

Bilateral barriers or good neighbourliness?
The role of bilateral disputes in the EU
enlargement process

Arjan Uilenreef

June 2010

Netherlands Institute of International Relations
Clingendael

Uilenreef, Arjan

Bilateral barriers or good neighbourliness? The role of bilateral disputes in the EU enlargement process / A.D. Uilenreef, The Hague, Netherlands Institute of International Relations Clingendael.
Clingendael European Papers



Desk top publishing by Birgit Leiteritz

Netherlands Institute of
International Relations Clingendael
Clingendael European Studies Programme
Clingendael 7
2597 VH The Hague
Phone number +31(0)70 - 3245384
Telefax +31(0)70 - 3282002
P.O. Box 93080
2509 AB The Hague
E-mail: cesp@clingendael.nl
Website: <http://www.clingendael.nl>

The Netherlands Institute of International Relations Clingendael is an independent institute for research, training and public information on international affairs. It publishes the results of its own research projects and the monthly 'Internationale Spectator' and offers a broad range of courses and conferences covering a wide variety of international issues. It also maintains a library and documentation centre.

© Netherlands Institute of International Relations Clingendael. All rights reserved. No part of this book may be reproduced, stored in a retrieval system, or transmitted, in any form or by any means, electronic, mechanical, photocopying, recording, or otherwise, without the prior written permission of the copyright holders. Clingendael Institute, P.O. Box 93080, 2509 AB The Hague, The Netherlands.

Table of Contents

Introduction	5
The enlargement process and the accession criteria	6
The principle of good neighbourliness	9
Overview of existing bilateral differences	13
The border dispute between Slovenia and Croatia	15
The name dispute between Greece and FYR Macedonia	23
Conclusions	28

Bilateral barriers or good neighbourliness? The role of bilateral disputes in the EU enlargement process

Arjan Uilenreef¹

Introduction

The enlargement of the European Union is often considered one of the biggest achievements of the European integration project. Since its foundation, the size of the Union has continued to grow and its membership still has a big appeal to neighbouring countries. Since the first enlargement in 1973, a large volume of literature has appeared on the subject, in which numerous enlargement rounds have been described and explained. Recently, however, a phenomenon has emerged to which EU institutions have not found the right answer and which has been scarcely researched: the increasing role that bilateral disputes play in the accession negotiations between EU member states and candidate countries.

This paper describes this phenomenon through two case studies: the border dispute between Slovenia and Croatia, and the name dispute between Greece and the former Yugoslav Republic of Macedonia (subsequently referred to as FYR Macedonia). It describes the development within the EU of the principle of ‘good neighbourliness’, including the regional approach towards the Western Balkans, tries to give an explanation for the increasing role of bilateral disputes within the enlargement process, examines whether member states are successful at playing a bilateral issue through the enlargement process and looks at the way the EU tries to deal with this.

1) Arjan Uilenreef works at the Dutch Ministry of Foreign Affairs. This paper represents the personal views of the author and does not necessarily reflect the opinions of his employer.

The enlargement process and the accession criteria

In 2009, the yearly ‘Enlargement Strategy’ of the European Commission for the first time included a paragraph entitled ‘bilateral questions’. The Commission writes therein that it expects ‘all parties concerned to make every effort towards solving outstanding bilateral issues with their neighbours [...]. Where appropriate, the Commission is ready to facilitate the search for solutions, at the request of the parties concerned’. Parties that have a disagreement are encouraged to find a solution in the spirit of ‘good neighbourliness’.² This paragraph has been included because in recent times, the enlargement negotiations have become increasingly hampered by bilateral disputes.

Before having a more detailed look at the role of bilateral disputes, a brief description will be given of the different stages of the enlargement process and the responsibilities of the various players involved in this process. Decision making on enlargement reflects the EU’s complex, multilevel character. It involves the Council, the Commission, the European Parliament, the member states (assembled in an intergovernmental conference) and the applicant country. The process starts with a membership application from a non-member state. The Council can then request the Commission to issue an Opinion (*avis*) with an analysis of the preparedness of the applicant for membership to take on the obligations of membership. On this basis the Council (this has usually been done by a Council meeting at the level of heads of state and government) can unanimously decide to award candidate membership status to a country and to start accession negotiations. The Commission proposes and the Council unanimously adopts the ‘common positions’ to be taken by the Union in these negotiations. After the EU has agreed on a position, the rotating EU presidency organises and chairs a so-called Accession Conference. These accession negotiations are essentially intergovernmental conferences, outside the framework of the Council, between the member states and the applicant country. However, the term ‘negotiations’ is slightly misleading: the applicant country has to accept

2) The European Commission, *Enlargement Strategy and main challenges*, COM(2009) 533, pp. 6.

fully the existing EU law and rules, the *acquis communautaire*, with only limited possibilities for derogations or transition periods. At the end of the accession negotiations, the Council must approve the draft accession treaty by unanimous vote and the European Parliament has to give assent with an absolute majority of its members. Subsequently, the treaty has to be signed and ratified by all member states and the applicant country.³

The Commission plays a central role in the enlargement process; in the preparation and implementation of the pre-accession strategy, as well as during the accession negotiations. The Commission carries out the initial screening with a candidate country to see how national legislation relates to the *acquis communautaire*. It acts as an honest broker between the member states during the formulation of the common negotiating position, and can be requested by the Council ‘to seek solutions with the applicant country in cases of serious disagreement between the applicant and the member states’.⁴ During the enlargement process, the Commission sees to it that the Council plays according to the rules and that the proposed conditions are in line with the applicable Copenhagen Criteria for accession. The Copenhagen Criteria prescribe that accession countries can become a member when they have stable institutions that guarantee ‘democracy, the rule of law, human rights and respect for and protection of minorities, the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union. Membership presupposes the candidate’s ability to take on the obligations of membership including adherence to the aims of political, economic and monetary union.’⁵

As guardian of the treaties and the related *acquis*, which forms a central part of the membership obligations, the Commission sees to it that matters brought forward by member states during the negotiations

3) M.J. Baun, *A wider Europe: the process and politics of European Union Enlargement* (Maryland: Rowman & Littlefield, 2000), pp. 11-15. D. Kochenov, *EU Enlargement and the Failure of Conditionality* (Alphen a/d Rijn: Kluwer Law International), pp. 57-62.

4) M.J. Baun, *A wider Europe*, pp. 17.

5) Presidency Conclusions, European Council in Copenhagen, 21-22 June 1993.

are indeed related to these requirements (for Croatia and Turkey the *acquis* that has to be adopted is divided in 35 negotiating chapters). According to this same logic, it is justified if a (single) member state addresses a specific issue under a certain chapter during the negotiations, as long as there is a direct connection with the *acquis*. For example, a member state can object within the chapter agriculture and rural development to a candidate country's non-justifiable claim as a unique country of origin for certain alcoholic beverages. A member state is even allowed to ask for adjustment of certain legislation in a candidate country when this request is related to a specific bilateral issue (e.g. border dispute), as long as this finds a clear justification in the standards set by the *acquis*. This could for example vary from uncertainty about the air traffic system in a candidate country (transport chapter) to the waste-management procedures of a neighbouring nuclear plant (energy chapter). However, as soon as a member state tries to relate a bilateral dispute to a specific negotiating chapter without a valid justification on the basis of EU law and regulations, the Commission will – whether or not supported by member states – reject this.

In spite of this central role of the Commission in the enlargement process, ultimately, member states have a decisive voice. As Dimitry Kochenov writes in his 'EU Enlargement and the Failure of Conditionality': 'It is notable that the Community Institutions, although taking part in the process of enlargement preparation, do not sign the Treaties of Accession. [...] Clearly, enlargement of the EU is not about the Union enlarging but about the Member States enlarging the Union with the help of Institutions.' When speaking of EU conditionality, he also points to the tension which results from the duality of the enlargement process. This process is on the one hand legally regulated by the relevant provisions in the EU treaties, and on the other hand influenced by the political process between the member states and the candidate countries at the negotiating table. We will see that his observation that 'law and politics follow different rationales and are most likely to come into conflict when simultaneously regulating the same issue' also applies to the manner in which the Union deals with

bilateral disputes.⁶ Before we do this, the principle of good neighbourliness – which plays a role besides the Copenhagen Criteria – and its importance during both the previous and current enlargement rounds will be examined.

The principle of good neighbourliness

Although the prominent reference to bilateral issues by the Commission in its ‘Enlargement Strategy’ is a new development and points to its increasing importance, both the term itself and the reference to good neighbourliness are not. The principle of good neighbourliness is a universal concept in international relations. The preamble of the Charter of the United Nations declares that the peoples of the United Nations ‘will practise tolerance and live together in peace with one another as good neighbours’.⁷ It is based on the universal principle in favour of peaceful resolution of disputes over the use of force. Also in the founding document of the CSCE the participating states commit themselves to endeavour to promote ‘friendly and good-neighbourly relations among themselves’.⁸

The concept of good neighbourliness in relation to the enlargement process was first introduced by the EU in 1991 in the concluding document of the ‘Pact on the Stability in Europe’, also referred to as the ‘Balladur-Plan’.⁹ The Pact focused on the countries in Central and Eastern Europe (Bulgaria, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania and Slovakia) which – after the disintegration of the Soviet Union and the Warsaw Pact – had to undergo a radical transformation if they were eventually to become part of the Union. These countries had many bilateral disagreements among

6) D. Kochenov, *EU Enlargement and the Failure of Conditionality*, pp. 312-313.

7) Charter of the United Nations and Statute of the International Court of Justice.

8) Conference on Security and Co-operation in Europe, Final Act, (Helsinki 1975), Chapter IX.

9) H. Sjursen and K.E. Smith, ‘Justifying EU foreign policy: the logics underpinning EU enlargement’, *Arena Working Papers*, January 2001.

themselves, as well as with some of the member states. These disagreements harboured serious risks for ethnic conflict in the post-communist world. The participating states decided to set up regional round tables with the aim of creating favourable conditions for good neighbourly relations. The candidate countries were encouraged to conclude bilateral and multilateral agreements, notably those guaranteeing minority rights. EU conditionality did most of the heavy lifting when it came to pursuing the necessary reforms in these countries.¹⁰

In 1997, the European Commission stated in its 'Agenda 2000'-report that before accession, applicants (which apart from the countries mentioned above also included Cyprus, Malta and Slovenia) should make every effort to solve outstanding disputes amongst themselves and with third countries. In cases where they fail to solve these disputes themselves, they should be referred to the International Court of Justice. Various bilateral issues, which were mainly related to minority issues included in the Copenhagen Criteria, were settled through EU pressure. For example, both Hungary and Slovakia acknowledged that EU-membership incentives had driven the talks on a bilateral treaty on minority rights between both countries. Two other examples of bilateral issues which were settled during the preparation for EU-accession also involved contentious minority issues. The Commission report of 1998 expressed satisfaction that Romania was preparing the foundation of a multicultural Hungarian-German university, which subsequently became operational in 2002. Lithuania and Poland agreed on numerous issues related to educational rights for the Polish minority in Lithuania and administrative-territorial reforms.¹¹ Cyprus was an important exception to this approach. In 1998, France did not want to open accession negotiations with Cyprus in the absence of a solution for the partition of the island. As a result, Greece successfully threatened to

10) J.G. Kelley, *Ethnic Politics in Europe: the Power of Norms and Incentives* (New Jersey: Princeton University Press, 2006) pp. 182.

11) J.G. Kelly, *Ethnic Politics in Europe*, pp. 122. J.W. van der Meulen, *De bescherming van minderheden als criterium bij EU-uitbreiding: de Europese Commissie en Midden-Europa*, Instituut Clingendael, January 2003, <http://www.clingendael.nl/publications/archive/essays/?language=Dutch>

block the enlargement process with the other countries. This repeated itself the following year during the Helsinki Summit, when the European Council declared that a political solution for Cyprus was not a necessary condition for accession, in exchange for Greek agreement to granting candidate membership to Turkey.¹²

From 1999 onwards, good neighbourly relations also played an important role in the EU policy towards the countries of the Western Balkans. The challenges in this war-torn region, heavily damaged and traumatised by the conflict that followed the dissolution of the Federal Republic of Yugoslavia, were even greater than those of Central and Eastern Europe. The level of state formation, with related border problems and even recognition of countries as such, was far less evolved. In May 1999, during the Kosovo war, the European Commission published a document which coined the term Stabilisation and Association Process (SAP), followed a month later by the establishment of the Stability Pact for South Eastern Europe which targeted Albania, Bosnia-Herzegovina, Bulgaria, Croatia, Moldova, Montenegro, Romania, Serbia and FYR Macedonia. This approach was essentially based on the principles of the Pact on Stability in Europe and mentioned as a shared objective the development of peaceful and good neighbourly relations. Within the SAP and, as a part of it, the Stabilisation and Association Agreements (SAA), regional cooperation was also included as a condition for accession.

However, the countries in the region soon realized, as confirmed by the Thessaloniki Declaration of 2003, that there would be no new group enlargement and that progress would predominantly depend on individual achievement.¹³ The Thessaloniki summit stressed that, while fully supporting the European perspective of the Western Balkan countries, they must first meet the established criteria. The pace of further movement towards the EU lay 'in their own hands' and would depend on 'each country's performance in implementing reforms'. The principles of 'own merits' and 'catch up' would be applied in parallel

12) *A wider Europe*, pp. 103, 110, 132.

13) D. Bechev, 'Carrots, sticks and norms: the EU and regional cooperation in Southeast Europe', *Journal of Southern Europe and the Balkans*, Volume 8, Number 1, April 2006.

with the regional approach. The Council reiterated that the speed with which each country moved towards the EU depended on its 'increasing ability to fulfil all obligations and criteria required of each and every country'.¹⁴ Currently, Croatia is already reaching the final stage of the accession negotiations and FYR Macedonia has acquired the status of candidate member but not yet started negotiations. Three other countries in the Western Balkans – Albania, Montenegro and Serbia – just recently applied for membership and not all of them have a ratified SAA in place. Bosnia-Herzegovina and Kosovo are even further behind and still require a strong international presence under UN auspices. Several observers have pointed out that considerable tension exists between the wish for EU accession and the need for regional cooperation. As some countries progress faster towards the EU, this creates asymmetries and tensions that threaten to undermine regional cohesion. EU integration is essentially a bilateral exercise. For this reason one author, Milica Delevic, states that 'if the regional approach is to be promoted, ways have to be found to make the progress of each country a win-win situation for the others'. Certainly, as will be shown further on in this paper, this is not yet the case.¹⁵

The importance of good neighbourly relations is also part of the specific negotiating frameworks that the EU concluded in 2005 with Croatia and Turkey. These establish the rules for the accession negotiations which both countries conduct with the Union. They stipulate that progress is not only measured against the fulfilment of the Copenhagen Criteria, but also against the commitment of these countries to good neighbourly relations and their undertaking to resolve any border dispute in conformity with the principle of peaceful settlement of disputes in accordance with the UN Charter, if necessary including jurisdiction by the International Court of Justice.¹⁶ The

14) Presidency Conclusions, 19-20 June 2003. Council Conclusions, 16 June, Annex A 'The Thessaloniki Agenda for the Western Balkans: moving towards European integration',

www.consilium.europa.eu/ueDocs/csm.Data/docs/pressdata/en/gena/76201.pdf

15) M. Delevic, 'Regional cooperation in the Western Balkans', *Chaillot paper*, July 2007.

16) Negotiating framework, Luxembourg, 3 October 2005,

Accession Partnership with candidate country FYR Macedonia, which at the time of writing has not yet reached the stage of accession negotiations, contains similar references.¹⁷ The general principle of good neighbourly relations is thus mentioned in all the key documents with regard to enlargement. The requirement of good neighbourly relations is, however, not part of the 'hard' conditionality such as the Copenhagen Criteria and the compulsory adoption of the *acquis*. Until recently, the main documents did not refer to the solution of specific disputes as an important requirement for further steps in the enlargement process. This has changed recently, however, as we will see below.

Overview of existing bilateral differences

Before examining the two announced case studies, it would be good to get an idea of the size of the problem, without pretending to be exhaustive. Which countries, involved in the enlargement process, currently have bilateral disputes?

In the Western Balkans, Croatia and Serbia disagree over two small islands in the Danube. Croatia is of the opinion that Serbia needs to return these two islands, Vukovar and Šarengrad, since the Badinter Arbitration Commission judged in 1991 that all borders between the former Yugoslav republics have become international borders. Serbia argues that these are Serbian islands because they are situated closer to the Serbian river border. Both countries have installed a committee to solve the dispute. Another dispute concerns the territory of Croatia which is interrupted in the south by 22 kilometres of Bosnian coast. Bosnia-Herzegovina objects to Croatia's plan to build a bridge from Klek to Pelješac to connect Croatia's mainland to its southernmost

http://ec.europa.eu/enlargement/enlargement_process/accesion_process/how_does_a_country_join_the_eu/negotiations_croatia_turkey/index_en.htm.

17) Council decision of 18 February 2008 on the principles, priorities and conditions contained in the Accession Partnership with the former Yugoslav Republic of Macedonia and repealing decision 2006/57/EC, Official Journal L 080, 19/03/2008 P. 0032-0045.

region. Bosnian authorities and citizens challenge this because it would disturb Bosnian access to the sea and would violate its rights under the International Law of the Sea. Serbia disagrees in turn with Bosnia-Herzegovina over several Serbian villages which are cut off from the rest of its territory by the River Lim. No agreement on an exchange of territories has been reached yet. Serbia and Croatia disagree on the number of refugees that fled to Serbia during the war, as well as the compensation and accommodation that should be offered to returning Serbian refugees. Croatia also filed a genocide complaint against Serbia before the International Court of Justice. Last but not least, as far as the Western Balkans is concerned, the non-recognition of Kosovo's independence by Serbia will pose considerable difficulties. The International Court of Justice is, at Serbian request, currently examining the legality of Kosovo's declaration of independence, the outcome is hard to predict. In addition to Serbia, there are even some current EU members which have not recognised Kosovo.

Several contentious bilateral issues exist between Greece and Turkey. These mainly relate to the delimitation of the territorial waters, national airspace, continental shelf and the status of several islands in the Aegean Sea. On the basis of the United Nations Convention on the Law of the Sea (UNCLOS), not ratified by Turkey, Greece claims it has a right to 12 nautical miles of territorial waters around the Greek islands. Turkey only accepts 6 nautical miles because many Greek islands are situated right in front of the Turkish mainland. The Turkish parliament adopted a resolution in 1995 which considers unilateral extension by Greece beyond the 6 nautical miles a 'casus belli'. In addition, Greece claims 10 nautical miles above the islands as its national airspace, whilst Turkey again draws the line at 6 nautical miles. Turkish fighter planes occasionally fly into the outer 4 miles zone of the disputed airspace. There is difference of opinion on defining the continental shelf, relevant for the economic exploitation of resources, such as oil drilling. Other sensitive questions are which Greek islands should be considered as demilitarised and Turkey's challenge of Greek ownership of a few small rock islands, referred to by Turkey as so-called 'grey zones'. This is without mentioning the quarrel over the treatment of each others minorities: the position of the Greek minority in Turkey, including the position of the Patriarch in Istanbul, and the position of

the Muslim minority in Greece, considered by Turkey to be a Turkish minority. There exist also a number of unsolved issues between Bulgaria and Turkey. This mainly involves the compensation of properties as a result of the Balkan wars at the start of the last century and the border delimitation near the river Rezovska. The overview given above indicates there are still a lot of contentious issues, which could burden the enlargement process for the years to come.

Most of these examples have the potential to turn into a bilateral dispute within the accession negotiations. Three disputes currently already play such a role: the border dispute between Slovenia and Croatia, the name dispute between Greece and FYR Macedonia, and the territorial disagreements between Greece and Turkey. I have selected the first two for the purpose of this paper; the last dispute has not yet reached its full potential because the main stumbling block between the EU and Turkey is currently the non-implementation by the latter of the Additional Protocol to the Ankara Agreement, including the requirement to open its ports and airports to Cyprus.

The border dispute between Slovenia and Croatia

‘Let’s all try to calm down, have a good Christmas break and immediately after the break think how we can get out of this’.¹⁸ This is what Enlargement Commissioner Olli Rehn concluded in December 2008, after Slovenia had decided not to approve the opening and closure of a large number of negotiating chapters with Croatia. The European Commission anticipated in its progress report of 2008 that the candidate country would complete the technical negotiations before the end of 2009. Slovenia wanted to settle the border dispute before Croatia would become an EU member.

Since their independence following the dissolution of the Federal Republic of Yugoslavia in 1991, both countries have been embroiled in a conflict over the delimitation of the maritime and land borders. This specifically regards the delimitation of the Piran Bay; a small gulf in the

18) Javno.hr, ‘EU urges calm on Slovenia-Croatia border dispute’, Brussels, 19 December 2008, www.javno.com.

northern part of the Adriatic. This includes the determination of the coastal border around the bay, the delimitation of the territorial sea in the bay, and the question of direct contact of the Slovenian territorial sea with the high seas. There is also disagreement over the land border, in particular along the Dragonja River that flows into the bay and which more or less separates both countries. The dispute appeared to have been solved in 2001, when the prime ministers of the two countries signed the Drnovšek-Račan agreement which included both the maritime and land border. Slovenia would get the much desired sea corridor to the high seas. Some villages on the most downstream part of the Dragonja River, with mostly people of Slovenian origin, would be ceded to Croatia. This move of the Slovenian government was seen as a compromise for an exchange for greater part of the Piran Bay.¹⁹ However, the Croatian parliament did not ratify the agreement. In the following years, both countries never managed to agree on the terms under which the dispute should be brought before an international tribunal.

So in December 2008, with the finishing line of the accession negotiations in reach, the Croatian ambitions ran up against a Slovenian blockade. Slovenia objected to elements of the Croatian negotiating position with regard to eleven negotiating chapters.²⁰ The Croatian position was said to prejudge the outcome of the border dispute. Slovenia for example, took offence at the negotiating position with regard to the chapter agriculture and rural development (chapter 11) which referred indirectly to a law which included mention of the contested settlements at the left bank of the Dragonja River. The negotiating position on the chapter Trans-European Networks (chapter 21), according to the Slovenes, contained a reference to controversial maps with the maritime boundary. The negotiating position regarding the chapters on taxation (chapter 16) and justice, freedom and security (chapter 24) included references to legislation which mentioned 'border

19) M. Avbelj and J.L. Černič, 'The conundrum of the Piran Bay: Slovenia v. Croatia - The Case of Maritime Delimitation', *The University of Pennsylvania Journal of International Law & Policy*, Vol. 5, No. 2, 2007.

20) Opening of chapters 4, 11, 12, 16, 22, 24; provisional closure of chapters 2, 6, 18, 21, 29.

crossing’ instead of ‘provisional border crossing’.²¹ The Slovenian negotiators argued that they would acknowledge Croatia’s territorial claims if they accepted these negotiating positions. The EU presidency and other EU member states were of opinion that the documents submitted by Croatia would not prejudice the outcome of the border dispute.

In 2009, at the start of the New Year, Commissioner Rehn took the initiative and announced that he had approached former Finnish President Martti Ahtisaari to chair a senior expert group that should try to find a solution for the border dispute. Rehn underscored that, because it involved a bilateral dispute outside the scope of the accession negotiations, the European Commission would not in itself act as an arbiter. Croatia was hesitant and feared that because of direct EU involvement, including of member state Slovenia, impartiality was insufficiently guaranteed. It considered above all that it stood a better chance if the route of international arbitration was followed, because of its perceived strong legal position regarding the delimitation of the territorial waters, such as through the International Court of Justice. The Slovenian side, on the other hand, reacted favourably and viewed the proposal as a form of the desired (political) mediation instead of judicial arbitration. So from the outset, both parties disagreed over the task that should be conferred upon Ahtisaari.

The European Commission kept the initiative to itself and did not share much information with the member states. On March 19, Rehn elucidated his proposal in a short article ‘Europe, Law and Border’ which appeared in the Slovenian and Croatian press.

‘To begin with, the delimitation of the border between Croatia and Slovenia is a bilateral issue that has become a European problem. Fortunately, there is also a European framework to deal with it – I refer to the basic document on the conduct of the EU accession negotiations with Croatia, which we call the “negotiating framework”. [...] According to the UN Charter, the parties can

21) Official website Government of the Republic of Slovenia, www.mzz.gov.si, ‘Information on prejudices in certain negotiating chapters of accession negotiations for Croatia’s membership of the EU’, 18 December 2008.

choose either non-binding or binding third party settlement or a combination of them to settle a dispute. [...] There are two equally important conclusions of this: First, the parties can choose any one of these methods, and the Commission's initiative to refer the issue to a Senior Experts' Group is certainly and without any doubt among them. Second, whichever method of these in the UN Charter they agree to choose, they have to agree between the two of them.²²

Hardly any progress was made. Two scheduled Intergovernmental Conferences between the EU and Croatia, during which new chapters should have been opened and closed, were cancelled. The member states were getting more involved in the talks. This was done by the combined Czech presidency, the preceding French presidency and the succeeding Swedish presidency (referred to as the 'Trio', which is not a regular EU-format). Irritation about the Slovenian behaviour mounted. Swedish Foreign Minister Carl Bildt warned that member countries were losing their patience with the Slovenian misuse of a bilateral dispute to block a multilateral procedure. British Foreign Secretary David Miliband added that 'there is no case for blocking' Croatia's EU membership.²³ However, the mediation efforts by Commissioner Rehn were unsuccessful, partially because they were viewed by Croatia as too pro-Slovenian. By March 30, only Slovenia had submitted written comments to Rehn's proposal. The meeting between the parties, scheduled for April 1, was cancelled at the eleventh hour.²⁴ The German Chancellor made it clear to Zagreb that since Slovenia was an EU member, the negotiations could only be completed with the consent

22) http://ec.europa.eu/commission_barroso/rehn/pdf/interviews/090324_article_law_and_border_en.pdf

23) EuropeanVoice.com., 'Croatian-Slovenian dispute reaches critical point', 1 April 2009. B92, 'Mesic offers Slovenia new agreement', 3 April 2009.

24) Official website Government of the Republic of Croatia, www.vlada.hr, 'Prime Minister Sanader says Croatia won't stop halfway, wants to join EU', 7 April 2009.

of Slovenia.²⁵ Croatia countered a few days later by comparing Slovenia's demands to blackmail and warning that 'friendship will not be bought with even one inch of Croatian land'.²⁶ The Croatian Prime Minister Ivo Sanader considered it unjust that Slovenia had been allowed to become an EU member without first solving its outstanding border disputes.²⁷

On April 23, Commissioner Rehn submitted a new proposal which shifted somewhat in the direction of the Croatian wishes. It emphasised arbitration above mediation. Ahtisaari was now out the picture and the proposed arbitral tribunal consisted of judges, possibly from the International Court of Justice. The tribunal would give a binding award and Slovenia would lift its reserves on the negotiating chapters. Some Slovenian wishes had been taken aboard, including the provision that the situation as at 25 June 1991, when both countries became formally independent, should present the basis for a resolution. (As part of the former Yugoslavia, Slovenia had had territorial access to the high seas). Additionally, no action undertaken or document published unilaterally by either side after this date would be accorded legal significance. A compromise had been sought by stating that the arbitration tribunal would apply international law to determine the course of the land and maritime boundary, but that it would not exclusively apply international law with regard to the use of maritime areas and Slovenia's contact to the high sea, but also the principles of equity and good neighbourly relations in order to achieve a fair and just outcome.

The Croatian government accepted the proposal since it provided for binding arbitration and immediate unblocking of the accession negotiations. The Croatian parliament approved the proposal on May 8 on a 'take it or leave it' basis. Ljubljana, however, insisted that the proposal should have substantial amendments. It wanted the too weakly

25) Official website Government of the Republic of Croatia, 'German Chancellor Merkel: Croatia and Slovenia must resolve their dispute on their own', 8 April 2009.

26) Official website Republic of Croatia, 'Prime Minister Sanader: Croatia can and must enter EU despite border dispute with Slovenia', 14 April 2009.

27) Official website Republic of Croatia, 'PM comments on border dispute with Slovenia', 12 March 2009.

formulated ‘contact’ replaced by ‘territorial contact’ or ‘junction’ to the High Sea. It considered a direct connection of the Slovenian territorial sea to the high sea essential. It also desired a reference to the ‘vital interest’ of both countries in the text. Slovenia demanded that the arbitration agreement would be ratified by the parliaments in both countries before it would unblock the negotiating chapters. The arbitration panel should be composed differently, with less stress on judges from the International Court of Justice. The country also wanted to keep the possibility for political mediation open. Commissioner Rehn took some of the Slovenian amendments on board in his proposal of June 15, such as the use of the terms ‘junction’, ‘vital interests’ and the possibility for political mediation. The Slovenian demand that its reservation on the negotiation chapters would only be lifted after ratification of the agreement was not acceptable. After all, the immediate resumption of the negotiations on these chapters had been the principal reason for Rehn’s involvement.²⁸

The negotiations on an arbitration agreement collapsed of June 18, just before a scheduled trilateral meeting between Rehn and the foreign ministers of Slovenia and Croatia. Prime Minister Sanader rejected the Slovenian amendments. The Slovenian foreign minister, Samuel Zbogar, announced that the Commissioner for Enlargement had seen no possibility to continue. Upon the suggestion of Sanader that the EU should find another way to complete the talks, Zbogar responded that Croatia had to learn something about the EU. He hoped there would be no pressure from other member states on Slovenia to lift the blockade: ‘I don’t think this is the way the EU works’.²⁹ The incoming Swedish presidency announced, in the person of Carl Bildt, that Stockholm had no intention of deploying new initiatives: ‘Responsibility for solving disputes rests with the countries themselves. They should not affect the

28) This paragraph is based on a reconstruction of the information provided by the official websites of the Governments of the Republic of Croatia and the Republic of Slovenia, as well as electronic articles in the Slovenian Times, EU observer, European Voice and Euractiv. RadioNet, ‘Rehn declines to comment on ‘junction issue’, 17 September 2009.

29) EU Observer ‘Croatia EU timetable slipping away over border dispute’, 18 June 2009, www.euobserver.com/9/28328.

accession negotiations, in our opinion, but they have done so. But now it's time for the countries to reflect and we'll see if that reflection, at some point in time, has any result'.³⁰ Two weeks later Prime Minister Sanader resigned. Although his motives for stepping down might be manifold, he himself said: 'I have done it out of protest on account of their [European politicians] unacceptable conduct towards Croatia. I simply refuse to continue to be involved in the political games of certain European politicians who, though they very well know how important EU accession is for Croatia, refused to make the necessary effort to stop Slovenia's unprecedented blackmail'.³¹

The 'reflection period' announced by Bildt proved successful when Jadranka Kosor, the new Croatian Prime Minister, reached an agreement in principle on 11 September 2009 with her Slovenian colleague Pahor on a resumption of the talks. Croatia accepted, with some minor changes, the Rehn-proposal of June 15 which had been previously rejected by Sanader. Slovenia in turn agreed to lift the reservations on the negotiating chapters.³² Prime Minister Kosor declared, in a letter to her Swedish colleague Reinfeldt, that no document in the accession process could prejudge the resolution of the border dispute between Croatia and Slovenia and that the situation of 25 June 1991 presented the basis for a resolution. She indicated that both countries agreed 'to submit the border dispute to the Arbitral Tribunal or to conclude the bilateral agreement on the common state border in accordance with the key priorities expressed in the Accession Partnership with Croatia.'³³ Slovenia in turn, would lift its reservations related to the border dispute with immediate effect and not postpone this until ratification of the agreement by the Croatian parliament.

30) 'Sweden calls for reflection in Croatia-Slovenia border dispute', 24 June 2009, www.youtube.com/watch?v=ocoRKtyw6uU.

31) Jutarnji List, taken from Croatian Media Scan, 3 July.

32) Arbitration Agreement between the Government of the Republic of Croatia and the Government of the Republic of Slovenia, signed on 4 November 2009. Official website Slovenian Ministry of Foreign Affairs, http://www.mzz.gov.si/fileadmin/pageuploads/Novinarsko_sredisce/Sporocila_za_javnost/Sporazum-angl.pdf.

33) Official website Republic of Croatia, 'Prime Minister Kosor's letter to Swedish EU Presidency', 11 September 2009.

On October 2, an Intergovernmental Conference was convened during which Slovenia lifted its reservations on the eleven chapters. For a while, Slovenia still maintained a reservation on chapter 31 (common foreign and security policy) with its reference to good neighbourly relations. The fact that Slovenia will eventually also have to agree to the closure of this chapter could be used as an incentive to ensure a cooperative Croatian attitude in the bilateral border negotiations. As a spokesperson of the Slovenian Foreign Ministry phrased it: ‘Slovenia will keep all the security mechanisms in its own hand’, and some negotiating chapters would only be unblocked and eventually closed: ‘when it’s clear how the settlement of the border issue is going’.³⁴

On 4 November 2009, the arbitration agreement was signed by the government leaders of Slovenia and Croatia, witnessed by the Swedish Prime Minister. The European Commission would provide secretarial support to the arbitral tribunal. The Croatian parliament ratified the agreement shortly thereafter. On 19 April 2010, the Slovenian parliament approved the arbitration agreement. Six weeks later, a referendum was held in which the Slovenian population voted in favour of the agreement. Ratification of the arbitration agreement, however, is not sufficient to start the arbitration. The agreement stipulates that the tribunal will commence its duties from the date of signature of the EU accession treaty with Croatia. This is not expected to happen before mid-2011. After signature of the accession treaty with Croatia, it has to be ratified by a two-third majority in the Slovenian parliament. The ratification process of an accession treaty by the EU can easily take a year. It remains to be seen if the arbitral tribunal reaches a decision within this period. Otherwise, it is not inconceivable that Slovenia holds up ratification of the accession treaty until a satisfactory solution has been found for the border dispute.³⁵

34) EMG, ‘Slovenian parliament to discuss arbitration deal’, 30 September 2009, www.emg.rs/en/news/region/99922.html.

35) ‘Through this agreement, Croatia has committed itself to settle the border dispute in accordance with the principle tasks of the Accession Partnership for Croatia and by the understanding that agreement on the method of settling this dispute will be reached before the vote on accession treaty takes place in

The name dispute between Greece and FYR Macedonia

The bilateral dispute over the constitutional name of FYR Macedonia also originates from the dissolution of the Federal Republic of Yugoslavia. In 1991, the newly independent Balkan country called itself 'Republic of Macedonia'. Greece immediately opposed the use of this name and claimed that by calling itself accordingly, the country harboured irredentist aspirations towards Greece's northern province of Macedonia. In 1993, a temporary solution was found that enabled the country to become a member of the United Nations under the provisional name 'former Yugoslav Republic of Macedonia'. Shortly afterwards, all EU member states recognised the country under this name and in 1995 an Interim Agreement was brokered, with the help of the United States.³⁶ As a result, Greece also accepted the country under its provisional name and FYR Macedonia agreed to change its flag and deleted claims from its constitution which were perceived as irredentist towards Greek territory. Greece accepted in the Interim Agreement not to obstruct Macedonian applications for membership of regional and international organisations, as long as in those organisations the country would be referred to as the 'former Yugoslav Republic of Macedonia'.³⁷ All UN members declared that they would accept any negotiated agreement on the name issue between both countries.

From the start of its existence, the integration into EU and NATO was the prime policy priority of FYR Macedonia. In 2001, the EU signed a Stabilisation and Association Agreement (SAA) with the country and saw this rapprochement as an important tool to stabilise the Balkan republic which was suffering from a violent ethnic conflict. This agreement, ratified in 2003, also referred to the country as the 'former Yugoslav Republic of Macedonia'. The SAA does not mention the name dispute explicitly, only the need to 'ensure regional

the Slovenian National Assembly.' (Site of the Prime Minister of the Republic of Slovenia, www.kpv.gov.si, 11 September 2009).

36) International Crisis Group, Macedonia's Name: why the dispute matters and how to resolve it, p.11-14, Europe Report Nr 122, 10 December 2001.

37) Interim Accord between the Hellenic Republic and the former Yugoslav Republic of Macedonia, New York, 13 September 1995.

cooperation and good neighbourly relations’.³⁸ This wording is identical to SAA’s signed with other countries. When the first Stabilisation and Association Council was held between the EU and FYR Macedonia in 2004, the EU adopted - in spite of Greek reservations - a text that called upon *both* parties to find a solution: ‘The European Union notes that the difference over the name of the former Yugoslav Republic of Macedonia still persists and encourages the finding of a mutually acceptable solution within the framework of UNSCR 817/93 and 845/93 by Greece and the former Yugoslav Republic of Macedonia’.³⁹ The European Commission and the other member states were keen to keep, in spite of Greek wishes, the dispute out of the accession process and to refer to the UN process.

In 2004, FYR Macedonia applied for EU membership. In its Opinion of November 2005, the Commission recommended the Council – carefully taking into account the respective political positions of the member states – to grant the country membership on the one hand, but only start the accession negotiations when it sufficiently fulfilled the membership criteria on the other hand.⁴⁰ Although sometimes suggested, the name dispute did not play a decisive role in postponing the accession negotiations. According to many member states, FYR Macedonia simply did not sufficiently fulfil the political Copenhagen Criteria to justify this step towards their own populations. This coincided with the Greek desire not to start accession negotiations before the name dispute had been solved. At the same time, member states appreciated the progress made and wanted to give an encouraging signal to the country and the region.

38) 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, Article 4 and 7, Official Journal of the European Union, 20 March 2004, L84/13.

39) Hellenic Republic, Ministry of Foreign Affairs, http://old.mfa.gr/english/foreign_policy/europe_southeastern/balkans/fyrom_name.html

40) Commission Opinion on the application from the former Yugoslav Republic of Macedonia for membership of the European Union {SEC(2005) 1425} {SEC(2005) 1429}.

The tension about the name issue resurfaced when the Macedonian government decided in 2006 to rename the Petrovec Airport in Skopje after the Greek-Macedonian hero Alexander the Great. In the run-up to the Greek parliamentary elections, the stakes were raised. Prime Minister Kostas Karamanlis, who unlike other Greek politicians had always stated that he would only veto a Macedonian membership application for EU and NATO if the country wanted to join under the name 'Republic of Macedonia', now said that membership was only possible if a mutual acceptable solution was found for the name dispute.⁴¹ While FYR Macedonia endeavoured to fulfil the EU accession criteria, the tougher Greek stance resonated in the EU agreements with the applicant country. Did the European Partnership of 2005, like the SAA, only mention under the paragraph Regional and International Obligations that Skopje had to 'ensure regional cooperation and good neighbourly relations', the Accession Partnership of 2008 specifically stated that the country had to ensure good neighbourly relations 'in particular by intensifying efforts with a constructive approach to find a negotiated and mutually acceptable solution to the name issue with Greece'.⁴²

The real turning point, however, was the NATO Summit in Bucharest of April 2008. The decisions during this summit would have direct ramifications for the EU accession process. Up to that point, both within EU and NATO, the name issue was consequently referred to as a bilateral dispute and its resolution not presented as a membership condition. During the summit, FYR Macedonia, Croatia and Albania were supposed to be invited to join the alliance. The United States increased the pressure on Athens in the preceding days, whilst UN negotiator Matthew Nimetz meanwhile tried to broker an agreement. Commissioner Rehn, aware of the importance for the EU accession process, urged Skopje to show the political will to reach an agreement. Greece was determined to use the decision on NATO

41) International Crisis Group, 'Macedonia's name: breaking the deadlock', Europe Briefing 52, 12 January 2009.

42) 2008/212/EC: Council Decision of 18 February 2008 on the principles, priorities and conditions contained in the Accession Partnership with the former Yugoslav Republic of Macedonia and repealing Decision 2006/57/EC.

membership to settle the name dispute to its advantage. Without an agreement, it threatened to block the membership invitation. During the meeting, Athens received unequivocal support from President Nicholas Sarkozy. The NATO leaders decided not to grant membership to FYR Macedonia until the name dispute had been settled.⁴³

This outcome strengthened Greece's position within the EU, of which most member states are also NATO members. Greece felt emboldened by the stance of Sarkozy, who in addition to his support in Budapest, said during his visit to Athens of June 2008: 'I told the Prime Minister that the Greek position is legal, responsible and open to discussion. [...] I want you to know we have chosen Greece. And we will not re-evaluate that choice'.⁴⁴ The other EU member states accepted the reality of Greece's strong negotiating position by means of a possible veto. The calculation of most of them that they had more to lose than to win in a conflict between a fellow member state and a (small) applicant had been made explicit already in 2004 by the former Minister of State for Europe, Denis MacShane. When questioned in the British Parliament on the name issue he answered: 'We are not going to go against a powerful EU partner like Greece. I am sorry, Britain is not unilaterally going to say that if this is that important to Greece, even if we do not agree with it, we know better and the Greeks have got no rights in this regard'.⁴⁵

Two months after the NATO Summit, the European Council conclusions of 20 June 2008 stated that: 'Maintaining good neighbourly relations, including a negotiated and mutually acceptable solution on the name issue, remains essential'.⁴⁶ The Greek government announced that the European Council had concluded 'for the first time explicitly that the resolution of the name issue is essential for the opening of

43) Bucharest Summit Declaration issued by the Heads of State and Government participating in the meeting of the North Atlantic Council, 3 April 2008, www.summitbucharest.ro/en/doc_201.html.

44) 'Sarkozy before the Assembly of the Greeks', 6 June 2008, www.youtube.com/f9LzjIVmsRs.

45) Select Committee on Foreign Affairs, Minutes of Evidence, Examination of Witnesses (Questions 240-259), 30 November 2004.

46) Presidency Conclusions, European Council Conclusions in Brussels, 20 June 2008.

accession negotiations with FYROM'.⁴⁷ Although the resolution of the name dispute was in fact not explicitly mentioned as a condition for opening accession negotiations – one can assume this paragraph was phrased ambiguously on purpose – it is true that the reference made by the EU as a requirement for accession went further than ever. But it was not so much the discussion within the EU that led to this outcome, but the NATO summit in Budapest two months before.

Having lost all hope of a swift solution, the Macedonian government summoned Greece in November 2008 before the International Court of Justice over violation of the Interim Agreement. It argued that Greece had violated the principle that it would not veto the country's entry under its provisional name. Athens replied that its northern neighbour had itself repeatedly violated the Interim Agreement, including the principle of good neighbourly relations, by renaming the airport of Skopje and using its constitutional name within the UN instead of the provisional name agreed upon. Commissioner Rehn responded that outstanding bilateral disputes should not hamper the accession process and generally called for the resolution through negotiations rather than through lawsuits filed before the International Court of Justice.⁴⁸ It could take several years for the Court to reach a verdict.

In December 2009, the External Relations Council decided, in spite of such a recommendation by the Commission in its progress report, not to open accession negotiations with FYR Macedonia because of Greek opposition. The Ministers for Foreign Affairs agreed to return to the issue during the first half of 2010.⁴⁹ It can be expected that progress will only be made when FYR Macedonia meets the Greek demands.

47) Hellenic Republic, Ministry of Foreign Affairs, May 26 2009, www.mfa.gr/www.mfa.gr

48) EurActiv, 'Commissioner Rehn: I am just the factory manager', Interview, 21 November 2008, <http://www.euractiv.com/en/enlargement/commissioner-rehn-am-just-factory-manager/article-177381>.

49) General Affairs Council, Council Conclusions on enlargement/stabilisation and association process, 7-8 December 2009, http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/genaff/111830.pdf.

Conclusions

For several reasons, bilateral disputes have become a bigger obstacle in the current EU accession process than was the case during previous enlargements. The present-day countries with an accession perspective are predominantly situated on the Balkans. This region is characterised by the consequences of a recent war, weak state formation, undetermined borders and contentious minority issues. This means there are simply more unresolved issues between neighbouring countries than during previous enlargements. Besides this, during the 2004 enlargement, the EU followed a group approach during which applicants acquired membership simultaneously. Candidate countries with bilateral disputes among themselves had, in order to acquire membership, an equal interest and equal bargaining power in solving them. (The exception to this rule was Cyprus, where one member state actively sided with one of the parties.) This differs from the present-day situation, where many bilateral disputes exist between EU member states on the one hand (Slovenia, Greece) and non-EU members (Croatia and FYR Macedonia) on the other hand.

EU member states are successful when attempting to turn a bilateral dispute into a political condition of the accession process. The two case studies in this paper illustrate that member states have a stronger bargaining position through the accession process, and that they do not hesitate to make use of it in order to influence the outcome of a bilateral dispute with a candidate member. This can be done in several ways, varying from withholding consent to the opening of negotiating chapters, to objecting to the graduation of a country to a new phase of the accession process (candidate membership, opening of negotiations, membership). During this process, member states have numerous opportunities to exert pressure since most decisions have to be taken with unanimity in the Council. At the end of the entire accession process, every member state has a veto at its disposal, since each national parliament has to ratify the accession treaty.

Other member states exert little pressure on a member state involved in a bilateral dispute (although Slovenia occasionally complained about a lack of EU solidarity). They prefer to remain 'neutral' and are not prepared to put their relationship with an insider, a

fellow EU member with influence on all kinds of internal decision-making, to the test in favour of an outsider, the applicant country. An additional reason could be enlargement fatigue within the EU after the *bing bang* enlargement of 2004 and the subsequent accession of Bulgaria and Romania. European leaders might be hesitant to invest much political capital into something which is unpopular amongst their own constituency.

The EU presidency and the European Commission will have to take a more prominent future role in addressing bilateral problems. This could develop along the lines followed during the border dispute. This means facilitation by the EU presidency and Commission, but actual arbitration – in order to be acceptable to the non-EU member state – by an independent arbiter. Recent developments have shown that problems cannot be denied by simply stating that they are not a matter for the EU to deal with, as has long been the case with the name dispute by referring to the fruitless UN process. Particularly the EU presidency and the Commission need to play a role in this, since the actions of the Council of Ministers as a whole (and the preparatory working groups) are restrained by the fact that one of the parties to a particular dispute is a participant in this forum. The position of the Commission that bilateral disputes should be separated as much as possible from the technical negotiations on the *acquis* remains, however difficult to put into practice, a useful approach. It enables the Commission to criticise a member state that tries to connect a bilateral dispute which has no relation to the *acquis*, to a specific negotiating chapter. At the same time, it should be acknowledged in the broader framework of the accession process that these differences have to be solved before a candidate member can actually accede. It is in the interest of the Union to avoid potential instability by importing bilateral conflicts.

In the future, a candidate member should preferably only become a member when it has also solved its bilateral differences with (potential) candidate countries. This will diminish the chance for bilateral conflicts between EU and non-EU countries. In order to avoid the membership aspiration of a candidate country being taken hostage by a less cooperative neighbour, the applicant should show convincingly that it has exhausted every venue (mediation, arbitration or otherwise) to

reach a peaceful settlement of the dispute. This logic then requires Croatia to endeavour to settle its bilateral disputes with its neighbours before it can accede to the Union, just as the other countries which are part of the Stabilisation and Association Process should do. Such an approach would create a more level playing field: when both countries are applicants, they have an equal interest in solving their bilateral differences. This is best achieved if the countries concerned find themselves in comparable stages of the accession process. A real regional approach, where the EU tries to ensure that the Western Balkan countries do not deviate too much in terms of their membership perspective would therefore be helpful. Without this, the enlargement process could run into even stormier weather.