

DECLARATION OF JUDGE BENNOUNA

[English Original Text]

Exceptio non adimpleti contractus — Synallagmatic obligations — Counter-measures — Role of the judge — Dynamic analysis of international law.

My aim, in this declaration, is simply to point out that the Court has chosen to evade certain key legal issues raised and discussed at length by the Parties, sheltering behind its assessment of the facts relied on in support of the Parties' arguments, in order to conclude that it need not address those issues.

Thus the Court, after recalling the arguments of the Parties concerning the application to this case of the *exceptio non adimpleti contractus*, is content to conclude that “[t]he Respondent has thus failed to establish that the conditions which it has itself asserted would be necessary for the application of the *exceptio* have been satisfied in this case”, adding: “It is, therefore, unnecessary for the Court to determine whether that doctrine forms part of contemporary international law.” (Judgment, para. 161.)

First, the issue is not about determining whether or not a given theory is recognized by general international law, but rather of ascertaining the scope, in general international law, of the principle of reciprocity, presented as *exceptio non adimpleti contractus*, with regard to the obligations of the Parties under the Interim Accord and, specifically, Article 11 thereof.

Even if the status of the exception in general international law remains uncertain, as noted by certain scholars (J. Crawford and S. Olleson, “The Exception of Non-Performance: Links between the Law of Treaties and the Law of State Responsibility”, *Australian Year Book of International Law*, 2000, Vol. 21), the fact is that, in the past, the Court has frequently revisited concepts, institutions or norms, by taking into account the process of their evolution over time in accordance with the needs of the international community.

The Court has thus demonstrated that its role, as a world court with general jurisdiction, goes beyond the resolution, on a case-by-case basis, of the disputes submitted to it.

The Court could accordingly have taken the opportunity in the present case to emphasize that the *exceptio* can only be contemplated, in general international law, under a strict construction of reciprocity in the implementation of certain international obligations, where the implementation of one is inconceivable without the other. These are obligations of a strictly interdependent nature. The Court thus considered in the case of *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)* that: “Djibouti cannot rely on the principle of reciprocity”, because the Convention on Mutual Assistance in Criminal Matters con-

cluded with France does not provide that “the granting of assistance by one State in respect of one matter imposes on the other State the obligation to do likewise when assistance is requested of it in turn” (*Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, Judgment, *I.C.J. Reports 2008*, p. 221, para. 119).

In the present case, the Court could have reached the same conclusion in addressing the *exceptio*, since Greece’s obligation not to oppose the admission of the FYROM to NATO does not depend on the latter’s implementation of some other obligation included in the Interim Accord, with the exception of that laid down in the second clause of Article 11, paragraph 1, namely its agreement to join NATO under its provisional name. Both obligations can be considered as synallagmatic: accession under its provisional name on the one side, and the non-objection to admission on the other. The scope of the exception stops there, and cannot concern the entire Interim Accord, presented by Greece as a legal transaction, a *negotium*, or a balanced exchange of reciprocal obligations in the context of a *modus vivendi* (CR 2011/8, Abi-Saab).

In the alternative, Greece argued that its objection to the admission of the FYROM to membership of NATO can be justified as a countermeasure, proportional to the breaches of the Interim Accord allegedly committed by the FYROM. Once again, the Court provided an account of the Parties’ arguments and then concluded that it “rejects the Respondent’s claim that its objection could be justified as a countermeasure precluding the wrongfulness of the Respondent’s objection to the Applicant’s admission to NATO”, basing itself on a factual finding, namely that there had been no violation of the Interim Accord as alleged against the Applicant. The Court adds that: “there is no reason for [it] to consider any of the additional arguments advanced by the Parties with respect to the law governing countermeasures” (Judgment, para. 164).

I believe that, after recalling that, even if it is yet to be established that the legal régime of countermeasures, as set forth in Articles 49 to 54 of the International Law Commission’s Draft Articles on the Responsibility of States for Internationally Wrongful Acts (annexed to resolution 56/83 of 12 December 2001 of the General Assembly of the United Nations) is of a customary nature, the Court could have pointed out that that régime nonetheless provides certain procedural conditions for its implementation (Art. 52), which were not met in this case, notably the duty to “notify the responsible State of any decision to take countermeasures and offer to negotiate with that State”. Since Greece never fulfilled this obligation, it cannot, in any case, invoke the right to take countermeasures in the present case.

Of course, whenever the Court considers a particular legal régime, it must bear in mind the overall legal context in which such a régime operates. The Vienna Convention on the Law of Treaties, in providing, in Article 31.3 (*c*), concerning the general rule of interpretation, that “[t]here shall be taken into account, together with the context . . . any

relevant rules of international law applicable in the relations between the parties”, thus underlines the existing interconnection, not only between different obligations of States, but also between the different areas of international law. In considering this interconnection, the Court cannot ignore the general architecture of this branch of the law, including the values that underpin it.

In a fragmented community, governed by a law which contains many lacunae, as is the case for the international community, the judge owes it to himself to engage in a dynamic analysis of international law, taking account of its temporal and material evolution, and thus to go beyond the resolution on a case-by-case basis of the disputes submitted to him.

(Signed) Mohamed BENNOUNA.
