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CURRENT LEGAL DEVELOPMENTS

The Authority of States to Use Names in International Law and the Macedonian Affair: Unilateral Entitlements, Historic Title, and Trademark Analogies

ILIAS BANTEKAS*

Abstract

The international legal entitlement by which a state constitutionally designates its name, or a province therein, involves a unilateral act. Where, however, another state wishes to choose the same appellation, as is the case with the former Yugoslav Republic of Macedonia (FYROM), the matter can only be resolved by reference to the first user and the maxim *prior in tempore potior in jure*. The first user must provide evidence of continuous use and of protest in those cases where the same appellation was appropriated by a third state. Under such circumstances the entitlement becomes exclusive, rather than concurrent, because the prior user may be said to possess a sound historic title, such that has been recognized by international judicial bodies to determine acquisition of territory, effective administration, historic bays, and so on. The exclusivity of the entitlement is further reinforced by analogy with general principles derived from the law of trademarks. At a practical level, the application of the international law of geographical indications clearly demonstrates that the designation ‘Macedonia’ cannot be used for a significant number of products originating in FYROM, since the Greek province of Macedonia has for a long time branded and registered such products. This will create insurmountable problems for producers in FYROM when they try to brand their goods under the country’s constitutional name. A change of name, particularly through the compromisory use of a compound, would alleviate legal, political, and financial concerns.

Key words

geographic designation; historic title; Macedonia; prior use; unilateral acts

I. INTRODUCTION

With the break-up of Yugoslavia some of the federal states contained within it sought to claim statehood. Many complexities arose out of this claim, not least because it touched on issues of territory, succession with respect to property and liabilities, recognition by other states, and others. In this regard, the territorial basis on which third states were willing to recognize these new entities as sovereign states in their

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own right was that which existed and was constitutionally recognized while these were federal states within the Socialist Federal Republic of Yugoslavia (SFRY).¹ This formula – that is, the retention of prior constitutional borders – ensures continuity and the least possibility of complaints, is certainly the least demanding, and was successfully applied in the break-up of Czechoslovakia and the Soviet Union; and it was upon this model that the referendum on the secession of Quebec was premised. It was not, therefore, surprising that the same tested formula was followed in the case of the seceding Republic of Macedonia from the SFRY, at least with regard to its territory. Although that republic's status as a state was not in question after the disintegration of the SFRY,² the ensuing interstate dispute which arose between Greece and this new state, concerning predominantly the use of 'Macedonia' as its constitutional name, contributed to friction with respect to its recognition³ under this constitutional name and the country's application for membership of international organizations.⁴ In 1993 'Macedonia' was admitted to the United Nations and was provisionally referred to for all legal and other purposes of that organization as the 'former Yugoslav Republic of Macedonia' (FYROM), pending settlement of the differences over the new republic's name.⁵

The vast majority of legal commentators taking the time to devote some wisdom to the issue took the view, on the one hand, that the matter is not regulated by a general rule of international law, claiming, therefore, that the name of a state is exclusively an issue of domestic jurisdiction over which no other entity can proffer any counter demands.⁶ Others, particularly non-governmental organizations (NGOs) concerned

1 The view that the principle of *uti possidetis* be applied to internationalize former administrative boundaries in the case of the SFRY was adopted by the EC Arbitration Commission on Yugoslavia and subsequently affirmed by the EC member states. See M. Craven, 'The European Community Arbitration Commission on Yugoslavia', (1995) 66 BYIL 333, at 335.

2 C. Warbrick, 'Recognition of States: Part 2', (1993) 42 ICLQ 433, at 438.

3 Greece imposed an embargo on FYROM on 16 February 1994 on the basis of then Art. 224 of the EC Treaty. The EC Commission subsequently commenced proceedings against Greece before the European Court of Justice (ECJ) on the grounds that the embargo hindered Community trade and distorted competition within the EU. *Commission v. Hellenic Republic*, Case C-120/94R, [1994] ECR I-3037. The Advocate-General, Mr Jacobs, sided with Greece's invocation of Art. 224 by arguing that 'where a government and people are fervently convinced that a foreign state is usurping a part of their cultural patrimony and has long-term designs on a part of their national territory, it would be difficult to say that war is such an unlikely hypothesis that the threat of war can be excluded altogether'. The Commission subsequently dropped the case before reaching the merits stage, while Greece concluded an Interim Accord with FYROM on 13 September 1995, *infra* note 9. See C. Stefanou and H. Xanthaki, *A Legal and Political Interpretation of Articles 224 and 225 of the Treaty of Rome: The Former Yugoslav Republic of Macedonia Cases* (1997).

4 Initially Greek claims centred on particular provisions of the FYROM constitution, which together with the use of the name 'Macedonia', it argued, implied territorial claims against Greece. This was subsequently remedied by the FYROM Assembly on 6 January 1992 with the amendment of the constitution through two constitutional acts which provided that FYROM had no territorial claims against neighbouring countries and no intention of changing its borders, and that it would not interfere in the sovereign or other internal affairs of other states. However, it is the usurpation of the name 'Macedonia', with all its cultural and historic attributes, to which Greece was, and is, opposed. See Greek Memorandum to the UN Concerning the Application of FYROM for Admission to the United Nations, UN Doc. A/47/877-S/25158 (25 Jan 1993). See I. Janev, 'Legal Aspects of the Use of a Provisional Name for Macedonia in the United Nations System', (1999) 93 AJIL 155, at 159. On the basis of the amendments the EC Arbitration Commission on Yugoslavia stated that 'the use of the name Macedonia cannot therefore imply any territorial claim against another state'. Opinion No. 6, (1992) 31 ILM 1507, at 1511. This article does not examine the validity of these territorial claims.

5 SC Res. 817 (7 April 1993); GA Res. 47/225 (8 April 1993).

6 Application of FYROM for membership to the United Nations, UN Doc. A/47/876-S/25147, cited and commented on in Janev, *supra* note 4, at 159; for a similar view see L. Henkin, R. C. Pugh, O. Schachter, and H. Smit,

with crisis management and conflict prevention, took the view that the recognition of a non-Greek 'Macedonian' identity that encompasses the current population of FYROM constitutes a foundation for the stability of that country.⁷ This stability objective was elevated to a political imperative, against which historic title, national sensitivities, and actual damage all took second stage. One such organization asserted that

The historical region of Macedonia indeed forms an important part of the Greek identity. But however important ancient Macedonia may be to Greeks, there is an objective difference: Greece does not depend on the name Macedonia as the exclusive signifier of the Greek identity.⁸

In 1995 the two countries entered into an Interim Agreement, the purpose of which was to facilitate their bilateral economic and political relations until a final agreement on the name was reached. Until such time, the newly emerged state was bound to use the name FYROM in its international relations and to remove, *inter alia*, those symbols from its flag which related to ancient artefacts excavated in Greece and which were traditionally considered by Greece to be its own national symbols.⁹ Since then a number of mediation efforts have failed to yield results, particularly because FYROM has rejected the incorporation of a compound next to the name 'Macedonia', which, although strongly unpopular with the Greek public, successive governments of the latter have been willing to accommodate as a compromise solution. During the latest rounds of negotiations in February 2008, the Greek government reaffirmed its commitment that a potential solution must be based on a win-win formula for both parties for the sake of good neighbourliness and regional stability, and no doubt this is also what the people of both countries are seeking. The positive signs offered by some states convinced the government of FYROM that it would be admitted into NATO and the European Union, despite Greek reservations. As a result of FYROM's intransigence over this proposed compromise and of general hostility towards US expansion of NATO to include Ukraine and Georgia, the majority of NATO members generally supported the Greek claim and upheld the veto against admission of FYROM until such time as 'a mutually acceptable solution to the name issue has been reached'.¹⁰ There still are a lot of uncertainties swirling around these recent developments. It is not wholly clear whether Greece has violated its obligation under Article 11 of the 1995 Interim Agreement not to obstruct the admission of

International Law: Cases and Materials (1993), 253 and M. Craven, 'What's in a Name? The Former Yugoslav Republic and Issues of Statehood', (1995) 16 *Australian Yearbook of International Law* 199; nonetheless, while it is true that states are free, under international law, to pursue certain unilateral acts in accordance with their municipal law, particularly in matters of nationality and maritime delimitation, the validity of these acts with respect to other states depends ultimately upon international law. See *UK v. Norway (Anglo-Norwegian Fisheries)*, (1951) ICJ Rep. 116, at 132, and *Liechtenstein v. Guatemala (Nottebohm)*, (1955) ICJ Rep. 4, at 20–1.

7 ICG, 'Macedonia's Name: Why the Dispute Matters and How to Resolve It', ICG Balkans Report No. 122, 10 December 2001, 1–2, 12.

8 *Ibid.*, at 16.

9 UN Interim Accord between the Hellenic Republic and the FYROM of 13 September 1995, available at www.hri.org/docs/fyrom/95-27866.html, Art. 7(2)–(3).

10 Bucharest Summit Declaration, Issued by the Heads of State and Government participating in the Meeting of the North Atlantic Council, Press Release (2008)049 (3 April 2008), point 20, available at www.nato.int/docu/pr/2008/p08-049e.html

FYROM to international organizations in which it is a party, on account of the fact that the government of that country has not made any compromise in order to resolve the name issue since signing the Interim Agreement. This is no easy task, however, as the internal political pressures on both governments over this issue are overwhelming; it is certainly an issue over which elections are lost and won. Equally, despite the recorded statements by the Greek minister of foreign affairs that Greece would not support FYROM's application to join NATO unless concrete commitments were made to resolve the dispute over the name, there is no concrete evidence that Greece alone vetoed this application. This is particularly true given that NATO adheres to a strict policy of secrecy as regards member states' voting choices. These diverging views on the meaning and the scope of the 1995 Interim Agreement led the government of FYROM to lodge an application against Greece in late 2008 before the International Court of Justice (ICJ), arguing that Greece had violated Article 11 of the 1995 Interim Agreement by blocking FYROM's entry into NATO.¹¹ The application does not deal with the entitlement issue over the disputed name and it is not expected that the World Court will address this matter even as *obiter dicta*. Despite my aforementioned positions, FYROM's application before the ICJ is not without merit, and the Court should consider carefully the specificity of positive obligations assumed by states in their quest for peace-building measures. Greece has generally failed to take the initiative in making FYROM feel like a 'neighbour' – unlike Greek investors who have invested heavily in the country, expecting that the situation would be defused through the negotiating process.

Following the NATO Bucharest summit in 2008, the matter is once again ripe for new rounds of negotiations. The case pending before the ICJ should act as a catalyst for a concrete solution. For the purposes of this article it should be noted, however, that all the mediating and negotiating processes thus far have failed to address the issue through the lens of international law; rather, their focus has been purely political. This approach would have been fine had politics provided a solution, but it seems only to have protracted discussions and given rise to a stalemate. This is perhaps a good lesson vis-à-vis the aversion to international legal solutions in respect of international mediating efforts.

An absence of full knowledge of the relevant issues is evident in the international legal literature, as well as an understandable political bias in favour of the underdog, without, however, there being any clear methodology or persuasive arguments that conform to international legal standards or historical title. The omission of the latter in the relevant literature is striking. The present analysis is quintessentially legal. It seeks to discern the existence of a legal entitlement pertaining to appellations and symbols by a resort to the concept of historic title, whether through multilateral, bilateral, or unilateral acts. It goes on to show the relevance of the maxim *prior in tempore potior in jure* with a view to determining a right of protest by the first

11 Application of 17 November 2008, *FYROM v. Greece*, Dispute Concerning the Implementation of Article 11(1) of the Interim Accord of 13 September 1995, available at www.icj-cij.org/docket/files/142/14879.pdf. By a subsequent Order issued on 20 January 2009, the ICJ fixed the time limits for the submission of memorials and counter-memorials.

user. We then examine the probative significance of historic evidence as a method of international law, which must certainly be the *sine qua non* criterion for ascertaining the existence or not of historic title. Equally, we assess the legal nature of appellations and symbols by attempting an analogy with the general principles of trademarks, which bear a close resemblance to the principal purposes of names and symbols. It is also without doubt that the trademark analogy gives rise to serious questions of damage or harm to the entity with a long-standing legal entitlement. In closing this introduction, the author was conscious that the legal framework of the name dispute could have been argued on the basis of the principle of self-determination. Nonetheless, given the existence of two conflicting claims, any such analysis of self-determination would have necessarily referred back to the foundational origins of these claims – that is, historic title.

2. CONCEPTUALIZING THE LEGAL ENTITLEMENT TO A NAME: UNILATERAL ACTS AND PROTESTS

States claim rights and prerogatives chiefly from the primary sources of international law – that is, treaties and custom. These contain rights that are directly conferred on the state entities concerned and, depending on participation in the treaty or customary rule, rights conferred may be global, regional, or bilateral. Equally, depending on the scope of the right, this could be narrow, wide, qualified, or other. Whether through treaty or custom, the fundamental criterion for the conferral of rights is consent, in terms of both conferral and acceptance. States can, however, also accrue rights to themselves on the basis of unilateral action. This is possible under strict circumstances, and in every case unilateral acts and declarations can produce legal effects only where they genuinely represent the will of the particular state. Such unilateral acts comprise behaviour on the basis of which states assume obligations (such as promises),¹² acts by which a state waives a right or a legal claim,¹³ acts by which a state reaffirms a right or a legal claim (such as recognition),¹⁴ and silence and estoppel as principles modifying some state acts.¹⁵ It is within the realm of unilateral acts, therefore, that the right of a country to lay claim to a name must necessarily fall. At this point we should also distinguish between three very different propositions or questions. (i) The first concerns claims to the name as a result of a legitimate entitlement, or opposing counterclaim, stemming from a unilateral act. This is fundamentally a legal question. (ii) The second proposition relates to the relevance of historic claims by either of the disputing entities and the possible outcome were one claim significantly to outweigh the other. Although *prima facie* this is merely a historical proposition, if international law were somehow to give weight, between two competing claims, to the one with the greatest reliance on historical title, it follows that this is also a legal question. (iii) Finally, even if the first

12 ILC, 7th Report on Unilateral Acts of States, UN Doc. A/CN.4/542 (22 April 2004), 7–43.

13 *Ibid.*, 44–8.

14 *Ibid.*, 48–70.

15 *Ibid.*, 72–8.

two questions were resolved in favour of Greece – that is, the country that is opposed to the ‘appropriation’ and use of the name ‘Macedonia’ by FYROM – the existence of FYROM as a sovereign state entity is not legally affected. Equally, recognition of this country under the name ‘Macedonia’ by other states produces legal effects as to the name between the various states concerned, irrespective of the outcomes in questions (i) and (ii) above.

Jurisprudence suggests that international judicial bodies have resorted to two standards in order to ascertain whether the existence of a particular claim is compliant with international law. The Permanent Court of International Justice (PCIJ) contended that a state may validly lay claim to a particular type of jurisdiction (and hence to a legal entitlement) where no other rule of international law is opposed to it.¹⁶ The opposite test is self-evident. Although the *Lotus* judgment was rightly criticized on numerous grounds, its proposition is sound and logical, otherwise no action would ever be taken internationally until such time as a large number of states decided either to enter into a treaty or otherwise mutually to act in a consistent and uniform manner in order to produce a customary rule. Unilateral action is therefore welcome and permissible, provided that it does not conflict with an existing rule of international law. In the present case, two legal impediments preclude the use by FYROM of the name ‘Macedonia’ and relevant symbols. The first concerns the official use of the name and symbols by Greece prior to their appropriation by the FYROM authorities, while the second impediment relates to the fact that Greece has always protested against the use of the name ‘Macedonia’ during the republic’s tenure as a federated republic of the SFRY and later on as an independent state. The *Lotus* test necessarily implies that a unilateral claim will fail only where an existing counterclaim or rule is of a legal rather than of a moral quality and texture. A moral claim could never trump a legal claim, except in those exceptionally rare circumstances where to do otherwise would contravene all notions of justice – although it is doubtful that there exists universal agreement on this point. Consequently, Greece’s claim of prior use must satisfy the requirements pertaining to a legal claim; that is, it must be an act producing legal effects. Although it is true that Greece’s official designation is the Hellenic Republic and thus the name ‘Macedonia’ does not feature in it, according to its constitution it is split into several administrative regions, one of which is Macedonia. Following the Balkan Wars of 1912–13 and the assumption of sovereignty over a large part of the geographical region of Macedonia that formerly belonged to the Ottoman Empire, the Greek government immediately adopted Law No. 524 in 1914,¹⁷ Article 1 of which stated,

The new countries, except for Epirus and the Aegean islands, are divided administratively into General Administrative Units and Prefectures; *Macedonia*, Epirus and the Aegean islands can be subdivided [apart from prefectures] into sub-administrative

16 *France v. Turkey (Lotus)*, (1927) PCIJ Reports, Ser. A, No. 10.

17 Law No. 524 On Administrative Division and Administration of the New Countries, published in Government Gazette of the Hellenic Kingdom, vol. 404(A) of 31 December 1914.

units... Thessaloniki and Chania are defined as the seats of the General Administrative Units of *Macedonia* and Crete, respectively. (Emphasis added.)

Given that this Greek normative designation, as well as a multitude of others,¹⁸ far precedes the post-Second World War Constitution of the SFRY, Greece officially made use of the name well before its neighbouring entities, even though this entitlement was also available to them at that time. One could, however, argue that a domestic law is capable of producing only internal, as opposed to external or international, legal effects and does not therefore fall within the *Lotus* rule, whereas the use of the name by FYROM relates to this country's international relations and is therefore the only relevant unilateral act of usage producing international legal effects. This position is untenable because domestic laws are no less purely domestic acts than are declarations made by government entities, or speeches given by prime ministers and ministers before their national parliaments. To the extent that such documents or actions are intended by their authors to, and do in fact, produce legal effects in the international sphere, such instruments are international in nature and binding upon their authors. Domestic laws offer evidence, in any event, for ascertaining state practice in particular areas of law. It is clear, therefore, that in its international relations with third states, Greece had through its domestic laws unilaterally laid primary claim to the use of the name 'Macedonia'. The fact that such designation referred only to a province, rather than to the country as a whole, does not limit other unilateral claims only as to provinces, since the use of the name to designate an entire country, as is the case with FYROM, creates legal effects for FYROM which conflict with Greece's pre-existing legal entitlement.

Greek protests over the use of the contested name by its neighbour constitute an additionally persuasive legal argument and a good example of a unilateral act producing legal effects.¹⁹ A protest is a negative act, in that it purports not to set a new paradigm, but simply to negate the existence of a claim made by another state. It is a formal act of objection by which the protesting state declares its intent not to be bound by an act of another state, and/or an intent not to recognize or acquiesce in the legal validity of such an act. The ICJ has consistently held that for a protest to be successful (i) it must immediately follow the act against which the protest is lodged;²⁰ (ii) the act or actions that constitute the protest must historically

18 A series of executive orders were made by the Governor-General of Macedonia (i.e. the Greek State) from 1914 onwards, a sample of which is contained in Museum of the Macedonian Struggle Foundation (eds.), *Macedonia: A Greek Term in Modern Usage* (2005), 29–31. Other laws concerning Macedonia were also promulgated in the immediate aftermath of the Second World War, such as Emergency Law No. 208 to Establish the General Administration of Northern Greece, Art. 1 of which encompassed therein 'the general administrative units of Western Macedonia, Central Macedonia, Eastern Macedonia and Thrace', published in Government Gazette Vol. 65, 21 March 1945; equally, Law No. 92 on the Reinstatement of the General Administrative Units and Abolition of Government Representatives, Art. 1 of which reinstated the General Administration of Macedonia, published in Government Gazette Vol. 13 of 20 January 1945. During the interwar period the Greek government had established a variety of public institutions that included the name 'Macedonia', such as the Agricultural Bank of Macedonia, the Supreme Administration of the Gendarmerie of Macedonia and others.

19 See I. C. McGibbon, 'Some Observations on the Part of Protest in International Law', (1953) 30 *British Yearbook of International Law* 298.

20 *Anglo-Norwegian Fisheries*, *supra* note 6, at 131.

accompany the contested unilateral act;²¹ (iii) the protest must be consistent and uninterrupted;²² and (iv) the intent of the protesting state must be to prevent the emergence or recognition of a legal entitlement by another state. In the case at hand, it is only one party, namely Greece, that is claiming the existence of an uninterrupted historic title that stems from its domestic law arrangements. Given that at the time the laws of the modern Greek state, following the conclusion of the First World War, incorporated the province of Macedonia into Greek territory, 'Macedonia' existed neither as an independent state entity nor as a constitutionally recognized region within the then Kingdom of the Serbs, Croats, and Slovenes (the Kingdom), it follows that the first historic title claimant is Greece. There is no record of the Kingdom or of Bulgaria ever protesting against Greece's designation of its northern region with the name Macedonia. Equally, when the post-Second World War constitution of the SFRY named its southernmost province Macedonia in order to consolidate the plethora of ethnic groups inhabiting that region, Greece protested against this action and at the same time took some domestic steps that clearly demonstrated its objection to the use of the name for any legal purpose. Thus Greece has consistently refused to recognize the so-called ethnic Macedonian minority in Greece.²³ It is not that Greece refuses to recognize the distinct characteristics of this group, particularly its use of a Slavic dialect; on the contrary, the Greek state does not accept the group's designation as Macedonians because that would conflict with its constitutional – not to mention historical – tradition whereby it has already designated the characterization of 'Macedonian' to its Greek population living in the province of Macedonia.²⁴ Greece has refused to recognize this language as a distinct Macedonian language for the same reasons, as will be demonstrated in the following section.

Having analysed the validity and legal nature of unilateral acts and their actors' claims concerning the production of legal effects, we have demonstrated that Greece was the first of the two contesting entities to use the name Macedonia in order to designate as such a distinct part of its territory. The *prior in tempore potior in jure* maxim therefore justifies the first-in-time user's exclusive use of the name and its protest against any other entity usurping it. It is equally evident that Greece's protests against the use of the name within the SFRY (and later on when the break-away republic became known as FYROM), which included both oral statements and positive action, satisfy the aforementioned criteria giving legal credence and effect to the protests. Greece's protests against the contested appellation from the time this name was introduced in the SFRY and later when FYROM became a sovereign

21 *El Salvador v. Honduras (Land, Island and Maritime Frontier Dispute)*, (1992) ICJ Rep. 351, 577, para. 364.

22 *Anglo-Norwegian Fisheries*, *supra* note 6, at 138; *USA v. Mexico (Chamizal arbitration)*, (1911) 5 AJIL 807.

23 H. Poulton, *Who Are the Macedonians?* (2000), 171.

24 Greece's record on the protection of its minorities is generally poor. This is true also of its slavophone minority on which it imposed numerous unnecessary and harsh linguistic and other penalties in the mistaken belief that such measures would foster assimilation. Nonetheless, the European Court of Human Rights in *Sidiropoulos et al. v. Greece*, 4 ECHR (1998) 500, did not attempt to answer the question as to whether a distinct ethnic Macedonian minority should be recognized at a time when the Greek population of northern Greece is already designated as Macedonian. The Court clearly suggested, however, in paras. 37–39 that the intention to dispute 'the Greek identity of Macedonia and its inhabitants and undermine Greece's territorial integrity' constitutes a legitimate interference in the right of association (Art. 11 ECHR) with the aim of protecting national security and preventing disorder.

state can probably also be described as persistent objections.²⁵ Let us now examine the legal relevance, if any, of legal claims arising out of historic title.

3. THE HISTORIC TITLE CLAIM

During the course of the twentieth century many an opportunity arose for states to argue that in particular instances they had a legal entitlement as a result of some historic or original title.²⁶ Litigation over the existence of such a title concerned mainly rights to land territory or waters, historic bays, and others. In attempting to discern the legal nature of historic titles, it has been suggested that one should not be guided by private law analogies such as estoppel or prescription, but instead rely on state acquiescence or consent. As such, historic rights constitute a particular type of custom which deviates from what would normally be the applicable rule were it not for the lapse of time and the maxim of *quieta non movere*.²⁷ Indeed, in this sense the customary rule that comes into being between the interested entities involves a bilateral or trilateral custom, which is the case for historic bays or title to territory. It is undeniable, however, that estoppel, or the lack thereof, plays a significant part in the formation of such a customary rule, because in the circumstances at hand it operates either to denote or to remove consent. In any event, the fact remains that in many parts of the world the consolidation of land boundaries through ancient or historic traditional title remains paramount.²⁸ The same is not necessarily true with regard to historic bays.²⁹ It should be noted, however, that the reason why historic title to bays is disputed is because the matter is resolved to a significant degree by the 1958 Convention on the Territorial Sea and by the 1982 UN Convention on the Law of the Sea (UNCLOS).³⁰ Equally, although historic title to bays is not disputed per se, the historical evidence required to prove its existence, coupled with the usual requirements of customary law, has prevented the ICJ from adopting a uniform rule applicable in all relevant cases. As a result, the ICJ has made it clear that claims to historic titles over bays are subject to ad hoc legal

25 The rule on consistent objection is very important in this case, as it would determine whether a state may be estopped of its historical claims. See generally J. I. Charney, 'The Persistent Objector Rule and the Development of Customary International Law' (1985) 56 *British Yearbook of International Law* 1. It has been argued that Greece's present opposition to the use of this particular name possibly contradicts its previous attitude when it adopted the 16 December 1991 'Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union', European Political Cooperation (EPC) Documentation Bulletin No. 91/464, 16 December 1991. Since the adoption of these Guidelines was only intended to formulate a common EC external policy on recognition it cannot be inferred that through its consent Greece tacitly accepted later claims on the issue of the name. See A. Peters, 'Commission of the European Communities v. Hellenic Republic', (1995) 89 AJIL 376, at 383.

26 In *El Salvador v. Honduras*, *supra* note 21, para. 45, the ICJ confirmed that the term 'title' encompasses not only documentary evidence, but also 'any evidence which may establish the existence of a right, and the actual source of that right'.

27 Y. Z. Blum, *Historic Titles in International Law* (1965).

28 See K. Kaikobad, 'Some Observations on the Doctrine of Finality and Continuity of Boundaries', (1983) 54 *British Yearbook of International Law* 119, 130–2.

29 I. Brownlie, *Principles of Public International Law* (2003), 158.

30 (1982) 21 ILM 1245. Even so, Art. 10(6) of UNCLOS, which regulates the delimitation of bays, states that the entirety of Art. 10 does not apply to historic bays.

regimes determined by their particular circumstances,³¹ which may, as in the *Gulf of Fonseca* case, turn out to be a pluri-state historic bay subject to a particular species of threefold sovereignty.³² Despite the limited application of historic titles due to the detailed regulation of UNCLOS, the Convention itself is not blind to the fact that some facets relating to the law of the sea are still best regulated by reference not to the general rule established each time by UNCLOS, but instead by historic title, such as that regarding the delimitation of the territorial sea between states with opposite or adjacent coastlines.³³ A particular, but not markedly different, variant of historic title is the so-called historical consolidation of title. Its contemporary origins lie in the ICJ's judgment delivered in the *Anglo-Norwegian Fisheries* case, according to which the Norwegian use of straight baselines since 1869, which itself had received general toleration, was 'the basis of an historical consolidation which would make it enforceable against all States'.³⁴

Ascertaining the origin and ownership of specific 'cultural elements' undoubtedly requires a historical examination of facts, something which we have demonstrated is hardly new in interstate litigation.³⁵ Historic title is of twofold significance in the current context. First, one should examine the practice of the disputing states themselves from the moment the Macedonian region came into their hands. The crucial period in this regard is 1913, at which time the region was ceded to Greece, Bulgaria, and Serbia following the defeat of the Ottoman armed forces. The relevant position since 1913 of FYROM's predecessor, the Kingdom of Serbs, Croats, and Slovenes – and Bulgaria, where this is territorially relevant – is equally important. The period from 1913 to the present day will provide evidence as to the legality of unilateral entitlement claims on the basis of the *prior in tempore potior in jure* rule, as well as the existence of counterclaims on the basis of protest. The period prior to 1913 is also equally important because, much like 'usage' in the case of historic bays, although the region was not in the hands of either of the contesting states, the treatment of the region as Greek or otherwise by the Ottomans or other empires before them helps to clarify the contemporary arguments of the parties. In the present case it is undisputed that the inhabitants of Macedonia were an ancient Greek tribe who spoke one of the oldest forms of Greek, which had affinities with the Aeolian, Arcado-Cypriot, and Mycenaean dialects. The most renowned of these ancient Macedonians, King Philip of Macedon and his son Alexander the Great, acted, not as a distinct and non-Greek tribal people, but as a pan-Hellenic movement with the aim of uniting all the Greek city states.³⁶ The fact that the ancient Macedonians were self-identified as Greeks and viewed as such by other

31 *Tunisia v. Libya (Continental Shelf)*, (1982) ICJ Rep. 18, paras. 98–107; *El Salvador v. Honduras*, *supra* note 21, paras. 404 ff.

32 *El Salvador v. Honduras*, *supra* note 21.

33 UNCLOS, Art. 15.

34 *Anglo-Norwegians Fisheries*, *supra* note 6, at 138.

35 The historic method is extensively used in interstate disputes concerning title to territory. In the *Minquiers and Ecrehos* case ((1953) ICJ Rep. 47), for example, the ICJ examined the history of the islands as far back as 1066 AD. Ancient historical title was also claimed by Yemen in its case against Eritrea. *Eritrea v. Yemen*, Boundary Commission Decision (13 April 2002), (2002) 41 ILM 1057.

36 Institute of International, Political and Strategic Studies (eds.), *The Macedonian Affair* (1997), 7, citing among others the German historian Johann Gustav Droysen.

Greek city states is attested by ancient historians, such as Herodotus and Strabo, as well as by engravings in tombs, as epigraphs, and on coins, among others, excavated in Macedonia, all of which were written in Greek. Strong Greek presence in the geographical area of Macedonia continued even after the appearance of Slavs and Bulgars in the sixth and seventh centuries AD.³⁷

Following the collapse of Ottoman rule in the Balkans and subsequent fragmentation, no mention was made of a 'Macedonian' people and no such claims were made in an ethnic context.³⁸ The British were monitoring the region and their consul in the 1860s reported that the slavophone population were designated as Bulgarians.³⁹ It must be understood that at the time the former subjects of the Ottoman Empire did not determine their identity on the basis of ethnicity, but primarily on grounds of religion and language. Given that all Christians were subject to the authority of the Ecumenical Patriarch in Constantinople, which was the universal beacon of Greek language and orthodoxy, the Greek authorities complacently believed that slavophone Macedonians were equally happy with this arrangement, particularly since the impoverished slavophone rural populations bore the burden of financial demands from local bishops subordinate to the Ecumenical Patriarch.⁴⁰ The new Bulgarian state capitalized on this dissatisfaction and in 1870 legalized the status of the Bulgarian Exarchate Church, and thus offered a new alternative to the slavophones of the region with a view to cultivating a Bulgarian national consciousness. In 1891 the British Foreign Office conducted a survey of the linguistic and ethnic composition of the region of Western Macedonia, making no mention of a distinct Macedonian ethnicity, but instead pointing out that some slavophones had indeed begun to assert a Bulgarian ethnic identity.⁴¹ It is telling that not even the principal Macedonian slavophone paramilitary organization, the EMEO, asserted the existence of a distinct Macedonian ethnic group or social class.⁴² This is only natural, since neither the 1878 Treaty of Berlin,⁴³ nor the 1878 Treaty of San Stefano,⁴⁴ which it revoked, made any reference to such an ethnic group. This lack of reference to a Macedonian ethnicity, or of claims thereto, continued even in the aftermath of the First World War in the context of bilateral population transfer treaties, particularly the 1919 Neuilly Treaty between the Allied and Associated Powers and Bulgaria,⁴⁵ nor was there any such mention in the reports of any

37 Ibid., citing the French historian Paul Lemerle.

38 Ibid., 8, citing Lord Salisbury who, as British representative at the Congress of Berlin, stated in his address of 19 June 1878 that 'Macedonia and Thrace are as Greek as Crete'.

39 *Parliamentary Papers – Accounts and Papers* (PPAP), Vol. 75 (1867), 607.

40 Ibid., Vol. 67 (1861), 512, and Vol. 75 (1867), 618–19.

41 FO Public Records, FO Doc. 195/1849, Shipley to Blunt (Monastir, 31 March 1884), 103–7.

42 V. K. Gounaris, 'The slavophones of Macedonia', in K. Tsitselikis and D. Hristopoulos (eds.), *The Minority Phenomenon in Greece* (1997), 83–4.

43 Treaty between Great Britain, Austria-Hungary, France, Germany, Italy, Russia and Turkey for the Settlement of the Affairs of the East, signed at Berlin on 13 July 1878, contained in A. Oakes and R. B. Mowat (eds.), *The Great European Treaties of the Nineteenth Century* (1918), 332–60.

44 Preliminary Treaty of Peace between Russia and Turkey, signed at San Stefano on 3 March 1878, in *ibid.*, at 377–90.

45 Available at www.hri.org/docs/fyrom/95-27866.html. In fact, Arts. 46 and 54 of this treaty, which concern the obligation to protect minorities on the territory of Greece and Bulgaria respectively, refer only to linguistic, racial, and religious minorities and not to ethnic minorities. Nor indeed is there any mention of an ethnic

government or non-government entities. In 1924 Greece and Bulgaria adopted a bilateral protocol (the so-called Politis-Kalfop Protocol), by which Greece acknowledged that the slavophones of Western Macedonia constituted a Bulgarian minority.⁴⁶ This was an altogether foolish decision, given that many slavophones in the region had by that time openly professed a Greek ethnic identity and had taken part in the Balkan wars against Bulgaria. Serbia took advantage of the turmoil within the Greek slavophone Macedonian community, requesting from Greece its recognition as a Serbian, rather than a Bulgarian, minority.⁴⁷ Until the rise of Tito in Yugoslavia no mention was ever made of 'Macedonians' as a distinct ethnic group. In fact Tito did not believe in the existence of a non-Greek Macedonian identity, but had no alternative but to concoct one or risk ethnic tensions in the southernmost region of his country.⁴⁸

It is thus clear that the name 'Macedonia' has, since antiquity, been employed to designate a geographic location and not a distinct ethnic or national group as such. This conclusion is also confirmed, under the weight of historic evidence, through the interpretative communities theory, which articulates the notion that within an institutional setting the various actors share common assumptions and beliefs (interpretative community), such that the meaning of a text or of a concept is constrained by providing the assumptions and understanding relating to the practice at hand.⁴⁹ In the present case, it is evident that the international community between 1860 and 1940 had not conceived, nor was it a recipient of claims concerning, the existence of a distinct Macedonian ethnicity.

The former Yugoslav Republic of Macedonia is composed of a variety of ethnic groups: Slavs, Albanians, Vlachs, Greeks, and others. These multi-ethnic populations with a plethora of languages and dialects do not come within the historic meaning identified with the term 'Macedonian', except through their geographical inclusion in the greater region of Macedonia. The modern state of FYROM, therefore, does not constitute an extension of ancient Macedonian history, whether in terms of language or ethnicity.⁵⁰ On the sole basis, nonetheless, that it does occupy part of the wider geographical region of Macedonia, it may be argued that the use of the name 'Macedonia' by FYROM is permissible, but only insofar as this is used to designate its geographical location. For reasons already explained in our analysis of historic title, the name 'Macedonia' cannot be used to designate the ethnicity

Macedonian group in the 1913 Bucharest Peace Treaty between Romania, Montenegro, Serbia, Bulgaria, and Greece, which related to those countries' borders following the conclusion of the First World War, available at www.mtholyoke.edu/acad/intrel/boshtml/bos149.htm.

46 Unpublished, on file with the author.

47 Gounaris, *supra* note 42, at 96–7. Despite the subsequent refusal by the Greek parliament to ratify the Politis-Kalfop Protocol, the justified disillusionment of the Greek slavophone population was hard to repair.

48 E. Koufos, *The Macedonian Question: The Politics of Mutation* (1987), 3–4. Tito's intentions in this regard are generally undisputed.

49 S. Fish, *Is There a Text in the Class? The Authority of Interpretative Communities* (1982); I. Johnstone, 'Security Council Deliberations: The Power of the Better Argument', (2003) 14 *EJIL* 437, at 444.

50 The first president of FYROM, Kiro Gligorov, stated that 'We are Slavs who came to this area in the sixth century . . . we are not descendants of the ancient Macedonians.' Foreign Information Service Daily Report, Eastern Europe, 26 February 1992, 35; statements to the same effect were printed in the *Toronto Star*, 15 March 1992.

or language of the people of FYROM, given that the term 'Macedonia' had never in the past been used to designate a distinct ethnic group. Equally, on account of Greece's use of the term 'Macedonia' to define constitutionally part of its territory, and given its unopposed historic title in this regard, FYROM cannot reasonably expect that it may employ this particular designation as the name of the country on incidental geographical grounds. As will be explained in the next section, FYROM can expect, at best, that the term 'Macedonia' may be employed, but only where this is qualified in order to avoid confusion between the two entities and their various ethnic, linguistic, and other traditions. Nonetheless, this is a matter for negotiation and is by no means an automatic entitlement. Several suggestions were proffered in the past as suitable for this purpose, such as 'Slavo-Macedonia', 'Vardar-Macedonia', 'Northern Macedonia',⁵¹ and, more recently, 'New Macedonia',⁵² among others.

4. THE LEGAL NATURE OF NAMES AND SYMBOLS AND THE TRADEMARK ANALOGY

One issue that has not been discussed thus far concerns the legal nature of the disputed name and symbols. More precisely, do they constitute tangible assets in the sense of real or immovable property, do they resemble financial instruments (such as bonds and securities), or do they instead perform the functions of intangible property in the same way as copyright or trademarks? The first two seem clearly to be too far remote from the object and purpose of the term 'Macedonia' and the way it is used by the two countries, as well as the meaning and feelings it conveys in the peoples of the two neighbouring states. At the same time, however, it is not possible wholly to transplant the general principles of copyright and trademark law to resolve this legal dispute because of the essentially private law and individualistic – in terms of creators – outlook of intellectual property. Therefore, in order to make use of a coherent methodological analogy from the realm of intellectual property (IP) law, one must necessarily employ only such law that satisfies the following criteria: (i) that the said law be susceptible to an analogy whereby the object, idea, or trademark or sign can be seen as belonging to a collectivity under a particular legal personality (i.e. a state), having, moreover, come to it through historic consequence or succession, or on the basis of geographic occurrence; (ii) that the trademark under consideration reflect a value, whether financial or other, to the wider group or persons that claim a legal entitlement; and, most importantly, (iii) that the registration (in any prescribed manner) of the trademark provide the holder with an exclusive right.

Article 15 of the Trade-Related Aspects of Intellectual Property Rights (TRIPS) Convention defines as a protectable trademark:

⁵¹ See ICG Report, *supra* note 7, 12–15.

⁵² This option of 'New Macedonia' has reportedly surfaced unofficially following the last round of negotiations between the two countries in February 2008, but no official source has confirmed it. See P. Karajkov, 'Macedonia Name Dispute Enters Critical Phase', 15 April 2008, available at www.newropeans-magazine.org/content/view/full/7502/259/.

Any sign, or any combination of signs, capable of distinguishing the goods or services of one undertaking from those of other undertakings. Such signs, in particular words including personal names, letters, numerals, figurative elements [etc.] . . . shall be eligible for registration as trademarks. Where signs are not inherently capable of distinguishing the relevant goods or services, members may make registrability depend on distinctiveness acquired through use.

From the perspective of the current discussion, it is evident that a trademark – in this case the appellation ‘Macedonia’ and the ancient Macedonian artefacts used by FYROM as national symbols – must distinguish a good, service, or product from other goods, services, or products falling within the same category. Given that the name ‘Macedonia’ and the symbols are employed by both contesting nations for the same purposes, it follows that the dual use of the same ‘trademark’ for the same purpose cannot possibly distinguish the two purposes. It is, therefore, only reasonable that Article 16(1) of TRIPS confers upon the owner of a registered trademark the exclusive right to

prevent all third parties not having the owner’s consent from using in the course of trade identical or similar signs for goods or services which are identical or similar to those in respect of which the trademark is registered, where such use would result in the likelihood of confusion.⁵³

The historical title belonging to Greece, as already explained, would make Greece the first and exclusive user of the name and symbols. An interesting and viable analogy is warranted in this connection between the need for registration in IP law in order for a trademark to be protected and the requirement in international law that historic title conform to the criteria for producing a customary rule (i.e. uninterrupted long and consistent use and *opinio juris*).

Two notable exceptions to this general rule underlie the law of trademarks and it is only fair that their tenets are further exposed. The first exception rightly posits that a natural person cannot be prevented from employing his name in order to designate his personal business, even if this person’s trademark is unregistered. Equally, someone with an unregistered trademark may prevent others from registering it, or using it, where that person has been using the particular trademark consistently for a good amount of time and he is moreover well known for his business activities in that line of trade. This concept is known as *passing-off*.⁵⁴ In the case at hand, the analogy to registration of a trademark, as has already been demonstrated, is tantamount to long usage of the name and symbols by Greece, without any protest from FYROM or its predecessors. As a result, the concept of passing-off does not aid the argument of the latter country, as it has never been known in its modern history by that name and the same is true of the symbols, which were excavated on Greek territory. The

53 One could also make use of Arts. 22–24 of TRIPS, relating to the protection of geographical indications. These provisions serve to protect indications that identify a good as originating in a particular territory, ‘where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin’. As will become evident in the next section of this article, the maintenance of the name ‘Macedonia’ in both Greece and FYROM carries with it significant dangers with regard to the designation of products or services originating in the two countries.

54 See generally *Reckitt and Colman Ltd v. Borden Inc*, [1990] 1 RPC 344.

fact that Greece first employed both the name and the symbols for official purposes reflects the 'priority right', which is the highlight of the 1883 Paris Convention for the Protection of Industrial Property, now ratified by 171 states, according to which the filing date of a trademark in a contracting state is considered to be the effective filing date in another contracting state, provided that another application is filed within six months.⁵⁵

As regards, specifically, the use as symbols of historic objects belonging to the cultural heritage of another state, such as the ancient Macedonian Sun of Vergina which appeared on the first FYROM flag,⁵⁶ it is firmly established that their use for whatever purpose is fully dependent on the consent of the state in whose territory these are lawfully found.⁵⁷ This is confirmed by Article 6 of the 1972 UNESCO Convention for the Protection of World Cultural and Natural Heritage.⁵⁸ This instrument establishes a legal regime under which historic and artistic works and sites are classified as belonging to a 'world heritage'.⁵⁹ The attributes of this regime, however, are not akin to the concept of 'common heritage of mankind' under UNCLOS. The latter does not allow the exercise of sovereignty or sovereign rights over the seabed beneath the high seas, making it clear that this area is reserved for the common use of all states.⁶⁰ The concept of 'world cultural heritage', on the other hand, under Article 6 of the 1972 Convention, expressly places all historic objects and sites under the exclusive sovereignty of the holding state and, by implication, this includes the right to exhibit them or to deny to other entities the use as symbols of such historic artefacts.

It is hoped that the trademark analogy sheds some light on the particular legal nature of names and symbols in international law and on the enforceability of the priority right, which is consonant with the *prior in tempore* maxim. The following section focuses on the potential harm that may be caused as a result of appropriating symbols and names of a long-term and prior user, as well as the practical implications such an appropriation might have for the victim state. We shall also employ an additional facet of international trademark law (although the two are formally distinct categories of commercial signs), the concept of geographical indications, to assess whether the protection of such indications is exclusive. This matter, because of its financial implications, best suits a discussion on damage rather than a section dealing with an analogy of historic title as a type of trademark.

55 Paris Convention for the Protection of Industrial Property, Art. 4.

56 See *supra* note 9 and *infra* note 68.

57 Under Art. 149 of UNCLOS, all objects of an historic or archaeological nature found on the seabed beneath the high seas shall be preserved for the benefit of mankind, with particular regard paid 'to the preferential rights of the State or country of origin, or the State of cultural origin, or the State of archaeological or historical origin'. This confirms that the state where such objects are situated exercises exclusive sovereignty over them, whereas, if not situated on that state's territory, the latter may have only sovereign rights of unknown quantity. By analogy to the present case, Art. 148 confirms that a state exercises exclusive jurisdiction over all historic or cultural elements found on its territory.

58 Adopted 16 November 1972, repr. (1972) 11 ILM 1358.

59 Arts. 1 and 2.

60 UNCLOS, Art. 137.

5. DAMAGE CAUSED TO AND THE PRACTICAL IMPLICATIONS FOR THE VICTIM STATE: THE PROTECTION OF GEOGRAPHICAL INDICATORS PARADIGM

Thus far we have discussed the legal nature of names and symbols in international law and the possible legal avenues by means of which to determine which state, to the exclusion of other states, may appropriate these. What remains to be analysed is the degree of harm or damage, if any, that may be caused to the state with the exclusive legal entitlement through the use by a state lacking such an entitlement of the contested name and symbols. If we take it for granted that the usurping state therefore commits an unlawful act, this would give rise to state responsibility irrespective of whether damage has been sustained to the title-holder as a result.⁶¹ This is so because proof of damage is not a criterion for the determination of such responsibility. All that is required is evidence that the appropriation of the name and symbol does not correspond to an entitlement or an existing lawful obligation.⁶²

Given the international community's lack of interest in the matter of legal entitlement and historic title, evinced mainly by the fact that a large number of states have moved to recognize FYROM as 'Macedonia', it is significant to explain on what basis Greece suffers actual damage through the appropriation of this appellation by FYROM. The trademark analogy employed earlier in this article suggests that where a state using a particular appellation has done so for a particularly long time and has achieved a reputation associated with such appellation or symbol, it is only logical that a commercial value attaches to this appellation and symbol. Plainly put, every successful and well-known trademark possesses a financial dimension other than any other value that may accrue to it, particularly fame. The same is true of geographical appellations ('geographical indications' in trademark terminology), and they are protected under relevant multilateral⁶³ and bilateral⁶⁴ trademark conventions and have, moreover, been the subject of fierce litigation before the European

61 ILC's Articles on State Responsibility, Art. 1.

62 *Ibid.*, Art. 16.

63 The 1883 Paris Convention for the Protection of Industrial Property (as amended), available at www.wipo.int/treaties/en/ip/paris/trtdocs_woo20.html, Arts. 9 and 10, directs member states to seize upon importation all goods bearing 'direct or indirect false indications of the source of the goods'. Art. 10 *bis* prohibits indications that are misleading, but does not refer to geographic origin. See S. P. Ladas, *Patents, Trademarks and Related Rights: National and International Protection I–III* (1975), 1579. Thereafter, Art. 4 of the 1891 Madrid Agreement for the Repression of False or Deceptive Indication of Source of Goods (as amended) prohibits member states from treating regional geographic indications of wine as generic terms. The strongest protective measures for geographical indications have, however, come about as a result of Arts. 22–24 of TRIPS, at the insistence of the EC and Switzerland during the Uruguay Round of the General Agreement on Tariffs and Trade (GATT). Art. 22(1) of TRIPS simply states that 'a given quality, reputation or other characteristic of the good is essentially attributable to' the product's place of origin, which could be either a name or a symbol. There exist two types of protection, one in respect of wines and spirits and a general protection for all other products. A product is not protected if it is not registered as such in the country of origin (Art. 24(9)), as well as where it involves a generic term in a member state (Art. 24(6)). A. Conrad, 'The Protection of Geographical Indications in the TRIPS Agreement', (1996) 86 *Trademark Reporter* 11.

64 E.g. 1910 US–Portugal bilateral agreement, whereby the designations 'Porto' and 'Madeira' were agreed to be protected in the United States. See Conrad, *supra* note 63, at 27. The EC has engaged in a tremendous effort to adopt bilateral agreements in order to phase out the generic use of EC member states' geographical indications. See 1994 EC–Australia on Trade in Wine, OJ 2003 L 336/100.

Court of Justice⁶⁵ and other courts.⁶⁶ It is well known that certain geographical appellations are so famous that the particular product that is produced there is known not by its type, but by the name of the city or region itself. A few examples come to mind, such as Champagne and Bordeaux. The European Communities and the European Court of Justice (ECJ) through its judgments have reiterated that one need not demonstrate that a product is endowed with exclusive characteristics as a result of its place of origin, but that the consumer public throughout the world associates the product with a particular geographical location.⁶⁷ One can imagine the confusion and economic loss that would be incurred if a new state named Bordeaux emerged in the environs of France and produced wine under the appellation of Bordeaux. If one follows the argument of FYROM and its supporters one would come up with the absurd result that the country Bordeaux would not be compelled to use a compound name, or indeed change its name, in order to distinguish itself from the region of Bordeaux, which itself has through great pains and over time created a successful geographical indication, on which it premises its financial viability. Presumably such a result would be construed on a conclusion that the geographical indication analogy in international relations is a practical and legal fallacy and that states have a unilateral legal entitlement to adopt any appellation and symbols, irrespective of a historic title or continuity, even if to do so would necessarily hurt, at the very least, long-standing commercial interests of other states. It is more than obvious that compelling reasons dictate the rejection of such a unilateral entitlement. The Greek province of Macedonia is in its own right well known for its local delicacies, including cheese and wine, as well as for its tourist industry, a significant portion of which is precisely centred on ancient Macedonia and its symbols.⁶⁸ The ECJ in the *Feta II* case supported Greek claims that feta cheese receives exclusive protection as a product of origin as a result, among others, of consumer association with Greece. More importantly, the Court concurred that in accordance with Greek legislation, the milk used to make the cheese is only that which is produced in a specified number of Greek provinces, among which is Macedonia.⁶⁹ These are just few, but illustrative, examples of the confusion and subsequent financial loss that may be caused by the appropriation of a well-known geographical appellation (or the potential thereof) by another state. Given that all products originating from the Greek province of Macedonia would fall under protected geographical indications, it would be devastating for FYROM to be legally precluded from branding its local

65 Following its early case law, the ECJ made it clear that geographical origin would be protected only where there was a link between particular characteristics of a product produced there and its geographical origin. As a result it rejected protection in *EC Commission v. FRG (Sekt/Weinbrandt)*, [1975] ECR 181; and in *Criminal Proceedings against Karl Prantl (Bocksbeutel)*, [1984] ECR 1299.

66 *EC v. Australia (Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs)*, (2005) WT/DS290/R; on the same subject matter, *EC v. USA*, (2005) WT/DS174/R.

67 See *Exportur SA v. LOR SA and Confiserie du Tech (Exportur case)*, [1992] ECR I-5529; *Belgium v. Spain (Rioja II)*, [2000] ECR I-3123; *Budejovický Budvar, Narodní podnik v. Rudolf Ammersin GmbH (American Bud)*, [2003] ECR I-13617;

68 The first flag of FYROM displayed the Sun of Vergina, an artefact excavated in the ancient Macedonian palace at Pellas, Greece. Following Greek protests and international pressure over appropriation of this symbol, the government of FYROM amended the design, without, however abandoning the Sun.

69 *FRG and Denmark v. Commission (Feta II)*, [2005] ECR I-9115.

products under the country's constitutional name. As a matter of state economics, therefore, it makes sense for FYROM to change its name.

Additional damage may potentially be caused in the sphere of international cultural heritage law. An obvious problem arising from the use of the same name by the two states is which of the two, Greece or FYROM, would be entitled to claim the return of historical or cultural objects related to Macedonia. One may suggest that the widespread recognition of FYROM with its constitutional name is a distinct issue from that of cultural heritage claims, on the basis that the purpose of recognition was the preservation of stability, or indeed the recognition of unilateral entitlements over a country's name, whereas the return of cultural treasure should be premised on historic title. The denial of historical evidence, however, in one circumstance and its acceptance in another brings to mind neo-imperialistic connotations that can only help to fuel criticisms that international law is inconsistent. Indeed, if a petitioned state were to return archaeological artefacts to Greece under the premise that they form part of the ancient Macedonian heritage that was exclusively Greek, how would the same petitioned entity explain its refusal to return the same artifacts to FYROM, where it has recognized FYROM as Macedonia, given that this country claims strong historical links with ancient Macedonians? It is obvious that this instance cannot be justified and has the potential to inflame serious international friction. Historical claims, therefore, have a significant bearing on legal entitlements and cannot be divorced from them.

This conflict over the name could also have implications regarding laws granting nationality, as Greece exercises the *jus sanguinis* principle of nationality, which is based on descent from a national. This would affect people who have lived abroad for a number of generations under a Macedonian upbringing and whose predecessors took for granted their Greek ethnicity, as would be the case with any emigrant from London to the United States who need not emphasize that he or she is thereby from the United Kingdom.⁷⁰ People in these particular circumstances are bound to encounter a substantial amount of confusion in identifying their ancestral land, especially where they have taken up the language of their current abode and have no links with the country of origin of their ancestors.⁷¹

Finally, it should not be forgotten that the legal arguments referred to in this article are useful before judicial bodies, particularly the International Court of Justice and ad hoc arbitration, were the parties to decide to settle their dispute through judicial means. Equally, these conclusions would empower non-judicial settlement in the event that the appointed entity was empowered to formulate a legal argument and bring it to the attention of the parties. In the absence of any of these mechanisms, it is maybe wishful thinking to expect that the party with the weakest legal

70 The ICJ in the *Nottebohm* case, *supra* note 6, 20–1, confirmed that although each state is free to determine the conferment of nationality on the basis of its own laws, it is international law that determines whether a state is entitled to exercise related functions, such as diplomatic protection.

71 This is particularly important, since it affects possible land and voting rights which some states grant to persons belonging to the ethnic population of the state. Under Art. 6 of the Greek Citizenship Code (Law No. 2130/1993) persons of Greek descent are not required to have resided in Greece for any period of time in order to apply for citizenship, as is required for other foreign nationals. See Z. Papasiopi-Pasia, *The Law of Citizenship* (1994, in Greek), 46.

arguments would entertain them before any forum. Legal arguments are, nonetheless, simply one part of this particular equation. The international community is right to be concerned with the stability of FYROM, particularly given its diverse ethnic composition. It is also right in helping this country to shape its identity without causing friction in the process, particularly where long-running sentiments of adjacent nations are at stake. It is, however, simplistic and without political, social, or moral merit to argue that the underdog should enjoy an advantage it does not deserve, on the sole basis of its underdog status, while disregarding the claims and sentiments of its opponents. Such policies breed resentment, mistrust, and conflict. The international community needs to sensitize itself to such sentiments and take them into serious consideration. We have seen how during the period of colonization the colonizers exercised a divide-and-rule strategy in carving up various parts of the world and providing a loose or false identity to the local populations, at a time when these populations had never conceived the limitations of boundaries or national identities. The results of these actions, such as the artificial division by the Belgians of the Hutu and the Tutsi in the Tanganyika region and the carving up of the Arab world by the British, to name just two, were catastrophic and their consequences are evident to this day.

6. CONCLUSION

There is little optimism that legal means are intended to be utilized to resolve the dispute over the name 'Macedonia', unless the two parties decide to extend their current ICJ dispute in respect of the 1995 Interim Agreement to cover the real issue: the dispute over the name 'Macedonia'. To those who have given scant attention to the legal merits of the dispute, it was no surprise that the supposed absence of a general rule gave rise to a unilateral entitlement to use any appellation or symbol. Following close inspection, however, it is at least more obvious that any unilateral entitlement must take heed of prior state practice, particularly opposing practice. The weight of historical evidence clearly suggests that Greece possesses historic title over the name 'Macedonia' and the ancient Macedonian symbols excavated on its territory, since it has used the name 'Macedonia' for constitutional purposes long before it was ever introduced in the SFRY. Whether or not the first user's entitlement is tantamount to, or analogous with, entitlements deriving from discovery is something that was not pursued in this article, but there is no apparent reason why the same legal regime cannot find application in the present case. A combination of historic title and continuous state practice has given rise to an exclusive legal entitlement on the basis of the maxim *prior in tempore potior in jure*. Why the entitlement is exclusive, rather than concurrent, was answered, in addition, by reference to analogies from the law of trademarks and that of geographical indications. The first demonstrates that the first user possesses an exclusive entitlement, save where a concurrent user is well known or has made use of the trade for a considerable amount of time, without having, however, registered it. The international law of geographical indications is in fact applied without the need for analogy. We argue that the assumption of FYROM's constitutional name would create substantial problems for the country's

export potential, since the Greek province of Macedonia has already secured a large number of local products as products of origin. As a result, FYROM's products would have to be renamed with a distinctive compound, a fact that negates the very reason for retaining its constitutional name of Macedonia.

This article has examined some legal avenues in order to explain the entitlement to a name in international law. The legal issues should not obfuscate political reality, but, equally, political intentions should not inflame tensions and cause injustice. In the present case, injustice would be served where historical truth is ignored but also where the international community fails to preserve peace and stability in FYROM. Equally, Greece must place viable alternatives on the negotiating table and promote as far as possible the financial and other interests of FYROM before international institutions. In any event, the matter is in need of immediate resolution and although the parties have set as their goal a diplomatic solution through the use of mediation, they should certainly consider subjecting their dispute to the International Court of Justice.