city's international airport "Alexander the Great" (eighth preambular paragraph, H.Res.356[2007]) See also the almost identical wording of the eighth preambular paragraph of US S. Res. 300 (2007). H.Res356[110], 1 May 2007 : Annex 156; SRes300[110], 3 August 2007 : Annex 157.

[157] Press Release of the Office of the Prime Minister, dated 17 December 2008 available at: http://www.vlada.mk/?q=node/1916: Annex 129.

[158] "Decision on the naming of the highway E-75 from border crossing Tabanovce up to border crossing Bogorodica (Corridor X)", *Official Gazette of the "Republic of Macedonia,* No 164 (29 December 2008), p. 5: Annex 106.

[159] "Decision on the renaming of the Stadium of Skopje", *Official Gazette of the Republic of Macedonia,* No 164 (29 December 2008), p. 7 : Annex 107.

[160] No 141.1/48/AS 488. See Annex 66 as well as Annex 71 respectively. See also letters of the Permanent Representative of Greece to the United Nations, doc. A/63/712-S/2009/82 dated 10 February 2009: Annex 12 and doc. A/63/869-S/2009/285, dated 2 June 2009: Annex 13.

[161] Par. 2.20 (p. 29) of the Memorial.

[162] Par. 2.20 (p. 30) of the Memorial.

Yugoslav Republic of Macedonia" is already printed above the signature place. Thus, the representative of the FYROM, by inserting by hand, between the printed name and its signature, the constitutional name, in fact attempts to modify language already agreed on which figures on the original text of the treaty.[163] There is no other such precedent in international practice, neither is it provided for in the Vienna Convention on the Law of Treaties that a person signing an international agreement is permitted to attempt to modify or question the content of the treaty, as there is no doubt that the printed names of the States signing the treaty are an integral part of its text.

4.67. The FYROM did not make use of the provisional name either in the United Nations or in any other organisation or institution of which it is a member or an associate. For instance, in September 2007, during the general debate of the 62nd session of the United Nations General Assembly, the President of the FYROM, Mr. Branko Crvenkovski, in his statement to the Assembly used the name "Republic of Macedonia" and stated that "the name of my country is the Republic of Macedonia and will be the Republic of Macedonia."[164] That same day, the President of the Assembly, Mr. Srgjan Kerim, a national of the FYROM, while announcing the President of his country, Mr. Crvenkovski, referred to him as the "President of the Republic of Macedonia" and repeatedly used the same name for his country, taking advantage of his position as an official of the United Nations.[165] Moreover, in reply to Greece's written reaction

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[163] See for instance the International Convention for the Suppression of Acts of Nuclear Terrorism, New York 15 September 2000 where, between the printed provisional name and the signature, it was added by hand "On behalf of the Government of the Republic of Macedonia", as well as the Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime, New York 15 November 2000 where, between the printed provisional name and the signature, it was added by hand in capital letters, "On the name of Republic of Macedonia": Annex 151.

[164] Statement made by President Crvenkovski in September 2007 before the General Assembly, United Nations, *Official Records of the General Assembly, Sixty Second Session, 4th Plenary Meeting*, doc. A/62/PV.4 at p. 29: Annex 5.

[165] The transaction, at the fourth plenary meeting of the 62nd General Assembly session, is recorded as follows:

*"**The President**: The Assembly will now hear an address by His Excellency Mr. Branko Crvenkovski, President of the Republic of Macedonia.*

Mr. Branko Crvenkovski, President of the former Yugoslav Republic of Macedonia, was escorted into the General Assembly Hall.

***The President**: On behalf of the General Assembly, I have the honour to welcome to the United Nations His Excellency Mr. Branko Crvenkovski, President of the Republic of Macedonia, and to invite him to address the Assembly."*

United Nations, *Official Records of the General Assembly, Sixty Second Session, 4th Plenary Meeting*, doc. A/62/PV.4 at p 27: Annex 5. For Greece's oral and written protest,

through the letter dated 4 October 2007 from the Permanent Representative of Greece to the United Nations,[166] the Chargé d'affaires of the Permanent Mission of the FYROM to the United Nations addressed a letter to the Secretary-General arguing, *inter alia,* that the "additional condition for membership" imposed on its country by SC res 817 (1993) ("that the State would be provisionally referred to as 'the former Yugoslav Republic of Macedonia' pending settlement of the difference that had arisen over the name") "ran contrary to the Advisory opinion of the International Court of Justice of May 1948."[167]

4.68. During the exchange of letters for the conclusion of the "Agreement in the form of an exchange of letters concerning the conclusion of the Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the former Yugoslav Republic of Macedonia, of the other part", the Prime Minister of the FYROM, Ljubco Georgievski, in his letter of acceptance of the letter of the European Communities and its member States dated 9 April 2001, declared:

> "the Republic of Macedonia does not accept the denomination used for my country in the above-mentioned documents having in view that the constitutional name of my country is the Republic of Macedonia."

The European Communities and its Member States, through a second letter dated 9 April 2001, acknowledged receipt of the letter of the Prime Minister noting, however, that the exchange of letters "cannot be interpreted as acceptance or recognition by the European Communities and their Member States in whatever form or content of a denomination other than the "former Yugoslav Republic of Macedonia."[168]

4.69. More recently, Prime Minister Gruevski wrote a letter dated 27 April 2009 to H.E. Professor Rolf-Dieter Heuer, Director-General of the

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see respectively United Nations, *Official Records of the General Assembly, Sixty Second Session, 4th Plenary Meeting*, doc. A/62/PV.4 at p. 27(Annex 5) and Letter dated 4 Oct 2007 from the Permanent Representative of Greece to the United Nations, John Mourikis, addressed to the Secretary-General, doc. A/62/470-S/2007/592, dated 5 October 2007: Annex 6.

166 See doc. A/62/470-S/2007/592, dated 5 Oct 2007 : Annex 6.

167 See letter dated 17 October 2007 from the Chargé d'affaires a.i. of the Permanent Mission of the former Yugoslav Republic of Macedonia to the United Nations, addressed to the Secretary-General, doc. A/62/497-S/2007/621, dated 19 October 2007: Annex 7.

168 For the text of the letters see Official Journal of the European Union 20 March 2004, respectively L 84/3, L/84/7 and L/84/9 : Annex 4.

European Organisation for Nuclear Research (hereinafter "CERN"), acknowledging CERN's announcement of a cooperation agreement between that organisation and the FYROM. In this letter, the Prime Minister stated that "the Republic of Macedonia does not accept the denomination used for my country in the above-mentioned Agreement, having in view that the constitutional name of my country is the Republic of Macedonia."[169]

4.70. As far as the NATO is concerned, the FYROM expressed its wish to participate in NATO's Partnership for Peace (hereinafter "PfP") through a letter of the Minister of Foreign Relations, Stevo Crvenkovski, dated 17 March 1994, using the constitutional name "Republic of Macedonia".[170] This is also the case of the letter of the Ambassador of the FYROM in Brussels, dated 15 April 1996, whereby the Secretary General of NATO is informed that the Government of the "Republic of Macedonia, according to the proclaimed desire by the Macedonian Parliament in 1993, for joining the North Atlantic Treaty Organisation, intends to respond positively to the invitation for the initiation of the individual dialogue with NATO on the basis of the Study on Enlargement."[171] The FYROM also used its constitutional name in a letter from the Minister of Foreign Affairs addressed to the Secretary General of the Alliance, dated 7 April 1997, formally reaffirming "the interest and willingness of the Republic of Macedonia for a full membership in NATO […]."[172]

4.71. The FYROM was admitted to NATO's PfP in November 1995 under its provisional name. Despite this fact, the FYROM signed, on 30 May 1997, the "Agreement among the States Parties to the North Atlantic Treaty and the other States participating in the Partnership for Peace regarding the Status of their Forces" (hereinafter "PfP SOFA Agreement"), as well as the "Additional Protocol to the Agreement among the States Parties to the North Atlantic Treaty and the other States Participating in the Partnership for Peace regarding the Status of their

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169 Letter from Nikola Gruevski, Prime Minister, 27 April 2009, in response to Letter from Rolf Heuer, Director-General of the European Organization for Nuclear Research, 27 April 2009 : Annex 164.

170 See letter of Stevo Crvenkovski, Minister of Foreign Relations of the FYROM, addressed to Mr. Gebhardt von Moltke, NATO Assistant Secretary General for Political Affairs, dated 17 March 1994: Annex 147.

171 See letter of Jovan Tegovski, Ambassador of the FYROM to Brussels, addressed to Mr. Javier Solana, Secretary General of NATO, N. 117-04 dated 15 April 1996 : Annex 149.

172 See letter, of the Minister of Foreign Affairs of the FYROM Ljubomir Frckoski to Mr. Javier Solana, Secretary General of NATO, dated 7 April 1997: Annex 150.

Forces" (hereinafter "Additional Protocol to the PfP SOFA Agreement"), under its constitutional name. In reacting to this attitude of the FYROM, the Permanent Representative of Greece to NATO, Ambassador George Savvaides, lodged the following declaration upon signing on behalf of Greece on 9 October 1997 the PfP SOFA Agreement:

> "Regarding the signing of this Agreement by the former Yugoslav Republic of Macedonia, the Hellenic Republic declares that its own signing of the said Agreement can in no way be interpreted as an acceptance from its part, or as recognition in any form and content of a name other than that of 'the former Yugoslav Republic of Macedonia' under which the Hellenic Republic has recognized the said country and under which the latter has joined the NATO 'Partnership for Peace' Programme, where resolution 817/93 of the UN Security Council was taken into consideration."[173]

A similar declaration was lodged by Ambassador George Savvaides, the Permanent Representative of Greece to NATO, upon signing on 9 October 1997, on behalf of Greece, the Additional Protocol to the PfP SOFA Agreement.[174]

4.72. It is clear that the FYROM, even if not objecting to being admitted to NATO under its provisional name, would, after admission, use its constitutional name in the context of the Alliance. Moreover, given the fact that NATO operates under the consensus rule, one cannot preclude the possibility that the FYROM might attempt to block the adoption of NATO decisions which use its provisional name, thus paralysing the Alliance's decision making procedure.

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[173] See Agreement among the States Parties to the North Atlantic Treaty and the other States participating in the Partnership for Peace regarding the status of their forces: Annex 16.

[174] "Regarding the signing of this Protocol by the FYROM, the Hellenic Republic declares that its own signing of the said Protocol can in no way be interpreted as an acceptance from its part, or as recognition in any form and content of a name other than that of "the former Yugoslav Republic of Macedonia" under which the Hellenic Republic has recognized the said country and under which the latter has joined the NATO "Partnership for Peace" Programme, where resolution 817/93 of the UN Security Council was taken into consideration" (See Additional Protocol to the Agreement among the States Parties to the North Atlantic Treaty and the other States participating in the Partnership for Peace regarding the status of their forces : Annex 17).

VII. GREECE'S REACTIONS TO THE FYROM'S BEHAVIOUR PRIOR TO THE BUCHAREST SUMMIT

4.73. The FYROM's breaches of the Interim Accord have been numerous, material and not limited to one or a few of the obligations this State assumed by virtue of the Interim Accord. In practice, the FYROM has disregarded, sometimes continuously as in the case of irredentist and hostile propaganda, key obligations under the Interim Accord. The violations are widely known. Resolution 486 (2009) of the United States House of Representatives as well as Resolution 169 (2009) of the United States Senate have "urged the former Yugoslav Republic of Macedonia to abstain from hostile activities and stop violating provisions of the United Nations-brokered Interim Agreement between the former Yugoslav Republic of Macedonia and Greece regarding 'hostile activities or propaganda'."[175]

4.74. Greece has reacted to this attitude both by reminding the FYROM of its duties as well as by denouncing its actions as constituting breaches of the Interim Accord, but to no avail.

4.75. In a letter to the FYROM's then-Prime Minister Georgievski dated 22 January 1999, Mr. Theodoros Pangalos, Greece's Minister of Foreign Affairs, expressed his surprise regarding his visit to Skopje:

> "[T]wo issues, totally irrelevant both to the agenda of my visit and to the overall framework of our relations, namely the issue of an alleged 'Macedonian minority in Greece' and that of the restitution of property belonging to those who fled the country during the Greek Civil war, were raised by the Foreign Minister Dimitrov."

Mr. Pangalos linked this event with the obligations assumed by the FYROM, stressing in his letter to the Prime Minister:

> "I welcome your assurance that our bilateral relations are guided by the texts we have signed as well as your commitment to comply with their provisions including in

[175] See par. 2 of United States House of Representatives Resolution 486 (2009) H.Res. 486[111], 21 May 2009 (Annex 165), as well as par. 2 of United States Senate Resolution169 (2009) S.Res.169[111], 4 June 2009 (Annex 166).

particular those referred to in Articles 6 and 7 of the Interim Accord."[176]

4.76. On 8 November 2004, the Liaison Office of the Hellenic Republic in Skopje, lodged a verbal demarche to the FYROM's Ministry of Foreign Affairs as well as a second one to the Cabinet of the Minister of Defence, over the use of the Sun of Vergina and irredentist publications in the issues of August 2004 and November 2004 of the official journal "Defence" of the Ministry of Defence. It was stressed that the use of the Sun of Vergina in the emblem of the Technical Regiment of the Army constituted a continuing violation of the Interim Accord.[177]

4.77. Following a proposal for consultations between the two countries contained in the Verbal Note No 0.1-586/1/05 dated 11 August 2005 of the Liaison Office of the FYROM in Athens, its Head, Ambassador Handziski, was invited to the A3 Directorate for Balkan Affairs of the Ministry of Foreign Affairs of Greece. Its Director, Ambassador Mallias, handed over to Ambassador Handziski the Verbal Note in Reply of the Ministry of Foreign Affairs, No AS 1524 dated 22 August 2005. During the meeting, held on 22 August 2005, Ambassador Mallias referred both to the rejection by the FYROM of the set of ideas presented by the Special Representative of the UN Secretary General, as well as to the FYROM's continuous irredentist propaganda illustrated, and made clear that the Interim Accord could not be applied unilaterally, i.e., only on the part of Greece.[178]

4.78. Greece protested against the FYROM's decision to rename the international airport of Skopje "Alexander the Great", characterizing it as a violation of the Interim Accord. In particular, the then Foreign Minister Ms. Dora Bakoyannis made an official statement on the 28 December 2006, describing this conduct as "not consistent with the obligations concerning good neighbourly relations that emanate from the Interim Agreement and Skopje's commitments to the EU".[179] In the same vein, at a

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[176] See Letter form the Minister of Foreign Affairs of Greece to the Prime Minister of the FYROM, dated 22 January 1999 : Annex 40.

[177] See document of the Hellenic Republic Liaison Office in Skopje, No F. 141.1A/87/AS 1414, dated 8 November 2004: Annex 152.

[178] See document of the A3 Directorate of the Ministry of Foreign Affairs of the Hellenic Republic, No 140/G/AS 1529/142/ON, dated 22 August 2005 with attached Verbal Notes: Annex 153.

[179] See Statement of Foreign Minister of Greece, Ms. Bakoyannis regarding Skopje's decision to rename its international airport, Athens, 28 December 2006, available at : http://www.mfa.gr/www.mfa.gr/GoToPrintable.aspx?UICulture=en-US&GUID={EB4A0EB2-CBA2-4378-9E01-FC18367F5028}: Annex 119. See also

speech to the Parliamentary Standing Committee on National Defence and Foreign Affairs of the Greek Parliament, dated 20 February 2007, Foreign Minister Bakoyannis stated:

> "the recent decision of the government of the FYROM to rename Skopje's Petroveč airport 'Alexander the Great' is not an act of good neighbourly relations. It was a breach of the 1995 Interim Agreement. An historically groundless and politically counterproductive action. It rendered even more difficult – as Mr. Nimetz himself stressed publicly during his visit here – the mission that has been undertaken by the UN mediator."[180]

4.79. On 4 May 2007, the Spokesman of the Ministry of the Foreign Affairs of Greece, Mr. Koumoutsakos, answering a journalist's question, stated:

> "[W]e are constructively pursuing a mutually acceptable solution to the name issue, through the UN process and in accordance with Security Council Resolution 817. We are awaiting a similar response from the former Yugoslav Republic of Macedonia, which presupposes that various circles within and outside the Skopje Government abandon the practice of aiming irredentist propaganda against a member state of NATO and the European Union – by using symbols, maps, textbooks etc – and that they conduct themselves in a manner that is consistent with the European acquis."[181]

4.80. On 3 June 2007, the spokesman of the Ministry of the Foreign Affairs of Greece, Mr. Koumoutsakos, stated that the FYROM, in order to achieve "a smooth Euro-Atlantic course", needed to "implement a policy of good neighbourly relations, rectify and abandon actions and policies

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Verbal Note of the Hellenic Republic Liaison Office in Skopje, No. F. 141.1/48/AS 488, dated 15 April 2009, par. (b) : Annex 71.

[180] See Speech of Foreign Minister of Greece Ms. Bakoyannis to the Parliamentary Standing Committee on National Defense and Foreign Affairs, Athens, 20 February 2007, available at : http://www.mfa.gr/www.mfa.gr/GoToPrintable.aspx?UICulture=en-US&GUID={C45FA976-9469-4954-B32F-8AC686D588D3}, visited on 24/09/2009 : Annex 120.

[181] See Answer of Foreign Ministry Spokesman Mr. G. Koumoutsakos to a journalist's question regarding the US House of Representatives resolution on former Yugoslav Republic of Macedonia propaganda, Athens, 4 May 2007, available at *: http://www.mfa.gr/www.mfa.gr/GoToPrintable.aspx?UICulture=en-US&GUID={C6F297C0-2199-4FEF-9089-355DB42EC026}*: Annex 121.

based on irredentist thinking towards a member state of NATO and the European Union, adopt a conciliatory and moderate spirit within the framework of the consultations taking place at the UN aimed at the achievement of a mutually acceptable solution on the name issue, given that the current name is temporary", stressing that "this is all provided for in the Interim Agreement, which the current Skopje government is unfortunately calling into question through many of its actions."[182]

4.81. On 13 September 2007, Foreign Minister Bakoyannis stated:

> "[A] number of the Skopje government's decisions and actions have confirmed its persistence with regard to historically groundless and provocative propaganda that assails the principle of good neighbourly relations. They have forgotten the obligations they have undertaken, and I am referring to article 7 of the Interim Accord, which explicitly prohibits direct or indirect actions of irredentist propaganda."[183]

VIII. CONCLUSION

4.82. The FYROM has committed numerous and material breaches of the Interim Accord and, in practice, has disregarded its obligations under the Agreement. Greece has made multiple attempts, outlined above, to encourage the FYROM to resume performance of those obligations. Unfortunately, Greece's efforts have been to no avail.

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[182] See Statement of Foreign Ministry spokesman Mr. G. Koumoutsakos regarding today's statements from the FYROM President Mr. Crvenkovski, Athens, 3 June 2007, available at : http://www.mfa.gr/www.mfa.gr/GoToPrintable.aspx?UICulture=en-US&GUID={6BF87A42-F2F9-4644-9045-BA9D07041B4B}: Annex 122.

[183] Statement of Foreign Minister of Greece Ms. Bakoyannis regarding statements made by FYROM President Mr. Crvenkovski, 13 September 2007, available at http://www.greekembassy.org/Embassy/Content/en/Article.aspx?office=1&folder=24&article=21578 (emphasis added by Greece): Annex 127.

CHAPTER 5: NATO'S DECISION ON THE FYROM'S MEMBERSHIP

I. INTRODUCTION: NATO AS AN INTEGRATED INTERNATIONAL ORGANIZATION

5.1. NATO is an intergovernmental military alliance based on the North Atlantic Treaty of 4 April 1949. As a system of collective self-defence, its Member States agree to mutual defence should there be an armed attack by an outside party. The North Atlantic Treaty, which the United Nations Treaty Database categorises as a closed multilateral treaty, pledges the Member States "separately and jointly, by means of continuous and effective self-help and mutual aid", to "maintain and develop their individual and collective capacity to resist armed attack."[184] The Treaty prescribes that the Parties "will consult together whenever, in the opinion of any of them, the territorial integrity, political independence or security of any of the Parties is threatened."[185] Under Article 5, if an armed attack has occurred against any Member State, it "shall be considered an attack against them all," and each Party undertakes to assist, "by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area."[186]

5.2. Although the Member States of NATO and other highly integrated organisations certainly do not constitute a State,[187] diplomats and writers have referred to the Member States of such organisations as "pooling sovereignty."[188] The expression nicely captures the mutual dependence for security and, to that end, the importance within NATO of coordinated decision-making and shared commitment to Alliance policy. Defence – and particularly the maintenance and strengthening of peace

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184 North Atlantic Treaty, Art 3: 34 UNTS 242, 246.

185 *Ibid*, Art 4.

186 *Ibid*, Art 5.

187 See *Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion of 11 Apr 1949, ICJ Rep 1949* p. 174, 179. See also *Interpretation of the Agreement of March 25, 1951 Between the WHO and Egypt*, *Advisory Opinion of 20 Dec 1980*, *ICJ Reports 1980 p 73,* Sep. Op. Judge Gros, p.103.

188 E.g., T. Pickering, "Southeastern Europe: An Endeavor Consistent with the Transatlantic Vision and Indicative of the Changing International Environment" (2000) 94 *ASIL Proc* 234, 238.

through preparedness and solidarity among the Member States – is the primary reason for which NATO was created.

5.3. Towards implementation of the Alliance's purpose as the principal collective mechanism of defence in the North Atlantic area, the Member States established its permanent headquarters in Brussels in 1967. The headquarters is staffed by approximately 4,000 personnel, including 1,200 International Staff and 500 International Military Staff.[189] NATO implements a large number of agreements and programmes to integrate and standardise materiel, operating procedures, logistics and other components of Alliance activity.[190] NATO headquarters is a venue for approximately 5,000 internal meetings per year.[191]

5.4. According to Article 9 of the North Atlantic Treaty, the principal political organ of the Alliance is the North Atlantic Council (hereinafter "NAC"), which contains representatives of each Party, considers "matters concerning the implementation" of the Treaty and is mandated to "set up such subsidiary bodies as may be necessary…" According to NATO:

> "The North Atlantic Council is the principal decision-making body within NATO. It brings together high-level representatives of each member country to discuss policy or operational questions requiring collective decisions. In sum, it provides a forum for wide-ranging consultation between members on all issues affecting their security".[192]

5.5. Decisions reached in the Council and its subsidiary bodies belong broadly to the following categories:[193]

(i) Political and military strategies, incorporated into NATO documents such as the Alliance Strategic Concept and Ministerial Guidance and decisions concerning enlargement;

(ii) Military structure and planning functions, covering areas such as the NATO command and force

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189 The remainder are personnel of the diplomatic missions of the individual member States and partnership States: http://www.nato.int/cps/en/natolive/topics_49284.htm

190 For a list of NATO Standardization Agreements (STANAGS), see http://www.nato.int/cps/en/natolive/stanag.htm.

191 *Ibid*.

192 http://www.nato.int/cps/en/natolive/topics_49763.htm

193 Leo G. Michel, "NATO Decision Making: Au Revoir to the Consensus Rule?", *Strategic Forum*, No 202/August 2002, 5.

structure, deployment of military resources, and operational planning for contingencies related to potential security needs;

(iii) Authorizing, monitoring and adjusting collective defense and crisis management operations, such as NATO-led operations in the Balkans and Afghanistan;

(iv) Organisational and management concerns, including defining the responsibilities of and overseeing the International Military Staff and the various NATO subsidiary bodies; and

(v) Management of resources and budgeting.

5.6. The NAC's competences cover fields of significant complexity. The staff of the Alliance, serving in the various subsidiary bodies within the headquarters' bureaucracy, oversees the implementation of Council decisions. This takes place across the considerable geographic and substantive spheres in which the Alliance operates.

5.7. For the Alliance to retain its intended capacity to take emergency action, as well as for it to maintain its on-going stabilisation activities, it is indispensable that the foreign policies of its members be in sufficient alignment such that bilateral differences within the Alliance not interfere with organisational decision-making or with the implementation of decisions reached. The mutual alignment of the Member States is a significant requirement of the Alliance in respect of its stability-building function: NATO aims with its integrated structure to solidify European security and a high degree of solidarity among its members is necessary for the fulfilment of this goal.

II. NATO'S ACTIVITIES AS AN ALLIANCE

5.8. The Alliance, which conducts ongoing activities in support of regional peace and security, must have the capability to react rapidly to any "armed attack against one or more of [the Member States] in Europe or North America […]."[194] The Alliance demonstrated this capability when the NAC, on 12 September 2001, adopted a statement invoking Article 5 of the Treaty[195] less than twenty-four hours after an armed attack on the territory of one of its Member States. The Alliance maintains a

[194] North Atlantic Treaty, Art 5: 32 UNTS 242, 246.

[195] NATO Press Release (2001)124, 12 Sept 2001. See also Press Release PR/CP(2001)122, 11 Sept 2001.

major deployment in Afghanistan in the form of the International Security Assistance Force (hereinafter "ISAF"),[196] as well as a major deployment in Kosovo in the form of the NATO Kosovo Force (hereinafter "KFOR").[197] The North Atlantic Treaty also furnishes a basis for the Alliance's activity in political and economic fields: Article 2 provides that the NATO Member States will "contribute toward the further development of peaceful and friendly international relations by strengthening their free institutions, by bringing about a better understanding of the principles upon which these institutions are founded, and by promoting conditions of stability and well-being." Article 2 further provides that NATO Members "will seek to eliminate conflict in their international economic policies and will encourage economic collaboration between any or all of them."[198] The Alliance has addressed the international financial crisis[199] and the development of science and technology.

III. NATO'S CONSULTATION PROCESS

5.9. Consultation between Member States is a key part of the decision-making process in NATO, allowing Allies to exchange views and information prior to reaching agreement and taking action. The process is continuous and takes place both on an informal and a formal basis; it facilitates efficiency within the decision making process.

5.10. In NATO there is no provision for decision by majority vote. Rather, decisions are taken by consensus, meaning "an agreement reached by common consent and supported by each member country" and "action […] agreed upon on the basis of unanimity and common accord."[200] Where there are disagreements between allies, efforts will be made to reconcile those differences to further facilitate the consensus process. Once taken, any decision by NATO represents the common determination of all Member States to implement it in full.[201]

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196 http://www.nato.int/isaf/docu/epub/pdf/placemat.pdf.

197 http://www.nato.int/kfor/structur/nations/placemap/kfor_placemat.pdf.

198 See also Press Release NAC-S(99)66, *Membership Action Plan (MAP)*, dated 24 April 1999, Part I ("Political and Economic Issues") and Part III (concerning, *inter alia,* defense appropriations and budgeting): Annex 21.

199 http://www.nato.int/docu/review/2009/FinancialCrisis/PROTECTIONISM/EN/index.htm.

200 *NATO Handbook*, Public Diplomacy Division, NATO, 2006, at p. 33 and 35: Annex 22.

201 *Idem,* pp. 33-34.

5.11. The main principles that govern consultation between Allies are set in the *Text of the Report of the Committee of Three on Non Military Cooperation in NATO.*[202]

5.12. In particular, the Report recommends that Member States should:

- Inform each other of any development which significantly affects the Alliance;
- Raise for discussion within NATO any subject of common interest;
- Seek prior consultation before making a firm policy decision or pronouncement on a matter of major concern to another Ally;
- Take the views and interests of their Allies into account when developing their national policies and
- Follow any decision reached in the Alliance with firm action in their national policies, or, if they cannot do so, explain why.

5.13. According to Fredo Dannenbring, a former NATO Assistant Secretary General for Political Affairs:

> "[A]s to the substance and limitations of political consultations it must first of all be borne in mind that the decision making process in the Alliance is governed by the rule of consensus. This means that policy making remains the ultimate prerogative of sovereign member states. Common policies and joint positions can therefore only be developed when all of them agree. It is in recognition of the importance of political cohesion that the Allies have in fact been able to agree on many elements of joint policy. This is most visibly demonstrated in Ministerial Communiqués and Summit Declarations all of which are the result of a painstaking and sometimes difficult consultative effort."[203]

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[202] Approved by NAC in Brussels on 13 December 1956, text *in NATO Handbook Documentation*, NATO Office of Information, 1999, p. 166: Annex 19.

[203] Fredo Dannenbring: "Consultations: The political lifeblood of the Alliance" *NATO Review*, volume 33 / 6, 1985, p. 5, at p. 10: Annex 145.

5.14. The consensus rule does not imply that each Member State has a veto power. As NATO's Secretary General Scheffer declared in Cracow on 19 February 2009:

> "**Q:** Mr. Scheffer, what are NATO plans for Macedonia since the name dispute won't be solved, it's likely in the near future, according to the Madam Minister of Foreign Affairs of Greece today: she told media in Greece that the Greek government planned to put a veto on Macedonian invitation one year before the Bucharest Summit.
>
> **DE HOOP SCHEFFER:** That last remark I do not understand and I'll not comment on. NATO does not know the word veto. We operate by consensus and unfortunately there was no consensus last year at the Summit in Bucharest, but I'm not going to repeat what I've said many times before.
>
> On the accession question, I can only say that I do hope that the name issue will be resolved as soon as possible and you know that last year in Bucharest it was this issue which prevented the consensus. And that in the meantime NATO's cooperation with Skopje will go on. That's an intensive cooperation in the framework of the Membership Action Plan."[204]

5.15. In fact, the rationale of the consensus rule is not to provide each Member State with the power to *block* organizational decisions, but to induce Member States to reach mutually agreed-upon solutions, satisfactory to all of them, thereby ensuring the unity of the Alliance.[205]

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[204] Press Conference by NATO Secretary General Jaap De Hoop Scheffer after the informal Meeting of NATO Defense Ministers, with Invitees with non NATO ISAF Contributing Nations, Cracow, Poland, dated 19 February 2009, available at http://www.nato.int/docu/speech/2009/s090219c.html : Annex 33; See also the Secretary-General's observations to the same effect in Athens:

> "NATO doesn't know the word veto. NATO does know the word consensus. And although some people might have been disappointed, there was a consensus in Bucharest last year, and there was a consensus again in Strasbourg/Kehl. So there is no veto. NATO doesn't know the word veto, and no nation has ever vetoed anything in NATO."

Statements of Foreign Minister of Greece Ms. Bakoyannis and NATO Secretary-General Scheffer following their meeting, Athens, 14 May 2009, available at http://www.mfa.gr/www.mfa.gr/Articles/en-US/140509_H1918.htm: Annex 141.

[205] "Le droit de veto est essentiellement négatif. Il confère à une puissance le pouvoir formel de s'opposer à une décision sans même en justifier les raisons. La règle de

IV. THE NATO ENLARGEMENT PROCESS

5.16. A central characteristic of NATO enlargement is that, for a State to receive the invitation of NATO to accede to the North Atlantic Treaty, that State must satisfy certain prescribed criteria. In part, the criteria are set out in the Treaty; in part they are specified by the Alliance through decisions of the NAC and may be refined or augmented in respect of particular States. Article 10 of the North Atlantic Treaty provides as follows:

> "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."

5.17. Under Article 10, an aspirant State must meet the following requirements: (i) it must be a State; (ii) it must be located in Europe; (iii) it must be "in a position to further the principles" of the Treaty; and (iv) it must be able to "contribute to the security" of the geographical area to which the Treaty pertains. As the text of Article 10 of the Treaty makes clear, the Member States retain the discretion to invite, or not to invite, any other State meeting these criteria—they "may" do so, but they are not obliged to invite any given State under the Treaty, even if it meets the requisite qualifications. Member States are, however, at will to decline an invitation to an aspirant State which does not satisfy the criteria specified.

5.18. NATO began with a relatively small group of original Member States in 1949 and since then has undergone enlargement in stages. Greece and Turkey acceded to the North Atlantic Treaty in 1952,[206] the Federal Republic of Germany in 1955,[207] and Spain in 1982.[208]

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l'unanimité, à l'opposé, est une invitation pressante à la conciliation. Elle s'inspire du souci d'assurer l'unité d'action en vue du but commun" (*OTAN, Documentation sur l'Organisation du Traité de l'Atlantique Nord*, *Analyse du Traité*, Publication OTAN, Service de l'information, Paris, 1962, p. 18: Annex 15).

[206] Protocol to the North Atlantic Treaty on the Accession of Greece and Turkey of 17 Oct 1951, entry into force 15 Feb 1952: 126 UNTS 350.

[207] Protocol to the North Atlantic Treaty on the Accession of the Federal Republic of Germany of 23 Oct 1954, entry into force 5 May 1955: 243 UNTS 308.

[208] Protocol to the North Atlantic Treaty on the Accession of Spain of 10 Dec 1981, entry into force 29 May 1982: 1871 UNTS 426.

5.19. During the first years, the enlargement of the Alliance with the accession of Greece and Turkey required the amendment of the North Atlantic Treaty.[209] In the subsequent enlargements the Accession Protocols were considered as additional to the Treaty itself. In any event these Protocols contained a standardised formulation in their Article 2 which provides that it [the Accession Protocol] "shall enter into force when each of the Parties to the North Atlantic Treaty has notified the Government of the United States of its acceptance thereof."[210]

5.20. In other words, the requirement of Article 10 of the North Atlantic Treaty for a unanimous Agreement of the Member States of the Alliance is fulfilled once all Member States notify the Depository of their acceptance of the Accession Protocol.[211] The Depository or the Secretary General in more recent Accession Protocols is then mandated to

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[209] See Article 1 of the Protocol to the North Atlantic Treaty on the Accession of Greece and Turkey, 126 UNTS 350.

[210] Protocol to the North Atlantic Treaty on the Accession of the Czech Republic; Protocol to the North Atlantic Treaty on the Accession of the Republic of Hungary,; Protocol to the North Atlantic Treaty on the Accession of the Republic of Poland,; Protocol to the North Atlantic Treaty on the Accession of the Republic of Bulgaria, Protocol to the North Atlantic Treaty on the Accession of the Republic of Estonia, Protocol to the North Atlantic Treaty on the Accession of Latvia, Protocol to the North Atlantic Treaty on the Accession of Lithuania, Protocol to the North Atlantic Treaty on the Accession of Romania; Protocol to the North Atlantic Treaty on the Accession of the Slovak Republic, Protocol to the North Atlantic Treaty on the Accession of Slovenia, all available at: http://www.nato.int/cps/en/natolive/57772.htm.

[211] The acceptance of the Protocol as a form of consent of a given member State is subject to the constitutional requirements of each member state (Article 14.2 of the Vienna Convention on the Law of Treaties). "C'est à la fois pour ne pas dénaturer l'objet d'un traité de défense et pour ne pas augmenter sans leur accord les engagements des signataires que l'adhésion de tout nouvel État à l'alliance est subordonnée au consentement unanime des participants….quand le Pacte Atlantique vint devant l'Assemblée Nationale française, la crainte de celle-ci d'y voir entrer l'Allemagne fit stipuler dans la loi autorisant la ratification l'obligation d'un traité formel d'alliance, donc un examen par le Parlement, pour que tout nouvel Etat y adhère. Une même position fut prise, pour ces raisons et d'autres, par le Secrétaire d'État devant le Sénat américain " (Daniel Vignes, "La place des Pactes de défense dans la société internationale actuelle", *AFDI* 1959, p. 37-101, p. 72-73, note 2). (See also : Richard H. Heindel, Thorsten Kalijarvi and Francis Wilcox : "The North Atlantic Treaty in the United States Senate", 43 *American Journal of International Law* 1949 p. 633, at p. 656. Since members of the Senate were particularly interested in determining whether the policy of the United States with respect to membership would be formulated by the Executive Branch Secretary of State D. Acheson allayed Senate concern by the following comment on article 10: "The President of the United States [says] that in his judgment the accession of new members to this Treaty creates in regard to each member coming in in effect a new treaty between the United States and that nation, and therefore the President would consider it necessary to ask for advice and consent of the Senate before himself agreeing to the admission of a new member").

communicate to the invited State the invitation to accede to the North Atlantic Treaty.

5.21. After the end of the Cold War, twelve countries joined NATO. In 1999 the Alliance invited the Czech Republic, Hungary, and Poland to accede. Seven more States acceded to the Treaty in 2004: Bulgaria, Estonia, Latvia, Lithuania, Romania, Slovakia and Slovenia. Albania and Croatia acceded in 2009.

5.22. The Study on NATO Enlargement, which was adopted by the Heads of State and Government participating at the NAC Meeting in Brussels on 3 September 1995,[212] stresses that the enlargement of the Alliance will accord strictly with Article 10 of the North Atlantic Treaty.[213] In paragraph 7 it adds:

> "Decisions on enlargement will be for NATO itself … Ultimately Allies will decide by consensus whether to invite each new member to join according *to their judgment of whether doing so will contribute to security and stability in the North Atlantic area at the time such decision is made … No country outside the Alliance should be given a veto or droit de regard over the process and decisions*" (emphasis added).

5.23. The same study reiterates that the decision making process on enlargement will be in accordance with the North Atlantic Treaty,[214] and continues by adding that "countries could be invited to join sequentially or […] simultaneously […] bearing in mind that *all* Allies will decide *by consensus* on each invitation." (emphasis added)[215]

5.24. The Study also deals with the question of maintaining the effectiveness of the Alliance to perform its core functions and new missions,[216] stressing that "[t]he Alliance may require, if appropriate, specific political commitments in the course of accession negotiations." Upon joining the Alliance, new Member States must accept the full obligations of the North Atlantic Treaty. This includes "participation in the consultation process within the Alliance and the principle of decision

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[212] *NATO Handbook Documentation*, NATO Office of Information and Press, 1999, p. 335: Annex 19.
[213] See *idid,* Principles of Enlargement, chapter 1, para. 4.
[214] *Ibid*, chapter 2, paras. 29, 30.
[215] *Ibid*, chapter 2, para. 30.
[216] *Ibid*, chapter 4, paras. 42 et seq. and chapter 2, para. 30 respectively.

making by consensus, which requires a commitment to build consensus within the Alliance on all issues of concern to it."[217]

5.25. At the Washington Summit in April 1999,[218] NATO launched the Membership Action Plan (hereinafter "MAP") to assist countries wishing to join the Alliance by providing advice, assistance and practical support. Aspirants are expected to demonstrate commitment to the rule of law and should "settle ethnic disputes or external territorial disputes including irredentist claims or internal jurisdictional disputes by peaceful means in accordance with OSCE principles and to pursue good neighbourly relations."[219] It bears noting that participation in the MAP does not guarantee future accession to NATO. Decisions to invite aspirants to start accession talks are taken by consensus among NATO Member States and on a case by case basis.[220]

5.26. There are in principle several rounds of MAP assessment before NAC decides to extend an invitation to an aspirant State. The FYROM underwent nine rounds of MAP assessment before the NAC Summit in Bucharest. From this history, it can be seen that NATO has conceived itself from the start as accommodating its own enlargement but only after careful collective consideration. The continuity of the Alliance depends significantly on the manner in which it has regulated enlargement. Each invitation to a new Member State has taken place by means of particular processes and formalities, subject always to the requirements of the North Atlantic Treaty itself.

5.27. NATO has thus controlled its membership process in view of its character as a closed multilateral treaty and an integrated military alliance. As noted above, NATO's objective is to enhance and maintain the military and political security of a particular region, and, pursuant to that objective, it has enlarged its membership in stages. Each enlargement has been carried out through a process which carefully evaluates potential new Member States and, where needed, guides them in reform. Not only does NATO evaluate a potential new Member State, but it also actively engages with the aspirant to assist it in adapting its laws, regulations, and practices to meet Alliance requirements. The process is designed to prepare the potential new Member for accession to the Treaty. In

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[217] *Ibid*, chapter 4, para. 43.
[218] Press Release NAC-S (99)64, *An Alliance for the 21st Century. Washington Summit Communiqué issued by the Heads of State and Government in the meeting of the North Atlantic Council in Washington, D.C.,* 24 April 1999: Annex 20.
[219] Press Release NAC-S(99)66, 24 April 1999, Chapter I, para. 2c: Annex 21.
[220] *NATO Handbook*, p. 189: Annex 22.

preparing itself for a possible invitation to accede, the aspirant is expected to make adjustments to its internal policies and practices in multiple fields, including its foreign policy. Changes thus made by the potential new Member are designed and implemented to assure that membership, if it is achieved, will be conducive to the functioning of the Organisation.

5.28. NATO does not apply an identical accession process to every candidate for membership. Instead, it sets out individually tailored requirements in view of the particular conditions prevailing with respect to a given aspirant. "The Alliance may require, if appropriate, specific political commitments in the course of accession negotiations."[221] According to the NATO Study on Enlargement, "[t]here is no fixed or rigid list of criteria for inviting new member states to join the Alliance. Enlargement will be decided on a case by case basis […]."[222] The following general outline contains steps that aspirant States have typically followed in the accession process:

- The aspirant State expresses its interest in joining the Alliance.
- The aspirant State is invited to engage in an intensified dialogue with NATO about its membership aspirations and reforms that will support accession.
- The aspirant State may then be invited to participate in the Membership Action Plan (MAP), described below, to prepare for potential invitation to membership.
- NATO may decide to extend an invitation to the aspirant State to begin accession talks.
- Accession talks are conducted in Brussels, in two sessions, between the aspirant State and a NATO team. The talks result in a timetable for the completion of necessary reforms. Reforms may continue after the State has acceded to the Treaty.
- The Foreign Minister of the aspirant State addresses a letter of intent to the NATO Secretary General, in which the aspirant State provides confirmation of its acceptance of

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221 See *Study on NATO Enlargement, issued by the Heads of State and Government participating in the meeting of the North Atlantic Council*, Brussels, 3 September 1995 (published *in NATO Handbook Documentation*, NATO Office of Information and Press, 1999 pp. 335-369), para 30: Annex 19.

222 *Ibid,* para 7.

the obligations and commitments entailed by membership. The aspirant State joins the reform timetable in accordance with this letter.

- Accession Protocols are signed and then ratified by all NATO Member States.
- The Secretary General of NATO invites the aspirant State to accede to the North Atlantic Treaty.
- The aspirant State, now an Invitee State, formally accedes to the North Atlantic Treaty and becomes a Member State upon deposit of its instrument of accession with the Depository.

5.29. The MAP, if extended to an aspirant State, is in no way an assurance of a future invitation. According to the NATO statement setting out the general MAP process:

> "Any decision to invite an aspirant to begin accession talks with the Alliance will be made on a case-by-case basis by Allies in accordance with paragraph 8 of the Madrid Summit Declaration, and the Washington Summit Declaration. Participation in the Membership Action Plan, which would be on the basis of self-differentiation, does not imply any timeframe for any such decision nor any guarantee of eventual membership. The programme cannot be considered as a list of criteria for membership."[223]

5.30. Paragraph 8 of the Madrid Summit Declaration reiterates NATO's commitment to an "open door" policy, under which the Alliance maintains an "active relationship with those nations that have expressed an interest in NATO membership as well as those who may wish to seek membership in the future." It also indicates that "[n]o European democratic country whose admission would fulfil the objectives of the Treaty will be excluded from consideration."[224] In short, the MAP, as an implementing mechanism for Article 10 of the North Atlantic Treaty, encourages an ongoing process of evaluation and engagement, while preserving the discretion of the Member States under Article 10.

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223 Press Release NAC-S(99)66, 24 Apr 1999, at para 3: Annex 21.

224 NATO Press Release M-1 (97) 81, *Madrid Declaration on Euro-Atlantic Security and Cooperation, Issued by the Heads of State and Government,* 8 July 1997, para 8: Annex 18.

5.31. Under Article 10, the Member States retain substantial discretion as to those aspirant States which satisfy the enlargement criteria of the Alliance. The Member States "may" decide to invite such an aspirant State, meaning that it is within their discretion to invite, or not to invite, any State satisfying the criteria. By contrast, the admissions provision of the Treaty and the admissions practice of NATO leave no discretion to the Council as to an aspirant State which fails to satisfy the criteria. A State which does not meet the criteria for NATO enlargement *must* be declined an invitation to accede.

5.32. The procedure for gaining membership in the Alliance requires multiple stages of consensus-based approval from NATO Allies. At the earliest stage, an aspirant State is invited for accession negotiations. For a State to actually become a member there must be unanimity among all of the NAC Member States, as well as the signature and ratification of the Accession Protocol on the part of the aspirant.[225]

V. THE FYROM'S PARTICIPATION IN MAP

5.33. In 1999, the FYROM began its participation in MAP. In the various MAP Progress Reports on the FYROM, the Alliance stressed the need for full compliance with the undertakings required for membership in NATO, including "good neighbourly relations" with all NATO Members and the need to resolve any "outstanding issues."

5.34. From the beginning of this process, it was well known that the FYROM's disagreement with Greece over its name was one such "outstanding issue" that would have to be resolved before the FYROM would receive an invitation to begin accession.

5.35. In early 1999 the Prime Minister of the FYROM, Ljubco Georgievski, after a meeting with the Minister of Foreign Affairs of Greece, Theodoros Pangalos, wrote to the Foreign Minister of Greece:

> "During our meeting both private and in the presence of Delegations we noticed a coincidence of views on the issues we discussed. As I had already the opportunity to discuss with You dear Mr Pangalos this Government of the Republic of Macedonia considers Greece as its strategic partner in the region. We are fully aware that the upgrading of our relations with the European Union and NATO aiming at the integration of my country to both

[225] On the distinction between "obligations not to do" and "obligations to do" (obligations de faire) see G. Arangio-Ruiz, "Preliminary Report on the law of State responsibility", ILC, *Yearbook 1988*, volume II, part I, para 44, p.16.

> organizations depends at a large extent on the support of the Hellenic Republic and the solution of pending issues. I can assure You that from my part, I will spare no efforts in deploying the positive energy needed in order to reach eventually by the end of this year a mutually acceptable solution on our last difference."[226]

5.36. Further on in the same letter the Prime Minister of the FYROM continued by saying that, "[t]he only existing bilateral difference between our countries is referred to Article 5 of the said Accord."[227] Accordingly, it appears that at that time when the FYROM was to begin its participation in the MAP, the Prime Minister of the FYROM considered that the resolution of the pending issues, namely the prior resolution of the difference on the name was a necessary condition for the integration of the FYROM in both NATO and the EU.

5.37. In its Final Communiqué at the end of the Ministerial Meeting in Brussels on 7 December 2007, the NAC stated in relation to the FYROM:

> "In the Western Balkans, Euro-Atlantic integration, based on solidarity and democratic values, remains necessary for long-term stability. This involves promoting cooperation in the region, good-neighbourly relations, *and mutually acceptable, timely solutions to outstanding issues* […]. We recognize the strong reform efforts being made by the three countries engaged in the MAP – Albania, Croatia and the former Yugoslav Republic of Macedonia – and urge them to intensify their respective efforts. At the Bucharest Summit, our Heads of State and Government intend to invite *those counties who meet NATO's performance-based standards and are able and willing to contribute to Euro-Atlantic security and stability*."[228] (Emphasis added).

5.38. The FYROM understood, and there could have been under no misapprehension that, the "resolution of outstanding issues" as a condition to join the Alliance included the resolution of the name issue. During a joint press conference with the FYROM's Prime Minister, Nikola

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[226] Letter from the Prime Minister of the FYROM to the Minister of Foreign Affairs of Greece, dated 21 January1999: Annex 39.
[227] *Ibid.*
[228] NATO Press Release, (2007) 130, *Final Communiqué. Ministerial meeting of the North Atlantic Council held at NATO Headquarters Brussels,* 7 December 2007, paras. 14-15: Annex 25.

Gruevski, Secretary General of NATO Jaap de Hoop Scheffer referred to the language of the NAC's Communiqué:

> "Euro-Atlantic integration of course also demands and requires good neighbourly relations and it is crystal clear that there were a lot of pleas from around the table to find a solution to the name issue ... I would not give you a complete report if I would not say referring to the communiqué by the way of the NATO Foreign Ministers last December where there is this line on good neighbourly relations and the name issue."[229]

5.39. Based on these statements, there can be no doubt that NATO considered the resolution of the outstanding name issue to be a "performance-based standard" in the context of good-neighbourliness, which the FYROM would have to satisfy before being invited to join the Alliance.

5.40. Prior to the Summit in Bucharest, the Permanent Representatives of NATO discussed the most recent MAP Progress Report with the Prime Minister of the FYROM. At that meeting, the FYROM had the occasion to present to the NAC its progress in fulfilling the MAP criteria.

5.41. The NAC reviewed the FYROM's performance in such areas as the rule of law, judicial reform, measures taken to combat organised crime, implementation of the Ohrid Agreement, and compensation for victims of the 2001 crisis. NATO Members then had the opportunity to express their positions in relation to the Progress Report.

5.42. In that regard, the Permanent Representative of Greece reiterated that every aspirant, including the FYROM, should fully comply with the criteria required to reach good neighbourly relations with Members of the Alliance, and stressed the need for timely solutions on the outstanding issues, in particular the disagreement over the FYROM's name. The Permanent Representative of Greece also emphasized that it would be willing to accept a composite name if the FYROM would take the remaining steps towards a mutually acceptable solution.

5.43. Other delegations during that meeting also emphasised the need for the FYROM to work towards resolving the name issue. Specifically, according to the Press of the FYROM which reported on the

[229] Joint Press Point with NATO Secretary General Jaap de Hoop Scheffer and the Prime Minister of the former Yugoslav Republic of Macedonia, Nikola Gruevski, 23 January 2008, available at: www.nato.int/cps/en/natolive/opinions_7381.htm: Annex 26.

meeting, the Prime Minister received "the non encouraging message from half of the participants that a mutually agreed solution on the name issue should be found".[230]

5.44. In short, several of the intervening delegations during the NAC meeting of 23 January 2008 – the last meeting before the Bucharest Summit – made reference to the necessity for the FYROM to resolve the name issue before it would be invited to accede.

5.45. Prime Minister Gruevski himself admitted during his meeting with the NAC Members, "the main issue that many of the Ambassadors mentioned is potential risks and the issue that has to be solved is the name issue with Greece where many of them said that it's necessary to intensify the discussions."[231] This makes clear that the FYROM's government knew the resolution of the name issue would be a determining factor in its potential accession to NATO and moreover that this was a requirement set forth by many Member States.

5.46. In response to the concerns raised by NATO ambassadors, Prime Minister Gruevski insisted that "we will do the best to solve as soon as possible this 17-year problem [of the name issue]… anyway, we will double the efforts and we'll try to do the best for our country and for our partners also in the Alliance ."[232] Unfortunately no progress was made towards resolving the name issue prior to the Bucharest Summit.

5.47. On 6 March 2008, the NAC met at the level of Ministers of Foreign Affairs in Brussels and reviewed among other issues, which were of interest to the Alliance, the progress of the three aspirants: Albania, Croatia and the FYROM. The Secretary General of the NATO in his

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[230] Slobodanka Jovanovska, "NATO is preparing invitation asking for a solution on the name", *Utrinski Vesnik*, dated 24 January 2008: Annex 130. See also Svetlana Jovanovska, "NATO confirms the progress of Macedonia", *Dnevnik*, dated 24 January 2008: Annex 131.

[231] Joint Press Point with NATO Secretary General Jaap de Hoop Scheffer and the Prime Minister of the former Yugoslav Republic of Macedonia, Nikola Gruevski, 23 January 2008, available at: www.nato.int/cps/en/natolive/opinions_7381.htm:Annex 26. On 26 February 2008 during a visit in Budapest after a meeting with the Hungarian Prime Minister, the Prime Minister of FYROM said: "The bilateral problem about the name with Greece, which is now imposed as a problem of the Alliance, is a precedent which can harm not only Macedonia and the region, but also the Alliance itself" ("Gruevski: The imposed problem with Greece is a precedent which is harming the Alliance", *Macedonian Information Agency*, dated 26 February 2008: Annex 132).

[232] Joint Press Point with NATO Secretary General Jaap de Hoop Scheffer and the Prime Minister of the former Yugoslav Republic of Macedonia, Nikola Gruevski, 23January 2008, available at: www.nato.int/cps/en/natolive/opinions_7381.htm: Annex 26.

opening remarks stated that the meeting was also intended to examine ‘‘broader issues of Euro Atlantic integration, including how to deepen [our] engagement with our Partners in Western Balkans.”[233] In a subsequent press Conference the Secretary General of the Organisation explained that during that meeting there was no decision on the FYROM’s membership. In this respect, the Secretary General added the wish of the Alliance that Greece and the FYROM find a solution to the name difference in the remaining period of time between that NAC Meeting and the NATO Summit in Bucharest. He also stressed the importance of consensus decision making within the Alliance.[234]

VI. THE BUCHAREST DECISION

5.48. On 2-4 April 2008, NATO Member States met in Bucharest, Romania. At that meeting, it was unanimously decided that the FYROM would not yet be invited to begin the accession process. Rather than closing the door to the possibility of the FYROM’s future membership in the Alliance, NATO’s decision in Bucharest made clear that an invitation “will be extended” to the FYROM once the name issue has been resolved, and there is no longer an impediment to the FYROM’s ability to maintain “good neighbourly relations” with all of NATO’s Member States.

5.49. The Bucharest Summit Declaration, in relevant part, provided:

> “We recognise the hard work and the commitment demonstrated by the former Yugoslav Republic of Macedonia to NATO values and Alliance operations. We commend them for their efforts to build a multi-ethnic society. Within the framework of the UN, many actors have worked hard to resolve the name issue, but the Alliance has noted with regret that these talks have not produced a successful outcome. Therefore we agreed that an invitation to the former Yugoslav Republic of Macedonia will be extended *as soon as a mutually acceptable solution to the name issue has been reached*. We encourage the negotiations to be resumed without

[233] Opening Statement by NATO Secretary General at the Meeting of the North Atlantic Council, March 6, 2008, available at: http://www.nato.int/cps/en/natolive/opinions_7550.htm : Annex 28.
[234] Press Conference by NATO Secretary General following the Meeting of the North Atlantic Council of 6 March 2008 available at: http://www.nato.int/cps/en/natolive/opinions_7551.htm : Annex 29.

delay and expect them to be concluded as soon as possible."[235] (Emphasis added).

5.50. The spokesman for NATO also stated:

> "[… there is] a *unanimous* view within the Alliance that the FYROM should as soon as possible be offered the opportunity in accession talks […] But the general *consensus*, and that includes the *consensus* of the Greek government is they wish to see all three MAP countries join the Alliance as quickly as possible once the necessary conditions are in place. And in this case that means resolution of the name issue."[236] (Emphasis added).

5.51. At its meeting in Brussels on 3 December 2008, the NAC again discussed the possibility of extending an accession invitation to the FYROM.[237] Paragraph 17 of the Final Communiqué of that meeting provides:

> "We reiterate the agreement of Heads of State and Government in Bucharest Summit *to extend an invitation to the former Yugoslav Republic of Macedonia as soon as a mutually acceptable solution to the name issue has been reached* within the framework of the UN and urge intensified efforts towards that goal. At the same time, we will continue to support and assist reform efforts of the Government of the former Yugoslav Republic of Macedonia." (Emphasis added).

5.52. This position was also restated in the Strasbourg/Kehl Declaration issued by the Heads of State and Government participating in

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[235] NATO Press Release (2008)049, *Bucharest Summit Declaration Issued by the Heads of State and Government participating in the meeting of the North Atlantic Council in Bucharest on 3 April 2008*, paragraph 20 : Memorial, Annex 65.

[236] Press Briefing by NATO Spokesman, James Appathurai available at http://www.nato.int/docu/speech/2008/s080403e.html : Annex 30. NATO Secretary General presenting during a Press Conference following the NAC Summit meeting on Apr.3, 2008, the text of the NAC decision in Bucharest which referred to FYROM commented as follows: "That is the text on the nation which *has not yet been invited*" (emphasis added). Text available at: http://www.nato.int/docu/speech/2008/s080403g.html : Annex 31.

[237] NATO Press Release (2008) 153, *Final Communiqué. Meeting of the North Atlantic Council at the level of Foreign Ministers held at NATO Headquarters, Brussels,* 3 December 2008: Annex 32.

the meeting of the NAC on 4 April 2009.[238] Paragraph 22 of the Declaration states:

> "We reiterate our agreement at the Bucharest Summit to extend an invitation to the former Yugoslav Republic of Macedonia as soon as a mutually acceptable solution to the name issue has been reached within the framework of the UN [...]
>
> In accordance with Article 10 of the North Atlantic Treaty, NATO's door will remain open to all European democracies which share the values of our Alliance, which are willing and able to assume the responsibilities and obligations of membership, and whose inclusion can contribute to common security and stability."[239]

5.53. In order to make out its case, the FYROM relies on certain statements by the Prime Minister and Foreign Minister of Greece stressing Greek opposition to FYROM's NATO membership, and claiming to have vetoed an invitation to the FYROM to accede.[240]

5.54. These statements were unilateral acts, not made in the context of interstate negotiations and "not directed at any particular recipient."[241] They do not express any intention to be bound on the international plane. Nor do they involve "unilateral declarations of States capable of creating legal obligations," in terms of the ILC's "Guiding Principles" of 2006 on that topic.[242]

5.55. The statements in question have no legal effect insofar as the decision in Bucharest is concerned. They were directed to the media and

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[238] NATO Press Release (2009) 044, *Strasbourg/Kehl Summit Declaration. Issued by the Heads of State and Government participating in the meeting of the North Atlantic Council in Strasbourg/Kehl on 4 April 2009*: Annex 35. See also NATO Press Release (2009) 190 *Final Statement-Meeting of the North Atlantic Council at the level of Foreign Ministers held at NATO Headquarters, Brussels*, dated 4 December 2009: Annex 36.

[239] NATO Press Release (2009) 044, *Strasbourg/Kehl Summit Declaration. Issued by the Heads of State and Government participating in the meeting of the North Atlantic Council in Strasbourg/Kehl on 4 April 2009,* paragraph 21: Annex 35.

[240] Memorial, paras 2.58-2.60.

[241] Cf. *Frontier Dispute (Burkina Faso/Mali)*, *Judgment, ICJ Reports 1986* p. 554 at 573-574 (paras. 38-40) for a discussion of relevant principles, and *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, *Judgment of 19 December 2005*, paras. 129-130, for their application to "a political statement by the Ugandan High Command".

[242] See International Law Commission, Report of the 58th Session, A/61/10, 2006, ch IX.

to public audiences, using general language appropriate to those settings. They were not an attempt accurately to describe Greece's conduct in terms of NATO processes, and they did not qualify that conduct in terms of the Interim Accord. To refer to Greece's conduct at Bucharest as a "veto" is meaningless in the NATO lexicon; it does not correspond to any provision of the North Atlantic Treaty, or to practice within NATO. When the NATO Secretary-General observed that "NATO does not know the word veto," this was an accurate reference to the Treaty and the Alliance's consistent practice.

VII. CONCLUSION

5.56. The NATO Bucharest summit decision regarding the deferment of the FYROM's invitation to begin the accession process until a mutually acceptable solution to the name issue has been reached within the framework of the UN was a unanimous decision taken by the Heads of State and Government. In that decision the latter agreed by consensus that the non resolution of the dispute over the name issue was a substantive condition for the admission of the FYROM to the NATO according to the requirements of the Treaty itself. This collective agreement of the Alliance derives from the specific nature of the Organisation as a closed multilateral treaty and an integrated military alliance whose primary objective is to enhance and maintain the military and political security of a particular region, through preparedness and solidarity among its Member States. At the Bucharest Summit the NATO's Member States agreed collectively that the resolution of the name issue was a basic condition that had to be fulfilled for the accession of the FYROM to the NATO.

CHAPTER 6: THE COURT'S JURISDICTION

I. INTRODUCTION

6.1. The FYROM claims that it has suffered an injury as the result of NATO's unanimous decision at the Bucharest Summit in 2008 not to extend an accession invitation to the FYROM at that time,[243] and that the outcome of that meeting would have been in its favour but for Greece's alleged violation of Article 11(1) of the Interim Accord.[244] The FYROM would locate this alleged violation in NATO's collective consensus decision, communicated in the Bucharest Summit Declaration of 3 April 2008,[245] to postpone extending to the FYROM an invitation for NATO membership.[246]

6.2. As explained in the preceding chapters of this Counter-Memorial, Greece denies the factual allegations that constitute the predicate of the FYROM's claim and maintains that it has not acted in any way in violation of the Interim Accord.

6.3. Before turning to the merits of the case, the present chapter will address issues of jurisdiction and admissibility. Specifically, Greece will demonstrate that even if, *arguendo*, the FYROM's factual allegations are assumed to be true, *quod non*, the Court would not have jurisdiction over the FYROM's claims and, accordingly, the case should be dismissed *in limine litis.*

6.4. As Greece explained to the Court in its letter of 5 August 2009, it has chosen to present its jurisdictional objections together with its rebuttal of the substance of the FYROM's claims, rather than requesting a separate, preliminary hearing. This decision was made in the interest of a more economical and consolidated procedure, in view of the fact that many of the analyses are relevant both to the case's jurisdiction and its merits.

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[243] NATO Press Release (2008)049, *Bucharest Summit Declaration Issued by the Heads of State and Government participating in the meeting of the North Atlantic Council in Bucharest on 3 April 2008*, paragraph 20 : Memorial, Annex 65.

[244] Interim Accord between Greece and the Former Yugoslav Republic of Macedonia, 13 September 1995, U.N.T.S. 1891, I-32193 [hereinafter Interim Accord].

[245] NATO Press Release (2008)049, *Bucharest Summit Declaration Issued by the Heads of State and Government participating in the meeting of the North Atlantic Council in Bucharest on 3 April 2008*, paragraph 20 : Memorial, Annex 65.

[246] See Memorial, paras. 1.3 – 1.9.

II. THE LAW WITH RESPECT TO JURISDICTION

A. Jurisdiction in Consent-based Adjudication

6.5. The law on this matter is now well-established. Before proceeding to the merits of a dispute, the Court must find, at least provisionally, the existence of a consensual basis for jurisdiction.[247] In all international adjudication and arbitration based upon consent, it is axiomatic that the test at the jurisdictional threshold is whether the as-yet-unproved factual allegations, *if* true, *could* constitute a violation of an international obligation within the Court's jurisdictional title. If the answer to this inquiry is in the affirmative, jurisdiction can be sustained and the Court can proceed to a consideration of the merits. In that phase, the Claimant State, which until that point in the process benefitted from the assumption *pro tempore* that the facts, as alleged, were true, will then have the burden of proving those facts as well as all other elements of its case. But if, at the jurisdictional threshold, the answer to the question of whether the as-yet-unproved factual allegations, even if assumed to be true, could not constitute a violation of an international obligation within the Court's jurisdiction, the Court must dismiss the claim.

6.6. In *Oil Platforms*,[248] the question whether the parties had consented to the Court's jurisdiction could not be answered by accepting that the claimant's interpretation of the treaty was merely "arguable." The Court could only accept jurisdiction if the claimant could demonstrate, first, that the question of the legality of the parties' actions fell within the treaty (containing a clause conferring compulsory jurisdiction on the Court) and, second, that the requirements of that clause were definitively met. The Court expressly rejected Iran's argument that a disagreement between the parties as to the applicability of the treaty was enough to constitute a dispute falling within the jurisdictional clause.

6.7. In order to examine the first issue of whether the legality of the parties' actions fell within the treaty's domain, the Court interpreted the substantive provisions of the treaty invoked by the claimant to determine if the alleged facts could amount to a breach; if so, then the treaty, and its jurisdiction clause, would apply. The point of emphasis here is that the Court considered whether Iran's allegations against the United States, *if* true, *could* violate the treaty pursuant to which it brought that case,[249]

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[247] *Oil Platforms (Islamic Republic of Iran v. United States of America)*, *Judgment, I.C.J. Reports 2003*, p. 181.

[248] *Oil Platforms (Islamic Republic of Iran v. United States of America) Preliminary Objection*, *Judgment, I.C.J. Reports 1996* at p. 803.

[249] Treaty of Amity, Economic Relations, and Consular Rights, Aug. 15, 1955, U.S.-Iran, 8 U.S.T. 899, 284 U.N.T.S. 93.

stating that its role at the jurisdictional stage is solely to "ascertain whether the violations [. . .] pleaded do or do not fall within the provisions of the Treaty and whether, as a consequence, the dispute is one which the Court has jurisdiction *ratione materiae* to entertain."[250]

6.8. Judge Higgins, concurring, elaborated on how the Court should make this assumption—perforce provisionally and in a manner that would avoid prejudice to any subsequent adjudication of the merits. She wrote:

> "The only way in which . . . it can be determined whether the claims of Iran are sufficiently plausibly based upon the 1955 Treaty is to accept *pro tem* the facts as alleged by Iran to be true and in that light to interpret Articles I, IV and X for jurisdictional purposes—that is to say, to see if on the basis of Iran's claims of fact there *could* occur a violation of one or more of them.
>
> [I]n the *Mavrommatis* case the Permanent Court said it was necessary, to establish its jurisdiction, to see if the Greek claims "would" involve a breach of the provisions of the article. This would seem to go too far. *Only at the merits, after the deployment of evidence, and possible defences, may "could" be converted to "would". The Court should thus see if, on the facts as alleged by Iran, the United States actions complained of might violate the Treaty articles*."[251]

6.9. Several observations may be made with respect to the procedure which the Court prescribes. First, as to the scope of its inquiry, the prescribed procedure does not "limit itself to noting that one of the Parties maintains that such a dispute exists, and the other denies it."[252] Such an approach would merely have addressed the question of whether a dispute existed but would have ignored the more relevant issue of whether that dispute fell within the "four walls" of the treaty upon which jurisdiction depended. Rather, the question to be decided was whether "the violations of the Treaty of 1955 pleaded by Iran did or did not fall within the provisions of the Treaty," thereby giving the Court, in that case, jurisdiction *ratione materiae*.[253]

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[250] *Oil Platforms*, *I.C.J. Reports 1996* at 810, para 16.
[251] *Oil Platforms*, *I.C.J. Reports 1996* at 856, paras 32 and 33 (emphasis added).
[252] *Ibid*., at 810, para16.
[253] *Ibid*., at 810, para 16 (*citing* Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ Reports 1996 (II)).

6.10. Second, the Court's posture in this phase was, as it explained, more nuanced than would be a simple and automatic "acceptance". There was no such blanket acceptance; the Court itself exercised *pro tempore* judgment as to the probability of the facts as alleged, basing its decision on neither the high standard required for criminal conviction (proof beyond a reasonable doubt) nor even upon the more lenient civil law standard (preponderance of evidence). Rather it concluded that the claim must be "sufficiently plausibly based" upon the relevant treaty. Conversely, the respondent need only show that the claim *is not* "sufficiently plausibly based" on the relevant treaty.

6.11. Third, replacing the Permanent Court's use in *Mavrommatis* of the verb "would" with the verb "could," further reduced the burden of proof that had been previously required of the claimant. Thus the claimant need not prove that if the facts it alleged are assumed to be true, it *will* prevail in the case; it need only prove that it "could" prevail. The approach taken by the Court has been cited with approval and followed by many international arbitral tribunals with comparable jurisdictional regimes. Of course, the general approval of the Court's approach to jurisdiction is not surprising, as it recommends itself for the economising of judicial resources as well as for its fairness to both parties.

6.12. In the present case, as will be seen, the facts with respect to Greece's behaviour as alleged by the FYROM cannot plausibly be considered a violation of the Interim Accord – regardless of whether they are proven to be true or not.

B. The Jurisdictional Regime in the Instant Case

6.13. Article 36(1) of the Statute grants the Court jurisdiction over, *inter alia*, "all matters specially provided for . . . in treaties and conventions in force."[254] In this case, the treaty in question is the Interim Accord. As will be shown, the jurisdiction "specially provided for" in this instrument is quite complex.

6.14. Article 21(2) of the Interim Accord states that:

> "*Any difference* or dispute that arises between the Parties concerning the interpretation or implementation of this Interim Accord may be submitted by either of them to the

[254] Statute of the International Court of Justice, art. 36.

International Court of Justice, *except for the difference referred to in Article 5, paragraph 1*."[255] (Emphasis added)

Article 5(1) of the Interim Accord, to which Article 21(2) refers, provides:

> "The Parties agree to continue negotiations under the auspices of the Secretary-General of the United Nations pursuant to Security Council resolution 845 (1993) with a view to reaching agreement on the *difference described in that resolution* and in Security Council resolution 817 (1993)."[256] (Emphasis added).

1. Resolution 817

6.15. The "difference" to which Article 5(1) of the Interim Accord refers is described in the third *considerandum* of SC res 817 (1993) as:

> "a difference … over the name of the State, which needs to be resolved in the interest of the maintenance of peaceful and good-neighbourly relations in the region […]"

6.16. Lest any reader of SC res 817 (1993) infer from the use of the apparently anodyne term "difference" that the Council thought it was dealing with some sort of technical dispute of marginal importance, the Resolution's third *considerandum* explains that the resolution of that "difference" is necessary "in the interest of the maintenance of peaceful and good-neighbourly relations in the region." The words "peaceful relations" evoke a major purpose of the United Nations and the primary responsibility of the Security Council.[257] Nor did the Security Council exaggerate. As was shown in Chapter 2 of this Counter-Memorial, the issues to which the "difference" refers are indeed fundamental to the peace and security of the region and are of central importance to Greece.

6.17. The provisional method for dealing with the "difference" is set out in operative Paragraph 2 of SC res 817 (1993), in which the Council:

> "Recommends to the General Assembly that the State whose application is contained in document S/25147 be admitted to membership in the United Nations, this State being provisionally referred to for all purposes within the United Nations as 'the former Yugoslav Republic of

[255] Interim Accord, art. 21(2). (emphasis added).
[256] *Ibid*., p. 132. (emphasis added).
[257] United Nations Charter, Article 1(1), Article 1(2).

> Macedonia' pending settlement of the difference that has arisen over the name of the State."

6.18. The apparently recommendatory language in SC res 817 (1993) should not mislead; it is a decision. Article 4(2) of the Charter prescribes that admission of a State to the United Nations is "effected by a decision of the General Assembly upon the recommendation of the Security Council." The Council's initiative is indispensable. As the Court said in its second *Admissions* Opinion:

> "The admission of a State to membership in the United Nations, pursuant to paragraph 2 of Article 4 of the Charter, cannot be effected by a decision of the General Assembly when the Security Council has made no recommendation for admission, by reason of the candidate failing to obtain the requisite majority or of the negative vote of a permanent Member upon a resolution so to recommend."[258]

If the Council declines to recommend, the Assembly cannot bypass the Council and admit on its own. For the same reason, the Assembly cannot admit on terms other than those set by the Council, for to do otherwise would usurp the Charter-prescribed role of the Council in the admissions process.

6.19. Once a State has been admitted to the United Nations, it is subject to all the obligations of membership. Article 2(2) of the Charter provides:

> "All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfill in good faith the obligations assumed by them in accordance with the present Charter."

Article 2(2) emphasises that the good faith performance of the obligations assumed by each member is not simply for the benefit of the Organisation but also ensures the rights and benefits of the other members. In being admitted to the United Nations under the terms prescribed in SC res 817 (1993), the FYROM assumed obligations, derived from that Resolution and the Charter itself, to all members of the United Nations, including Greece.

6.20. Regardless of how the "difference" over the name may ultimately be settled, the FYROM is required to identify itself by that designated title

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[258] *Competence of the General Assembly for the Admission of a State to the United Nations, Advisory Opinion, I.C.J. Reports 1950* p.4, at p. 10.

"for all purposes" within the United Nations, so long as the "difference" exists. The fact that the provisional arrangement which was incorporated into the Interim Accord was to survive it is indicative of the importance the drafters of the instrument attributed to SC res 817 (1993).

2. Article 11(1)

6.21. Article 11(1) of the Interim Accord also bears a closer analysis than that offered by the FYROM in its Memorial. A more detailed analysis will be provided in Chapter 7. For the moment it is sufficient to note that it provides, in relevant part:

> "Upon entry into force of this Interim Accord, the Party of the First Part agrees not to object to the application by or the membership of the Party of the Second Part in international, multilateral and regional organizations and institutions of which the Party of the First Part is a member; however, the Party of the First Part reserves the right to object to any membership referred to above if and to the extent the Party of the Second Part is to be referred to in such organization or institution differently than in paragraph 2 of United Nations Security Council resolution 817 (1993)."[259]

6.22. The provision is comprised of two clauses whose linkage is emphasized both by the qualifier "however," which signals that what follows will restrict what preceded, and by the fact that the two clauses are separated only by a semi-colon rather than by the sharper caesura of a period, or full stop.[260] The first sentence imposes on Greece an obligation not to object to the FYROM's application for or membership in international organisations in which Greece is a member.

6.23. The duty not to object in the first clause of Article 11(1) is subject to two clearly defined reservations preserving Greece's existing rights. The first is set out in the second clause of Article 11(1), and the second in Article 22. It is appropriate to characterise them as "preserved" rights because each is independent of and existed prior to the Interim Accord and neither is changed by the Interim Accord. Both preservations of rights

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[259] *Ibid.*, at art. 11(1).

[260] It may be noted in passing that the FYROM characterises each of the sentences of Article 11(1) as a "clause." The notion of clause implies that one of the clauses is dominant, the other subordinate and the FYROM does, indeed, try to create that impression as a way of reducing the force of the second sentence. As explained below, it also misstates the language of the second sentence. The correct designation of the components of Article 11(1) is as two sentences which are notionally linked.

are relevant to the jurisdiction of the Court in the case at bar and, as they are of different natures, each merits a separate analysis.

The Exception in Article 11(1)

6.24. The second sentence of Article 11(1) contains a preservation of rights which is specific to the obligation assumed in the first sentence: Greece reserves the right to object to *any* membership of an organisation or institution to which the first sentence refers "if and to the extent the Party of the Second Part is to be referred to in such organisation or institution differently" than as the FYROM. The use of the verb "reserves" should not mislead. Unlike a reservation in a bilateral treaty, which is a unilateral claim whose legal validity depends upon the acquiescence of the other treaty party,[261] what both parties confirmed in the Interim Accord was that Greece retained a right to object; the FYROM agreed to this right as an integral part of the treaty itself. By contrast to other rights in the Interim Accord, the right in the second sentence of Article 11(1) is unqualified and does not require any prior procedures, formal notice or negotiation for its exercise. This aspect of Article 11(1) will be explored in more detail in Chapter 7 below.

The Exception in Article 22

6.25. An entirely separate preservation of rights with respect to the duty not to object in the first sentence of Article 11(1) is to be found more generally in Article 22. It provides, in relevant part:

> "This Interim Accord . . . does not infringe on the rights and duties resulting from bilateral and multilateral agreements already in force that the parties have concluded with other States or international organizations."

Article 22 appears in "Part F. Final Clauses" of the Interim Accord. By virtue of its terms and its location within the treaty, it applies to *every* right and duty in the Interim Accord. In effect, this part of Article 22 says, "but note: no part of the Interim Accord is to be read in such a way as to infringe any other rights and duties resulting from bilateral and multilateral agreements already in force."

6.26. Now, there is another critical jurisdictional element in Article 22. Article 22 does not say something on the order of "in case of a conflict between rights and obligations arising under the Interim Accord and rights and obligations arising under any other bilateral or multilateral agreements, the Court shall determine which of those rights and

[261] Article 20, Vienna Convention on the Law of Treaties.

obligations shall prevail." The Interim Accord resolves any potential conflicts by saying, in explicit and imperative terms, that "[t]he Interim Accord [...] does not infringe [...]." In other words, in case of a conflict, the Interim Accord explicitly superordinates the obligation in the other bilateral or multilateral agreement over any obligation that Greece might have assumed under the Interim Accord.

6.27. While it should be reiterated that Article 22 applies to every provision in the Interim Accord, the issue in this part of Greece's analysis concerns the application of Article 22 to the duty not to object in the first sentence of Article 11(1). For clarity in the discussion that follows, it will be useful to join, with the insertion of a bracketed conjunction, the relevant part of the specific provision of Article 11(1) to the general exception in Article 22 in order better to ascertain the legal consequence. Such a reconstruction would read as follows:

> "[. . .] 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 [. . . but] this Interim Accord . . . 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."

6.28. Now, on the merits of this case and wholly apart from the second clause of Article 11(1), Greece will show, in Chapter 8, that the stream of actions of the FYROM which were reviewed in Chapter 4 above, carried out in manifest and intentional violation of the Interim Accord, would have constituted ample justification for Greece to take actions that might otherwise have been inconsistent with the Interim Accord. (Greece denies that it took such actions.) But because this section of the Counter-Memorial is limited to issues of jurisdiction, Greece will address the application of the relevant treaty provisions to the facts as alleged. As discussed above, and to paraphrase Judge Higgins in *Oil Platforms*, "the only way in which [...] it can be determined whether the claims [...] are sufficiently plausibly based upon the [...] Treaty is to accept *pro tem* the facts as alleged [...] to be true."[262]

6.29. The jurisdictional regime of the Interim Accord is complex. The apparent inclusiveness of the words "[a]ny difference or dispute" is

[262] *Oil Platforms*, *I.C.J. Reports 1996* at 856, para 32.

subject to two explicit exclusions. First, the Interim Accord excludes "the difference referred to in Article 5(1)" such that, if Greece's alleged actions were taken as a result of the difference over the name, Article 21(2) of the Interim Accord does not reach them; they are not admissible and the Court does not have jurisdiction over them. Such actions would be inseverably linked to the difference over the name, which is excluded from the jurisdiction of the court by Article 21(2).

6.30. Second, and just as critical, the Interim Accord's jurisdictional regime excludes actions by Greece which might otherwise be deemed to have violated Article 11 of the Interim Accord but which were taken in accordance with "rights and duties resulting from bilateral and multilateral agreements already in force that the Parties have concluded with other States or international organizations." Significantly, this exception immediately follows the jurisdictional clause. Greece's duties as a member of NATO with respect to its participation in organisational decisions about membership applications clearly fall under Article 22 of the Interim Accord.

6.31. Each of these two grounds is considered in more detail below.

III. THE DISPUTE CONCERNS THE DIFFERENCE REFERRED TO IN ARTICLE 5(1) OF THE INTERIM ACCORD AND IS ACCORDINGLY OUTSIDE THE JURISDICTION OF THE COURT

6.32. Article 21(2) of the Interim Accord establishes the jurisdiction of the Court "except for the difference referred to in Article 5, paragraph 1."

6.33. As will be recalled, Article 5(1) of the Interim Accord provides:

> "The Parties agree to continue negotiations under the auspices of the Secretary-General of the United Nations pursuant to Security Council resolution 845 (1993)[263] with a view to reaching agreement on the difference described in that resolution and in Security Council resolution 817 (1993)."[264]

The "difference," as discussed above, is defined in SC res 817 (1993) as "a difference [...] over the name of the State [...]."

[263] United Nations, *Official Records of the Security Council, Forty-eighth Year, Resolutions and Decisions of the Security Council 1993* (S/INF/49), p. 33.
[264] *Ibid*., p. 132.

6.34. In an attempt to reduce its own obligations under the Interim Accord and to minimize its violations of it, the FYROM has sought to portray the "difference" as if it were a trivial matter – whether in the Memorial or, mockingly, in statements made to the General Assembly of the United Nations. As shown in Chapter 4, the FYROM has not respected its obligation to find a resolution to the name issue and even treats that obligation lightly in its Memorial. One of the more blatant examples is to be found in the FYROM's correspondence in the instant case with the Court, the principal judicial organ of the United Nations and, as such, plainly included in SC res 817 (1993); in its letter to the Registrar of 10 July 2009, the FYROM identified itself as the "Republic of Macedonia".[265]

6.35. Now it is clear that the difference over the name of the FYROM has not been resolved. Therefore, the rights and obligations with respect to the provisional regime for "the difference" remain in force. The violations which the FYROM alleges Greece to have committed relate to "the difference referred to in Article 5(1)". In view of the constant pattern of conduct of the FYROM, Greece had reasonable grounds to conclude that "the difference" was directly relevant to the FYROM's application for membership in NATO, and moreover that the FYROM's prior actions with regard to other, cognate international organisations with respect to "the difference" were also relevant to its prospective application for membership in NATO.

6.36. The FYROM contends that the "subject of this dispute does not concern – either directly or indirectly – the difference referred to in Article 5, paragraph 1 of the Interim Accord […]."[266] Assuming, as the FYROM alleges, that Greece did "object" to the issuing of an invitation to the FYROM for membership in NATO[267] (overlooking, for purposes of this hypothesis, the actual procedures for membership decisions in NATO which were described in Chapter 5 of this Counter-Memorial), it is not plausible, whether "sufficiently" or, indeed, by *any* measure of plausibility, to contend that the unresolved "difference" referred to in SC res 817 (1993) would not have been a central part of the objection whose occurrence has been assumed for testing jurisdiction.

6.37. The text of the Bucharest Summit Declaration and public statements that followed it, as well as the context of both the Interim

[265] Letter of Nikola Dimitrov, Co-Agent, to the Registrar of the Court, M. Philippe Couvreur, 20 July 2009.
[266] Application, *supra* note 2, at para 10.
[267] *Ibid*., at p. 88.

Accord and NATO membership, establish a direct connection between accession to the organisation and resolution of the name dispute.

6.38. At the Bucharest Summit, the NATO Heads of State and Government deliberated over whether to follow up on their Riga Summit intention to "extend further invitation to those countries which meet NATO's performance based standards and are able to contribute to Euro-Atlantic security and stability,"[268] including the FYROM.

6.39. In declining to extend the invitation to the FYROM at Bucharest, the NATO Heads of State and Government indicated a direct link between NATO membership and the resolution of the name issue, locating responsibility for negotiations over the latter within the UN. While the NATO Heads of State and Government "recognize[d] the hard work and commitment" of the FYROM, they "agreed that an invitation to the Former Yugoslav Republic of Macedonia will be extended as soon as a mutually acceptable solution to the name issue has been reached." NATO recognized that negotiations were on-going "[w]ithin the framework of the UN", but "noted with regret that these talks ha[d] not yet produced a successful outcome."[269]

6.40. For the NAC, therefore, the FYROM's prospective membership was inseparably linked to the resolution of the name issue in Article 5 of the Interim Accord. The relevance of the fact that the conduct of which the FYROM complains is that of NATO and not of Greece will be explained in Chapter 7 below.[270] The point of emphasis here is that even if Greece *had* objected to the FYROM's membership application at the Bucharest meeting, the documents issuing from the summit make clear that the failure to resolve the difference over the name would have been the sole reason. Thus, the specific exception in Article 21(2) of the Interim Accord applies and the jurisdiction of the Court can not extend to the FYROM's claims.

6.41. Because the FYROM cannot plausibly contend that the "difference" was not the key element in Greece's hypothesised objection, it has strained to reinterpret Article 5(1) and Article 11(1) of the Interim Accord to suit its own purposes. It is one thing to assert, as it does at paragraph 5.8 of its Memorial, that "[t]here is no question that the Respondent objected to the Applicant's accession to NATO and that its

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[268] NATO Press Release (2006)150, *Riga Summit Declaration*, *Issued by the Heads of State and Government participating in the meeting of the North Atlantic Council in Riga on 29 November 2006*, at para 30 [hereinafter Riga Summit Declaration]: Annex 23.
[269] Bucharest Summit Declaration, at para 20.
[270] See *infra,* Part II, Chapter 7.

objection ultimately served to prevent the Applicant from being invited to join NATO." It is quite another to explain *why* Greece would have objected (assuming it had done so) if not because of the "difference." In fact, NATO's Bucharest communiqué makes explicit that the "difference" was critical to its collective decision.

6.42. As was explained in Chapter 3, the second sentence of Article 11(1) has two, cumulative conditions, the second of which — "to the extent" — attaches to the FYROM's obligation with respect to the provisional name the element of duration. In its Memorial, the FYROM insists that "[t]his case is about the legality of the Respondent's objection, no more no less."[271] With respect to jurisdiction, the FYROM proposes that "the only matter that the two States declined to have resolved by the Court was [...] the *final* resolution of the difference concerning the Applicant's name."[272] Greece would draw attention to the adjective "final" in the quotation. That word does not appear in Article 5(1), in Article 11 or in Article 21(2) of the Interim Accord. Nor does it appear in SC res 817 (1993).

6.43. The FYROM is proposing to the Court an unrealistically narrow and self-serving vision both of the Interim Accord and of this case. Reading the word "final" into Article 21(2) has the effect of transforming what is a balanced jurisdictional clause into one which would tilt heavily in favour of the FYROM. If the only issue excluded from the Court's jurisdiction by the "except" section of Article 21(2) is "the *final* resolution of the difference concerning the Applicant's name," as the FYROM contends, then the result is that the FYROM – having been admitted to the United Nations by virtue of the Interim Accord – can proceed to violate its commitment to conduct itself in good faith with respect to its United Nations obligations by failing to use its provisional name, while any responses by Greece will be unlawful *per se* and, moreover, actionable before the Court under the Interim Accord. The FYROM also conveniently interprets its obligation under Article 5(1) as only requiring nominal, rather than good faith *effort* on its part.[273] Its various interpretations would enable it to flout its obligation with respect to the provisional name (as it has done) and to be obdurate in negotiations (as it has been) yet to use the jurisdiction available under Article 21(2) against Greece for any number of reasons. But the word "final" does not appear in the text and cannot be read into it. A proper reading of the term

[271] *Ibid*., at para 1.11.
[272] *Ibid*., at para 3.11.
[273] Memorial at para 2.23.

"difference" in this context must be wider and include matters and actions inseparable from the name issue.

6.44. It is apposite to note that, in referring to the "difference" in its communiqués after Bucharest, NATO was acting within its own organisational mandate. The Interim Accord itself was the product of UN negotiations that clearly established a connection between resolution of the name dispute and regional security. Article 5 incorporates SC res 817 (1993), which, in turn, states that a "difference has arisen over the name of the State, which needs to be resolved in the interest of the maintenance of peaceful and good neighbourly relations in the region."[274] On the basis of the text of the Bucharest Summit Declaration and Article 5 of the Interim Accord, it is clear that the name dispute was the primary reason for deferring FYROM's invitation for membership. Moreover, it was entirely *intra vires* NATO to act on this basis. Indeed, it is difficult to see how NATO, as a security organisation, could have avoided doing so.

6.45. The point of emphasis, however, is that because that dispute is excluded by Article 21(2), the Court lacks jurisdiction to hear the case. It is inescapable that the hypothesised objection to NATO membership of which the FYROM indicts Greece was centrally related to the "difference" over the name. That simple fact is conclusive for purposes of determining whether the Court has jurisdiction in the instant case. Article 21(2) of the Interim Accord establishes the Court's jurisdiction "except for the difference referred to in Article 5, paragraph 1."

6.46. In paragraph 4.31 of its Memorial, the FYROM paraphrases the first part of the second clause of Article 11(1) as "The Respondent's right to object may be exercised if – and only if – the Applicant"; the FYROM then proceeds, this time in quotation marks, to accurately quote the rest of the clause: "is to be referred to in such organization or institution differently than in paragraph 2 of United Nations Security Council resolution 817 (1993)." Its paraphrase of the first part of the second clause is a misrepresentation, and it is so important to the FYROM's case that it recurs in both Chapters 4 and 5 of the Memorial, in paragraphs 4.31 and 5.9.

6.47. In fact, the second sentence of Article 11(1) does not say "if and only if;" it says "*if and to the extent*." The words "to the extent" which the FYROM tries to elide from the provision introduce an element of continuity and material scope. Those words enable Greece to examine the FYROM's behaviour in other international organisations over time as part

[274] UN Security Council Resolution 817 (1) (1993).

of exercising the right which is reserved to it in the second sentence of Article 11(1).

6.48. In suppressing the actual language of this part of Article 11 and inserting in its place language that is not to be found there, the FYROM tries to defend actions in violation of the Interim Accord while clawing back from Greece the right which the FYROM had allowed it to reserve – without condition – in the second sentence of Article 11(1). The FYROM's obligation with respect to the "difference" then ceases to be an obligation that continues until such time as the "difference" is settled and is reduced to a mere formality for securing entry into an organisation. Thereupon, in the FYROM's version, that obligation can simply be ignored and the FYROM may use the name which it had promised Greece it would refrain from using pending settlement of the "difference."

6.49. Consider the FYROM's contention at paragraph 2.20 of its Memorial:

> "Significantly, the Resolution [817] did not require the Applicant *to call itself* 'the former Yugoslav Republic of Macedonia', and the Applicant never agreed to refer to itself as such. Consequently, in accordance with resolution 817 and without raising any difficulties with the United Nations Secretariat, the Applicant has always used its constitutional name in written and oral communications with the United Nations, its members and officials."[275]

Or consider the FYROM's line of argument in Chapter 5 of its Memorial. In paragraph 5.65, the FYROM states:

> "In accepting the terms of resolution 817, the Applicant agreed "to be referred to" under the provisional designation within the United Nations, but was not fettering its sovereign right to call itself by its constitutional name, as made clear by the Applicant during the negotiation process. Consequently, in accordance with resolution 817, *the Applicant has continued to call itself by its constitutional name in written and oral communication with the United Nations* and its Member States."[276]

6.50. Greece would recall to the Court the key operative language of SC res 817 (1993): "this State being provisionally referred to for all purposes

[275] *Ibid*., at p. 29. Italics in original.
[276] *Ibid*., at p. 111. (Emphasis supplied).

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." Greece would also recall the language of the second sentence of Article 11(1) of the Interim Accord: "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)."

6.51. As stated above, the mere fact that the hypothesised objection inescapably relates to the "difference" in Article 21(2) of the Interim Accord is conclusive as to the absence of jurisdiction over the FYROM's claim. But even if one were to accept the implication in the FYROM's argument that the unqualified reservation of the right to object to any membership "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)," is actually subject to certain unspecified or implied qualifications, the FYROM's argument here would still fail. The FYROM's prior actions with respect to (i) its use of a name in the United Nations other than that required by SC res 817 (1993); (ii) its explicitly self-serving interpretation of the Interim Accord; and (iii) its declaration of the future actions which it intends to take with respect to the "difference" are all in clear violation of the Interim Accord and reveal exactly how the FYROM would behave were it admitted to NATO without the "difference" first being settled.

IV. THE DISPUTE IS EXCLUDED BY ARTICLE 22 OF THE INTERIM ACCORD

6.52. In its Memorial, the FYROM submits that "the only matter that the two States declined to have resolved by the Court was the one issue that they could not accept in the 1993 draft Treaty, namely the final resolution of the difference concerning the Applicant's name."[277] The FYROM studiedly overlooks another critical provision with regard to jurisdiction: Article 22. Indeed, the only two references to Article 22 in the entire text of the Memorial are in its paragraph 2.39, where it is clear from the context that the FYROM is actually referring to Article 23(2), and in paragraph 4.12 where the FYROM blandly summarises the provision as one concerning "the Accord's effect on third states and international organizations." This purported summary simply skips that half of Article 22 which actually relates to and is dispositive of this case. The FYROM

[277] *Ibid*., at para 3.11. As noted above, the word "final" does not appear in the provision.

would prefer that Article 22 of the Interim Accord not exist.[278] But it does exist and, moreover, is decisive with respect to the absence of jurisdiction in this case. The relation between Article 11(1) and Article 22 has already been noted. A more detailed consideration will be undertaken here.

6.53. Article 22 of the Interim Accord follows directly after the jurisdictional clause. Although it has been set out above, it will be helpful to restate it.

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

6.54. Article 22 establishes an important exception. It states that the Accord will not "infringe on any rights and duties resulting from bilateral and multilateral agreements already in force that the Parties have concluded with other States or international organizations."[279] Article 22 does not stand alone, for unlike the exception in the second sentence of Article 11(1), which is specific to that provision, Article 22 applies to the *entire* Interim Accord, so it is necessary to relate it to particular provisions of the Interim Accord in order to assess its meaning.

6.55. The FYROM's repeated insistence in its Memorial that the present dispute concerns only one provision of the Interim Accord *in abstracto* and that the entirety of that instrument can be virtually ignored is incorrect as a matter of fact and a profound error as a matter of international law. As was noted in Chapter 3, in interpreting the Interim Accord, as any complex instrument, the Court has the task of reading the treaty as a whole, rather than focusing only on a "solitary" clause in isolation from the language that precedes and follows it. Article 31(2) of the Vienna Convention on the Law of Treaties instructs interpreters to read individual provisions of a treaty in their "context," which it explains as meaning, first and foremost, the text, preamble and annexes. This is especially pertinent to a treaty which includes provisions like Article 22, which are manifestly designed to apply to other provisions within the treaty.

6.56. By virtue of its general and unqualified language, Article 22 applies to any kind of treaties, including the constitutive acts of international organisations. Now with respect to organisations, students of international relations have long distinguished between *organisations à*

[278] See *infra* for discussion of Memorial para 1.8.
[279] *Ibid,.* at art. 22.

vocation universelle, on the one hand, and *organisations fermées,* on the other. The former category is comprised of organisations which may be called "adhesive" international organisations, i.e., organisations in which new members are simply "added on" by application and *pro forma* approval. These organisations are usually of a "parliamentary" or technical character and aspire to a wide if not universal membership. They have general membership criteria with respect to which any state meeting those criteria is generally expected to become a member. In international organisations in this category, the addition of a new member does not change the rights, obligations and reliances of members with respect to each other and toward the collective objectives of the organisation. Because of such an organisational character, the participatory abilities and prior and existing relationships of the putative new member are of marginal importance.

6.57. The second category of international organisations is comprised of organisations of a much more limited membership. In accordance with the raison d'être of these international organisations, membership involves substantial mutual commitments and reliances, such that the admission of each new member has the potential for significantly affecting the commitments and obligations of the prior members. Hence criteria for membership in such organisations are likely to be more stringent, for admission procedures involve collective policy judgments on the part of existing members, all of whom carry a heavy responsibility.

6.58. A State's admission to membership in international organisations falling in the first category is usually accomplished without requiring existing members to undertake any significant role or new responsibility. By contrast, admission to membership in international organisations in the second category involves the active participation of the existing members; therefore the constitutive instruments of such international organisations often prescribe stringent criteria for states aspiring to membership which are applied in complex admission processes. Examples may be found in the basic treaties of the European Union or in the NATO Charter.

6.59. Thus, a state that is party to an international organisation in the second category has international legal responsibilities to both the other members of the organisation and the organisation itself with respect to discharge of its rights and duties in the membership process. To commit itself in a subsequent bilateral treaty not to honour such obligations would constitute a violation of the earlier treaty. Were a State-party to such a treaty to have subsequently committed itself to an incompatible treaty obligation, the question as to which of those contradictory obligations should prevail (and, conversely, which should be violated) would present

an interesting legal problem to an international tribunal with jurisdiction over it. But such a problem does not arise in the present case because the Interim Accord's Article 22 anticipated the potential for inter-treaty conflicts and established a general rule, by agreement of the Parties, that would determine which of the competing obligations would always prevail. Article 22 states, in relevant part, that the "[a]ccord [...] 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."

6.60. No bilateral agreement exists in a vacuum. Because each is perforce inserted into a pre-existing web of other treaties and general international legal obligations, the prudent draftsman will anticipate and provide for possible conflicts with other instruments. Article 22 is this type of provision. It is concerned with the consequences of the Accord for third parties, including international organisations. It is comprised of two distinct components. The first, the only component which the FYROM acknowledges, is not relevant to the jurisdictional issue addressed here; it is an assurance that the Interim Accord "is not directed against any other State or entity."

6.61. But the second component of Article 22 is of critical importance to both the jurisdiction and merits of the case at bar. In this provision, the FYROM acknowledges and accepts the fact that Greece has prior rights and obligations by operation of other bilateral and multilateral agreements with other states or international organisations and that the Interim Accord does not infringe them. Thus this provision super-ordinates the obligations which either party to the Interim Accord may have under those other treaties *over* the obligations in the Interim Accord.

6.62. Without mentioning Article 22, the FYROM is obviously conscious of it and its implications for the present case. The FYROM seeks to eliminate Article 22 by unsubstantiated assertion. Thus, it insists:

> "The Respondent's obligation was "not to object": that obligation applies irrespective of whether its objection amounted to a veto and irrespective of the effect or consequence of its objection. Thus, *these proceedings are not concerned in any way* with the acts or omissions of any third States, or *with any provisions of the constituent instrument of NATO or of any other international organization or institution*: the object and subject matter of these proceedings are exclusively related to the actions of

the Respondent and their incompatibility with the Interim Accord."[280]

6.63. Assuming, *pro tem*, that Greece did in fact object to the extension of an invitation to the FYROM, *quod non*, the question for the Court is whether NATO, through its Charter and other legal instruments, falls within the category of international organisations to which Article 22 refers. The answer to that question is clear. Article 22 requires, *inter alia*, that there be in force a multilateral agreement with other states or international organisations; NATO is such an organisation. It requires that the agreement accord rights and impose duties; Chapter 5 of the Counter-Memorial has elaborated the rights and duties in the membership process which obtain for all NATO members. If we assume for purposes of argument that Greece, 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. Hence the FYROM's claims are neither admissible nor subject to the jurisdiction of the Court.

V. THE DISPUTE CONCERNS CONDUCT ATTRIBUTABLE TO NATO

6.64. Besides those discussed in the previous Sections, there is another reason why the Court has no jurisdiction to decide on the FYROM's Application: given the object of the Application, it is really directed against NATO.

6.65. NATO is indeed not a party to this adjudication since it is not subject to the Court's jurisdiction. Yet it is not inapposite to note that, in referring to the "difference" in its communiqués after Bucharest, NATO was acting within its own organisational mandate and expressly referred to the name issue.[281] The Interim Accord itself was the product of UN negotiations that clearly established that resolution of the name dispute was critical to regional security. Article 5 incorporates SC res 817 (1993), which, in turn, states that a "difference has arisen over the name of the State, which needs to be resolved *in the interest of the maintenance of*

[280] Memorial at para 1.8.

[281] NATO Press Release: (2009) 190, *Final Statement, Meeting of the North Atlantic Council at the level of Foreign Ministers held at NATO Headquarters, Brussels 4 December 2009*: Annex 36; see also NATO, Press Release: (2009) 044, 4 April 2009 *Strasbourg / Kehl Summit Declaration, Issued by the Heads of State and Government participating in the meeting of the North Atlantic Council in Strasbourg / Kehl on 4 April 2009:* Annex 35.

peaceful and good neighbourly relations in the region."[282] On the basis of the text of the Bucharest Summit Declaration and Article 5 of the Interim Accord, it is clear that the name dispute was the primary reason for deferring FYROM's invitation for membership. Moreover, it was entirely in conformity with NATO's *raison d'être* to act on this basis. Indeed, it is difficult to see how NATO, as a security organisation, could have avoided doing so.

6.66. The decision challenged by the FYROM was not taken by Greece and the dispute (inseparable from the name issue) concerns conduct attributable not to Greece, but to NATO (A). Consequently, the individual member States of the Organisation, including Greece, cannot be held accountable for this NATO's decision – whatever its reason (B).

A. The Actions Taken in Bucharest with Respect to the FYROM are Attributable to NATO

6.67. In its Submissions, the FYROM has targeted Greece's "State organs and agents."[283] This is the incorrect target: the decision not to extend an invitation to join NATO has not been taken by Greek State organs and agents; it is a collective decision taken by NATO and its organs.[284]

6.68. As pointed out by Greece's Liaison Office in Skopje to the FYROM's Ministry of Foreign Affairs:

> "The decision to extend an invitation to the former Yugoslav Republic of Macedonia to join NATO as soon as a mutually acceptable solution to the name issue has been reached is a collective decision taken unanimously by the Heads of State and Government of the NATO member states at the Summit held in Bucharest on 3 April 2008. It is not a unilateral act of Greece falling within the scope of article 11 of the Interim Accord […]. Any grievances against this NATO decision should consequently be addressed to the competent authorities of the Alliance, which represent legally the said organization."[285]

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282 Security Council Res. 817 (1) (1993) – italics added.

283 P. 123, (i).

284 For a description of NATO's decision processes, see above paras 5.16-5.32.

285 Memorial, Annex 51, Verbal note dated 15 May 2008 from Greece's Liaison Office in Skopje to the FYROM's Ministry of Foreign Affairs.

6.69. International organisations have a legal personality distinct from the legal personality of their member States.

> "What [that] means is that [the organisation] is a subject of international law and capable of possessing international rights and duties, and that it has capacity to maintain its rights by bringing international claims."[286]

The counterpart of this "capacity to maintain its rights" is that "[e]very internationally wrongful act of an international organization entails the international responsibility of the international organization."[287] It is therefore in order to determine whether NATO can be held responsible for the decision challenged by the FYROM.

6.70. This would be the case if the adoption of this decision:

> a) is attributable to the international organisation under international law; and
>
> b) constitutes a breach of an international obligation of that international organisation.[288]

This is not so since, while the decision is indisputably attributable to NATO, (1) it does not constitute a breach of any international obligation bearing upon the Organisation (2).

1. The Decision on the Deferral of the Invitation to the FYROM is Attributable to NATO

6.71. There can be no doubt that NATO is an international organisation vested with international legal personality. In line with the reasoning of the Court in the case concerning *Reparation for Injuries Suffered in the Service of the United Nations*,[289] this is implicit in the North Atlantic Treaty of 4 April 1949 by which the Organisation was established, which creates organs, in particular the NAC, its supreme body, through which the Organisation acts, and has given it special tasks which require the existence of legal personality. The distinction between the situation of the Organisation and that of its members is evidenced by the power of its bodies, and, in particular the NAC, to issue recommendations to members

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[286] *Reparation for Injuries Suffered in the Service of the United Nations*, *Advisory Opinion*, *I.C.J. Reports 1949*, p. 179.

[287] Report of the International Law Commission of its sixty-first session, A/64/10, Article 3 of the *Draft Articles on Responsibility of International Organisations p.20*.

[288] Article 4, *ibid.*

[289] *Reparation for Injuries Suffered in the Service of the United Nations*, *Advisory Opinion, I.C.J. Reports 1949*, p. 179.

under Article 9 of the Treaty and to take decisions – such as the admission of a new Member (Article 10). Moreover, numerous member States and certain non-members have permanent representations to NATO, and the Organisation has entered in treaties with its own Member States as well as with third countries.

6.72. NATO summit meetings, such as the 20th NATO Summit held in Bucharest on 2-4 April 2008, "provide periodic opportunities for Heads of State and Government of member countries to evaluate and provide strategic direction for alliance activities."[290] NATO summit meetings are very important elements of its decision-making process, in particular for decisions to introduce new policy, invite new Member States, launch initiatives and build partnerships with non-NATO States. "NATO summit meetings are effectively meetings of the NAC – the Alliance's principal political decision-making body – at its highest level, that of Heads of State and Government."[291] The decision to convene a NATO summit meeting is approved by the NAC, as "NATO summit meetings are centred on the activities of the NAC."[292] Decisions taken at the summit, such as the Bucharest declaration, are decisions of the NAC, which will be implemented by the NAC's subordinate committees and NATO's command structure: "When persons or entities are characterised as organs or agents by the rules of the organisation, there is no doubt that the conduct of those persons or entities has to be attributed, in principle, to the organization."[293] Accordingly, since the NAC is the senior decision making organ of the Organisation, its decision is attributable to NATO.

6.73. In the present case, as made very clear in the final Declaration of the Bucharest Summit, the decision challenged by the FYROM has been taken by "the heads of State and Government of the member countries of the North Atlantic Alliance participating in the meeting of the North Atlantic Council in Bucharest on 3 April 2008." It reads as follows:

> "Therefore *we agreed* that an invitation to the former Yugoslav Republic of Macedonia will be extended as

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290 NATO, "NATO summit meetings" available at http://www.nato.int/issues/summits/index.html: Annex 37.

291 *Ibid.*

292 *Ibid.*

293 Report of the International Law Commission of its sixty-first session, A/64/10, p. 60, para. 5 of the commentary of Article 5 of the Draft articles on responsibility of international organisations.

soon as a mutually acceptable solution to the name issue has been reached."[294]

6.74. Greece is not mentioned one single time. The reason is simply that Greece had no individual or autonomous role to play in NATO's decision. At the meeting of the NAC on 2-3 December 2008, NATO has reiterated "*the agreement of Heads of State and Government at the Bucharest Summit* to extend an invitation to the former Yugoslav Republic of Macedonia as soon as a mutually acceptable solution to the name issue has been reached" and that it will continue "to support and assist the reform efforts of the Government of the former Yugoslav Republic of Macedonia."[295] NATO reaffirmed its position in the Strasbourg/Kehl Summit Declaration of April 2009.[296] This confirms that NATO takes full responsibility for the decision not to extend *yet* an invitation to the FYROM. This was also made crystal clear by Mr. De Hoop Scheffer, Secretary General of NATO in a Press Conference on 19 February 2009, in which he rejected the idea of a veto by Greece and stated that "NATO does not know the word veto. We operate by consensus and unfortunately there was no consensus last year at the summit in Bucharest [...]."[297] This

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[294] Memorial, Annex 65, NATO Press Release (2008)049 dated 3 April 2008, *Bucharest Summit Declaration Issued by the Heads of State and Government participating in the meeting of the North Atlantic Council in Bucharest on 3 April 2008*, para. 20 (emphasis added).

[295] NATO Press Release (2008) 153, *Final Communiqué. Meeting of the North Atlantic Council at the level of Foreign Ministers held at NATO Headquarters, Brussels,* 3 December 2008: Annex 32 (emphasis added).

[296] NATO Press Release: (2009) 044 *Strasbourg/Kehl Summit Declaration, Issued by the Heads of State and Government participating in the meeting of the North Atlantic Council in Strasbourg / Kehl on 4 April 2009*: Annex 35: "22. *We reiterate* our agreement at the Bucharest Summit to extend an invitation to the former Yugoslav Republic of Macedonia as soon as a mutually acceptable solution to the name issue has been reached within the framework of the UN, and urge intensified efforts towards that goal. We will continue to support and assist the reform efforts of the Government of the former Yugoslav Republic of Macedonia to increase its contribution to ISAF." (emphasis added).

[297] Press Conference by NATO Secretary General Jaap de Hoop Scheffer after the informal Meeting of NATO Defence Ministers, with Invitees, with non NATO ISAF Contributing Nations, Cracow, Poland, dated 19 February 2009, available at http://www.nato.int/docu/speech/2009/s090219c.html: Annex 33. See also Statements of Foreign Minister of Greece Ms. Bakoyannis and NATO Secretary General Mr. Scheffer following their meeting, dated 3 March 2008, available at http://www.mfa.gr/www.mfa.gr/Articles/en-US/04032008_ALK1539.htm: Annex 133: "This is a performance-based process, there is no automation in NATO enlargement. NATO's door is open but nations will have to perform. And it is also clear that invitations will be issued when all 26 allies can agree because as you know NATO operates on the basis and the principle of consensus. […] Any consensus can only be reached if all 26 NATO allies agree."

statement clearly rules out any attempt to link NATO's decision to Greece. The President of the FYROM himself stated "[n]amely, *NATO in its final position* indirectly verified the putting of the Interim Agreement out of force and pointed out that the only method for our accession in the Alliance is finding a mutually acceptable solution to the name dispute."[298] In other words, the decision to delay the FYROM's accession to NATO is the common decision of the Members States with which Greece agrees but which is not the result of its opposition.

6.75. In this respect, it is of interest to note that a few months before the Bucharest Summit, doubts were already expressed by NATO – by NATO, not by Greece – about the FYROM's admission to the Organisation:

> "The discussion showed that efforts to join NATO are being well noted by Allies. NATO Allies agreed that the former Yugoslav Republic of Macedonia has made progress in implementing political, economic and military reforms, *but that more needs to be accomplished*."[299]

No special role was attributed to Greece on this occasion either as the FYROM itself acknowledges in its Memorial.[300]

6.76. In its Application, the FYROM requests the Court:

> "to order that the Respondent immediately take all necessary steps to comply with its obligations under Article 11, paragraph 1 of the Interim Accord, and to cease and desist from objecting in any way whether directly or indirectly, to the Applicant's membership of the North Atlantic Treaty Organisation and/or of any other 'international, multilateral and regional organizations and institutions' of which the Respondent is a member, in circumstances where the Applicant is to be referred to in such organizations or institutions by the

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[298] Annual Address of Branko Crvenkovski, President of the FYROM in Parliament, *Stenography Notes from the 37th Session of the Parliament of the Republic of Macedonia,* held on 18 December 2008: Annex 105 (emphasis added).

[299] NATO, Press release, *Prime Minister of former Yugoslav Republic of Macedonia discusses membership aspirations with NATO allies*, 23 January 2008, available at http://www.nato.int/docu/update/2008/01-january/e0123b.html: Annex 27 (emphasis added). See also: Joint Press Point with NATO Secretary General Jaap de Hoop Scheffer and the Prime Minister of the former Yugoslav Republic of Macedonia, Nikola Gruevski, 23 January 2008 available at http://www.nato.int/cps/en/natolive/opinions_7381.htm: Annex 26.

[300] Memorial, para. 1.11 p. 10, 1.4 p. 6.

> designation provided for in paragraph 2 of United Nations Security Council Resolution 817 (1993)."[301]

6.77. Supposing, for the sake of discussion, that the Court were to accede to the FYROM's claim, it would mean, in fact, that Greece could not honour its obligation towards the Organisation, that it could not protest against the FYROM's violation of its commitment to be referred to in conformity with SC res 817 (1993) after it has been admitted not only in NATO, but also in any other "international, multilateral and regional organisations and institutions." But, above all, regardless of the position of Greece, such a decision by the Court would have no effect on the collective decision of NATO, which is the real object of the Application.

2. NATO Did not Breach any International Obligation

6.78. The Bucharest decision, which is exclusively attributable to NATO, does not constitute "a breach of an international obligation of that international organisation."[302] The NAC decision is obviously not capable of engaging the international responsibility of NATO since there is no internationally wrongful act of NATO in setting a condition for admission of the FYROM – in particular, a condition relating to the settlement of a dispute with implications for international peace and security.

6.79. The Bucharest Summit did not decide to refuse the FYROM's admission. It only decided that "[…] an invitation to the former Yugoslav Republic of Macedonia will be extended as soon as a mutually acceptable solution to the name issue has been reached." This is in full conformity with the process of admission of a new State within the Organisation:

> - The first step for a State to join NATO is to declare its interest in joining the Alliance; then, NATO and the candidate country engage in an Intensified Dialogue about the State's membership aspirations and related reforms;
>
> - The second step for the aspirant country is to be invited to participate in the Membership Action Plan (MAP) "to prepare for potential membership and demonstrate [its] ability to meet the obligations and commitments of possible future membership"[303]; the

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[301] Application, para. 23(ii).

[302] ILC, Article 4(b) of the *Draft Articles on Responsibility of International Organisations*, quoted above.

[303] NATO, "NATO enlargement" available at: http://www.nato.int/cps/en/natolive/topics_49212.htm: Annex 38.

invitation to participate in the MAP *does not guarantee*[304] the future membership of the aspirant country, which have to "demonstrate that they are in a position to further the principles of the 1949 Washington Treaty and contribute to security in the Euro-Atlantic area"[305];

- The third step starts with an invitation to become a Member of NATO; the invitation, such as the ones conveyed to Croatia and Albania in the Bucharest Summit Declaration[306], is only the starting point of the accession process on the way to formal membership.[307]

6.80. The FYROM's candidacy is now at the second stage of the process of admission.[308] By a decision of 23 December 1993, the FYROM resolved that "it should join the North Atlantic Treaty Organization."[309] It first joined the PfP programme in 1995 and then the MAP in 1999, which was launched to help seven aspiring countries to join the Alliance (by providing advice, assistance and practical support). The MAP set the criteria that the FYROM and the other aspiring countries must fulfil to receive an invitation. During the past 10 years, NATO and the FYROM have worked on the FYROM's accession, through visits and exchanges.[310]

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[304] See NATO, Press Release NAC-S(99)66, *Membership Action Plan (MAP)*, dated 24 April 1999, para 3: Annex 21.

[305] NATO, "NATO enlargement" available at: http://www.nato.int/cps/en/natolive/topics_49212.htm: Annex 38.

[306] Memorial, Annex 65, NATO Press Release (2008)049 dated 3 April 2008, *Bucharest Summit Declaration Issued by the Heads of State and Government participating in the meeting of the North Atlantic Council in Bucharest on 3 April 2008*, para. 2.

[307] The accession process for the aspirant/invitees country consists in: (1) accession talks with a NATO team, (2) the invitees will send letters of intent along with timetables for completion of reforms, (3) signature of the accession protocols by NATO countries, (4) ratification of the accession protocols by NATO countries, (5) invitation of accession by the Secretary General. The aspirant/invitees countries will finally become NATO Members once theirs instruments of accession have been deposited with the US State Department (after accession in accordance with their national procedures). See NATO, "NATO enlargement" available at: http://www.nato.int/cps/en/natolive/topics_49212.htm : Annex 38.

[308] See above para. 5.33-5.47.

[309] Memorial, Annex 21, "Decision on the Attainment of Membership by the Republic of Macedonia of the North Atlantic Treaty Organization - NATO" (23 December 1993), *Official Gazette of the Republic of Macedonia*, No. 78, Year XLIX (27 December 1993), Article 1.

[310] E.g. NATO, "Prime Minister of former Yugoslav Republic of Macedonia visits NATO", 14 February 2007 available at : http://www.nato.int/cps/en/natolive/news_7492.htm: Annex 24. NATO Secretary

At the Bucharest meeting, the FYROM did not get an invitation but "was assured that it will also be invited to join the Alliance as soon as a solution to the issue of the country's name has been reached with Greece."[311]

6.81. It also goes without saying that the NAC is not bound by the Interim Accord of 1995 between Greece and the FYROM, which is *res inter alios acta* for NATO and which, in any case, could not prevail over the rules of the Organisation concerning the admission of new Members embodied in Article 10 of the North Atlantic Treaty.[312] The admission of a new Member State is decided by a unanimous agreement of the NATO Parties. An invitation can be extended to "any other European State in a position to further the principles of [the North Atlantic] Treaty and to contribute to the security of the North Atlantic area to accede to this Treaty."[313]

6.82. Absent any breach of an international obligation, NATO cannot be held internationally responsible for the deferral of the admission of the FYROM into the Organisation, of which the Claimant complains.[314] In any case, the Court has no jurisdiction *vis-à-vis* NATO.

B. The Individual Member States of NATO Cannot be Held Responsible for the Alliance's Decision

6.83. The ILC in its work on the topic of responsibility of international organisations has proposed draft articles on the relation between the Member State and the international organisation. In particular, the ILC has produced on first reading draft articles to define the situations in which responsibility may attach to the Member State for conduct by the organisation or for the conduct of the State within the organisation.[315] In its commentary to the draft articles addressing this part of the topic, the

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General "praised these reform efforts, adding that *still much remains to be done*". (emphasis added).

311 NATO, "NATO enlargement" available at: http://www.nato.int/cps/en/natolive/topics_49212.htm: Annex 38. The same decision has been reaffirmed at the Strasbourg / Kehl Summit; NATO Press Release: (2009) 044, *Strasbourg / Kehl Summit Declaration, Issued by the Heads of State and Government participating in the meeting of the North Atlantic Council in Strasbourg / Kehl on 4 April 2009*: Annex 35, and NATO Press Release: (2009) 190, *Final Statement, Meeting of the North Atlantic Council at the level of Foreign Ministers held at NATO Headquarters, Brussels 4 December 2009*: Annex 36.

312 See also below, para. 6.94.

313 Article 10 of the North Atlantic Treaty.

314 Cf. Article 3 of the *Draft Articles on Responsibility of International Organisations*: "Every internationally wrongful act of an international organization entails the international responsibility of the international organization."

315 Draft Articles 57-59.

ILC is clear that responsibility will not attach "simply" because of the State's "participation in the decision-making process of the organization according to the pertinent rules of the organization." According to paragraph (2) of the commentary to draft article 57,

> "A State aiding or assisting an international organization in the commission of an internationally wrongful act may or may not be a member of that organisation. Should the State be a member, the influence that may amount to aid or assistance *could not simply consist in participation in the decision-making process of the organization according to the pertinent rules of the organization*."[316]

6.84. NATO, as an international organisation, has its own legal personality, which is distinct from those of its Members and it alone must therefore face the responsibility for its acts. Consequently, the Organisation acts as a veil preventing the Member States from being held responsible for the conduct of the Organisation (a). Moreover, even assuming *arguendo* that the decision deferring the FYROM's admission to NATO could be attributed to Greece and entail its responsibility, the Court could not decide on this point without also deciding on the responsibility of NATO or its other Members, over whom it has no jurisdiction; therefore the *Monetary Gold* principle applies (b).

1. The "Veil Effect"

6.85. The "veil effect" is the direct consequence of the recognition of a separate legal personality to international organisations.[317] As a result the acts of an international organisation, whether lawful or unlawful are not attributable to the Member States and do not entail their responsibility.

6.86. This was very clearly explained by Advocate General Darmon in the European Court of Justice case concerning the bankruptcy of the International Tin Council:

> "136. Consequently, it does appear that the [International Tin Council] is an entity distinct from its members vested with its 'own decision-making power'. *Its conduct may not therefore be imputed to one of its*

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316 ILC, Report of the International Law Commission of its sixty-first session, A/64/10, p. 160, para. 2 of the commentary of Article 57 of the Draft articles on responsibility of international organisations.

317 In particular by the ICJ, *Reparation for Injuries Suffered in the Service of the United Nations*, *Advisory Opinion, ICJ Reports 1949*, p. 179.

> *members without ignoring the 'individualization' of the organization in relation to the latter*. In those circumstances, the reference to solutions adopted in the field of private law concerning the liability of persons running commercial companies has no relevance whatsoever. No guidance can be derived from the judgment of the International Court of Justice in the *Barcelona Traction* case, for instance. That court did indeed consider that the concept of the lifting of the 'corporate veil' might apply in international law, but there it was precisely a question which concerned private commercial companies. As regards an international organization, as has been shown, 'it is necessary to rule out any analogy -which could only be wrong- with the mechanisms of commercial law.'
>
> 137. Although that reflection deals with the liability of the members of the ITC for its debts, a fortiori it must apply to the question of imputing the ITC's conduct to its members. *The fact that it is impossible to impute the conduct of an international organization to one of its members ensues from its possession of separate legal personality*, even though it is thought by some that the existence of that legal personality leaves open the principle of liability for the debts of the legal person."[318]

6.87. The consequence of such a "veil effect" is that the decisions of an organisation cannot be attributed to the Member States who have participated in the decision process.[319] Accordingly, when a State's representative fully participates in the adoption of a decision of the

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[318] ECJ, *Maclaine Watson & Company Limited v. Council and Commission of the European Communities*, Opinion of Mr. Advocate General Darmon delivered on 1 June 1989, *E.C.J. Reports* 1990-I, p. 818, paras 136-137 (emphasis added).

[319] See above para. 6.83. See also J.J. Caicedo, *La répartition de la responsabilité internationale entre les organisations internationales et leurs Etats membres*, Thèse pour le doctorat en droit, Université Paris 1 Panthéon-Sorbonne, 2005, p. 166, para. 207: "The screen effect prevents the attribution to a member of a decision of the organisation to which it has participated" (translation by Greece - "L'effet d'écran empêche qu'une décision de l'organisation à laquelle un membre a participé lui soit attribuable."); or A. Pellet, "Le droit international à l'aube du XXIème siècle (La société internationale contemporaine - permanences et tendances nouvelles)", Fundamental Course, *in Bancaja Euromediterranean Courses of International Law*, vol. I, 1997, Aranzadi, Pamplona, 1998, p 80.

organisation, he or she does not act as a representative of the State but as member of the organisation. As explained by R. Higgins:

> "[A]t the international level this leads one into the area of '*dédoublement fonctionnel*', the role of the members not being as individual States but rather as members of the relevant decision making organ […] where the organization has a '*volonté distincte*' the continuing role of State members, *qua* organs should be regarded as neutral as regards the issue of members liability for the acts of international organizations."[320]

Even if a State's representative takes an active part in the decision process through dialogue or debate, "a member State acting in its capacity as a member of a governing body of an international organization with separate personality would be acting to commit the organization rather than itself."[321]

6.88. NATO's requirement of a consensus does not allow piercing the Organisation's veil. On the contrary, the fact that decisions within NATO may be taken only by consensus makes it impossible to individualise Member States' responsibility. Far from permitting individualisation of responsibility, this method of decision making demonstrates the cohesion and solidarity between the Member States of the Organisation and precludes extracting from it the single responsibility of one of the Members.

6.89. A consensus-based decision process such as that of the NAC is clearly not an international agreement falling under the ambit of the 1969 Vienna Convention on the Law of Treaties.[322] Such decision reflects the will of the organisation and not the will of a given Member State. Accordingly, this decision is attributable to the organisation and not to any of its Member States. It would be absurd to argue that those Members of the UN Security Council who abstain on a decision[323] can be held

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320 R. Higgins, "The Legal Consequences for Member States of the Non-Fulfilment by International Organizations of their Obligations Toward Third Parties, Preliminary Exposé and Draft Questionnaire", June 1989, *Yearbook of the Institut de Droit International,* Vol. 66-I, 1995, pp. 260-261.

321 Answer of Professor James Crawford, 26 January 1991, *Yearbook of the Institut de Droit International*, Vol. 66-I, 1995, pp. 333-334.

322 See Article 3 of the Convention.

323 Indeed whatever the positions of the Members (permanent or not) of the Security Council, the resolutions of this organ could entail the responsibility of the United Nations, not of its Member States whatever their vote.

responsible for the decision if it were unlawful. *A fortiori* even "if a permanent member of the Security Council persistently blocks the lifting of sanctions that have proved to infringe on some basic human rights, it cannot be deemed to be abusing the legal personality of the organization in the sense used in this Article and cannot accordingly be held jointly or concurrently responsible of the persistent violations of human rights."[324]

6.90. In the event of a collective decision by NATO such as the NAC decision in Bucharest, there is no room for the individual responsibility of the Member States. The collective decision does not lie in the vote of the Member States and consequently in the expression of their individual will. It is therefore vain to speculate on (i) what was the legal effect of the position taken by each and every Member State, (ii) which position each member has taken during consultations in the NAC, and (iii) what is the impact in legal terms of such position in framing the final result of consensus. In other words, it is not possible and it is legally irrelevant, in cases such as the present one, to try to search out and individualise the ('real') author of the proposal on which the consensus is based. Such decisions are, by definition, not attributable to any individual State, that is, in the present case, not attributable to Greece.

6.91. Even if NATO had committed a wrongful act by refusing to extend immediately an invitation to the FYROM, NATO solely and not any of its members could be held responsible.

> "[T]he autonomy of the international organisation, and the existence of its distinct will must prevent from granting any role to State' behaviours as organs [of the organisation] for the determination of their responsibility for the acts of the organisation […] in this

[324] J. d'Aspremont, "Abuse of the Legal Personality of International Organizations and the Responsibility of Member States", *International Organizations Law Review*, 2007, p. 110. See ECHR, Decision on admissibility of 2 May 2007, *Behrami v. France; Saramati v. France, Germany and Norway*, para. 149: "Since operations established by UNSC Resolutions under Chapter VII of the UN Charter are fundamental to the mission of the UN to secure international peace and security and since they rely for their effectiveness on support from member states, the Convention cannot be interpreted in a manner which would subject the acts and omissions of Contracting Parties which are covered by UNSC Resolutions and occur prior to or in the course of such missions, to the scrutiny of the Court. […] This reasoning equally applies to voluntary acts of the respondent States such as the vote of a permanent member of the UNSC in favour of the relevant Chapter VII Resolution and the contribution of troops to the security mission: such acts may not have amounted to obligations flowing from membership of the UN but they remained crucial to the effective fulfilment by the UNSC of its Chapter VII mandate and, consequently, by the UN of its imperative peace and security aim."

> area too, the fact that international organisations have their own legal personality plays an important role in the attribution [of the responsibility] to the organisation rather than to its members."[325]

6.92. In sum, the decision taken at the Bucharest Summit on 3 April 2008 not to invite the FYROM to immediately join NATO is attributable to NATO itself. This decision is not individually and autonomously attributable to Greece or any other NATO Member State. The decision was taken by a consensus for which NATO alone has responsibility. The "veil effect" thus precludes the responsibility of Greece for the deferral of the FYROM's immediate invitation to NATO which cannot be imputed to an autonomous act of the Greek Government.

6.93. It must also be specified that the NAC decision in Bucharest is not a circumvention of the obligation of Greece towards the FYROM "not to object" to its membership in international organisations (according to Article 11 of the Interim Accord). NATO has its own rules concerning the admission of new Members[326] and, in the circumstances, they have simply been implemented. Article 60 of the ILC Draft Articles on Responsibility of International Organisations[327] envisages the case of a State seeking "to avoid complying with one of its own international obligations" *only in case* the international organisation "has competence in relation to the subject-matter of that obligation."[328] In the present case, Greece has not transferred to NATO any special competence to decide on the FYROM invitation to become a Member. NATO had no competence in relation

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[325] P. Klein, *La responsabilité des organisations internationales*, Bruylant, Bruxelles, 1998, pp. 488-489; translated by Greece: "l'autonomie de l'organisation internationale, et l'existence d'une volonté distincte dans son chef doivent conduire à n'attribuer aucun rôle au comportement adopté par les Etats membres en leur qualité d'organe pour la détermination de leur responsabilité pour les actes de l'organisation […] dans ce domaine aussi, le fait que les organisations internationales soient dotées d'une personnalité juridique propre dans l'ordre international joue donc un rôle déterminant dans l'attribution à l'organisation, plutôt qu'à ses membres."

[326] See above, para. 6.81.

[327] Text of Article 60:

"Responsibility of a member State seeking to avoid compliance

1. A State member of an international organization incurs international responsibility if it seeks to avoid complying with one of its own international obligations by taking advantage of the fact that the organisation has competence in relation to the subject matter of that obligation, thereby prompting the organization to commit an act that, if committed by the State, would have constituted a breach of the obligation.

2. Paragraph 1 applies whether or not the act in question is internationally wrongful for the international organisation."

[328] ILC, Report of the International Law Commission of its sixty-first session, A/64/10, p. 163.

with Article 11 of the Interim Accord in that it could not have (and has not) aided Greece not to comply with its own obligations. Once again, the only thing NATO did was to apply its own rules, and it did so without any consideration for the Interim Accord, which is not binding upon it.

6.94. Furthermore, Greece took part in the consultations in accordance with its rights and obligations on the basis of the North Atlantic Treaty, a treaty which precedes in time the Interim Accord; which is not superseded by the Accord; and which, as provided for in Article 22 of the Interim Accord, prevails over obligations stemming from the Accord.[329] Greece exercised within the NAC its rights and obligations as a member of the Alliance on an equal footing with the other members of the Alliance in relation to its consultation and consensus-based decision-making. Accordingly, there was no competence (in particular on membership questions) that was provided to the Organisation itself to decide on behalf of Greece on the FYROM invitation in the Alliance. In acting differently, Greece would have been in breach of its pre-existing obligations towards NATO and its Members States.

2. The Monetary Gold Principle

6.95. Another reason for the Application's inadmissibility can be found in the "*Monetary Gold* principle", according to which the Court's decision is precluded when the legal interests of a third party, not present in the proceedings "would not only be affected by a decision [on the merits], but would form the very subject-matter of the decision."[330] The Court applied this principle in the *East Timor* case:

> "[I]n this case, the effects of the judgment requested by Portugal would amount to a determination that Indonesia's entry into and continued presence in East Timor are unlawful and that, as a consequence, it does not have the treaty-making power in matters relating to the continental shelf resources of East Timor. Indonesia's rights and obligations would thus constitute the very-subject matter of such a judgment made in the absence of that State's consent. Such a judgment would run directly counter to the "well-established principle of international law embodied in the Court's Statute, namely, that the Court can only exercise jurisdiction

[329] See above paras. 6.52-6.63.

[330] ICJ, Judgment on Preliminary Objections of 15 June 1954, *Monetary Gold Removed from Rome in 1943 (Italy v. France, United Kingdom of Great Britain and Northern Ireland and United States of America)*, *I.C.J. Reports 1954*, p. 32.

over a State with its consent. (*Monetary Gold Removed from Rome in 1943, Judgment, I.C.J. Reports 1954*, p. 32)."[331]

6.96. In the present case, the decision has been taken and confirmed on numerous occasions by NATO and the Organisation has accepted full responsibility for that decision.[332] Therefore, the Court could not decide on the FYROM's Application without necessarily deciding on the legality of NATO's decision since that Organisation is not a minor participant but the most important actor in and the only author of the decision not to invite the FYROM to join the Organisation.

6.97. Were the Court to assume jurisdiction in the present case, it would take a decision that directly affected the other participants in NATO's decision who are not part of the present proceedings. Consequently and as the Court's jurisdiction is necessarily consensual, if, contrary to the argument presented in the previous Sections of the present Chapter, the Court were to hold that it has jurisdiction, it would be precluded from exercising it because that would require it first to rule on the rights and interests of all the Members States of NATO who participated in the decision challenged by the FYROM and of NATO itself, who are not parties to the proceedings and, in the case of the latter at least, cannot be parties thereto.

6.98. Article 34(1) of the Statute confers *locus standi* in proceedings before the Court on States alone and not on international organisations. Therefore, the Court does not have contentious jurisdiction over the present dispute.

VI. CONCLUSION

6.99. The FYROM's claim does not fall within the Court's jurisdiction on three grounds. First, it is implausible to contend that Greece's alleged actions, assuming they occurred, were not directly related to the "difference". Secondly, Greece's alleged actions, assuming they occurred, would have been a consequence of Greece exercising its "rights and duties resulting from bilateral and multilateral agreements already in force that the Parties have concluded with other States or international organizations." Finally, the dispute actually relates to the FYROM's dissatisfaction with the conduct of NATO and its Members, who are not subject to the Court's jurisdiction.

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[331] *East Timor (Portugal v. Australia)*, *Judgment, I.C.J. Reports 1995*, p. 105, para. 34.

[332] See above, para. 6.73.

CHAPTER 7: THE INTERPRETATION AND APPLICATION OF ARTICLE 11(1)

I. INTRODUCTION

7.1. Article 11(1) of the Interim Accord of 13 September 1995 is the subject of the FYROM's Application. The FYROM relies on that provision as the sole basis for its claim.[333]

7.2. Article 11(1) consists of two clauses: a clause which establishes a special obligation upon Greece (hereafter the Non-Objection Clause), and a second clause which preserves a pre-existing right of Greece (hereafter the Safeguard Clause). Article 11(1) reads in whole 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; 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)."

Thus the Non-Objection Clause establishes an obligation on Greece with respect to the FYROM's relations with certain international organisations; the Safeguard Clause preserves the right of Greece to object to membership if the FYROM "is to be referred to in such organization or institution differently" from the provisional designation established by SC res 817 (1993).

7.3. As stressed in Chapter 3 of this Counter-Memorial, the Interim Accord is a synallagmatic agreement. It could not, and indeed does not purport to, bind third States or international organisations. It establishes *mutual* rights and obligations which, taken as a whole, are intended to achieve the parties' purpose—namely, to stabilise their relations during the interim period, i.e., for so long as there is no definitive settlement of the difference described in SC res 817 (1993).[334] Article 11(1) reflects

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333 Memorial, para 1.1.

334 See *supra,* Chapter 3.

this mutuality: as part of the overall scheme of the Interim Accord, it balances the interests of the two parties during the interim period. The retained right of Greece under the Safeguard Clause is the corrective mechanism, available if the FYROM "is to be referred" to other than by the provisional name in the organization in question.

7.4. The Applicant entirely disregards that balance. In its Memorial, the FYROM denies that Article 11(1) imposes any obligation on it of any kind: it is "directed to just one of the Parties…"[335] In this unilateral mode, Article 11(1) is put forward as a broad obligation, subject to a narrowly-construed exception relating only to the formal title by which the FYROM is admitted to the organisation.[336] Thereafter the FYROM is free to subvert the agreed basis of multilateral relations during the interim period. In short, Article 11(1) is "directed only to [Greece],"[337] and in terms which are subversive of Greece's long-held position.

7.5. Moreover in its interpretation of the Accord, the FYROM virtually ignores Article 22 – a further example of its strategy of ignoring legal provisions which are inconvenient to the positions it takes. Article 22 provides:

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

As explained earlier in the Counter-Memorial, the placement of Article 22 in Part F of the Interim Accord, under the title of "Final Clauses", indicates that it applies throughout the Interim Accord, including to Article 11(1).

7.6. This Chapter discusses in turn each of these elements of the Interim Accord and their application to the present dispute. In particular:

- Part II deals with the Non-Objection Clause, read in conjunction with Article 22, and shows that at Bucharest Greece did not breach that provision.

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335 Memorial, para 4.19.

336 Thus while the Non-Objection Clause of Art. 11(1) is "unconditional" (Memorial, para. 4.28) and "unlimited" (*ibid*., paras. 4.17, 4.20), the Safeguard Clause is "exceptional" (ibid., para. 4.28), and "solitary" (ibid., paras. 4.21 (twice), 4.29).

337 FYROM Memorial, para 4.19; cf *ibid*., para. 4.19 ("an obligation solely upon the Respondent").

- Part III shows that in any event Greece would have been entitled, by virtue of the Safeguard Clause, to oppose the FYROM's NATO candidacy at Bucharest.

- Part IV summarises the conclusions reached.

II. THE NON-OBJECTION CLAUSE (READ IN LIGHT OF ARTICLE 22) AND THE BUCHAREST SUMMIT

7.7. The Non-Objection Clause of Article 11(1) commits Greece "not to object to the application by or the membership of the Party of the Second Part in international, multilateral and regional organisations and institutions of which the Party of the First Part is a member […]." The clause limits a right that Greece could otherwise freely exercise; i.e., the right, subject to the terms of the constitutive instrument, to adopt whatever position it wishes with respect to the relations of another State to an international organization to which it belongs, including by objecting to application or membership.

7.8. This Part:

- addresses the meaning of the Non-Objection Clause and its relevance within the particular processes of NATO enlargement (Section IIA);

- discusses the implications of Article 22 for Article 11(1), with particular reference to the North Atlantic Treaty (Section IIB);

- shows that Greece's conduct at the Bucharest Summit was not inconsistent with the Non-Objection Clause, read in conjunction with Article 22 (Section IIC).

A. The Meaning of the Non-Objection Clause in the Context of NATO Accession

7.9. Since it establishes Greece's consent to forego the exercise of a right, the Non-Objection Clause is to be interpreted as reaching only so far as its text clearly indicates. As the Permanent Court of International Justice stated in 1927, "restrictions upon the independence of States cannot […] be presumed."[338] Treaty provisions entered into by a State must be interpreted "in accordance with the intentions of its authors as

[338] *"Lotus", Judgment, No 9*, *1927, PCIJ, Series A, No. 10*, 1927, 18.

reflected by the text of the treaty and the other relevant factors in terms of interpretation."[339]

7.10. By contrast the FYROM, in describing the Safeguard Clause in Article 11(1), asserts that the "Parties have strictly limited the conditions in which *the grant of the Respondent's right* to object may be exercised."[340] To refer to Greece's pre-existing discretionary powers as a "grant" conferred by the Interim Accord is misconceived; it mistakes the character of the Non-Objection Clause. Under Article 11(1), the "grant," if any, is *to* the FYROM, and it is inapplicable when a situation obtains as specified in the Safeguard Clause.

7.11. The meaning of the Non-Objection Clause is considered here, *first*, in light of the ordinary meaning of the words "not to object", a matter the FYROM largely ignores. *Second*, Greece considers the drafting history of the clause, not because the history discloses any intention to use the words in a special or non-standard manner, but, rather because the FYROM makes only selective reference to it and wrongly asserts that it alters the ordinary meaning of the language actually adopted. *Third*, the specificity of international organisations and their internal procedures is considered, this being relevant to the implementation of the clause.

1. The Language of the Non-Objection Clause

7.12. *Ratione materiae*, the FYROM reads the Non-Objection Clause in the most comprehensive terms:

> "4.25. The obligation encompasses any implicit or explicit act or expression of disapproval or opposition in word or deed to the Applicant's application to or membership of an organization or institution. An act of objection may be expressed in different forms, including in writing and orally, by silence or in some other form.

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[339] *Navigational and Related Rights (Costa Rica v Nicaragua)*, *ICJ, Judgment of 13 July 2009*, para 48. More generally, on numerous occasions the Court has held that interpretation must be based above all on the text of the treaty: *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Judgment, ICJ Reports 2002,* p 625, 645 (para 37); *Kasikili/Sedudu Island (Botswana/Namibia), Judgment, ICJ Reports 1999,* p 1045, 1059 (para 18); *Oil Platforms (Islamic Republic of Iran v United States of' America), Preliminary Objection, Judgment, ICJ Reports 1996,* p 8, 12 (para 23); *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v Bahrain), Jurisdiction and Admissibility, Judgment, ICJ Reports 1995,* p 6, 18 (para 33); *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, ICJ Reports 1994,* p 6, 21-22 (para 41).

[340] Memorial, para 4.30 (emphasis added).

> 4.26. The formulation encompasses positive acts, such as a vote, as well as a failure to act, such as the failure to attend a meeting where participation is necessary in order to express a required view."[341]

These are mere assertions. If the parties had intended that Greece was not even implicitly to suggest, e.g. by failing to attend a meeting or by a nod and a wink in the corridor, that it was less than fully enthusiastic about FYROM's membership of a given body, they would have used the simple term "support". By the same token Article 11(1), in no way obliges Greece to "express a required view." It is deliberately couched in the negative – an obligation not to object.

7.13. Disputes over membership in international organisations have a long history and (quite apart from the criteria for membership, a matter addressed by Article 22), there are many gradations of position States may take. The difference between active rejection of a proposed Security Council resolution (i.e., by use of the veto) and abstention has been discussed by several judges of the Court[342] and extensively in the literature.[343] Applicant States have been admitted – for example – to the United Nations with some or many Member States abstaining or even absenting themselves; these have sometimes included Permanent Members of the Security Council.[344] Against that background, "not to object" means what it says, and nothing more.

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[341] Memorial, paras 4.25-4.26.

[342] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 267 (1970),* Dissenting Opinion of Judge Sir Gerald Fitzmaurice, *ICJ Reports 1971,* p 16, 282 (para 94); *Certain Expenses of the United Nations (Article 17, Paragraph 2 of the Charter), Advisory Opinion of 20 July 1962*, Separate Opinion of Judge De Castro, *ICJ Reports 1962* p 151, 185-6; *Ibid*, Dissenting Opinion of Judge Bustamante, *ICJ Reports 1962,* p 151, 291.

[343] See Bruno Simma, Stefan Brunner & Hans-Peter Kaul "Article 27," Part D, in Bruno Simma ed, *The Charter of the United Nations: A Commentary* 2nd edn (2002) 493-500; Paul Tavernier, "Article 27," in Jean-Piere Cot, Mathias Forteau & Alain Pellet eds., *La Charte des Nations Unies: commentaire article par article,* 3rd ed (2005) 935-957.

[344] See, e.g., the abstentions of China and the USA with respect to Albania, SCOR 10th yr 705th mtg, 14 Dec 1955 para 29; Hungary, ibid para 33; Romania, ibid para 36; and Bulgaria, ibid, para 37; and of the USSR with respect to Mauritania, SCOR 16th yr 971st mtg, 25 Oct 1961 para 228. The admission of Mauritania was as against the abstentions of twenty members of the General Assembly and the negative votes of thirteen: GA res 1631 (XVI), 27 Oct 1961; GAOR 16th sess 1043rd plen mtg, 27 Oct 1961 para 195. Mongolia met with no fewer than nine rejections in the Security Council between 1946 and 1961, and the Council's eventual recommendation to admit that State

7.14. The Interim Accord contains no indication that the Parties intended the phrase "to object" to mean anything other than a specific, negative act by Greece in an international organisation. Where the concept of objection has been applied in international legal relations, it has meant active conduct, not mere abstention or other withholding of assent. For example, for a State to object to another State's reservation to a treaty it must formulate its objection in writing and communicate it to the contracting States and other States entitled to become parties to the treaty.[345] In other situations, too, such as negotiations between two States, "to object" entails a "formal complaint against… steps taken" by another party.[346] Merely adducing reasons against some conduct, if not pressed to the point of outright opposition, does not constitute an objection.

2. Drafting History of the Non-Objection Clause

7.15. The FYROM seeks to transform the obligation of Article 11(1) into something positive and all-embracing. But the drafters deliberately rejected an active formulation, according to which Greece would have been obliged to take affirmative steps—i.e. "to support"—the FYROM's applications for membership. The FYROM's interpretation attempts to revert to the earlier rejected language.

7.16. The FYROM refers selectively to the drafting history of the Interim Accord. In particular, it says as follows:

> "The replacement of the words 'endeavour to support' with the obligation 'not to object' emphasizes the intention of the drafters to impose a clear, unambiguous and unlimited obligation on the Respondent in relation to the Applicant's membership of international, multilateral and regional organizations and institutions."[347]

7.17. The change from "endeavour to support" to "not to object" took place between the earliest draft (14 May 1993) and the adopted Accord (13 September 1995). There are at least two deficiencies in the FYROM's

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was adopted as against the abstention of the USA and non-participation of China: SCOR 16th yr 971st mtg, 25 Oct 1961 para 70.

[345] Vienna Convention on the Law of Treaties, Art. 23(1). See also ILC, "Guidelines 2.8.4 of the draft guidelines on reservations to treaties provisionally adopted so far by the Commission", Report of the International Law Commission of its sixty-first session, A/64/10, pp 240-241.

[346] See, e.g., statement of the Ruler of Qatar, quoted in *Case Concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v Bahrain), ICJ Reports 2001*, p. 40, 78 (para. 120).

[347] Memorial, para 4.17.

analysis of the change. First, the FYROM says that it widened the obligation—i.e., the change made the obligation "unlimited". The actual effect of the change over the course of drafting was just the opposite—i.e., its effect was to *narrow* the obligation. An obligation to "endeavour to support" is an obligation to take some affirmative steps. It necessarily entails the obligation "not to object"; it would make no sense to require a State to "endeavour to support" another in the attainment of a stated objective while permitting the State simultaneously "to object" to it. To amend the text from "endeavour to support" to "not to object" is to eliminate the active and affirmative element of the obligation, and to leave only the passive and negative element. The obligation "not to object," as actually incorporated into the Interim Accord, is a purely negative obligation, entailing refraining from one particular act.

7.18. Second, the FYROM gives only an incomplete account of the drafting history. In addition to the Vance-Owen draft of 14 May 1993, no fewer than nine further drafts were considered.[348] Before adoption of the Interim Accord in 1995, the drafters proposed certain variants on the language eventually incorporated into Article 11(1).

(a) A draft dated 13 April 1994 apparently contained no provision at all obliging Greece with respect to the relations of the FYROM to international organizations, though this may have been an incomplete draft.

(b) A draft dated the same month (17 April 1994) proposed the words: "The Parties will not hamper each other's participation in international organizations." This would have been an explicitly reciprocal obligation; and it would have been far-reaching, if somewhat vague: "not [to] hamper" could be a prohibition on a wide category of conduct.

(c) A draft of 23 April 1994 included the "not hamper" clause; it would also have obliged Greece to "support the full participation of [the FYROM] in the CSCE and other European and international organizations […]." An alternative version of the same provision in that draft would have obliged

[348] For the successive texts see Annex 148. No other documentary record was kept of the negotiations.

Greece to "positively consider supporting the participation of [the FYROM] in the CSCE and other European and international organizations." There was then a hiatus in the negotiations.

(d) A draft dated 15 March 1995 would have provided that Greece "shall not impede or object to [the FYROM] being admitted to or undertaking cooperative arrangements with those European and other multilateral institutions of which [Greece] is a member." A further draft (of the same date) retained this proposed language.

(e) Contrary to the FYROM's account, the drafters of the Interim Accord did not proceed from less extensive to more extensive obligations under what became Article 11(1). The 15 March 1995 drafts would have established a *more* extensive obligation on Greece: Greece would have been obliged not only "not to object" but also "not to impede," and the obligation would have extended to "cooperative arrangements," not only to "applications" or "memberships."

(f) A draft dated 4 May 1995 took a somewhat different form but also cast the obligation in broader terms than Article 11(1) would eventually do. In the 4 May 1995 draft, the article would have read:

> "[Greece] agrees (A) not raise any objection to the application for membership of [the FYROM] in the Organization for Security and Cooperation in Europe; (B) not to impede, and to remove any objection to, [the FYROM] undertaking cooperative arrangements with those international, multilateral and regional organizations and institutions of which [Greece] is a member; and (C) not to object to the application for membership of [the FYROM] in international,

> multilateral and regional organizations and institutions of which [Greece] is a member, which applications shall be governed by the regular procedures of those organizations and institutions."

(g) A draft dated 23 May 1995 incorporated language similar to the above and added an early version of the Safeguard Clause. The Safeguard Clause, in the 23 May 1995 draft, would have applied to parts (A) and (C), but not to part (B).

(h) A draft dated 21 July 1995 would have provided as follows:

> "Upon entry into force of this Interim Accord, [Greece] agrees not to object to the membership of [the FYROM] in international, multilateral and regional organizations and institutions of which Greece is a member; however, [Greece] reserves the right to object to any membership referred to above if, and to the extent, the provisional reference under which [the FYROM] is to be admitted to such organization or institution differs from that in paragraph 2 of United Nations Security Council Resolution 817 (1993)."

(i) A draft of 21 August 1995 changed "agrees not to object to the membership of" to "agrees not to object to the application by or the membership of."

7.19. The drafting history does not support the FYROM's conclusion that a more extensive obligation was intended to be established under Article 11(1) than at first proposed. There were variant formulations over an extended period of drafting and negotiation, but in the end, phrases such as "not hamper," "support the full participation," "positively consider supporting," "shall not impede or object to," "not to impede, and to remove any objection to" were abandoned in favour of the simple and limited phrase "agrees not to object."

3. Specificity of International Organisations and its Relevance to the Non-Objection Clause

7.20. The existence of various types of international organisations is relevant to the interpretation of the Interim Accord. The FYROM would treat all organisations alike, arguing, as it does, that the Non-Objection Clause "applies to *all* international, multilateral and regional organizations and institutions…"[349] Thus the FYROM seeks to transfer, without textual justification, the word "any" from the Safeguard Clause to the Non-Objection Clause. The word "any" in the Safeguard Clause simply means that Greece preserves its existing right to object in specified circumstances to the FYROM's membership in any of the organisations covered by the Non-Objection Clause. This says nothing as to the scope of application of the Non-Objection Clause, which does not contain the same unqualified term.

7.21. More generally the drafting acknowledges the universe of international organisations to which the Interim Accord would apply: all international organisations and institutions are not alike.[350] The special obligation in Article 11(1) must be considered in light of the system of international organisations.

7.22. Each international organisation is established and governed by its own charter or other constitutive instrument; a central element is the definition of the membership of the organisation. A constitutive instrument may define the membership as a closed set of specified States. Various conventions concerning the management of marine, river and lake resources take this form.[351] The Treaties of 1960 establishing the independence of Cyprus, for example, identified Cyprus, Greece, Turkey and United Kingdom as participants in certain tripartite and quadrilateral institutional arrangements.[352] If the FYROM sought to participate in such organizations or institutions, it clearly would be no use to refer to Article

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[349] Memorial, para 4.24 (emphasis added).

[350] See above para. 6.56 –6.58.

[351] See, e.g., International Convention for the High Seas Fisheries of the North Pacific Ocean, 9 May 1952, 205 UNTS 80, Art. II: establishing the International North Pacific Fisheries Commission (USA-Canada-Japan); Statute and Agreement of 22 May 1964: establishing the Lake Chad Basin Commission (originally Cameroon-Chad-Niger-Nigeria), for which see *Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v Nigeria) Preliminary Objections, ICJ Reports 1998,* p 275, 305 (para 64).

[352] Treaty of Guarantee, London, 16 Aug 1960, UKTS 1961 No. 5; 382 UNTS 3 (Cyprus, Greece, Turkey, and United Kingdom, establishing consultative arrangement); Treaty of Alliance, Nicosia, 16 Aug 1960, 397 UNTS 287 (Cyprus, Greece, and Turkey, establishing Tripartite Headquarters).

11(1). FYROM is not eligible to accede to them, and Greece's obligation "not to object" in such cases is irrelevant and inapplicable.[353]

7.23. Other organisations seek to include as members as many States as seek to participate. A "universal" organisation may not at a given time include all States, but its membership provisions are open, and such standards and criteria as the membership provisions might contain the organisation applies in open and liberal fashion.[354] Admission to the United Nations now is directed towards maintaining that organisation as the universal organisation of States.[355]

7.24. International organisations also exist that are neither limited to particular States designated in the constitutive instrument; nor open to all States. Among these are certain relatively integrated organisations such as military alliances. Such organisations typically have complex processes for admission/accession. NATO is an example: an invitation to accede to the Washington Treaty is subject to rules respecting both substance and process. The rules define specific substantive criteria which limit the States that NATO may invite to accede. The process is one of consensus. NATO, and not any individual Member State, extends or declines to extend an invitation.

7.25. In the interpretation and application of Article 11(1), the differences between the various international organisations and institutions must be taken into account. There is no evidence at all that the Interim Accord intended to override the requirements for membership laid down by the relevant constituent instrument – quite apart from the point that a bilateral treaty could not in principle do so. And this conclusion is powerfully reinforced by Article 22 of the Accord, as will now be demonstrated.

B. The Relevance of Article 22

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[353] This is in accordance with Article 22 of the Interim Accord, which protects the application of pre-existing rules, including the rules of such institutions. See above paragraphs 6.52-6.63.

[354] See definition in Art (1), Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character, 14 March 1975, A/Conf.67/16: "the United Nations, its specialized agencies, the International Atomic Energy Agency and any similar organization whose membership and responsibilities are on a worldwide scale."

[355] See *Aerial Incident of July 25, 1955 (Israel v Bulgaria), Judgment, ICJ Reports 1959,* p 127, Joint dissent of Judges Sir Hersch Lauterpacht, Wellington Koo and Sir Percy Spender, p.177: "…a Charter laying down the foundations of a universal community of States organized in the United Nations."

7.26. In Chapter 6 of this Counter-Memorial, Greece explained how Article 22 of the Interim Accord affects the admissibility of the present proceedings. For many of the same reasons, Article 22 is also decisive for the merits of the case, should the Court reach them.

1. Article 11(1) Must be Read in Light of Article 22

7.27. The FYROM insists that its dispute concerns only one provision of the Interim Accord, Article 11(1); in its view the rest of the Accord can be virtually ignored. This is, as noted earlier, incorrect both factually and legally. In interpreting and applying the Interim Accord, the Court must read it as a whole; this is required by the Vienna Convention on the Law of Treaties and is especially important for a treaty with a provision such as Article 22, which by its terms applies to other provisions within the treaty.

7.28. As also noted in Chapter 6 above, the Parties understood that the Interim Accord would not operate in a vacuum of rights and obligations. Both Parties, but particularly Greece as a long-established State, already participated in a significant number of bilateral and multilateral instruments, and it was beyond the power of the FYROM and Greece bilaterally to amend or abrogate legal positions established previously with other parties. In acknowledgment of this web of pre-existing obligations, the FYROM and Greece agreed that any obligations which either of them accepted under the Interim Accord would be subordinated to rights and obligations under each party's existing bilateral and multilateral commitments. Article 22 embodies this agreement. Yet, with respect to Article 22, all that the FYROM has to say is that it concerns "the Accord's effect on third states and international organizations."[356]

7.29. It will be recalled that in the discussion of jurisdiction and admissibility, it was found to be useful to join, by means of a bracketed conjunction, the relevant part of the specific provision of Article 11(1) to the general exception in Article 22(1) in order to highlight the legal consequences. The reconstruction was as follows:[357]

> "[…] 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 [… but] this Interim Accord […] does not infringe on the rights and duties resulting from

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356 See Memorial, para 4.12.

357 See above para. 6.27.

> bilateral and multilateral agreements already in force that the parties have concluded with other States or international organizations."

7.30. The implication of Article 22 for the present case is clear. Because the obligation of Article 11(1) cannot "infringe on any rights and duties resulting from bilateral and multilateral agreements already in force that the Parties have concluded with other States or international organizations," any rights of Greece under NATO, and any obligations owed to NATO or to the other NATO Member States must prevail in case of a conflict with the Non-Objection Clause in Article 11(1).

7.31. The point to be emphasised is that a State which is party to an international organisation, especially one of an integrative character such as NATO, has responsibilities to the other members of the organisation, and to the organisation itself. It is called on to exercise its rights and discharge its duties with respect to decisions taken in the membership process. For a member State to commit itself in a subsequent bilateral treaty to disregard the membership arrangements under an existing multilateral treaty would be a breach of the latter. Article 22 of the Interim Accord anticipates the potential inter-treaty conflict and prescribes which shall prevail: the "Accord [...] 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." There are no exceptions or qualifications to Article 22.

2. Greece's Rights and Obligations under the North Atlantic Treaty Prevail over Article 11(1)

7.32. As noted in Chapter 5, NATO is a multilateral, treaty-based military alliance that operates by consensus. All NATO Member States sit in the NAC, the supreme body created specifically by the North Atlantic Treaty and the primary political authority of the Organisation.

7.33. Within the Council, Member States are consulted on matters of concern to their security and to the functioning of the Organisation. All NATO member countries have an equal right to express their views at the Council table, as well as a duty to engage actively and promptly in discussions of concern to the Organisation. This consultation, and the discussion that ensues, has been put in place and functions to ensure that "member countries […] arrive at mutually acceptable agreements on collective decision or on action by the Alliance as a whole."[358] To this

[358] NATO. *NATO Handbook*, Public Diplomacy Division, 2006, at pp. 38-39: Annex 22.

end, decisions within NATO are taken on the basis of unanimity and common accord; there is no voting or decision-making by majority.

7.34. This also applies to decisions on NATO enlargement, which are governed by Article 10 of the North Atlantic Treaty, which has already been analysed.[359] Accessions are to be approved in accordance with a strict reading of Article 10, by unanimous decision and on a case-by-case basis.

7.35. Even if there were no general exception such as found in Article 22 of the Interim Accord, as a matter of general international law the application of the Non-Objection Clause without reference to the terms of the constituent instrument would be unthinkable in an organisation with complex accession procedures like NATO. In addition to the criteria of Article 10 of the North Atlantic Treaty, the Alliance may require "specific political commitments in the course of accession negotiations."[360] The accession process is described in detail in Chapter 5. One must bear in mind that even if participation in MAP ultimately leads to membership, it is only one out of nine steps in the process of attaining NATO membership.

7.36. Among the substantive accession criteria established under the MAP is the requirement that candidate States "settle ethnic disputes or external territorial disputes including irredentist claims or internal jurisdictional disputes by peaceful means in accordance with OSCE principles and [...] pursue good neighbourly relations."[361] To have required Greece to refrain from explaining that the FYROM does not fulfill these criteria would infringe upon Greece's rights and duties to the other members and to the Organisation itself.

7.37. The FYROM is obviously conscious of the implications of Article 22 for its case; it seeks to avoid these by unsubstantiated assertion. Thus, without even mentioning Article 22, it insists:

> "The Respondent's obligation was 'not to object': that obligation applies irrespective of whether its objection amounted to a veto and irrespective of the effect or consequence of its objection. Thus, *these proceedings are not concerned in any way* with the acts or omissions of any

[359] The North Atlantic Treaty, art. 10, 4 April 1949.
[360] *Study on NATO Enlargement in: NATO Handbook Documentation,* NATO Office of Information, 1999, para 30, p. 348: Annex 19
[361] Chapter I para 2 c. The MAP is contained *in:* Press Release NAC-S(99)66, *Membership Action Plan (MAP)*, dated 24 April 1999: Annex 21.

> third States, or *with any provisions of the constituent instrument of NATO or of any other international organization or institution*: the object and subject matter of these proceedings are exclusively related to the actions of the Respondent and their incompatibility with the Interim Accord."[362]

7.38. On the contrary – by reason of Article 22 and in any event – the proceedings do precisely concern the North Atlantic Treaty and associated legal instruments. Article 22 reserves, and thereby preserves, all the rights and obligations Greece may have under that treaty and those instruments.

7.39. Thus, even if the Court were to conclude that it had jurisdiction and that the FYROM's claim was admissible, the FYROM's claim must fail on the merits. The question for the Court would then be whether NATO, through its constitutive treaty and associated instruments, establishes rights and duties for Greece to which Article 22 refers. The answer to that question is clear. Article 22 operates where there is in force a multilateral agreement with other States or with an organisation; the North Atlantic Treaty is such an agreement. It prevails over all other provisions of the Interim Accord. If, Greece, as a member of NATO, had concluded that it had to object to the FYROM's application because of the unresolved difference, its judgment in this matter could not constitute a violation of the Interim Accord.

C. Greece Did not "Veto" the FYROM's Accession to NATO

7.40. In fact, Greece did not veto the FYROM's accession to NATO. The decision that NATO made in Bucharest with regard to the FYROM's future membership was made in accordance with NATO's criteria for the invitation of States to accede to the North Atlantic Treaty. It was a *collective* decision made on behalf of the Alliance as a whole. According to NATO itself, there was no "Greek veto", and as such, the Non-Objection Clause of Article 11(1) cannot apply. This NATO position is entitled to full deference from the Court. Moreover, as a matter of the law of responsibility, the conduct of each member State under the constitutional procedures of the alliance does not engage the member State's responsibility and, so, even if NATO contained a mechanism of individual veto or objection, Greece could not have been internationally responsible for employing it. These points will be dealt with in turn.

1. The Sequence of Events Leading to NATO's Bucharest Declaration

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[362] Memorial, para. 1.8 (emphasis added).

7.41. The processes leading to NATO's decisions in regard to new members at Bucharest were outlined in Chapter 5. The following points emerge from that account:

1. In the MAP Progress Reports on the FYROM between 1999 and the Bucharest Summit, NATO underscored that that State would have to satisfy the criterion of good neighbourly relations and it would have to resolve all outstanding bilateral issues with any Member State of the Alliance, before NATO could start the accession process for the FYROM.

2. Fulfilment of all criteria for invitation to accede to the North Atlantic Treaty is not a guarantee of an invitation; the Member States are still obliged to exercise judgment as to whether or not to invite an aspirant State fulfilling the explicit criteria.

3. It was a general concern of NATO that the difference concerning the name of the FYROM persisted. Settlement of the difference concerning the name was required to be on a "mutually acceptable" basis.

4. The 9th MAP Progress Report identified the difference concerning the name as an issue affecting good neighbourly relations.

5. On 23 January 2008, at the last meeting of the NAC before the Bucharest Summit, several Member States stressed that a mutually agreed solution on the name issue should be found.

6. As at the opening of the Bucharest Summit meeting, the difference had not been settled.

7. NATO determined that the FYROM, in light of the continued difference concerning the name of that State, had not fulfilled the criteria. This was the decision, and the only decision, taken with regard to the FYROM's request to accede.

8. The consensus process which led to the Summit Declaration at Bucharest entailed a common accord, achieved through the consultative efforts of all the Member States.

9. As in all decision-making at the level of the NAC on possible invitations to accession, there was no voting or majority decision. As such, there was no dissenting minority. Nor was there any veto by any Member State in the Council.

10. The resultant Summit Declaration at Bucharest was an act of NATO, not of a subset of its Members, nor could it have been otherwise: any such NATO act is an act of the Alliance as a whole.

11. A Member State in NATO may adopt a reservation to exclude itself from particular clauses of a Declaration or Communiqué. The Bucharest Summit Declaration contained no reservation.[363] Paragraph 20 of the Declaration reflects that the decision concerning the accession aspirations of the FYROM was reached by consensus.

12. The Declaration was clear in its message that the FYROM is not precluded from invitation to accede in the future, once the name issue has been resolved.

7.42. In order to appreciate these facts from a legal point of view, it is necessary to stress again the special character of NATO as an alliance. NATO is an integrated international Organisation. The North Atlantic Treaty constituted NATO as the chief military organisation providing for the defence of Western Europe and the North Atlantic area. The Alliance has, since its formation, existed to promote particular policies and to perform particular functions, in the military, political, and economic fields. It has determined its own processes by which other States, committed to the promotion of its policies and contributing to the performance of its functions, may be selectively invited to accede to the North Atlantic Treaty and thereby become Alliance Members. The

[363] In a footnote, the Communiqué simply recalls that Turkey has recognised the FYROM under its constitutional name.

specific character of NATO is to be understood especially in light of its integrated structure, the activities this structure is employed to carry out, and the controls the Alliance exercises over its enlargement.

7.43. To summarise, as the FYROM itself observes, "[t]he process for NATO accession is complex […]."[364] The process is one of accession following invitation, not admission following application. It entails discussions between the Alliance and the aspirant State, which may extend over time and may lead to various reform and integration initiatives, as preparation for a possible future invitation. The Alliance would decline an invitation to any aspirant State not meeting the requirements of Article 10 of the North Atlantic Treaty.

7.44. The FYROM argues, in effect, that under the Interim Accord it is entitled, as far as Greece is concerned, to accede to NATO. "Importantly, the Interim Accord also provided for the Applicant to join the family of nations and to become an active member of the international community."[365] But the two parties to the Interim Accord did not have the power, jointly or severally, to dispense with the multilaterally-established requirements for participation in international organisations. Article 22 of the Interim Accord makes it clear that they understood and affirmed this. The FYROM was no more entitled vis-à-vis Greece to accede to NATO than it was entitled to do so vis-à-vis NATO itself. But Greece was—and remains—entitled to point out deficiencies in the FYROM's conduct which, in its view, make it ineligible to be admitted to an organisation or, in the case of the NATO Alliance, to receive an invitation to accede. It was for the Member States, acting in accordance with the relevant constituent instrument, to decide collectively whether to give effect to these observations or not.

2. The Role of Greece in the NATO Enlargement Process

7.45. Specifically in terms of the Bucharest meeting, Article 11(1) of the Interim Accord did not impair Greece's right under Article 10 of the North Atlantic Treaty to form a judgment as to the readiness of an aspirant for invitation to the Alliance. It was (and is) Greece's right and obligation under the North Atlantic Treaty to do so. The judgment of Greece with respect to the FYROM's candidacy to NATO in 2008 was made clear: the failure to achieve a negotiated settlement of the difference concerning the name indicated serious questions about the effects FYROM membership would have on Alliance solidarity. This was not a judgment reached in

364 Memorial, para 5.50.

365 Memorial, para 4.13.

isolation, still less one pressed to a vote. It was a view shared by other member States, and it was articulated by the Alliance as a whole.

7.46. Speaking of the Bucharest meeting, the then U.S. Secretary of State noted that NATO is a "consensus organization […]."[366] Likewise the NATO Secretary-General stressed that "NATO does not know the word veto."[367] Secretary General Scheffer's repeated observations to that effect are entitled to great deference as an authoritative reflection of NATO practice.

7.47. NATO is free to establish such rules as its Members agree, including rules controlling invitation to membership, and these rules establish rights and duties which, as made clear in Article 22 of the Interim Accord, are legally unaffected by subsequent bilateral bargains. NATO's assertion of its autonomy is consistent with general international law as it relates to organisation membership and it is expressly preserved, through the medium of the rights and obligations of the Member States, by Article 22 of the Interim Accord.

3. The Consensus Processes of NATO at Bucharest Did not Engage Greece's International Responsibility

7.48. In its Summit Declaration adopted at Bucharest, NATO said as follows:

> "We recognise the hard work and the commitment demonstrated by the former Yugoslav Republic of Macedonia to NATO values and Alliance operations. We commend them for their efforts to build a multi-ethnic society. Within the framework of the UN, many actors have worked hard to resolve the name issue, but the Alliance has noted with regret that these talks have not produced a successful outcome. Therefore we agreed that an invitation to the former Yugoslav Republic of Macedonia will be extended as soon as a mutually acceptable solution to the name issue has been reached. We encourage the negotiations to be resumed without

366 Memorial, para 2.55.

367 Press Conference by NATO Secretary General Jaap De Hoop Scheffer after the informal Meeting of NATO Defence Ministers, with Invitees with non NATO ISAF Contributing Nations, Cracow, Poland, dated 19 February 2009, available at http://www.nato.int/docu/speech/2009/s090219c.html: Annex 33, quoted in full in paragraph 5.14 above.

delay and expect them to be concluded as soon as possible."[368]

7.49. This is not conduct of Greece; it is a statement of NATO. The Declaration, consistent with SC res 817 (1993) and Article 5(1) of the Interim Accord, identifies the bilateral negotiating process as the proper mechanism for achieving a final settlement of the difference concerning the name. It was the absence of "a mutually acceptable solution" to the difference, as at April 2008, that led the Alliance, as an organisation, to decide to remain seized of the candidacy of the FYROM, rather than move forward immediately to an invitation.

7.50. The FYROM argues that this NATO decision was caused by Greece's objection and that Greece's objection was in breach of Article 11(1). It says that conduct of Greece "prevented the Applicant from receiving an invitation to proceed with membership of NATO."[369] But this fails to take into account the following propositions, established in this Counter-Memorial:

(a) NATO itself, through its Secretary General, denies that there was a Greek veto (see above, paragraph 5.14). This is supported by the fact that there *was* a decision, duly reached by consensus—albeit not the decision the FYROM wished for.[370]

(b) The reason given by NATO for the decision was the absence of any resolution of the difference over the applicant's name (see above, paragraphs 5.38 – 5.47).

(c) That difference, and the failure to resolve it despite extensive efforts, were (and remain) *relevant* to the criteria for NATO membership. They are matters which the NATO Members were entitled to take into account in making their decision. As a military

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[368] NATO Press Release (2008)049, *Bucharest Summit Declaration Issued by the Heads of State and Government participating in the meeting of the North Atlantic Council in Bucharest on 3 April 2008*, paragraph 20 : Memorial, Annex 65.

[369] Memorial, para 1.1.

[370] By contrast, when a proposed Security Council resolution is vetoed, no decision is reached or recorded; the draft resolution is simply not adopted. See e.g. the 1975 draft resolution which would have recommended admission of South Korea, SCOR 30th yr 1834th mtg, 6 Aug 1975 p 2 para 5 (7-6:2); and, the same year, the draft resolution which would have recommended admission of North Viet Nam, SCOR 30th yr 1836th mtg, 11 Aug 1975 p 12 para 105 (13-1:1).

alliance, NATO could reasonably take the view that it should not invite as a new Member a State with which such a difference subsisted.

(d) Having regard in particular to Article 22 of the Interim Accord, Greece was not debarred under international law from drawing the attention of its Alliance partners to the facts summarised above. Greece having done so, it was for NATO as a whole to appreciate the situation.

7.51. If Article 11(1) of the Interim Accord had required Greece to support a FYROM application for NATO membership irrespective of whether FYROM was qualified for admission, then the FYROM could have presented the following syllogism:

Premise 1. The FYROM applied for membership.

Premise 2. Greece did not support the application.

Ergo: Greece breached Article 11(1).

But as has been demonstrated, this is not what Article 11(1) says, especially when read in the light of Article 22.

7.52. Instead the position as concerns NATO is far more complex. The FYROM's claim would have to be as reflected in the following syllogism:

Premise 1. The FYROM was in all respects qualified to be invited to accede to NATO, despite the fact that the difference over the name was not resolved.

Premise 2. Greece nonetheless objected, and for that reason the FYROM was not invited.

Ergo: Greece breached Article 11(1).

In short the FYROM has to establish that, despite the ongoing difference, it was qualified to be invited, and that it was only because of Greece's obduracy that it was not invited. But this raises fundamental difficulties, legally as well as factually.

7.53. As to premise 1, there was no decision by NATO that the FYROM was in all respects qualified to be invited to accede to NATO. On the contrary, there was a decision that it was not yet qualified because of the subsisting difference over the name. With great respect, the Court cannot second-guess that decision, or construe it as (or as evidencing) a quite different decision – that the FYROM was in truth qualified and that a

Greek veto was the solitary impediment to an invitation. Moreover, in order to appreciate the situation in those terms, the Court would be called on to decide the rights and wrongs of the difference concerning the name – a matter clearly non-justiciable under Article 21(2) of the Interim Accord. Premise 1 is wrong in fact; in law it is doubly non-justiciable.

7.54. As to premise 2, much the same situation arises. Greece was entitled under Article 22 of the Interim Accord to bring to the attention of its Alliance partners any deficiency in the conduct of the FYROM which was relevant to the latter's qualifications to be invited to become a NATO member.[371] In order to decide that Greece had done more – had objected to an invitation notwithstanding the FYROM's qualification to be invited – similar decisions would have to be made by the Court. Was the FYROM qualified? (This is for NATO as a collective to decide.) Did the failure to invite result from a Greek veto? (The Secretary-General of NATO has repeatedly denied it.) Premise 2 is wrong in fact and cannot be established as a matter of law.

7.55. In an attempt to avoid these difficulties, the FYROM's argument presents still further difficulties. The FYROM asserts that "the dispute […] is concerned exclusively with the meaning and effect of Article 11(1) of the Interim Accord in respect of actions that are attributable to the Respondent."[372] It claims to be "concerned only with the international responsibility of the Respondent, arising out of the actions attributable to it in relation to its objection to the Applicant's membership of NATO."[373] But, as demonstrated in Chapter 6, the acts of a Member State taken within and under the internal decision-making procedures of an international organization are not capable of establishing the international responsibility of the Member State.[374]

7.56. To conclude, the process of evaluating States for possible invitation to NATO is part of the "decision-making process of the organization according to [its] pertinent rules."[375] Participation in that process cannot attract the international responsibility of Greece.

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[371] See above, paragraphs 6.52-6.63.

[372] Memorial, para. 3.12. See also *ibid*., para 6.6: "To be clear… the Applicant is concerned only with the international responsibility of the Respondent, arising out of the actions attributable to it in relation to its objection to the Applicant's membership in NATO."

[373] Memorial, para. 6.6.

[374] See above, paragraphs 6.83.-6.94.

[375] Draft Articles on Responsibility of International Organizations, 2009, commentary to Art 57, para. (2), *in* Report of the International Law Commission, 61st Session, A/64/10, 2009, p. 160.

III. THE SAFEGUARD CLAUSE AND ITS POTENTIAL APPLICATION AT BUCHAREST

7.57. It will be recalled that the "not to object" obligation which Greece assumed in the first sentence of Article 11(1) of the Interim Accord was subject to two qualifications, one specific to Article 11(1) (the Safeguard Clause) and one of general application to the entire Interim Accord (Article 22). The Safeguard Clause preserves Greece's "right to object to any membership" in the following terms:

> "[…] 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)."

For the reasons set out below, the Safeguard Clause serves as a complete exoneration for Greece on the merits of this case, were it to be found that Greece had "object[ed] to the application by or the membership of" the FYROM to NATO in a manner *prima facie* contrary to the Non-Objection Clause.

7.58. This Part will deal with the Safeguard Clause under the following rubrics:

- first, it will consider the ordinary meaning of the Safeguard Clause, in light of its object and purpose as a safeguard of the provisional regime of the Interim Accord, its drafting history, and the lack of procedural preconditions for its invocation (**Section IIIA**);
- secondly, it will consider the FYROM's contention that its own unilateral practice has negated the clause as a safeguard of Greece's rights (**Section IIIB**);
- thirdly, it will discuss the conduct of the FYROM which has been in disregard of SC res 817 (1993), in disregard of its own agreement that the difference concerning its name must be negotiated with Greece, and in disregard of the understanding that it is to be referred to by the provisional name in multilateral organisations until a mutually agreed settlement is reached (**Section IIIC**).

In consequence, Greece would have been entitled by virtue of the Safeguard Clause to oppose the FYROM's NATO candidacy at Bucharest.

A. Interpretation of the Safeguard Clause

1. The Language of the Safeguard Clause

7.59. According to the FYROM, the Safeguard Clause "specifies the solitary, exceptional condition on which the Respondent may object […]."[376] But apart from the grammatically erroneous assertion that the Safeguard Clause is an exception as distinct from an independent qualifier, the FYROM's analysis of the Safeguard Clause is sparse. It is helpful to address this deficiency by considering in turn the component elements of the clause.

"if and to the extent that…"

7.60. This composite phrase "if and to the extent that" is significant. Grammatically the word "if" would have been sufficient. The FYROM implies that the Safeguard Clause has no application to events within an organisation or institution which has admitted it under the provisional name.[377] It studiously ignores the fact that, following its admission to certain organisations, the FYROM has sometimes been referred to other than as set out in SC res 817 (1993). But there must be no practice of referring to the FYROM differently, even to some extent; otherwise the Safeguard Clause is triggered. *To the extent that* there is any defection from the provisional name regime, as set out in SC res 817 (1993) and incorporated into Article 11(1) by reference, the overall relations of the parties are affected and the defection may be taken into account by Greece in determining whether the Safeguard Clause applies to a new membership application or request to accede.

"is to be referred to…"

7.61. Grammatically the phrase "is to be referred to" is significant in two ways.

7.62. First, the phrase is in the passive voice; it does not specify by whom the FYROM "is to be referred to […]." Especially when compared to earlier formulations, this supports the interpretation that it is not only the international organisation itself which is to refer to the FYROM under that name but that the FYROM itself must do so.

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376 Memorial, para 4.21.

377 See, e.g., Memorial, paras 4.32, 5.9.

7.63. Secondly, the future tense ("is to be") is used. This implies a continuing situation, a position fully consistent with the idea of an interim period during the whole of which the situation prescribed by SC res 817 (1993) is to obtain. The Interim Accord, as an instrument adopted to stabilise relations for the duration of negotiations pending final settlement of the difference over the name, protects Greece's interest in the process by which that settlement is reached. If the FYROM "is to be referred to" in the future differently, this is a concern to Greece, because such reference would tend to establish as a *fait accompli* a new name without Greece's participation in an agreed bilateral settlement. Until that time, Greece retains the right to object if the FYROM "is to be referred to" other than as designated.

7.64. There is a further implication to be drawn from the use of the future tense. It will only be *after* the FYROM's admission to a given organisation, and only as events unfold in that organisation, that it will be clear by what name or designation the FYROM will be referred to, and to what extent. Yet the Non-Objection Clause applies, by definition, *before* admission or accession. Thus Greece will necessarily have to estimate, based in particular on the attitude of the FYROM, whether and to what extent the condition comprised in the Safeguard Clause is to be met. If and to the extent that the FYROM proclaims its freedom to refer to itself by its constitutional name in an organisation, and to require its officials to do so even when occupying positions within the organisation, then the Safeguard Clause will apply.

"in such organization or institution"

7.65. The words "…in such organization or institution…" are also significant. Just as the passive construction "is to be referred to" has the effect of including the conduct of all relevant actors, so the choice of the proposition "in" has the effect of including all conduct taking place in each relevant organization or institution. If the intent of the Safeguard Clause had been to cover only the organization's own conduct, it would have read "*by* the organization", not "*in* the organization". Indeed, an earlier draft of the Safeguard Clause had been limited in precisely this way, as will be seen. Moreover, if all that mattered had been the formal designation by the organization, the qualifier "to the extent that" would have been unnecessary.

"differently than in paragraph 2 of United Nations Security Council resolution 817 (1993)"

7.66. The final phrase incorporates by reference the language of paragraph 2 of SC res 817 (1993). That paragraph – it will be recalled –

reads as follows: "this State being provisionally referred to for all purposes within the United Nations as […]." Three points stand out.

- First, the term used is not "by" the United Nations but "within" the United Nations. Debates, statements, etc take place within the United Nations, whether or not the statements made or designations employed are attributable to it. When a delegate of another State refers to the Applicant by its constitutional name in the General Assembly, this is action "within" the United Nations, though not "by" the United Nations.

- Second, the phrase "for all purposes" is as broad as it could be. It associates the United Nations and its Members (on whose behalf, under Article 25 of the Charter, the Security Council acts) with the principle of an interim period, and a provisional arrangement agreed for that period. In this respect it should be recalled that the International Court of Justice is the principal judicial organ of the United Nations: what happens before the Court happens "within the United Nations."

- Third, the incorporation by reference relates to practice in any and all organisations to which Article 11(1) is applicable, not just to the United Nations system. This follows from the construction of the Safeguard Clause and its grammatical connection to the Non-Objection Clause.

7.67. To conclude, the FYROM in effect reads the Safeguard Clause as follows: "with the solitary exception that [Greece] reserves the right to object to any membership referred to above if [the FYROM] is to be designated by such organisation differently than by the designation in paragraph 2 of Security Council resolution 817 (1993)". This is – evidently – not what the carefully negotiated clause says. Rather, Greece retains the right to object to membership in an organisation if and to the extent that that State is to be referred to for any purpose within the organisation other than as the FYROM.

2. The Object and Purpose of the Safeguard Clause

7.68. This conclusion accords with the object and purpose of the Safeguard Clause. SC res 817 (1993) requires that the Applicant State be

"provisionally referred to *for all purposes* within the United Nations" as the FYROM. The provisional designation of the FYROM under SC res 817 (1993) is central to the balancing arrangement of the Interim Accord. It is incorporated by reference in Article 11(1) and applies to any membership referred to in the Non-Objection Clause. The Interim Accord, as explained in Chapter 3 above, was adopted to establish and preserve a "holding operation" pending final settlement of the difference concerning the name. Inherent in this, any new situation or event prejudicial to the outcome of that settlement is inimical to the balance struck. If Article 11(1) contained only the obligation of Greece "not to object," then Greece would have no means to respond to conduct in international organisations which was inconsistent with the principle of an interim period. The conduct of an international organisation, and of States in an international organisation, can have significant effects on the crystallisation of particular statuses or situations. Faced with conduct which suggests that the permanent name of the FYROM has been settled without regard to the bilateral settlement process, Greece's right to react is preserved. The Safeguard Clause is an essential protection, established so that Greece is not prevented from taking steps to preserve the balance of interests which it is the design of the Interim Accord as a whole to preserve.

7.69. The grammatical structure of Article 11(1) reflects its object and purpose. The reservation in Article 11(1) is formed by a second clause, set off from the first by a semicolon and by the qualifier "however." The two clauses are grammatically of co-ordinate value. The Safeguard Clauses is not formulated as an exception; it is not a subordinate clause but a self-contained sentence of weight equal to the Non-Objection Clause. Whatever the scope of organisations and institutions covered by the Non-Objection Clause, the Safeguard Clause applies over the Non-Objection Clause in its entirety. The obligation of Greece "not to object" is directly correlated with the provision of SC res 817 (1993) by which is specified the provisional designation of the FYROM "for all purposes." If the provisional designation is ignored, the overall scheme of the Interim Accord is disrupted, and the Safeguard Clause applies.

3. The Drafting History of the Safeguard Clause

7.70. This interpretation is also confirmed by the drafting history. The last two drafts show that the parties considered limiting the Safeguard Clause to the situation where the organisation itself referred to the FYROM differently. The contrast between the final text and these two immediately preceding drafts supports the wider interpretation.

7.71. Drafts of 21 July 1995 and 21 August 1995 would have phrased the Safeguard Clause as follows:

> "however, [Greece] reserves the right to object to any membership referred to above if, and to the extent, *the provisional reference under which [the FYROM] is to be admitted to* such organization or institution differs from that in paragraph 2 of United Nations Security Council Resolution 817 (1993)." (Emphasis added)

The adopted text changes the final part of the clause to read as follows:

> "…if and to the extent [the FYROM] *is to be referred to in such organization or institution* differently […]." (Emphasis added)

7.72. This is a material change. In the earlier versions (21 July/21 August 1995), the reservation applied only where the "provisional reference under which [the FYROM] is to be admitted" differs from the Security Council designation. The phrase "provisional reference under which [the FYROM] is to be admitted" denotes an official reference *by* the international organization or institution. Only the organisation admits a new Member State. So the expression "provisional reference" in those drafts would have meant a reference adopted by the organisation—not a reference by a Member State. The final language covers a considerably wider set of situations. It adds a future orientation ("…is to be referred to…differently," rather than the present tense "differs"); and it expands the text not only to include formal designations *by* the organisation or institution but also to include the situation in which the FYROM is to be referred to "*in* such organization or institution differently […]."

4. Non-Existence of Procedural Conditions for the Safeguard Clause to Operate

7.73. Though the FYROM interprets the Safeguard Clause to cover very little *ratione materiae,* it asserts that it contains a considerable procedural element. In the FYROM's interpretation, the Safeguard Clause operates only if a formal statement is filed by Greece announcing that the relevant condition exists, and this procedure is subject to a time-limit. That is to say, according to the FYROM, Greece may act under the Safeguard Clause only if it takes certain formal steps to do so prior to objecting. In the FYROM's view, not only is the available ground for objection narrow both as to its content and its timing, but the ground of action must be

announced beforehand or it has no effect.[378] The FYROM's interpretation of the Safeguard Clause in both respects is incorrect.

The so-called critical date

7.74. The FYROM makes a great deal of the date 3 April 2008, the day when NATO at the Bucharest Summit reached its decision on the accession of Albania and Croatia. It even refers to 3 April 2008 as the "critical date" for purposes of this dispute. Referring to *Pulau Ligitan and Pulau Sipadan*,[379] it argues that statements made by Greece after 3 April 2008 are not to be taken into consideration by the Court. But *Pulau Ligitan and Pulau Sipadan* involved – as many another case where the critical date was in issue – an analysis of *effectivités* undertaken to determine competing territorial claims. The dispute here concerns a clause of a bilateral treaty which of its own force preserves certain situations from an obligation "not to object." The Safeguard Clause sets as its condition that the FYROM "is to be referred to" differently from its SC res 817 (1993) designation. Historical questions entailed by a territorial dispute are fundamentally different from the question whether the Safeguard Clause under Article 11(1) applies. The former concern *evidence* of a pre-existing legal title, not the *exercise* of a reserved right which, under the treaty, is not subject to any procedural condition.

Putative requirement of formal notice

7.75. The FYROM says that there was no instance of Greece "formally alleging" that the FYROM is in breach of the Interim Accord before 3 April 2008.[380] According to the FYROM: "At no time did the Respondent seek to justify its objection on the ground that the Applicant would be referred to in NATO differently than in paragraph 2 of the United Nations Security Council resolution 817 (1993)[…]."[381] As is shown in Chapter 4, in truth Greece did make claims before 3 April 2008 relevant to the Safeguard Clause of Article 11(1). But in any event the absence of a prior claim is irrelevant.

7.76. In principle, whether a State can exercise a right reserved to it under international law or a treaty, and not subject to any express procedural precondition, depends only on whether the right actually exists, and not on considerations of form. A legal right exists independent

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[378] See, e.g., Memorial, paras 5.11-5.12.

[379] Memorial, para 1.9, quoting *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia v Malaysia), Judgment, ICJ Reports 2002,* p 682 (para 135).

[380] Memorial, para 1.10.

[381] Memorial, para 1.5. See also ibid., paras 1.7; 2.60, 2.68.

of any express recital at the time of its exercise. In *Nicaragua*, a bilateral treaty could be relied on even though not mentioned in the Application or in the prior communications between the parties.[382] In *Gabčíkovo-Nagymaros*, countermeasures were first pleaded as a defence by Slovakia in the second round of the written pleadings, yet the Court considered the defence.[383] The present case is *a fortiori*, concerning as it does a right expressly reserved.

7.77. Article 11(1) may be contrasted in this respect with Article 7(3). Under Article 7(3): "[i]f either Party believes one or more symbols constituting part of its historic or cultural patrimony is being used by the other Part, it shall bring such alleged use to the attention of the other Party […]." This is a relatively simple treaty mechanism, but it nevertheless establishes that one Party must give notice in order to trigger the other Party's obligation to respond.[384] No such notice requirement is contained in Article 11(1).[385] At the point in time when Greece exercises the reserved right, either the condition for invoking the Safeguard Clause is satisfied (in which case Greece can object) or it is not.

B. Subsequent Practice of the Parties and the Application of the Safeguard Clause

7.78. The FYROM argues that the subsequent practice of the parties to the Interim Accord establishes a different and narrower interpretation of the Safeguard Clause of Article 11(1). Specifically, it argues that:

> (i) the FYROM "has joined a significant number of organizations… having applied using its constitutional name…";[386]

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382 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America),* Judgment of 28 Nov 1984, *Jurisdiction and Admissibility*, *ICJ Reports 1984,* p 392, 428 (para 83). See also ibid, *Judgment of 27 June 1986 (Merits), ICJ Reports 1986,* p 14, 31 (para 43); Counter-Memorial of the United States of America (Questions of Jurisdiction and Admissibility), 17 Aug 1984, p 51 (para 169).

383 *Gabčíkovo-Nagymoros Project (Hungary/Slovakia), Judgment*, *ICJ Reports 1997,* p 7, 55 (para 82); Counter-Memorial of Slovakia, 5 Dec 1994, pp 347-53 (paras 11.54-11.74).

384 The FYROM refers to "specific procedures" under Article 7, paragraph 3: Memorial, para 2.32. Article 7, paragraph 3 "prescribes a remedial process…": Memorial, para 5.16.

385 The FYROM notes that *other* provisions of the Interim Accord establish no formal requirements to the exercise of rights under its terms: "The Interim Accord does not impose any procedural requirements to be followed by the Applicant before the exercise of its right of recourse to the Court under its Article 21…" Memorial, para 3.15.

386 Memorial, para 4.32.

(ii) after admission to these organisations, the FYROM has "thereafter [been] provisionally referred to in the manner set out in resolution 817";[387]

(iii) besides during its applications to international organisations, the FYROM "has continued to refer to itself by its constitutional name […]," including in its relations with international organisations.[388]

It concludes that "[i]n short, there is no question that, in the context of NATO, the Applicant's process towards membership was fully in accordance with the requirements of resolution 817."[389]

7.79. In its Memorial, the FYROM acknowledges that it has no intention of complying with the actual terms of SC res 817 (1993). It justifies this position in the following way:

> "Significantly, the Resolution [817] did not require the Applicant *to call itself* 'the former Yugoslav Republic of Macedonia', and the Applicant never agreed to refer to itself as such. Consequently, in accordance with resolution 817 and without raising any difficulties with the United Nations Secretariat, the Applicant has always used its constitutional name in written and oral communications with the United Nations, its members and officials.[390]
>
> In accepting the terms of resolution 817, the Applicant agreed "to be referred to" under the provisional designation within the United Nations, but was not fettering its sovereign right to call itself by its constitutional name, as made clear by the Applicant during the negotiation process. Consequently, in accordance with resolution 817, *the Applicant has continued to call itself by its constitutional name in written and oral communication with the United Nations* and its Member States."[391]

7.80. An initial comment is that the Applicant is much concerned not to fetter its own sovereign rights, but it shows no equivalent concern for the sovereign rights of Greece, expressly preserved in the Safeguard Clause and by Article 22.

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387 *Ibid.*
388 *Ibid.*
389 Memorial, para 4.32.
390 *Ibid.*, para 2.20 (emphasis in original).
391 *Ibid.*, para 5.65 (emphasis added).

7.81. That being said, the argument seems to be that since Greece has tolerated the FYROM referring to itself by its constitutional name in the United Nations, and under the two Memoranda of 13 September 1995,[392] this constitutes practice of the parties supportive of a restrictive interpretation of the Safeguard Clause. To this argument there are at least three answers.

1. The Requirements for Subsequent Practice

7.82. An initial point is linguistic: if the FYROM applies to international organisations under its constitutional name, it is at that point by definition not "in" or "within" the organisation. It is only after admission that the requirement to use the provisional designation applies, as the phrase "is to be referred to" in Article 11(1), indicates. In fact, the FYROM in all instances has been admitted under the provisional designation, not under its constitutional name.

7.83. Turning to the post-admission practice in international organisations, the FYROM argues that it "has continued to refer to itself by its constitutional name […]," including in its relations with international organisations,[393] and that this practice has to be taken into account in the interpretation of Article 11(1).

7.84. Under international law, the Interim Accord, like any treaty, is to 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 the light of its object and purpose."[394] The "context" for the purpose of the interpretation of a treaty includes, *inter alia,* "any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty…"[395] These provisions were adopted by the ILC in 1966 and incorporated into the Vienna Convention without substantial amendment.[396] It is also part of the general rule of interpretation of treaties that there shall be taken into account "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation."[397]

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392 Memorial, para 2.36; for the Memoranda, see Memorial Annexes 3 & 4.

393 Memorial, para 4.32.

394 Vienna Convention on the Law of Treaties, 22 May 1969, 1155 UNTS 331, art 31(1).

395 Vienna Convention on the Law of Treaties, art 31(2)(a).

396 *Yearbook of the International Law Commission,*1966 Vol. II p 217.

397 Vienna Convention on the Law of Treaties, art 31 (3)(b).

7.85. The FYROM suggests that its use of its constitutional name in applying to various organisations, and its continued insistence on the use of the constitutional name within those organisations, act to curtail the scope of the Safeguard Clause.[398] According to this theory, the FYROM's subsequent unilateral practice governs the interpretation of the Interim Accord. Moreover, notwithstanding the drafting history and text,[399] the FYROM says that the Safeguard Clause covers only the situation in which the organisation itself refers to the FYROM other than by the SC res 817 (1993) designation. The FYROM asserts that the FYROM would have been properly designated "in" NATO; and concludes from this that the Safeguard Clause did not apply with respect to the FYROM's NATO candidacy.[400]

7.86. In support of this theory, the FYROM relies heavily on the practical arrangements for bilateral communications and relations, referred to in Article 12 of the Interim Accord and elaborated in ancillary agreements (i.e., the Memorandum on 'Practical Measures' and the Memorandum Related to the Interim Agreement).[401] Under the two Memoranda, the FYROM has referred to itself under its constitutional name, while Greece has used the SC res 817 (1993) name. But the question is not how the FYROM refers to itself in bilateral relations, or whether the Interim Accord permits the FYROM to refer to itself by its constitutional name, for purposes other than those of Article 11. The Interim Accord made separate and distinct arrangements for (a) bilateral or *inter se* relations of the parties and (b) the relations of FYROM with international, multilateral and regional institutions. It is obviously invalid to draw inferences from the former as regard the latter. A practical accommodation by Greece in the form of measures concerning nameplates, letterhead, and forms of address is not the same thing as relinquishing a retained right under the Safeguard Clause of Article 11(1). Moreover, no-one reading the Memoranda of 1995 would infer Greek acquiescence in any definitive use of the constitutional name.

2. Practice in International Organizations

7.87. Turning to practice specifically related to Article 11(1), Article 31(3)(b) of the Vienna Convention requires that the subsequent practice has to be such as to "establish[] the agreement of the parties regarding [the] interpretation" of the treaty provision in question. Unilateral

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398 See, e.g., Memorial, para 4.32.

399 See paras 7.73-7.75 above.

400 Memorial, para 1.8.

401 Memorial, paras 2.36, 4.32, and 5.67.

practice by one party to a bilateral treaty does not establish any agreement, even if accompanied by silence from the other party. Agreements are not made by silence, and this is particularly the case where there is no duty to respond. The Safeguard Clause is a *preservation* of rights: if it is triggered Greece may object, but it is not obliged to do so. FYROM's argument based on an alleged agreement is tantamount to an argument that Greece has tacitly relinquished the right expressly reserved in Article 11(1). There has obviously been no such relinquishment.

7.88. Moreover practice under an interim agreement has particular characteristics. States enter into interim agreements in order to facilitate a final settlement and to avoid aggravating the dispute pending such settlement. The interim agreement having been concluded, the need for a continued blizzard of protest notes should abate. The long-term positions of both sides are reserved; their legal relations during the interim period are as defined in the interim agreement. In the absence of a final settlement there must be a strong presumption against a modification of the interim regime. The FYROM asserts, without producing the slightest documentary evidence in support, that it has "never agreed to call itself" by that designation in international, multilateral and regional institutions, and that it remains free to dispense with the Security Council's designation at will.[402] In effect, it argues that its silence in 1995 implied a reservation of rights on its part. By contrast Greece, which insisted on an express safeguard clause in the broad terms already analysed, is treated as having forfeited the right to act by its silence on sundry occasions. This is typical of the unilateral and unsupported assertions of the FYROM in the present case. It would be surprising if, for purposes of Article 11, Greece alone must be taken to have made definitive concessions.

3. Greece has in Fact Given Notice that the FYROM's Conduct is not in Accordance with the Interim Accord

7.89. Further, it should be stressed that Greece *has* objected to uses of a name other than the provisional designation mandated by SC res 817 (1993). As noted already, it did so, for example, in 2007 when a FYROM national, serving as President of the UN General Assembly, in that capacity referred to the FYROM's President as "the President of the Republic of Macedonia."[403] That provoked a Greek protest from the floor[404] and subsequently in writing.[405] Other examples of protest are

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402 *Ibid.*, para 2.20.

403 The President (Mr Kerim): United Nations, *Official Records of the General Assembly, Sixty Second Session, 4th Plenary Meeting*, doc. A/62/PV.4 at p 27: Annex 5.

404 Mr Mourikis (Greece): *ibid.* at p 27.

annexed.[406] Even if there may have been occasions when Greece refrained from protesting, its position on the name issue has from the first been well known, and silence on some occasions does not entail an abandonment of rights.

4. Conclusion on Subsequent Practice

7.90. As set out in this Counter-Memorial, the FYROM's conduct since adoption of the Interim Accord has contained notable instances of non-performance. The sum of this conduct would suggest that the FYROM seeks to ignore and put an end to the "holding operation" which it is a principal object and purpose of the Interim Accord to maintain pending final settlement – in effect, to intrude a permanent settlement by stealth under cover of an interim agreement. Greece has never accepted any such position. The ILC, in recognising the significance of the subsequent practice of the parties as part of the general rule of interpretation of treaties, was clear that each party "should have accepted the practice" if any interpretative consequence was to flow.[407] Greece, like any party to a bilateral treaty, does not waive its rights, clearly established by treaty, except by expressing its intention unambiguously to do so.[408]

C. Greece was Entitled to Rely on the Safeguard Clause

7.91. As already demonstrated, the FYROM's allegation of a Greek objection in Bucharest is based on both a misunderstanding of NATO membership procedures and an erroneous account of what actually occurred at the Bucharest meeting. But even if the Court were to conclude that Greece had objected to the FYROM's application for membership in Bucharest, it is clear that the reason for the deferral of FYROM's membership application was the difference over the name. Specifically, Greece had ample grounds for concluding from the FYROM's behaviour in the United Nations and in every international

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[405] Letter dated 4 Oct 2007 from the Permanent Representative of Greece to the United Nations addressed to the Secretary-General: A/62/470-S/2007/592, 5 Oct 2007; Annex 6. See also Verbal Note, 15 May 2008, from the Liaison Office of the Hellenic Republic in Skopje to the Ministry of Foreign Affairs of the FYROM (Memorial Annex 51). As to the FYROM's position on this statement, see above para 4.67.

[406] See, for another example, United Nations, *Official Records of the General Assembly, Sixty Second session, Third Committee*, document A/C.3/62/SR.42, 28 January 2008, p. 7 para. 49: Annex 8.

[407] Commentary to draft article 27, para (15): *Yearbook of the International Law Commisison,* 1966 Vol II p 222.

[408] *Certain Phosphate Lands in Nauru (Nauru v Australia), Preliminary Objections*, *Judgment*, *ICJ Reports 1992,* p 240, 247 (para 13).

organisation in which the FYROM would later secure membership that it would then insist (SC res 817 (1993) notwithstanding) on denominating itself by a name other than the one it used for purposes of securing membership. For the FYROM there is no interim period: there is only a vista of freedom to pursue irredentist names and claims in all the "international, multilateral and regional organizations and institutions" to which it may be admitted pursuant to the Interim Accord.[409]

7.92. In fact the highest officials of the FYROM have, in violation of its obligations under SC res 817 (1993) and the Interim Accord, openly used the name, "Republic of Macedonia," as recalled in Chapter 4 above. The President of the FYROM took the floor of the United Nations General Assembly in September 2007 using the title of "Republic of Macedonia" and stated before the General Assembly that "the name of my country is the Republic of Macedonia and will be the Republic of Macedonia."[410] The President of the Assembly, his countryman, repeatedly used the same expression in his capacity as an official of the United Nations.[411] The FYROM passes over these events in an embarrassed footnote.[412]

7.93. Even before this Court there is for the FYROM no interim period. The very Application to the Court is brought in the name of the Republic of Macedonia. "The Republic of Macedonia […] ('the Applicant') brings this Application against Greece."[413] In the circumstances Greece was

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409 Cf. Memorial, paras 5.66-5.67.

410 Statement made by President Crvenkovski in September 2007 before the General Assembly *in* United Nations, *Official Records of the General Assembly, Sixty Second Session, 4th Plenary Meeting*, doc. A/62/PV.4, at p. 29: Annex 5.

411 The transaction, at the fourth plenary meeting of the 62nd General Assembly session, is recorded as follows:

> "**The President**: The Assembly will now hear an address by His Excellency Mr. Branko Crvenkovski, President of the Republic of Macedonia.
>
> *Mr. Branko Crvenkovski, President of the former Yugoslav Republic of Macedonia, was escorted into the General Assembly Hall.*
>
> **The President**: On behalf of the General Assembly, I have the honour to welcome to the United Nations His Excellency Mr. Branko Crvenkovski, President of the Republic of Macedonia, and to invite him to address the Assembly."

Official Records of the General Assembly, Sixty Second Session, 4th Plenary Meeting, doc. A/62/PV.4 at p 27 : Annex 5. It should be understood that the President of the General Assembly was a member of the FYROM delegation. For Greece's contemporaneous protest, see Letter dated 4 Oct 2007 from the Permanent Representative of Greece to the United Nations addressed to the Secretary-General: A/62/470-S/2007/592, 5 Oct 2007: Annex 6

412 Memorial, para 5.67 fn 218.

413 Application, para 1.

entitled to conclude that the FYROM would be referred to within NATO, at least to some extent, differently than in paragraph 2 of SC res 817 (1993). Under that Resolution, the FYROM was to be referred to "for *all* purposes" by its provisional designation (emphasis added). Greece was entitled to conclude that this would not be the case in fact. It follows that on *any* view of the interpretation and application of Article 11(1) Greece having reserved the right to object to the membership would have been entitled to do so.

D. Conclusions as to the Safeguard Clause

7.94. The purpose in establishing the provisional name of the FYROM was to commit the settlement of the difference concerning the FYROM's name to a bilateral process. The name finally adopted is to be agreed between Greece and the FYROM; it is not to be imposed unilaterally without Greece's consent. The aspect of consent is central to the process. Greece, by entering into the Interim Accord, agreed to limit its own pre-existing rights in certain respects—i.e., not to object in accordance with Article 11(1). The Interim Accord affirmed, in return, that Greece has the right, together with the FYROM, to achieve a negotiated settlement of the difference concerning the FYROM's name. The Safeguard Clause of Article 11(1) serves as a counterpoise, to assure that this arrangement is respected.

IV. CONCLUSIONS

7.95. Like any treaty provision, Article 11(1) of the Interim Accord is to be interpreted so as to give effect to the plain meaning of its terms in light of its object and purpose. The Interim Accord was adopted in order to stabilise the bilateral relations of Greece and the FYROM, and to allow the FYROM access to international institutions, but without prejudice to the eventual resolution of the difference over the name by the two parties. In the framework of the Interim Accord as a whole, Article 11(1) preserves both parties' interest in that eventual settlement. Steps by, or in, any international organisation, whether taken by the organisation itself or by a Member State, constitute part of general international practice; as such they can have the effect of changing a given *status quo*. Greece agreed, under Article 11(1), that, where it otherwise would possess the discretionary right not to object to an application of the FYROM to an international organisation, it would not object. But, consistent with principles of third party legal relations, and as recognised under Article 22 of the Interim Accord, Greece did not—and could not have—agreed to breach its existing commitments, including those assumed as a member

State of international organisations. Nor did it abandon its rights under existing treaties, including rights to object.

7.96. Further to maintaining the interim arrangement, Article 11(1) reserves to Greece the right to object, where the FYROM is to be referred to in an organisation other than by its provisional designation. The reservation fits logically into the balancing mechanism of the Interim Accord: the manner in which States and organisations actually refer to the FYROM will have an effect on the outcome of the difference concerning the name. The Security Council, by SC res 817 (1993), and the parties, by the Interim Accord, have decided that the outcome of the difference is to be achieved through one modality and through that modality only. If the conduct of States or organisations is tending to settle the difference in any other way—for example, by way of unilateral imposition of a name, independent of consultation with and agreement by Greece—then Greece retains its right to object.

7.97. The FYROM's interpretation of Article 11(1) is entirely selective and unilateral. The FYROM ignores the relevance of Article 22, which preserves existing rights and obligations, including those under the constitutive instruments of international organisations. Under Article 10 of the North Atlantic Treaty, no Member State of NATO may endorse the admission of a non-member which it knows to fail the criteria of membership. Yet the FYROM interprets Article 11(1) as if other international obligations did not exist; and as if Article 22 of the Interim Accord itself had no effect.

7.98. Further, the FYROM would have the Safeguard Clause of Article 11(1) pertain only to the conduct *by* an international organisation. The parties, however, rejected any such limitation. The Safeguard Clause applies whenever, and to whatever extent, the FYROM is "to be referred to *in*" an international organisation other than by the provisional designation adopted by the Security Council, and referred to for any purpose. The provisional designation is the centrepiece of the interim arrangement pending a bilateral agreed settlement.

7.99. Just as the FYROM would exclude from application certain elements of Article 11(1), so would its interpretation add terms to that provision in excess of the meaning of its plain text.

7.100. First, the FYROM gives a very expansive reading to the Non-Objection Clause. According to the FYROM, the clause not only would prohibit objection; it also would oblige affirmative conduct—this, despite the parties' rejection of earlier drafts that would have done just that.

7.101. Second, the FYROM asserts that Greece needed to make a formal *démarche* or other statement as a prerequisite to exercising its retained right under the Safeguard Clause. There is no textual basis in the Interim Accord for this assertion.

7.102. Third, the FYROM relies on an alleged agreement by way of subsequent practice. According to the FYROM, pursuant to this agreed interpretation it is free, without regard to SC res 817 (1993), to use the "constitutional" name within international organisations. The FYROM's position finds no support in general treaty law; and no support in the relations of the parties under the Interim Accord. Unilateral practice does not establish the agreement of the parties which Article 31(3)(b) of the Vienna Convention requires. Moreover, the Interim Accord, in the character of an interim arrangement, exists to define the legal relations of its parties during the interim period. There is a strong presumption against the abandonment of rights and claims expressly reserved by such an arrangement.

7.103. To conclude, there was in fact no Greek veto at Bucharest; what occurred was a consensus decision (in which Greece joined) not to invite the FYROM to accede until the difference over the name is resolved by the means agreed in Article 5 of the Interim Accord. The reaching of that decision did not involve any breach by Greece of the Non-Objection Clause, but merely an exercise of its rights and a performance of its duties under the North Atlantic Treaty. These rights and duties are expressly preserved by Article 22 and cannot give rise to the responsibility of Greece. There is correspondingly no basis for finding any breach of the Non-Objection Clause.

7.104. But even if Greece had objected to an invitation, and even if its right to object were not preserved by Article 22, there would have been no breach of treaty. The conditions for the exercise of the right to object set out in the Safeguard Clause were met. In the circumstances of the FYROM's increasingly strident policy to refer to itself, and to be referred to, other than as required by paragraph 2 of SC res 817 (1993), Greece was entitled to conclude that the FYROM would be referred to in NATO by its constitutional name, at least to some extent. In those circumstances the Safeguard Clause applied, and it applied without any procedural prerequisite. That provides a further, and independent, ground for holding that there was no breach of Article 11(1) of the Interim Accord in the present case.

CHAPTER 8: THE EXCEPTION OF NON-PERFORMANCE

I. INTRODUCTION

8.1. In an effort to anticipate potential Greek "defences," the FYROM alleges in some detail (i) that "[t]he Respondent's non-performance cannot be explained on the basis of a Suspension of Article 11(1) of the Interim Accord for material breach"[414] – thus basing itself on Article 60 of the 1969 Vienna Convention on the Law of Treaties – and (ii) that "[t]he Respondent's violation of Article 11(1) cannot be excused as a lawful countermeasure to a precedent wrongful act by the Applicant."[415] In reality, Greece bases itself neither on one or the other ground.

8.2. In respect to its supposed argument that Greece could base itself on Article 60 of the 1969 Vienna Convention, it must be noted that:

> - Greece has never claimed any intent to suspend (let alone to terminate) in whole or in part the operation of the Interim Accord (even though it would be entitled to do so).
>
> - On the contrary, it has steadily and consistently maintained that the Accord is in force and ought to be fully respected; in particular, Greece has recently stated that it "fully respects the provisions of the Interim Accord, on the basis of the fundamental principle *pacta sunt servanda*"[416]

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414 Memorial, Section III, pp. 94-100.

415 Memorial, Section IV, pp. 101-106.

416 Memorial, p. 42, para. 5.21, quoting Memorial, Annex 47, Letter dated 2 June 2009 from the Permanent Representative of Greece to the United Nations, John Mourikis, to the United Nations Secretary General, UN doc. S/2009/285. See also Memorial, Annex 44, Letter dated 27 November 2008 from the Permanent Representative of Greece to the United Nations, John Mourikis, to the United Nations Secretary-General, UN doc. S/2008/746 (1st December 2008): "Greece's commitment to the continuation of the process of negotiations within the framework of the United Nations with the aim of reaching a speedy and mutually acceptable solution over the name issue"; and Memorial, Annex 51, Verbal Note dated 15 May 2008 from the Hellenic Republic Liaison Office in Skopje to the FYROM's Ministry of Foreign Affairs: "Greece remains committed to the Interim Accord, as well as to the relevant Security Council resolutions, and engaged in the negotiation process under the UN auspices aimed at reaching a speedy solution to the name issue."

For its part, Greece remains fully attached to the Interim Accord and, far from willing to suspend it, it intends having it fully respected by the FYROM.

8.3. Counter-measures according to Article 22 of the ILC Articles on State Responsibility, are a "circumstance precluding wrongfulness." In the present case, Greece does not rely on such a circumstance. Rather, it invokes the more general principle of reciprocity according to which *non adimpleti non est adimpledum*, which means that as long as the FYROM does not comply with its obligations under the 1995 Accord, Greece is entitled not to comply with its own obligations under the same instrument. Unlike counter-measures the purpose of which is, as explained in Article 49(1) of the ILC Articles on State Responsibility, "to induce [a State which is responsible for an internationally wrongful act] to comply with its obligations under Part Two" of said Articles relating to the "content" of the responsibility – the *exceptio* is a defence which can be invoked at any time in response to a claim by another State.

8.4. Greece wishes to make perfectly clear however, that the present Chapter is only of a subsidiary character and does not imply any recognition that it has breached Article 11 of the Interim Accord. The purpose of this Chapter is only to show that Greece *would*, in any event, have been entitled to object to the FYROM's application by virtue of the exception of non-performance. To repeat, Greece has not breached Article 11. This Chapter shows, in the alternative (*à titre subsidiaire*), that it would have been entitled to do so in response to the FYROM's numerous and serious breaches of its own obligations under the 1995 Accord.

8.5. In the first Section of this Chapter, Greece will review the conditions triggering recourse to the *exceptio*. In Section Two, it will show that these conditions are met in the present case.

II. THE CONDITIONS TRIGGERING RECOURSE TO THE *EXCEPTIO NON ADIMPLETI CONTRACTUS*

8.6. The *exceptio inadimpleti contractus* must not be confused with the ground for suspension and termination of a treaty dealt with in Article 60 of the Vienna Convention or with countermeasures (even though the conditions for recourse to countermeasures are also met). It is merely a defence against a claim of non-performance of a conventional obligation.

8.7. There is a common element to these three international law institutions: all are lawful responses to unlawful conduct by another State. In all, the obligation breached either can be derived from a treaty (in the case of countermeasures) or is necessarily so derived (in the cases of

Article 60 of the Vienna Convention and of the *exceptio*). However, the conditions triggering the exception of non-performance are different from and less rigid than the conditions for suspending a treaty or precluding wrongfulness by way of countermeasures and the reasons for this relate to the very nature and purpose of the exception of non-performance (A) which explain why, in what respect and to what extent the legal régime of the *exceptio* (B) differs from those of the suspension of a treaty or of countermeasures.

A. The Character and Purpose of the *Exceptio*

8.8. The *exceptio non adimpleti contractus* has been defined as being "[l]iterally: [the] 'exception of a non-performed contract'." An exception that the injured Partie(s) can invoke because of the non-performance of a conventional agreement by another contractual Party and which allows in turn not to apply in turn the conventional agreement in part or as a whole."[417]

8.9. When Judge Anzilotti stated the principle in memorable terms,[418] that too was a situation where the integrity of a treaty arrangement was disrupted by one party's non-performance. The Treaty of 12 May 1863 concerning the regime of diversion of water from the Meuse (Netherlands-Belgium)[419] may be compared to the Interim Accord: failure of one party to perform a fundamental provision of the envisaged regime frustrates the system as a whole; the situation is then transformed into one of unilateral obligation on the part of the other State. In his dissenting opinion, Judge Anzilotti insisted that the principle *inadimplenti non est adimplendum* "is so just, so equitable, so universally recognised, that it must be applied in international relations also. In any case, it is one of these 'general principles of law recognized by civilized nations' which the Court applies in virtue of Article 38 of its Statute."[420]

8.10. J. Nisot, described as follows the *raison d'être* of the *exceptio*: "In an agreement creating *reciprocal* obligations, one Party cannot obtain from the other the execution of its obligation, if it does not respect its own

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417 J. Salmon, *Dictionnaire de Droit International Public*, Bruylant, Bruxelles, 2001, p. 471: "Littéralement : 'exception de contrat non rempli'. Exception que peut invoquer la ou les partie(s) lésées(s) en raison de la non-exécution d'un engagement conventionnel par une autre partie contractante et qui l'autorise à ne pas appliquer à son tour tout ou partie de cet engagement conventionnel." (translated by Greece).

418 *Diversion of Water from the Meuse (Netherlands v. Belgium)*, *Judgment of 28 June 1937, PCIJ, Series A/B, No. 70,* Dissenting Opinion of Judge Anzilotti, pp. 49-50.

419 Annex I to the Judgment (*ibid.*, p. 81).

420 *Diversion of Water from the Meuse (Netherlands v. Belgium)*, *Judgment of 28 June 1937*, *PCIJ, Series A/B, No. 70*, Dissenting Opinion of Judge Anzilotti, p. 50.

commitment. It is a generally accepted principle that the State Party to a treaty is allowed to abstain from complying with it, when the other party does not itself comply with it."[421] He emphasised the need to keep the *exceptio* as a customary means of defence in the interest of the injured Party[422] and stressed that it was broader than the rule which has been codified in Article 60 of the Vienna Convention and leads to the suspension or termination of the treaty.

8.11. "In conventional law, reciprocity finds expression in the *exceptio non adimpleti contractus* whereby a party has the right to stop performing a contract if the other party does not apply it. However, the *exceptio non adimpleti contractus* is not the same as suspension of the contract."[423] It is clear that these concepts have different consequences. The *exceptio* suspends the execution of only the injured Party's obligation,[424] that is the

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421 J. Nisot, "L'exception '*non adimpleti contractus*' en droit international", *RGDIP* 1970, p. 668 (emphasis added by Greece): "[d]ans une convention engendrant des obligations *réciproques*, une Partie ne peut obtenir de l'autre l'exécution de ses engagements, si, de son côté, elle ne respecte pas les siens. Il est de principe général que l'État partie à un traité est fondé à s'abstenir de s'y conformer, lorsque son co-contractant ne s'y conforme pas lui-même." (translated by Greece).

422 *Ibid*. p. 672. See also C. Laly-Chevalier, *La violation du traité*, Bruylant, 2005, pp. 418-419: "It is true that pursuant to Articles 65 and 66 of the Vienna Convention, the Party which considers itself the victim of a material violation of the treaty cannot initiate reprisals before the end of the long and insufficiently efficient procedure. The interest of the victims seems to be sacrificed to the benefit of treaties stability, this has been criticized by some authors." ("Il est vrai qu'aux termes des articles 65 et 66 CV, la partie qui s'estime victime d'une violation substantielle du traité ne peut déclencher les ripostes avant que la procédure, longue et d'une efficacité relative, ne soit menée à son terme. L'intérêt des victimes parait sacrifié au profit de la stabilité des traités, ce que n'a pas manqué de critiquer une partie de la doctrine.") (translated by Greece).

423 E. Zoller, *Peacetime Unilateral Remedies: An analysis of Countermeasures*, Transnational Publishers, Inc., 1984, p. 15: "Indeed, a non-performed contract is still a contract in force and compulsory between the parties, whereas a suspended contract is not. There is a clear distinction between non-performance and suspension of a contract. While suspension affects the existence of the contract in its legal aspects, reciprocity has no such effect. While suspension involves a temporary eclipse of the contract from legal relations between the parties, reciprocity never does. During non-performance of a treaty, each party remains bound *de jure* by its obligations under the treaty, whereas during suspension they are released from complying with them." See also, C. Laly-Chevalier, *La violation du traité*, Bruylant, 2005, pp. 417-418.

424 C. Laly-Chevalier, *La violation du traité*, Bruylant, 2005, pp. 423: "Therefore, in case of suspension of the application of the treaty, …. the Parties are symmetrically released from the obligation to perform the treaty provision that has been violated, while, in case of non-execution through the concept of reciprocity, only the injured Party is exempted from the execution of the obligation." ("Ainsi, dans le cas de la suspension de l'application du traité, (…) les parties sont symétriquement libérées de l'obligation d'exécuter la disposition conventionnelle transgressée, alors que dans l'hypothèse de

counterpart or the reciprocal engagement of the non-performed obligation. Suspension under Article 60 of the Vienna Convention suspends the execution of the obligations of the treaty for both parties (and termination puts an end to them definitively). It would be paradoxical that the victim of a treaty breach has no choice but to suspend or terminate it.

8.12. As stated above,[425] Greece has always been committed to the full and good faith implementation of the Interim Accord and has reasserted on several occasions that the Accord is still in force and binds both parties. Greece does not argue the suspension of the Accord but insists upon its right not to perform its part of the Accord in view of the non-performance by the FYROM of its own obligations under the Interim Accord.[426] As aptly noted by Sir Gerald Fitzmaurice, "[a]ction on a 'reciprocity' basis is only possible and effective in certain kinds of cases. It applies mainly in cases where the breach of treaty is negative in character, i.e., involves a simple non-performance of some requirement of the treaty."[427] This is precisely the case here.

8.13. The *exceptio* shares something with the principle embodied in Article 60 of the Vienna Convention which is sometimes described under the same appellation.[428] However, it is a different notion, rooted in the law of State responsibility and not in the law of treaties. Concerning Counter-measures, the ILC indicated in its commentary to Article 42 of its Articles on the Responsibility of States for Internationally Wrongful Acts:

> "The definition in article 42 is closely modelled on article 60 of the 1969 Vienna Convention, although the scope and purpose of the two provisions are different. Article 42 is concerned with any breach of an international obligation of whatever character, whereas article 60 is concerned with breach of treaties. Moreover, article 60 is concerned exclusively with the right of a State party to a treaty to invoke a material breach of that treaty by another party as grounds for its

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non-exécution par mesure de réciprocité, seule la partie victime est exonérée de l'exécution de l'obligation.") (translated by Greece).

425 See above, para. 8.1.

426 As well as of its specific obligations under Article 11(1) itself – but this is inherently part of the rule invoked by the FYROM; on this aspect, see above, Chapter 7.

427 *Yearbook of the International Law Commission, 1959*, vol. II, p. 67, para. 83.

428 M. Gomaa, *Suspension or Termination of Treaties on Grounds of Breach*, Martinus Nijhoff Publishers, 1996, p. 115.

> suspension or termination. It is not concerned with the question of responsibility for breach of the treaty."[429]

8.14. Successive Special Rapporteurs of the I.L.C. on State Responsibility clearly distinguished the different types of suspension. In his reports, W. Riphagen drafted three separate provisions on suspension. *First*, he designed a specific article to refer to the suspension of reciprocal obligations because of non performance.

Article 8

> "Subject to articles 11 to 13, the injured State is entitled, *by way of reciprocity*, to suspend the performance of its obligations towards the State which has committed an internationally wrongful act, if such obligations correspond to, or are directly connected with, the obligation breached."[430]

Second, Riphagen drew a specific provision for the suspension as a way of reprisal, which can be assimilated to the notion of countermeasures, and which required proportionality.

Article 9

> "1. Subject to articles 10 to 13, the injured State is entitled, by way of reprisal, to suspend the performance of its other obligations towards the State which has committed the internationally wrongful act.
>
> 2. The exercise of this right by the injured State shall not, in its effects, be manifestly disproportional to the seriousness of the internationally wrongful act committed."[431]

Third, Riphagen specifically excluded from the Draft Articles the suspension that can result in application of the provisions of the Vienna Convention.

Article 16

> "The provisions of the present articles shall not prejudge any question that may arise in regard to:

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[429] *Yearbook of the International Law Commission, 2001*, vol. II, part two, p. 117, para. 4 of the commentary of Article 42.

[430] *Yearbook of the International Law Commission, 1985*, vol. I, part one, p. 10 (emphasis added).

[431] *Ibid.*, p. 11.

(a) the invalidity, termination and *suspension of the operation of treaties*;

(b) the rights of membership of an international organization;

(c) belligerent reprisals."[432]

Special Rapporteur Riphagen's draft articles have not been adopted as such by the ILC. However, the distinction drawn by Riphagen was firmly endorsed by the last Special Rapporteur of the ILC on the topic, J. Crawford.[433] "In short, issues of performance are left to be dealt with under the topic of state responsibility."[434]

8.15. The relationship between the exception of non-performance and suspension of treaties can be described as a sequential or consecutive relation. When facing the non-execution of a conventional agreement, the injured party can forthwith have recourse to the *exceptio*. The treaty will remain in force between the Parties but 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. If the use of the *exceptio* does not lead the non-performing Party to resume executing its obligations under the Treaty, the injured Party can exercise "*ultimately* [its] right […] to suspend or terminate the contract"[435] under the conditions prescribed by the Vienna Convention. In any case, it is the free choice of the injured State and there is no reason why that State would be compelled to resort to the suspension of the treaty if, as is the case of Greece in the present case, it remains committed to the full execution of the Treaty.

8.16. The *exceptio* must also be distinguished from countermeasures. This was made very clear in the Third Report of J. Crawford on State Responsibility:

"364. The first question is whether the exception of non-performance is to be considered as a form of countermeasure. It is clear that the exception only

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[432] *Ibid.*, p. 15 (emphasis added).

[433] J. Crawford, "Multilateral Rights and Obligations in International Law", in *RCADI,* vol. 319, p. 429. See also ILC, *Third Report on State Responsibility by James Crawford, Special Rapporteur*, *fifty-second session of the ILC,* U.N. Doc. A/CN.4/507/Add.3, para. 366.

[434] J. Crawford and S. Olleson, "The Exception of Non-Performance: Links between the Law of Treaties and the Law of State Responsibility", 21 *Australian YIL* 59 (2001).

[435] M. Gomaa, *Suspension or Termination of Treaties on Grounds of Breach*, Martinus Nijhoff Publishers, 1996, p. xvii (emphasis added).

applies to synallagmatic obligations (prestations), where one party's performance is related to and contingent upon the other's. Normally this will involve performance of the same or a closely related obligation. But in the Special Rapporteur's opinion it is clear that the exception of non-performance is not to be identified as a countermeasure in the sense of article 47 [finally art. 52]. In cases where the exception applies, the reason why State A is entitled not to perform is simply that, in the absence of State B's performance of the related obligation, the time for State A's performance has not yet come. It is true that State A may withhold performance in order to induce State B to perform. But that is not the point of the exception, as it is of countermeasures. State A's motive is irrelevant; it may simply have no interest in performance in the absence of State B. Moreover there is no requirement of notice or of any attempt to settle the dispute by diplomatic or other means as a condition of continued application of the exception. It is simply that, following an agreement, for example, concerning the exchange of prisoners of war or for the joint funding of some project, State A is not obliged to release its prisoners of war to B or to make its contribution unless B is in turn ready to perform its part of the bargain. Thus the exception of non-performance is to be seen either as a circumstance precluding wrongfulness in respect of a certain class of (synallagmatic) obligations, or as limited to an implied term in certain treaties. By contrast, while the nexus between the breach and non-performance is relevant to the question of proportionality, there is and should be no specific requirement of a nexus in the law of countermeasures."[436]

8.17. As the ILC made clear,

> "Chapter V sets out the circumstances precluding wrongfulness presently recognized under general international law. Certain other candidates have been

[436] ILC, *Third Report on State Responsibility by James Crawford, Special Rapporteur*, fifty second session of the ILC, U.N. Doc. A/CN.4/507/Add.3, para 364. See also J. Crawford and S. Olleson, "The Exception of Non-performance: Links between the Law of Treaties and the Law of State Responsibility", 21 *Australian YIL* 57 (2001).

> excluded. For example, the exception of non-performance (*exceptio inadimpleti contractus*) is best seen as a specific feature of certain mutual or synallagmatic obligations and not a circumstance precluding wrongfulness. The principle that a State may not benefit from its own wrongful act is capable of generating consequences in the field of State responsibility but it is rather a general principle than a specific circumstance precluding wrongfulness."[437]

8.18. The suspension of the obligations deriving from the treaty as a countermeasure, designed as a way of reprisal and which requires the criterion of proportionality to be fulfilled, is a different concept than the *exceptio* which is based on the notion of reciprocity (and not proportionality). In fact, the criteria of proportionality is replaced by that of reciprocity. In the cases of "termination or suspension under the principle *inadimplenti non est adimplendum,* proportionality is replaced by a more specific criterion, namely by the typically synallagmatic principle *of quid pro quo (corrispettivo)*."[438]

8.19. The *exceptio* is based on the concept of reciprocity. "It would seem to be an important principle of equity that where two parties have assumed an identical or a *reciprocal obligation*, one party which is engaged in a continuing non performance of that obligation should not be permitted to take advantage of a similar non-performance of that obligation by the other party."[439] The importance of the concept of reciprocity has been emphasised by Greece with regard to the Interim Accord, which "cannot be implemented selectively and unilaterally, but as a whole and reciprocally, on the basis of the reciprocal application of the principle *pacta sunt servanda*."[440]

8.20. It was *because* the FYROM accepted

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[437] ILC, Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, *Yearbook 2001*, vol. II, part two, p. 72.

[438] M.L. Forlati Picchio, *La sanzione nel diritto internazionale*, Padoue, CEDAM 1974, quoted by Arangio-Ruiz,*Third Report on the Law of State Responsibility*, *Yearbook of the International Law Commission, 1991*, vol. II, part one, p. 25, para. 78.

[439] Individual opinion of Judge Hudson, *ibid.*, p. 77 (emphasis added).

[440] Memorial, Annex 51, Verbal Note dated 15 May 2008 from the Hellenic Republic Liaison Office in Skopje to the FYROM's Ministry of Foreign Affairs. See also Memorial, Annex 43, Letter dated 23 May 2008 from the Permanent Representative of Greece to the United Nations, John Mourikis, to the United Nations Secretary-General, UN doc. S/2008/346 (28 May 2008); and Memorial, Annex 129, Greece, *Aide Memoire* [2007]: "the Interim Accord is binding for both Parties as a whole (Art. 5, 7 and 11) and cannot be selectively implemented".

- to reform its antagonistic and irredentist behaviour,

- to be referred to as the FYROM in international organisations, and

- to negotiate in good faith,

that Greece accepted "not to object to the application by or the membership of the [FYROM] in international, multilateral and regional organizations and institutions of which [it] is a Party."[441]

8.21. In view of this tight mutuality of all the obligations deriving from the Interim Accord, the *exceptio* is of particular importance in the present case.

B. The Legal Régime of the *Exceptio*

8.22. "Reciprocity as applied by the *exceptio non adimpleti contractus* is merely a means of defence which results in a factual situation."[442] Therefore, as aptly noted by the ICSID Tribunal in the Award of 21 October 1983 in the *Klöckner v. Cameroon* case:

> "The *exception* [*sic*] *non adimpleti contractus* may be invoked at any time, even during judicial or arbitral proceedings, without giving prior notice of default to the non-performing party."[443]

The Tribunal relied on various authors, in particular French civil law scholars, as well as Judge Anzilotti's dissenting Opinion in the *Meuse* case,[444] to support its conclusion. According to Esmein, "the exception based on non-performance may be invoked without either authorization by the judge or prior notice of default."[445] Relying on case law, Alex Weill and François Terré stated that the *exceptio non adimpleti contractus* "requires neither a claim in court, not even a notice of default. It is

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441 Article 11(1) of the Interim Accord.

442 E. Zoller, *Peacetime Unilateral Remedies: An analysis of Countermeasures*, Transnational Publishers, inc., 1984, p. 15.

443 ICSID, Award of 21 October 1983, *Klöckner v. Cameroon*, *International Law Reports*, vol. 114, p. 211.

444 See above, para. 8.9.

445 Esmein, *in* Planiol and Ripert, *Traité pratique de droit civil français*, vol. VI (1930), No. 455, p. 626: "L'exception d'inexécution n'a pas besoin pour être opposée ni de l'autorisation du juge, ni d'une mise en demeure préalable."

sufficient that the *excipiens* invokes the exception against his protagonist at such time as the latter demands satisfaction of his right."[446]

8.23. The exception is a defence, *i.e*. it is a response to a claim for performance. It is a reaction to such a claim and thus can only be raised once such a claim is put forward. This is why it need not be raised at a certain specified time or follow a certain procedure as if it were procedurally an initial or self-standing claim.

8.24. The *Klöckner* award of 1983[447] was annulled by a decision of 3 May 1985. However, the decision on annulment is not based on the *exceptio non adimpleti contractus*. The *ad hoc* Committee analysed the *exceptio* in a section entitled "Other Complaints of the Applicant for Annulment." It did not challenge the use of the *exceptio* as such but criticised the insufficient reasoning of the Tribunal. It also concluded that "the Tribunal had erred using the *exceptio* as a ground for extinguishing obligations."[448] This is quite correct: the consequences of recourse to the *exceptio* is not the extinction of the obligations of the Parties but only a staying of the performance until the other does its part – not of the treaty itself but of the obligations resulting from the treaty which were the *quid pro quo* for the obligations breached by the other Party.[449] The decision of the Committee does not however condemn the procedural and conditional application of the *exceptio*. There can therefore be no doubt that the principles stated in the *Klöckner* Award of 1983 on the conditions of application of the *exceptio* are still applicable in general and, in particular, in the present case.

8.25. In this respect, an analogy can be drawn with Article 65, paragraph 5, of the Vienna Convention, according to which:

> "[w]ithout prejudice to article 45, the fact that a State has not previously made the notification prescribed in paragraph 1 shall not prevent it from making such notification in answer to another party claiming performance of the treaty or alleging its violation."

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446 A. Weill & F. Terré. *Droit civil, Les obligations*, 3rd ed., p. 547, No. 475: L'exception *non adimpleti contractus* "n'est subordonnée ni à une demande en justice, ni même à une mise en demeure. Il suffit que l'*excipiens* oppose l'exception à son protagoniste, lorsque celui-ci réclame l'exécution de sa créance."

447 See above, para. 8.22.

448 Ch. Schreuer, *The ICSID Convention: A Commentary*, Cambridge U.P., 2009, p. 1049, para. 519.

449 See above, para. 8.11.

The 1966 Commentary of the ILC Draft Articles on the Law of Treaties explains that this paragraph "reserves the right of any party to make the notification provided in paragraph 1 by way of answer to a demand for its performance or to a complaint in regard to its violation, even though it may not previously have initiated the procedure laid down in the article."[450] Although the *exceptio* clearly does not belong to the law of treaties, it arises from a need for flexibility in respect of reciprocal obligations: it must open the opportunity for the injured party to use the defences offered in case of breaches of treaty obligations not only as an immediate response to the wrongdoing, but also as a defence during proceedings initiated by the wrongdoer.

8.26. The consequence of this characteristic of the *exceptio* is that it does not have to be notified or proven beforehand. In the present case, the FYROM cannot ask Greece to fulfil its obligation under Article 11(1) of the Interim Accord as the FYROM has not itself fulfilled its own obligations and Greece can raise the *exceptio* as a defence at the merits stage.[451] Contrary to suspension under Article 60 of the Vienna Convention and countermeasures in the law of State responsibility, no rule requiring a notification of the suspension exists for the exception of non-performance. There are simply no procedural requirements to the exercise of the staying of the performance through the mechanism of the *exceptio*.

8.27. This being said, it must be noted that on multiple occasions, Greece has complained that the FYROM had not complied with its obligations under the Interim Accord. "Greece had repeatedly denounced this behaviour on the part of the Government of the former Yugoslav Republic of Macedonia at both the bilateral and international level, but to no avail, since the latter has not ceased so far its unlawful course of action or taken any corrective measures."[452] A few examples will suffice:[453]

> a. "[T]he recent decision of the government of the Former Yugoslav Republic of Macedonia to rename Skopje's Petroveč airport 'Alexander the Great' is not

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450 *Yearbook of the International Law Commission, 1966*, vol. II, p. 263, para. 8 of the Commentary of Article 62.

451 In the present case, Greece has decided to join its objections to the jurisdiction of the Court with its defence on the merits of the case, for the sake of expediency – see the letter of the Agents of Greece to the Registrar dated 5 August 2009: Annex 168.

452 Memorial, Annex 45, Letter dated 6 February 2009 from the Permanent Representative of Greece to the United Nations to the United Nations Secretary-General, U.N. doc A/63/712- S/2009/82 (10 February 2009).

453 The reactions of Greece to the FYROM's behaviour before the Bucharest Summit have been described in Chapter 4 of this Counter-Memorial, see above, paras. 4.73-4.81.

an act of good neighbourly relations. It was *a breach of the 1995 Interim Agreement*. An historically groundless and politically counterproductive action. It rendered even more difficult – as Mr. Nimetz himself stressed publicly during his visit here – the mission that has been undertaken by the UN mediator."[454]

b. "[W]e are constructively pursuing a mutually acceptable solution to the name issue, through the UN process and in accordance with Security Council Resolution 817. We are awaiting a similar response from the former Yugoslav Republic of Macedonia, which presupposes that various circles within and outside the Skopje Government abandon the practice of aiming irredentist propaganda against a member state of NATO and the European Union – by using symbols, maps, textbooks etc – and that they conduct themselves in a manner that is consistent with the European acquis."[455]

c. "The situation is very clear, and no one should waste their energies on mere unavailing tactics. To achieve the desired objective, which is: full normalisation of bilateral relations, further strengthening of regional cooperation in an environment of stability, and a smooth Euro-Atlantic course for our neighbouring country, the Skopje leadership needs to: implement a policy of good neighbourly relations, rectify and abandon actions and policies based on irredentist thinking towards a member state of NATO and the European Union, adopt a conciliatory and moderate spirit within the framework of the consultations taking place at the UN aimed at the achievement of a mutually acceptable solution on the name issue, given that the current name is temporary.

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[454] See Speech of Foreign Minister of Greece Ms. Bakoyannis to the Parliamentary Standing Committee on National Defense and Foreign Affairs, Athens, 20 February 2007, available at http://www.mfa.gr/www.mfa.gr/GoToPrintable.aspx?UICulture=en-US&GUID={C45FA976-9469-4954-B32F-8AC686D588D3}: Annex 120 (emphasis added).

[455] See Answer of Foreign Ministry Spokesman Mr. G. Koumoutsakos to a journalist's question regarding the US House of Representatives resolution on former Yugoslav's republic of Macedonia propaganda, Athens, 4 May 2007, available at*:* *http://www.mfa.gr/www.mfa.gr/GoToPrintable.aspx?UICulture=en-US&GUID={C6F297C0-2199-4FEF-9089-355DB42EC026}*: Annex 121.

This is all provided for in the Interim Agreement, which the current Skopje government *is unfortunately calling in to question through many of its actions*."[456]

d. "A number of the Skopje government's decisions and actions have confirmed its persistence with regard to historically groundless and provocative propaganda that assails the principle of good neighbourly relations. *They have forgotten the obligations they have undertaken*, and I am referring to article 7 of the Interim Accord, which explicitly prohibits direct or indirect actions of irredentist propaganda."[457]

e. "We remain deeply concerned by the incident and the actions of the current president of the General Assembly, Srgjan Kerim, who *in full contravention* of Security Council resolution 817 (1993), and General Assembly resolution 47/225 of 8 April 1993 [...]."[458] ; "Most important, such actions support the intransigent position of the former Yugoslav Republic of Macedonia in the ongoing negotiations [...]. This was clearly manifested by the statement made by President Crvenkovski on the same day before the General Assembly, according to which 'the name of my country is the Republic of Macedonia and will be the Republic of Macedonia'." [459]

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[456] See Statement of Foreign Ministry spokesman Mr. G. Koumoutsakos regarding today's statements from the Former Yugoslav republic of Macedonia president Mr. Crenkovski, Athens, 3 June 2007, available at http://www.mfa.gr/www.mfa.gr/GoToPrintable.aspx?UICulture=en-US&GUID={6BF87A42-F2F9-4644-9045-BA9D07041B4B}: Annex 122 (emphasis added).

[457] Statement of FM Ms. Bakoyannis regarding statements made by FYROM President Mr. Crvenkovski, 13 September 2007, available at: http://www.greekembassy.org/Embassy/Content/en/Article.aspx?office=1&folder=24&article=21578 : Annex 127 (emphasis added).

[458] Letter dated 4 October 2007 from the Permanent Representative of Greece to the United Nations Addressed to the Secretary-General, 5 October 2007, A/62/470-S/2007/592: Annex 6 (emphasis added).

[459] *Ibid.* See also Letter of the Minister of Foreign Affairs of the Hellenic Republic to the Minister of Foreign Affairs of the FYROM, dated 24 March 2009 under Reference 1024, forwarded through Verbal Note F.141.1/24/AS 378, dated 27 March 2009 of the Liaison Office of the Hellenic Republic in Skopje: Annex 70: "This statement clearly reflects the totally inflexible stance that your country has taken in the ongoing

f. "In the course of the last 14 years that the Interim Accord is in force, the Greek side has been witnessing with great concern and regret that essential provisions of the said Accord *have been consistently materially breached* by the former Yugoslav Republic of Macedonia."[460]

g. "Mr Milososki alleged, in his interview, that there is a 'Macedonian-speaking minority' in Greece which is not allowed to use its mother tongue nor develop its cultural identity. This allegation by a high official of the Former Yugoslav Republic of Macedonia, who also happens to be at the helm of the foreign policy of this state, constitutes a *gross violation* of article 6, para. 2 of the Interim Accord."[461]

h. "Those acts constitute a *flagrant violation* of article 7, par. 2 of the Interim Accord of 1995, which categorically prohibits the use, in any way of this symbol [the Sun of Vergina] by the former Yugoslav Republic of Macedonia."[462]

8.28. Another important difference between the legal regime of the *exceptio* compared with suspension under Article 60 of the 1969 Vienna Convention is that it is not confined to "material" breach, however defined, and can be used as a response to any breach of the wrongdoer's treaty obligations. As explained by J. Crawford, "[b]y contrast [to the law of treaties], in the law of State responsibility a party may be entitled to suspend its own performance vis-à-vis another State in breach (*not limited to material breach*), by virtue of the *exceptio inadimpleti contractus*."[463]

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negotiations under the aegis of the UN, contrary to the good faith that both parties should demonstrate in the quest for a commonly agreed settlement".

[460] Memorial, Annex 52, Verbal Note dated 15 January 2009 from the Hellenic Republic Liaison Office in Skopje to the Ministry of Foreign Affairs of the FYROM (emphasis added). See also Memorial, Annex 54, *Note Verbale* dated 27 February 2009 from the FYROM's Liaison Office in Athens to the Greek Ministry of Foreign Affairs.

[461] Memorial, Annex 53, *Note Verbale* dated 24 February 2009 from the Ministry of Foreign Affairs of Greece to the Liaison Office of the FYROM in Athens (emphasis added).

[462] Memorial, Annex 60, Verbal Note dated 15 April 2009 from the Hellenic Republic Liaison Office in Skopje to the Ministry of Foreign Affairs of the FYROM, No. F. 141.1/49/AS 489 (emphasis added).

[463] J. Crawford, "Multilateral Rights and Obligations in International Law", in *RCADI,* vol. 319, p. 429 – italics added. See also case concerning the *Factory at Chorzow (Jurisdiction)*, *PCIJ, Series A, No. 9 (1927)* 31; J. Crawford and S. Olleson,

These views have been endorsed by the International Law Commission: while "article 60 is restricted to 'material' breaches of treaties, [o]nly a material breach justifies termination or suspension of the treaty, […] in the context of State responsibility any breach of a treaty gives rise to responsibility irrespective of its gravity."[464]

C. Other Possible Defences

8.29. This being said, Greece maintains that, as will be shown in the next Section of this Chapter, the FYROM's violations of the Interim Accord qualify as material breaches. As a consequence, if the allegations of the FYROM concerning its breach of Article 11 were well founded – *quod non* – then Greece could invoke counter-measures as a circumstance precluding wrongfulness. However, since all the conditions for invoking the *exceptio non adimpleti contractus* are met, there is no need for the Respondent to expressly invoke counter-measures as a defence. And the same position exists in respect to the mechanism offered by Article 60 of the Vienna Convention on the Law of Treaties – with the crucial difference that Greece does not aim at a suspension of the Interim Accord.

8.30. The same holds true regarding the clean hands doctrine according to which "no action arises from wilful wrongdoing: *ex dolo malo non oritur actio*. It is also reflected in the maxim *nullus commodum capere potest de injuria sua propria*."[465] Consequently, "a State which is guilty of illegal conduct may be deprived of the necessary *locus standi in judicio* for complaining of corresponding illegalities on the part of other States."[466] This was also the position of Judge Anzilotti in the case concerning the *Legal Status of Eastern Greenland*,[467], and of Judge Schwebel[468] who both considered "that an 'unlawful act cannot serve as the basis of an action at law'." In the present case, since the FYROM has

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"The Exception of Non-Performance: Links between the Law of Treaties and the Law of State Responsibility", (2001) 21 *Australian YIL* 55.

[464] *Yearbook of the International Law Commission, 2001*, vol. II, part two, p. 117, para. 4 of the commentary of Article 42.

[465] ILC, *Sixth Report on Diplomatic Protection by John Dugard, Special Rapporteur*, A/CN.4/546, para. 2.

[466] G. Fitzmaurice, "The General Principles of International Law," *RCADI*, vol. 92, 1957-II, p. 119. See also, P. Daillier, M. Forteau et A. Pellet, *Droit international public*, L.G.D.J., Paris, 8th ed., 2009, p. 874, para. 480.

[467] *Legal Status of Eastern Greenland*, *Judgment, 5 April 1933, PCIJ, Series A/B, N° 53,* Dissenting opinion of Judge Anzilotti, p. 95.

[468] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, *Merits, Judgment, 27 June 1986, I.C.J. Reports 1986*, Dissenting Opinion of Judge Schwebel, p. 393, para. 270.

breached its obligations under the Interim Accord, it has no *locus standi* in the present case.

III. THE CONDITIONS TRIGGERING RECOURSE TO THE *EXCEPTIO* ARE MET IN THE PRESENT CASE

8.31. As explained in the previous Section, the condition triggering the defence based on the *exceptio non adimpleti contractus* is that the Applicant State has breached its obligations resulting from the Treaty if said provisions are the *quid pro quo* of the allegedly breached obligations of the Respondent. In the present case,

> (i) Greece committed itself to withhold its objections to the FYROM's participation to international organisations of which Greece was a member in exchange for the FYROM's commitment:
>
> - to cease its irredentist and other antagonizing behaviour;
>
> - to be referred to as the FYROM in international organisations;
>
> - and to negotiate in good faith. Moreover,
>
> (ii) the FYROM has repeatedly breached its obligations, as will be shown in the present Section.

8.32. In effect, as stated in the Verbal Note dated 15 May 2008:

> "the former Yugoslav Republic of Macedonia has been materially breaching the Interim Accord since its conclusion, by asserting and supporting territorial claims against Greece (material breach of Articles 2, 3 and 4), by promoting and condoning irredentism (material breach of Article 6(2)), by allowing and not discouraging acts inciting violence, hatred and hostility against Greece (material breach of Article 7(1)), by continuing, without any justification, the inappropriate use of symbols pertaining to the historic and cultural patrimony of Greece despite the protest of the latter (material breach of Article 7(3)) and by prohibiting historical research [...] which constitutes a material breach of Article 8(1). There is abundant and undisputable evidence corroborating these

> material breaches of the Interim Accord by the former Yugoslav Republic of Macedonia."[469]

And, in close relation to the present case, the FYROM has promoted by all means the circumvention of the Interim Accord by using its constitutional name on multiple occasions and in multiple contexts.

8.33. The breaches of the Interim Accord by the FYROM have been described in Chapter 4 of this Counter-Memorial. In this section, Greece will draw attention only to the most egregious of those breaches: the violations of Article 5 (A.), 6(2) (B.) and of Article 7 (C.), (D.) and (E.). The breaches concerning Article 11 have been analyzed in detail in Chapter 7.[470] They will be briefly restated below (F.).

A. Breach of Article 5: The FYROM's Conduct Towards Negotiations

8.34. According to Article 5(1) of the Interim Accord:

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

SC res 845 (1993) "[u]rge[d] the parties to continue their efforts under the auspices of the Secretary-General to arrive at a speedy settlement of the remaining issues between them."[471] The commitment in Article 5(1) to "continue negotiations" imports an obligation to act in good faith so that the negotiations can reach a conclusion, and necessarily entails from both Parties a flexibility and openness, in particular, not to be intransigent with regard to their initial positions.

8.35. The obligation to act in good faith appears in a number of ICJ judgments, as well as in numerous awards of arbitral tribunals. In the *Gulf of Maine* case, the Court referred to the "duty to negotiate with a view to reaching agreement, and *to do so in good faith*, with a genuine intention to

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469 Memorial, Annex 51, Verbal Note dated 15 May 2008 from the Hellenic Republic Liaison Office in Skopje to the FYROM's Ministry of Foreign Affairs. See also, Memorial, Annex 43 Letter dated 23 May 2008 from the Permanent Representative of Greece to the United Nations, John Mourikis, to the United Nations Secretary-General, UN doc. S/2008/346 (28 May 2008).

470 See above, paras. 7.91-7.93.

471 Memorial, Annex 22, United Nations Security Council resolution 817 (1993) (SC/RES/827) (7 April 1993).

achieve a positive result."[472] The same principle has been expressed by several Judges of the ICJ in their opinions[473] as well as by doctrinal authorities.[474] The positive aspect of the obligation to negotiate entails three more specific positive obligations, all of which are co-substantial with the principle of good faith: (1) a State which adamantly persists in its initial position throughout the negotiation process does not negotiate in good faith;[475] (2) each party to the dispute must pay reasonable regard to

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[472] *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/US)*, *Judgment of 12 October 1984, I.C.J. Reports 1984*, p. 292, para. 87 (emphasis added).

[473] Dissenting Opinion of Ch. De Visscher, *International Status of South West Africa, Advisory Opinion of 11 July 1950, I.C.J. Reports 1950*, p.188; Separate Opinion of Judge Dillard, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion of 21 June 1971, I.C.J. Reports 1971*, p.159; Dissenting Opinion of Judge Lachs, *North Sea Continental Shelf (Federal Republic of Germany/Netherlands)*, *Judgment of 20 February 1969, I.C.J. Reports 1969*, p. 219; Separate Opinion of Nagendra Singh, *Aegean Sea Continental Shelf (Greece/Turkey)*, *Judgment of 19 December 1978, I.C.J. Reports 1978*, p.47; Separate Opinion Judge Oda, *Interpretation of the agreement of 25 March 1951 between WHO and Egypt, Advisory Opinion of 20 December 1980, I.C.J. Reports 1980*, p.154; Separate Opinion Judge Ruda, *ibid*, p. 124; Dissenting Opinion Judge Gros, *Continental Shelf (Tunisia/Libyan Arab Jamahirya)*, *Judgment of 24 February 1982, I.C.J. Reports, 1982*, pp.144-145.

[474] H. Thirlway, "The Law and Procedure of the International Court of Justice (1960-1989): General Principles and Sources of Law", 60 *BYIL* 1989, p.25; R. Kolb, *La bonne foi en droit international public*, Paris, PUF, 2000, p.588; H. W. Halleck, *International Law*, Vol. 1, 4th ed., London, 1908, p.497; L. Oppenheim & H. Lauterpacht, *International Law*, 8th ed., Vol. 1, London, p.1182; P. Daillier, M. Forteau & A. Pellet, *Droit international Public*, 8th ed., Paris, 2009, pp. 924-927, para. 504; H. Thierry, *L'évolution du droit international*, *RCADI* 1990-III, p.77; N. Kontou, *The Termination and Revision of Treaties in the Light of New Customary International Law*, Oxford, 1994, pp.153-154; L. Caflisch, "The Law of International Waterways and Its Sources", *in* R. St. J.Macdonald (ed.), *Essays in Honour of Wang Tieya*, Dordrecht/Boston/London, 1993, p.124; C. B. Bourne, "Procedure in the Development of International Drainage Basins: The Duty to Consult and to Negotiate", 10 *Canadian YIL* 1972, p.224.

[475] *Claims arising out of decisions of the Mixed Graeco-German Arbitral Tribunal set up under Article 304 in Part X of the Treaty of Versailles (Greece/Federal Republic of Germany)*, Award, 26 January 1972, *UNRIAA*, Vol. XIX, p.56: "[A] *pactum de negotiando* is also not without legal consequences. It means that both sides would make an effort, in good faith, to bring about a mutually satisfactory solution by way of a compromise, even if that meant the relinquishment of strongly held positions earlier taken. It implies a willingness for the purpose of negotiation to abandon earlier positions and to meet the other side part way". See also, *North Sea Continental Shelf (Federal Republic of Germany/Denmark)*, *Judgment of 20 February 1969, I.C.J. Reports 1969*, para.85: "[The Parties] are under an obligation so to conduct themselves that the negotiations are meaningful, which will not be the case when either of them insists upon its own position without contemplating any modification of it".

the interests of the other party, in order to achieve an equitable solution;[476] and (3) the negotiations shall not merely consist of a formal process, but shall be meaningful.[477]

8.36. The general obligation to negotiate in good faith in international law does not merely consist of the above three mentioned specific positive obligations, but it further entails a series of obligations of abstention. In particular, the principle prohibits depriving negotiations of their object and purpose. The Parties cannot disregard the relevant negotiating procedures;[478] they must abstain from unilateral acts creating *de facto* situations and abstain from acts, which could further aggravate the dispute during the negotiation process.[479]

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[476] *Fisheries Jurisdiction (United Kingdom* v. *Iceland)*, *Merits, Judgment of 25 July 1974, I.C.J. Reports 1974*, paras. 78-79: "… [t]he task [of the parties] will be to conduct their negotiations on the basis that each must in good faith pay reasonable regard to the legal right of the other… [the parties] are under mutual obligations to undertake negotiations in good faith for the equitable solution of their differences concerning their respective (fisheries) rights…"; see also *Government of Kuwait v. American Independent Oil Company (AMINOIL)*, Award of 24 March 1982, 66 *ILR*, p. 578 (emphasis added): the general principle that ought to be observed in carrying out an obligation to negotiate "is good faith as properly to be understood; sustained upkeep of the negotiations over a period appropriate to the circumstances, *awareness of the interests of the other party and a persevering quest for an acceptable compromise*".

[477] *Claims arising out of decisions of the Mixed Graeco-German Arbitral Tribunal set up under Article 304 in Part X of the Treaty of Versailles (Greece/Federal Republic of Germany)*, Award, 26 January 1972, *UNRIAA*, Vol. XIX, p.64: "The negotiations to be conducted must be guided by the following principles: *(a)* They shall be meaningful and not merely consist of a formal process of negotiations. Meaningful negotiations cannot be conducted if either party insists upon its own position without contemplating any modification of it. *(b)* Both parties are under an obligation to act in such a way that the principles of the Agreement are applied in order to achieve a satisfactory and equitable result". See also: *Railway Traffic between Lithuania and Poland* case, *Advisory Opinion of 15 October 1931, PCIJ, Series A/B, No. 42*, p. 116; *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, *Advisory Opinion of 20 December 1980, I.C.J. Reports 1980*, p. 95; *North Sea Continental Shelf (Federal Republic of Germany/Denmark)*, *Judgment of 20 February 1969, I.C.J. Reports 1969*, para. 85; *Delimitation of the maritime boundary in the Gulf of Maine Area (Canada/US)*, *Judgment of 12 October 1984, I.C.J. Reports 1984*, p. 299; *Legality of the threat or use of Nuclear Weapons*, *Advisory Opinion of 8 July 1996, I.C.J. Reports 1996*, para. 99.

[478] *Affaire du lac Lanoux (Espagne/France)*, Award, 16 November 1957, *UNRIAA*, Vol. XII, p.307: "la réalité des obligations ainsi souscrites ne saurait être contestée et peut être sanctionnée, par exemple, en cas de rupture injustifiée des entretiens, de délais anormaux, de *mépris des procédures prévues,* de refus systématiques de prendre en considération les propositions ou les intérêts adverses, plus généralement en cas d'infraction aux règles de la bonne foi"(emphasis added).

[479] *Electricity Company of Sofia and Bulgaria (Belgium v. Bulgaria)*, *Order of 5 December 1939, PCIJ, Series A./B., No. 79*, p.199: "the principle universally accepted by

8.37. Greece has participated in the several rounds of negotiations organised by Special U.N. Representative Mathew Nimetz "with an open mind, a spirit of good will, compromise and understanding."[480] It "has always supported politically and economically the Former Republic of Macedonia aiming at the prosperity and stability of this country as part of our overall objective of prosperity and stability in the Balkans."[481] For the settlement of the name issue, Greece has been prepared to make compromises. In particular, it has "departed from [its] initial position and has accepted the idea of a compound name, which could also include the term 'Macedonia'."[482]

8.38. On sharp contrast, the FYROM has violated both its positive obligations to act in good faith and its obligations of abstention. The following elements substantiate the violation of Article 5 of the Interim Accord in relation to the two aspects of the general obligation to negotiate in good faith.

8.39. As stated in Chapter 4,[483] the FYROM has refused to engage in good faith negotiations. "[B]y adopting a totally intransigent and inflexible stance"[484] in the negotiations for the settlement of the name issue, it has therefore violated Article 5(1) of the Accord. The FYROM does not make any "efforts" to put an end to the name issue. That much is

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international tribunals […] to the effect that the parties to a case must abstain from any measure capable of exercising a prejudicial effect in regard to the execution of the decision to be given and, in general, not allow any step of any kind to be taken which might aggravate or extend the dispute". See also *Anglo-Iranian Co. (United Kingdom/Iran)*, *Interim Protection, Order of 5 July 1951, I.C.J. Reports 1951*, p. 93.

480 Memorial, Annex 129, Greece, *Aide Memoire* [2007].

481 *Ibid.*

482 Memorial, Annex 43 Letter dated 23 May 2008 from the Permanent Representative of Greece to the United Nations, John Mourikis, to the United Nations Secretary-General, UN doc. S/2008/346 (28 May 2008). See above paras. 4.10-4.11; see also "Greece considers Macedonia name", *BBC News*, 8 April 2005, available at http://news.bbc.co.uk/2/hi/europe/4425249.stm: Annex 114: "Greece has said the name could be a basis for constructive negotiations. [...] Greek Foreign Minister Petros Molyviatis told reports the suggestion did 'not totally satisfy Greece, but it was a basis for negotiations which Greece is ready to partake in a positive and constructive spirit'."; and Letter sent by Prime Minister Karamanlis to the United Nations Secretary General Ban Ki-Moon, 14 April 2008: Annex 9: "In order to revitalize talks, in September 2007, the Greek Government announced in Parliament that it was ready to accept a composite name that could include 'Macedonia' as the basis for a mutually acceptable solution. This represented a major unilateral change in our policy."

483 See above, paras. 4.2-4.13.

484 Memorial, Annex 43 Letter dated 23 May 2008 from the Greek Permanent Representative to the United Nations, John Mourikis, to the United Nations Secretary-General, UN doc. S/2008/346 (28 May 2008).

patent from the words of the FYROM's official authorities, be it President Crvenkovski[485] or Prime Minister Gruevski.[486] President Crvenkovski even admitted that the FYROM's insistence on the *dual formula* was used as "a position for repealing the negotiations, or at least freezing them for a long period."[487] Accordingly, not only has the FYROM impaired the negotiation process by adamantly persisting on its initial position, but it is also knowingly sabotaging the negotiations and aggravating or extending the dispute through its continuous use of its constitutional name as well as through its violations of the Interim Accord.[488]

8.40. It is true, as the FYROM notes, that "[t]hat Article imposes an obligation of conduct, not of result."[489] But an obligation of conduct *is* a legal obligation[490] and it is obvious that it was for Greece an essential condition for its willingness to conclude the Interim Accord. The inclusion of a provision about the process of negotiation to settle their issue, as drafted in Article 5, resulted from a discussion between both Parties and is (or should be) of fundamental importance for both.

8.41. Such a breach can without doubt be defined as a material breach given the global object and purpose of the Accord. Article 60 of the Vienna Convention defines a material breach as being:

> "(a) a repudiation of the treaty not sanctioned by the present Convention; or
>
> (b) the violation of a provision essential to the accomplishment of the object and purpose of the treaty."

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485 See above, para. 4.5 and 4.8.

486 See above, para. 4.6 and 4.9.

487 *Stenography notes from the 7th sequel of the 27th session of the Parliament of the Republic of Macedonia*, held on 3 November 2008 : Annex 104.

488 See above, paras. 4.12-4.13.

489 Memorial, p. 67, para. 3.7.

490 *North Sea Continental Shelf*, *Judgment of 20 February 1969, I.C.J. Reports 1969*, p. 47: the Parties "are under an obligation so to conduct themselves that the negotiations are meaningful". See also ILC, *Second Report on State Responsibility by J. Crawford*, *Special Rapporteur*, UN doc. A/CN.4/498 at para. 53 ("In particular, 'the conditions in which an international obligation is breached vary according to whether the obligation requires the State to take some particular action or only requires it to achieve a certain result, while leaving it free to choose the means of doing so.' The essential basis of the distinction is that obligations of conduct, while they will have some purpose or result in mind, determine with precision the means to be adopted; hence they are sometimes called obligations of means. By contrast, obligations of result do not do so, leaving it to the State party to determine the means to be used.")

8.42. The choice of the word "material" over the word "fundamental" demonstrates that a material breach is not necessarily a breach of one of the central provisions of the treaty. "[O]ther provisions considered by a party to be essential to the effective execution of the treaty may have been very material in inducing it to enter into the treaty at all, even though these provisions may be of an ancillary character."[491] The violation of Article 5 of the Interim Accord qualifies as a material breach as one of the *raison d'être* of the Accord is the settlement of the name issue through negotiation. In fact, Security Council Res. 817 (1993) "urge[d] the parties to continue to cooperate [...] in order to arrive at a speedy settlement of their difference."

8.43. Other provisions of the Accord such as Articles 2, 3, 4 and 7 are also of central importance to the Respondent. Those are issues to which Greece has been particularly sensitive before and during the negotiation of the Accord. In particular, when the United Nations discussed the FYROM's accession to the Organisation, Greece pointed out the "guarantees that the new state harbours no territorial claims against Greece," "the cessation of all hostile propaganda" and the "termination of the use of Greek symbols"[492] as elements of concern and particular interest for Greece. Any violation of those provisions by the FYROM are necessarily to be considered as material breaches of the Interim Accord.

B. Breach of Article 6(2): Prohibition of Interference in Internal Affairs

8.44. According to Article 6(2) of the Accord:

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

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491 ILC , *Draft Articles on the Law of Treaties with commentaries*, *Yearbook of the International Law Commission 1966*, para. 9 of the commentary of Article 57 (now Article 60).

492 Memorial, Annex 30, Letter dated 6 April 1993 from the Permanent Representative of Greece to the United Nations, Antonios Exarchos, to the President of the Security Council, forwarding a letter dated 6 April 1993 to him from the Minister for Foreign Affairs of Greece, Michael Papaconstantinou, UN doc. S/25543 (6 April 1993).

8.45. Even though the FYROM has the obligation under Article 6(2) of the Interim Accord and the 1992 amendment to its own Constitution[493] not to interfere in Greece's internal affairs, it has violated this obligation "by promoting and condoning irredentism."[494] The interference in Greece's internal affairs is manifest in particular in the statements by the FYROM's officials about the existence of a "Macedonian minority" in Greece.[495] Another recent example is the statement, published on 4 February 2009 by the German newspaper "*Tageszeitung*," of the FYROM's Foreign Minister, Mr. Milososki, regarding the existence of "a Macedonian-speaking minority" in Greece "which is not allowed to use its mother tongue nor develop its cultural identity."[496] These kind of statements are in gross violation of Article 6(2) of the Interim Accord. Similarly, the assistance provided by the FYROM to support associations promoting irredentism[497] is also in contravention of Article 6(2) of the Interim Accord.

C. Breach of Article 7(1): Prohibition of Hostile Activities and Propaganda

8.46. The same can be said in respect of Article 7(1):

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

The concept of "propaganda" as presented in Article 7(1) encompasses information intended to mislead and deceive the general public through false and distorted presentations.[498]

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493 See above, para. 5 for the text of the Constitutional amendment.

494 Memorial, Annex 51, Verbal Note dated 15 May 2008 from the Greek Liaison Office in Skopje to the FYROM's Ministry of Foreign Affairs.

495 See examples of statements by Prime Minister Butskovski, Prime Minister Gruevski and Defense Minister Konjanovski, in Chapter 4, para 4.16-4.17 or 4.21.

496 Memorial, Annex 53, *Note Verbale* No. 140/G/AS 311, dated 24 February 2009 of the Ministry of Foreign Affairs of the Hellenic Republic to the FYROM's Liaison Office in Athens. See also above, para. 4.20.

497 See above, paras. 4.22-4.24.

498 See *Encyclopedia of public international law, Published under the auspices of the Max Planck Institute for Comparative and International Law under the Direction of R. Bernhardt*, Amsterdam, Elsevier Science B.V, 1997, volume III, pp. 1135 et seq. at p. 1135. For instance, the 1936 Geneva Convention concerning the use of broadcasting in the case of peace includes, in its Article 3, an obligation to prevent broadcasts "likely to harm good international understanding by statements the incorrectness of which is or

8.47. The FYROM has violated Article 7(1) of the Interim Accord e.g., on numerous occasions, by failing to protect: (i) the Greek Liaison Office from outside demonstrations[499], (ii) the residence of the Head and the Counsellor of the Greek Liaison Office[500], and (iii) the means of transport of the Greek Liaison Office and the Consular Mission as well as their personnel.[501]

8.48. Violations of Article 7(1) include the FYROM's refusal to intervene, invoking the freedom of expression, when citizens raised, on 29 March 2008, several outdoor billboards in the streets of Skopje insulting the Greek flag by replacing the cross with a swastika.[502] Another example can be found in the publication of a photograph of the Greek Prime

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ought to be known to the persons responsible for the broadcast." This obligation may be deemed customary international law or, at the very least, as an obligation of good neighbourliness. The qualification of unlawful propaganda in international law concerns incorrect or inaccurate presentations, information or statements whose objective is condemned by a given international legal norm. For instance, Article 4 of the International Convention on the elimination of all forms of racial discrimination provides that "States Parties condemn all propaganda" which attempts to promote or justify racial discrimination. In customary international law, there is a growing tendency for condemning propaganda likely to provoke or encourage any threat to peace, breach of peace or act of aggression (see UN GA Resolution 110(II) adopted on 3 November 1947, entitled 'Measures to be taken against propaganda and the inciters of a new war'). In the same vein, UN GA Resolution 127(II), adopted on 15 November 1947, and UN GA Resolution 634(VII), adopted on 16 December 1952, call upon UN Member States to combat, within their constitutional limits, the diffusion of false or distorted reports likely to injure friendly relations between States.

499 See above, para. 4.50-4.51 and 4.54.

500 See above, para. 4.53-4.55.

501 See above, paras. 4.52-4.53 and 4.55.

502 See above, para. 4.45. See also *Answer of Foreign Ministry Spokesman Mr. G. Koumoutsakos regarding Skopje billboards insulting to the Greek flag, Athens, 30 March 2008 available at* http://www.mfa.gr/www.mfa.gr/GoToPrintable.aspx?UICulture=en-US&GUID={D0ACAF24-06AB-41A1-901D-34EFAD4487ED}: Annex 134: On March 30, 2008, the spokesman of the Ministry of Foreign Affairs of Greece, Mr. Koumoutsakos, answering to a journalist's question stated, among others, that "This unacceptable poster, which was circulated via a private initiative and raised on Skopje's streets, directly insults our country's national symbol and our struggle against fascism and Nazism. This incident demonstrates the huge mistake made by those who invest in nationalism and bigotry. It also confirms, once again, the correctness of Greece's position that a necessary condition for the establishment of relations of solidarity and allied relations is, in practice, respect of good-neighborly relations between countries and peoples. Greece's ambassador to the Former Yugoslav Republic of Macedonia, Ms. A. Papadopoulou, has been instructed, within the day, to make a strong demarche to the Foreign Ministry of the neighboring country, requesting the immediate removal of the offensive billboard".

Minister wearing a Nazi uniform in the March 2008 issue of *FORUM*, a magazine owned by the FYROM's former Foreign Minister, Mr.Casule.[503]

8.49. Furthermore, since 2006, several verbal notes have been exchanged on a consistent pattern of harassment including repeated attacks perpetrated against the Greek Liaison Office in Skopje. Greek diplomatic staff have had their home and cars vandalised. Nevertheless, the FYROM has failed to take any adequate measures to prevent and remedy such incidents.[504] In the same vein, following the manifestation of 19 February 2008 of up to one thousand demonstrators chanting anti-Greek slogans and insults outside the Liaison Office, the Greek Liaison Office stressed in a Verbal Note dated February 2008 "the obvious lack of proper protection on behalf of the authorities of the host country against the latter's obligation to guarantee the accredited diplomatic missions the necessary secure environment which will allow them to properly function and discharge their duties."[505]

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[503] The photo was published on page 76 of the 31 March 2008 issue: Annex 161. Those acts have been qualified as contravening the provisions of the Interim Accord by the Greek Foreign Minister Ms. Dora Bakoyannis, in a Letter of the Minister of Foreign Affairs of the Hellenic Republic to the Minister of Foreign Affairs of the FYROM, dated 24 March 2009 under Reference 1024, forwarded through Verbal Note F.141.1/24/AS 378, dated 27 March 2009 of the Liaison Office of the Hellenic Republic in Skopje: Annex 70.

[504] See above, para. 4.56. See as examples: Verbal Note of the Hellenic Republic Liaison Office in Skopje No F/050/KG/2/AS 673, dated 29 May 2006: Annex 41; Verbal Note of the Hellenic Republic Liaison Office in Skopje No F. 050/KG./1/AS 164, dated 5 February 2007: Annex 43; Verbal Note of the Hellenic Republic Liaison Office in Skopje No F. 050/KG/2/AS 40, dated 14 January 2008: Annex 45; Verbal Note of the Hellenic Republic Liaison Office in Skopje No F. 010.GS/2/AS 218, dated 11 February 2008: Annex 46; Verbal Note of the Hellenic Republic Liaison Office in Skopje No F. 050.SA/2/AS 340 dated 29 February 2008: Annex 49; Verbal Note of the Hellenic Republic Liaison Office in Skopje No F. 050/KG/5/AS 490, dated 24 March 2008: Annex 50; Verbal Note of the Hellenic Republic Liaison Office in Skopje No F050/KG/7/AS 556, dated 7 April 2008: Annex 51; Verbal Note of the Hellenic Republic Liaison Office in Skopje No F. 010.GS/30/AS 672, dated 21 April 2008 : Annex 55; Verbal Note of the Hellenic Republic Liaison Office in Skopje No F. 050.EP/2/AS 784, dated 16 May 2008: Annex 57; Verbal Note of the Hellenic Republic Liaison Office in Skopje No F 050/KG/15/AS 856, dated 30 May 2008: Annex 58; Verbal Note of the Hellenic Republic Liaison Office in Skopje No F 010.GS/40/AS 990, dated 20 June 2008: Annex 59 ("The Liaison Office deeply regrets the fact that its premises are very often left unsupervised and trusts that the competent authorities of the country will take all adequate measures"); Verbal Note of the Hellenic Republic Liaison Office in Skopje, No F. 050.BM/1/AS 1082, dated 9 July 2008: Annex 61.

[505] See Verbal Note of the Hellenic Republic Liaison Office in Skopje, No F. 010.GS/7/AS 283, dated 20 February 2008: Annex 47; See also Verbal Note of the

8.50. Not only has the FYROM not taken any measures to prevent the attacks and hostile behaviour against Greek personnel, but it has also itself engaged in, and tolerated, propaganda. The propaganda has been exercised in various ways,[506] in particular at schools through textbooks.[507] Many of the textbooks attempt to inculcate a sense of injustice because of the partition of Macedonia in the Treaty of Bucharest of 1913.[508] The FYROM's propaganda is closely related to its irredentism and territorial claims. History textbooks insist on the artificial construction of the historic "Greater Macedonia" and present Greek historical figures as being their ancestors. For example, students can read in a Grade V history textbook that "our fatherland has a long and rich history. In ancient times it was a powerful state. In the reign of Philip II, Macedonia was the most powerful state in the Balkan Peninsula. In the reign of his son, Alexander of Macedonia, it spread out over three continents, and was a world power."[509] The textbooks contain maps that wrongfully substantiate the existence of the "Greater Macedonia," which encompass a great part of the actual province of Greek Macedonia.[510] Through historical inaccuracies in the school textbooks and the "pro-minority" policy of the FYROM authorities,[511] people of the FYROM are induced in feeling the injustice of living in a partitioned State and thus hatred for their neighbours. This propaganda, directly organised by the FYROM's authorities or indirectly through the funding of organisations or festivities,[512] is a violation of Article 7(1) of the Interim Accord. Furthermore, because the propaganda is closely related to the FYROM's

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Hellenic Republic Liaison Office in Skopje, No F 010.GSD/14/AS 314, dated 26 February 2008: Annex 48; see also above, para. 4.50-4.51.

506 See above, paras. 4.28-4.37.

507 See para. (e) of the Verbal Note of the Hellenic Republic Liaison Office in Skopje No F. 141.1/48/AS 488, dated 15 April 2009: "the former Yugoslav Republic of Macedonia has defied the territorial integrity of Greece, through a series of actions and official statements, including the making, publication and promotion of maps, depicting large areas of Greek territory as part of a distinct 'Macedonian' entity": Annex 71.

508 See above, para. 4.31; see as an example: Blaze Ristovski, Shukri Rahimi, Simo Mladenovski, Stojan Kiselinovski and Todor Cepreganov, *History Textbook, Grade VII,* Skopje 2005, Reprinted 2008, p. 131, Annex 94: "The Bucharest Peace Treaty had grave political, ethnic and economic consequences for the Macedonian people. The treaty meant that the territorial and ethnic unity of Macedonia was disrupted".

509 Kosta Atsievski, Darinka Petreska, Violeta Ackoska, Naum Dimovski and Vanco Gjorgjiev, *History Textbook, Grade V,* Skopje 2005, Reprinted 2008, p. 4: Annex 91.

510 See above, para. 4.30.

511 See above, paras. 4.28-4.31 and 4.36.

512 See above, paras 4.38-4.45.

irredentism, it is also in violation of the FYROM's obligations under Articles 2, 3 and 4 of the Interim Accord.

8.51. To insist that this is only an obligation of conduct bearing upon the FYROM is to ignore that it *is* a legally binding obligation, the breach of which entails FYROM's responsibility[513]. And this too was a crucial element which had induced Greece to sign the Interim Accord. Greece raised its concern over the FYROM's attitude of propaganda before and during the negotiations of the Accord, in particular during the review of the FYROM membership application to the United Nations.

> "There are numerous indications that the expansionist propaganda aimed at the neighbouring Macedonian province of Greece continues unabated. This is shown, in particular, through the wide circulation within F.Y.R.O.M. of maps portraying a greater Macedonia i.e. incorporating parts of the territory of all its neighbouring states, and of hostile literature usurping Greek symbols and heritage."[514]

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[513] *Report of the International Law Commission on the Work of its fifty-third session,* doc. A/56/10 (2001), *Draft Articles on Responsibility of States on Internationally Wrongful Acts,* p. 145, para. 14 of the commentary of Article 14: "Obligations of prevention are usually construed as best efforts obligations, requiring States to take all reasonable or necessary measures to prevent a given event from occurring, but without warranting that the event will not occur." See also, ICJ, Judgment, 26 February 2007, *Case concerning the application of the Convention on the prevention and punishment of the crime of genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, para. 430: "the obligation in question is one of conduct and not one of result, in the sense that a State cannot be under an obligation to succeed, whatever the circumstances, in preventing the commission of genocide: the obligation of State parties is rather *to employ all means reasonably available to them*, so as to prevent genocide so far as possible" (emphasis added).

[514] Memorial, Annex 26, Letter dated 25 January 1993 from the Permanent Representative of Greece to the United Nations, Antonios Exarchos, to the United Nations Secretary-General, forwarding a letter and annex of the same date from the Greek Minister for Foreign Affairs, Michael Papaconstantinou, to the United Nations Secretary- General, UN doc. S/25158 (25 January 1993). See also Memorial, Annex 30, Letter dated 6 April 1993 from the Greek Permanent Representative to the United Nations, Antonios Exarchos, to the President of the Security Council, forwarding a letter dated 6 April 1993 to him from the Greek Minister for Foreign Affairs, Michael Papaconstantinou, UN doc. S/25543 (6 April 1993): "The cessation of all hostile propaganda, particularly acts which could provoke public opinion and impede efforts towards establishing good neighbourly relations" was one of the key elements for Greece when considering the draft resolution for the admission of the FYROM to the United Nations.

Therefore, a breach by the FYROM of Article 7(1) clearly constitutes a material breach within the meaning of Article 60 of the Vienna Convention.

D. Breach of Article 7(2): Use of the "Sun of Vergina" by the FYROM

8.52. One additional violation of the Interim Accord is to be found in the continued improper use by the FYROM of the "Sun of Vergina."[515] According to Article 7(2) of the Interim Accord:

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

This provision was particularly important for Greece.[516] In a draft agreement of 14 May 1993 prepared by U.N. Mediators Cyrus Vance and Lord Owen, Co-Chairmen of the Steering Committee, it was mentioned in draft Article 7(2) that "the Republic of Nova Makedonija agrees, as a *confidence building measure*, not to use the Vergina Sun *in any way*."[517]

8.53. In a letter dated 3 July 1995,[518] the World Intellectual Property Organisation (WIPO) informed Greece that it had recorded its request to have the Sun of Vergina recognised as a Greek State emblem, protected under Article 6ter of the Paris Convention of the Protection of Industrial Property.[519] In a Verbal Note dated 12 August 1995 addressed to the WIPO, the FYROM objected to the protection of the Sun of Vergina under its three forms as a State emblem of Greece, "due to the fact that

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[515] On the history of this symbol, see above, para. 2.19.

[516] It was made clear that the symbol referred to in article 7(2) is the Sun of Vergina in all its forms, in the letter of the Minister of Foreign Affairs of Greece, Mr. Karolos Papoulias, addressed to the Special Envoy of the UN Secretary General, Mr. Cyrus Vance, on 13 September 1995, which is the date of signing of the Interim Accord: Annex 3.

[517] Memorial, Annex 33, Letter dated 26 May 1994 from the United Nations Secretary-General, Boutros Boutros-Ghali, to the President of the Security Council, forwarding the Report of the Secretary-General submitted pursuant to resolution 817, UN doc. S/25855 (28 May 1993) (emphasis added).

[518] See letter of the Minister of Foreign Affairs of Greece, Mr. Karolos Papoulias, to the International Bureau of the World Intellectual Property Organisation, dated 22 May 1995, and the letter of reply of the Director General of WIPO dated 3 July 1995, together with Note C.5682-551 of WIPO, dated 3 July 1995, addressed to the States Parties to the Paris Convention: Annex 2.

[519] Article 6 ter of the Paris Convention for the Protection of Industrial Property.

they are a copy of the state flag of the Republic of Macedonia."[520] Despite the conclusion of the Interim Accord in September 1995, the FYROM has never withdrawn its objection.[521]

8.54. As noted in Chapter 4 above, the FYROM continues to use the "Sun of Vergina" as a symbol. For example, in the August 2004 issue of the official magazine of the FYROM's Ministry of Defence, a short article entitled "The emblem of the Technical Regiment of the Army," displayed a photo of the Sun of Vergina.[522] In 2007, during the official celebration of the Ilinden Uprising in Krushevo, which was attended by Prime Minister Gruevski, the program included the use of flags displaying the Sun of Vergina.[523] In 2007 the Ministry of Sciences financed the edition of a treatise entitled "Macedonian National Minorities in Neighbouring Countries" in the paper cover of which the Sun of Vergina is displayed twice, one of which was in the background of a map of "Greater Macedonia".[524]

8.55. The Sun of Vergina is constantly displayed on the shield of the Statue of Alexander the Great built on 15 October 2006 at the city of Prilep as well as on the pavement surrounding the Statue.[525] The Sun of Vergina is also regularly displayed at the entrance of the Special Hospital for surgical diseases "Philip II," founded nine years ago and located at the premises of the military hospital of Skopje as well as on the webpage of the Special Hospital.[526]

8.56. In 2008, the Sun of Vergina was used in a televised program, carried on behalf of the FYROM's government, bearing the title "Macedonia Timeless."[527] Recently, the Sun of Vergina was displayed on the pavement of the main square in the municipality of Gazi Baba.[528] It was also displayed on the website of the State Agency of Youth and Sport, and in a leaflet, published and distributed by the FYROM's Directorate of Culture and Art of the Ministry of Culture.[529]

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520 See above, para 4.57.
521 See above, para 4.58.
522 See *ibid.*
523 See *ibid.*
524 See *ibid.*
525 See para 4.60.
526 See *ibid.*
527 See above para 4.59.
528 See *ibid.*
529 See *ibid.*

8.57. These acts are intentional violations by the FYROM of its obligations under Article7(2) of the Interim Accord – use of the Sun of Vergina on a national flag – and Article 7(3) – use of Greek symbols.

E. Breach of Article 7(3): Use of Historical and Cultural Symbols

8.58. Similarly, there is evidence that the FYROM has breached its obligation under Article 7(3):

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

The crux of this provision is that each party should abstain from using symbols constituting part of the historic or cultural patrimony of the other party, given the fact that such behaviour could undermine the objectives of the Interim Accord, especially the establishment of good neighbourly relations and the avoidance of hatred or hostility against each other. The drafters of the Interim Accord wanted to prevent the emergence of a conflict between the two States over the use by one of the parties of a historic or cultural symbol.

8.59. As shown in Chapter 4, the FYROM obstinately uses Greece's historical and cultural symbols in clear breach of this provision. [530] The examples given thereof bear witness to the FYROM's attempt to appropriate Greece's historic and cultural patrimony. The FYROM is therefore in material breach of Article 7(3) of the Interim Accord, as recently noted again, in a Verbal Note dated 15 April 2009, concerning "the decision to name the main stadium of Skopje after 'Philip II, the Macedon'" which "constitute[s] a material breach of article 7 of the Interim Accord."[531] Furthermore, those acts also constitute a violation of Article 7(1) of the Interim Accord since they are acts of hostile propaganda by the FYROM.

F. Breach of Article 11: Reference to the FYROM Under the U.N. Name

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[530] See above, paras. 4.61-4.64.

[531] Verbal Note from the Hellenic Republic Liaison Office in Skopje to the Ministry of Foreign Affairs of the FYROM, No. 141.1/48/AS 488, dated 15 April 2009: Annex 71. See also "Decision on the renaming of the Stadium of Skopje," *Official Gazette of the Republic of Macedonia,* No 164 (29 December 2008), p. 7: Annex 107.

8.60. Last – but certainly not least – the FYROM has breached Article 11(1) of the Interim Accord:

> "Upon entry into force of this Interim Accord, the Party of the First Part agrees not to object to the application by or the membership of the Party of the Second Part in international, multilateral and regional organizations and institutions of which the Party of the First Part is a member; however, the Party of the First Part reserves the right to object to any membership referred to above if and to the extent the Party of the Second Part is to be referred to in such organization or institution differently than in paragraph 2 of United Nations Security Council resolution 817 (1993)."

As shown above in this Counter-Memorial,[532] the FYROM has breached this obligation in many different occasions, notably by insisting on using its constitutional name in the U.N. One episode in particular is significant in this respect: President Crvenkovski's address to the General Assembly,[533] while it stands out in its public and intentional violation of the Interim Accord, it is part of a larger pattern.[534]

8.61. A breach by the FYROM of its obligation not "to be referred to in such organization or institution differently than in paragraph 2 of United Nations Security Council resolution 817 (1993)" should be considered as "material." Moreover, such a breach lends itself particularly well to the application of the *exceptio* since, as noted by the ILC:

> "[…] the exception of non-performance (*exceptio inadimpleti contractus*) is best seen as a specific feature of *certain mutual or synallagmatic obligations* and not a circumstance precluding wrongfulness. The principle that a State may not benefit from its own wrongful act is capable of generating consequences in the field of State responsibility but it is rather a general principle than a specific circumstance precluding wrongfulness."[535]

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532 See above, paras. 7.91-7.93.

533 See above, para. 7.92.

534 See above, paras. 7.92-7.93.

535 ILC, Draft articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, *Yearbook of the International Law Commission 2001*, vol. II, part two, p. 72 (emphasis added). See also Judge Hudson's Individual Opinion in the case concerning the *Diversion of Water from the Meuse (Netherlands v Belgium)*: "It

Since, in itself, the obligation bearing upon Greece by virtue of Article 11(1), is synallagmatic, the exception of non-performance fits well with the principle.

8.62. Since the FYROM has grossly breached its part of the obligations imposed upon the parties by Article 11(1), this would have been a more than sufficient basis for Greece not to comply with its own part of those obligations. This being said, it must be repeated that, by no means, Greece accepts the accusations by the FYROM that it has breached the obligation in question. Simply, it results from the present Chapter that, had this been the case, it would have been entitled to do so on the basis of the *exceptio*.

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would seem to be an important principle of equity that where two parties have assumed an identical or a reciprocal obligation, one party which is engaged in a continuing non-performance of that obligation should not be permitted to take advantage of a similar non-performance of that obligation by the other party. […]The *exceptio non adimpleti contractus* required a claimant to prove that he had performed or offered to perform his obligation (PCIJ, Series A/B No. 70, p. 77).

CHAPTER 9: REMEDIES

I. INTRODUCTION

9.1. In its Submissions, the FYROM:

> "Requests the Court:
>
> (i) to adjudge and declare that the Respondent, through its State organs and agents, has violated its obligations under Article 11(1)of the Interim Accord; and
>
> (ii) to order that the Respondent immediately take all necessary steps to comply with its obligations under Article 11(1) of the Interim Accord, and to cease and desist from objecting in any way, whether directly or indirectly, to the Applicant's membership of the North Atlantic Treaty Organisation and/or of any other "international, multilateral and regional organizations and institutions" of which the Respondent is a member, in circumstances where the Applicant is to be referred to in such organization or institution by the designation provided for in paragraph 2 of United Nations Security Council resolution 817 (1993)."[536]

9.2. Greece will discuss successively each of these requests; it will also briefly discuss the rather sibylline and inconsistent "Reservation of Rights" made by the Applicant in paragraph 6.26 of its Memorial.

II. THE FYROM'S FIRST REQUEST

9.3. The first relief sought by the FYROM is "a declaration that the Respondent has acted illegally." It does not call for extensive rebuttal. As Greece has shown in this Counter-Memorial:

> a. the Court has no jurisdiction to decide on the merits of the case brought by the FYROM;
>
> b. even admitting the Court has jurisdiction, *quod non*, Greece has not breached its obligation under Article 11 of the Interim Accord;

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536 Memorial, p. 123.

c. even if Greece had breached its obligation, *quod non*, it would have been entitled to do this, given the numerous material breaches of the Accord attributable to the FYROM.

9.4. This being said, if, against the evidence provided by Greece, the Court were to find that it has jurisdiction and that the decision of the NATO Summit of Bucharest – which is the only legal act the FYROM can complain of – constituted an internationally wrongful act entailing the responsibility of the Hellenic Republic, such a declaration by the Court could have no effect and would be incompatible with the Court's exclusively judicial function.[537] The same would be true if the Court were to accept the FYROM's contentions of Greece's alleged breach without, at the same time, finding the numerous and serious violations of the 1995 Interim Accord by the FYROM.

9.5. Concerning the first point, it will be shown in the next section of this Chapter that a hypothetical favourable finding for the FYROM could have no effect at all since it is only NATO, which is absent from this proceeding, which could give effect to the Court's decision. As the Court recalled in its 2004 Judgment in the case concerning *Legality of Use of Force*:

> "A decision of the Court should have, in the words of the Judgment in the *Northern Cameroons* case, 'some practical consequence in the sense that it can affect existing legal rights or obligations *of the parties*, thus removing uncertainty from *their* legal relations' (*I.C.J. Reports 1963*, p. 34; emphasis added)."[538]

If only from this point of view, the circumstances of the present case are very different from those prevailing in the *Congo v. Uganda* case which has been invoked by the FYROM as a precedent.[539]

9.6. As for the second point (a one-sided declaration failing to take the FYROM's breaches into account), it must be recalled that, as shown in Chapters 4 and 8 of this Counter-Memorial, the FYROM has seriously breached a number of its obligations under the 1995 Interim Accord. Therefore, even if the Court were to find that it has jurisdiction, that

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[537] *Northern Cameroons (Cameroon v. United Kingdom)*, *Preliminary Objections, Judgment, I.C.J. Reports 1963*, p. 37.

[538] *Legality of Use of Force (Serbia and Montenegro v. Belgium), Preliminary Objections, Judgment*, *I.C.J. Reports 2004*, pp. 295-296, para. 38.

[539] See Memorial p. 114, para. 6.14.

Greece had breached its obligation under Article 11(1) of the Accord, and that the *exceptio non adimpleti contractus* cannot be invoked, it would be unjust for the Court to make the declaration requested by the FYROM without, at the same time, taking account of the material breaches attributable to that State.

9.7. The FYROM has explained that "[t]he relief sought has been narrowly crafted to meet the specific needs of the particular dispute that has been referred to the Court by the Applicant, and does not require the Court to express views on other matters that may divide the Parties but are not in issue before the Court."[540] As narrow and self-serving as the petition may be, the Applicant cannot deprive the Court of its jurisdiction – which is "to decide in accordance with international law such disputes as are submitted to it" – by artificially redefining the scope of the dispute.

9.8. As the Court made clear in the *Nuclear Tests* cases:

> "[T]he Court possesses an inherent jurisdiction enabling it to take such action as may be required [...] to provide for the orderly settlement of *all matters* in dispute [...].[541]

That mandate could not be achieved by a partial judgment limiting itself to declaring that Greece would have breached its obligation under Article 11(1) of the Interim Accord, while ignoring the numerous breaches of that same instrument by the FYROM. Once again, it must

> "be emphasized that the Court possesses an inherent jurisdiction enabling it to take such action as may be required, on the one hand to ensure that the exercise of its jurisdiction over the merits, if and when established, shall not be frustrated, and on the other, to provide for the orderly settlement of all matters in dispute, to ensure the observance of the 'inherent limitations on the exercise of the judicial function' of the Court, and to 'maintain its judicial character' (*Northern Cameroons, Judgment, I.C.J. Reports 1963,* at p. 29). Such inherent jurisdiction, on the basis of which the Court is fully empowered to make whatever findings may be necessary for the purposes just indicated, derives from

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[540] Memorial, p. 114, para. 6.2.

[541] *Nuclear Tests (Australia* v. *France), Judgment*, *I.C.J. Reports* 1974, p. 259, para. 23; *Nuclear Tests (New Zealand* v. *France), Judgment*, *I.C.J. Reports* 1974, p. 463, para. 23 (emphasis added).

> the mere existence of the Court as a judicial organ established by the consent of States, and is conferred upon it in order that its basic judicial functions may be safeguarded."[542]

III. THE FYROM'S SECOND REQUEST

9.9. The second relief sought by the FYROM is "an order that the Respondent take all necessary steps to restore the Applicant to the *status quo ante* and to refrain from any action that violates its obligation under Article 11(1) in the future."[543] The FYROM links this relief with its "continuing desire to receive an invitation to join NATO."[544]

9.10. In the first place, this does not correspond to the meaning of the Safeguard Clause. The Safeguard Clause operates where the FYROM is to be referred to in an organisation other than as designated in SC res 817 (1993). To prevent the clause from operating, it is not enough that the FYROM "is to be referred to" – *i.e.*, referred to once, or sporadically, or less than "for all purposes." As a consequence, the Court could not isolate a single act from the set of obligations envisaged by Article 5 of the Interim Accord, for that would amount to the Court's endorsement, in advance, of the types of violations which the FYROM has been committing and would continue to commit in the future.[545]

9.11. It bears repeating that Greece does not have the power to decide itself on the FYROM's admission to NATO. Moreover, it is beyond the power of the Court to order the FYROM's admission to NATO. Therefore, a decision by the Court granting the FYROM's request would be devoid of any effect, an outcome incompatible with the Court's inherent judicial function.[546]

9.12. As the Court made clear in the *Northern Cameroons* case:

> "it is not the function of a court merely to provide a basis for political action if no question of actual legal rights is involved. Whenever the Court adjudicates on the merits of a dispute, one or the other party, or both

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542 *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment*, *I.C.J. Reports 1985*, p. 23, para. 19.
543 Memorial, para. 6.1.
544 Memorial, para. 6.18.
545 See above, paras. 8.34-8.42.
546 See above, paras. 9.4-9.5. See also paras. 6.71-6.75.

> parties, as a factual matter, are in a position to take some retroactive or prospective action or avoidance of action, which would constitute a compliance with the Court's judgment or a defiance thereof. That is not the situation here."[547]

9.13. Nor is it the situation in the present case: the entity vested with the competence to take the decision to invite the FYROM to join NATO – which is the real objective of the Application – is not Greece but the Parties to the North Atlantic Treaty represented by the Heads of State and Government of the Member States of the North Atlantic Alliance and deciding "by unanimous agreement."[548] The FYROM cannot evade this reality by pretending that the purpose of its Application is only to seek Greece's compliance with Article 11(1), since precisely such a decision by the Court could have – and would have – no effect.

9.14. The precedents invoked by the FYROM in support of its request are not in point for the present case. The FYROM relies on cases in which the Court has ordered a State Party to a dispute to "inform the authorities" about the Court's order and to enforce it.[549] The decision of the Court had to be applied by the State *vis-à-vis* its own authorities. The FYROM's logic would require Greece to have and exercise some sort of authority within NATO which would compel that Organisation to change its opinion about the FYROM's admission. This is obviously an authority that Greece does not possess.

9.15. Moreover, as for the FYROM's requested remedies, the *status quo ante* (re-establishing the situation existing before the Bucharest Summit) was merely that of a MAP candidate.[550] That same status continues to be the status of the FYROM as of today. Therefore the remedy requested from the Court would have and could have no effect.

9.16. In sum, if the Court were to satisfy the FYROM's request it would act beyond its judicial function since:

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[547] *Northern Cameroons (Cameroon v. United Kingdom)*, *Preliminary Objections, Judgment, I.C.J. Reports 1963*, p. 38.

[548] Article 10 of the North Atlantic Treaty: "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."

[549] Memorial, pp. 120-121, paras. 6.23-6.25.

[550] See above, para. 5.33-5.47.

(a) the effect of such a finding would entirely depend on an entity other than Greece – that is on NATO; and

(b) in any case, by so doing, the Court would do no more than state the obvious, *i.e.*, that the Interim Accord – which is a treaty – must be complied with in accordance with the principle of *pacta sunt servanda*.

IV. THE FYROM'S "RESERVATION OF RIGHTS"

9.17. The FYROM's prayer at the end of its Memorial for a "reservation of rights" is also unfounded.

9.18. According to this single short paragraph:

> "In its Application, the Applicant reserved its right 'to modify and extend the terms of this Application, as well as the grounds involved'. For the avoidance of doubt, the Applicant wishes to make clear that this reservation of right extends to the relief sought, in the event that further acts of the Respondent require any such additional relief to be sought."[551]

9.19. It is difficult to discern in this sweeping and essentially vacuous assertion what rights the FYROM refers to and how they would be "reserved."[552]

9.20. Unless it is a routine precaution (and even then one of doubtful utility), the "reservation" serves no obvious purpose. If it means that the FYROM reserves its so-called "right" to "request the Court […] (ii) to order that the Respondent immediately take all necessary steps to comply with its obligations under Article 11(1) of the Interim Accord, and to cease and desist from objecting in any way, whether directly or indirectly, to the Applicant's membership of the North Atlantic Treaty Organization and/or of any other 'international, multilateral and regional organizations and institutions' of which the Respondent is a member […]":

> (i) this has already been done in the Memorial, being a word-for-word repetition of the Submissions appearing at the end of it;[553]

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551 Memorial, p. 122, para. 6.26.

552 "The Applicant reserves the right to modify and extend the terms of this Application, as well as the grounds involved." (Application, para. 25).

553 Memorial, p. 123, second request.

(ii) as for the FYROM's other prayers, they encounter the same hurdle – *i.e.*, it is inappropriate and contrary to the Court's judicial function to simply re-state the obvious: that the Interim Accord must be implemented (by *both* States);[554]

(iii) moreover, it runs against the mission of the Court which is to "decide […] such *disputes* which are submitted to it": "the Court can exercise its jurisdiction in contentious proceedings only when a dispute genuinely exists between the parties";[555] no dispute, no jurisdiction; it is therefore not for the Court to anticipate hypothetical situations and to decide upon them before they have arisen.

9.21. The "explanation" given by the Applicant for its unusual second request explains nothing:

> "The Order sought, which is consistent with the approach reflected in Article 30 of the ILC Articles, is not, however, limited to the issue of NATO membership. It also relates to other ongoing or future applications on the part of the Applicant for membership of 'any other "international, multilateral and regional organizations and institutions"', including any procedures related to the Applicant's application for membership of the European Union. This aspect of the relief sought is motivated by the Applicant's serious concern that the Respondent will adopt in relation to the EU the unlawful approach that characterized its action on 3 April 2008 in respect of NATO. An Order by the Court to deal with present and future conduct is needed to bring to an immediate end the conduct of the Respondent that is wholly inconsistent with the requirements of Article 11(1) of the Interim Accord."[556]

9.22. The FYROM gives no explanation for its "serious concern," nor does it recall that the admission process within the EU is a long and rigorous one and that the negotiations with the Council have yet even to start. The FYROM applied to join the EU in March 2004. As the General

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[554] See ICJ, Judgment, 13 July 2009, *Dispute regarding navigational and related rights (Costa Rica v. Nicaragua)*, paras. 148, 150 and 155.

[555] *Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, p. 271, para. 57; *Nuclear Tests (New Zealand* v. *France), Judgment, I.C.J. Reports 1974*, p. 477, para. 60.

[556] Memorial, pp. 119-120, para. 6.21 – footnote omitted; see also p. 114, para. 6.4.

Affairs Council declared during its Brussels meeting on 7 and 8 December 2009:

> "32. The Council notes that the Commission recommends the opening of accession negotiations with the former Yugoslav Republic of Macedonia and will return to the matter during the next Presidency.
>
> 33. Maintaining good neighbourly relations, including a negotiated and mutually acceptable solution on the name issue, under the auspices of the UN, remains essential. The Council is encouraged by recent positive developments concerning the relations between Greece and the former Yugoslav Republic of Macedonia."[557]

9.23. Moreover, the FYROM's threat to implement its "reservation of rights" would materially modify and extend the scope of the dispute as clearly defined in the Memorial:

> "To be clear, and as described in Chapter V, *the Applicant is concerned only* with the international responsibility of the Respondent, arising out of the actions attributable to it in relation to its objection to *the Applicant's membership of NATO*."[558]

9.24. As recently noted by the Court in a case where the Applicant had "reserved its 'right to supplement or to amend' the Application":[559]

> "[t]here is no doubt that it is for the Applicant, in its Application, to present to the Court the dispute with which it wishes to seise the Court and to set out the claims which it is submitting to it" (*Fisheries Jurisdiction (Spain* v. *Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, p. 447, para. 29). Article 40, paragraph 1, of the Statute of the Court requires moreover that the 'subject of the dispute' be indicated in the Application; and Article 38, paragraph 2, of the Rules of Court requires 'the precise

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[557] Conclusions of the 2984th General Affairs Council meeting on enlargement/stabilization and association process, Brussels, 7 and 8 December 2009, endorsed by the European Council, Conclusions, 10/11 December 2009, para. 39: Annex 14: "The European Council endorses the Council conclusions of 8 December 2009 on Enlargement and the Stabilisation and Association Process."

[558] Memorial, p. 115, para. 6.6 (emphasis added by Greece).

[559] ICJ, Judgment of 8 October 2007, *Case concerning territorial and maritime dispute between Nicaragua and Honduras in the Caribbean Sea*, para. 104.

> nature of the claim' to be specified in the Application. In a number of instances in the past the Court has had occasion to refer to these provisions. It has characterized them as 'essential from the point of view of legal security and the good administration of justice' and, on this basis, the Court held inadmissible certain new claims, formulated during the course of proceedings, which, if they had been entertained, would have transformed the subject of the dispute originally brought before it under the terms of the Application (*Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992,* p. 267, para. 69; *Fisheries Jurisdiction (Spain* v. *Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, p. 447, para. 29; see also *Prince von Pless Administration, Order of 4 February 1933, P.C.I.J., Series A/B, No. 52*, p. 14, and *Société Commerciale de Belgique, Judgment, 1939, P.C.I.J., Series A/B, No. 78*, p. 173).[560]

9.25. Extending an Application expressly limited to "the international responsibility of the Respondent, arising out of the actions attributable to it in relation to its objection to *the Applicant's membership of NATO*" to the Respondent's alleged responsibility for a future postulated objection to the admission of the FYROM in other organisations would clearly transform "the subject of the dispute originally brought before" the Court.

9.26. There can therefore be no doubt that the "reservation of rights" invoked by the FYROM is inadmissible and must be dismissed straightaway.

[560] *Ibid.*, para. 108. See also ICJ, Judgment of 4 June 2008, *Certain questions of mutual assistance in criminal matters (Djibouti v. France)*, para. 87.

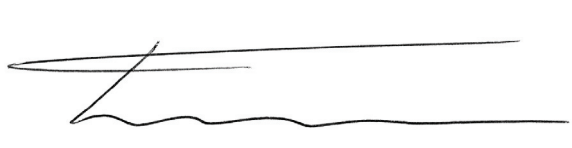
SUBMISSIONS

On the basis of the preceding evidence and legal arguments, the Respondent, the Hellenic Republic, requests the Court to adjudge and declare:

(i) That the case brought by the FYROM before the Court does not fall within the jurisdiction of the Court and that the FYROM's claims are inadmissible;

(ii) In the event that the Court finds that it has jurisdiction and that the claims are admissible, that the FYROM's claims are unfounded.

19 January 2010



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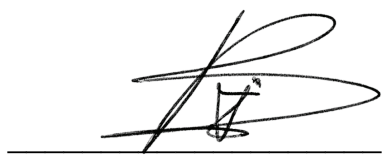
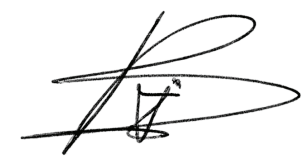


Maria Telalian

Agents of the Hellenic Republic

CERTIFICATION

We certify that the annexes are true copies of the documents referred to and that the translations provided are accurate.



Georges Savvaides

Maria Telalian

Agents of the Hellenic Republic

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Annex 17 Additional Protocol to the Agreement among the States Parties to the North Atlantic Treaty and the other States participating in the Partnership for Peace regarding the status of their forces, Brussels 19 June 1995

Annex 18 NATO Press Release M-1 (97) 81, *Madrid Declaration on Euro-Atlantic Security and Cooperation, Issued by the Heads of State and Government,* 8 July 1997

Annex 19 *NATO Handbook Documentation,* NATO Office of Information 1999, pp. 166-193, 335-369

Annex 20 Press Release NAC-S (99)64, *An Alliance for the 21st Century. Washington Summit Communiqué issued by the Heads of State and Government in the meeting of the North Atlantic Council in Washington, D.C.,* 24 April 1999

Annex 21 Press Release NAC-S(99)66, *Membership Action Plan (MAP),* dated 24 April 1999

Annex 22 *NATO Handbook,* Public Diplomacy Division, 2006, pp. 33-41,183-190

Annex 23 NATO Press Release (2006)150, *Riga Summit Declaration, Issued by the Heads of State and Government participating in the meeting of the North Atlantic Council in Riga on 29 November 2006*

Annex 24 NATO, "Prime Minister of former Yugoslav Republic of Macedonia visits NATO", 14 February 2007, available at: http://www.nato.int/cps/en/natolive/news_7492.htm

Annex 25 NATO Press Release, (2007) 130, *Final Communiqué. Ministerial meeting of the North Atlantic Council held at NATO Headquarters Brussels,* 7 December 2007

Annex 26 Joint Press Point with NATO Secretary General Jaap de Hoop Scheffer and the Prime Minister of the FYROM, Nikola Gruevski, 23 January 2008, available at : www.nato.int/cps/en/natolive/opinions_7381.htm

Annex 27 NATO, Press release, *Prime Minister of FYROM discusses membership aspirations with NATO Allies*, 23 January 2008, available at : http://www.nato.int/docu/update/2008/01-january/e0123b.html

Annex 28 Opening Statement by NATO Secretary General at the Meeting of the North Atlantic Council, 6 March 2008, available at: http://www.nato.int/cps/en/natolive/opinions_7550.htm

Annex 29 Press Conference by NATO Secretary General following the Meeting of the North Atlantic Council of 6 March, 2008, available at: http://www.nato.int/cps/en/natolive/opinions_7551.htm

Annex 30 Press Briefing by NATO Spokesman, James Appathurai, 3 April 2008, available at: http://www.nato.int/docu/speech/2008/s080403e.html

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Annex 32 NATO Press Release (2008) 153, *Final Communiqué. Meeting of the North Atlantic Council at the level of Foreign Ministers held at NATO Headquarters, Brussels,* 3 December 2008

Annex 33 Press Conference by NATO Secretary General Jaap De Hoop Scheffer after the informal Meeting of NATO Defence Ministers, with Invitees with non NATO ISAF Contributing Nations, Cracow, Poland, dated 19 February 2009, available at: http://www.nato.int/docu/speech/2009/s090219c.html

Annex 34 NATO, Speech by NATO Secretary General Jaap de Hoop Scheffer at the International Conference “NATO Enlargement Ten Years On Achievement, Challenges, Prospects”, dated 12 March 2009, available at : http://www.nato.int/cps/en/natolive/opinions_51768.htm

Annex 35 NATO Press Release (2009) 044, *Strasbourg/Kehl Summit Declaration Issued by the Heads of State and Government participating in the meeting of the North Atlantic Council in Strasbourg/Kehl on 4 April 2009*

Annex 36 NATO Press Release (2009) 190 *Final Statement-Meeting of the North Atlantic Council at the level of Foreign Ministers held at NATO Headquarters, Brussels,* dated 4 December 2009

Annex 37 NATO, "NATO summit meetings", available at: http: //www.nato.int/issues/summits/index.html

Annex 38 NATO, "NATO enlargement", available at: http://www.nato.int/cps/en/natolive/topics_49212.htm

DIPLOMATIC CORRESPONDENCE

Annex 39 Letter from the Prime Minister of the FYROM to the Minister of Foreign Affairs of Greece, dated 21 January 1999

Annex 40 Letter from the Minister of Foreign Affairs of Greece to the Prime Minister of the FYROM, dated 22 January 1999

Annex 41 Verbal Note of the Hellenic Republic Liaison Office in Skopje No F/050/KG/2/AS 673, dated 29 May 2006

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Annex 81 School Maps of the FYROM, Svetozar Naumovski, Novica Veljanovski, Simo Mladenovski and Stojan Kiselinovski, *History Textbook, Grade II*, Skopje 1992 at p. 44, Blagoj Cukarski (ed.), *History Atlas for primary school*, Skopje 1997 at p.p. 72 and 85

Annex 82 "Law on Scientific and Research Activities", *Official Gazette of the Republic of Macedonia*, No 13, 15 March 1996

Annex 83 Jove Dimitrija Talevski, *The Borders of the Republic of Macedonia/ Granicite na Republika Makedonije*, Herakli Komerc, Bitola, 1998, p.300, maps number 1, 3, 4, 5 and 7 at pp. 22-29

Annex 84 Novica Veljanovski, Simo Mladenovski, Stojan Kiselonovski and Svetozar Naumovski, *History Textbook, Grade VIII*, Skopje 1998, p. 38

Annex 85 Aleksandar Stojmilov, *Geography Textbook*, Grade II, Skopje 2002, p. 93

Annex 86 Vance Stojcev, *Military History of Macedonia*, volumes I and II, Published by the Military Academy "General Mihailo Apostolski", Jugoreklam, Skopje 2004

Annex 87 *Defense*, No 100, August 2004, Official magazine of the Ministry of Defense of the FYROM, p. 33

Annex 88 "Program for Celebration Anniversaries of Major Events and Important Persons for the year 2004", *Official Gazette of the Republic of Macedonia* No 6, 13 February 2004, p.4 and "Decision on Fund Distribution from the Budget of the Republic of Macedonia for the year 2004 to Finance Associations and Foundations", *Official Gazette of the Republic of Macedonia* No 41, 24 July 2004, pp. 12-13

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Annex 93 Map of Macedonia and the Balkans in prehistoric times in Kosta Atsievski, Darinka Petreska, Violeta Ackoska, Naum Dimovski and Vanco Gjorgjiev, *History Textbook, Grade V*, Skopje 2005, Reprinted 2008, p. 20 as well as map of Macedonia at the time of the Ilinden uprising in Blaze Ristovski, Shukri Rahimi, Simo Mladenovski, Stojan Kiselinovski and Todor Cepreganov, *History Textbook, Grade VII*, Skopje 2005, Reprinted 2008, p. 120

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