

Bilateral Disputes between EU Member States and Russia

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Abstract

Over the past years, a series of bilateral disputes between EU member states and Moscow have significantly affected EU–Russian relations and exposed sharp internal divisions over the EU's approach towards Russia. Despite their potential for having a highly disruptive impact on EU foreign policy, the EU still lacks a consensus on how to handle bilateral disputes. This paper employs a case-study approach to provide an in-depth analysis of selected disputes and reviews several questions of importance for the coherence of EU policy towards Russia: What kinds of issues are at the centre of bilateral disputes? What strategies do member states adopt to resolve them? Under what circumstances are disputes raised to the EU level? The paper concludes that the scope of 'EU solidarity' in bilateral disputes remains deeply contested and draws on insights from the case studies to propose a set of guidelines for the EU's approach to bilateral disputes.

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1. Introduction

In November 2006, Poland's veto of the EU–Russia negotiating directives brought the issue of bilateral disputes with Moscow into the public spotlight and illustrated their potential for having a highly disruptive impact on EU–Russian relations. Over the subsequent months, a series of incidents including the Litvinenko affair, the Mazeikiu refinery dispute and the Estonian monument crisis suggested that bilateral disputes were quickly beginning to dominate EU–Russian relations.

To some degree, this rapid focus of attention was unwarranted. Bilateral disputes did not suddenly appear in EU–Russian relations with the 2004 enlargement or Russia's growing international assertiveness. In the mid-1990s, for example, Russian import restrictions over alleged sanitary shortcomings caused significant difficulties for the Finnish egg sector and prompted Helsinki to push for a strong EU response. In the wake of the theatre hostage crisis in Moscow in October 2002, a conflict over Denmark's refusal to cancel the World Chechen Congress in Copenhagen threatened to disrupt an upcoming EU–Russia summit and forced Denmark to move the summit venue to Brussels.

Furthermore, bilateral disputes are by no means exclusive to EU–Russian relations and they have seriously affected the EU's ties with other third countries. In 1994–95, Greece temporarily obstructed the conclusion of the EC–Turkey Customs Union Agreement owing to concerns about the implications of the unresolved Cyprus conflict for the island's future EU membership. The conflict continues to plague Ankara's accession negotiations, which have inter alia witnessed the freezing of eight crucial negotiating chapters over the Cyprus issue. Bilateral disputes also threaten to disrupt the enlargement process elsewhere in south-eastern Europe, notably in the shape of the Slovenian–Croatian border dispute and the Macedonia naming dispute. In late 2008, Beijing postponed an upcoming EU–China summit over a planned meeting between French President Nicolas Sarkozy and the Dalai Lama.

Despite these caveats, the issue of bilateral disputes in EU–Russian relations indeed merits closer attention for several reasons. First, the EU's approach towards Russia remains one of the most divisive matters in EU foreign policy and the appropriate handling of bilateral disputes has recently been a key element of these disagreements. Although the notion of 'EU solidarity' in bilateral disputes has gained greater visibility, its practical implications remain deeply contested.

Second, Moscow's strategic use of bilateral disputes poses a particular challenge for the EU. While it is not suggested that the Kremlin artificially fans every dispute as part of a grand 'divide and rule' strategy, Moscow has exploited existing disagreements in various ways. For

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example, Russia has continuously used Estonia's and Latvia's citizenship policies to expose alleged double standards in the EU's human rights policy and deflect criticism from its own human rights record. In combination with bilateral energy deals, Moscow has skilfully employed specific bilateral disputes to weaken EU unity and isolate governments perceived as exerting an unfavourable influence on EU foreign policy.

Finally, Moscow's absence from major international legal frameworks like the WTO and the Energy Charter Treaty significantly reduces the chances for a law-based settlement of arising disputes. The lack of legal regimes guaranteeing transparency and non-discrimination in crucial sectors of the economy also renders the emergence of disputes more likely in the first place. In recent years, Moscow has not only declined to enter new regimes on Western terms, but has actively sought to renegotiate critical elements of the post-cold war settlement, such as the Treaty on Conventional Armed Forces in Europe. As the promotion of binding governance frameworks is a central pillar of EU foreign policy, Russia's drive to renegotiate contracts perceived as disadvantageous, for example in the context of the Sakhalin-2 project, is of particular concern for the EU.

Irrespective of signs of a certain rapprochement in EU–Russian relations, these challenges are likely to persist. Over the past years, the bilateral policies of member state governments towards Russia have attracted considerable attention.¹ In contrast, there are to date few studies examining the dynamics of specific disputes in greater detail. This paper employs a case-study approach to provide an in-depth analysis of selected disputes and review several questions of importance for EU coherence amid bilateral disputes: What kinds of issues are at the centre of bilateral disputes? What strategies do member state governments adopt to resolve them? Under what circumstances are disputes raised to the EU level? What measures does the EU take to tackle a dispute? Is a consensus emerging on the scope of EU solidarity?

The selected cases include the Polish agricultural row, the Estonian monument crisis, the Lufthansa Cargo dispute and the Litvinenko affair. This selection comprises some of the most controversial cases of recent years, while also including a mix of large and small, as well as old and new member states. The case studies draw on numerous interviews with EU and member state officials conducted in Brussels and other European capitals in the course of 2008. All case studies begin with a description of the political context and the substance of the dispute. Next, each case study analyses the approach taken by the government concerned, the measures implemented at the EU level and the degree of EU unity over the issue. Before embarking on the case studies, the next two sections draw a distinction among various types of disputes in relation to Community competence and provide a brief overview of predominantly economic and predominantly political disputes. The final part of this document draws the findings together for horizontal conclusions.

2. Community competence and EU solidarity in bilateral disputes

Given the advanced stage of the European integration process, one can legitimately question whether any dispute between a member state and a third country can still be considered 'bilateral'. Notwithstanding the innovations of the Lisbon Treaty, European foreign policy continues to consist of three interconnected, yet separate strands, namely the Community's external relations, the common foreign and security policy (CFSP) and the national foreign

¹ See M. Leonard and N. Popescu, *A Power Audit of EU–Russian Relations*, ECFR Policy Paper, European Council on Foreign Relations, London, 2007; see also EU–Russia Centre (EURC), "The Bilateral Relations of EU Member States with Russia", *EU–Russia Review*, No. 5, EURC, Brussels, 2007.

policies of the member states. Hence, a distinction among various disputes needs to be drawn on the basis of the formal division of competences between the member states and the Community.

In common parlance, the term ‘bilateral dispute’ refers to disagreements falling squarely within *member state competence*. Classic examples are unresolved territorial claims or espionage scandals. Despite their strictly bilateral character, these issues can attract close EU attention because of their impact on EU policies. For example, the EU’s interest in the legal certainty of its eastern perimeter has prompted it to identify the proper demarcation of the Russian–Baltic borders as one of the ‘key outstanding issues’ in EU–Russian relations. At the other end of the spectrum are disputes falling within *exclusive Community competence*. These disputes are by definition not bilateral matters, yet they can have a profound bilateral dimension because of their disproportionate impact on a specific country. For example, Moscow’s plans to increase the export duties on Russian timber primarily affect the Finnish and Swedish wood-processing industries, even if the issue is formally handled by the European Commission. Finally, numerous disputes *do not fall neatly into either category*. In practice, the specific scope of Community competence and the measures at its disposal are often uncertain and depend on the individual case.

Although the cited examples demonstrate that this distinction is becoming increasingly blurred, the formal division of competences still has far-reaching implications for the handling of bilateral disputes. If exclusive Community competences are concerned, there is no debate on whether a dispute should be lifted to the EU level. The European Commission has duly taken up disputes falling into this category, for example, the timber export duties or the discriminatory railway tariffs affecting the Baltic States, which play an important role in Russia’s WTO negotiations. Certainly, this does not imply the absence of frictions. If only small trade volumes and few member states are concerned, other EU actors can be unwilling to confront Moscow over the issue. Also, regardless of the EU’s status as Russia’s largest trading partner, there is no guarantee that Moscow will yield to EU demands, which can create the impression that the European Commission is not putting its full weight behind the issue.

Nevertheless, disputes falling within exclusive Community competence are generally less controversial. Therefore, this paper primarily examines disputes in the other two categories. If a genuinely bilateral dispute concerns only a single country, the affected government essentially has to rely on the *solidarity* of its counterparts to receive EU support. In general, the solidarity principle occupies a prominent place in many EU policies ranging from regional development and social cohesion to civil protection. It rests on a sense of mutual support among EU member states and the practice of extending assistance to a member state facing significant difficulties. The promotion of solidarity among the member states is an explicit objective of the Community (Art. 2 of the Treaty establishing the European Community), which finds its manifestation in instruments like the structural funds or the EU solidarity fund. The Lisbon Treaty will further introduce a solidarity clause in cases of terrorist attacks and natural or man-made disasters. In the context of the current financial and economic crisis, EU solidarity has become the buzzword of many European policy debates.

In the area of EU foreign policy, however, the principle of EU solidarity is currently less developed. The respective wording of the CFSP clauses in Art. 11.2 of the Treaty on European Union is too vague to establish a firm legal obligation. In practice, EU solidarity therefore frequently suffers from a collective action problem. All member states in principle wish to be able to mobilise EU support in a bilateral dispute. At the same time, their own readiness to extend solidarity in a specific case might be affected by other interests, for example the wish to avoid damaging their business interests in Russia. Historical examples such as the Perejil/Leila and the Falklands/Malvinas crises illustrate that even in disputes concerning the territorial integrity of a member state, the invocation of EU solidarity has often faced considerable

obstacles. If the damage to national interests is relatively minor or other considerations are at stake, other member state governments might contest the call for support.² In addition, the Union appears to expect certain patterns of conduct from the member state invoking solidarity. This suggests that EU solidarity is not unidirectional, but also places significant requirements on the party requesting support.³ The following case studies explore in greater detail the factors that influenced the dynamics of EU solidarity in practice. Before embarking on the first case, the next section places the cases into context by providing a non-exhaustive overview of various disputes in the economic and political spheres.

3. An overview of different disputes

Even though there are strong grounds for judging individual cases on their specific merits, the present section places the case studies into context by grouping bilateral disputes into mainly economic and mainly political cases. Any such categorisation faces considerable constraints, as the close relationship between Russian business and politics makes it inherently difficult to disentangle economic from political actors. Political and economic motives also frequently overlap and various disputes can consequently be attributed to more than one group. For example, Russia's discriminatory tariffs on international railway freight not only promote the economic development of its own maritime export terminals, they also reduce Russia's dependence on the Baltic States by lowering reliance on the Baltic export capacities.

3.1 Disputes falling predominantly into the economic sphere

Notwithstanding these limitations, one can identify a first group comprising what are essentially *commercial disputes*. These conflicts are primarily driven by business actors seeking to maximise profits and display limited indications of a hidden political agenda. For example, Lukoil's repeated reductions of crude oil supplies to German refineries in 2007–08 were caused by pricing disagreements and Lukoil's ambition to circumvent the general importer Sunimex. Likewise, the protracted TNK-BP shareholder dispute of 2008 was essentially a boardroom struggle over the running of the joint venture between BP and its Russian business partners, even if the Russian side employed considerable administrative pressure.

Another set of disputes over Russian import restrictions appears to stem from fundamentally *technical problems*. While Moscow undeniably manipulates technical standards in certain cases, Russian concerns over issues such as public health cannot *a priori* be dismissed as groundless. In particular, EU agricultural exports are not beyond reproach in each case.⁴ The number of Russian restrictions (6) listed in the EU's non-exhaustive Sanitary and Phytosanitary Export Database does not stand out against the number of restrictions imposed by other large

² J. Monar, "The CFSP and the Leila/Perejil Island Incident: The Nemesis of Solidarity and Leadership", *European Foreign Affairs Review*, Vol. 7, No. 3, 2002.

³ G. Edwards, "Europe and the Falkland Islands Conflict", in S. Stavridis and C. Hill (eds), *Domestic sources of foreign policy: West European reactions to the Falklands conflict*, Oxford: Berg Publishers, 1996.

⁴ In the case of a recent Russian ban on Polish fishmeal imposed in October 2007, for example, the European Commission confirmed cross-contamination of fishmeal from one Polish establishment with protein of terrestrial animal origin. See European Parliament, "Problems regarding trade in agricultural goods with Russia", Answer given by Mr Kyprianou on behalf of the Commission to a written question by Bogdan Golik, E-5258/2007, European Parliament, Brussels, 2007.

economies such as Canada (4), China (6), India (6), Japan (13) or the US (7).⁵ In view of the huge overall trade volume between the EU and Russia, which in 2007 ranked as the EU's third-largest trading partner with EU imports from Russia totalling €143.88 billion and EU exports of €89.1 billion, the number and volume of trade-related disputes are not deemed extraordinary by European trade officials.

Given the long-standing objective of diversifying Russia's economy and modernising its decaying infrastructure, *Russian industrial policy* is the key driver behind another set of disputes. For example, President Vladimir Putin publicly admitted that the timber export duties aim at developing Russia's wood-processing industry, namely by forcing Finnish companies to move their wood processing plants to Russia.⁶ Similar measures include the increased car import duties introduced in early 2009, the forced relocation of Lufthansa Cargo's Asian transit hub to Krasnoyarsk and the Siberian overflight payments, which in effect constitute a subsidy to Aeroflot. In several of these cases, Moscow exploits its status of being outside the WTO framework to pursue protectionist policies running counter to WTO principles and the EU–Russian bilateral market-access agreement of May 2004.

As reflected by the increasing state control over Russia's strategic industries, the Russian *energy sector* straddles the boundary between the economic and the political spheres. Since energy exports are of crucial importance for the Russian budget and one of Moscow's primary sources of power, Russian energy policy seeks to maximise both economic and political gains. Although these objectives frequently overlap, for instance in the case of Gazprom's acquisition of profitable and strategic downstream assets, political considerations can take precedence in other cases. For example, expensive, offshore infrastructure projects (like the South Stream gas pipeline or the Baltic Pipeline System 2) mainly serve the political objective of circumventing traditional transit states such as Ukraine or Belarus. In 2007-08, the dispute over the Lithuanian Mazeikiu refinery was of particular relevance for EU-Russian relations. After the Polish energy company PKN Orlen had acquired a majority stake in the refinery at the expense of Russian competitors, Transneft cut crude oil supplies delivered through the Druzhba pipeline in July 2006. As Transneft stonewalled Lithuania's requests for resuming supplies, Vilnius eventually took the step of formally blocking the EU–Russia negotiating directives in early 2008 to leverage EU pressure for reopening the pipeline. Further energy disputes displaying a mix of economic and political objectives include the struggle over the Sakhalin-2 project in 2006 and Transneft's supply cut against the Latvian Ventspils oil terminal in 2003.

In terms of the *member states concerned*, Russia's neighbours are undeniably more frequently affected by certain disputes owing to their specific geography, historical ties and infrastructure connections. Examples here include the timber export duties or the discriminatory railway tariffs. Despite the drastic diversification of export markets in the 1990s, several industries in the new member states also remain highly dependent on the Russian market. Recent Russian import restrictions against Latvia's two largest sprats producers decreased Latvian canned fish exports by 25% in 2007 alone.⁷ In the energy sector, most intentional supply cuts have likewise

⁵ European Commission, The Sanitary and Phytosanitary Export Database, DG Trade, European Commission, Brussels, 2009 (retrieved from http://mkaccdb.eu.int/madb_barriers/indexPubli_sps.htm, accessed 5 March).

⁶ Russian Federation, Transcript of the Annual Big Press Conference by President V.V. Putin, Russian Presidential Administration, Moscow, 14 February 2008.

⁷ See the *newsru.com* article, “Двухлетняя шпротная “война” между Россией и Латвией закончится 1 сентября [Two-year sprat ‘war’ between Russia and Latvia will end on 1 September]”, 8 August 2008.

targeted the Baltic States and other former Soviet Republics.⁸ As the January 2009 gas crisis illustrated, the inherited import dependence on a single supplier and transit state, combined with low gas-storage capacities and the absence of LNG facilities, renders many new member states highly vulnerable to supply disruptions.

Nevertheless, the differences between Russia's neighbours and other EU member states should not be overstated. Given Russia's pre-crisis status as Europe's largest consumer market in several areas, a number of Western industries have become dependent on market access. In 2008, for example, Russian restrictions on British pelagic fish deprived several Scottish processors of their largest export destination. Furthermore, the major disputes over energy investments in Russia such as Sakhalin-2, the Kovykta field and TNK-BP concerned old member states like the UK or the Netherlands. Trade officials opine that notwithstanding several politically motivated cases discussed below, there is only limited evidence that Russia systematically singles out certain member states in trade disputes. Regarding sanitary and phytosanitary (SPS) disputes, no official EU or Russian database suggests that Moscow is targeting a specific country on a large scale.⁹ Indeed, even governments engaged in fierce political disputes have enjoyed flourishing business relations with Russia. Polish overall exports to Russia registered high growth rates throughout the agricultural row and rose by 18.4% in 2006 alone.¹⁰ Conversely, import bans imposed on technical or protectionist grounds, such as the restrictions introduced in early 2008 over antibiotics residues in certain meat products, have not excluded member states enjoying close relations with Russia. While the number of disputes has undeniably risen since enlargement, this increase is not disproportionate given the specific trading patterns of the new member states.

3.2 Disputes falling predominantly into the political and historical spheres

In contrast to the preceding examples, many disputes mainly fall into the political sphere. The underlying causes are often highly idiosyncratic, yet a categorisation according to issue areas can help to identify certain patterns.

In several cases, Russian economic restrictions are clearly *politically motivated* and aim at influencing political decisions or penalising governments defying the Kremlin. The restrictions imposed on Estonia after the monument crisis evidently served as retribution for the monument's removal. As a substantial share of Estonian export terminals are owned by Russian companies, the restrictions actually hurt Russian business interests. The characteristics of the Polish agricultural ban also pointed to political underpinnings; even so, Moscow's open use of economic sanctions has largely been confined to the Baltic States and other post-Soviet countries like Georgia.¹¹ Elsewhere, politically motivated sanctions have occasionally drawn on semi-official measures with only limited effectiveness. During the Chechen World Congress in 2002, for example, the United Russia Party issued a boycott call against Danish goods.

⁸ R.L. Larsson, "Russia's Energy Policy: Security Dimensions and Russia's Reliability as an Energy Supplier", Swedish Defence Research Agency, Stockholm, 2006, p. 6.

⁹ Rosselkhoz nadzor, Ввоз. Вывоз. Транзит [Import, Export, Transit; List of import restrictions by country], Russian Federal Service for Sanitary and Phytosanitary Surveillance, Moscow, 2009 (retrieved from http://www.fsvps.ru/fsvps/importExport/index.html?_language=ru, accessed 5 March).

¹⁰ A. Eberhardt, "Relations between Poland and Russia", in R. Kuzniar (ed.), *Yearbook of Polish Foreign Policy*, Polish Institute of International Affairs, Warsaw, 2007, p. 136.

¹¹ J. Hedenskog and R.L. Larsson, *Russian Leverage on the CIS and the Baltic States*, Swedish Defence Research Agency, Stockholm, 2007.

Disputes over *asylum and extradition decisions* frequently stem from a clash between Moscow's wish to prosecute individuals deemed hostile to the government and European doubts about the independence of the Russian judiciary. Under this heading are the British–Russian rows over political émigrés like Boris Berezovsky or Denmark's refusal to extradite Akhmed Zakayev in 2002. Spain and Greece also rejected extraditing media magnate Vladimir Gusinsky in 2000–01 and 2003, respectively. Similar rule of law considerations motivated London's insistence on trying Andrey Lugovoy in the UK and Denmark's refusal to cancel the Chechen World Congress. These decisions are frequently taken by independent European judicial bodies, but Russian pressure or ministerial interventions on the EU side can strongly politicise these cases.¹²

Violations of diplomatic privileges have usually occurred as part of broader political conflicts. For example, a harassment campaign by the pro-Kremlin youth group Nashi against the British ambassador to Russia, Tony Brenton, was triggered by his speech at the “Other Russia” opposition conference in July 2006 against the background of growing British criticism of Russia's authoritarian development. The failure to adequately protect the Estonian embassy in Moscow was motivated by the monument crisis. Although an attack on Polish embassy staff by unknown assailants in summer 2005 appeared to be in-kind retribution for the beatings of Russian diplomats' children by Warsaw hooligans, it also occurred in the context of tense Polish–Russian relations.

Even before Russia's resumption of strategic bomber flights in August 2007, *airspace violations* by Russian military aircraft travelling to Kaliningrad have repeatedly affected Finland and the Baltic States. In September 2005, the crash of a Russian fighter jet on Lithuanian territory caused considerable frictions in spite of a Russian apology and compensation pledge. While both sides at first cooperated professionally, Moscow exerted considerable pressure to protest against Lithuania's insistence on a full investigation before the release of the pilot and the remains of the aircraft.

Moscow's increasingly critical stance towards independent media has also led to restrictions on the work of *official European cultural agents*. EU broadcasters had already been affected by temporary licensing disputes, but the Litvinenko case reportedly motivated the forced removal of the BBC's Russian Service from two local FM partner stations in November 2006 and the Bolshoye Radio joint venture in August 2007, which permanently left the Russian Service without FM broadcasting.¹³ Likewise, foreign minister Sergey Lavrov explicitly labelled the forced closure of two regional British Council offices in early 2008 retribution for London's measures in the Litvinenko affair.

The majority of *historical disputes* between the member states and Russia are rooted in diverging interpretations of the former USSR's role in World War II. This concerns, for example, Russia's refusal of access to the Katyn investigation files, Lithuania's ban on the public display of Soviet and Nazi symbols and the Estonian monument crisis. Irrespective of their seemingly symbolic subject matter, several historiographical disputes have considerable practical implications. For instance, the dispute over the annexation of the Baltic States is the primary reason for the absence of an Estonian–Russian border agreement. Historical issues also play a minor role in Russia's relations with its former WWII adversaries. Prominent examples include the dispute over German cultural property transferred to the USSR after WWII, which in the 1990s caused considerable political infighting in Russia, and the legal attempts of Finnish civil society organisations to reclaim private properties in certain parts of Karelia.

¹² In 2007, for example, the Spanish Council of Ministers took a high-level decision to grant Vladimir Gusinsky Spanish citizenship, which enabled him to live in Spain without fear of extradition.

¹³ L. Harding, “Russia forces World Service off FM radio”, *The Guardian*, 18 August 2007.

The idiosyncratic nature of many political and historical disputes makes it difficult to identify the *member states affected* beyond a few broad generalisations. As the examples show, political disputes are not confined to the small and new member states – they also affect old and large member states like the UK or Spain. In most cases, serious disputes have occurred against the backdrop of pre-existing political tensions, which suggests a mutually reinforcing dynamic between specific bilateral disputes and the broader political context. Yet, the overview indicates that political disputes can also suddenly affect countries like Denmark or Spain, which otherwise entertain constructive ties with Moscow. In the case of historical disputes, the Baltic States are most frequently affected owing to the disproportionately higher number of open issues and the domestic sensitivity of relations with Russia. In this respect, Moscow’s selective engagement with Central Europe also contributes to a certain differentiation among the new member states. For example, even though Moscow retains an unbending stance on the Baltic annexation, President Putin made conciliatory gestures towards Budapest and Prague in spring 2006 by acknowledging Russia’s moral responsibility for the suppression of the Hungarian uprising in 1956 and the invasion of Czechoslovakia in 1968.

Along with showing that bilateral disputes with Russia are not limited to a particular group of member states, these examples suggest the existence of several important differences, including regarding the handling of specific disputes. These differences are examined below through four in-depth case studies. The analysis begins with the Polish case, which not only witnessed the most extensive EU involvement, but was also the first time that the call for ‘solidarity’ in EU–Russian relations was vigorously made.

4. The Russian import ban on Polish agricultural products

4.1 Political context of the case

In recent years, Polish–Russian relations have been severely strained by numerous political disagreements. Warsaw’s advocacy of further NATO and EU enlargement has clashed with Moscow’s claims to a sphere of influence in the former USSR. In the energy sphere, Gazprom’s downstream expansion and offshore transit strategy have triggered opposition from Warsaw, whereas Polish plans for hosting the US missile defence shield have provoked angry reactions from Moscow. Besides an ongoing dispute over navigation in the Vistula/Kaliningrad lagoon – which centres on Russian access restrictions for third-country vessels passing through the Strait of Baltiysk – the two sides have also been engaged in several protracted historical rows. Two important cases concern Russia’s denial of access to the Katyn investigation files and the restitution of Polish cultural property transferred to the USSR in the wake of WWII. The agricultural import ban had been preceded by a particularly tense period in 2005, which saw quarrels over historical anniversaries relating to WWII, several symbolic disputes and the planned Nord Stream pipeline.

4.2 The substance and background of the dispute

On 10 November 2005, the Russian Federal Service for Veterinary and Phytosanitary Surveillance (Rosselkhoz nadzor) banned a wide range of meat imports from Poland, which was supplemented by a ban on plant products on 14 November.¹⁴ Rosselkhoz nadzor’s justification

¹⁴ Rosselkhoz nadzor, Письмо от 9 ноября 2005 г. N ФС-СД-2/8008 ‘О введении временных ограничений на ввоз из Республики Польша в Российскую Федерацию продукции животного происхождения’ [Letter of 9 November 2005, No. FS-SD-2/8008 “On the introduction of temporary

for the restrictions was vague and changed repeatedly. Initially, Moscow claimed that certain meat products that were not suitable for human consumption had been exported to Russia from third countries with counterfeit Polish certificates. Next, the Russian authorities asserted that several Polish meat shipments had violated Russian veterinary regulations or had been accompanied by falsified veterinary export certificates. Russia made similar accusations regarding counterfeit phytosanitary certificates and inadmissible pesticide residues in Polish plant products. As Warsaw took corrective measures, Russia criticised the principles of intra-Community transit more broadly and even demanded that Poland certify all EU agricultural exports transiting Poland en route to Russia as complying with Russian legislation.

Veterinary and phytosanitary certification had earlier caused frictions with Russia, which to a certain extent had been linked to the division of competences within the EU. The European Commission is the main player regarding SPS imports, but problems concerning SPS exports have traditionally been handled by the member states. In June 2004, Moscow briefly blocked meat imports from the entire EU to push for a single EU export certificate. Lacking a comprehensive veterinary and phytosanitary agreement, Moscow and Brussels have resolved arising disputes in an ad hoc fashion, in particular by signing memoranda on harmonised veterinary and phytosanitary certificates in 2004–05.

The Polish authorities acknowledged certain shortcomings and took corrective measures by improving safeguards against document falsification, tightening quality controls and strengthening the role of the Polish customs service in meat export controls. Simultaneously, Warsaw insisted that the ban was disproportionate to the reported irregularities and highly discriminatory, as several problems also concerned other member states. Since the ban's imposition had coincided with a parliamentary confidence vote in the new government of the Law and Justice Party, numerous officials regarded the restrictions as politically motivated.

4.3 The Polish government's approach to the dispute

Despite the political overtones, Warsaw initially treated the ban as a technical issue. Polish foreign minister Stefan Meller sought to avoid an escalation and arranged for bilateral expert consultations between the respective veterinary and customs services. The government informed its EU counterparts,¹⁵ yet only requested discreet European Commission involvement and did not push the issue onto the agenda of the Council's 133 Committee on external trade policy or the Working Party on Eastern Europe and Central Asia (COEST).

By early 2006, the Polish veterinary and phytosanitary services had held several meetings with their Russian counterparts. In February 2006, the visit of Russian presidential envoy Sergey Yastrzhembsky briefly raised hopes for a thaw in bilateral relations, but produced no agreement on narrowing the ban. As Rosselkhoznadzor stonewalled, Warsaw raised the issue onto a higher level by requesting a meeting between the agriculture ministers and dispatching a letter from the prime minister, Kazimierz Marcinkiewicz, to which there was no reply. When a ministerial meeting finally took place on 30–31 March, it only produced further Russian requests for information.¹⁶

restrictions on the import of products of animal origin from the Republic of Poland into the Russian Federation”], Russian Federal Service for Veterinary and Phytosanitary Surveillance, Moscow, 2005.

¹⁵ Council of the European Union, Information from the Polish Delegation, Problems in exports of meat, meat products and plant products to the Russian Federation, Council Document No. 14533/05, 16 November, Brussels, 2005.

¹⁶ Republic of Poland, Ministry of Agriculture and Rural Development, Informacja o wybranych działaniach Ministerstwa Rolnictwa i Rozwoju Wsi w okresie od 31.10.2005 do 24.04.2006 [Information

As the bilateral talks yielded no result, Warsaw progressively sought stronger EU support. In spring 2006, the Polish ministry of the economy began to consider the ban as a market access issue, pushed for greater involvement of the Commission's Directorate-General for Trade and formally enquired about the possibility of using the dispute-settlement mechanism of the EU–Russia Partnership and Cooperation Agreement. When the European Commission tabled the draft negotiating directives for the new EU–Russia agreement in July 2006, Warsaw reiterated its request for stronger support, but initially made no linkage between the ban and the directives. As their adoption drew closer, Polish officials increasingly felt that Brussels addressed the ban without genuine commitment and resented that it continued being treated as a bilateral problem. The dispute had also become more politicised with the July 2006 assumption of the prime ministerial office by Jaroslaw Kaczynski, who placed great emphasis on defending traditionally-understood Polish national interests. By mid-October, Poland had openly linked the ban with the EU–Russia negotiations and formally blocked the directives at the General Affairs and External Relations Council of 13 November 2006 amid calls for EU solidarity.

After the veto, the dispute became highly politicised and Warsaw took an uncompromising stance towards both Russia and the EU. Kaczynski rejected the idea of making concessions, stylised the issue as a trial of strength and appeared to limit dialogue with Moscow. In September 2007, Poland further increased its counter-pressure by blocking a preliminary stage of Moscow's OECD accession talks and by threatening to block Russia's WTO accession.

4.4 EU involvement

On the EU side, the Directorate-General for Health and Consumers and the European Commission's Moscow delegation had been involved early on. After initially being confined to a support role, the Commission began taking the lead in the technical consultations as of early 2006. Various council bodies also dealt with the issue and an ad hoc group on anti-fraud measures for export certificates was created. Both prior to and after the veto, the EU's Food and Veterinary Office conducted several inspection rounds in Poland. Brussels supported Poland's view that the ban was disproportionate and discriminatory. On 22 May 2006, EU commissioner for health and consumer protection, Markos Kyprianou, reiterated that Poland "had taken all necessary steps to meet the Russian technical requirements" and noted that he was closely liaising with Peter Mandelson, then European commissioner for trade, to address what "had clearly become a trade issue".¹⁷ Mandelson and his officials did indeed raise the ban at several EU–Russia meetings. Still, Warsaw regarded EU support as lukewarm and complained that some officials apparently dismissed the ban as a historically charged row between Poland and its former colonial overlord.

Most governments were exasperated by the Polish veto, but the move nonetheless triggered renewed efforts to resolve the dispute. As Brussels dispatched fresh inspection missions, the Finnish Council presidency pressured Warsaw to accept a compromise before the EU–Russia summit of 23 November 2006. In spite of assurances of strong EU support for lifting the ban, Warsaw rejected all proposals and insisted on the ability to interrupt the EU-Russia negotiations anytime.

In January 2007, the problem was inherited by the German presidency, which sought to resolve the dispute by expanding high-level contacts with Russia. Meanwhile, the European

on selected activities of the Ministry of Agriculture and Rural Development in the period from 31.10.2005 to 24.04.2006], Warsaw, 21 April 2006.

¹⁷ Council of the European Union, 2730th Council Meeting – Agriculture and Fisheries, Council Document 9170/06, Press release 132, Brussels, 22 May 2006.

Commission arranged the first rounds of ‘joint’ inspections by Russian and Commission veterinary services in Poland. Berlin tried hard to negotiate an agreement, but a key EU–Russia meeting on 21–22 April failed to produce the desired breakthrough and mutual relations instead plummeted to new lows with the Estonian monument crisis. The failure to reach a deal with Russia prompted Berlin to take a strong position at the Samara summit of 17–18 May 2007, during which Chancellor Angela Merkel repeatedly raised the ban. During the press conference, Commission President José Manuel Barroso explicitly stated that “a Polish problem is a European problem”, as the EU was “based on principles of solidarity”.¹⁸ The summit was hailed as a great success by Poland and came as a genuine surprise to Moscow, which had not expected a robust show of EU support for a government regarded as an awkward partner.

With a resolution still pending, the Portuguese presidency decreased attention to the dispute and focused EU–Russian cooperation on practical issues like tackling border congestion. The breakthrough only came with the Polish pre-term elections of October 2007. As the incoming prime minister, Donald Tusk, had made the improvement of relations with Russia and the EU a priority, Poland sought to re-establish dialogue, toned down the political rhetoric and made a conciliatory gesture by unblocking Russia’s OECD talks. On the Russian side, the elections allowed Moscow to blame the Kaczynski government for the dispute and proceed towards the negotiations of the new EU–Russia agreement. As the EU had refused to be split by Russia over the dispute despite the irritation at Poland’s intransigence, the ban had also exhausted its political usefulness for Moscow.

After fresh inspections of Polish meat plants and a visit by foreign minister Radoslaw Sikorski to Moscow, the meat ban and the restrictions on Polish plant products not for human consumption were lifted in December 2007 and January 2008, respectively. The remaining restrictions were lifted in March 2008 after the negotiation of an EU–Russia memorandum on the safety of plant products for human consumption. Rosselkhoznadzor had continually raised new technical problems over the previous years, some of which had been deemed legitimate by EU officials; still, the rapid lifting of the ban confirmed that the resolution had largely depended on the political will of both Moscow and Warsaw.

4.5 Assessing EU unity and support

As Moscow stonewalled in spite of Poland’s efforts to address the irregularities, most European officials initially regarded Warsaw’s request for support as legitimate. Poland also cooperated well with the European Commission on a technical level. In contrast, no member state except Lithuania openly condoned Poland’s attempt to ‘force’ stronger support. Poland complained about being treated as a second-class member of the EU. EU officials, however, denied that Brussels was not putting its full weight behind the issue. To a certain extent, these differences stemmed from legal uncertainties over the nature of Community competence for SPS exports, which were only clarified after the Polish veto. Apart from the Polish case, the competence issue was also raised by a Russian threat to ban meat imports from the entire EU as of January 2007 because of swine fever in Bulgaria and Romania. Moscow demanded signing bilateral agreements with individual member states to continue exports, while the Commission insisted that the issue concerned Community competence. As the member states refused to sign bilateral deals, Moscow eventually gave in and reached agreement with the EU to avert the ban. Following a discussion in the Council’s Permanent Representatives Committee (COREPER II)

¹⁸ Council of the European Union (German Presidency), Press conference, EU–Russia Summit in Samara, 18 May 2007(b).

on 20 December 2006, an ad hoc working party was established to clarify the competence issue exhaustively, which presented its conclusions in spring 2007.¹⁹

Notwithstanding the legal issues, most officials strongly disapproved of Poland's veto for several reasons. First, the import ban was widely regarded as a largely symbolic dispute. Although the restrictions officially affected 45% of Polish agricultural exports to Russia, many producers soon switched to alternative markets or channelled their exports to Russia through other countries. Compared with Warsaw's early calculation of the value of the restrictions at \$225 million, later estimates put the actual losses incurred in 2006 at a fraction of this amount.²⁰ Second, most officials rejected taking an openly confrontational approach towards Moscow and deemed it unlikely that Russia could be forced into an open climb-down in a politically charged dispute. Hence, the veto was considered counterproductive, as it undermined the EU's ability to settle the dispute in the context of the EU–Russia negotiations. Third, most governments greatly disapproved of Poland's uncompromising stance after the imposition of the veto, which created the impression that it only invoked solidarity for itself. Many officials concluded that Kaczynski was more interested in shoring up domestic support and asserting Poland's position in Europe than in genuinely solving the dispute.²¹

Consequently, the EU had severe difficulties in upholding a united position. Whereas at first the EU provided reasonable support, the veto decreased EU coherence, exposed sharp internal divisions and led to an embarrassing EU–Russia summit in November 2006. The growing deterioration of EU–Russian relations in 2007 facilitated a certain convergence, yet the show of support at Samara masked considerable divisions. Even as the member states recognised that the Union could not allow itself to be split over the dispute and Germany also sought to mollify Poland for the upcoming reform treaty negotiations, many officials deemed it illegitimate to hold EU–Russian relations hostage to a largely symbolic, highly politicised dispute.

5. The Estonian monument crisis

5.1 Political context of the case

Estonian–Russian relations have been continually strained by fundamental disagreements over the Soviet role in WWII. While Tallinn holds that Estonia was forcibly annexed to the USSR in 1940, Moscow insists that the Baltic Republics joined voluntarily. After restoring its independence, Estonia adopted a relatively restrictive citizenship policy, which was heavily criticised by Moscow for not automatically granting citizenship to the Soviet migrants settling in the Estonian Soviet Socialist Republic after 1940. A border treaty signed in May 2005 was not ratified by Russia, when the Estonian parliament added references to the restoration of statehood and the Tartu Peace Treaty of 1920 to the preamble of the ratification law. Given that the USSR's role as Europe's liberator from fascism serves an important symbolic function in Russia, the Kremlin perceives Estonia's portrayal of the USSR as an aggressive occupant as directly undermining its legitimacy.

¹⁹ Council of the European Union, Procedural principles for arrangements with third countries in the veterinary and plant health fields – Draft Council Conclusions, Council Document 10252/07, Brussels, 2007(b).

²⁰ Eberhardt (2007), *op. cit.*, p. 135.

²¹ A. Podolski, Polskie weto [The Polish veto], Raporty i Analizy 01/06, Center for International Relations, Warsaw, 2006.

5.2 The substance and background of the dispute

Erected in 1947, the Monument to the Liberators of Tallinn (Bronze Soldier) originally occupied a square in central Tallinn and contained a small Soviet war grave. Whereas many Estonians came to regard the monument as a symbol of Soviet repression, it represented wartime sacrifice to many Red Army veterans. During Victory Day commemorations on 9 May 2006, a serious clash between pro-Soviet demonstrators and Estonian nationalists occurred at the site. This prompted the prime minister, Andrus Ansip, to argue for relocating the monument, which in his view had become a site of confrontation exacerbating societal divisions. In January 2007, the Estonian parliament passed the War Graves Protection Act to create a legal basis for relocating the monument and circumventing opposition from Tallinn's city council and its mayor, Edgar Savisaar.²² During the parliamentary elections of March 2007, Ansip's vigorous stance on the issue allowed him to capture a large share of the nationalist vote. Besides parts of Estonia's Russian-speaking community, the planned relocation evoked fierce protests from Russian politicians, who levelled vociferous accusations of glorifying fascism at Estonia. On 23 April 2007, the Russian foreign ministry issued an official protest, warning of "most serious consequences for relations between Russia and Estonia".²³

The crisis started on 26 April, when excavation preparations at the site sparked a series of demonstrations and violent riots. Following a government emergency meeting, the Bronze Soldier was removed in the early hours of 27 April. Before the situation calmed down on 28 April, two nights of rioting and looting in central Tallinn had left over 1,000 persons detained, more than 150 injured and 1 dead. The riots were accompanied by highly inflammatory rhetoric in the Russian government-controlled media and pressure from Russian officials, who condemned Estonia's actions as 'barbarism' or 'blasphemy'. On 27 April, the Russian Federation Council passed a resolution calling for a stern response including the possible termination of diplomatic relations. As of 27 April, the websites of Estonian state institutions and service providers also experienced large-scale cyber attacks, with ever more sophistication.

Most international attention focused on the weeklong blockade of the Estonian embassy in Moscow by the youth movements Nashi and Molodaya Gvardiya. In violation of the Vienna Convention on Diplomatic Relations, Russian police forces did not stop the picketers from tearing down the Estonian flag, restricting the movement of embassy staff or blocking access to visitors. On 2 May, the bodyguards of Estonia's ambassador Marina Kaljurand had to use tear gas against activists, who violently disrupted a press conference held at the Moscow office of the newspaper *Argumenty i fakty*. Finally, Estonia faced economic pressure referred to as 'hidden sanctions'. Apart from boycott calls against Estonian products by Russian officials, Estonian sales contracts were abruptly cancelled and planned Russian investments suspended. On 2 May 2007, truck traffic at the main bridge into Estonia was blocked and the Russian railways halted deliveries of oil, petroleum products and coal. Most measures proved temporary, but the crisis accelerated the decline of Russian transit trade, which cut Estonian GDP growth for 2007 by up to 1.5%.²⁴

²² Riigikogu, "The Riigikogu passed the War Graves Protection Act", Weekly Record 08-11/01/2007, Riigikogu Press Information Service, Parliament of Estonia, Tallin, 10 January 2007.

²³ Russian Federation, Ministry of Foreign Affairs, О ноте МИД России внешнеполитическому ведомству Эстонии [On the note from the Russian MFA to the Estonian Foreign Office], Press release, Information and Press Department, Ministry of Foreign Affairs, Moscow, 23 April 2007(b).

²⁴ R. Anderson, "Estonia pays price of defying Russia", *Russia Profile*, Moscow, 24 June 2008.

Moscow denied imposing any sanctions, even as Estonian foreign minister Urmas Paet openly accused Russia of “coordinated activities undertaken against Estonia”.²⁵ Paet claimed that the cyber attacks originated from servers within Russian government agencies and accused Russian embassy staff of instigating the Tallinn riots. Estonia emphasised that despite Moscow’s rhetoric about the ‘blasphemous’ removal of the ‘sacred’ monument, similar monuments had routinely been relocated in Russia itself, and suggested that Moscow’s fierce reaction aimed at instilling a siege mentality among the Russian population in view of the upcoming political transition.

5.3 The Estonian government’s approach to the dispute

Initially, Estonia firmly treated the dispute as bilateral and hoped to allay concerns by carrying out the relocation in a legally correct manner. Tallinn briefed other member state governments about its plans, but did not display the intention of gaining EU-level leverage. Estonia only requested EU support after the eruption of the crisis. Even then, the government argued that the relocation and the riots were internal matters, whereas the retaliatory measures concerned the entire EU. During the events, Estonia was mostly pre-occupied with seeking to contain the crisis. Upon the initiative of the Council presidency, the government invited a State Duma delegation to Estonia to open a channel of communication. This step failed to defuse the tensions, as the delegation publicly called for the government’s resignation and the return of the monument. Foreign Minister Paet also issued several notes to protest against the failure to adequately protect the Estonian embassy and on 2 May telephoned his Russian counterpart to urge increased security measures.

As the situation deteriorated, Paet issued a dramatic declaration stating that “the European Union is under attack, as Russia is attacking Estonia”.²⁶ He opined that the EU reaction should be “as vigorous as possible” and suggested that the EU–Russia negotiations should not start or the upcoming Samara summit should be postponed. Prime Minister Ansip also called for an adequate EU response, but Tallinn soon toned down its rhetoric and never seriously threatened to join Poland’s veto. The government hoped that a strong display of EU solidarity would end the crisis; however, Tallinn continued to be restrained in its requests for specific assistance.

5.4 EU involvement

International involvement was very limited before the escalation. With the eruption of the crisis, individual member state governments, NATO and Washington issued declarations of support. EU High Representative Javier Solana engaged in telephone diplomacy and the European Commission cooperated through its Moscow delegation and called upon Russian companies to honour their contracts with Estonia. As Brussels had limited legal leverage to address the ‘hidden sanctions’, Tallinn refrained from pushing for substantial EU action over this issue.

The most comprehensive EU involvement came through the mediation attempts of the German Council presidency. Following two nights of riots, Chancellor Merkel held telephone conversations with Putin and Ansip to urge restraint and encourage direct Estonian–Russian contacts. Even as Merkel emphasised that the relocation was a “sovereign decision of the Estonian government”,²⁷ Berlin carefully avoided taking sides in the historical dispute and

²⁵ Republic of Estonia, Ministry of Foreign Affairs, Declaration of the Minister of Foreign Affairs of the Republic of Estonia, Tallin, 1 May 2007.

²⁶ Ibid.

²⁷ Federal Government of Germany, Bundeskanzlerin Merkel telefonierte mit Putin und Ansip [Federal Chancellor spoke over the telephone with Putin and Ansip], Press release, Berlin, 28 April 2007.

instead focused on the measures against Estonia. When the crisis intensified with the deterioration of the embassy blockade, a CFSP statement issued on 2 May “strongly urge[d]” Russia to comply with its obligations under the Vienna Diplomatic Convention, which was followed up by a formal demarche and a corresponding European Commission declaration.²⁸ Eventually, German foreign minister Frank-Walter Steinmeier mediated a compromise to end the crisis. Russia agreed to forcibly disperse the blockade, if required, under the condition that Ambassador Kaljurand left Moscow.²⁹ When Tallinn agreed and Kaljurand departed on 3 May 2007, the youth groups claimed victory and promptly cleared the site. At the Samara summit, the presidency and the European Commission also raised the embassy blockade, the sanctions and the cyber attacks. While Commission President Barroso called for mutual dialogue over sensitive historical issues, he expressed the EU’s solidarity with Tallinn and asserted during the press conference that Estonian problems were problems for all of Europe. The European Commission further reminded Moscow of its commitment to cooperate in the fight against cyber crime under various legal frameworks.

5.5 Assessing EU unity and support

In assessing EU unity and support, a distinction can be drawn between the monument dispute itself and the retaliatory measures. The EU emphasised Estonia’s sovereign right to relocate the monument, but many officials privately questioned the wisdom of the relocation and regarded the dispute as somewhat bizarre. In contrast, Russia’s crude overreaction was instrumental in producing a reasonably high degree of unity during the crisis itself. The riots, the embassy blockade and the cyber attacks clearly affected important national interests. Although the overall degree of government involvement was uncertain, Russian officials failed to protect the Estonian embassy and issued inflammatory statements. Moscow ignored Estonian requests for protecting the embassy and Tallinn exhausted its own possibilities for addressing the crisis. Many governments resented that the EU was dragged into a politicised historical dispute, but there was a certain understanding that regardless of these reservations, the Union had no choice but to support a member state under fierce pressure from Moscow. Except for Paet’s dramatic declaration on 1 May, Estonia’s conduct during the crisis was also regarded as cooperative. As the government was aware of its very limited political capital, Tallinn was pleased with the level of EU support and careful not to be perceived as misusing EU solidarity.

6. The dispute over Lufthansa Cargo overflight rights

6.1 Political context of the case

Germany and Russia consider each other strategic partners and attach great significance to their close political and economic ties. Chancellor Merkel has taken a more reserved stance than her predecessor has, but Berlin remains a major advocate of closer EU–Russian integration.³⁰ German political discourse heavily emphasises Russia’s indispensable role for preserving European stability and addressing common global challenges. In the economic sphere, Russia accounts for over 42% of German natural gas imports and is a significant export market.

²⁸ Council of the European Union (German Presidency), EU Presidency Statement on the situation in front of the Estonian Embassy in Moscow, 2 May 2007(a).

²⁹ H. Wetzel, N. Kreimeier and G. Parker, “Russien beenden Botschaftsbelagerung [Russians end embassy siege]”, *Financial Times Deutschland*, 4 May 2007.

³⁰ F.-W. Steinmeier, “Interaction and Integration”, *Internationale Politik*, Global Edition Vol. 8, No. 1. 2007.

Conversely, Germany is Russia's largest trade partner and a major source of investment and technology. Nevertheless, bilateral disputes are not alien to German–Russian relations, as exemplified by the cultural property dispute. Yet, most disputes are of a commercial nature and are resolved without great controversy, as in the case of Lukoil's repeated oil-supply reductions in 2007–08.

6.2 The substance and background of the dispute

Irrespective of the recent development of external aviation policy at the Community level and the Commission's proposals for a comprehensive air-transport agreement, EU–Russian aviation relations remain highly fragmented. Crucial issues such as traffic rights continue to be regulated through bilateral air-services agreements. Aviation experts consider the German–Russian air services agreement to be among the most liberal and comprehensive regimes. The agreement has allowed Germany to gain the highest proportion of EU–Russian air traffic (with 39% of frequencies) and to become Russia's biggest single international-aviation market.³¹

The dispute concerned the right of Lufthansa Cargo to transit Russian airspace en route to East Asia and the transport hub used for this itinerary. Before the dispute, Lufthansa Cargo, Europe's largest airfreight carrier and a 100% subsidiary of the German flag-carrier Lufthansa, had been using a recently modernised airport in Kazakhstan near Astana as its main hub for up to 49 flights per week to East Asian destinations. On 28 October 2007, Russia announced a de facto ban on these flights with the expiry of the summer flight plan. The ban compelled Lufthansa Cargo to circumvent Russian territory and considerably pushed up operation costs by extending flight duration by three hours. The Russian transport ministry claimed that the flight routes agreed in the German–Russian air transport agreement did not cover the itinerary via Astana, which had only been based on a temporary permission expiring on 27 October. Moscow further asserted that a German–Russian protocol signed on 23 February 2007 committed Lufthansa Cargo to switching its hub to Krasnoyarsk or Novosibirsk. As the German side had allegedly taken no steps to implement the commitment, Moscow made the extension of the temporary permission conditional on the relocation of the hub to a Russian airport.³² European officials concluded that Moscow's stance was motivated by the objective of developing Russia's airport infrastructure and increasing its role as an international transit route.

Initially, Berlin dismissed the claims as unfounded and stressed that the ban had come without advance warning. Germany insisted that an agreement on extending the existing overflight permission had been reached only a week earlier. Lufthansa Cargo confirmed that Russia had expressed an interest in hosting the hub, but the company categorically denied the existence of binding commitments and rejected any linkage with the overflight rights.

6.3 The German government's approach to the dispute

During the first week, the ministries involved lacked a coherent approach to the dispute. Initially, Wolfgang Tiefensee, the German transport minister, took a robust stance. In parallel with initiating consultations, Tiefensee suspended Aeroflot's landing rights for cargo flights to its Western European hub at Hahn airport in Rhineland-Palatinate. After Aeroflot threatened to move its transportation business to Luxembourg, however, local businessmen lobbied the

³¹ European Commission, Communication on a Framework for Developing Relations with the Russian Federation in the Field of Air Transport, COM(2005) 77 final, European Commission, Brussels, 2005, p. 6.

³² Russian Federation, Ministry of Transport, Press release, Ministry of Transport, 2 November 2007 (retrieved from http://www.mintrans.ru/prensa/Novosty_071102_2.htm, accessed 3 September 2008).

premier of Rhineland-Palatinate, Kurt Beck, who in his capacity as Tiefensee's party leader successfully pushed for rescinding the measures the very next day. In contrast to Tiefensee, the German foreign office placed strong emphasis on avoiding further escalation and averting potential damage to German–Russian relations. After the first talks between the transport ministries yielded no result, Frank-Walter Steinmeier intervened and raised the issue during a telephone conversation with his Russian counterpart on 1 November. Steinmeier was reportedly dissatisfied with Tiefensee's approach, but he apparently became involved only grudgingly and continued to stress Tiefensee's responsibility for the matter.

Subsequently, Tiefensee took a softer approach and stressed the need to negotiate a mutually satisfactory solution. After Germany declared its readiness to consider moving the transit hub to Krasnoyarsk, the Russian transport ministry lifted the de facto ban on 2 November 2007 and extended Lufthansa Cargo's temporary overflight rights until 15 November 2007. In an apparent concession, Tiefensee emphasised that further negotiations would primarily focus on the conditions for relocating the transit hub. In particular, Germany demanded framework conditions comparable to those in Astana and an upgrade of Krasnoyarsk airport to International Civil Aviation Organization (ICAO) category II to allow for landing in difficult weather conditions.

From the outset, the dispute attracted broad media attention. Both coalition and opposition politicians called for sending 'a clear message' to Moscow and taking 'counter-measures', for example by blocking Russia's WTO accession.³³ The opposition sharply criticised Tiefensee's handling of the dispute and Steinmeier's alleged inactivity. After overcoming the initial coordination problems, however, the government was anxious to contain the domestic reverberations and play down the significance of the dispute. When Russian air traffic controllers denied a military supply flight for the German troop contingent in Afghanistan the right to cross Russian territory on 14 November 2007 – ostensibly because the flight had no diplomatic clearance after being re-scheduled due to bad weather – defence minister Franz Josef Jung vehemently denied any political background and dismissed the incident as a mere administrative problem.

On 9 November, Tiefensee announced that an agreement had been reached on the continuation of the flights until the end of February 2008, whereas the relocation of the hub would be hammered out in bilateral negotiations.³⁴ Lufthansa Cargo had earlier appeared dissatisfied with Tiefensee's weak stance and had declared that the relocation was not a foregone conclusion, but the airline eventually agreed to move the hub subject to an upgrade of Krasnoyarsk airport. A definitive solution was reached during intergovernmental negotiations in Munich on 13-14 March 2008. Moscow further extended Lufthansa Cargo's overflight permission and granted additional overflight rights for South Korean destinations. Berlin made a definitive commitment to relocate the hub no later than five months after Krasnoyarsk received category II certification from the ICAO. In a declaration of intent signed in May 2008, Krasnoyarsk airport pledged to undertake the required upgrades and investment.

³³ FAZ, "Russland setzt Lufthansa ein Ultimatum" [Russia issues ultimatum to Lufthansa], *Frankfurter Allgemeine Zeitung*, 3 November 2007.

³⁴ Federal Government of Germany, Ministry of Transport, Building and Urban Affairs, Tiefensee: Einigung mit Russland – Überflugrechte für Lufthansa Cargo verlängert [Tiefensee: Agreement with Russia – Overflight rights for Lufthansa Cargo extended], Press release 338/2007, Ministry of Transport, Building and Urban Affairs, Berlin, 9 November 2007.

6.4 EU involvement

As the matter did not immediately concern Community competence, Berlin was not obliged to involve the EU. After some hesitation, Germany firmly treated the dispute as a bilateral matter. Various politicians called for lifting the dispute to the EU level, but Tiefensee stated during the de facto ban that EU involvement would only be considered if other member states were experiencing similar problems or no swift solution were found.³⁵ The government consulted the European Commission and informed its EU counterparts, although it did not request that the issue be raised during EU–Russia meetings. Berlin opined that EU involvement would not provide any additional leverage, but only further politicise the dispute. Whereas the spat arguably exacerbated the difficult climate in EU–Russian relations in the field of aviation, it had no major impact on EU–Russian relations in general. The postponement of the EU–Russia aviation summit of 9 November 2007 resulted from Russia’s failure to sign the Siberian overflight agreement. Even though the dispute suggested that even Moscow’s strategic partners could become the victim of Russian bullying tactics, German officials reported that other governments displayed no particular interest in the case.

7. The Litvinenko case

7.1 Political context of the case

Traditionally treated by Russia as one of Europe’s great powers, the UK enjoyed close relations with Moscow in the early 2000s. In March 2000, the prime minister, Tony Blair, spearheaded a series of bilateral visits by Western leaders to court the then acting President Putin. After the 9/11 attacks, the UK actively promoted Moscow’s alignment with the ‘war against terrorism’ and the creation of the NATO–Russia Council. Steadily growing trade flows, British foreign investment and the increasing importance of the London Stock Exchange for Russian companies underpinned the relationship. While business has continued to flourish, political ties have deteriorated sharply in recent years over London’s close alignment with Washington during the Iraq war and its growing criticism of Russian domestic politics. These differences have been reinforced by a series of bilateral disputes, in particular over asylum and extradition decisions. Over the period 2001–07, the UK refused repeated extradition requests by Russia for 13 individuals and granted political asylum to high-profile figures such as Akhmed Zakayev and Boris Berezovsky.³⁶

7.2 The substance and background of the dispute

The dispute in this case focused on the murder of Alexander Litvinenko, a former FSB officer and naturalised UK citizen, and the UK’s extradition request for the prime suspect. On 1 November 2006, Litvinenko fell ill after meeting two former Russian intelligence officers, Andrey Lugovoy and Dmitry Kovtun, at a London hotel. He died on 23 November of poisoning with the radioactive isotope Polonium-210, which had presumably been ingested through a cup of tea consumed at the meeting. Having traced the polonium trails left by the three men, British officers undertook investigations in Moscow in December 2006. In May 2007, the Crown

³⁵ See the *RIAN* article, “Überflugstreit Russland – Lufthansa: Deutsche Regierung erwägt Einschaltung der EU” [Overflight spat Russia – Lufthansa: German government considering involving the EU], *RIA Novosti online*, 2 November 2007.

³⁶ UK Parliament, House of Commons Foreign Affairs Committee, *Global Security: Russia*, Second Report of Session 2007–08, London: The Stationery Office, 2007, p. 46.

Prosecution Service announced that sufficient evidence had been gathered to charge Lugovoy with murder and lodged an extradition request under the European Convention on Extradition of 1957 (ECE).³⁷

Russia rejected the request based on a constitutional ban on extraditing Russian citizens and Art. 6.1 ECE. In line with the convention, Russia's prosecutor general, Yury Chaika, offered to try Lugovoy in Russia, if London submitted additional evidence.³⁸ Russia had opened its own criminal case in 2006 and suggested that former Yukos Vice-President Leonid Nevzlin had played a role in the poisoning. The Russian investigation was inconclusive, however. The ECE only required London to submit a summary of the British investigation, but Moscow refused to comply with further cooperation requests, unless the British government released further crucial evidence, including the coroner's report. At the political level, Moscow angrily denied any government involvement and portrayed Litvinenko's murder as a well-rehearsed plan to discredit Russia. President Putin dismissed the UK's insistence on the extradition as "a remnant of a colonial mindset" and pointed out that London had repeatedly rejected Russian extradition requests.³⁹ Instead of being extradited, Lugovoy was placed second on the Liberal Democratic Party list for the 2007 elections and obtained a Duma mandate providing him with parliamentary immunity.

London categorically rejected the proposal of trying Lugovoy in Russia and instead suggested that Moscow should circumvent the constitutional difficulties. Reportedly, London feared that Russia could abuse the full evidence for a politically charged trial to acquit Lugovoy. As the dispute reached a deadlock, it subsequently spilled over into other areas. Against the background of long-standing difficulties with re-broadcasting arrangements, the BBC's Russian Service was removed from two local FM partner stations in November 2006 and the Bolshoye Radio joint venture in Moscow in August 2007. On 25 October 2007, Russia demanded that the British Council freeze all operations outside Moscow as of January 2008. Among other allegations, Russia claimed that the regional offices in Yekaterinburg and St Petersburg operated without legal basis.⁴⁰ London denied any violations and insisted that a British–Russian framework agreement of 1994 on educational, scientific and cultural cooperation provided an adequate legal basis.

7.3 The British government's approach to the dispute

The suspicious death of a former FSB officer and the contamination of numerous locations in London with a hazardous substance created considerable domestic pressure. Accordingly, London took a principled position and insisted on the unqualified observance of the rule of law. The government sought to avoid an escalation by framing the issue as a criminal matter dealt with by independent judicial bodies, but it simultaneously provided strong political backing. Blair insisted that "no political or diplomatic barrier would be allowed to stand in the way of the

³⁷ Crown Prosecution Service (CPS), "CPS announces decision on Alexander Litvinenko case", Press release, CPS, London, 22 May 2007.

³⁸ Prosecutor General of the Russian Federation, Генеральная прокуратура Российской Федерации направила в компетентные органы Великобритании ответ на запрос о выдаче Андрея Лугового [The Office of the Prosecutor General of the Russian Federation dispatched the answer to the extradition request for Andrey Lugovoy to the competent bodies of Great Britain], Press release, Prosecutor General's Office, Moscow, 5 July 2007.

³⁹ See the BBC news article, "Putin rebukes 'colonial' Britain", *BBC News Online*, London, 24 July 2007.

⁴⁰ Russian Federation, Ministry of Foreign Affairs, "Russian MFA Spokesman Mikhail Kamynin Commentary regarding a Media Question concerning the Situation Surrounding the Activities in Russia of the British Council", Ministry of Foreign Affairs, Moscow, 12 December 2007.

British investigation”.⁴¹ London repeatedly called in Moscow’s ambassador to demand full cooperation and raised the extradition request at top-level meetings, including the June 2007 G8 summit. Simultaneously, the government cautiously refrained from suggesting any state involvement in Litvinenko’s death and continually underlined Russia’s importance as a partner in tackling common global challenges.

All the same, the vigorous political backing created strong pressure for a reaction to Moscow’s rejection of the extradition request. On 16 July 2007, the new foreign secretary David Miliband announced that the UK was expelling four Russian diplomats, reviewing the extent of cooperation with Russia, suspending visa facilitation negotiations and raising Lugovoy’s extradition at the EU level. Moscow condemned the measures as a deliberate escalation and retaliated by expelling four British diplomats and reciprocating the visa restrictions. The UK government subsequently reduced the attention given to the issue, but it refused to drop the extradition request, issued a European arrest warrant for Lugovoy and continued to raise the matter with Moscow. The UK also openly defied the order to close the British Council and only suspended operations in St Petersburg and Yekaterinburg after the FSB summoned locally hired employees for individual interviews. Although Miliband insisted that the measures imposed in July 2007 would “continue to be administered rigorously”,⁴² afterwards London tried to break the vicious circle and ruled out retaliating against Russian cultural activities in Britain. Instead, the UK made increasing efforts to repair bilateral relations and hoped for a thaw after the Russian presidential elections. In October 2008, in his role as UK business secretary, Peter Mandelson became the first cabinet minister to visit Russia since early 2007. Mandelson expressed a desire to re-engage and admitted that Russian foreign minister Sergey Lavrov was the first to mention the Litvinenko case during their meeting. The new UK ambassador to Moscow, Anne Pringle, was also less vocal on the issue than her predecessor was. While not formally retreating from its position, London stopped pushing the case and sought to improve bilateral ties by increasing dialogue and focusing on common interests.

7.4 EU involvement

London regularly briefed its EU partners but did not push Litvinenko’s death onto the EU agenda as long as criminal investigations were underway. Even when London finally sought active support, the government treated EU involvement only as a backup for its position in the bilateral dispute. During a meeting of the Council’s Article 36 Committee on police and judicial cooperation, the UK reported on the planned extradition request and asked all member states to support the UK’s approach in their contacts with Russia.⁴³ Accordingly, the Council presidency backed the UK with a CFSP statement issued on 1 June 2007, which called upon Russia to cooperate constructively with the UK. A declaration issued after Miliband’s announcement of the diplomatic expulsions also expressed the EU’s disappointment with Moscow, but the Portuguese presidency emphasised the bilateral nature of the dispute and denied plans for further EU action.

After Russia reciprocated the expulsions, London sought to avoid further escalation and did not request an EU response. Even though the EU continued to raise the case with Moscow, for example at the Permanent Partnership Council on Justice and Home Affairs of 22-23 November

⁴¹ See “Russia will not extradite Litvinenko suspects”, *The Guardian*, London, 5 December 2006.

⁴² Foreign and Commonwealth Office (FCO), “Miliband’s statement to Parliament: British Council in Russia”, Press Release, FCO, London, 19 January 2008(a).

⁴³ Council of the European Union, Outcome of Proceedings of the Article 36 Committee meeting on 22-23 May 2007, Council Document 10621/07, Brussels, 21 June 2007(a).

2007, the issue was slowly slipping off the EU–Russian agenda until the standoff over the British Council. In response to Moscow’s ultimatum, the EU National Institutes for Culture sent Moscow a letter signed on behalf of the cultural institutes of 18 member states. The Portuguese presidency also issued a CFSP statement that “urge[d] the Russian Authorities to revisit their decision”.⁴⁴ Many governments considered Moscow’s crackdown on the British Council disgraceful and supported another CFSP declaration issued after the forced closure. Still, the UK refrained from insisting on a stronger EU response. Despite the lack of the desired results, the UK underlined its wish not to delay the strategic EU–Russia negotiations over the dispute. Instead, London satisfied itself with an agreement reached in June 2007 to annex a protocol declaration to the negotiating mandate, which in line with previous CFSP statements highlighted EU concerns regarding Lugovoy’s extradition.⁴⁵

7.5 Assessing EU unity and support

Despite the ostensible display of solidarity through consecutive declarations of support, the EU achieved only a medium degree of unity in the Litvinenko case. Because of the hints at a certain level of state involvement in Litvinenko’s poisoning, many governments were reluctant to become entangled in a potentially explosive bilateral dispute. Yet most member states supported the UK over the criminal investigation itself given the public health risk and the damage to national interests. European officials also welcomed that London was measured in its requests for EU involvement. In contrast, the UK’s diplomatic expulsions, which had been announced without prior consultation, only enjoyed limited backing. Although EU leaders understood the domestic pressure on the freshly inaugurated British government, several member states regarded the expulsions as an overreaction. As Moscow’s refusal of the extradition request did not violate its international obligations, the fact that London pushed for Lugovoy’s extradition on a rule-of-law basis while simultaneously calling upon Russia to circumvent its constitution also weakened EU support.

Consequently, the UK received more muted expressions of support than desired. Despite an urgent request, the CFSP declaration of 18 July only emerged with delay and did not explicitly condone the UK’s expulsions. Likewise, the measured declaration on the British Council was published a week after the UK had announced that a strong EU statement was about to be issued. These differences did not provoke further difficulties, however, as London had been aware of the limited support, did not try to elicit stronger EU action and instead downgraded the dispute.

8. Horizontal findings

This section aims at drawing together the findings of the above case studies for more general conclusions, which are also informed by several other cases referred to in the above overview of various types of disputes.

⁴⁴ Council of the European Union (Portuguese Presidency), Declaration by the Presidency on behalf of the European Union on the closure of regional offices of the British Council in Russia, Council Document 1976/07, Presse 174, 21 December 2007.

⁴⁵ Foreign and Commonwealth Office (FCO), *Global Security: Russia, Response of the Secretary of State for Foreign and Commonwealth Affairs to the Second Report from the Foreign Affairs Committee*, Session 2007–08, London: The Stationery Office, 2008(b), p. 11.

8.1 Government approaches to bilateral disputes

As the case studies have illustrated, one should avoid firmly attributing a specific approach to a particular member state. Certain member states are undeniably more inclined to pursue a specific strategy than others do, but a government can simultaneously pursue different approaches towards various disputes. For example, Poland never treated the Vistula/Kaliningrad lagoon dispute with the same urgency as the agricultural ban and did not raise the Katyn dispute to the EU level at all. In addition, the policy pursued towards a particular dispute is by no means static, as governments adapt to changing circumstances and reconsider unsuccessful strategies. The emergence of a deadlock, a thaw in relations with Moscow or changes of government can be important turning points. Moreover, member state governments do not always constitute unitary actors in a dispute. For example, the Lufthansa case initially witnessed limited coordination among the ministries involved, which undermined the government's position *vis-à-vis* Moscow.

Even though these findings caution against generalisations, the case studies allow for identifying certain patterns regarding the approaches taken by member state governments towards bilateral disputes. In particular, a certain distinction could be observed between more accommodative and more uncompromising government approaches. In the first category, the governments affected made visible efforts to avoid any escalation and accommodate Russian interests. In this respect, after initially taking a more uncompromising stance, Berlin abandoned its firm line and declared its readiness to negotiate mutually acceptable conditions for relocating the Lufthansa Cargo hub. This strategy is by no means confined to the old member states. In the context of improving Latvian–Russian relations in 2006–08, Riga took a very subdued approach towards Russian restrictions on Latvian sprats and eventually managed to negotiate their termination. The governments concerned frequently treated arising disputes as technical matters, played down their significance and only raised them to a higher level after exhausting expert-level contacts. Even acknowledging its limits, numerous officials regard this as a tested strategy to allow for a face-saving resolution. Nevertheless, government approaches can seldom be described in dichotomous terms as ‘technical’ or ‘political’ and they do not necessarily evolve from low to high-level contacts. For instance, Steinmeier's intervention in the Lufthansa case created a calmer setting for the subsequent technical negotiations.

In contrast, several governments pursued a more uncompromising approach. For example, London categorically rejected Moscow's offer of trying Lugovoy in Russia and Estonia denied Moscow any veto over the Bronze Soldier. Denmark and Lithuania also firmly resisted Russian pressure over the World Chechen Congress and the Mazeikiu refinery. Owing to the nature of the disputes and their high degree of domestic controversy, these cases were from the outset addressed at the highest political level. The member states concerned pursued a firm line towards Moscow, yet at the same time sought to avoid excessive escalation. At the farther end of the spectrum, the approach taken by Jaroslaw Kaczynski – who engaged in fierce rhetoric, sought to mobilise strong EU leverage and displayed limited concern for collateral damage to Polish–Russian or EU–Russian relations – could be described as openly confrontational.

Many officials identify the avoidance of further damage to bilateral ties as the main motivation for accommodative strategies, but the reasons for the adoption of a specific approach mostly defy generalisation. In the cases examined, these decisions were influenced by a combination of numerous factors including the perceived damage to national interests, the state of bilateral relations and the degree of domestic pressure. Even though it appears that member state governments more readily adopt uncompromising strategies when bilateral ties with Moscow are already strained and domestic pressures are high, one should avoid making deterministic claims over the influence of these factors. After the British Council affair, for example, London took a conscientious decision to pursue a softer line despite the bilateral tensions and the

domestic outcry. In the case of the timber export duties, the domestic repercussions in terms of potential job losses encouraged the Finnish government to take a very firm stance towards Russia despite otherwise excellent bilateral relations. A government's approach is hence subject to considerable discretion, yet can still be constrained by the specific nature of the dispute. For example, economic disputes between Russia and its main trade partners clearly offer more room for striking mutually beneficial deals than zero-sum conflicts over historical issues.

Despite these caveats, historical experience and domestic factors go a long way towards accounting for certain differences between the old and some new member states. Uncompromising strategies were not confined to the new member states, but the degree of politicisation on the part of both Moscow and the member state governments concerned was frequently higher in these cases. For example, the rhetorical devices deployed by several Polish and Baltic leaders, such as the description of the agricultural "embargo" by Polish foreign minister Anna Fotyga as a "kind of declaration of war" differed substantially from the language used elsewhere. Given their recent past, several new member states are particularly sensitive if Russia does not treat them as genuinely sovereign. In particular, Kaczynski framed the import ban as a dispute over Poland's status as a full-fledged EU member state. Even though all the disputes examined reverberated with a strong domestic echo, the governments of several new member states frequently face greater domestic pressures, as policy towards Russia remains an integral part of domestic politics in these countries. For the same reason, political leaders can be tempted to play on bilateral disputes to shore up political support, as suggested by the approaches of Ansip and Kaczynski. In contrast, the UK and other old member states are generally not perceived as domestically exploiting disputes with Russia, even if London's approach to the Litvinenko case was likewise influenced by domestic considerations.

Even in highly politicised cases, the use of counter-leverage by member state governments remained conspicuously limited. Except for the EU counter-pressure deployed by Warsaw and Vilnius, most governments only employed the threat of countermeasures as a negotiating tactic. For example, the UK sent a political signal with the diplomatic expulsions in the Litvinenko case but refrained from retaliating against Russian cultural activities during the dispute over the British Council. Similarly, Berlin's suspension of Aeroflot's landing rights was rescinded within a day, and Lithuania did not implement a threat to close the railway connection between Kaliningrad and mainland Russia. This restraint has several foundations. First, all member states are based on the rule of law, which proscribes arbitrarily violating agreements or imposing sanctions without sound legal basis. Moscow takes this into account by exploiting legal loopholes, acting through proxies and imposing restrictions in a manner not openly violating its obligations.⁴⁶ Second, available counter-leverage is frequently offset by dependence on Russia for energy supplies and cooperation in other areas, and most governments thus seek to avoid excessive escalation. Whereas Russia occasionally takes action hurting its own long-term interests, most member states resist taking such measures. Notably, Helsinki deemed it counter-productive to block Russia's WTO accession over the timber export duties, as Russian WTO accession is in Finland's long-term interest. As illustrated by Aeroflot's successful tactic of threatening to relocate its operations to Luxembourg, the EU's lack of coherence often prevents it from bringing Russia's dependence on the EU to bear in such matters. Third, the British case suggests that counter-measures such as the diplomatic expulsions can be interpreted as unnecessary escalation and diminish EU support. While Russia occasionally ignores

⁴⁶ Although Russia created a legal basis for imposing sanctions in late 2006, the official procedure has been used very infrequently. See Russian Federation, 'Федеральный закон Российская [sic] Федерации от 30 декабря 2006 г. N 281-ФЗ О специальных экономических мерах' [Russian Federation Federal Law of 30 December 2006, No. 281-FZ, On special economic measures], *Rossiyskaya Gazeta*, 10 January 2007(a).

reputational costs, for instance over the British Council, the interest of most member state governments in maintaining international respectability prohibits similar measures.

8.2 EU involvement in bilateral disputes

As the case studies show, most governments routinely consult the European Commission about arising trade-related disputes irrespective of the further course of action. The disputes falling into Community competence were subsequently addressed by the European Commission, but numerous trade-related cases falling outside exclusive Community competence, such as the Latvian sprats, TNK-BP or the Lufthansa Cargo disputes, were actually not placed onto the EU–Russian agenda. EU officials report that in particular the larger member states often deem it more promising to resolve disputes on a bilateral basis. Besides possessing well-established bilateral channels to address arising problems, larger member states face lower incentives for EU involvement owing to the limited gains of additional leverage. Furthermore, governments often seek to avoid the additional politicisation associated with EU involvement. Indeed, many bilateral disputes are only raised at Moscow’s initiative. For example, Moscow has brought up the Baltic States’ alleged persecution of Soviet WWII veterans and tried to discuss the Czech–Polish missile defence plans with Brussels. As the Estonian case shows, bilateral disputes can thus unexpectedly spill over into EU–Russian ties even in spite of efforts by the government concerned to keep the issue bilateral. During the crisis, Russian foreign minister Sergey Lavrov accused the EU of conniving with Estonian attempts to rewrite history and several hundred activists picketed the European Commission’s Moscow delegation on 4 May 2007.

Even in cases of strained ties with Moscow, most government requests for EU support were actually preceded by attempts to resolve the dispute through bilateral channels. Bilateral contacts usually continued in parallel with EU efforts and even cases falling into exclusive Community competence (such as the timber export duties) continued to witness extensive bilateral talks. Whereas many governments only requested stronger EU involvement after bilateral contacts had been exhausted, several disputes like the Mazeikiu refinery case were raised relatively quickly. EU officials report that smaller member states tend to exert stronger pressure on Brussels owing to the relatively larger gains of leverage and a perceived powerlessness to resolve the issue bilaterally. Irrespective of a member state’s size, domestic expectations can also facilitate EU involvement in a particular dispute, if the government concerned seeks to demonstrate a high level of activity to the public. In other cases, member state governments request EU involvement in the hope of containing an acute crisis or of avoiding an unmediated bilateral confrontation with Moscow in the first place. Among the various categories, trade-related disputes are more readily raised to the EU level, as the defence of European commercial interests is regarded as the EU’s core business. In contrast, the member states are more selective over genuinely bilateral disputes falling into the political realm. For example, the UK never formally requested EU support regarding the harassment campaign against Ambassador Brenton. In particular, certain categories including espionage affairs or historical disputes are with few exceptions tackled on a bilateral basis. Despite recent initiatives to discuss the crimes of totalitarian regimes at the EU level, most officials do not regard Brussels as the appropriate venue for addressing historical disputes and have refrained from pushing individual cases such as the dispute over the Katyn investigation files.

In most instances, the requests for EU support resulted in relatively extensive measures being taken at the EU level. In spite of the limits of EU action over disputes falling outside Community competence, most officials considered EU support over these disputes as very substantial. Still, given the controversial nature of specific disputes, for example the agricultural ban, the relevant Commission services did not always appear to take a coherent position regarding the desirable degree of Commission involvement. Commission Vice-President Günter

Verheugen also contradicted the EU line in the Finnish case by stating that the timber “importers have been treating Russia as a third-world country”.⁴⁷ Crucially, government expectations towards EU support after the invocation of solidarity differed dramatically. Despite requesting support, London did not regard the EU as the primary channel for solving the Litvinenko dispute and Tallinn was aware of its thin political capital. In these and other cases (the Latvian Ventspils terminal or the timber export duties), the governments affected never insisted on a resolution. In contrast, the Polish veto catapulted the agricultural ban to the top of the EU–Russian agenda. Similar to the Mazeikiu case, Warsaw tabled the veto amid open complaints about lacking EU support and the perception that Poland was being treated as a second-class member of the EU.

8.3 Patterns of EU unity and support

As the above cases illustrate, the EU had severe difficulties in forging a common stance over the various disputes. Although the principle of EU solidarity as such is not disputed, EU support appears to be subject to certain conditions. Moreover, the views among the member states on the scope and practical implications of EU solidarity diverge significantly. Most governments recognise that the EU cannot entirely ignore bilateral disputes and accept the legitimacy of raising economic disputes with a certain relevance to Community competence. Even though the majority of member states emphasise that genuinely bilateral disputes should normally remain bilateral, many capitals are also open to the idea of issuing a general declaration of EU solidarity in these cases to support the bilateral efforts of the government concerned.

In contrast, the calls for extensive EU involvement in individual, highly politicised cases and the strategies used by certain governments to elicit EU support triggered controversial discussions. At one end of the spectrum, several governments consider extensive EU involvement in individual disputes undesirable and emphasise the need to seek an agreement with Russia bilaterally. Others readily accept the legitimacy of placing substantive cases onto the EU–Russian agenda, provided they affect important national interests and the government concerned has already exhausted its own possibilities. To a certain extent, the disagreements over the scope of EU solidarity reflect the long-standing divisions between the member states traditionally pursuing close bilateral ties with Moscow and those supporting a more assertive and genuinely common EU policy towards Russia. At the same time, even the latter group voices concerns about the risk of paralysis in EU–Russian relations over a growing number of bilateral disputes.

More specifically, Warsaw’s use of the veto proved particularly divisive. Notwithstanding the legal uncertainties, most officials deemed the complaint about insufficient support unjustified and resented that Poland had tabled its veto in the face of considerable EU efforts. Whereas other governments correctly anticipated the limits to EU solidarity, Poland’s and Lithuania’s attempts to ‘force’ stronger support were met with incomprehension and revealed the absence of a consensus on the scope of EU solidarity. As the respective disputes caused only limited material damage, the blocking of the EU–Russia negotiations over largely symbolic disputes was widely regarded as grossly disproportionate. Many officials complained that the two governments did not reciprocate solidarity and ignored collective EU interests, as they rejected or even refused to discuss consecutive compromise proposals. As other member states generally sought to avoid letting bilateral disputes substantially damage EU–Russian relations, most governments deemed it illegitimate that Kaczynski appeared to have used the dispute to push the EU into taking a more assertive line with Russia and actually to have welcomed the frostier climate.

⁴⁷ A European Commission spokesperson subsequently insisted that the comments had been taken out of context. See N. Popova, “EU Wants Russia Treaty before Summit”, *St Petersburg Times*, 20 May 2008.

In addition, several governments questioned the extent to which Warsaw and Vilnius genuinely worked towards a resolution of the respective disputes. In view of Russia's emphasis on equality in EU–Russian relations, most officials deemed it futile to attempt to pressure Moscow into open submission in a politicised dispute. Consequently, Poland and Lithuania were perceived as insisting on their firm approaches as a matter of principle, which contravened the EU's emphasis on seeking compromise and trading mutual concessions. Likewise, the strong politicisation of certain cases through the use of populist rhetoric, for example Polish and Estonian threats to 'veto' the Samara summit, was regarded as unhelpful to EU efforts to address the disputes. The impression that some leaders placed more emphasis on dramatic public posturing than on professionally solving a problem considerably strained EU solidarity.

The cases examined also suggest that EU solidarity has certain limits, if other member states regard the damage incurred in a dispute as partially self-inflicted, notably if a government seems deliberately to pick an avoidable fight with Moscow in knowledge of the likely consequences. In particular, many governments regarded the relocation of the Bronze Soldier to have unnecessarily provoked an open conflict with Russia. Even though most governments recognise that Moscow shares considerable responsibility, many old member states remain critical of the persistent historiographical conflicts involving several new member states and are very reluctant with respect to any EU involvement in historically charged disputes.

In more procedural terms, the communication and information policies of member state governments also appear to affect EU support. While Warsaw cooperated efficiently to address the veterinary issues, the Polish veto was poorly prepared and caused considerable surprise. Lithuania also triggered resentment by sending contradictory signals over its veto and by tabling numerous additional requests for support at a late stage. In several other cases, EU officials report that despite requesting assistance, member state governments do not always provide sufficient information to allow the EU to defend their interests effectively. Finally, legal considerations seem to influence the evaluation of requests for solidarity. For example, the fact that Moscow's rejection of the extradition request did not violate its international obligations limited support for London's retaliatory measures. It also caused consternation that the Polish export problems were not directly related to the content of the negotiating directives vetoed.

Consequently, the EU's ostensible unity at the Samara summit masked considerable divisions over the legitimacy of the respective cases. The main motivation for the strong display of solidarity with the governments concerned was the insight that the Union could not allow itself to be split by Russia and that it had to remain the EU's prerogative to determine *vis-à-vis* third countries which issues are considered bilateral. Most governments also regarded it as a fundamental matter of credibility for the Union to support a member state facing severe pressure from Moscow irrespective of potential reservations. At the same time, the convergence among the member states has remained limited and the differences over the scope and practical implications of EU solidarity persist.

9. Conclusions and policy recommendations

This final section draws on the above findings to make several recommendations for the EU's approach to bilateral disputes. As this paper has argued, bilateral disputes are by no means a recent phenomenon or exclusive to the EU's relations with Russia. Moreover, only a small share of the numerous bilateral disputes *directly* affects the EU, as many cases are never raised in Brussels. The problem of bilateral disputes in EU–Russian relations should therefore not be blown out of proportion, but the case studies have confirmed the disruptive potential of such frictions. Besides the substantial risk of direct spillover, persistent tensions between some member states and Russia over acrimonious disputes undeniably affect EU interests. Additionally, disagreements over solidarity can exacerbate existing divisions over EU policy

towards Russia. In the long term, a credible EU foreign policy requires the member states to support each other in *serious* bilateral disputes. Otherwise, an incoherent EU will not only lose global influence and invite divide-and-rule policies, disenchanted member states perceiving a lack of EU solidarity will also turn to other partners like Washington. Conversely, if EU–Russian relations are persistently obstructed by bilateral disputes, the large member states will pursue their ties with Moscow outside the common framework.

Despite a certain rapprochement in EU–Russian relations, these problems remain on the agenda. To address the issue, the member states should attempt to build a consensus on a set of *political guidelines* for governments seeking support from their EU counterparts and the EU as a whole. As suggested elsewhere,⁴⁸ the European Council could formally adopt these guidelines as a political agreement. Even though the record suggests that agreements without independent enforcement mechanisms have always been subject to defections and different interpretations, occasional violations do not entirely invalidate political agreements, whose major purpose is to shape government conduct and avoid norm violations in the first place.

The objective of any guidelines must be to balance the interests involved by maximising the prospects for effective solidarity in a serious dispute while minimising the fallout for collective EU interests. Any guidelines must also recognise the need for flexibility. Bearing in mind the wide diversity of disputes, one cannot expect full convergence towards a common EU approach to bilateral disputes. The range of viable measures often depends on unique circumstances and there is no silver bullet for resolving a dispute. Nevertheless, this does not imply the absence of *common minimum standards*. Given the risk of spillover, member state governments need to recognise certain constraints on the handling of a bilateral dispute, even over matters within their exclusive competence. In terms of EU involvement, the member states must in any case retain the discretion to seek various degrees of EU support. A strong display of solidarity may be required to defuse a crisis, but discreet technical support or a gradual increase of political pressure could be more suitable in other cases. Likewise, the requirements placed upon governments seeking EU support should vary and be stricter for genuinely bilateral disputes than for cases on the border of Community competence or acute crises. The following proposals focus on genuinely bilateral disputes involving substantial EU support, because of the greater levels of controversy surrounding them.

9.1 Proposed guidelines for the EU's approach to bilateral disputes

Irrespective of possible EU involvement, the member states should always seek to *minimise potential damage* to the EU. Whereas it is not always possible to negotiate an agreement, for example, if Moscow deliberately escalates a dispute, *openly confrontational strategies* should be avoided where possible. The unnecessary politicisation of second-rank disputes through shrill rhetoric not only renders a face-saving exit impossible, it also diminishes the scope for constructive EU involvement and support from other capitals. Leaders should also refrain from pursuing disputes for *predominantly domestic purposes*. Furthermore, the prospect of solidarity must not induce governments to *take greater risks* in a dispute and fall victim to the pitfalls of 'moral hazard'.

To avoid an erosion of solidarity, strong support should be requested *very selectively*. EU solidarity rests on mutual trust and 'diffuse reciprocity', i.e. the approximate balancing of mutual concessions over the long term. Although specific circumstances need to be taken into

⁴⁸ A. Wilson, N. Popescu and P. Noël, *The future of EU–Russian relations. A way forward in solidarity and the rule of law*, Briefing Paper, Policy Department, External Policies, European Parliament, Brussels, 2009.

account, EU solidarity will diminish if individual governments request support with *grossly disproportionate frequency* or over mostly *symbolic issues*. Instead, strong EU support should be reserved for cases involving very important national interests. Before requesting support, the affected governments also should have engaged in substantial *bilateral efforts*.

As these requirements place the burden of proof on member states seeking support, the governments concerned need to adapt their *communication policies* accordingly. To build mutual trust, member state governments should provide detailed information about emerging disputes at an early stage. This requires non-affected member states to duly familiarise themselves with the problems facing their EU partners. Requests for EU support should be communicated in a timely and unambiguous fashion, which necessitates that governments enforce a *coherent position* within their administrations. Not all of these criteria will be met evenly, but they do require governments seeking support to exercise considerable restraint. Hence, it is imperative that upon request EU support is provided in a *prompt and effective manner*. If deemed necessary, other member states should be ready to raise the dispute in their own contacts with Moscow in coordination with the Council presidency. Member state governments must also *refrain from undercutting* each other during a dispute, which renders counter-leverage less effective and allows Russia to impose sanctions by shifting benefits from one member to another.

To render EU support effective, the government involved should carefully discuss its actions with the EU and promptly implement EU recommendations. While that member state retains the major responsibility for resolving the dispute, a single government cannot force a particular approach towards Moscow on the EU. Governments invoking support should *reciprocate solidarity* and display a readiness for compromise towards both Moscow and Brussels. Conversely, the EU must refrain from compelling a government to accept massive concessions. Finally, requests for EU support must be *proportionate* to the damage inflicted and the consequences for the EU. Governments should refrain from insisting on the pursuit of objectives that are evidently *not achievable* or could not be attained despite sustained efforts. Collective EU action is no panacea and the *opportunity costs* of sustained EU efforts can by far outweigh the damage inflicted. In these cases, EU support might be better aimed at *alleviating* the problem, for example by helping to open new markets for banned exports, while temporarily relegating the dispute to a lower order.

9.2 Further mechanisms and institutions

The adoption of political guidelines should not be a prerequisite for considering other mechanisms to strengthen EU coherence. In particular, all member state governments should adopt *administrative directives* to ensure coherent information policies and common procedures, for example by creating prior consultation requirements for the use of counter-measures. The directives should stipulate a comprehensive exchange of information with EU partners making full use of existing channels like the EU's COREU network. As many disputes arise in technical areas, the foreign ministries or prime minister's offices should early on be quietly involved to ensure inter-ministerial coordination. Likewise, the European Commission could examine ways to strengthen its procedures for ensuring coherence in a dispute involving several Commission services.

On the EU level, a reinforced, specific *review mechanism* for bilateral disputes based on the existing arrangements could increase the visibility of bilateral disputes. That being stated, the drawbacks of a strengthened *formal* mechanism appear to outweigh its advantages, as an official EU catalogue of bilateral disputes might in the long term accelerate the tendency to place minor disputes onto the EU–Russian agenda. The record also shows that a formal stocktaking exercise can be purpose-defeating, as governments preferring a more discreet approach can shy away

from submitting information. Instead, *regular, informal reporting sessions* on bilateral disputes should be held on the fringes of COEST capital meetings to ensure adequate exchanges about simmering conflicts. If desired, a summary of these exchanges could be presented to the Gymnich-type, informal foreign ministers' meetings.

Given the need for flexibility, it is unfeasible to create a general solidarity mechanism that would automatically trigger a set of EU measures in a dispute. Nonetheless, *sectoral solidarity mechanisms* could be established for areas in which prompt support is imperative and the required EU measures are evident. Concerning the security of natural gas supplies, for instance, a robust EU mechanism including a detailed contingency plan for allocating available gas supplies and infrastructure capacities during a supply crisis should be established. Any significant supply disruption should activate efforts in non-affected member states to free supplies through interruptible contracts, storage withdrawal or fuel-switching for the effective provision of solidarity.⁴⁹

Finally, the Council Secretariat and the European Commission could compile an *inventory* of EU measures and lessons learned from past disputes. While the review of lessons learned could promote internal debate, the inventory could assist the EU in weighing various options during a dispute. These could include trilateral consultations under Commission auspices, fact-finding missions by the Commission and the Council, various formats for international mediation, as well as linkage strategies with Russian interests. As the EU's leverage frequently depends on Moscow's international obligations, the EU should continue to promote Russia's inclusion into multilateral governance frameworks. The conclusion of a comprehensive EU–Russia agreement, which should comprise the main principles of the Energy Charter Treaty and a deep free trade agreement with effective dispute-settlement provisions, could further mitigate the problem of (bilateral) disputes in EU–Russian relations.

⁴⁹ For a detailed discussion of natural gas supply security in the EU–Russian context, which is beyond the confines of this document, see P. Noël, *Beyond dependence: How to deal with Russian gas*, ECFR Policy Brief, European Council on Foreign Relations, London, 2008.

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