

The Turkish Republic of Northern Cyprus and International Trade Law

P A T R I C K T A N I *

I. INTRODUCTION

THERE ARE MANY UNRECOGNIZED STATES WORLDWIDE, THOUGH the exact number depends on how one chooses to define 'state'. The Turkish Republic of Northern Cyprus (TRNC) is one of those states not recognized by the international community. Many legal scholars have delved into the issues regarding the international status of unrecognized states generally and the disputed issues relating to Cyprus, but there is a relative scarcity of articles specifically dedicated to how the legal status of the TRNC affects international trade.

The island of Cyprus, located in the Mediterranean Sea, is currently divided. With the unilateral declaration of independence by the TRNC, a myriad of de facto (practically speaking, but not necessarily by law) international borders split the island of Cyprus. The Republic of Cyprus controls sixty percent of the 3,572 square miles of the island's land area, the TRNC controls 35 percent, the United Kingdom's sovereign bases control three percent and the rest is in the United Nations' buffer zone. De jure, or legally, there is only one border, which is between the Republic of Cyprus and the UK's sovereign bases. Although there have been many international efforts to unify Cyprus, the island remains divided and its future is unclear.

As a result of the partition of Cyprus, the international trade situation between the TRNC and other countries is quite complicated, especially when it comes to exporting goods produced in the TRNC. One scholar has observed that the international community may pursue one of two

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approaches regarding trade with unrecognized states: 1) the practical trade approach, which recognizes the government of de facto control only in trade, or 2) the political trade approach, which does not recognize the legitimacy of an unrecognized government even for the purpose of trade. Legal cases regarding trade with the TRNC have shown that the members of the international community have approached the TRNC in the second manner. However, this paper argues that the international community ought to follow the practical trade approach with the TRNC because the alternative conflicts with efforts to unify Cyprus. To that end, this paper will look briefly at the Cyprus dispute and the law on state recognition. This paper will then examine the following: 1) The rules of origin and the two approaches (the practical trade approach and the political trade approach) in connection with cases of the European Court of Justice (ECJ) dealing with the TRNC's trade issues, and 2) the contrast with the current international approach to the Republic of China (Taiwan). By evaluating the problems that arise with the political approach to the recognition of the TRNC, this paper concludes that current practice forces the TRNC towards Turkey and away from reunification with Cyprus.

II. A BRIEF INTRODUCTION TO THE CYPRUS DISPUTE

First, it is necessary to look briefly at the historical background of the division of Cyprus. The UK granted independence to the island of Cyprus in 1960, except for two Sovereign Base Areas on the island, Akrotiri and Dhekelia, retained by the UK.

Ethnic tensions in Cyprus between Greek and Turkish residents post-independence were severe. In response to a coup backed by the Greek military junta, Turkey invaded Cyprus in July 1974 and occupied 35 percent of the island. In 1983, Northern Cyprus declared its independence as the Turkish Republic of Northern Cyprus and introduced its own government and legal system.¹ The international community rejected the move to independence, and to date, only Turkey recognises it as a state. Considered the de jure government of the entire island (save for the military bases under UK sovereignty) the Republic of Cyprus joined the European Union in 2004.

¹ Michael Fishpool, "Cyprus" (2003/2004) 27 *Middle East Review: The Economic and Business Report*, 25 at 25.

III. A BRIEF INTRODUCTION ON STATE RECOGNITION

Currently, there are two theories regarding the recognition of a state: the constitutive and the declarative. The constitutive theory posits, “an entity does not exist as a state until it has been recognized by other states” and “the recognition itself constitutes the state.”² However, this theory is “not widely accepted today, as is borne out by actual practice.”³ Some problems of the theory have been asserted as follows:

The constitutive theory has some serious drawbacks, especially when an entity has been recognized only by part of the community of states. At a very concrete level, questions arise as to how many recognizing states are needed before an entity ‘transforms’ into a state and whether the decision to recognize should be based on facts, norms, geopolitical considerations, or a combination of factors. At a more fundamental level, the theory leads to the somewhat counterintuitive conclusion that statehood is a relative, rather than an absolute, concept.⁴

Under the declaratory theory, the facts of statehood rather than formal recognition define an entity as a state. The necessary factors are well defined in Article 1 of the *Montevideo Convention on Rights and Duties of States*:⁵ “The state as a person of international law should possess the following qualifications: a) a permanent population; b) a defined territory; c) government; and d) capacity to enter into relations with the other states.”⁶ If an entity is recognized as a state without meeting the criteria of *Montevideo Convention*, “the premature recognition is seen as a violation of the principle of non-intervention and therefore an illegitimate act.”⁷ While the declaratory theory dominates in current doctrine and jurisprudence, the theory also contains flaws.

First of all, it is often pointed out that non-recognized entities have no international legal personality and thus cannot be considered to be a state, even if they meet all the requirements outlined above. Another problem is that the theory does not look at the way the entity has acquired the

² Linda A. Malone, *International Law* (New York: Aspen Publishers, 2008) at 44.

³ *Ibid.*

⁴ Cedric Ryngaert & Sven Sobrie, “Recognition of States: International Law or Realpolitik?: The Practice of Recognition in the Wake of Kosovo, South Ossetia, and Abkhazia” (2011) 24 *Leiden J. Int’l L.* 467 at 469 [Ryngaert & Sobrie].

⁵ *Montevideo Convention on Rights and Duties of States*, 26 December 1933, 165 LNTS 19.

⁶ *Ibid* art 1.

⁷ Ryngaert & Sobrie, *supra* note 4 at 472.

necessary requirements, as result of which states can come into being through grave violations of international law. State practice responds to such events by not granting recognition to these entities—a sanction that cannot be fitted into the pure declaratory theory.⁸

Indeed, from the perspective of the declaratory theory, the TRNC meets all the criteria listed in the *Montevideo Convention*: they have a permanent population, a defined territory, an effective government that actually controls and provide services within their territory, and they are capable of entering into relations with the other states as soon as the other states recognize them. To make this clearer, we need to examine the definition of ‘capacity’.

Arguably, the essence of the capacity to enter into relations with other states in the context *Montevideo Convention* is derived from “independence.”⁹ Anzilotti J in the *Austro-German Customs Union case*¹⁰ held that “*independence*” means, “the State has over it no other authority than that of international law.” At the same time, Anzilotti J added that a state does not have to be free from outside interference in order to be independent:

The legal conception of independence has nothing to do with a State’s subordination to international law or with the numerous and constantly increasing states of *de facto* dependence which characterise the relation of one country to other countries. It also follows that the restrictions upon a State’s liberty, whether arising out of ordinary international law or contractual engagements, do not as such in the least affect its independence.¹¹

Viewed from this definition, the TRNC is an independent state because it is, by itself, working in a framework of a semi-presidential representative democratic republic, with a head of state; head of government; executive, legislative and judicial power; and its own constitution, without another foreign authority controlling them. Simply speaking, the TRNC meets these criteria, as it has no other authority over it except that of international law. Some may argue that the influence of the Turkish government is still strong in the TRNC. Even if this is

⁸ *Ibid* at 470.

⁹ David Raic, *Statehood and the Law of Self-determination* (The Hague: Kluwer Law International, 2002) at 74.

¹⁰ *Customs Regime Between Germany and Austria* (Protocol of March 19th, 1931), Advisory Opinion, PCIJ, Ser. A/B, No 41, at 45, Anzilotti J, separate opinion.

¹¹ *Ibid* at 57-58.

assumed true, the words of Anzilotti J above render the TRNC to be independent enough, and thus capable of entering into relations with other states.

Despite this reasoning, no member of the United Nations except Turkey recognizes the TRNC. This very limited acknowledgment demonstrates a middle position between the constitutive and declaratory theories and practice.¹² When the TRNC unilaterally claimed its independence, UN Resolution 541 clearly urged “all States not to recognize any Cypriot State other than the Republic of Cyprus.”¹³ According to the resolution, recognition of the TRNC would be incompatible with the 1960 UN Treaty No. 5476 concerning the establishment of the Republic of Cyprus and the 1960 UN Treaty of Guarantee (No. 5475), and would “contribute to a worsening of the situation in Cyprus.”¹⁴

The Turkish invasion was a response to a Greek-backed coup in Cyprus on July 20th 1974.¹⁵ Fighting ceased during negotiations in Geneva, but resumed on August 14th after they proved unsuccessful.¹⁶ On August 16th, Turkey launched the second wave of the invasion of Cyprus. A permanent ceasefire, signed on August 17th, saw Turkey control 36 percent of Cyprus.¹⁷ From a legal perspective, the Turkish invasion can be challenged under Article IV of the UN Treaty of Guarantee.¹⁸ This article states that each of the three guaranteeing powers of Cyprus (Greece, Turkey and the UK) “reserves the right to take action with the sole aim of re-establishing the state of affairs created by the present Treaty.”¹⁹ The result of the Turkish action on Cyprus, however, was not “re-establishing the state of affairs” called for by the Treaty, but rather the opposite: the *de facto* partitioning of the Republic of Cyprus.

¹² Malcolm N. Shaw, *International Law* (New York: Cambridge University Press, 2003) at 369 [Shaw].

¹³ *The Situation in Cyprus*, S Res 541, UNSCOR, 2500th Mtg, (1983) 14 at 16.

¹⁴ *Ibid*

¹⁵ James Ker-Lindsay, *The Cyprus Problem: What Everyone Needs to Know* (New York: Oxford University Press, 2011) at 43.

¹⁶ *Ibid* at 44.

¹⁷ *Ibid*.

¹⁸ *Treaty of Guarantee*, UK of Great Britain and Northern Ireland, Greece and Turkey and Cyprus, 16 August 1960, 382 UNT S 5475 (entered into force 16 August 1960, the date of signature).

¹⁹ *Ibid* art 4.

UN Resolution 541 resulted in all UN members, except Turkey, refusing to recognize the TRNC as a sovereign state. From an international perspective, the TRNC is *de jure* part of the territory of the Republic of Cyprus, despite the fact that the Republic of Cyprus currently holds no control over the region. As a result, the government of the TRNC holds no title in international organizations (including WTO and the United Nations), and its citizens are barred from being involved in such international activity. Such barriers bring many difficult issues, especially in terms of international trade, which unfairly expands the economic gap between the south and north in Cyprus (further explanation of the use of *unfairly* follows in subsection 7). For now, this paper will examine the rules of origin, because “unrecognized by the international community” means that the products from the TRNC may have a difficult time proving the origin of goods.

IV. BASIC TECHNIQUES FOR DETERMINING THE COUNTRY OF ORIGIN

The Rules of Origin, as the name suggests, define where a product originates. There are two classes: non-preferential and preferential. Non-preferential rules of origin are used “to distinguish foreign from domestic products in establishing anti-dumping and countervailing duties, safeguard measures, origin marking requirements, and/or discriminatory quantitative restrictions or quotas.”²⁰ The preferential rules of origin define “the conditions under which the importing country will regard a product as originating in an exporting country that receives preferential treatment under a free trade agreement” used mainly “to prevent imports from third countries from taking advantage of the concessions made by member countries of the free trade agreement.”²¹ In other words, the prime function of the rules of origin is to differentiate mechanisms “to determine whether a particular discriminatory arrangement will be applied to a given product in international trade.”²² The problem is, with an

²⁰ Robert Kunimoto, *NAFTA Rules of Origin: Discussion Paper* (Ottawa: Policy Research Initiative, 2005) at 3.

²¹ *Ibid.*

²² Mosche Hirsch, “Rules of Origin as Trade or Foreign Policy Instruments?: The European Union Policy on Products Manufactured in the Settlements in the West Bank and the Gaza Strip” (2002) 26:3 *Fordham Int'l LJ* 572 at 574, online: Fordham University School of Law <<http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1879&context=ilj>> [Hirsch].

increasing number of global corporations and factories, “most final products in contemporary international commerce involve factors of production from more than one country.”²³

The Rules of Origin Agreement, which all the members of the World Trade Organizations are party to, is an attempt to respond to this growing problem. Article 1(1) of the agreement defines the rules as “those laws, regulations and administrative determinations of general application applied by any Member to determine the country of origin of goods”.²⁴ It is relatively easy to determine the country of origin for products that are “wholly obtained or produced” in one state, and these are commonly included in many preferential trade agreements. Nevertheless, under the WTO Rules of Origin Agreement “[t]here is no international consensus . . . as to how, precisely, national and regional preferential rules of origin should be formulated.”²⁵ While many WTO members enjoy a wide degree of discretion there are, in practice, four broad categories of rules or tests employed to determine origin, although these are not exhaustive or mutually exclusive.²⁶

One of the categories “widely accepted in international trade law”²⁷ is that of substantial transformation: “the State carrying out the last substantial process or sufficient working or processing is the originating State.”²⁸ However, this has been criticised as a principle that “is vague and leaves wide discretion to national customs authorities” generating “an undesirable situation of uncertainty and undermin[ing] predictability for traders.”²⁹

The remaining three categories are economic tests designed to facilitate precision. First, the *ad valorem* percentage test, (the value-added or the domestic content test) requires either a minimum content originating from the preferential area, or a maximum percentage from outside the area.³⁰ The second is a technical test (the list process test), in which negative or positive manufacturing or processing operations may be

²³ *Ibid* at 575.

²⁴ WTO *Agreement of Rules of Origin*, at Art. 1(1) (Final act, Marrakesh, 1994).

²⁵ Roman Grunberg, *Rules of Origin: Textiles and Clothing Sector* (London: Cameron May, 2005) at 506 [Grunberg].

²⁶ *Ibid*.

²⁷ Hirsch, *supra* note 22 at 575.

²⁸ *Ibid*.

²⁹ *Ibid* at 576.

³⁰ Grunberg, *supra* note 25 at 506-507.

specified that accord origin in the preferential region.³¹ The third is the tariff-shift test (the change in tariff classification test), which requires the product to change its tariff heading under the Harmonized Commodity Description System in the originating state³² (also referred to as the Harmonized System or HS). Simply put, HS is a structured nomenclature rule system used for the purpose of comparing trade statistics, based on the HS Convention of 1983.³³

The rules of origin are “relevant to territorial disputes because the origin of goods is commonly defined in international trade law on a territorial basis.”³⁴ Issues arise when a product originates from a disputed territory or from within the territory of an unrecognized state. Questions of competence arise when an unrecognized government issues a certification of origin or a certification for the export of a product. Therefore, applying the rules of origin to goods produced in disputed territories, such as the TRNC, “is likely to constitute a source of political friction.”³⁵

V. RULES OF ORIGIN AND THE TRNC

The situation in the TRNC is not unique. Many states exist that are either unrecognized or recognized by a limited number of other states. Moshe Hirsch, a professor at the Faculty of Law, Hebrew University of Jerusalem, has suggested that states importing goods from unrecognized states may pursue one of two alternative approaches:

The practical-trade approach considers the issue of origin from a commercial perspective and resolves the relevant questions in accordance with rules of international trade law that emphasize the factors of de facto control, jurisdiction, and ensuing responsibility. This course of action seeks to minimize the role of political factors in the operation of rules of origin;

The political-sovereignty approach considers the issue of origin from an international political perspective, underlines the involved questions of

³¹ *Ibid* at 507.

³² Hirsch, *supra* note 22 at 576.

³³ United Nations Statistical Division, *International Merchandise Trade Statistics: Compilers Manual* (New York: United Nations, 2004) at 29.

³⁴ Hirsch, *supra* note 22 at 576-577.

³⁵ *Ibid* at 576.

sovereignty and recognition, and addresses the question of origin as flowing from an early determination regarding the questions of sovereignty or recognition.³⁶

Currently, the international community's approach to the TRNC is the second, the political-sovereignty approach. Regarding international trade with the TRNC this approach was clearly demonstrated in the two cases—*Anastasiou 1994*³⁷ and *Anastasiou 2003*³⁸. In these two decisions, the ECJ gave more weight to the international political perspective that the northern part of Cyprus is under the sovereignty of the Republic of Cyprus, even though it is practically controlled by the government of the TRNC.

A. *Anastasiou 1994*

Anastasiou 1994 was brought to the UK High Court in 1993, but the court referred the case to the ECJ for a preliminary ruling in 1994.³⁹ Thirteen producers and exporters of citrus products and one exporter of potatoes initially brought the case from the Republic of Cyprus against the Minister of Agriculture Fisheries and Food of the UK. The citrus and potatoes were in fact produced in the area controlled by the TRNC and had custom stamps and phytosanitary certification issued by the authority of the TRNC. When the producers and exporters tried to export citrus and potatoes to the UK with the certification issued by the TRNC, the British authority refused to accept the certificates of origin issued by, or bearing customs stamps referring to, the TRNC.

Two issues arose before the ECJ. The first was who the appropriate customs authority for the exporting state was. The key to solving the issue was contained in the 1977 protocol.⁴⁰ Article 6(1) of the 1977 protocol states that the evidence of the originating status of products is to be given by the movements certificate EUR 1.⁴¹ Articles 7(1) and 8(1) specify that

³⁶ *Ibid* at 577.

³⁷ *The Queen v Minister of Agriculture, Fisheries and Food, ex parte S.P. Anastasiou (Pissouri) Ltd and others*, C-432/92, [1994] ECR I-3116 [*Anastasiou 1994*].

³⁸ *The Queen v Minister of Agriculture, Fisheries and Food, ex parte S.P. Anastasiou (Pissouri) Ltd and others*, C-140/02, [2003] E.C.R. I-10635 [*Anastasiou 2003*].

³⁹ *Anastasiou 1994*, *supra* note 37 at para 14.

⁴⁰ Council Regulation on the Conclusion of the Additional Protocol to the Agreement Establishing an Association between the European Economic Community and the Republic of Cyprus, (EEC) No 2907/77 of 20 December 1977.

⁴¹ *Anastasiou 1994*, *supra* note 37 at para 7.

the movement certificate is to be issued by the customs authorities of the exporting state, and Article 8(3) provides in particular that it is the responsibility of the customs authorities of the exporting state to ensure that the forms referred to in Article 9 and afterwards to be duly completed.⁴²

Considering the special situation of Cyprus, “de facto acceptance of the certificates in question issued by authorities other than the competent authorities of the Republic of Cyprus is certainly not tantamount to recognition of the TRNC as a State, but represents the necessary and justifiable corollary of the need to take the interests of the whole population of Cyprus into account.”⁴³ However, the court made it clear that the current political situation would not change the interpretation of the protocol.

While the de facto partition of the territory of Cyprus, as a result of the intervention of the Turkish armed forces in 1974, into a zone where the authorities of the Republic of Cyprus continue fully to exercise their powers and a zone where they cannot in fact do so raises problems that are difficult to resolve in connection with the application of the Association Agreement to the whole of Cyprus, that *does not warrant a departure from the clear, precise and unconditional provisions of the 1977 Protocol on the origin of products and administrative cooperation.*[emphasis added]⁴⁴

Political circumstances aside, the court found the purpose of the protocol to be: “[t]he system whereby movement certificates are regarded as evidence of the origin of products is founded on the principle of mutual reliance and cooperation between the competent authorities of the exporting State and those of the importing State.”⁴⁵ The court further explained:

Acceptance of certificates by the customs authorities of the importing State reflects their total confidence in the system of checking the origin of products as implemented by the competent authorities of the exporting State. It also shows that the importing State is in no doubt that subsequent verification, consultation and settlement of any disputes in respect of the origin of products or the

⁴² *Ibid.*

⁴³ *Ibid* at para 34.

⁴⁴ *Ibid* at para 37.

⁴⁵ *Ibid* at para 38.

existence of fraud will be carried out efficiently with the cooperation of the authorities concerned.⁴⁶

Viewed in this way, the court concluded that “the northern part of Cyprus, which is recognised neither by the community nor by the Member States,” is excluded from recognition by the authorities because “[a] system of that kind cannot therefore function properly unless the procedures for administrative cooperation are strictly complied with.”⁴⁷ Thus, regardless of the changed political circumstances, the only acceptable certificates are from those issued by the Republic of Cyprus.

The second issue is whether denying the certificates from the TRNC constitutes discrimination as defined under Article 5 of the Association Agreement.⁴⁸ Trade in citrus fruit and potatoes between Cyprus and the European Community was governed by the Agreement of 19 December 1972, establishing an association between the European Community and the Republic of Cyprus.⁴⁹ The agreement introduced a system of preferential tariffs for products originating in Cyprus. In order to benefit from the agreement it is necessary for a product to have an EUR 1 movement certificate as proof of origin. At the same time, Article 5 of the agreement states, “[t]he rules governing trade between contracting parties may not give rise to any discrimination between nationals or companies of Cyprus.”⁵⁰ Since the territorial area of Cyprus included the entire part of the island now under the control of the TRNC at the time of the agreement, the question was whether denying certificates from the TRNC constituted discrimination against the people of the TRNC.

In response, the court referred to Article 3 of the agreement, which states “[t]he contracting parties shall take all appropriate measures whether general or particular to ensure fulfillment of the obligations arising out of the agreement. They shall refrain from any measure likely to jeopardise the achievements of the aims of the agreement.”⁵¹ According to the court,

⁴⁶ *Ibid* at para 39.

⁴⁷ *Ibid* at para 40.

⁴⁸ Regulation on the conclusion of an Agreement establishing an Association between the European Economic Community and the Republic of Cyprus, (EEC) No 1246/73 of 14 May 1973.

⁴⁹ *Ibid*.

⁵⁰ *The Queen v Minister of Agriculture, Fisheries and Food, ex parte S.P. Anastasiou (Pissouri) Ltd and others*, 11 November 1994, Transcript of John Larking (CO/1132/92).

⁵¹ *Anastasiou 1994, supra* note 37 at para 4.

“[a]ny alternative means of proof must be discussed and decided upon by the Community and the Republic of Cyprus within the framework of the institutions established pursuant to the Association Agreement, and then applied in a uniform manner by the two Contracting Parties.”⁵² Overall, the ECJ took the view that interpreting the fundamental principle of non-discrimination must be balanced against the proper operation of the agreement, the need for uniformity in community policy, practice based on the principle of mutual reliance, and cooperation between the competent authorities.⁵³ Thus, “Article 5 cannot in any event confer on the Community the right to interfere in the internal affairs of Cyprus” and “[t]he problems resulting from the de facto partition of the island must be resolved exclusively by the Republic of Cyprus, which alone is internationally recognized.”⁵⁴

Furthermore, the court exemplified the files containing practice based on the Association Agreement as follows:

The file shows that the advantages stemming from the Association Agreement have on several occasions been accessible to the whole population of Cyprus. Thus, the financial protocols concluded pursuant to the Agreement are administered in such a way that the resources made available by the Community are used for purposes that are equally for the benefit of the population established in the northern part of Cyprus.⁵⁵

The court concluded that:

[T]he Community has not so far alleged that the events that took place on the island of Cyprus prevent the proper operation of the Agreement, nor has it contended that the Republic of Cyprus has infringed the provisions of the Association Agreement by discriminating against Turkish exporters established in the northern part of Cyprus.⁵⁶

Stressing that the Cyprus dispute has to be solved within the community, rather than through international law, the court eventually rejected the claim that denying certificates from the TRNC constituted discrimination under the Article 5 of the agreement. The issue and

⁵² *Ibid* at para 46.

⁵³ Stephanie L. Shaelou, *The EU and Cyprus: Principles and Strategies of Full Integration* (Leiden: Martinus Nijhoff Publishers, 2010) at 34.

⁵⁴ *Anastasiou 1994*, *supra* note 37 at para 47.

⁵⁵ *Ibid* at para 45.

⁵⁶ *Ibid* at para 48.

reasoning used by the court supports the political-sovereignty approach, which “accords considerable importance to prior determination regarding sovereignty or recognition with regard to a particular territory, and this earlier stage overshadows the process of determination of origin.”⁵⁷

B. *Anastasiou 2000*

Six years after the decision of *Anastasiou 1994*, the House of Lords in England referred a second case to the ECJ, commonly called, *Anastasiou 2000*. After the rejection of the claims by the exporters from the northern part of Cyprus in 1994, the citrus exporters concluded an agreement with a company established in Turkey. The agreement provided that citrus fruit originating in the northern part of Cyprus covered by phytosanitary certificates issued by officials of the TRNC would first be shipped to Turkey, the only national government recognising the TRNC. Under the agreement, the ship was to be put in to a Turkish port for less than 24 hours and then, without any cargo being unloaded or imported, continue its voyage to the UK. The cargo was to be subsequently covered by phytosanitary certificates issued by the Turkish authorities following its inspection on board the ship.

Anastasiou 1994 has been referred twice to the ECJ: in 2000 and 2003. In the 2000 decision, the court used some of the reasoning from the first case. According to the court,

compliance with which can be checked by the importing Member State by reference to the shipping documents, ensures cooperation between the exporting and importing States, the importance of which was emphasised in *Anastasiou 1994*, and reduces the various risks inherent in a situation in which products would be certified when they were merely passing through the territory of a non-member State.⁵⁸

The court stated that the introduction of harmful organisms in produce imported from non-member states “is 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

⁵⁷ Hirsch, *supra* note 22 at 581.

⁵⁸ *The Queen v Minister of Agriculture, Fisheries and Food, ex parte S.P. Anastasiou (Pissouri) Ltd and others*, C-219/98, [2000] ECR. I-5241 at para 37 [*Anastasiou 2000*].

issue of the appropriate phytosanitary certificate.”⁵⁹ The certificate is “to protect the territory of the community from the introduction and spread of organisms harmful to plants”.⁶⁰ The court observed that as long as the cooperation is clearly to ensure that protection, the mere fact that the citrus fruits were produced in an unrecognised state does not affect the validity of certificates for importation. Turkey, in this case, was the authority issuing the certificates, and the cooperation was possible as it, unlike the TRNC, is a fully recognised state in the international community. Therefore, the arrangement with Turkey for the checking of the products and issuance of certificates is a satisfactory arrangement. It “ensures cooperation between the exporting and importing State, the importance of which was emphasised in *Anastasiou 1994*, and reduces the various risks inherent in a situation in which products would be certified when they were merely pressing through the territory of a non-member state.”⁶¹

However, when the House of Lords resumed the case after the decision by the ECJ in 2000, the question remained as to whether the citrus fruit at issue in those proceedings was indeed subject to the special requirement, laid down in item 16.1 of the Council Directive 77/93: that its packaging must bear an appropriate origin mark. In their submission, this could be satisfied only in the country of origin, so that the Minister was not entitled to accept the phytosanitary certificate issued by the Turkish authorities.⁶² The House of Lords took the view that the judgment by the ECJ in 2000 did not decisively answer the question of whether the appropriate origin mark referred to in item 16.1 could be affixed at a place other than the plants' place of origin. Additionally, the Advocate General had proposed in his opinion that the court should hold that to be impermissible. It therefore decided to refer the issue once more to the ECJ in 2003.

It was argued that the requirement of an appropriate origin mark could be fulfilled in a country other than the country of origin, based on a check as to the mark's validity by an inspector empowered in that other country to issue the phytosanitary certificate. However, the court rejected the argument, listing the following reasons:

⁵⁹ *Ibid* at para 22.

⁶⁰ *Ibid* at para 32.

⁶¹ *Ibid* at para 37.

⁶² *Ibid* at para 23.

First, such an analysis of item 16.1, interpreting it as requiring merely a subsequent check that the packaging bears an appropriate origin mark, is contrary to the purpose of that item, which requires actual performance of that marking requirement. Second, the inspector responsible for issuing the phytosanitary certificate in that other country is not in the same situation as his counterpart in the country of origin for the purpose of detecting any falsification of the origin mark designed to derive improper advantage from a satisfactory phytosanitary finding as to the country of origin, inasmuch as he will be able to act on the basis only of invoices or transport or dispatch documents. Finally, the cooperation which the competent authorities of the importing Member State build up with those of a non-member country other than the country from which the imported plants originate cannot establish itself under conditions as satisfactory as in the case of direct cooperation with the competent authorities of the country of origin. Effective cooperation with the latter authorities is especially important, particularly in the case of contamination.⁶³

There were also provisions requiring that the phytosanitary certificate accompanying the plants can provide a permanent record of their origin, whereas the origin mark affixed to the packaging may be lost if the packaging is damaged. As a result, the court held that it would be contrary to the objective of strengthening phytosanitary safeguards to construe the official statements required by items 16.2 to 16.3a as amended so as to be capable of being made in a non-member country other than the products' country of origin, when those new provisions are designed to extend the requirements for certification of origin.⁶⁴

Overall, the ECJ assumed, particularly in *Anastasiou 1994 (2003)*, that the government of the TRNC is politically unrecognised and, thus, the authority from the TRNC government is unacceptable. The Court's decision in *Anastasiou 1994* has clearly followed an approach based on the fact that the TRNC is not recognized by the international community, the political-sovereignty, discussed above. This draws a sharp contrast from the practical trading approach applied to Taiwan, where recognition is similarly limited from the international community but that fact does not define the trading relationship.

⁶³ *Anastasiou 2003*, *supra* note 38 at para 63.

⁶⁴ *Ibid* at para 69.

VI. CURRENT PRACTICES REGARDING TAIWAN

Unlike the TRNC, Taiwan is a separate member of the World Trade Organization despite not being considered an independent state by that international body. The legal basis for the Taiwan's membership was Article XII (1) of *Marrakesh Agreement Establishing the World Trade Organization*, which provides:

Any State or separate customs territory possessing full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement and the Multilateral Trade Agreements may accede to this Agreement, on terms to be agreed between it and the WTO. Such accession shall apply to this Agreement and the Multilateral Trade.⁶⁵

The above article suggests that statehood itself is not the sole basis for WTO membership eligibility. Corroborating this interpretation is the WTO Ministerial Meeting's approval of Taiwan's membership application on 11 November 2001, and Taiwan's accession to the WTO on 1 January 2002.⁶⁶

Notably, the international community has approached the Taiwan issue from the practical-trade approach perspective mentioned above, even before the year of 2002. When considering the Taiwanese case from the perspective of *Anastasiou*, Taiwan's non-recognized status has not precluded mutual reliance and cooperation with respect to import certificates. For instance, some 10 months after the decision in *Anastasiou 1994*, the EC Commission adopted Regulation No. 1084/95,⁶⁷ abolishing the protective measure applicable to imports of garlic originating in Taiwan and replacing it with a certificate of origin. Article 2(1)(a) of Regulation (EC) No. 1084/95 provides 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 Article 55 to 65 of Regulation (EEC) No. 2454/93." 'Competent national authority' means competent

⁶⁵ *Marrakesh Agreement Establishing the World Trade Organization* (15 April 1994), online: WTO <http://www.wto.org/english/docs_e/legal_e/04-wto_e.htm>.

⁶⁶ Han-Wei Liu, "An Entity Sui Generis in the WTO: Taiwan's WTO Membership and Its Trade Law Regime" (2009) 4:4 *Journal of International Commercial Law and Technology* 252 at 254.

⁶⁷ Commission Regulation Abolishing the Protective Measure Applicable to Imports of Garlic Originating in Taiwan and Replacing it with a Certificate of Origin, (EC No 1084/95) of 15 May 1995.

governmental authority, which is the “Bureau of Commodity Inspection & Quarantine in the Ministry of Economic Affairs for Exports & Import Certificates issued on behalf of the Ministry of Economic Affairs in the Republic of China” in the case of Taiwan.⁶⁸ An observer notes that,

If one applied the reasoning of the Court of Justice in *Anastasiou 1994*, whereby ‘it would be impossible for an importing state to address inquiries to the departments or officials of an entity which is not recognised, for instance, concerning ... certificates that are incorrect or have been interfered with’, to Taiwan, the member states would not be allowed to accept certificates of origin issued by the unrecognized authorities of the Republic of China.⁶⁹

Both the decision in *Anastasiou* and the EC Commission were made in 1994, and some progress has been made since the Republic of Cyprus’ EU Accession Agreement in 2004.⁷⁰ According to the current report, “trade between north Cyprus and EU member states can take place as long as products from the north transited through ports operated by the government of Cyprus,” under the EU’s Green Line Regulations of 2004.⁷¹ As the government of the Republic of Cyprus argues, it may initially seem that the TRNC is far from isolated, since the type of production noted above even gives EU trade preferences.⁷² However, allowing transition from the north through ports operated by the government of Cyprus does not fix the “isolated situation” of TRNC in international trade, because the process of transition is more expensive than exporting products via Turkey,⁷³ (further details will be in next section). The basic assumption in *Anastasiou*, that the TRNC cannot be considered a legitimate authority in the realm of international trade, has not changed. The sharp contrast between the treatments of the two states lends support to the notion that it is time for the international

⁶⁸ Stefan Talmon, “*The Cyprus Question before the ECJ*” (2001) 12:4 EJIL 727 at 747.

⁶⁹ *Ibid* at 748.

⁷⁰ *Documents Concerning the Accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic to the European Union* 46 OJ L 236, 23 September 2003.

⁷¹ Vincent Morelli, “*Cyprus: Reunification Proving Elusive*” (Paper prepared for Members and Committees of Congress, 5 January 2011), Congressional Research Service Report at 12 [Morelli].

⁷² *Ibid*.

⁷³ Bahro A. Berhan & Glenn P. Jerkins, “The Self-imposed Embargo: Customs-related Transaction Costs of North Cyprus” (2011) 44:5 *Applied Economics* 587 at 587 [Berhan & Jerkins].

community to adopt an approach to the TRNC similar to its approach to Taiwan.

VII. WHY SHOULD THE INTERNATIONAL COMMUNITY CHANGE ITS APPROACH TO THE TRNC?

When examining the international community's approach to Taiwan, it becomes clear that the decision of the ECJ in *Anastasiou 1994* is based only on non-recognition and "not on any specific reasons for the non-recognition".⁷⁴ As briefly discussed above, the peaceful unification of Cyprus is the stated purpose of non-recognition. Arguably, "the illegality with which the Security Council was concerned constituted the violation of the 1960 treaties, and possibly the secession" but neither is "a sufficient ground for an obligation of non-recognition."⁷⁵ According to the observer, the "use of force by Turkey in 1974" brings serious illegality to the government of the Turkish Republic of Cyprus.⁷⁶ The government of the TRNC argues, "Turkey's recourse to force was within its right - and obligation - under the Treaty of Guarantee, to protect the Turkish Cypriot population".⁷⁷ However, it is "not clear that the Treaty of Guarantee allows the guarantor powers to intervene on behalf of only part of the population, rather than for the protection of Cyprus as a whole."⁷⁸ Still, even if the international community does not recognize the sovereignty of TRNC, the world has to allow the products from TRNC to be exported freely.

If the illegality of the Turkish invasion of Cyprus forms the basis for the obstacles imposed on trade, then the penalty should be administered against Turkey. Currently the people of the TRNC are penalized, while Turkey remains unaffected by its own "illegal" actions. If the obstacles imposed on trade relate to the purpose of peaceful unification, as mentioned in the *Treaty of Guarantee*, the difficulty of becoming involved in international trade for the residents of the TRNC has rather made unification more difficult. Though it has become slightly easier for the TRNC to partake in international trade, the only authority allowed to give

⁷⁴ Morelli, *supra* note 71.

⁷⁵ Yael Ronen, *Transition from Illegal Regimes under International Law* (Cambridge: Cambridge University Press, 2010) at 66.

⁷⁶ *Ibid.*

⁷⁷ *Ibid.*

⁷⁸ *Ibid.*

certificates for goods produced in the TRNC remains the Republic of Cyprus. In other words, even though it has become possible to export some goods, if the goods are not transited through ports operated by the Government of Cyprus, authorities from the TRNC cannot issue the certificates necessary to export them and must export through Turkey.

The government of the TRNC has complained that the transition process has serious limitations in itself. The Government of Cyprus has placed certain restrictions on the transit of goods by the Government of Cyprus, making it “more expensive to comply with EU regulations.”⁷⁹ Therefore, most of the TRNC’s imports and exports (unless requiring strict certificate regulations, as did citrus fruits in *Anastasiou*) still come or go via Turkish ports, which inflicts excessive trade transaction costs on the residents of the TRNC.⁸⁰ One researcher finds that the process of shipping via Turkey has “caused damage to the economy of North Cyprus in a variety of other ways”⁸¹ and calculated that the economic loss due to such shipping amounted to more than 12 million US dollars in 2004.⁸²

Indeed, the most recent version of the *CIA World Factbook* reports, “[t]he Turkish Cypriot economy has roughly half the per capita GDP of the south, and economic growth tends to be volatile, given the north’s relative isolation”.⁸³ A large economic gap between northern and southern Cyprus is not helpful for the unification of Cyprus, as it increases the economic burden on the potential unified government of Cyprus. In addition, the economic sanctions on the TRNC, such as trade sanctions, make the people of the TRNC more dependent on the government of Turkey. The *CIA World Factbook* states “[t]he Turkish Cypriots are heavily dependent on transfers from the Turkish Government.... Aid from Turkey has exceeded \$400 million annually in recent years.”⁸⁴ If dependence on the Turkish government continues, both the cultural and economic gaps between the north and south will be exacerbated, making reunification even more difficult.

⁷⁹ Morelli, *supra* note 71.

⁸⁰ Berhan & Jerkins, *supra* note 73 at 587.

⁸¹ *Ibid* at 588.

⁸² *Ibid* at 596.

⁸³ *Cyprus: Economy of the area administered by Turkish Cypriots*, *CIA World Factbooks* (21 October 2011), online: The CIA World Factbook < <https://www.cia.gov/library/publications/the-world-factbook/geos/cy.htm>>.

⁸⁴ *Ibid*.

The current policy of the international community towards trade with the TRNC harms the prospect of the reunification of Cyprus. Even if the international community does not recognize the TRNC as a separate sovereign state, practical approaches to trade issues must remain separate from recognition. This would not be unprecedented as sovereignty and trade are dealt with separately in the case of Taiwan. The practical-trade approach holds that:

Trade treaties, such as the free-trade-areas agreements, are ordinarily aimed at liberalizing trade relations between the contracting parties, and not at determining the legal status of a certain territory. Consequently, interpretation of the relevant rules of origin included in such agreements should not be based on the various rules regarding sovereignty, acquisition of territory, or international recognition, but rather, on factual factors like de facto control, jurisdiction, and ensuing international responsibility.⁸⁵

It follows that the trade practices can be separated from the official recognition of a state, as this is the approach that the international community has taken with respect to Taiwan. Recently, Kemell Baykalli, of the Turkish Cypriot Chamber of Commerce (KTTO), has also suggested that “the adoption of the direct trade proposal ... will increase the competitiveness of Turkish Cypriot products and thus help bridge the economic gap with Greek Cyprus,”⁸⁶ adding that such a “bridge” will not harm the unification of Cyprus, as argued above.

VIII. OTHER PROBLEMS REGARDING CYPRUS

There are many more obstacles to the involvement of the residents of the TRNC in the international community. For one, it has been reported that the embargoes resulting from non-recognition by the international community have created a banking system “that is under-resourced and stretched but hardy.”⁸⁷ These embargoes “cross every area of the banking sector, from access to the swift payment system to obtaining international

⁸⁵ Hirsch, *supra* note 22 at 578.

⁸⁶ Morelli, *supra* note 71.

⁸⁷ Nick Kochan, “Western Europe: Northern Cyprus - Anticipating Acceptance - Despite International Embargoes that Restrict their Operations, Northern Cyprus Banks are Making Preparation in the Hope that Eventually they will be Included in the EU” *The Banker* (December 2007) at 1.

legal and financial qualifications and travel.”⁸⁸ Isolation in the banking sector means, “foreign banks play a minimal role in the development of the country” and consequently, “do not have any positive impact on the country’s economic growth.”⁸⁹

Furthermore, even if non-Cypriots living outside of the island of Cyprus are not involved in international trade with the TRNC, they may feel the results of the embargoes on the TRNC merely by sending a parcel there. The northern part of Cyprus is still barred from the Universal Postal Union and “foreign mail addressed to residents of the north has to transit via Turkey”; proving that “every effort is made to symbolically link the north to mainland Turkey” rather than Cyprus.⁹⁰ In addition, all mail going to the TRNC from foreign countries has to use the suffix “Mersin 10, Turkey” not “the Turkish Republic of Northern Cyprus” or even “Cyprus”.⁹¹ Mersin is a province in southern Turkey, implying that the TRNC is a part of Turkey, not Cyprus. Current embargoes on the TRNC conflict with efforts to unify Cyprus in many respects, since the current practices bring the TRNC closer to Turkey than Cyprus.

More specifically, WTO considers postal and courier services to “form a key part of the global communications infrastructure, with high economic and social importance”,⁹² thus, reform of the current arrangements regarding the sending of international post to the TRNC can be argued as part of a practical-trade approach, while aiding with the goal of reunification. Currently, the TRNC is not a member of any international organization, including the WTO, while Taiwan is a separate member. If exclusion from membership creates trouble for Cyprus, the ideal solution would be for Cyprus to follow Taiwan’s example and join. While many international organizations treat Taiwan as a part of mainland China, it still joined the World Trade Organization and Universal Postal Union as a separate entity. Taiwan has avoided an assertion of statehood, by claiming to be the “custom territory of Taiwan, Penghu, Kinmen and Matsu”⁹³ and, in its WTO membership, been named

⁸⁸ *Ibid.*

⁸⁹ *Ibid.*

⁹⁰ Nicholas Bray, “Long Division: Cyprus Plays Spoiler in the Mediterranean” (2011) 28:1 World Policy Journal 73 at 80.

⁹¹ Vesna Maric, *Cyprus* (London: Lonely Planet Publications, 2009) at 229.

⁹² Postal and Courier Services, World Trade Organization, online: WTO <<https://www.wto.org>>.

⁹³ Shaw, *supra* note 12 at 212.

the “Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu” or “Chinese Taipei”. There has been consistent pressure from the People’s Republic of China not to name Taiwan “the Republic of China”, and the current membership name has been the result of negotiation.⁹⁴ Therefore, the term “custom territory” is ambiguous, since it locates the Taiwan somewhere between an independent state and part of the People’s Republic of China. Still, the ambiguity of the term suggests a potential solution to the TRNC, since it was the key to bringing about separate membership within the international community without requiring recognition as a sovereign state. Both the government of the Republic of Cyprus and the TRNC should consider a similar arrangement. In addition, the international community and international organizations must consider such approaches more seriously, since their adoption does not harm the unification of Cyprus. Rather, from this perspective, an ambiguous name would move the TRNC closer to Cyprus and away from Turkey.

IX. INTERNATIONAL ATTEMPTS TO UNIFY CYPRUS

There have been international efforts to unify Cyprus, the most popular being UN Secretary General Kofi Annan’s peace plan, which arranged a referendum on 24 April 2004 between North and South Cyprus for the first time. This plan “generated great hopes for the international community” to achieve the peaceful unification of Cyprus.⁹⁵ Unfortunately, the result of the referendum was not positive as 75.8 percent of Greek Cypriots rejected the plan, while 64.9 percent of Turkish Cypriots supported it.⁹⁶

Such efforts continue to this day. There have been series of meetings between Greek Cypriot leader Dimitris Christofias and Turkish Cypriot president Dervis Eroglu to solve some core issues to unify Cyprus. Even though there is no clear agreement yet, it is important to note these efforts in this paper. It is clear that international community wants to unify

⁹⁴ Chien-pin Li, “Taiwan’s Participation in Inter-Governmental Organizations: An Overview of its Initiatives” (2006) 46:4 *Asian Survey* 597.

⁹⁵ Muzaffer E. Yilmaz, “The Cyprus Conflict and the Annan Plan: Why One More Failure?” (2005) *Ege Academic Review* 29 at 31.

⁹⁶ Michaela Maier, *Campaigning in Europe – Campaigning for Europe* (Piscataway: Transaction Publishers, 2008) at 176.

Cyprus peacefully, and this is why approaching the TRNC from a practical-trade approach is more appropriate as argued above.

X. CONCLUSION

This paper has dealt with the issue of Cyprus in international trade law. Even if the non-recognition of the government of the TRNC is justified, current practices in international trade law have contradicted the purposes of non-recognition. The two *Anastasiou* cases have shown that the current international policy serves the political-sovereignty approach, which emphasizes official sovereignty and recognition, over the situation on the ground. The political-sovereignty approach has made it much more difficult for the people living in the TRNC to be involved in international trade. As trade is one of the most important factors for the economic growth of a country, this policy handcuffs the economic growth of the TRNC, as products from the unrecognized authority of the TRNC are extremely difficult to export. As a result, the economic gap between the TRNC and the Republic of Cyprus continues to grow and makes the unification of Cyprus even more difficult. For example, in the case Germany, reunification was very expensive and more difficult for West Germany than it would have been had East Germany been more prosperous.⁹⁷ It is thus a legitimate concern that economic disparity between the TRNC and Cyprus could further complicate the prospects of reunification.

Furthermore, since only the Turkish government recognizes the TRNC, the political-sovereignty approach serves to push the TRNC closer to Turkey and farther from Cyprus. Furthermore, the TRNC looks more like a part of Turkey than Cyprus, as all international mail must include the address "Turkey" to reach anyone in the TRNC.

In summary, the international community must apply a practical-trade approach towards the TRNC that would remove the bans on products exported from the TRNC to the world. The practical-trade approach would reduce the economic gap between the Republic of Cyprus and the TRNC, stop pushing the TRNC towards Turkey and lay a more effective framework for the political reunification of the island of Cyprus.

⁹⁷ Marc Fisher, "Germany's birthday blues; On 1st anniversary of unification, easterners await happy returns amid soaring inflation, unemployment" *The Gazette* (3 October 1991) A9.

