

AFTER THE TREATY OF LISBON: CYPRUS AND THE DIRECT TRADE ISSUE IN THE EUROPEAN UNION

By Nicholas G. Karambelas, Esq.

Published in AHI Policy Journal (2010)

Abstract

*Turkey illegally invaded Cyprus in 1974 and has occupied the northern one-third of Cyprus. The Turkish military has excluded and continues to exclude Cyprus from exercising effective control in the territory of Cyprus which the Turkish military occupies. Turkey effectively administers that area through a regime referred to as the “Turkish Republic of Northern Cyprus” or TRNC. The Treaty of Accession under which Cyprus became a Member State of the European Union (EU) suspended the application of the EU *acquis communautaire* in the TRNC. The geographical position at which the Turkish military halted in 1974 has become known as the “green line”. Under a protocol to the Treaty of Accession, the Council issued the Green Line Regulation which regulates the movement of people, goods and services over the green line. In July 2004, the European Commission proposed a direct trade regulation to facilitate the movement of goods between the TRNC and the Member States of the EU, (referred to as the Direct Trade Resolution or DTR), certain goods moved from the TRNC to Member States would be exempt from customs duties and tariffs and would become community goods. The proper legal basis for the DTR is disputed. The dispute assumed a new dimension after the Treaty of Lisbon took effect on December 1, 2009 because that Treaty amended the law making procedures of the Council and the European Parliament.*

INTRODUCTION

On May 1, 2004, Cyprus ¹ became a Member State of the European Union (EU).² The *acquis communautaire* of the EU was suspended in those portions of Cyprus from which the

¹ The term “Cyprus” is generally used interchangeably to mean either the Republic of Cyprus, which an internationally recognized nation-state, or an island in the Eastern Mediterranean Sea, which is a geological formation. For the purpose of this Article, the term “Cyprus” refers only to the Republic of Cyprus and the government of the Republic of Cyprus. The term “Member State” means a nation which has acceded to the European Union.

² Hoffmeister, Frank. Legal Aspects of the Cyprus Problem: Annan Plan and EU Accession, Nijhoff Law Specials. Vol. 67. Leiden: Martinus Nijhoff, 2006. chap.VI and VII.

control of Cyprus is displaced by the Turkish military.³ Almost from the moment at which Turkey completed its military occupation of Cyprus in August 1974, Turkish Cypriots and Turks from Turkey, who Turkey settled in the “Turkish Republic of Northern Cyprus” (referred to as the TRNC)⁴ have used and commercially exploited the land and resources within the TRNC. Most of that land and resources are owned by persons who hold legal title under the laws of Cyprus.⁵ Since 1983, Turkish Cypriot and Turkish settlers endeavored to export agricultural products derived from the use of the land directly to Member States under trade preferences available to Cyprus under a 1972 association agreement between the EU and Cyprus. Since Cyprus became a Member State, Turkish Cypriots and Turks in the TRNC have endeavored to export products from the TRNC directly to the Member States benefitted by the exemptions and trade preferences which benefit like products from Cyprus.

The geographical position at which the Turkish military halted in 1974 has become known as the “green line”. The green line is a buffer zone patrolled by United Nations peacekeeping troops (UNFICYP). It is the geographical and physical limit within which Turkey excludes Cyprus from effectively governing. The Treaty of Accession empowered the EU through the

³ Treaty of Accession, OJ L 236 23.9.2003, Protocol No. 10 on Cyprus Art (1)1.

⁴ In 1975, the Republic of Turkey enabled the leaders of the Turkish Cypriot community to declare the establishment of the “Turkish Federated State of Cyprus” in Turkish-occupied Cyprus. It was renamed the “Turkish Republic of Northern Cyprus” (referred to as TRNC) in 1983. Only Turkey has recognized the TRNC. No other country has recognized the TRNC. The international community has complied with the resolution of the United Nations Security Council which called upon “all States not to recognize any Cypriot state other than the Republic of Cyprus,” *See* UN Sec Res 541 (1983). For the purpose of this Article, the territory of Cyprus which is occupied by the Turkish military and effectively administered by Turkey is referred to as the “Turkish Republic of Northern Cyprus” or TRNC.

⁵ See court decisions cited at n. 85, *infra*.

Council to regulate the movement of goods, services and persons over the green line.⁶ The Council adopted such a regulation (referred to as the Green Line Regulation) which took effect on April 29, 2004.⁷

In July 2004, the European Commission proposed measures to facilitate the economic development of the TRNC. The proposed measures took the form of two draft regulations: a financial aid regulation and a direct trade regulation.⁸ The financial aid regulation is not a subject of this Article. Under the proposed direct trade regulation (referred to as the Direct Trade Regulation or DTR), certain agricultural goods moved from the TRNC to Member States would be accorded trade preferences and become community goods. The proper legal basis for the DTR is disputed between and among the legislative institutions of the EU, which are the Council and the European Parliament, and the executive institution of the EU, which is the European Commission. The dispute assumed a new dimension after the Treaty of Lisbon took effect on December 1, 2009 because that Treaty amended the law making procedures of the Council and the European Parliament.

The DTR legal dispute is strictly a matter of EU law. The dispute can only be understood with reference to the amendments made by the Treaty of Lisbon, the respective law making roles of the primary institutions of the EU and the Treaty of Accession. This Article will analyze the legal dispute and the legal effect of each legal position. This Article does not present an analysis

⁶ Treaty of Accession, Protocol 10, Art.2.

⁷ Council Regulation (EC) 866/2004 as amended by Council Resolution (EC) No 293/2005 of 17 February 2005 and Council Regulation (EC) No. 587/2008 of 16 June 2008.

⁸ COM (2004) 465, COM (2004) 466, Appendix 5.

of the origins and development of the events that preceded the Turkish invasion of Cyprus or the dynamics of the Cyprus issue.⁹

PART ONE: THE STRUCTURE OF THE EUROPEAN UNION

The EU is one of the most significant transnational political and economic organizations in the world. It was originally called the European Coal and Steel Community, then the European Economic Community or Common Market, then the European Community and, after 1993, the European Union.¹⁰ The EU consists of 27 Member States which collectively occupy most of the land mass of Europe, has a Gross Domestic Product (GDP) almost equal to the GDP of the United States and has a population of almost 500 million people.¹¹ The dream of a united Europe dates back to medieval times. In the 20th century, the devastating experience of two catastrophic world wars urgently impeded Europeans to transform the dream into a reality. The evolution of the EU began immediately after the Second World War.

The fundamental governance issue confronting the EU has been how and the extent to which sovereign power is allocated between the EU as a supranational entity and the Member States as national entities. As the EU evolved, sovereign power was allocated on a fragmented

⁹ See generally Coufoudakis, Van. CYPRUS: A Contemporary Problem in Historical Perspective. Minnesota Mediterranean and East European Monographs No.15 (Modern Greek Studies University of Minnesota, 2006).

¹⁰ As of December 1, 2009, the effective date of the Treaty of Lisbon, the European Union is the official name for all purposes.

¹¹ The Member States are Ireland, United Kingdom, France, Netherlands, Belgium, Luxembourg, Denmark, Sweden, Finland, Germany, Spain, Portugal, Italy, Malta, Austria, Greece, Estonia, Latvia, Lithuania, Poland, Hungary, Czech Republic, Slovakia, Cyprus, Slovenia, Bulgaria and Romania.

basis by three foundation treaties, a series of amendments to those treaties and special purpose treaties. In December 2007, the EU took the most significant step in its history towards rationalizing and establishing the allocation of power. The Member States signed the Treaty of Lisbon which took effect on December 1, 2009.

I. GOVERNING TREATIES OF THE EU AFTER TREATY OF LISBON

The Treaty of Lisbon is essentially an amending treaty. It does not nor is it intended to replace the existing treaties. The Treaty of Lisbon consolidates and modifies the existing foundation treaties. It adds to the existing foundation treaties in the area of foreign policy by creating the office of the High Representative of the European Union for Foreign Affairs and Security Policy.¹² As amended by the Treaty of Lisbon, the EU is fundamentally governed by the following treaties:¹³

Treaty on the Functioning of the European Union (TFEU) formerly the Treaty establishing the European Economic Community (EC Treaty)

Having taken effect in 1957, the purpose of the EC Treaty was to establish a common internal market among the Member States. The EC Treaty eliminated customs duties and quotas among Member States, established a common external tariff and trade policy toward Member States, guaranteed free movement of persons, capital and services among the Member States, adopted common agricultural and transportation policies and common competition policies. In 1965, the Merger Treaty eliminated parallel sets of institutions and created one Council and one

¹² The original versions of the foundational treaties of the EU are the Treaty Establishing the European Economic Community, Mar. 25, 1957, 1957 O.J. (C 340) 173 and the Treaty on European Union, Feb. 7, 1992, 1992 O.J. (C 191) 1. The Consolidated Versions of the Treaty on the European Union and the Treaty Establishing the European Community, 2006 O.J. (C 321 E) 1 contain all amendments made before the Treaty of Lisbon. The third foundation treaty is the Treaty Establishing the European Atomic Energy Community (EURATOM), Mar. 25, 1957, 298 U.N.T.S. 259. The EURATOM treaty remains in effect as amended by the Treaty of Lisbon.

¹³ Consolidated Version of the Treaty on the European Union (TEU) as amended by the Treaty of Lisbon pmb., 2010 O.J. (C 83) 13.

European Commission. In 1987, the Single European Act (SEA) amended and expanded the EC Treaty by eliminating all physical, technical and fiscal impediments and integrating persons, goods, services and capital into one market by 1992.

Treaty on the European Union of 1993 (TEU)

Also referred to as the Maastricht Treaty, the TEU fundamentally amended and expanded the EC Treaty. The TEU established the structure for the creation of the euro as a single currency and the basis for a full political and economic union of the Member States. The TEU set forth the three pillars of the EU which are, one, the common trade and commerce measures contained in the EC Treaty as amended by the SEA and the TEU, two, common foreign and defense policy and, three, common justice and police policy. The Treaty of Amsterdam of 1999 and the Treaty of Nice of 2003 made further procedural and structural changes in the operation of the EU institutions.

Charter of Fundamental Rights

The Charter sets forth certain political, social, and economic rights for EU citizens and residents. The EU must act consistent with the Charter. The EU courts are empowered to rule as invalid any law which contravenes the Charter. The Charter only applies to Member States when they implement EU law.

II. THE ALLOCATION OF SOVEREIGN POWER IN THE EU

The EU is allocated only the powers and authorities which the Member States have conferred on the EU. Such powers and authorities are referred to as competences.¹⁴ The amendments made by the Treaty of Lisbon set forth the following categories of competences:¹⁵

*Exclusive Competence*¹⁶

The EU can enact laws that are binding on the Member States without the consent or approval of any Member State in the following policy areas:

¹⁴ The areas of foreign policy and defense are treated as competences which are separate from the other policy areas, TEU Art 21 *et seq.*

¹⁵ TFEU Art. 2a-2e and Protocol on exercise of shared competence.

¹⁶ TFEU Art. 3

1. Customs Union
2. Anti-trust
3. Monetary policies for the Euro Group
4. Marine biological conservation
5. Commercial policy

Any act of the EU in a policy area of exclusive competence is subject to the principle of proportionality which means that the nature and scope of any such act must be calculated only to achieve a treaty purpose.¹⁷

Competence Shared with Member States¹⁸

The Member States may act in the following policy areas. However, if the EU acts in any of these policy areas, then the Member States are precluded from acting unless the EU ceases to act in any area in which it has already acted:

1. Internal market
2. Social policy in the areas set forth in the TFEU
3. Agriculture and fisheries
4. Energy
5. Health, safety security and justice
6. Consumer protection
7. Transportation

Any act of the EU in a policy area of shared competence is subject to the principle of subsidiarity

¹⁷ TEU Art. 5(4)

¹⁸ TFEU Art. 4

which means that an act by EU must be more effective than an act in the same policy area by a Member State.¹⁹

*Complementary Competence*²⁰

The EU may act to support, coordinate and supplement the acts of the Member States in the following policy areas. However, the EU cannot preclude or force the Member States to harmonize their acts.

1. Health
2. Industry
3. Culture and tourism
4. Education and sports

Flexibility Clause

The EU may act in a policy area, except foreign policy and defense, if no Treaty provision confers a power or competence on the EU as long as such act is necessary to achieve an objective of the Treaties.²¹

III. THE EU INSTITUTIONS

The EU acts through the institutions which the Member States have established in the foundation treaties.²² The EU institutions are the European Parliament, the Council, the European Council, European Commission, Court of Justice of the European Union and the

¹⁹ TEU Art. 5(3)

²⁰ TFEU Art. 6

²¹ TFEU Art. 308

²² TEU Art. 13

General Court, European Central Bank and the Court of Auditors.

A. European Parliament

The European Parliament (also referred to as the Parliament) performs a legislative function which is similar to the U.S. House of Representatives. The Parliament exercises legislative and budgetary functions jointly with the Council and represents the interests of the people of the EU.²³ The Parliament cannot initiate legislation. It can only consider legislation that has been proposed by the European Commission.

The Parliament is composed of a maximum of 750 members (referred to as MEPs) plus the President of the Parliament who is elected by the MEPs. Each Member State elects a number of MEPs which is proportional to the ratio that the population of each Member State bears to the EU population as a whole. No Member State shall have less than 6 representatives and no Member State shall have more than 96 representatives. Each member is elected on a popular basis by each Member State on the same day for a term of five years.²⁴ Generally, the Parliament acts by a majority vote of the representatives.²⁵ The Parliament conducts its business according to European Parliament Rules of Procedure (referred to as EP Rules) which the MEPs enact and periodically amend.

The Parliament is not an assembly of delegates from various nations like the United Nations. The MEPs do not caucus as delegates from a nation but rather they caucus according to their respective political affinities. The MEPs elected from Greece do not sit or act as

²³ TEU Art. 14(1)

²⁴ TEU Art. 14(2)

²⁵ TFEU Art. 225, 231

representatives of Greece. The Greek socialists caucus with the socialists from Italy or France and the Greek conservatives caucus with the conservatives from Italy or France. The various caucuses are referred to as political groups.²⁶ Each political group elects a chairperson. The Chairs of each political group and the President of the Parliament form the Conference of Presidents.²⁷ The Conference organizes all of the work of the Parliament and parliamentary bodies. Decisions of the Conference are made by consensus. If no consensus is reached, the Conference decides by a weighted vote based on the number of MEPs in each political group.²⁸

B. The Council or Council of Ministers or Consilium

The Council exercises legislative and budgetary functions jointly with the Parliament. It consists of a ministerial level representative from each Member State.²⁹ Like the Parliament, the Council cannot initiate legislation but can only consider legislation proposed by the European Commission. Each Member State has one representative on the Council. The particular representative of a Member State varies according to the policy area at issue at issue at a particular time but he or she must be duly authorized to bind his or her Member State. Each such policy area is referred to as a configuration and each representative presides over each such

²⁶ As of the most recent Parliamentary election in 2009, the political groups are: European People's Party - European Democrats (EPP-ED); Progressive Alliance of Socialists and Democrats in Europe (S&D); Alliance of Liberals and Democrats for Europe (ALDE); European United Left-Nordic Green Left (GUE/NGL); Greens/European Free Alliance (Greens/EFA); European Conservatives and Reformists Group (ECR); Europe of Freedom and Democracy (EFD); Non-Escrits (MEPs who are not part of a political group).

²⁷ EP Rules 22-24

²⁸ *Ibid.*

²⁹ TEU Art. 16(1)-(2)

configuration on a rotating basis. The configurations are specified by the European Council.³⁰ The Council generally votes by a qualified majority although certain decisions such as taxation, foreign policy and treaty modification require a unanimous vote.³¹

The Council elects its President from a Member State on rotating basis for a six-month term according to a schedule that is set through 2020.³² To increase efficiency, continuity and coordination between successive Presidencies, the immediate past, present and immediate future Presidencies (referred to as presidency trios) cooperate on a common political program for an 18 month period.³³

The Committee of Permanent Representatives of the Governments of the Member States (COREPER) prepares the work of the Council and consists of each ambassador to the EU of each Member State. The Council is also served by a Secretary-General with a staff. Legislative meetings of the Council are open to the public.³⁴ The Council is the primary decision making institution of the EU.

C. European Council

The European Council defines the general political directions and priorities but does not perform a legislative function.³⁵ It consists of the heads of state or government of each Member

³⁰ TEU Art. 16(6); TFEU Art. 236; See this Part, this Section C., *infra*.

³¹ See this Part, IV. D., *infra*.

³² TEU Art. 16(9); TFEU Art. 236

³³ *Draft 18 month programme of the Council*, Doc 16771/09 POLGEN 219

³⁴ TEU Art. 16(8)

³⁵ TEU Art. 15(1)

State, the President of the European Council, the President of the European Commission and meets twice every 6 months.³⁶ The European Council elects a President by a qualified majority for a term of 18 months with one succession term. Decisions are made by consensus.³⁷ Although the European Council lacks any enumerated powers or specific authority, it exercises its influence by virtue of the fact that it is composed of the national leaders of the Member States.

D. European Commission

The European Commission performs the executive function of the EU.³⁸ It consists of one commissioner from each Member State. The commissioners are charged with pursuing the interests of the EU and not the interests of their respective Member States. Each commissioner is appointed by the European Council.³⁹ The Commission serves a term of five years. The President of the Commission is nominated by the European Council and approved by the Parliament.⁴⁰ The Commission functions through a series of directorates, each of which has a designated policy subject matter. The Commission exercises the following powers:

1. Except for instances in which the national legislatures of the Member States may cause the European Commission to reconsider a legislative proposal and refer the issue to the Council and the European Parliament,⁴¹

³⁶ TEU Art. 15(2) - (3)

³⁷ TEU Art. 15(5), (4)

³⁸ TEU Art. 17(1)

³⁹ TFEU Art. 244

⁴⁰ TEU Art. 17(7), Art. 14(1)

⁴¹ TEU Art. 12(b), TFEU Art. 88(2)

initiates legislation which is forwarded to the Council and the Parliament but does not vote on the legislation,⁴²

2. Implements the budget of the EU,
3. Enforces compliance with the EU Treaties by Member States, other EU institutions and citizens and represents the EU in legal proceedings,
4. Represents the EU in negotiations with non-Member States, and
5. Enacts laws which involve monopolies and concessions granted to companies by Member States and certain rights of workers.⁴³

E. Judicial Institutions

The Court of Justice of the EU (CJEU) assures that the TFEU and TEU are interpreted and applied in a consistent and systematic manner.⁴⁴ The CJEU has exclusive original subject matter jurisdiction over any case asserted by:

1. The European Commission against any Member State that the European Commission alleges has failed to fulfill an obligation under the TFEU or TEU⁴⁵ and
2. A Member State against another Member State for the failure of a Member State to fulfill an obligation under the TFEU or TEU. The case must first be brought before the Commission, which may render an opinion. If the Commission does not render an opinion within three months, the CJEU may hear the case without a Commission opinion.⁴⁶
3. The CJEU performs another function that is not strictly a matter of jurisdiction. It may issue preliminary rulings on questions concerning EU

⁴² TEU Art. 17(2)

⁴³ TFEU Art. 106(3), Art. 45(3)(d)

⁴⁴ TEU Art 19

⁴⁵ TFEU Art. 258

⁴⁶ TFEU Art. 259

law that arise in the domestic courts of the Member States.⁴⁷ A preliminary ruling is not advisory but rather mandatory. The domestic court which requests the preliminary ruling must comply with it. The lower courts of a Member State may, but are not obligated to, seek “authoritative guidance” in the form of a preliminary ruling. However, if the highest court of a Member State has before it a case involving a question of EU law, then that court must seek a preliminary ruling on the question from the CJEU.

The CJEU has exclusive appellate jurisdiction over cases appealed from the General Court which functions as a trial court. The CJEU can only review matters of law and not matters of fact.⁴⁸

The CJEU has been described as a constitutional court, which performs a function similar to that of the U.S. Supreme Court. However, unlike the Supreme Court, the CJEU does not hear appeals from the decisions of the national courts of Member States.⁴⁹

F. The European Central Bank and the Court of Auditors.

The European Central Bank (ECB) manages the euro and safeguards price stability in the Euro Group. The ECB frames and implements the economic and monetary policy of the EU. The ECB is completely independent from the EU institutions, the national central banks of the Euro Group and the Member States. The ECB prepares and implements the decisions taken by the Euro Group decision-making bodies - the Governing Council, the Executive Board and the General Council.

The Court of Auditors consists of one national from each Member State. The Court of Auditors acts through a qualified majority. Its duties are to examine all revenue and expense

⁴⁷ TFEU Art. 267

⁴⁸ TFEU Art 256(1)

⁴⁹ See generally Karambelas, Nicholas G. *Fundamentals of the European Union Court System*, Vol. 18 No. 4 The Washington Lawyer December, 2003.

accounts of the EU and each EU institution, provide annual audited financial statements to the EU institutions and advise the EU on fiscal management issues.

IV. LAW MAKING PROCEDURE IN THE EU

A. Laws of the EU

The entire body of EU laws is referred to as the *acquis communautaire* which translates from French as “that which is obtained by the community”. The *acquis communautaire* consists of primary legislation, secondary legislation and the case law of the CJEU.⁵⁰ The primary legislation consists of the TEU, TFEU as each Treaty is amended by the Treaty of Lisbon and the Charter of Fundamental Rights. Secondary legislation consists of the following:⁵¹

1. Regulations - A regulation is binding on the EU and each Member State. No national legislation to implement the regulation is required.
2. Directives - A directive is binding on the EU and each Member State but each Member State may choose the form and method of implementing a directive by through its own national legislation.
3. Decisions - A decision is binding the party to whom it is addressed and no national legislation is required to implement a decision. That party can be one or more of the Member States, an entity or an individual.
4. Recommendations, Interpretive Communications and Commission Comments - These items are not binding but are rules of conduct which have persuasive or practical effects.

B. Ordinary Legislative Procedure (formerly Co-Decision)

As of the Treaty of Lisbon, the EU adopts most of its secondary legislation through the

⁵⁰ Delcourt, *The Acquis Communautaire: Has the Concept Had its Day?*, 38 Common Market Law Review 829 (2001); Ziller, *Integration of the Aquis Communautaire into the Legal Order of New and Future Member States*, COE Report CDL-UDT (2005)032.

⁵¹ TFEU Art. 288

ordinary legislative procedure. Legislation in 73 policy areas including common commercial policy, internal market, economic governance, budget and immigration can be enacted only through this procedure. Under this procedure, an item of secondary legislation is law when both the European Parliament and the Council decide in favor of any such regulation, directive or decision.⁵² The European Commission proposes a regulation, directive or decision which is then brought to vote in each of the European Parliament and the Council according to the following procedure.⁵³

Introduction of secondary legislation

The European Commission proposes an item of secondary legislation to each of the European Parliament and the Council.

Enactment after First Reading

The European Parliament takes a position on the proposal and communicates that position to the Council.

If the Council approves the position of the European Parliament, then the position of the European Parliament as reflected in the text communicated to the Council by the European Parliament is enacted.

Enactment after Second Reading

If the Council does not approve the position of the European Parliament, then the Council shall adopt its own position and communicates that position with reasons to the European Parliament.

If, within three months after it receives the non-approving Council position, the European Parliament approves the Council position, then the position of the Council as reflected in the text communicated to the European Parliament by the Council is enacted.

⁵² TFEU Art. 289(1)

⁵³ TFEU Art. 294 (1) - (14)

Rejection after Second Reading

If, within three months after it receives the non-approving Council position, the European Parliament rejects the Council position by a majority of its representatives, then the position of the Council as reflected in the text communicated to the European Parliament by the Council is not enacted.

Amendment after Second Reading

If, within three months after it receives the non-approving Council position, the European Parliament amends the Council position by a majority of its representatives, then the amended text is communicated to each of the Council and the European Commission, each of which render an opinion on the amended text.

Enactment of Amended Text after Second Reading

If, within three months after it receives the amended text of the European Parliament to the Council position, the Council approved the amended text by a qualified majority, then the proposal as reflected in the amended text is enacted except that, for any amendment on which the European Commission renders a negative opinion, the Council must approve by unanimous decision.

Rejection of Amended Text after Second Reading and Conciliation

If, within three months after it receives the amended text of the European Parliament to the Council position, the Council does not approve the amended text, then the President of the Council and the President of the European Parliament must each agree to convene the Conciliation Committee within six weeks.

Conciliation Committee and Procedure

The Conciliation Committee consists of each member of the Council and an equal number of representatives of the European Parliament. The purpose of the Conciliation Committee is to agree on a joint text based on the respective positions of the Council and the European Parliament after the Second Reading.

The Council decides on any joint text by a qualified majority of the Council. The European Parliament decides on any joint text by a majority of the representatives on the Conciliation Committee. The Conciliation Committee must decide on a joint text within six weeks of when it is convened unless extended.

The European Commission participates in the Conciliation Committee deliberations but does not decide.

Rejection by Conciliation Committee after Second Reading

If the Conciliation Committee does not approve a joint text, then the proposed item of secondary legislation is not enacted.

Approval by Conciliation Committee after Second Reading and Third Reading

If the Conciliation Committee timely approves a joint text, then, within six weeks from that approval, the joint text is law as long as the European Parliament approves the joint text by a majority of the votes cast and the Council approves the joint text by a qualified majority. If one or neither institution does not timely approve the joint text, the joint text is not enacted.

C. Special Legislative Procedure

Secondary legislation in certain policy areas specified in an article of either the TEU or the TFEU must be proposed and enacted according to the procedure specified in that particular article.⁵⁴ Most of these articles enable the Council to enact secondary legislation proposed by the European Commission by a unanimous vote as long as the Council has obtained the consent of or consulted with the European Parliament. Also, in certain articles the Council may change the procedure from the procedure set forth in the article to the ordinary legislative procedure.⁵⁵

D. Decision Making

The TEU and TFEU enable EU institutions to make decisions by unanimous vote, majority vote or qualified majority vote. The European Parliament acts by a majority vote of its representatives according to rules as to quorums set forth in the EP Rules. The Council generally acts by a qualified majority vote under the ordinary legislative procedure and by unanimous vote

⁵⁴ See e.g. TFEU, Art.19, Art. 311-312

⁵⁵ TFEU, Art. 81(3), Art.153(2)

under most special legislative procedures. The qualified majority vote operates as follows:⁵⁶

1. Until October 31, 2014, each Member State has a weighted vote which is based on the relative populations of each Member State for a total number of 345 votes.⁵⁷ For legislation which the European Commission proposes (which is most legislation) a qualified majority is at least 74% or 255 out of the 345 votes. For legislation or a decision which is not proposed by the European Commission, the 255 votes must represent at least 2/3 of the Member States.
2. Beginning November 1, 2014, the weighted vote is abolished and each Member State has one vote. A qualified majority is at least 55% of the Member States as long as the 55% consists of at least 15 Member States which represent at least 65% of the total EU population.
 - a. If at least 4 Member States vote negative, then there is no qualified majority under any circumstances, (referred to as a blocking minority).
 - b. For legislation or a decision in policy areas not proposed by either the European Commission or the High Representative proposes, a qualified majority is at least 72% of the Member States as long as the 72% represents at least 65% represents at least 65% of the total EU population.
 - c. For legislation or a decision in policy areas in which less than all of the Member States participate, a qualified majority is at least 55% of the participating Member States as long as the 55% represents at 65% of the total population of the participating Member States. A blocking minority is at least 4 Member States as long as the 4 Member States represent more than 35% the total population of the participating Member States plus one more Member State whose population is not included to calculate the population percentage.

⁵⁶ TFEU, Art. 238(2); TFEU Protocol No. 36.

⁵⁷ Germany, France, Italy and the United Kingdom 29 each; Spain and Poland 27 each; Romania 14; Netherlands 13; Belgium, the Czech Republic, Greece, Hungary and Portugal 12 each; Austria, Bulgaria and Sweden 10 each; Denmark, Finland, Ireland, Lithuania and Slovakia 7 each; Cyprus, Estonia, Latvia, Luxembourg and Slovenia 4 each; and Malta 3.

PART THREE: CYPRUS AND THE DIRECT TRADE ISSUE

I. TRADE BETWEEN CYPRUS AND THE EU AFTER THE TURKISH INVASION AND BEFORE CYPRUS BECAME A MEMBER STATE.

The Turkish invasion of Cyprus in 1974 and its continued occupation of Cyprus affected the operation of the association agreement which Cyprus had concluded with the EU before Cyprus became a Member State, (referred to as EEC-ROC Agreement).⁵⁸ The EEC-ROC Agreement set forth a system of beneficial trade preferences for citrus fruits and potatoes which originated from Cyprus and were imported into the EU.⁵⁹ The origin of the citrus fruits and potatoes was proven by an origin certificate issued by the duly authorized customs official of Cyprus as the exporting state.⁶⁰ Also, Cyprus was required to issue phytosanitary certificates for the exported citrus fruits and potatoes which attested to the absence of harmful organisms on any such product.⁶¹ TRNC persons endeavored to move agricultural products derived from the land in the TRNC to Member States the under trade preferences available to Cyprus under the EEC-ROC Agreement. This endeavor resulted in a series of CJEU judgments.

A. The *Anastasiou* Cases in the CJEU

1. *Anastasiou I*

⁵⁸ Agreement of 19 December 1972 establishing an Association between the European Economic Community and the Republic of Cyprus, OJ 1973 L 133/1.

⁵⁹ See generally Emiliou, *Cypriot Import Certificates: Some Hot Potatoes*, 20 European L Rev 202 (1995); Talmon, *The Cyprus Question before the European Court of Justice*, 12 Euro. J. of Int. L 727 (2001).

⁶⁰ Origin Protocol of 1977, Art. 6(1) annexed to EEC-ROC Agreement.

⁶¹ Council Directive 77/93/EEC, OJ 1977 L 26/20.

TRNC persons moved citrus fruits and potatoes produced in the TRNC to Member States. These TRNC persons effectively claimed the trade benefits available to Cyprus under the EEC-ROC Agreement for these products. The TRNC “authorities” issued origin and phytosanitary certificates for citrus fruits and potatoes produced in the TRNC under the name of Cyprus. The United Kingdom (UK), other Member States and the European Commission accepted these certificates and accorded the tariff benefits of the EEC-ROC Agreement to these citrus fruits and potatoes.

Persons who produced citrus fruits and potatoes in Cyprus asserted a cause of action in the courts of the UK to prohibit any citrus fruits or potatoes from being imported into the UK from anywhere in Cyprus under the EEC-ROC Agreement unless Cyprus customs authorities had issued origin and phytosanitary certificates in connection with such products. Because the cause of action involved a substantial issue of EU law, the High Court of Justice of England and Wales referred the issue to the CJEU under the preliminary ruling procedure.

The issue for the CJEU was whether the EEC-ROC Agreement should be interpreted to prohibit any Member State from accepting any origin certificates in connection with citrus fruits and potatoes unless the certificates were issued by the customs authorities of Cyprus. The UK and the European Commission argued that the Turkish occupation created a special situation in Cyprus. Member States should be allowed to accept the certificates for citrus fruits and potatoes produced in the TRNC, even though they were not issued by the customs authorities of Cyprus, so that the interests of the whole population of Cyprus are considered. The UK and the European Commission invoked the Namibia Principle to support their argument. The Namibia Principle derives from an advisory opinion of the International Court of Justice of the United Nations (ICJ)

which holds that, even though the international community does not recognize the legal authority and political power of a government over a territory, the routine government acts which benefit the people of that territory such as the registration of births, deaths and marriages must be accorded legal effect so that individuals in the territory are not deprived of any advantages which derive from international cooperation.⁶²

The CJEU rejected the arguments of the UK and the European Commission.⁶³ The CJEU ruled that the Namibia Principle did not apply where its application would contravene the precise mandates of an international agreement between the importing and exporting countries.⁶⁴ The administrative cooperation necessary to effect such an agreement is not possible with any purported authority such as the TRNC and that the only “Cypriot State recognized is the Republic of Cyprus.”⁶⁵

2. Anastasiou II and III

Anastasiou II involved the same parties and generally the same facts with some crucial differences. Although the citrus fruit in question was produced in the TRNC, the ship upon which the citrus fruit was transported called at a port in Turkey. Turkish officials issued a phytosanitary certificate. The UK, the European Commission and the importers argued that, because of the

⁶² *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, ICJ Reports, 16 (1971), para. 124.

⁶³ *Minister of Agriculture, Fisheries, and Food, ex parte S.P. Anastasiou (Pissouri) Ltd. and Others*, Case C-432/92 [1994], ECR 3087.

⁶⁴ *Ibid.* 3131

⁶⁵ *Id.* 3131-32

language of an amendment to the directive on phytosanitary certificates, a non Member State which was not the country of origin could issue the phytosanitary certificates. The High Court of England and Wales again referred the issue to the CJEU. The CJEU ruled that the non Member State which was not the country of origin could issue the phytosanitary certificate as long as the products were checked in the territory of the non Member State, the products were in that country for a time and under conditions to enable the proper checks and the products were not subject to any special requirements which could only be satisfied in the country of origin.⁶⁶

In *Anastasiou III*, the High Court of England and Wales asked the CJEU to rule on whether any special requirements applied to the citrus fruit in question in *Anastasiou II*. The CJEU ruled that special requirements did apply under the directive in question and only the authorities of the country of origin could issue the phytosanitary certificates. The country of origin was Cyprus. Consequently, the citrus fruit could be imported under the EEC-ROC Agreement only if the customs officials of Cyprus issued the phytosanitary certificates.⁶⁷

II. TRADE BETWEEN CYPRUS AND THE EU AFTER CYPRUS BECAME A MEMBER STATE

When Cyprus became a Member State⁶⁸, the EEC-ROC Agreement was extinguished and products from Cyprus were benefitted by the EU customs union available to all Member States.

⁶⁶ *Regina v. Minister of Agriculture, Fisheries and Food, ex parte S.P. Anastasiou (Pissouri) Ltd. and Others*, Case C-219/98 [2000] ECR I-5241.

⁶⁷ *Regina v. Minister of Agriculture, Fisheries and Food, ex parte S.P. Anastasiou (Pissouri) Ltd. and Others*, Case C-140/02 [2003] ECR I-10635.

⁶⁸ For events leading up to accession, see generally Christou, George. The European Union and Enlargement: The Case of Cyprus. Palgrave MacMillan, (2004); Stephanou, Constantin (ed.). Cyprus and the EU: The Road to Accession. Ashgate, (2005).

The EU had resolved that Cyprus would become a Member State even if Turkey continued to physically divide the territory of Cyprus. Acknowledging the fact that Turkey forcibly prevents Cyprus from “exercis[ing] effective control” in the TRNC, the Treaty of Accession contains a protocol (referred to as the Suspension Protocol) which suspends the application of the *acquis communautaire* in the TRNC.⁶⁹

A. Green Line Regulation

Even though the *acquis communautaire* was suspended, Cyprus and the EU recognized that rules governing the movement of people, goods and services between the government controlled areas of Cyprus and the TRNC must be established.⁷⁰ The European Commission was authorized to propose a regime containing such rules. The Council was empowered to enact that regime by unanimous vote under the Suspension Protocol.⁷¹ The European Commission proposal was unanimously approved by the Council (referred to as the Green Line Regulation).⁷² The Green Line Regulation sets forth a regime for the movement of people, goods and services between government controlled Cyprus and the TRNC. For the movement of goods (excluding live animals and animal products), Cyprus agreed that proof of origin of goods from the TRNC would

⁶⁹ Treaty of Accession, Protocol No. 10 on Cyprus Art. 1(1); See generally Skoutaris, Nikos, *The Application of the Acquis Communautaire in the Areas not under the Effective Control of the Republic of Cyprus: The Green Line Regulation*, 45 Common Market Law Review 727 (2008).

⁷⁰ *Ibid.* Art. 2

⁷¹ *Id.* Art. 2(1)

⁷² Council Regulation (EC) No. 866/2004, 29.4.2004. The Regulation was subsequently amended to add 2 more crossing points, Council Regulation (EC) No. 293/2005 of 17 February 2005 and certain technical amendments, Council Regulation (EC) No. 587/2008 of 16 June 2008. All references are to the base regulation.

be issued by the Turkish Cypriot Chamber of Commerce.⁷³ The goods are subject to applicable EU safety and phytosanitary requirements. As long as these goods are to be consumed in Cyprus, then no import taxes are due. Once the goods enter Cyprus, they are community goods, (*i.e.* they are like any other goods which are imported from one Member State into another Member State) and subject to VAT.⁷⁴ The European Commission promulgated rules to implement the Green Line Regulation.⁷⁵

B. Proposed Direct Trade Regulation (DTR)

The European Commission considered it necessary to propose to the Council measures to facilitate direct trade between the TRNC and the Member States.⁷⁶ The proposal would enable goods from the TRNC to enter other Member States with the Turkish Cypriot Chamber of Commerce issuing certificates of origin and subject to applicable EU safety and phytosanitary requirements. These goods would be exempt from any customs duties and tariffs. Once they entered a Member State, the goods would be community goods which means they would be like any other goods which are imported from one Member State into another Member State.

The European Commission based the proposed direct trade regulation (referred to as the DTR) on the Common Commercial Policy of the EU which sets forth the rules under which the

⁷³ Commission Decision of 7 July 2004, OJ L 272 on authorization of the Turkish Cypriot Chamber of Commerce according to Article 4(5) of Council Regulation (EC) No. 866/2004 (*notified under document number C(2004) 2583*).

⁷⁴ Council Regulation (EC) No. 866/2004, 29.4.2004, Art.4.

⁷⁵ Commission Regulation (EC) No. 1480/2004.

⁷⁶ Proposal for a Council Regulation COM(2004) 466 final 2004/0148 (ACC); See annual Reports from the Commission to the Council on the implementation of the [Green Line Regulation], the most recent of which is COM (2010) 499 final SEC(2010) 1094.

EU conducts external trade with non Member States.⁷⁷ Cyprus objected to the Common Commercial Policy being the legal basis for the DTR on the grounds that the DTR must be adopted in a manner consistent with the Suspension Protocol. Cyprus argued that as a matter of process the DTR could be adopted only if the Council voted unanimously in favor of the DTR with no involvement at all of the European Parliament. In August 2004, the Legal Service of the Council opined that the DTR can only be adopted under the authority of and consistent with the Suspension Protocol.⁷⁸ The Council took no further action with respect to the DTR.

When the Treaty of Lisbon took effect in December 1, 2009, the issue of the DTR was revived. The amendments to the TFEU made the Common Commercial Policy subject to the ordinary legislative procedure.⁷⁹ The Common Commercial Policy regulates trade between Member States and third countries.⁸⁰ Secondary legislation arising under the Common Commercial Policy could be adopted by a qualified majority of the Council and a majority of the European Parliament.⁸¹ The European Commission submitted the DTR to the European Parliament under the ordinary legislative procedure. The Legal Affairs Committee of the European Parliament asked its Legal Service for a legal opinion whether the legal basis for the DTR is the Common Commercial Policy or the Treaty of Accession. In October 2010, the Legal

⁷⁷ *Ibid.*, Explanatory Memorandum p.3; TFEU, Art. 207 (former EC Art. 133).

⁷⁸ Opinion of the Legal Service of the Council of European Council, 11874/04 LIMITE JUR 361 ESE 10, 25 August 2004.

⁷⁹ See Part One, IV. B., *supra*.

⁸⁰ TFEU, Art. 207

⁸¹ See Part One, IV. C., *supra*.

Service of the European Parliament agreed with Legal Service of the Council and opined that the Suspension Protocol is the proper legal basis for the DTR.⁸² On October 20, 2010, the Legal Committee of the European Parliament voted to accept the conclusion of the Legal service and report it to the Conference of Presidents. As of December 1, 2010, the Conference had the matter under advisement.

III. ANALYSIS OF THE LEGAL BASES

A. The Suspension Protocol as the Proper Legal Basis for the DTR.

Every regulation must be grounded in a legal basis which derives from an article of either the TFEU or the TEU. The regulation must be based on the single legal basis that is most concerned with the predominant purpose or component of the regulation.⁸³ Cyprus became a Member State as a whole. The suspension of the *acquis communautaire* in the TRNC merely acknowledges that the Turkish occupation prevents Cyprus from exercising control in the TRNC. The suspension did not create any external border in Cyprus, any kind of autonomous area nor otherwise detach a portion of territory from Cyprus. The only national actors under the DTR are Cyprus as a Member State and the other Member States. The TRNC is definitely not nor is it recognized to be a “third country” within any meaning of the term in the Common Commercial

⁸² Opinion on the legal basis of the proposal for a Council Regulation on special conditions for trade with those areas of the Republic of Cyprus in which the Government of Cyprus does not exercise effective control, Committee on Legal Affairs, AL/835074EN.doc, PE450.882v01-00, October 10, 2010.

⁸³ Case C-411/06 *Commission v. Parliament and Council on annulment of Regulation 1013/2006 on the shipment of waste*, judgment of 8 September 2009 (Grand Chamber).

Policy.⁸⁴ No third country is implicated in any way in the DTR. This means that if the Common Commercial Policy were the legal basis, the DTR would have the effect of amending the TFEU by ordinary legislative procedure because the Common Commercial Policy applies to and is relevant only to trade between Member States and third countries.

The EU has trade preferences under the Common Commercial Policy which apply to territories of Member States.⁸⁵ The European Commission cites the preferences with these territories as support for the legal basis of the DTR being the Common Commercial Policy.⁸⁶ Ceuta and Melilla are autonomous Spanish cities on the coast of Africa with strong ties to Spain. Gibraltar, formerly referred to as a crown colony, is a British Overseas Territory under the British Nationality Act of 1981. Helgoland has historically been governed by Germany. Busingen is a town which is wholly within a Swiss canton and part of the Swiss customs union but is administratively part of Germany. Campione d'Italia is also wholly within a Swiss canton with a substantial Italian population, though administered by Switzerland under agreements with Italy.

The legal, historical and political relationship of each of these territories with its Member State differs significantly from Cyprus and the TRNC. When the UK, Spain, Italy and Germany became Member States, they each had a measure of control over the territories. They could

⁸⁴ *Ibid.* See also, *Apostolides v. Orams et al.*, ECJ Case C-420/07, *Loizidou v. Turkey*, [1997] 23 EHRR 513, *Cyprus v. Turkey*, [2002] 35 EHRR 30, *Xenides-Arestis v. Turkey*, App. No. 46347/99 (2005), *Demopoulos and Others v. Turkey*, App. Nos. 46113/99, 3843/02, 13751/02, 13466/03, 10200/04, 14163/04, 19993/04, 21819/04 (Eur. Ct. H.R. 2010). *The Queen (on application of Kibris Turk Hava Yollari and CTA Holidays Limited) and Secretary of State for Transport and the Republic of Cyprus*, [2009] EWHC 1918 (Admin); *Caglar v. Billingham (Inspector of Taxes) and related appeals*, [1996] STC (SCD) 150, [1996] 1 LRC 526.

⁸⁵ Council Regulation (EC) No. 2501/2001, Council Regulation (EC) No. 1140/2004.

⁸⁶ See n.76 at Explanatory Memorandum p. 3.

determine voluntarily whether and, if so, the conditions under which the territories also entered the EU. In contrast, when it became a Member State, Cyprus had no comparable measure of control over the TRNC because of the Turkish invasion and occupation. The governing control of Cyprus, a sovereign nation state, was forcibly displaced by Turkey, another sovereign state. Turkey created the TRNC to administer its occupation of Cyprus. Cyprus did not create the TRNC. Unlike Ceuta and Melilla as well as Gibraltar and Helgoland, the TRNC is not the remnant of a past colonial era of the Member State. Unlike Busingen and Campione d'Italia, the TRNC is not administered under voluntary agreements between Cyprus and a third country.

The only legal basis for the DTR derives from the Suspension Protocol.⁸⁷ These provisions authorize the Council, acting unanimously, to define which provisions of EU law apply to the Green Line.⁸⁸ The Council properly did so when it enacted the Green Line Regulation. The only authority that the Council has to affect trade in products from the TRNC directly into Member States other than under the Green Line Regulation is to withdraw the suspension of the *acquis communautaire*, again acting unanimously.⁸⁹ By its terms, the Suspension Protocol is not meant to “preclude measures with a view to promoting the economic development “ of the TRNC.⁹⁰ However, any such measures must be accomplished in a manner consistent with the legal and practical effects of the suspension based on the fact that the whole of Cyprus is a Member State. Allowing products from the TRNC into Member States as if those products were

⁸⁷ Treaty of Accession, Protocol 10 on Cyprus.

⁸⁸ *Ibid.* Art.2(1)

⁸⁹ Treaty of Accession, Protocol 10 on Cyprus, Art.1(2).

⁹⁰ Treaty of Accession, Protocol 10 on Cyprus, Art.3.

community products is contrary to the intent and purpose of the Treaty of Accession.

B. The Law Making Procedure on the DTR under the Suspension Protocol

Choosing the proper legal basis is essential to the legal sufficiency of an EU law. Just as important, the choice of the legal basis also establishes the procedure under which the law is enacted. Under the Suspension Protocol, the Council acts alone and it must act unanimously to enact any regulation under the Suspension Protocol. No regulation such as the DTR could be enacted unless Cyprus voted in the affirmative as it did on the Green Line Regulation. The affirmative vote of Cyprus has been and remains a necessary means by which Cyprus can prevent any *de jure* infringement on its sovereignty over the TRNC.

The Treaty of Lisbon amendments make the Common Commercial Policy one of the policy areas that is subject to the ordinary legislative procedure. Any regulation in this policy area must be decided by both the European Parliament, acting by majority vote and the Council, acting by a qualified majority and not by unanimous vote. If the legal basis of the DTR was the Common Commercial Policy, the DTR could be enacted by a majority vote of the European Parliament and a qualified majority of the Council. Consequently, under the ordinary legislative procedure, a regulation such as the DTR could be enacted over the objection of Cyprus. This circumstance would in effect amend the Suspension Protocol. Making the Common Commercial Policy the legal basis for the DTR would have the effect of circumventing an agreement which is fundamental to the terms under which Cyprus entered the EU.

PART FOUR: CONCLUSION

The fundamental legal principle at issue with respect to the legal basis of the DTR is

essentially the same legal principle at issue in the *Anastasiou* cases. International commercial relations can only be conducted between or among nations states whose authority to act and be bound by such acts under international law is duly recognized by other nation states. The EU is founded on the principle that it is an association of nation states, each of which has voluntarily agreed to transfer a measure of its sovereignty to common institutions under the terms and conditions set forth in the TFEU and the TEU as amended by the Treaty of Lisbon. Whether the issue is the directive in the *Anastasiou* cases or the legal basis of the DTR, only a recognized nation state which has become a Member State can act under EU law or be bound to act under EU law. As the CJEU held in *Anastasiou III*, statements about products and certificates of origin must be issued by “an authority of a recognized State. Statements made by authorities of the ‘Turkish Republic of Northern Cyprus’ are thus precluded.”⁹¹ A finding that the proper legal basis of the DTR is the Suspension Protocol is not a victory for Greeks nor a defeat for Turks. It is a victory for the EU and the Member States. It affirms the fundamental legal principles on which the EU is founded and implements the law, procedures and processes which the Member States have adopted in a rational and effective manner.

* * * *

⁹¹ *Regina v. Minister of Agriculture, Fisheries and Food, ex parte S.P. Anastasiou (Pissouri) Ltd. and Others*, Case C-140/02 [2003] ECR I-10635, para. 71-72, 83, 87.