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# *The Cyprus Question before the European Court of Justice*

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## **Abstract**

*Cyprus, linked with the EU by an association agreement, has been de facto divided since 1974. In 1983, the northern part declared independence as the Turkish Republic of Northern Cyprus (TRNC), a state recognized only by Turkey. The English courts, faced with the questions of whether certificates required under EC law for the importation of goods originating in Cyprus under the association agreement could be issued by the TRNC authorities and, if not, whether these certificates could be issued in Turkey by Turkish officials instead, referred these questions to the ECJ for a preliminary ruling. The ECJ ruled that EU members must not accept certificates issued by those authorities because cooperation required under the certificate system was excluded with the TRNC as it was not recognized either by the EU or its members. However, indirect imports from Cyprus via third non-member states were permissible under certain conditions, leaving open, however, the question of whether these conditions could be satisfied in Turkey, a question (still) to be decided by the English courts. By banning the direct importation of Turkish Cypriot products or taxing them out of the European market on the basis of the non-recognition of the TRNC, the ECJ misjudged the scope and consequences of the principle of non-recognition in international law and, in fact, applied economic sanctions, a measure that should be reserved for the political bodies responsible for the conduct of the Community's foreign relations.*

## **1 Introduction**

Since the Turkish military intervention in 1974, the island of Cyprus has been *de facto* partitioned into a Greek Cypriot southern part and a Turkish Cypriot northern part. The Greek Cypriot Government in the south is recognized by the international community (with the sole exception of Turkey) as the Government of the Republic of Cyprus, a state established by the two communities in August 1960 and whose territory comprises the whole island of Cyprus. On 15 November 1983, the Turkish Cypriot community declared an independent state in the northern part of Cyprus.

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calling itself the Turkish Republic of Northern Cyprus (TRNC). By Resolution 541 (1983), the United Nations Security Council deplored ‘the purported secession of part of the Republic of Cyprus’ and called upon ‘all States not to recognize any Cypriot State other than the Republic of Cyprus’. In Resolution 550 (1984), the Security Council reiterated the call upon all states ‘not to recognize the purported State of the “Turkish Republic of Northern Cyprus” set up by secessionist acts’ and called upon them ‘not to facilitate or in any way assist the aforesaid secessionist entity’. Similarly, by declarations of 16 and 17 November 1983, the European Parliament, the Commission and the Foreign Ministers of the member states, in the framework of European Political Cooperation, rejected the Turkish Cypriot declaration of independence and expressed their continued recognition of the Greek Cypriot Government of President Kyprianou as the legitimate Government of the Republic of Cyprus.<sup>1</sup> With these declarations, the relations between the European Community (EC) and Cyprus were defined in so far as the EC regarded the island as a single state whose legitimate government is the Government of the Republic of Cyprus.<sup>2</sup> No state other than Turkey has so far recognized the TRNC. In order to force the Turkish Cypriots to withdraw their declaration of independence, the Greek Cypriot Government in southern Cyprus, using its position as the internationally recognized Government of the Republic of Cyprus, has tried to impose an economic embargo on northern Cyprus.<sup>3</sup> Soon after the *de facto* partition the Greek Cypriot Government of the Republic of Cyprus tried to stop agricultural exports from northern Cyprus to the EC.<sup>4</sup> In 1975, several Greek Cypriot owners of citrus groves in northern Cyprus, who had fled before the advancing Turkish forces in 1974, brought proceedings against fruit merchants and importers of citrus fruit from northern Cyprus in several EC member states. The plaintiffs, however, did not succeed with their claim that the citrus fruit had been ‘stolen’ from their groves in northern Cyprus.<sup>5</sup> The Greek Cypriot side therefore looked for other ways to stop

<sup>1</sup> See *EC Bulletin* 11–1983, points 2.2.34, 2.4.1 and 2.4.2; and OJ 1983 C 342/52. On recognition of the Government of the Republic of Cyprus, see also *EC Bulletin* 3–1984, point 2.4.3; and OJ 1994 C 289/13.

<sup>2</sup> Report of the Committee on Foreign Affairs, Human Rights, Common Security and Defence Policy of the European Parliament on Cyprus’s application for membership of the European Union (Rapporteur: Mr Jan Willem Bertens), submitted on 22 June 1995, PE-DOC-A4–1995/156–1EN, at 9.

<sup>3</sup> Although the Greek Cypriot Government denies this, the measures it has taken are widely regarded by neutral observers as constituting an economic embargo. Thus, the United States Department of State wrote in its 1999 Country Report on Human Rights Practices in Cyprus, released 25 February 2000: ‘The Turkish Cypriot economy . . . is handicapped significantly by an economic embargo by the Greek Cypriots’ ([www.state.gov](http://www.state.gov)).

<sup>4</sup> On 4 November 1974, the Embassy of the Republic of Cyprus in Germany applied to the County Court (*Amtsgericht*) in Hamburg for an order to examine whether 42,231 boxes of citrus fruit, which had arrived in the port of Hamburg, originated in northern Cyprus (UN Doc. S/11559, 15 November 1974). See also Mehmet, ‘Towards a Solution in Cyprus Through Economic Federalism’, in N. Salem (ed.), *Cyprus: A Regional Conflict and Its Resolution* (1992) 169–186, at 185, n. 15.

<sup>5</sup> *Archangelos Domain Ltd and Others v. Rodolfo (London) Ltd*, High Court, Queen’s Bench Division (1975 A. No. 3427); *Archangelos Domain Ltd and Others v. Euroface Holland BV*, Rotterdam District Court, 6 January 1976 (Röln. 325/75). On these cases, see UN Doc. A/C.3/31/7, 25 October 1976, Annex. 13; and Z.M. Nedjatigil, *Setting the Record Straight on Cyprus* (Public Information Office of the Turkish Federated State of Cyprus, Nicosia, 1979) 46.

agricultural imports into EC member states from northern Cyprus or, at least, to make such imports more difficult. One such way (which, in the end, proved successful) was to question the validity of certificates required under EC law for the importation of agricultural goods issued by the Turkish Cypriot authorities.<sup>6</sup> Although the Greek Cypriot Foreign Minister, Mr George Iacovou, had stated before the Foreign Affairs Committee of the UK Parliament on 18 March 1987 that his government had 'not appealed to the European Court to stop this kind of trade' because he did 'not like pursuing mainly political questions in the courts',<sup>7</sup> it took less than three years before the (political) question of Turkish Cypriot import certificates and thus the Cyprus question itself<sup>8</sup> reached the European Court of Justice (ECJ).<sup>9</sup>

## 2 Turkish Cypriot Agricultural Exports to the EC and the Certificate Requirement

Despite the growth of the tourism industry, agriculture is (still) the backbone of the Turkish Cypriot economy and a major foreign currency earner. In 1994, agricultural products accounted for 48.1 per cent of total exports and 23.4 per cent of the working population was employed in the sector.<sup>10</sup> Citrus fruit (oranges, lemons and grapefruit) account for almost two-thirds of the agricultural exports, potatoes and vegetables account for much of the rest.<sup>11</sup> In terms of export markets, the European Community, and especially the United Kingdom, is the TRNC's main trading partner.<sup>12</sup> In 1994, some 80 per cent of the citrus crop of northern Cyprus was sold to the United Kingdom.

Trade in citrus fruit and potatoes between Cyprus and the European Community is governed by the Agreement of 19 December 1972 Establishing an Association Between the European Community and the Republic of Cyprus ('Association

<sup>6</sup> As early as 1984, the Greek Cypriot Government of the Republic of Cyprus announced that it would have the UK practice of accepting import certificates issued by the Turkish Cypriot authorities reviewed by the ECJ: *The Times*, 17 May 1984, at 8; *ibid.*, 20 June 1984, at 5. See also *Greek Review International* No. 58, 16 May 1985, at 4.

<sup>7</sup> House of Commons, Foreign Affairs Committee, Third Report, Session 1986–1987, *Cyprus* (HCP (1986–87) 23) 85.

<sup>8</sup> For a Turkish Cypriot view, see Z.M. Necatigil, *The Cyprus Question and the Turkish Position in International Law* (2nd rev. ed., 1998); and for a Greek Cypriot view, see K. Chrysostomides, *The Republic of Cyprus. A Study in International Law* (1999).

<sup>9</sup> On 6 March 1990, the application in Case C-50/90, *Sunzest v. Commission* [1991] ECR I-2917, was lodged at the Court Registry.

<sup>10</sup> TRNC, State Planning Organization, *Economic Developments in the Turkish Republic of Northern Cyprus* (1995) 21. In 1996, the figures were 44 per cent and 21.2 per cent, respectively ((1998) 6 *Kibris* 7, at 8). On the Turkish Cypriot economy in general, see R.J.A. Wilson, *Cyprus and the International Economy* (1992) 116–139.

<sup>11</sup> Wilson, *supra* note 10, at 133. See also H. Williams, *Future Prospects of Cyprus Citrus Exports to the EEC* (1986).

<sup>12</sup> Cf. *The Economist*, 6 August 1994, at 43; *Independent*, 8 June 1993, at 22. On Turkish Cypriot exports to the EC in general, see Orthgieß, 'Außenhandel', in *Südosteuropa-Handbuch*, vol. VIII (1998) 437–467, at 454–462.

Agreement')<sup>13</sup> and the protocols thereto. Although concluded by a government made up solely of Greek Cypriots, it is generally agreed — albeit for different reasons<sup>14</sup> — that the Agreement applies to the whole island of Cyprus, both north and south of the dividing line. The Association Agreement provides for a system of tariff preferences benefiting agricultural and industrial products from Cyprus.<sup>15</sup> The preference is conditional on evidence being furnished that the products originate in Cyprus. The concept of origin is defined in the 1977 Protocol concerning the definition of the concept of 'originating products' and methods of administrative cooperation ('Origin Protocol'),<sup>16</sup> Article 6(1) of which requires that evidence of the originating status of products is given by EUR.1 movement certificates which are to be issued by the 'customs authorities of the exporting State' (Articles 7(1) and 8(1)). Article 8(3) provides in particular that it is the responsibility of the customs authorities of the exporting state to ensure that the movement certificates are duly completed. Under Article 24 of the Protocol, subsequent verification of EUR.1 movement certificates is to be carried out at random or whenever the customs authorities of the importing state have reasonable doubt as to the authenticity of the document or the accuracy of the information regarding the true origin of the goods in question. For that purpose the customs authorities of the importing state are to return the movement certificate, or a photocopy thereof, to the customs authorities of the exporting state, giving the reasons of form or substance for an inquiry. The customs authorities of the importing state are to be informed of the results of the verification as quickly as possible. Disputes between customs authorities that cannot be settled or raise a question as to the interpretation of the Protocol are to be submitted to the Customs Cooperation Committee established under the Association Agreement. The exporting state is

<sup>13</sup> OJ 1973 L 133/1. For a detailed account of the Association Agreement, see C. Tsardanidis, *The Politics of the EEC–Cyprus Association Agreement: 1972–1982* (1988); C. Lycourgos, *L'association de Chypre à la CEE* (1989); Kranidiotis, 'Relations Between Cyprus and the European Community' (1992) 8 *Modern Greek Studies Yearbook* 165–208.

<sup>14</sup> While states that do not recognize the TRNC consider the Association Agreement applicable to both north and south Cyprus because, in their view, the territory of the Republic of Cyprus still comprises the whole island of Cyprus (cf. OJ 1987 C 177/62), the TRNC considers itself a successor state to the treaty rights and obligations of the Republic of Cyprus under the Association Agreement in the area of Cyprus under its control. For the TRNC's position, see the decision of the Court of Appeal in *R. v. Minister of Agriculture, Fisheries and Food, ex parte SP Anastasiou (Pissouri) Ltd and Others*, 2 April 1996, Transcript of Smith Bernal (FC3 96/5419/D) 26–27.

<sup>15</sup> The Association Agreement provides for progressively closer cooperation between the Community and Cyprus. In the first stage, which lasted until 1987, the Community's Common External Tariff (CET) on Cypriot products was reduced by 70 per cent. An Additional Protocol to the Association Agreement (OJ 1987 L 393/2), which entered into force on 1 January 1988, governs the second stage and aims to create a customs union between the Community and Cyprus within the next 15 years. The second stage is divided into two phases: the first phase, from 1988 to 1997, involved, *inter alia*, the further reduction of duties and the abolition of quantitative restrictions; the second phase, from 1997 to 2002, is to lead to the abolition of all tariffs, quotas or other restrictions on trade with the Community.

<sup>16</sup> The Origin Protocol was approved by the Community by Council Regulation (EEC) No. 2907/77 on the conclusion of the Additional Protocol to the Agreement Establishing an Association Between the Community and the Republic of Cyprus (OJ 1977 L 339/1). The Protocol is an addition to the Association Agreement of 1972.

responsible for furnishing the European Commission with the address of its competent customs authorities as well as specimen seals, signatures and stamps used by these authorities which the Commission, in turn, forwards to the competent customs authorities of the member states.

Imports of citrus fruit and potatoes into the EC member states are further governed by the 'Council Directive on protective measures against the introduction into the Community of organisms harmful to plants or plant products and against their spread within the Community' ('Plant Health Directive'). Until 30 July 2000, it was Directive 77/93/EEC of 21 December 1976;<sup>17</sup> since then it has been Directive 2000/29/EC,<sup>18</sup> which in the relevant provisions is identical with its predecessor. The Plant Health Directive requires citrus fruit (except lemons) and potatoes to be accompanied upon importation by phytosanitary certificates drawn up on a specific form, following an examination enabling freedom from any disease or any parasites to be certified. Under Article 12(1)(b)<sup>19</sup> the certificates are to be issued by 'authorities empowered for this purpose . . . on the basis of laws or regulations of the' exporting state. Article 9(1) provides that, in the case of citrus fruit and other objects to which special requirements apply, phytosanitary certificates must be issued in the country in which the citrus fruit originates. An exception to that rule is made only where the special requirements applicable to citrus fruit, i.e. that the fruit be free from stalks and leaves and that its packing bear an appropriate mark of origin, can be satisfied also at places other than that of origin. Unlike the Origin Protocol, the Plant Health Directive does not expressly provide for a subsequent verification procedure involving cooperation between the competent authorities of the exporting and importing states.

### 3 Acceptance of Certificates Issued by the Turkish Cypriot Authorities

After the *de facto* partition of Cyprus in 1974, the United Kingdom, Germany and several other member states<sup>20</sup> continued to accept movement and phytosanitary certificates accompanying citrus fruit and potatoes from northern Cyprus issued by the Turkish Cypriot Chamber of Commerce<sup>21</sup> provided that those certificates were not issued in the name of the 'Turkish Federated State of Cyprus', the 'Turkish Republic of

<sup>17</sup> OJ 1977 L 26/20, as amended, *inter alia*, by Council Directive 91/683/EEC of 19 December 1991 (OJ 1991 L 376/29) and Commission Directive 92/103/EEC of 1 December 1992 (OJ 1992 L 363/1). In accordance with Article 2(1)(a) of the Directive, citrus fruit are 'plants' rather than 'plant products'.

<sup>18</sup> Adopted on 18 May 2000, OJ 2000 L 169/1.

<sup>19</sup> Now Article 13(1)(b).

<sup>20</sup> Besides the United Kingdom and Germany, these were Belgium, France, Ireland, Italy and the Netherlands. See Case C-432/92, *Anastasiou I* [1994] ECR I-3087, at I-3098, n. 11. See also *Financial Times*, 17 May 1984, at 2; *Independent*, 8 June 1993, at 22.

<sup>21</sup> The necessary documents (inspection certificates, certificates of origin) in respect of produce exported from the northern part of Cyprus were issued by the Turkish Cypriot Chamber of Commerce, a body incorporated in 1959 under the company laws of Cyprus of 1951 and 1954. Cf. the letter dated 22 October 1976 from Mr Nail Atalay to the UN Secretary-General, UN Doc. A/C.3/31/7, 25 October 1976, Annex, at 14 and also at 32. Cf. also *Financial Times*, 21 January 1984, at 2.

Northern Cyprus' or other equivalent designation. The UK Customs and Excise, which is responsible for checking EUR.1 movement certificates, accepted movement certificates issued by the Turkish Cypriot authorities which bore the (old) stamp of the 'Cyprus Customs Authorities'. Similarly, the competent authorities accepted phyto-sanitary certificates in the name of 'Republic of Cyprus — Turkish Federated State of Cyprus' and — since 1991 at least — in the name of 'Republic of Cyprus — Ministry of Agriculture'. The Community, relying on Article 5 of the Association Agreement, which provides that 'the rules governing trade between the Contracting Parties may not give rise to any discrimination between . . . nationals or companies of Cyprus', initially took the view that the Agreement was legally with the internationally recognized Government of the Republic of Cyprus but that trade and other preferential arrangements flowing from it should apply to the entire population of the island and that therefore certificates issued by Turkish Cypriots should be accepted.<sup>22</sup> After the declaration of independence of the Turkish Republic of Northern Cyprus in November 1983, the Government of the Republic of Cyprus introduced new customs stamps and addressed a 'note verbal' to the Community in which it stated that only certificates issued by its authorities satisfied the requirements of the Association Agreement. While the EC Commission — at first — adopted the view taken by the Government of the Republic of Cyprus and adopted moves to limit preferential access to exports formally certified by the Government of the Republic of Cyprus,<sup>23</sup> the Council (of Foreign Ministers) at the end of 1983 and the beginning of 1984 reiterated the position that the Association Agreement was to benefit the whole population of the island, but no more precise guidance was given for dealing with the certificates issued by the Turkish Cypriot authorities. This led *The Times* to state that the 'new kind of document would be acceptable to the customs in each member state. But nothing was agreed about cancelling the old documents which can still be issued in the Turkish part.'<sup>24</sup> The Commission's line of conduct in the question of Turkish Cypriot import certificates was not consistent. On the one hand, it furnished the competent authorities of the member states with specimen seals, signatures and stamps used by the Turkish Cypriots.<sup>25</sup> On the other hand, the Director-General of DG-VI (Agriculture), Guy Legras, on 5 December 1989, sent a letter to the Permanent Representatives of the member states in Brussels stating *inter alia*:

In the case of Cyprus, Article 12(1)(b) [of the Plant Health Directive] must be read as referring exclusively to the authorities empowered on the basis of the laws or regulations of the Republic of Cyprus. Indeed, the position of the Community is clear in this respect: while the Association

<sup>22</sup> Cf. OJ 1980 C 74/4–5; OJ 1985 C 65/3–4; and OJ 1987 C 177/62. See also R. McDonald, *The Problem of Cyprus* (Adelphi Papers No. 234, International Institute of Strategic Studies, London, 1988/89) 69.

<sup>23</sup> Cf. "'TRNC" exports to the EEC effectively blocked', *Greek Review International* No. 53, 17 March 1984, at 8. Cf. also *ibid.*, No. 46, 10 December 1983, at 5; and *ibid.*, No. 48, 7 January 1984, at 7. See further *Financial Times*, 21 January 1984, at 2.

<sup>24</sup> *The Times*, 20 December 1983, at 5.

<sup>25</sup> Case C-432/92, *Anastasiou I* [1994] ECR I-3097, para. 19. On the practice of the Commission, see also G. Schmidt, 'Die Ursprungsregeln im Außenwirtschaftsrecht der EG' (doctoral thesis, Free University Berlin, 29 November 1996) 128.

Agreement with Cyprus is for the benefit of the whole population of the island, the only government recognized is that of the Republic of Cyprus. For this reason goods circulating under cover of a phytosanitary certificate for the purposes of Directive 77/93/EEC and originating in the northern part of the island are to be considered to be in accordance with the terms of the said directive only when the certificate carries the name 'Republic of Cyprus' and where certification is carried out by the competent authorities thereof.<sup>26</sup>

This letter gave rise to proceedings against the EC Commission before the European Court of Justice. Two Dutch companies, which imported and marketed within the member states citrus fruit originating in northern Cyprus under phytosanitary certificates issued by Turkish Cypriot authorities, brought an action under Article 173(2) EEC (now Article 230(4) EC) for the annulment of the decision said to be contained in this letter, and under Article 215(2) EEC (now Article 288(2) EC) for compensation for the damage resulting from the Commission's unlawful conduct. The Court of Justice ruled on 13 June 1991 in Case C-50/90, *Sunzest v. Commission*, that the action was inadmissible on the ground that the letter of 5 December 1989 did not contain a 'decision', as required by Article 173(2) EEC (now Article 230(4) EC), but merely an opinion of the Commission's staff with no effect in law, and that therefore the companies could not rely on the (alleged) illegality of that letter in support of their claim for compensation.<sup>27</sup> As the Commission's letter thus was not binding on the member states, UK, German and other customs authorities continued to accept EUR.1 movement certificates issued by the Turkish Cypriot authorities. In the case of doubt as to the authenticity of a certificate or the accuracy of the information regarding the true origin of the goods in question, for example, the competent German authorities sent a 'formal verification request' in accordance with Article 24 of the Origin Protocol to the 'Ministry of Economy and Finance, Directorate of the Department of Customs & Excise, Nicosia, Turkish Cypriot Community, via Mersin 10, Turkey. In its corresponding reply the said authorities confirmed (if applicable) the authenticity and accuracy of the movement certificate in question.'<sup>28</sup>

#### 4 Direct Imports from Northern Cyprus

On 21 May 1992, SP Anastasiou (Pissouri) Ltd and 12 other Greek Cypriot producers and exporters of citrus fruit and the national marketing board for potatoes

<sup>26</sup> Case C-432/92, *Anastasiou I* [1994] ECR I-3098, para. 20. A slightly different version of the letter is given in Case C-50/90, *Sunzest v. Commission* [1991] ECR I-2917, para. 5. On 12 March 1987, the Commission had replied to a written parliamentary question that the preferential tariff arrangements under the EC-Cyprus Association Agreement also applied to citrus fruit from northern Cyprus: OJ 1987 C 177/62. For the Commission's position, see also OJ 1985 C 65/3-4; OJ 1985 C 241/26; and OJ 1994 C 289/13.

<sup>27</sup> Case C-50/90, *Sunzest v. Commission* [1991] ECR I-2917. On this case, see also Plender, 'Decisions of the Court of Justice of the European Communities During 1991' (1991) 62 *British Yearbook of International Law* 525-534, at 531-532.

<sup>28</sup> Letter to the author from the competent German customs authorities, the *Zentralstelle Ursprungsnachprüfung bei der Oberfinanzdirektion Münster*, dated 18 May 1998 (reference: Z 4215 B-346-ZUN-81a).

in the Republic of Cyprus ('Anastasiou and Others') instituted proceedings against the Minister of Agriculture, Fisheries and Food (MAFF) in the UK High Court of Justice for judicial review of the practice of the UK authorities of accepting imports of citrus fruit and potatoes 'originating from' northern Cyprus when the products in question were not accompanied by movement and phytosanitary certificates issued by the competent authorities of the Republic of Cyprus as required by Community law. By order of 2 December 1992, the Queen's Bench Divisional Court stayed the proceedings and referred to the European Court of Justice for a preliminary ruling under Article 177 EEC (now Article 234 EC) five questions on the interpretation of the Association Agreement and the Plant Health Directive, the essence of which was whether the Agreement and the Directive precluded, or alternatively required, acceptance by the national authorities of the member states of certificates issued by authorities other than those of the Republic of Cyprus when citrus fruit or potatoes were imported from the northern part of Cyprus, and whether the answer would be different if certain circumstances connected with the special situation of the island of Cyprus were taken as established.<sup>29</sup> Two weeks before the oral hearings before the Court of Justice were due to open, the Cyprus Fruit and Vegetable Enterprises Limited ('Cypfruvex'), a Turkish Cypriot company, 81 per cent of whose shares were held by the Turkish Republic of Northern Cyprus, and its British subsidiary, Cypfruvex (UK) Ltd, both substantial importers of citrus fruit and potatoes from northern Cyprus, applied (rather belatedly)<sup>30</sup> to the High Court for leave to intervene in the proceedings. The application was allowed subject to an understanding from the companies not to argue before the Court of Justice that the TRNC was a sovereign state or to assert its legitimacy.<sup>31</sup>

In Case C-432/92, *Anastasiou I*,<sup>32</sup> the European Court of Justice was, in effect, called upon to interpret the provisions 'customs authorities of the exporting State' in the Origin Protocol<sup>33</sup> to the Association Agreement and 'authorities empowered for this purpose . . . on the basis of laws or regulations of the [exporting] country' in the Plant

<sup>29</sup> Cf. Case C-432/92, *Anastasiou I* [1994] ECR I-3116, para. 15.

<sup>30</sup> This rather belated application to intervene worked to the interveners' own detriment. See the judgment of the Court of Appeal in *R. v. MAFF, ex parte SP Anastasiou (Pissouri) Ltd and Others*, 2 April 1996, Transcript of Smith Bernal (FC3 96/5419/D) 23–30, *per* Schiemann LJ.

<sup>31</sup> *R. v. MAFF, ex parte SP Anastasiou (Pissouri) Ltd and Others*, 24 February 1994, [1994] *Crown Office Digest* 329, at 330; 100 ILR 244, at 254–257. In this case, the High Court applied the Foreign Corporations Act (FCA) 1991 (1991 c. 44) to Cypfruvex. Section 1 of the FCA provides for the treatment of foreign corporations incorporated under the law of territories which are not recognized by the United Kingdom as a state to be treated as having legal personality for the purposes of United Kingdom law. On the FCA, see Talmon, 'Recognition of Governments: An Analysis of the New British Policy and Practice' (1992) 63 *British Yearbook of International Law* 231–297, at 295–296.

<sup>32</sup> [1994] ECR I-3087. Notes on this case appear at (1995) 54 *Cambridge Law Journal* 4–6; (1995) 20 *European Law Review* 202–210; (1995) 48 *RHDI* 305–321; (1996) 33 *Common Market Law Review* 125–136; and (1996) 7 *EJIL* 120–123.

<sup>33</sup> On a (preliminary) issue raised by the United Kingdom and the Commission, the Court held that the relevant provisions of the Origin Protocol had direct effect and could be relied on in proceedings before national courts.

Health Directive. The United Kingdom and the EC Commission<sup>34</sup> argued that the provisions in question, interpreted in the light of Article 5 of the Association Agreement and having regard to the *de facto* partition of the island, allowed member states to accept certificates issued by the Turkish Cypriot community in the northern part of Cyprus. Moreover, they maintained that the acceptance of the Turkish Cypriot certificates was certainly not tantamount to recognition of the TRNC as a state, but represented the necessary and justifiable corollary of the need to take the interests of the whole population of Cyprus into account. This argument, however, was not accepted by the Court of Justice which held with regard to EUR.1 movement certificates as follows.

While the *de facto* partition of Cyprus into a zone where the recognized authorities of the Republic of Cyprus continued fully to exercise their powers and a zone where they could not in fact do so raised problems that were difficult to resolve in connection with the application of the Association Agreement to the entire island, that did not warrant a departure from the clear and precise and unconditional provisions of the Origin Protocol. The problems resulting from the *de facto* partition of the island had to be resolved exclusively by the Republic of Cyprus, which alone was internationally recognized. The system whereby movement certificates were regarded as evidence of the origin of products was founded on the principle of mutual reliance and cooperation between the competent authorities of the exporting and importing states. A system of that kind could not function properly unless the procedures for administrative cooperation were strictly complied with. However, such cooperation was excluded with the authorities of an entity such as the TRNC, 'which was recognized neither by the Community nor by the member states'. In those circumstances, the acceptance of movement certificates not issued by the competent authorities of the Republic of Cyprus would constitute, in the absence of any possibility of checks or cooperation, a denial of the very object and purpose of the system established by the Origin Protocol.<sup>35</sup>

With regard to phytosanitary certificates, the Court held that the system of protection against the introduction of harmful organisms laid down in the Plant Health Directive was based essentially on a system of checks carried out by experts lawfully empowered for that purpose by the government of the exporting state and guaranteed by the issue of a phytosanitary certificate. The cooperation which was necessary to achieve the Directive's objective could not be established with authorities who were 'not recognized either by the Community or by its member states'. It would be impossible for an importing state to address inquiries to the departments or officials of an entity such as the TRNC which was not recognized, for instance concerning contaminated plants or certificates that were incorrect or had been interfered with. Clearly, only the authorities of the Republic of Cyprus were in a position to take action following complaints of contamination of plants exported from Cyprus. Consequently,

<sup>34</sup> In proceedings for a preliminary ruling, member states, the Commission and the Council may submit written and oral observations. See Articles 103 and 104 of the Rules of Procedure of the Court of Justice of 19 June 1991 (OJ 1991 L 176/7 and amendments OJ 1995 L 44/61 and OJ 1997 L 103/1).

<sup>35</sup> [1994] ECR I-3116, paras 36-41 and 47.

the term ‘authorities empowered’ in the Directive was to be interpreted as referring exclusively to the authorities empowered by the Republic of Cyprus to issue phytosanitary certificates.<sup>36</sup>

On those grounds the Court of Justice, on 5 July 1994, ruled that the Origin Protocol and the Plant Health Directive had to be interpreted as precluding acceptance by the national authorities of member states, when citrus fruit and potatoes were directly imported from northern Cyprus, of movement and phytosanitary certificates issued by authorities other than the competent authorities of the Republic of Cyprus. On receipt of the ECJ’s ruling, the UK High Court, on 11 November 1994, declared that the United Kingdom may not accept, in relation to the import of citrus fruit and potatoes from the TRNC, movement and phytosanitary certificates other than those issued by the competent authorities of the Republic of Cyprus.<sup>37</sup> Although preliminary rulings under Article 177 EEC (now Article 234 EC) are legally binding only on the parties to the main proceedings, such rulings on the interpretation of (normative) acts of Community institutions are in fact binding on all Community organs and the member states.<sup>38</sup> The EC Commission thus informed the member states in several committees about the practical consequences of the ECJ’s ruling and called for particular vigilance with respect to products which might originate in northern Cyprus.<sup>39</sup> The competent German customs authorities also considered themselves bound by the decision of the Court of Justice with the consequence that they no longer accepted movement certificates issued by the Turkish Cypriot authorities after 5 July 1994.<sup>40</sup> German customs officials were instructed that, for the preferential tariff arrangements of the EC–Cyprus Association Agreement, only the ‘Department of Customs & Excise Customs Headquarters (Greek)’ and the ‘Custom House in Nicosia, Limassol, Larnaca, Paphos’ (all in southern Cyprus) were empowered to issue EUR.1 movement certificates for Cyprus.<sup>41</sup> The ECJ ruling seriously affected the TRNC economy, especially the citrus fruit and clothing sectors.<sup>42</sup> Although the Court did not formally impose an ‘embargo’ on goods from northern Cyprus (as it has been widely contended),<sup>43</sup> its ruling virtually closed the European Community market to goods from northern Cyprus: without a valid EUR.1

<sup>36</sup> *Ibid.*, paras 61–64.

<sup>37</sup> *R. v. MAFF, ex parte SP Anastasiou (Pissouri) Ltd and Others*, 11 November 1994, Transcript of John Larking (CO/1132/92). This case is also briefly reported in [1995] *Crown Office Digest* 339.

<sup>38</sup> Case 66/80, *SpA International Chemical Cooperation v. Amministrazione delle Finanze dello Stato* [1981] ECR 1191. See also T. Oppermann, *Europarecht* (2nd ed., 1999) marginal note 771.

<sup>39</sup> See the reply of the Commission, given on 10 March 1995, to the questions concerning ‘illegal imports to the European Union of products originating from the occupied part of Cyprus’: OJ 1995 C 145/23.

<sup>40</sup> Letter to the author from the competent German customs authorities, *supra* note 28.

<sup>41</sup> See the administrative regulations for the German Inland Revenue: Bundesministerium der Finanzen, *Vorschriften Bundesfinanzverwaltung*, Z 4268: Warenursprung und Präferenzen, Fachteil. Besondere Bestimmungen 2 — Berechtigte Behörden, 2 October 1997.

<sup>42</sup> *Reuter European Community Report*, 15 November 1995.

<sup>43</sup> Cf. Emiliou, ‘Cypriot Import Certificates: Some Hot Potatoes’ (1995) 20 *European Law Review* 202–210, at 210; Kizilyürek, ‘Sozialstruktur’, in *Südosteuropa-Handbuch*, *supra* note 12, 516, at 546; *The Times*, 29 March 1996, at 23; and *Frankfurter Allgemeine Zeitung*, 20 March 1998, at 20.

movement certificate, furnishing evidence of their Cypriot origin, Turkish Cypriot goods could still be imported into the Community but were treated as goods from a country not associated with the European Community, thus exposing them to import duties ranging from 3 per cent to 32 per cent.<sup>44</sup> This meant that Turkish Cypriot companies, specially in the textile industry, had to lay off several hundred workers, a significant part of the TRNC's workforce, as their goods were no longer competitive on the European market.<sup>45</sup> Without a valid phytosanitary certificate, citrus fruit (except lemons) and potatoes from the TRNC could no longer be imported directly into the Community.

## 5 Indirect Imports via Turkey

On 15 November 1994, only three days after the UK High Court had rendered its decision in *Anastasiou I*, Cypfruvex and its British subsidiary, which had until then been shipping citrus fruit and potatoes from northern Cyprus to the United Kingdom under cover of phytosanitary certificates issued by officials of the Turkish Republic of Northern Cyprus, rather than by the competent authorities of the Republic of Cyprus, entered into an agreement with an associate company in Turkey ('Citex'), which provided that ships carrying agricultural produce from northern Cyprus, equipped with a phytosanitary certificate issued in the TRNC, would put in to the Turkish port of Mersin for less than 24 hours, where the competent Turkish officials would inspect the cargo on board the ships and issue the required phytosanitary certificates, before the ships continued their voyage to ports in the European Community. The phytosanitary certificates issued by Turkish officials stated the origin of the goods to be 'Cyprus'.<sup>46</sup> Following the acceptance of two such cargoes by the UK authorities,<sup>47</sup> Anastasiou and Others applied to the UK High Court for an order restraining the Minister of Agriculture, Fisheries and Food (MAFF) from allowing into the United Kingdom any citrus fruit or potatoes 'produced in' northern Cyprus unless accompanied by certificates issued by the competent authorities of the Republic of Cyprus. Cypfruvex and Cypfruvex (UK) Ltd intervened once more in support of the respondent. The order

<sup>44</sup> *The Guardian*, 14 July 1994, at 13; *ibid.*, 18 January 1995, at 10; *Cyprus News* No. 59 (1994) 3.

<sup>45</sup> According to European Community officials, some 3,000–4,000 people were laid off as a consequence of the ECJ decision (*Reuter European Business Report*, 7 March 1995). According to the Turkish Cypriot Union of Textile Manufactures, more than 20 companies temporarily laid off hundreds of workers in the first week after the decision (*The Guardian*, 14 July 1994, at 13).

<sup>46</sup> For the details, see the decisions in *R. v. MAFF, ex parte SP Anastasiou (Pissouri) Ltd and Others* in the Court of Appeal, 2 April 1996, *supra* note 14; and in the House of Lords, 20 May 1998, [1999] 3 CMLR 469; [1999] *European Law Reports* 168. See also OJ 1995 C 145/23.

<sup>47</sup> Such shipments were also accepted by the authorities of other member states. Lemons originating from northern Cyprus, for example, were found in Germany in early December 1994 when the price of lemons in the market was lower than the limit defined by the EC Commission, which in turn asked the Government of the Republic of Cyprus to pay the difference. See 'Illegal Imports Into EU Ferried Through Turkey', *Greek Review International* No. 228 (February 1995) 4.

sought was refused (except for potatoes),<sup>48</sup> both by the UK High Court and the Court of Appeal,<sup>49</sup> and the applicants appealed against the latter decision to the House of Lords which, by order of 20 May 1998, stayed the proceedings and referred to the European Court of Justice for a preliminary ruling under Article 177 EC (now Article 234 EC) five questions on the interpretation of the Plant Health Directive,<sup>50</sup> the essence of which was whether, and if so under what conditions, the Directive permitted a member state to allow into its territory plants originating in a non-member country, to which special requirements applied, where the required phytosanitary certificates that accompanied those plants were issued by the authorities of a non-member country from which the plants were transported to the Community and not by the authorities of the non-member country of origin of the plants. In addition, the House of Lords asked whether the reasons why phytosanitary certificates were not issued in the plants' country of origin had to be taken into account by an importing member state in determining whether the certificates accompanying the plants met the requirements laid down by the Directive.

In Case C-219/98, *Anastasiou II*,<sup>51</sup> the European Court of Justice was solely concerned with the interpretation of the Plant Health Directive with regard to citrus fruit originating from northern Cyprus. It was not concerned with EUR.1 movement certificates as the shipments from Turkey were made outside the EC–Cyprus Association Agreement and thus were not benefiting from the preferential tariffs of that agreement. *Anastasiou and Others and the Greek Government*<sup>52</sup> argued that the Plant Health Directive required that phytosanitary certificates be always issued by the competent authorities of the country of origin of the products, even though, where there were certain special requirements that could be fulfilled without difficulty elsewhere, additional certificates (attesting fulfilment of these special requirements) could be issued by the authorities of a consignor country other than the country of origin. This argument, however, was not accepted by the Court of Justice which, distinguishing between plants of Community origin and plants from non-member countries, held as follows.

While Article 12(1)(b) of the Directive required phytosanitary certificates to be issued by the 'authorities empowered for this purpose' in the exporting country, it in no way stated that the authorities in question had to be those of the country in which the produce originated. Article 9(1) of the Directive provided that, where plants were

<sup>48</sup> At the time of the order, the island of Cyprus was not recognized as being free from the disease of brown rot which meant that according to the Plant Health Directive certificates for potatoes had to be issued at the place of origin. Cf. the decision of the Court of Appeal in *R. v. MAFF, ex parte SP Anastasiou (Pissouri) Ltd and Others*, 2 April 1996, Transcript of Smith Bernal (FC3 96/5419/D) 19 per Kennedy LJ; and para. 13 of the Opinion of Advocate-General Fennelly, delivered on 24 February 2000, in *Anastasiou II*, available at [www.curia.eu.int](http://www.curia.eu.int), also reported at [2000] ECR I-5241.

<sup>49</sup> *R. v. MAFF, ex parte SP Anastasiou (Pissouri) Ltd and Others*, 2 April 1996, Transcript of Smith Bernal (FC3 96/5419/D) 1–22.

<sup>50</sup> *R. v. MAFF, ex parte SP Anastasiou (Pissouri) Ltd and Others*, House of Lords, 20 May 1998, [1999] 3 CMLR 469; [1999] *European Law Reports* 168.

<sup>51</sup> [2000] 3 CMLR 339.

<sup>52</sup> See *supra* note 34.

subject to special requirements, phytosanitary certificates had to be issued in the country in which the plants originated, save where the special requirements could be satisfied elsewhere. If the phytosanitary certificates for all plants that were subject to phytosanitary certification had to be issued in their country of origin, irrespective of whether or not they were subject to any special requirements, there would be no reason for Article 9(1) to make provision for that general obligation as a special rule applicable only to certain plants. On the other hand, the provision made sense if it was accepted that, save in the case set out in Article 9(1), phytosanitary certification could take place either in the non-member country in which the plants originated or in a non-member country other than the country of origin. The objective of the Directive, which was to protect the territory of the Community from the introduction and spread of organisms harmful to plants, could also be attained without requiring plants originating outside the Community to undergo a certification procedure in their country of origin. Furthermore, the cooperation requirement between the authorities of the exporting state and those of the importing states which was set out in *Anastasiou I*<sup>53</sup> did not necessarily imply that a member state was not allowed to admit into its territory produce that was accompanied not by phytosanitary certificates from the country of its origin but only by a certificate issued by a non-member consignor country.<sup>54</sup>

On those grounds, the Court of Justice on 4 July 2000 ruled that the Plant Health Directive permitted a member state to allow into its territory plants originating in a non-member country, to which certain special requirements applied, where the required phytosanitary certificate that accompanied those plants was issued by the authorities of a non-member country from which the plants were transported to the Community and not by the authorities empowered for that purpose in the plants' country of origin, provided that the plants (i) had been imported<sup>55</sup> into the territory of the country where the checks had taken place before being exported from there to the Community, (ii) had remained in that country for such time and under such conditions as to enable the proper checks to be completed, and (iii) were not subject to special requirements that could only be satisfied in their place of origin. The Court of Justice also ruled that it was not for the member states concerned to take account of the reasons for which a phytosanitary certificate had not been issued in the country of origin of the plants, in determining whether the certificate complied with the requirements of the Plant Health Directive.

<sup>53</sup> [1994] ECR I-3116, para. 63.

<sup>54</sup> *Cypfruvex*, the United Kingdom and the EC Commission pointed out that the necessary cooperation could be achieved with the officials of a non-member consignor country, provided that those officials are authorized and recognized, as they were in the case of Turkey (judgment, [2000] 3 CMLR 339, para. 21). Cf also paras 21 and 36 of the Opinion of the Advocate-General, *supra* note 48.

<sup>55</sup> 'Imported' does not require that the plants have passed the customs barrier but that they have 'entered the territory' of the country (cf. judgment, [2000] 3 CMLR 339, para. 36). Compliance with this condition can be checked by reference to the bills of lading (para. 37). It must therefore be considered sufficient for the boat transporting the plants to have entered the territorial waters (or ports) of the consignor country. Whether this is also sufficient to enable proper checks to be conducted is, however, a different question.

While the Court of Justice observed that the citrus fruit at issue in the main proceedings were subject to the special requirements that the fruit be free from stalks and leaves and that its packaging bear an appropriate mark of origin, it did not rule on whether these requirements could be satisfied also at places other than that of origin (as it was not expressly asked that question). The question thus remains for the House of Lords to decide.<sup>56</sup> It was not disputed in the proceedings before the Court of Justice that it was possible to check whether the leaves and stalks had been removed from the fruit by means of visual inspection in places other than that of origin. The same, however, was not true for the requirement that the packaging of the citrus fruit bore an appropriate origin mark.<sup>57</sup> In his opinion, delivered on 24 February 2000, which is not binding on the House of Lords, Advocate-General Fennelly took the view that this special requirement could not be fulfilled at a place other than that of origin in the case of citrus fruit stated to originate in northern Cyprus. He argued as follows.

It presented no difficulty for the Turkish authorities to check that a mark of origin of some sort had been affixed to the packaging of citrus fruit. However, the qualification ‘appropriate’ had to have substantive content. It presupposed that the certifying authorities had reason to believe in the veracity of the mark, as it would otherwise be useless. Furthermore, proof of origin was required. In the case of citrus fruit from northern Cyprus, such proof could not be given by the phytosanitary certificate issued by the Turkish authorities as the latter could not adequately satisfy themselves of the Cypriot origin of the fruit. The accompanying shipping documents, in particular the bill of lading, did not establish more than that the fruit was *shipped* from Cyprus; they said nothing about where the fruit originally came from. It seemed highly likely that, in reality, the Turkish authorities, since they recognized the Turkish Republic of Northern Cyprus, in fact relied on certification of origin emanating from that source. While that might indeed offer a better guarantee of the true origin of the fruit than shipping documents, such indirect reliance by member states on certification by the Turkish Cypriot authorities would be difficult to reconcile with *Anastasiou I*, where, in the case of direct exports from northern Cyprus, it was stated that ‘any difficulty or doubt concerning a certificate must be brought to the attention of the authorities of the exporting state ... and that such cooperation ... cannot be established with authorities who are not recognized either by the Community or by its member states’. Any investigation of cases of suspected fraud, or even simple error, would be irretrievably hampered by the impossibility of cooperation with the authorities in northern Cyprus.<sup>58</sup>

<sup>56</sup> There seems no need to refer the question back to the ECJ. On the conditions under which a further reference to the ECJ may be made, see Case 69/85, *Wünsche Handelsgesellschaft GmbH & Co. v. Federal Republic of Germany* [1986] ECR 947.

<sup>57</sup> While *Cypfruvex*, the United Kingdom and the Commission took the view that this special requirement could be fulfilled also at places other than that of origin, *Anastasiou and Others* and the Greek Government argued that it could only be satisfied in the country of origin. Cf. paras 17 and 25, respectively, of the Advocate-General’s Opinion, *supra* note 48.

<sup>58</sup> See paras 39–51 of the Opinion of the Advocate-General, *supra* note 48.

The Advocate-General's argument is open to various criticism:<sup>59</sup> Accepting, in principle, that proof of origin may be given by phytosanitary certificates issued by the Turkish authorities,<sup>60</sup> he attempted to dictate to the Turkish authorities how they were to verify the origin marking on the packaging of the fruit: while certificates of origin issued by the authorities of the Republic of Cyprus may be relied on, those emanating from the authorities of the Turkish Republic of Northern Cyprus are not acceptable.<sup>61</sup> The Court of Justice, however, held in *Anastasiou II* that it was physically and legally impossible for the member states to make detailed inquiries of the authorities of a non-member country which had issued a phytosanitary certificate as to how the examination which preceded the issue of the certificate was carried out.<sup>62</sup> Indeed, the principle of non-interference in the internal affairs (or, at least, international comity) precludes inquiries into the acts of officials of a foreign state carried out in that state. Reliance by Turkey on certification by TRNC authorities is also not difficult to reconcile with *Anastasiou I*. In that judgment, the Court of Justice held that, in order to achieve the objectives of the Plant Health Directive, there had to be cooperation between the authorities of the *exporting* state (not the state of origin of the plants)<sup>63</sup> and those of the *importing* state which could only be established with authorities of an entity that was recognized by the Community and its member states.<sup>64</sup> As the Court of Justice held in *Anastasiou II* with regard to the Community and its member states, the exporting state, to whose attention any difficulty or doubt concerning a certificate can be brought, is Turkey, a country internationally recognized.<sup>65</sup> The exporting state with regard to Turkey, on the other hand, is the TRNC, a country which is recognized by Turkey.<sup>66</sup> Nowhere did the Court of Justice establish, in the case of indirect imports via another non-member state, a cooperation (and thus recognition) requirement between the non-member state from which the plants originated and the importing state. On the contrary, in *Anastasiou II* the Court held that the objective of the Directive could be attained without any certification procedure in the plants' country of origin. There is no room for a concept of 'indirect

<sup>59</sup> The Court of Justice disagreed with the Advocate-General's analysis of the relation between Article 12 and Article 9(1) of the Directive. Cf. para. 42 of the Advocate-General's Opinion, *supra* note 48; and judgment, [2000] 3 CMLR 339, paras 25–28.

<sup>60</sup> Cf. in this connection also the International Convention Relating to the Simplification of Customs Formalities of 3 November 1923 (30 LNTS 371), to which both Cyprus and the United Kingdom (as well as other EC member states) are parties. Article 11(3) provides that 'in cases where goods are not imported direct from the country of origin, but are forwarded through the territory of a third contracting country, the Customs administrations shall accept the certificates of origin drawn up by the approved organizations of the third contracting country'.

<sup>61</sup> Cf. paras 41 and 49 of the Opinion of the Advocate-General, *supra* note 48.

<sup>62</sup> Judgment, [2000] 3 CMLR 339, para. 35.

<sup>63</sup> Cf. also judgment, [2000] 3 CMLR 339, para. 32, where the Court of Justice held that the objective of the Directive could be attained without ... a certification procedure in the plants' country of origin.

<sup>64</sup> [1994] ECR I-3116, para. 63.

<sup>65</sup> Cf. judgment, [2000] 3 CMLR 339, paras 36, 37 and 38.

<sup>66</sup> Cf. the order of the House of Lords in *R. v. MAFF, ex parte SP Anastasiou (Pissouri) Ltd and Others*, House of Lords, 20 May 1998, [1999] 3 CMLR 469; [1999] *European Law Reports* 168.

reliance' by member states on certification by the Turkish Cypriot authorities, as proof of origin is adequately given by the phytosanitary certificates issued by the Turkish authorities upon verification that the packaging of the fruit contains an appropriate origin mark. The special requirement that the packaging bear an appropriate mark of origin can be fulfilled in Turkey which may thus issue the phytosanitary certificates required for the importation of citrus fruit from northern Cyprus into the Community. This also seems to have been the starting point of the House of Lords when it made the reference to the Court of Justice.<sup>67</sup> The Court of Appeal had even expressly accepted that 'where, as here, the special requirements identified in relation to the relevant produce (originating outside the Community) fall within the exception provided for by Article 9 no official phytosanitary certificate has to be issued in the country of origin'.<sup>68</sup>

However, even if the House of Lords will rule (as expected) that the United Kingdom may in relation to the import of citrus fruit from northern Cyprus accept phytosanitary certificates issued by Turkey, the decisions of the Court of Justice so far have resulted in great damage to the TRNC economy. While non-agricultural goods such as textiles may still be imported into the member states without accepted EUR.1 movement certificates, they do not benefit from the preferential tariffs pursuant to the EC–Cyprus Association Agreement and are thus, in effect, 'taxed out' of the EC market. Citrus fruit too may still be imported into the Community outside the preference arrangement of the EC–Cyprus Association Agreement, but only indirectly via Turkey which means logistical problems and additional costs.<sup>69</sup> Other plants such as potatoes may not even be imported indirectly into the Community.

## 6 Acceptance of Certificates Issued by Unrecognized Authorities

The reasoning of the Court of Justice with regard to the non-acceptance of movement and phytosanitary certificates issued by TRNC authorities<sup>70</sup> may be summarized as follows. The EC's certificate system is founded on the principle of mutual reliance and cooperation between the competent authorities of the exporting state and those of the importing state. Such cooperation is excluded with the authorities of an entity

<sup>67</sup> The second question referred to the Court of Justice reads as follows: 'Does the answer to Question 1 [whether member states may accept phytosanitary certificates issued by a country other than the country of origin] differ . . . if the relevant plants are subject to special requirements . . . which can be fulfilled in non-Member countries other than that of origin within the meaning of Article 9(1) of the Directive?' (emphasis added).

<sup>68</sup> *R. v. MAFF, ex parte SP Anastasiou (Pissouri) Ltd and Others*, 2 April 1996, Transcript of Smith Bernal (FC3 96/5419/D) 13.

<sup>69</sup> The TRNC Government has attempted to compensate exporters for this limitation on their competitiveness by subsidizing indirect agricultural exports to Europe (cf. *Frankfurter Allgemeine Zeitung*, 20 March 1998, at 20).

<sup>70</sup> Similar questions may arise with respect to veterinary certificates. See Commission Decision of 30 October 1996 concerning animal health conditions and veterinary certificates for the importation of the porcine species from the Republic of Cyprus, OJ 1996 L 294/18.

which is not recognized either by the Community or its member states. Certificates issued by authorities of unrecognized entities such as the TRNC therefore cannot be accepted. At first sight, this reasoning seems convincing.<sup>71</sup> Closer examination, however, reveals that it is based on a false premise: international non-recognition does not necessarily preclude cooperation between the authorities of the non-recognizing state and those of the unrecognized state. As the practice of several member states from 1974 to 1994 shows, their authorities had no difficulties cooperating informally with the Turkish Cypriot authorities despite non-recognition of the TRNC.<sup>72</sup> The finding of the ECJ that ‘it would be impossible for an importing state to address inquiries to the departments or officials of an entity which is not recognized’<sup>73</sup> seems rather out of touch with reality, considering, just for one, the practice of German customs authorities which, in the case of doubt as to the authenticity of a certificate or the accuracy of the information regarding the true origin of the goods in question, sent a ‘formal verification request’ in accordance with Article 24 of the Origin Protocol to the ‘Ministry of Economy and Finance, Directorate of the Department of Customs & Excise, Nicosia, Turkish Cypriot Community, via Mersin 10, Turkey’. In view of this *de facto* cooperation with TRNC authorities, the UK High Court interpreted the finding of the Court of Justice that ‘cooperation is excluded with the authorities of an entity such as that established in the northern part of Cyprus’<sup>74</sup> as meaning that ‘cooperation is to be excluded *as a matter of law*’.<sup>75</sup> As there is no rule of (international or EC) law which prohibits states from cooperating with unrecognized authorities in general, cooperation is excluded only in so far as it implies recognition. Cooperation with Turkish Cypriot authorities within the framework of the system of certificates provided for under Community law could therefore only be excluded if it implied recognition of the Turkish Republic of Northern Cyprus as a sovereign state. In the following section the question of whether such cooperation would really imply *de jure* recognition of the TRNC will be considered.

### ***A Import Certificates under the International Opium Conventions***

The question of whether certificates required under an international agreement may also be issued by an unrecognized authority did not arise for the first time in the

<sup>71</sup> Cf. Vedder and Folz, ‘Anastasiou: Re Cypriot Import Certificates’ (1996) 7 *EJIL* 120–123, at 122 (‘a different outcome of the case could hardly have been imaginable’); the case note on *Anastasiou I* by Cremona, (1996) 33 *CMLR* 125–135, at 135 (‘The practical implication of the policy of non-recognition, namely . . . the consequent impossibility of establishing the necessary cooperation with the northern zone authorities, were crucial to the decision’).

<sup>72</sup> For the practice from 1974 to 1994, see *supra* note 2. Cf. also the submission of the United Kingdom in *Anastasiou I* [1994] ECR I–3087, at I–3105, and the finding of Popplewell J that the UK authorities ‘had had no problems in relation to the issue of the certificates from TRNC’ (*R. v. MAFF, ex parte SP Anastasiou (Pissouri) Ltd and Others*, 11 November 1994, Transcript of John Larking (CO/1132/92)).

<sup>73</sup> [1994] ECR I–3116, para. 63.

<sup>74</sup> *Ibid.*, para. 40.

<sup>75</sup> ‘What the Court were there saying was that the administrative cooperation is to be excluded *as a matter of law* with a body which is an illegal body.’ *R. v. MAFF, ex parte SP Anastasiou (Pissouri) Ltd and Others*, 11 November 1994, Transcript of John Larking (CO/1132/92) (emphasis added).

case of the EUR.1 movement certificates under the EC–Cyprus Association Agreement. Surprisingly, however, neither the Court of Justice nor those concerned in *Anastasiou* dealt with these precedents. One could have thought, for instance, of the International Opium Conventions,<sup>76</sup> which provide that export authorization for opium or other dangerous drugs may only be issued on receipt of an import certificate, issued by the ‘government’ or the ‘competent authorities’ of the importing country. State practice shows that non-recognition of a new state established in parts of the territory of a party to these Conventions did not necessarily preclude acceptance of import certificates issued by the authorities of the unrecognized state.

### 1 *Manchukuo*

On 18 February 1932, the three north-eastern provinces of China, which had been occupied by Japan since September 1931, declared their independence under the name of Manchukuo, a country not recognized by the international community.<sup>77</sup> In 1933 and 1934, the Special Advisory Committee appointed by the Assembly of the League of Nations to advise its member states on all questions consequent on the non-recognition of Manchukuo (‘Special Advisory Committee’) and the Advisory Committee on Traffic in Opium and other Dangerous Drugs (‘Opium Committee’) looked into the question of exports of opium and other dangerous drugs to Manchukuo. Control and supervision of the international trade in narcotic drugs was regulated by Chapter V of the International Opium Convention of 19 February 1925<sup>78</sup> which provided that each contracting party should require a separate export authorization to be obtained for each exportation of these drugs. An export authorization was only to be given on production by the exporter of an ‘import certificate issued by the Government of the importing country’ certifying that the importation was approved.<sup>79</sup> The export authorization had to state, *inter alia*, the authority by whom the import certificate had been issued. A copy of the export authorization was to accompany the consignment and a second copy was to be sent to the ‘Government of the importing country’ by the government issuing the export authorization. The government of the importing country, when the importation had been effected, was to return the export authorization, with an endorsement to that effect, to the government of the exporting state. The endorsement was to specify the

<sup>76</sup> International Convention Relating to Dangerous Drugs, with protocol, of 19 February 1925 (81 LNTS 317); Convention for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs of 13 July 1931 (139 LNTS 301); Single Convention on Narcotic Drugs of 30 March 1961 (520 UNTS 151).

<sup>77</sup> By 1935, Manchukuo had only been recognized by Japan and El Salvador. On Manchukuo in general, see H. Behr, *Die völkerrechtliche Anerkennung von Mandschukuo* (1936); Chailley, ‘La création et la reconnaissance du “Mandchoukouo”’ (1934) 13 *RDI* 151–174; Cavaré, ‘La reconnaissance de l’Etat et le Mandchoukouo’ (1935) 42 *RGDIP* 5–99; and W.W. Willoughby, *The Sino-Japanese Controversy and the League of Nations* (1935).

<sup>78</sup> 81 LNTS 317.

<sup>79</sup> Article 13 of the International Opium Convention. The ‘Model Form of Import Certificate’ annexed to the Convention reads as follows: ‘I hereby certify that the Ministry of . . . being the Ministry charged with the administration of the law relating to the dangerous drugs to which the International Opium Convention . . . applies, has approved the importation . . .’

amount actually imported. This control of international trade was aimed at suppressing the contraband trade in and abuse of dangerous drugs. The parties to the Convention realized that such control required 'the close cooperation of all the Contracting Parties'.<sup>80</sup> The question arose, by whom, in the case of exports of narcotic drugs to Manchukuo, the required import certificate should be issued. The League of Nations still regarded Manchukuo as being part of China, a party to the International Opium Convention.<sup>81</sup> On 14 June 1933, the Special Advisory Committee recommended to the members of the League, and to interested non-member states, that applications for the export to Manchukuo territory of opium or other dangerous drugs should not be granted unless the applicant produced an import certificate in accordance with the Opium Convention. It thereby assumed that import certificates would be issued by the Manchukuo Government.<sup>82</sup> The Committee only added that 'Governments should refrain from forwarding a second copy of the export authorization to "Manchukuo", since such action might be interpreted as *de facto* recognition of "Manchukuo"'.<sup>83</sup> Several states expressly concurred with this recommendation.<sup>84</sup> A draft resolution<sup>85</sup> which called for the prohibition of all exports of narcotic drugs to Manchukuo was rejected by the Opium Committee on 3 November 1933, which decided only to subject all exports to Manchukuo to strict scrutiny.<sup>86</sup> On 1 May 1934, the Chinese Government protested against the recommendation of the Special Advisory Committee, claiming that it prejudiced the principle of non-recognition of the regime in Manchuria. It proposed a general recommendation not to grant any application for exportation, re-exportation or transshipment of narcotic drugs to the territory of Manchukuo. If direct importation of such narcotics from other countries were really necessary, import certificates should be issued by foreign consular representatives in Manchuria. This practice would have the advantage of being free from any implication prejudicial to the principle of non-recognition of the present

<sup>80</sup> Para. 4 of the preamble of the International Opium Convention.

<sup>81</sup> League of Nations, (1936) *Official Journal* 1145, at 1212–1213. See also Tabouillot, 'Zur Frage der Anerkennung von Mandschukuo' (1935) 5 *ZaöRV* 138–148, at 142, n. 12.

<sup>82</sup> See the statements to this effect by the representatives of the United Kingdom and India in the 18th Session of the Opium Committee: League of Nations, (1935) *Official Journal* 18. See also Willoughby, *supra* note 77, at 528–529.

<sup>83</sup> League of Nations, (1933) *Official Journal*, Special Supplement No. 113, 10–13, at 13; also reproduced in G.H. Hackworth, *Digest of International Law*, vol. I (1940) 336–337.

<sup>84</sup> See the statements of 10 states (including the United Kingdom and the US) in League of Nations, (1934) *Official Journal* 17–18. The US only objected to exports of new and prepared opium under the Hague Opium Convention of 1912 but not to the sending of manufactured narcotic drugs under the International Opium Convention of 1925 (Willoughby, *supra* note 77, at 528–529).

<sup>85</sup> League of Nations Doc. C.661.M.316.1933.XI, at 19–20.

<sup>86</sup> *Ibid*, at 26–27.

regime in Manchuria.<sup>87</sup> On 31 May 1934, the Opium Committee rejected the system of consular certificates and referred the question by whom (if not by consular representatives) the import certificates should be issued to the Special Advisory Committee<sup>88</sup> which, however, issued no further recommendation.<sup>89</sup> Non-recognition thus did not preclude the issue of import certificates by the Manchukuo authorities as a local *de facto* ‘Government of the importing country’, China. Even the recommendation not to forward a second copy of the export authorization to the authorities in Manchukuo seems to have been politically motivated rather than required by non-recognition. In 1938, the Office of the Legal Adviser of the Department of State explained the US policy towards the authorities in Manchukuo as having ‘been based upon our *political policy* of refraining from any relations of any kind with the regime in Manchuria, rather than upon considerations relating to the legal effect of the establishment of such relations upon the matter of recognition. It was decided to refrain from any action which might be construed even as a *de facto* recognition of the existence of the new regime.’<sup>90</sup> The recommendation itself only said that such action ‘might be interpreted’ and not that it ‘implied’ *de facto* recognition of Manchukuo.<sup>91</sup> Non-recognition thus did not even preclude non-recognizing states from sending the second copy of the export authorization to the authorities in Manchukuo. However, other than in the case of recognized states, it could not be sent through diplomatic channels but had to be sent by post.

## 2 German Democratic Republic

The German Reich had been a party to the Convention for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs of 13 July 1931 (‘Limitation Convention’)<sup>92</sup> which provided in its Article 13(1) for the application of the above-mentioned rules on the control of international trade in Chapter V of the International Opium Convention. In 1958, the UN Secretary-General informed the parties to the Limitation Convention that the German Democratic Republic (GDR) had declared that Convention applicable to its territory.<sup>93</sup> In its reply, dated 3 March 1958, the United States Government stated that, in as much as the USA did not recognize the so-called ‘German Democratic Republic’ as a state, it regarded the above-mentioned declaration as being without legal effect and attached no significance to it. But it considered that the Limitation Convention, having become applicable to the entirety

<sup>87</sup> League of Nations, (1934) *Official Journal* 431–432.

<sup>88</sup> League of Nations, (1935) *Official Journal* 12. See also the discussion of this question during the 18th Session of the Opium Committee, *ibid.* at 13–19.

<sup>89</sup> Cf. Willoughby, *supra* note 77, at 528–529.

<sup>90</sup> M.M. Whiteman, *Digest of International Law*, vol. II (1963) 595–596 (emphasis added).

<sup>91</sup> The French text read: ‘pourrait être interprété’ (Société des Nations, (1933) *Journal Officiel*, Supplément Spécial, No. 113, at 13).

<sup>92</sup> 139 LNTS 301.

<sup>93</sup> On the practice of the German Democratic Republic to declare treaties concluded by the former German Reich as applicable to its territory, see B. Bot, *Nonrecognition and Treaty Relations* (1968) 198–208; and E. Zivier, *Die Nichtanerkennung im modernen Völkerrecht* (2nd ed., 1969) 171–173.

of German territory as a result of the action by which the former German Reich became a party to that Convention, 'continues to be applicable to the area mentioned above'.<sup>94</sup> Application of the Limitation Convention, however, meant that narcotic drugs could only be exported to the territory of the GDR on presentation of a valid import certificate. As the United States did not recognize the Government of the Federal Republic of Germany as the *de jure* government of the whole of Germany (including the territory of the GDR),<sup>95</sup> it seemed to assume that import certificates were issued by the authorities of the unrecognized GDR (as the local *de facto* 'Government of the importing country', Germany).

### **B Certificates of Origin Issued by the Republic of China (Taiwan)**

The Republic of China (Taiwan) is not recognized either by the Community or by its member states.<sup>96</sup> However, in the case of Taiwan, non-recognition does not seem to have 'excluded' mutual reliance and cooperation with respect to import certificates. Thus, on 15 May 1995, i.e. some 10 months after the decision of the Court of Justice in *Anastasiou I*, the EC Commission adopted Regulation (EC) No. 1084/95 abolishing the protective measure applicable to imports of garlic originating in Taiwan and replacing it with a certificate of origin<sup>97</sup> which provided in Article 2(1)(a) that garlic originating in Taiwan must be accompanied upon importation into the Community by a 'certificate of origin issued by the competent national authorities of the country of origin, in accordance with Articles 55 to 65 of Regulation (EEC) No. 2454/93'. Competent national authority means 'competent governmental authority' of the country of origin.<sup>98</sup> In the case of Taiwan, the competent governmental authority for issuing certificates is the 'Bureau of Commodity Inspection & Quarantine Ministry of Economic Affairs for Exports & Import Certificate issuing on behalf of Ministry of Economic Affairs Republic of China'.<sup>99</sup> Articles 63–65 of Regulation (EEC) No. 2454/93, which are largely identical to Article 24 of the above-mentioned Origin

<sup>94</sup> Whiteman, *supra* note 90, at 660.

<sup>95</sup> See the executive certificate of the US Department of State in *Carl Zeiss Stiftung v. VEB Carl Zeiss, Jena*, 293 F Supp 892, at 900 (SDNY 1968).

<sup>96</sup> The Republic of China is recognized neither as an independent state nor as the government of China. Both the EC and its member states consider Taiwan to be a province of the state of China. On the relations between the EC and its member states with Taiwan, see OJ 1984 C 144/27; OJ 1986 C 190/41. See also C.-C. Shen, *Struktur, Gestaltung und Funktion der offiziellen und inoffiziellen Beziehungen der Europäischen Gemeinschaft (EG) zu den Staaten außerhalb der Gemeinschaft: Ein Vergleich der wirtschaftlichen und politischen Beziehungen der EG zu den asiatischen Schwellenländern Südkorea und Taiwan* (1992) 85–106 and 369–391; Mengin, 'Rethinking the Europe–Taiwan Relationship' (1991) 4 *Pacific Review* 25–35; and Chiu, 'From Economic Relations to Political Ties: The ROC and Western Europe in the 1990s' (1991) 27 *Issues and Studies* 19–55. See also H.-H. Lin, *Der völkerrechtliche Status der Republik China (Taiwan) nach dem Ausschluß der nationalchinesischen Regierung aus den Vereinten Nationen dargestellt im Lichte der internationalen Praxis* (1986) 156–159.

<sup>97</sup> OJ 1995 L 109/1.

<sup>98</sup> Cf. Article 56(2) of Commission Regulation (EEC) No. 2454/93 of 2 July 1993, laying down provisions for the implementation of Council Regulation (EEC) No. 2913/92 of 12 October 1992 establishing the Community Customs Code, OJ 1993 L 253/1.

<sup>99</sup> See the Annex to Commission Regulation (EC) No. 1084/95, OJ 1995 L 109/1, at 3.

Protocol, regulate the ‘administrative cooperation’ between the authorities of the importing state and the state of origin. Under these provisions, the exporting state shall send the EC Commission the names and addresses of its issuing authorities for certificates of origin and of its authorities to which requests for subsequent verification of origin certificates should be sent as well as specimens of stamps used by the said authorities.<sup>100</sup> The Commission shall transmit this information to the competent authorities of the member states. Subsequent verification of the certificates of origin shall be carried out at random and whenever reasonable doubt has arisen as to the authenticity of a certificate or the accuracy of the information it contains. For this purpose, the competent authorities of the member states shall return the certificate of origin or a copy thereof to the government authority designated by the exporting state, giving, where appropriate, the reasons of form or substance for an inquiry. The results of subsequent verifications shall be communicated to the competent authorities in the Community as soon as possible. If one applied the reasoning of the Court of Justice in *Anastasiou I*, whereby ‘it would be impossible for an importing state to address inquiries to the departments or officials of an entity which is not recognized, for instance, concerning . . . certificates that are incorrect or have been interfered with’,<sup>101</sup> to Taiwan, the member states would not be allowed to accept certificates of origin issued by the unrecognized authorities of the Republic of China. The fact that a system of certificates was introduced for the (unrecognized) Republic of China after the ruling in *Anastasiou I* shows that both the Commission and the member states do not share the view of the Court on the legal effects of non-recognition. In this connection, it should also be noted that the Court of Justice based its ruling only on non-recognition as such and not on any specific reasons for the non-recognition (such as the international illegality of the unrecognized entity or calls by the United Nations Security Council not to recognize the entity in question).<sup>102</sup>

## 7 Conclusion

State practice shows that mutual reliance and (informal) cooperation with the authorities of an unrecognized entity are not generally excluded. Indeed, the Turkish Republic of Northern Cyprus is a very good example for such cooperation (especially in areas such as trade, crime prevention and law enforcement which also benefit the non-recognizing state).<sup>103</sup> The question of what kind of cooperation is excluded by non-recognition cannot be answered in general. It depends on what type of recognition is to be avoided: recognition as an (independent, sovereign) state, as the government of a recognized state, as a belligerent, *de facto* recognition, *de jure*

<sup>100</sup> Article 63(1) of Regulation (EEC) No. 2454/93.

<sup>101</sup> Case C-432/92, *Anastasiou I* [1994] ECR I-3116, para. 63.

<sup>102</sup> Cf. the Opinion of Advocate-General Gulmann, delivered on 24 April 1994, in *Anastasiou I* [1994] ECR I-3091, para. 70.

<sup>103</sup> Cf. the statement of TRNC President Rauf Denktaş, made on 5 May 1993: ‘In the past the British authorities have contacted and even collaborated with ours when it suited their interests’ (*Reuters Library Report*, 5 May 1993).

recognition or some other variant.<sup>104</sup> As shown by the relevant UN Security Council Resolutions<sup>105</sup> and the statements adopted by the EC member states,<sup>106</sup> what is in question in the case of the Turkish Republic of Northern Cyprus is the non-recognition of that entity as an independent sovereign *state*. Non-recognition as a state precludes intergovernmental cooperation, i.e. cooperation at ministerial level, as well as all cooperation that requires the existence of diplomatic relations. It does not, however, preclude administrative cooperation between government officials.<sup>107</sup> Non-recognized states have concluded several (trade) agreements which expressly provided for cooperation between the competent authorities.<sup>108</sup> For example, on 30 April 1936, Germany and Manchukuo (which, at that time, was not yet recognized by Germany)<sup>109</sup> agreed on an ‘Arrangement for German–Manchurian Trade’ which provided for cooperation between the ‘German authorities’ and the ‘customs authorities of Manchukuo’.<sup>110</sup> Cooperation with the Turkish Cypriot customs and plant health authorities, as practised by several member states, did not imply recognition of the Turkish Republic of Northern Cyprus as an independent state either by the Community or its member states. This was even more the case as the Turkish Cypriot authorities pretended to act in the name of the ‘Republic of Cyprus’ or ‘Cyprus’ and not in the name of the Turkish Republic of Northern Cyprus.<sup>111</sup> Non-acceptance of certificates issued by the Turkish Cypriot authorities could thus not be justified by non-recognition of the TRNC. It may be argued that while international law does not *preclude* administrative cooperation with officials of an unrecognized state, it also does not *impose* such cooperation (in the same way as it does not impose administrative cooperation with the authorities of recognized states in the absence of treaty obligations). In principle, the EC and its member states are free to decide whether or not to cooperate with the authorities of an unrecognized state. The European Union might well decide — in the framework of the Common Foreign and Security Policy (CFSP) — that its member states must not cooperate at the administrative level with the Turkish Cypriot authorities. This, however, would be a political decision and (as shown) not one necessitated by the fact of non-recognition. The ECJ did not base its ruling on such a decision of the competent political bodies of the Community but

<sup>104</sup> On the various types of recognition and their meaning, see S. Talmon, *Recognition of Governments in International Law* (1998) 21–111.

<sup>105</sup> In Resolution 541 (1983) the Security Council called upon ‘all States not to recognize any Cypriot *State* other than the Republic of Cyprus’, and in Resolution 550 (1984) it called upon ‘all States not to recognize the purported *State* of the “Turkish Republic of Cyprus”’ (emphasis added).

<sup>106</sup> E.g., the common statement of 16 November 1983 reads in the relevant part as follows: ‘The ten member states of the European Community are deeply concerned by the declaration purporting to establish a “Turkish Republic of Northern Cyprus” as an independent *State* . . . They call upon all interested parties not to recognize this act’ (*EC Bulletin* 11–1983, point 2.4.1 (emphasis added)).

<sup>107</sup> B. Loudwin, *Die konkludente Anerkennung im Völkerrecht* (1983) 78; W.H. Balekjian, *Die Effektivität und die Stellung nichtanerkannter Staaten im Völkerrecht* (1970) 130–139; Zivier, *supra* note 93, at 207; Lin, *supra* note 96, at 265.

<sup>108</sup> See J.A. Frowein, *Das de facto-Regime im Völkerrecht* (1968) 96–115; Bot, *supra* note 93, at 67–103.

<sup>109</sup> Germany recognized Manchukuo only on 12 May 1938.

<sup>110</sup> Article 5. For the text of the Agreement, see 36 *Nouveau Recueil Général de Traités* (3rd series) 350.

<sup>111</sup> See [1994] ECR I-3316, para. 13.

on the reasoning that administrative cooperation is excluded with the authorities of an entity which is not recognized either by the Community or by its member states. It must therefore be concluded that the Court of Justice misjudged the scope and consequences of the principle of non-recognition in international law. It went far beyond that principle and, in fact, applied economic sanctions, a measure that should be reserved for the political bodies responsible for the conduct of the Community's foreign relations.