The Former Yugoslav Republic of Macedonia v. Greece: Litigating a Naming Dispute before the World Court

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On 5 December 2011, the International Court of Justice (ICJ) rendered its judgment in *Application of the Interim Accord of 13 September 1995* between the former Yugoslav Republic of Macedonia (FYROM) and Greece, thereby entering into the complex and perennial 'Macedonian question'. With a resounding majority of 15 votes to 1 (the sole dissenter on this point being the judge *ad hoc* appointed by Greece), the World Court found that Greece, by objecting to FYROM's admission to NATO in 2008, had violated one of its treaty obligations. The case is nothing short of a *unicum*, as it is the first time (to the best of the author's knowledge) that a naming dispute formed the backdrop to inter-State judicial proceedings. This short piece aims to acquaint the reader with this *prima facie* unusual, yet fascinating case, by addressing the events in the run up to the case, the arguments of the litigants and the Court's approach. In the final section, I will consider the lessons we can learn from *Application of the Interim Accord of 13 September 1995* as regards the relevance of international law in naming disputes.

History

The contentious affair brought before the ICJ goes straight to the heart of a predicament that has plagued bilateral relations between FYROM and Greece over the past two decades, i.e. the dispute over the name of the former party. Emerging from the violent breakup of Yugoslavia relatively unscathed, the self-styled 'Republic of Macedonia' set its sights on being welcomed as the latest member of the world community (MIRC EV, 2001). On the road to international recognition however, the young Balkan State met with stiff resistance from Greece who objected to the latter's use, or 'usurpation' in its view, of the term Macedonia. Although in reality far more complex, the Hellenic Republic's grievances were at their core twofold. The first, historic in nature, relates to the emotional attachment of Greece to the idea of Macedonia and all that it implies (such as specific symbols e.g. the Sun of Vergina). In a nutshell, Macedonia is deemed an integral part of Hellenic heritage. FYROM for its part, equally affected by nationalist sentiments, made similar claims, constructing a glorious past dating back to the exploits of Alexander the Great. This cultural conflict of sorts can be described as one pitting Slavic 'Macedonism' against Greek 'Macedonology' (KOFOS, 2001, pp. 231 *et seq.*). The second Hellenic concern resides in the realm of security. Greece saw in this choice of name, coupled with 'revisionist' tractates, state-sponsored 'propaganda' and nationalist declarations by certain politicians, an irredentist claim to its northern regions (one of which is also called Macedonia). A large underlying part of the problem is that the region

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traditionally know as Macedonia, does not neatly fit within contemporary State boundaries, straddling northern Greece, FYROM and bits of Bulgaria.

The naming dispute was far from trivial, engendering far-reaching consequences for the newly-establish Slavic country. On the political plane, FYROM encountered difficulty in securing vital recognition from European countries despite fulfilling the general criteria of the Badinter Commission set up by the then European Economic Community (DENZA, 2011, pp. 328-329). Its economy suffered due to a lack of access to international finance, resulting from the combined effect of a Greek embargo and limited international recognition (DOBRKOVIĆ, 2001, p. 88). When the escalating Balkan crisis drew in the involvement of foreign powers, the strategic location of FYROM meant it acquired greater political leverage. This altered geopolitical setting enabled UN mediators to broker an agreement between Greece and FYROM, the 1995 Interim Accord, building upon UN Security Council Resolution 817 (1993) which opened the way for FYROM to UN membership. This legal document constitutes a provisional framework for regulating bilateral relations until a final agreement can be reached by both contracting parties on the name of the newly-established breakaway Republic. The scope is quite broad, ranging from economic co-operation to human and cultural rights. Moreover, it is written in a fairly peculiar fashion, in that the parties are not referred to by their actual names but rather as 'the Party of the First Part' and the 'Party of the Second Part' (TZANAKOPOULOS, 2011). This could very well be the only such treaty in the world concluded by "anonymous States" (ICJ, ROUCOUNAS, 2011, p. 2).

Central to the agreement are the following reciprocal commitments: as long as FYROM seeks admission to and is to be referred to in international organizations under the name 'the former Yugoslav Republic of Macedonia', Greece may not object to its application or membership. More precisely, Art. 11, § 1 Interim Accord, stipulates:

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

Fast-forwarding to the immediate events preceding the present court case, during its 2008 Bucharest Summit, NATO envisaged increasing its membership in Southeast Europe. Among the hopeful candidates was FYROM, yet it was promptly made clear by the organization that an invitation to join the military alliance would not be forthcoming (DORLHIAC, 2009, pp. 2-3). Faced with this bleak realization and suspecting Greece of wrongdoing (NATO decisions on admission (invitations to join) require unanimity, thus granting member States veto-like power), FYROM decided to take legal action against its northern neighbour.

Legal analysis

FYROM (Applicant) filed an application instituting proceedings before the ICJ against Greece (Respondent) seeking the following:

> "(i) to reject the Respondent's objections as to the jurisdiction of the Court and the admissibility of the Applicant's claims;
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> (ii) to adjudge and declare that the Respondent, through its State organs and agents, has violated its obligations under Article 11, paragraph 1, of the Interim Accord; and

> (iii) 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 Organization 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)." (ICJ, *Interim Accord*, p. 11)

The Hellenic Republic requested the Court to adjudge and declare:

> "(i) that the case brought by the Applicant before the Court does not fall within the jurisdiction of the Court and that the Applicant's claims are inadmissible;
>
> (ii) in the event that the Court finds that it has jurisdiction and that the claims are admissible, that the Applicant's claims are unfounded." (ICJ, *Interim Accord*, p. 11)

With a view to clarity and logical structure, the Court divided its decision into four distinct segments, (i) jurisdiction and admissibility, (ii) whether Greece failed to comply with Art. 11, § 1 of the Interim Accord, (iii) justifications invoked by Greece for precluding the wrongfulness of such breach, and (iv) remedies sought by FYROM.

Invariably, in all contentious proceedings, the World Court must confirm its jurisdiction as well as the admissibility of the application instituting proceedings. Given that the ICJ's jurisdiction is centred on the principle of consensuality, successfully bringing a case before the Court is contingent upon consent from both parties. A compromissory clause, i.e. a treaty provision providing for submission to binding third party settlement, is one such way of expressing consent (Art. 36, § 1 ICJ Statute). *In casu*, FYROM invoked Art. 21, § 2 of the Interim Accord as the Court's jurisdictional basis:

> "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."

Greece, contesting jurisdiction, relied upon the exception made for Art. 5, § 1, which stipulates:

> "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) [the final resolution of the name difference]."

The agents arguing on behalf of Respondent interpreted this clause as meaning that the Court was barred from passing judgment on the alleged violation of Art. 11, §1 because it is inextricably linked to the naming dispute, which exceeds its jurisdictional reach. To prove their point they submitted that NATO's decision to defer FYROM's accession was made because the disagreement over its name remained unabated. Unpersuaded by this contention, the judges reasoned that, even if there is a relationship between the claimed breach of Art. 11, § 1 and the naming difference, these are two distinct questions. The Art. 5, § 1 exception would merely come to the fore if the Court were requested by one of the parties to resolve the actual naming dispute itself (ICJ, *Interim Accord*, §§ 28-38). Additionally, the Hellenic Republic put forward the argument that in light of the collective or "unanimous" decision of NATO not to invite Applicant to join its ranks, the Court would have to consider the responsibility of NATO or other member States with respect to whom it lacks competence. This ill-fated attempt was swiftly dealt with by the bench, who deemed that the issue at stake was not the attribution of the decision to NATO but Respondent's commitments under the Interim Accord (ICJ, *Interim Accord*, §§ 39-44).

Having established its jurisdiction and the admissibility of the application, the Court turned to the question whether Respondent, by frustrating Applicant's NATO candidacy, had violated

the Interim Accord. Greece invoked several defences in descending, subsidiary order of which two will be discussed here. First, the latter maintained that it had not actually "objected" to FYROM's admission to NATO in the sense of Art. 11, §1, which it understood as requiring "a specific, negative act, such as casting a vote or exercising a veto" whereas NATO's decision-making on admissions does not follow this pattern. Rather, Greece argued that it had shared mere "observations" with its fellow member States. Disagreeing with that narrow interpretation of the term "object", the Court was satisfied that the evidence presented by Applicant (in the form of diplomatic correspondence and statements made by high-ranking officials) showed that Respondent had indeed objected at the Bucharest Summit due to the unresolved naming difference (ICJ, *Interim Accord*, §§ 67-83).

Subsequently, having to concede it had objected, the Hellenic Republic rejoined that it was entitled to do so because of Applicant's use of the name 'Republic of Macedonia' (constitutional name) in contravention of Art. 11, § 1. This clause does indeed relieve Greece from its duty not to object in the event that FYROM "is to be referred to in" an international organization by any other name. Parties however disagreed on the precise contours of the aforementioned wording. Greece accorded it a distinctly expansive interpretation such that Applicant is excluded from referring to itself as the Republic of Macedonia (a practice it is committed to in international fora). Seeking recourse to the techniques of treaty interpretation enshrined in the Vienna Convention on the Law of Treaties (VCLT), the judges refuted the broad understanding of the words "is to be referred to in". For one, it is written in the passive voice and thus hard to be construed as indicating how FYROM must call *itself*. Moreover, the Interim Accord cannot be understood in such a manner that it implicitly imposes an additional and onerous restraint on Applicant's naming policy. This is further borne out by subsequent practice after the entry into force of the Interim Accord: Greece never objected to the 15 organizations FYROM joined in which it refers to itself by its constitutional name nor to the fact that in the run-up to the Bucharest Summit, Applicant called itself Republic of Macedonia in its contact with NATO (ICJ, *Interim Accord*, §§ 84-103).

In order to preclude the wrongfulness of its violation of the Interim Accord, Respondent shielded itself behind a number of justifications which all share two basic requirements: (i) it must be shown that Applicant failed to meet its obligations under the Interim Accord and (ii) the violation by Respondent of Art. 11, § 1 constituted a response to Applicant's prior breaches (reciprocity between both parties' obligations). Greece asserted that FYROM had violated 6 distinct provisions of the treaty. An illustration thereof is the claim that Applicant skirted its duty to "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" (Art. 7, § 1), thereby referring to *inter alia* school curriculum hailing a "Greater Macedonia" and claiming descent from certain personalities of the Ancient world. None of the alleged breaches were upheld, except for (at least one) violation of Art. 7, § 2 (banning the use of the Vergina Sun symbol) by a regiment in FYROM's army in 2004. Whereas Art. 7, § 3 puts in place a consultation procedure for either party to deal with uses of symbols constituting part of its historic or cultural patrimony by the other party, no breach of this provision was found. Greece did not manage to convince the Court that its objection to FYROM's admission to NATO was specifically in response to and in connection with FYROM's violation of Art. 7, § 2. Moreover, the ICJ deemed that breach to be minor, since the use of the Vergina Sun symbol was discontinued the same year that Respondent had brought it to the attention of Applicant (ICJ, *Interim Accord*, §§ 114-165).

In three paragraphs, the World Court succinctly addressed Applicant's request for remedies. By finding that Greece had violated the Interim Accord, the ICJ considered that it had granted

appropriate satisfaction to FYROM. Applicant's second sought remedy, namely that the Court order Respondent "to refrain from any future conduct that violates its obligation under Article 11, paragraph 1, of the Interim Accord", was not upheld. The judges justified this rejection by reaffirming the general rule that good faith must be presumed, and thus one should not presume that Greece, having been found in breach of its treaty commitments, will be inclined to relapse.

Significance to naming disputes

The ICJ's judgment in *Application of the Interim Accord of 13 September 1995* offers us a unique look into the interaction between law and inter-State disputes with respect to naming. After all, prior to these proceedings, not much could be said of this relationship, other than the (somewhat related) observation that the Court and the Registrar adopt a policy of 'name neutrality' in determining the titles of cases (KAMTO, 2001, p. 12). I believe that three major lessons can be gleaned from this case.

The decision has made clear that naming disputes can perfectly be subjected to a process of 'juridification'. As long as contracting parties comply with *jus cogens*, i.e. the peremptory norms of international law, and the procedural and other requirements set out in the VCLT, they can create rights and obligations in conventional form vis-à-vis one another in pretty much any field, including problems arising from naming issues. It is noteworthy that although the Interim Accord excluded negotiations on the final name of FYROM from the jurisdiction of the Court and the latter acknowledged a relationship between this exception and the violation of Art. 11, § 1 (see above), it nonetheless asserted its jurisdiction, thus declaring itself competent to adjudicate in a delicate affair fraught with pitfalls.

At the same time however, the judges seem to have dodged addressing whether general international law brings anything to bear on naming. This exercise in judicial parsimony is somewhat unfortunate in light of the variegated opinions that scholars have voiced on this topic. This would include the legal basis on which States can rely to choose a name. Hence, it can be argued that having a name is inherent to the very notion of juridical personality, in the absence whereof States will face great challenges entering into agreements and establishing relations with other legal persons (JANEV, 1999, p. 160). As a result of sovereign equality and the principle of self-determination, it has been held that States are entitled to freely choose their own name, flag and symbols (CRAVEN, 1995, pp. 234-235). Concomitantly, the chosen name becomes opposable to others (FRANCKX, BENATAR, JOE & VAN DEN BOSSCHE, 2010, p. 3). The authoritative Friendly Relations Declaration (UN General Assembly Resolution 2625) seemingly endorses this freedom to choose:

> "By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter."

To this one can add the *obiter* made by the ICJ in *Nicaragua v. USA* (§ 205):

> "The principle [of non-intervention] forbids all States or groups of States to intervene directly or indirectly in internal or external affairs of other States. A prohibited intervention must accordingly be one bearing on matters in which each State is permitted, by the principle of State sovereignty to decide freely. One of these is the choice of a political, economic, social and cultural system, and the formulation of foreign policy."

Moreover, preventing a State from exercising this aforementioned right could even constitute illicit intervention, if such efforts take on a coercive character:

> "Intervention is wrongful when it uses methods of coercion in regard to such choices, which must remain free ones." (ICJ, *Nicaragua v. USA*, § 205; CRAVEN, 1995, pp. 234-235)

Conversly, it is equally pertinent to consider the extent to which international law can empower States seeking protection of certain historic nomenclature, such as Greece, through the mechanism of acquiescence and protest as well as the concept of *prior in tempore* (first user) (BANTEKAS, 2009).

Finally, and this is more of a sceptical observation, one can question whether judicial intervention in naming disputes will always make a meaningful contribution to peaceful dispute settlement. Judge Xue wrote an interesting dissenting opinion, in the present case, that touches upon this very concern of judicial propriety (which echoes in part Greek objections regarding jurisdiction and admissibility that were not dealt with in this paper). By issuing a merely declaratory finding of illegality the Court did not actually affect the validity of NATO's decision to defer FYROM's accession. This lack of practical effect can be viewed as contrary to the judicial function of the Court. To make matters worse, she opines, the judgment could actually be detrimental to future negotiations between Greece and FYROM as it could be employed by each party to embolden their respective stances in future bilateral talks (XUE, 2011, p. 5). Concluding her critique of the majority position, she writes:

> "[T]he Parties committed themselves to finding a solution to this name difference in a speedy manner. The imposition of a solution by a third party, or any direct or indirect involvement, even from this Court, is undesirable in this regard. As the Court pointed out long ago, 'the judicial settlement of international disputes, with a view to which the Court has been established, is simply an alternative to the direct and friendly settlement of such disputes between the Parties; as consequently it is for the Court to facilitate, so far as is compatible with its Statute, such direct and friendly settlement' (…). While a speedy settlement of the name issue serves the best interests of both Parties, this judicial exercise, in my view, might render a service which is not conducive to the achievement of this objective."

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