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The Republic of Turkey’s opposition to Cyprus’ entry into the European Union is being manifested in a public relations exercise, in which critical and sometimes polemical, papers are circulated in a virtual Eighteenth Century “campaign of the pamphlets,” attacking the State of Cyprus. Most brochures have reflected Turkish political assertions based on selective accounts of events, but, except where distortions were likely to have serious consequences, the Republic of Cyprus has not engaged in a reciprocal pamphlet campaign. However, with the time for a decision on Cyprus’ application to join the EU approaching, taken in conjunction with the restart of intercommunal talks (which will be a relevant factor as regards the EU’s attitude to its decision on Cyprus’ EU membership), there has been a concentrated Turkish attack by way of circulating legal Opinions questioning Cyprus’ eligibility for EU membership. Other documents, both asserting Turkey’s legal claims in respect of Cyprus and embroidered with threats of the consequences for the EU and Eastern Mediterranean stability should the EU decide to admit Cyprus, are also being disseminated.

The Republic of Cyprus, firmly believing in the Rule of Law, has always conducted itself in accordance with international law. It has used the available legal channels to deal with the consequences of Turkey’s 1974 invasion and occupation of Cyprus, which still continues, and has actively engaged in all other peaceful means of dispute settlement. It is still doing so.

Paradoxically, Turkey is currently promoting legal arguments against Cyprus’ EU membership while, at the same time, denouncing Cyprus’ invocation of legal remedies (especially in Council of Europe judicial organs). Turkey is also insisting

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1 Opinions grounded on alleged facts can only be as accurate as the facts selected by the writer or presented to a consultant jurist by his client. The “facts” on which current pamphlets are based have largely been taken from Z. M. Necatigil’s *The Cyprus Question and the Turkish Position in International Law*, 2nd ed. 1996. Mr. Necatigil was formerly “Attorney-General” and later a “Member of the Assembly of the Turkish Republic of Northern Cyprus”. He has produced numerous articles setting out Turkish and Turkish Cypriot positions. A veritable industry of academic writers and seminar-givers on international relations and conflict resolution has relied on his views and resulting papers have then been circulated by Turkish missions both within European Union and Council of Europe institutions and at the United Nations.
on political positions, contrary to international law, and which would make a political settlement reflecting these, unjust and unacceptable. This situation is not new, Turkey having intermingled her legal arguments with unlawful political positions ever since 1990. What is new is that a crucial deadline concerning Cyprus’ application for EU membership requires international decision-making on Cyprus. EU member states have therefore been targeted with publications seeking to persuade European decision-makers of the correctness and lawfulness of Turkey’s opposition to Cyprus’ EU membership.

Following Cyprus’ 1972 Association Agreement with the European Economic Community and a Customs Union Protocol in 1987, the Republic of Cyprus applied for accession to the European Communities on 4 July 1990. The Commission, in its Opinion on the application issued on 30 June 1993 and endorsed by the Council on 17 October 1993, concluded that beyond all doubt Cyprus had a “European identity and character and...[a] vocation to belong to the Community” (§44).\(^2\) The Commission took note of a Memorandum of 12 July 1990 to the EC Council of Ministers from “the de facto authorities of the northern part of the island” rejecting any right of the Government of the Republic of Cyprus to speak for the whole of Cyprus in approaching the European Community. After rehearsing the “TRNC’s” legal contentions,\(^3\) the Community “however, following the logic of its established position, which is consistent with that of the United Nations where the legitimacy of the Republic of Cyprus and non-recognition of the ‘Turkish Republic of Northern Cyprus’ are concerned, felt that the application was admissible and initiated the procedures laid down by the Treaties in order to examine it. The Community has therefore to establish its position on whether Cyprus is eligible for membership, its capacity to adopt within a reasonable time-scale the acquis communautaire, in particular the rules concerning the single market and the common policies, in order to become a dynamic member

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3 These legal contentions were circulated to the UN General Assembly and the Security Council as documents A/44/966 and S/21398 on 18 July 1990 and also as documents A/45/538 and S/21817 on 25 September 1990, the latter being a Supplementary Note to the 12 July 1990 Turkish Cypriot Memorandum. Together with two legal Opinions by the then QC Mr Elihu Lauterpacht and an Opinion by Professor Monroe Leigh, these documents were widely circulated as a pamphlet by the “TRNC Public Information Office” under the title, The Status of the Two Peoples in Cyprus, ed. N.M. Ertekun, 1990.
The Community concluded that Cyprus’ integration with the Community implied a peaceful, balanced and lasting settlement of the Cyprus question in which the two communities would be reconciled, but emphasised that

"While safeguarding the essential balance between the two communities and the right of each to preserve its fundamental interests, the institutional provisions contained in such a settlement should create the appropriate conditions for Cyprus to participate normally in the decision-making process of the European Community and in the correct application of community law throughout the island" (§47).

In May 1993 when the Commission Opinion was given, there was hope that the intercommunal process of negotiations under the auspices of the UN Secretary-General could lead to settlement. The Opinion stressed the importance of an equitable solution, declaring:

"It is equally important that whatever the institutional balance decided in the final settlement the process results in the establishment of institutions which are capable of carrying out their responsibilities both effectively and efficiently" (§21).

On 6 March 1995, the EU Council of Ministers, after re-examining Cyprus' application and after examining the report from the EU observer for Cyprus, reaffirmed the suitability of Cyprus for accession to the European Union; confirmed the EU’s will to incorporate Cyprus in the next stage of its enlargement; regretted the lack of progress in the intercommunal talks; considered that accession should benefit all countries and help to bring about civil peace and reconciliation; considered that accession negotiations would start six months after conclusion of the 1996 Inter-Governmental Conference; decided on a structural dialogue and expanded political dialogue on Common Foreign and Security Policy matters; and confirmed that the EU intended to continue to support with all means at its disposal the UN efforts to achieve a comprehensive settlement of the Cyprus problem. It should be added that, simultaneously with the meeting of the Council of Ministers, there was a meeting of the Association Council which took the decisions needed to move to the final stage of the EC-Turkey Customs Union and was the handiwork of the General Affairs Council of the EU, which effectively organized a "package deal" finalizing the Customs Union with Turkey.
and setting a date for beginning negotiations with Cyprus.\(^4\)

When in 1997 it became clear that the Inter-Governmental Conference would be concluded on schedule and that Opinions on the accession application would be presented in mid-1997, the Government of Turkey commissioned Professor M. H. Mendelson QC, of Kings College, University of London, to give an Opinion, “On the Application of the Republic of Cyprus to Join the European Union”. Given on 6 June 1997, with a Supplement dated 21 July 1997 on the Austrian situation, the Opinion expanded the details of the 1990 Turkish Cypriot arguments and was widely circulated by Turkey. The Opinion and Supplement were recently republished in Why Cyprus’ Entry into the European Union Would be Illegal. Legal Opinion, by Professor M. H. Mendelson QC, Embassy of the Republic of Turkey, London, October 2001.

The mid-1997 Opinion by Professor Mendelson was given serious consideration by the Republic of Cyprus. Advice was sought by the Republic of Cyprus from three members of the International Law Commission, Professor James Crawford of the University of Cambridge, Professor Gerhard Hafner of the University of Vienna and Professor Alain Pellet of the University of Paris-X. Their resulting Opinion, “Republic of Cyprus: Eligibility for EU Membership”, 24 September 1997, was submitted to the European Commission, and, since Turkey had circulated Professor Mendelson’s Opinion, was also published as a UN General Assembly and Security Council document (A/52/481, S/1997/805, 17 October 1997). The distinguished jurists consulted by Cyprus concluded that

“there is no basis for the view that Cyprus is prevented by the Treaty of Guarantee, or by any of the provisions of the Constitution of 1960, from becoming a member of the EU” (§39).

The outcome was that European Union institutions were not persuaded by Professor Mendelson’s Opinion, adhering instead to the views clearly and firmly expressed in the Commission’s 1993 Opinion (set out above).

Bearing in mind the approaching deadline for a decision on Cyprus’ EU membership application, the Republic of Turkey then asked Professor Mendelson to give his reaction to the Joint Opinion by Professors Crawford, Hafner and Pellet. Professor Mendelson maintained his original view that the Republic of Cyprus

\(^4\) See, Christopher Brewin. The European Union and Cyprus, Eothen, Huntingdon 2000, pp. 88-94. The Eothen Press has published a series of books explaining Turkish and Turkish Cypriot positions and containing the opinions of authors sympathising with such attitudes.
(for applying to join or joining) and any of the Guarantors under the 1960 Treaties (who failed to impede its accession) would be in breach of their international legal obligations as regards Cyprus. Moreover, the practical effect of admitting the Republic before a Cyprus solution would be unlikelihood that the entity admitted (Republic of Cyprus) would be able to fulfil all its obligations to other member states. This Further Opinion Turkey circulated to the UN as A/56/451, S/2001/953, together with a letter from its Permanent Representative, alleging that the United Kingdom was obliged to veto Cyprus’ accession to the European Union.

Again, the Republic of Cyprus sought legal advice. Professors Crawford, Hafner and Pellet prepared a Further Opinion: The Eligibility of the Republic of Cyprus for EU Membership on 17 November 2001. They concluded, after carefully studying Professor Mendelson’s reasons, that there were no new arguments supporting his conclusion and that there is no legal impediment to the admission of Cyprus.

Independently, before the three jurists completed their Further Opinion, the United Kingdom Government, as Guarantor Power under the 1960 Treaty of Guarantee, and whose Foreign Office has an outstanding department of international law specialists, circulated a letter to the United Nations General Assembly and Security Council (A/56/612 – S/2001/1059, 9 November 2001). The United Kingdom disagreed with Professor Mendelson’s assertion that Cyprus’ application to join the EU was illegal and that the UK was obliged by the terms of the 1960 Treaty of Guarantee to veto Cyprus’ accession to the European Union.

In parallel with its attempts by way of disseminating legal Opinions to deter EU member states from approving Cyprus’ accession, the Government of Turkey circulated other documents, notably an Aide Memoire (from Prime Minister Ecevit), dated 9 May 2001, paraphrasing the legal arguments earlier advanced and adding comments that

"Turkey has in Cyprus a number of rights and interests which are enshrined in international agreements."

The Aide-Memoire also declared that:

"If the Greek Cypriot administration is admitted into the EU before a settlement has been reached on the island the partition of the island would deepen and serious risks would arise for peace and stability in the island."
Subsequently, the Foreign Minister of Turkey, Mr Cem, reiterated that Turkey had rights over Cyprus, in particular mentioning the Treaty of Lausanne 1923. This position was set out in a letter of the Embassy of Turkey to the member states of the European Union, 23 May 2001. Threats to stability in the Eastern Mediterranean were re-emphasised in that letter. The purpose of both these Turkish documents was to prevent acceptance of a proposed contribution by Cyprus to the Headline Goals of the European Union and to reinforce Turkey’s arguments about Cyprus’ ineligibility for EU membership.

The Republic of Cyprus was thus yet again compelled to seek legal advice in response to Turkey’s further claims. The three leading jurists, who were well-versed with Cyprus history and issues, were asked whether the Treaty of Lausanne conferred on Turkey any specific rights with respect to Cyprus in particular, or whether it provided any rights relating to the maintenance of a "balance" in the region of the Eastern Mediterranean. Professors Crawford, Hafner and Pellet, delivered their Opinion on 18 November 2001, confirming that the Treaty of Lausanne did not provide any rights in favour of Turkey relating to establishment or maintenance of a "balance" in the region of the Eastern Mediterranean. Moreover, that Treaty did not contain any obligations concerning the future existence of a new state on the island of Cyprus. All rights Turkey had formerly possessed in Cyprus were terminated by Article 16 of the Treaty of Lausanne.

It is thus clear that there are no legal impediments to Cyprus’ application to accede to the European Union.

Because of the need for Cyprus, as a future member of the European Union, to be able

"to participate normally in the decision-making process of the European Community and in the correct application of Community law throughout the island" (Commission Opinion, May 1993, §47, quoted above),

it was also essential that the Republic of Cyprus should obtain legal advice as to the parameters within which it must reach a settlement of the Cyprus problem so that any future settlement would not detract from its capacity to become or remain an EU member state. For this purpose, Cyprus organized a consultation at the Hague in December 2000. From this emerged an Opinion, jointly given by 22 leading international law and European Community law jurists. That Opinion has provided Cyprus with guidance as to the minimal structure of future institutions requiring to be agreed in the revived intercommunal negotiations for a
Cyprus settlement. The guidance in the jurists’ Opinion is consistent with indications consistently received from the European Commission as to the necessity for Cyprus being able to conform to future EU obligations. The guidance is also consistent with other Opinions given to EU Governments and to the Commission as to the appropriate internal organisational structure of member states, an issue of general concern in view of the considerable number of states participating in the enlargement process.

Adherence to law is the only method of achieving justice and peace, of ensuring progress to a comprehensive settlement restoring constitutional arrangements covering the whole of the Republic of Cyprus, and of effecting the integration of Cyprus with the European Community in fulfilment of Cyprus’ vocation to belong to the Community. The Republic of Cyprus has therefore decided to publish the legal Opinions which are guiding it and which should also, in terms of international and European Community law, guide other international decision-makers.  

5 Guidance as to the human rights standards which require incorporation in a settlement can be derived from the judgment of the European Court of Human Rights in Cyprus v. Turkey, Application No. 25781/94, 10 May 2001, and from other Opinions prepared by international jurists at consultations in Geneva in June 1999 and at The Hague in December 2000. Although conformity with human rights standards is a crucial precondition to EU membership, since that particular requirement is not the focus of this booklet, these Opinions are not here reproduced. The Opinion: Legal Issues arising from Certain Population Transfers and Displacements on the Territory of the Republic of Cyprus in the Period since 20 July 1974 can be found at www.attorney-general.gov.cy.
Republic of Cyprus: Eligibility for EU Membership

Summary

1. We are asked whether the Republic of Cyprus is eligible to become a member of the European Union. In this regard it is necessary to consider:
   (a) Article 1 paragraph 2 of the Treaty of Guarantee, 1960;
   (b) Article 50 of the Constitution of Cyprus, 1960; and/or
   (c) Article 170 of the Constitution.
In our opinion, the answer is: yes. The Republic of Cyprus is eligible to become a member of the EU. In particular:

- Article 1 paragraph 2 of the Treaty of Guarantee does not prohibit Cyprus from becoming a member of a regional organisation such as the European Union. Membership of the EU would not constitute participation "in any political or economic union with any State whatsoever" within the meaning of Article 1 paragraph 2.

- As to Article 50 of the Constitution, there is no person now filling the role of Vice-President, and the provisions dealing with the powers of the Vice President are in abeyance. Thus the Vice-Presidential veto provided for in Article 50 cannot be exercised. In any event the accession of Cyprus would not involve, in the present circumstances, a "manifest" breach of internal law within the meaning of Article 46 of the Vienna Convention on the Law of Treaties, and thus it could not subsequently be invoked by Cyprus as a basis for invalidating its consent to be bound by the EU treaties.

- Article 170 provides for most-favoured nation treatment to be extended by Cyprus to the three guarantor states “for all agreements whatever their nature may be”. Such treatment has only to be extended “by agreement on appropriate terms”. In common with other most-favoured-nation clauses, Article 170 does not prohibit Cyprus from entering into agreements which confer benefits on third states; it envisages that benefits extended to the most-favoured-nation will also be extended to each of the guarantors. Thus Article 170 does not prohibit Cyprus from acceding to any agreement whatever. In fact, EC membership is not regarded as triggering general mfn obligations, under the GATT or otherwise. Turkey as a GATT contracting party and applicant for EU membership is well aware of this practice. Both Turkey and Greece, in bilateral treaties concluded with Cyprus after independence, have recognised that mfn obligations in respect of trade in products do not apply "to privileges... preferences or concessions... granted... in the future to other countries on account of... participation, entry or association... [to] a customs union, a free trade area or an economic community”. For these reasons Article 170 would not require Cyprus to extend any additional benefits of EU membership to Turkey.
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The Status of the Republic of Cyprus

2. An initial point to be noted is that the Republic of Cyprus is recognised as an independent state, including by all existing members of the EU. The Government of Cyprus, based in Nicosia, is equally regarded as the government of the Republic, with the normal competence and authority to represent the state. This is so notwithstanding the constitutional difficulties that have occurred in Cyprus since 1963, and the de facto division of the island following the Turkish invasion in 1974.¹

3. By contrast, no other entity within Cyprus is recognised as a state, as the government of a state, or as having any degree of separate legal status or personality on the international plane. The "Turkish Republic of Northern Cyprus", the entity created in the north of the island following the events of 1974, is recognised only by Turkey. The lack of international status of the "Turkish Republic of Northern Cyprus" has been consistently reaffirmed by the Security Council² as well as by the General Assembly,³ and by the European Court of Human Rights,⁴

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¹ Amongst numerous statements to this effect see SC Res 367 (1975), para 1; Report of the Secretary-General on his Mission of Good Offices in Cyprus, S/23121, 8 October 1991, paras 18-20.
² See esp SC Resns 541 (1983), 550 (1985). For the more recent resolutions see below, para 23.
⁴ See most recently Loizidou v Turkey (Preliminary Objections) ECHR Ser A vol 310 (1995) 18; Loizidou v Turkey (Merits) (1996) 108 ILR 443, paras 19-23, 42-6, 56, with references to earlier decisions of the Commission and the Council.
the European Court of Justice,\textsuperscript{5} and national courts.\textsuperscript{6} For example in a case concerning the 1977 Protocol to the 1972 Association Agreement between the EC and Cyprus, the European Court of Justice said:

"While the \textit{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... Article 5 cannot in any event confer on the Community the right to interfere in the internal affairs of Cyprus. The problems resulting from the \textit{de facto} partition of the island must be resolved exclusively by the Republic of Cyprus, which alone is internationally recognised."\textsuperscript{7}

4. Against this background we turn to consider the three provisions which, it is said, prevent Cyprus from becoming a member of the EU, or at any rate from doing so before Turkey also becomes a member.\textsuperscript{8}

\textbf{Article 1 paragraph 2 of the Treaty of Guarantee}

5. The Treaty of Guarantee of 16 August 1960 was concluded between Cyprus

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{5} \textit{R v Minister of Agriculture, Fisheries and Food, ex parte SP Anastasiou (Pissouri) Ltd} [1994] ECR I3087; 100 ILR 258.
\item\textsuperscript{6} In the UK see \textit{Hesperides Hotels Ltd v Aegean Turkish Holidays Ltd} [1979] AC 508 ILR 9; \textit{R v Minister of Agriculture, Fisheries and Food, ex parte SP Anastasiou (Pissouri) Ltd} (1994) 100 ILR 244; \textit{Polly Peck International plc v Nadir (No 2)} [1992] 4 All ER 769, 773; \textit{Caglar v Billingham} [1996] STC (SCD) 152, 108 ILR 510.
\item\textsuperscript{7} \textit{R v Minister of Agriculture, Fisheries and Food, ex parte SP Anastasiou (Pissouri) Ltd} [1994] ECR I3087, 3131, 3133-4; 100 ILR 258, 297-9.
\item\textsuperscript{8} In dealing with these arguments, we will also deal, to the extent they are relevant, with the positions contained in an "Opinion of Professor M.H. Mendelson QC on the Application of the Republic of Cyprus to Join the European Union", 6 June 1997 with a supplementary note of 21 July 1997. We have not thought it necessary to discuss the many factual assertions in that Opinion which are not relevant to the legal issue of eligibility. We note that most of these assertions are based on ZM Necatgli, \textit{The Cyprus Question and the Turkish Position in International Law} (2\textsuperscript{nd} edn, 1996), a work of doubtful objectivity since the author was "Attorney-General of the Turkish Republic of Northern Cyprus". We append a select bibliography of the literature dealing with the Cyprus conflict, to which we have referred in producing this Opinion.
\end{enumerate}
\end{footnotesize}
on the one part and the three guarantors, Greece, Turkey and the United Kingdom on the other part, on the day Cyprus became independent.\textsuperscript{9} Article I of the Treaty provides:

"The Republic of Cyprus undertakes to ensure the maintenance of its independence, territorial integrity and security, as well as respect for its Constitution.

It undertakes not to participate, in whole or in part, in any political or economic union with any state whatsoever. It accordingly declares prohibited any activity likely to promote, directly or indirectly, either union with any other state or partition of the island."

By Article II, the three guarantor states "taking note of the undertakings of the Republic of Cyprus set out in Article I... recognise and guarantee the independence, territorial integrity and security of the Republic of Cyprus, and also the state of affairs established by the Basic Articles of its Constitution."

6. We note that at different stages questions have been raised as to the interpretation, continuing validity or legal effect of the Treaty of Guarantee. Such issues only need to be considered if the provisions of the Treaty would be infringed by Cyprus's accession to the EC. For the reasons given here this is not the case.\textsuperscript{10}

7. One point is, however, crucial to the interpretation of Article 1 paragraph 2 of the Treaty. That provision embodies an unconditional and permanent prohibition upon partition or union with any state. It is not limited to cases of union through membership of organisations or participation in treaties to which Greece and Turkey are not members or parties. Accordingly, if Article 1 paragraph 2 is interpreted as prohibiting Cyprus from becoming a member of the EU, that prohibition is permanent and unconditional. It has nothing to do with the question whether or when Turkey may become a member of the EU.

8. The immediate precursor of Article 1 paragraph 2 was Point 22 of the "Basic Structure of the Republic of Cyprus", initialled by the Greek and Turkish Prime Ministers at Zurich on 11 February 1959. Point 22 provided:

"It shall be recognised that the total or partial union of Cyprus with any

\textsuperscript{9} UKTS 1961 No 5; 164 BFSP 388.

\textsuperscript{10} Nor have we dealt with any of the policy issues that need to be resolved in the accession negotiations; these are a matter for discussion between the EU and Cyprus.
other state, or a separatist independence for Cyprus (i.e., the partition of Cyprus into two independent states), shall be excluded.\(^{11}\)

The purpose of Point 22 was to exclude both *Enosis* and *Taksim* - union of Cyprus with Greece, or division of the island leading to the union, or close association, of one part with Greece and the other with Turkey. These were the avowed aims of the two communities during the 1950s: the compromise underlying the Zurich and London Accords of 1959 involved the abandonment of both. But the question is whether Article 1 paragraph 2 of the Treaty of Guarantee also had the effect of preventing Cyprus from ever becoming a party to a supranational regional economic agreement such as the EEC (now the EU).

### The interpretation of Article 1 paragraph 2

9. To answer that question it is necessary to apply the international law rules of the interpretation of treaties. These are authoritatively set out in Articles 31-33 of the Vienna Convention on the Law of Treaties of 1969,\(^{12}\) which relevantly provide as follows:

**Article 31 General rule of interpretation**

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. There shall be taken into account, together with the context...

   (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation...

**Article 32 Supplementary means of interpretation**

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its con-

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\(^{11}\) Text in: Conference on Cyprus. Documents signed and initialled at Lancaster House on February 19, 1959 (Cmd 679) p 9; also 164 BFSP 219.

\(^{12}\) 1155 UNTS 331. As at 31 December 1995 the Convention had 77 parties, including Cyprus, Greece and the United Kingdom, but not Turkey. By reason of Art 4 the Vienna Convention is not in force as such in relation to the Treaty of Guarantee; but many of its provisions, including Arts 31-33, are considered to reflect general international law. Cf *Re the Draft Treaty on a European Area (No 1) (Opinion 1/91)* (1991) ECR 1-6079, 6101; 100 ILR 165, 186; ICJ, *Case concerning the Gabčíkovo-Nagymaros Project (Hungary v Slovakia)* Judgment, 25 September 1997, para 47.
clusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable.

Thus the first step in any process of treaty interpretation is to consider the actual language of the treaty provision in its context and in the light of its object and purpose.

The ordinary meaning of Article 1 paragraph 2

10. The second paragraph of Article I consists of two sentences. The first contains a commitment by Cyprus itself “not to participate, in whole or in part, in any political or economic union with any state whatsoever”. The second declares that any activities likely “to promote, directly or indirectly, either union with any other state or partition of the Island” are prohibited. This is evidently aimed, inter alia, at popular agitation in favour of enosis or partition, and thus extends beyond the actions of the Government of Cyprus itself.

11. It should first be noted that the term "State" in Article I is in the singular. Moreover it is legitimate to take as the context of paragraph 2 the Constitution itself, to which paragraph 1 refers. Article 50 of the Constitution refers to “international organisations and pacts of alliance”. Article 169 of the Constitution refers to “international agreements with a foreign state or any international organisation relating to commercial matters, economic cooperation... and modus vivendi”. Article I paragraph 2 of the Treaty of Guarantee thus proceeds on the basis of a distinction between a “political or economic union with any state”, on the one hand, and “international organisations and pacts of alliance”, or economic cooperation agreements, on the other hand. It is true that a “political or economic union with any state” could be initiated by a treaty. But what is prohibited by Article I paragraph 2 is union with another state, not cooperation with a group of states in establishing a supranational organisation of a political and/or economic character.

12. It should be noted that from the earliest development of international

\[13\] See also Art 185 (2) of the 1960 Constitution, which provides that “The integral or partial union of Cyprus with any other state or the separatist independence is excluded.”
organisations in the 19th century, the term "union" was quite often used. Examples include, at the universal level, the International Telecommunications Union (1865) and the Universal Postal Union (so titled from 1878) and, at the regional level, the Western European Union (1954). Cognate terms such as "unity" and "united" are also often used, either in the title of the organisation, as in the Organisation of African Unity, or in terms of its purposes, as with Article I of the Statute of the Council of Europe. But a distinction has always been drawn between membership of multilateral or plurilateral organisations of states (whatever their title), and the political or economic union of one state with another state.

13. That distinction holds for the European Union. It is not necessary for present purposes exhaustively to analyse the European Union as it currently exists under the Treaty on European Union of 7 February 1992 (the Maastricht Treaty), or as it will become following the 1997 Intergovernmental Conference. Despite the continuing evolution of the EU, the position is clear enough. For example, the German Federal Constitutional Court has described the EU as "a supranational organisation, which is separate from the state authority of the member states", a "supranational system of competences". According to the Court, the Maastricht Treaty...

"establishes a European Union of States which is to be borne by the member states and respects their national identity. It relates to Germany's membership of supranational organisations, not membership of a European state... The exercise of sovereign authority by a union of states such as the European Union is based on powers conferred by states which remain sovereign and which, at international level, always act through their governments and thereby control the process of integration."

15 87 UNTS 103. The French text of Art I states that the aim of the Council is "de réaliser une union plus étroite entre ses Membres"; the English text speaks of "a greater unity between its Members". As far as we are aware, no objection was raised to Cyprus' membership of the Council of Europe, even during the period (1969-1974) when Greece was not a member.
16 See Conference of the Representatives of the Governments of the Member States, Draft Treaty of Amsterdam, Brussels, 19 June 1997: CONF/4001/97. For example Art F para 3 provides that "The Union shall respect the national identities of its Member States."
18 Ibid, 217.
A similar point is expressed by Article 88-1 of the French Constitution, which describes the EC and the EU as "established by states having freely chosen, pursuant to the constitutive treaties of those entities, to exercise certain of their powers in common". The French Constitutional Council had described the EU as "an independent legal order which, although integrated into the legal systems of the different Member states of the Communities, does not form part of the institutional order of the French Republic".  

This recalls the well-known description of the EEC, given by the European Court of Justice in 1964, as a distinct "legal system which... became an integral part of the legal systems of the member states". The European Court has never suggested that the legal system of each member state has become an integral part of the legal systems of the other members.

Rather, what each of the descriptions quoted in the previous paragraph seeks to convey is that, although the EU is a distinct community with its own legal system and an existence separate from that of its member states, and although it aspires to a "more perfect union", it is a legal system of a transnational character in which each member state participates. The member states have transferred certain defined elements of governmental authority to the EU, not to each other. The law of the EU is part of the laws of the member states, but the laws of the member states remain distinct from each other, each controlled by its own constitutional system. The EU is not a state, and it is inaccurate to describe any individual member state as economically or politically in union with other individual member states. In the language of the French Constitutional Council, no member state "forms part of the institutional order" of any other member state. Rather they are all linked in and through the commu-

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22 It is worth recalling that the Council of Europe too provides for "a greater unity" ("une union plus étroite") between its members: see note 15 above.
nity of the EU.23

15. This is a very different situation than the one envisaged and prohibited by Article 1 paragraph 2 of the Treaty of Guarantee, which was concerned to prevent Cyprus, or any part of Cyprus, becoming united with another particular state. In fact, of course, the concern was to prevent any form of political or economic union with either Greece or Turkey. As Professor Lavroff put it at the time: "On voit bien ici que la raison d’être des accords du 19 février 1959 est de couper court aux prétentions émises par la Grèce et la Turquie..." 24 Although for form’s sake these two states were not mentioned, it was precisely the formation of a statal union with either, in whole or in part, that was excluded. It was such a union which the two communities unsuccessfully sought to achieve in the conflicts of the 1950s. On the basis of the ordinary meaning to be given to the first sentence of Article 1 paragraph 2 in its context and in the light of its object and purpose, membership of the EU does not involve "political or economic union with any state".

16. It might be argued that the effect of EU membership is indirectly to promote union with any State, in that Cyprus by reason of its small size and population would inevitably tend to be dominated indirectly by other member states through the medium of the EU, and that this is contrary to the second sentence of paragraph 2.25 The simple answer, however, is that the prohibited result under both sentences of paragraph 2 is “union with any other state or partition of the island”. The position in the EU, both formally and in substance, is that the member states exercise collective control over the institutions of the EU, which in turn generates the rules and policies which member states must apply. There is no analogy whatsoever to the situation described by Judge Anzilotti in his decisive opinion in the Austro-German Customs Union case, where...

“In view of the great disproportion in the economic strengths of Germany and Austria... Austria’s economic life would sooner or later become depen-

23 By the same token EU citizenship is an additional citizenship conferred by the Maastricht Treaty on the citizens of member states. Each member state continues to determine who are its citizens; EU citizenship is complementary. Moreover, although citizens of EU member states possess certain rights by virtue of their EU citizenship, they do not thereby become citizens of other EU states. Thus, for example, German citizenship remains quite distinct from Greek citizenship, and vice versa.


25 This argument is briefly made in the Mendelson Opinion, 36-7.

26 PCIJ Ser A/B No 41 (1931) at 71-2. See further below, para 23.
dent upon Germany’s... and its effect would therefore be to conform and strengthen the movement towards the incorporation of Austria within a single big German state”.26

By contrast, Cyprus as a member of an organisation such as the European Union with between 15 and 21 members would be less dependent on any single state.

Subsequent practice in the application of Article 1 paragraph 2

17. Under Article 31 (3) (b) of the Vienna Convention, the subsequent practice of the parties to a treaty is to be taken into account if it establishes their agreement as to the interpretation of the treaty. Subsequent practice in the application of the Treaty of Guarantee suggests that it has not been regarded by the parties as preventing Cyprus from entering into treaties for closer economic and political relations with groups of states. Perhaps the best example is the Association Agreement between the EEC and Cyprus, signed in Brussels on 19 December 1972.27 The Agreement envisages a customs union between Cyprus and the EEC (Article 2 (3)), and adopts a principle of non-discrimination as between nationals or companies of member states, and also as between nationals or companies of Cyprus (Article 5). Objections to the conclusion of the Agreement were made in 1972 from the Turkish Cypriot side, but the EEC disregarded these on the ground that they were internal matters for Cyprus.28 Turkey, for its part, expressed concern over the possibility of discrimination against the Turkish community in Cyprus, a concern addressed by Article 5 of the Agreement. Neither the United Kingdom nor Turkey argued that the conclusion of the Association Agreement was a breach of Article 1 paragraph 2 of the Treaty of Guarantee: no one suggested that the Agreement indirectly created or envisaged an economic union with any existing member of the EEC.29 This example is all the more significant in that, as Professor Toulemon put it, such an association is a “stage vers l’adhésion”, a probationary step in the direction of membership.30

26 PCIJ Ser A/B No 41 (1931) at 71-2. See further below, para 23.
27 OJEC No L 133/1 (1973). There have been 6 amendments to the Agreement, most recently in 1987 (OJEC No L 393/13 (1987) and 1995 (OJEC No L 278 (1995)). The 1987 Protocol initiated the second stage of association, with a view to a complete customs union within 15 years (Art 31).
28 See above, para 3.
29 The Turkish objections in 1972 are summarized in Europe No 986, 16 February 1972. They do not rely on Article 1 of the Treaty of Guarantee.
The travaux préparatoires of Article 1 paragraph 2

18. Under Article 32 of the Vienna Convention, regard can always be had to the travaux préparatoires of a treaty in order to confirm its interpretation. In fact, agreement on Point 22, the precursor of Article 1 paragraph 2, was reached by the Greek and Turkish Foreign Ministers in Zurich on 11 February 1959 and was subsequently confirmed in discussions with the British Government. The two Foreign Ministers reported their agreement to the British Foreign Secretary on 12 February 1959, at which meeting the following exchange took place:

"The Secretary of State... turned to the Zürich documents beginning with the Treaty of Guarantee. Was the second paragraph of Article 1 intended to preclude Cypriot membership of all international associations, as for example the Free Trade Area if that ever came into existence.

_M. Zorlu_ explained that the paragraph was intended to prohibit partition and Enosis (whether with Greece or with any other country). _M. Averoff_ agreed; he explained that the wording was specifically designed to exclude possible Greek devices in the direction of Enosis, such as a personal union of Cyprus and Greece under the Greek Crown. _M. Zorlu_ and _M. Averoff_ both made it clear that there would be no objection to Cypriot membership of international associations of which both Greece and Turkey were members; eg, the Postal Union and any Free Trade Area. Nor did they exclude either Commonwealth membership for Cyprus or membership of the Sterling Area. They would, indeed, welcome Commonwealth membership... Article 1 of the Treaty of Guarantee could be amended if necessary to make clear that neither Commonwealth nor Sterling Area membership were excluded. But the final decision on such membership would, of course, rest with the Cypriots themselves."

Evidently the Foreign Secretary accepted this explanation and no amendment to Article 1 was found necessary.

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31 "Record of a Meeting Held at the Foreign Office at 4 p.m. on Thursday, February 12, 1959", FO 371/144640, p2. The reference in this passage to "membership of international associations of which both Greece and Turkey were members" was evidently illustrative, not exclusive; in the next sentence the two spokesmen went on to refer to the Commonwealth and the Sterling Area, yet Greece and Turkey have never been a member of either. In fact none of the texts limit Cyprus to membership of organisations of which both Greece and Turkey are members.

32 By contrast an additional article (Art 3) was added to the Treaty of Guarantee following the meeting of 12 February 1959 to ensure that the British bases in Cyprus were accepted and guaranteed by both Greece and Turkey: FO 371/144640, P 3.
19. The matter was raised again in the London Joint Committee on Cyprus on 19 October 1959. The Committee, which consisted of Greek Cypriot and Turkish Cypriot representatives as well as representatives of the United Kingdom, Greece and Turkey, was responsible for finalising the various texts in accordance with the provisions agreed on by the three states at Zurich and London. At the 26th meeting of the Committee, the following exchange took place between the British chairman and the senior Greek Cypriot representative:

"SIR KNOX HELM then asked if, apart from the proposed Article V Mr Rossides accepted the draft text.

MR ROSSIDES replied affirmatively. He then asked the meaning of Article I paragraph 2. He presumed it referred to union with Greece or Turkey, but it seemed rather sweeping, as he supposed that Cyprus could for instance join an economic organisation or the Commonwealth.

SIR KNOX HELM observed that that was coming near to re-examining the wording of the Treaty, and that it was perhaps better not to start to try to interpret the various Articles.

M. ROUMOS said he thought they could all assure Mr Rossides and put on record that it was certainly not intended that Cyprus should be precluded from membership of the Free Trade Area or multilateral organisations. What was meant was that Cyprus should not be politically united with Greece or Turkey, or even economically in the narrow sense of customs union; but that could not really be said in a Treaty.

M. BAYULKEN confirmed that the wording did not refer to any international organisations, such as FAO, GATT, etc.

MR. ROSSIDES thanked M. Roumos and M. Bayulken for their explanation, and then said that he must reply to Sir Knox Helm’s remark that he was trying to open discussion of the Treaty. When starting, he had said that he did not dispute it, and had asked for elucidation... His Delegation had received a constructive reply from the Greeks and Turks and had thought it proper to raise the issue."33

20. Thus the Greek and Turkish negotiators of the Treaty assured first the British Government and subsequently the Cypriot representatives that Article 1

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33 London Committee on Cyprus, Corrected Minutes of the 26th Meeting of the Committee of Deputies, LC (MD), 19 October 1959, p 6.
paragraph 2 of the Treaty of Guarantee would not prevent Cyprus becoming a party to international organisations including free trade areas, common currency areas, etc. Its concern was to prevent the two rival aims for which the opposing forces in Cyprus had been fighting during the 1950s, enosis or partition leading to de facto union with another state, together with any indirect form of arrangement which might achieve the same end, such as a "narrow... customs union" with Greece or Turkey. The travaux of Article 1 paragraph 2 confirm that it means exactly what it says, that the use of the singular term "state" is deliberate, and that it is not addressed at international organisations such as the EU.

**The attitude of the international community to the Cyprus application for membership**

21. This interpretation has also received support from the international community more widely. Cyprus applied for EC membership on 3 July 1990. In its Opinion on the application, the European Commission stated:

“...When presenting its application for accession, the Government of the Republic of Cyprus, recognised by the European Community and its member states as the only legitimate government representing the Cypriot people, addressed the Community on behalf of the whole of the island. The application was strongly challenged by the de facto authorities of the northern part of the island. While acknowledging that it would be in the interest of the Turkish Cypriot community to form part of the European Community, these authorities rejected the right of the Government of the Republic of Cyprus to speak for the whole of Cyprus in such an approach. They based their position on the Guarantee Treaty and the wording of the 1960 Constitution, which grants the President and Vice-President (a Turkish Cypriot) a veto over any foreign policy decision, particularly any decision on joining an international organisation or alliance that does not count both Greece and Turkey among its members. They consider, accordingly, that in the prevailing circumstances the Community should not take any on the application. The Community, however, following the logic of its established position, which is consistent with that of the United Nations where the legitimacy of the Government of the Republic of Cyprus and non-recognition of the ‘Turkish Republic of Northern Cyprus’ are concerned, felt that the application was admissible and initiated the procedures laid down by the Treaties in order to examine it.”

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The Commission went on to deal with economic and other issues relating to possible accession, reaching a broadly favourable conclusion. For present purposes, however, what matters is that the Commission confirmed, and member states subsequently endorsed, the view that Cyprus is "eligible for membership". That view has since been strongly reaffirmed.

22. The EU’s attitude cannot be explained on the basis that from its point of view Cyprus’s accession to the EU would prevail over its treaty obligations to a third state, Turkey. On the contrary the EU has been careful to preserve existing treaty rights and obligations, as is shown by Article 234 of the EC Treaty, which expressly preserves such rights and obligations. This concern has been taken fully into consideration in the subsequent adhesion treaties, and it is fully consistent with the law of treaties. The EU’s position is, evidently, that Cyprus is not prohibited by its existing treaty obligations either from association with or membership of the Union.

23. Reference may also be made to the position of the United Nations, as expressed by the Security Council in its consideration of the Cyprus question since 1990. The most recent resolution of the Security Council on Cyprus contains the following paragraphs:

"11. Reaffirms its position that a Cyprus settlement must be based on a State of Cyprus with a single sovereignty and international personality and a single citizenship, with its independence and territorial integrity safeguarded, and comprising two politically equal communities as described in the relevant Security Council resolutions, in a bi-communal and bi-zonal federation, and that such a settlement must exclude union in whole or in part with any other country or any form of partition or secession..."
14. **Reaffirms** that the decision of the European Union concerning the opening of accession negotiations with Cyprus is an important development that should facilitate an overall settlement.\(^39\)

These paragraphs also occur in earlier resolutions. The first paragraph has been repeated in successive resolutions since 1990;\(^40\) the second was also contained in SC Resolution 1092 of 23 December 1996. The conjunction of the two paragraphs makes it quite clear that the Security Council regards the accession of Cyprus to the EU as plainly consistent with a renewed commitment to avoid "union in whole or in part with any other country".

**Austria and the EU – An analogous case of a guarantee against political union**

24. The question of the accession of Cyprus to the EU has common features, from a legal point of view, with the earlier question of the accession of Austria.\(^41\) Under Article 4 (1) of the Austrian State Treaty of 1955, Austria undertook not to "enter into political or economic union with Germany in any form whatever". Article 4 paragraph 2 amplified that guarantee against another *Anschluss*, in the following terms:

"In order to prevent such union Austria shall not conclude any agreement with Germany, nor do any measures likely, directly or indirectly, to promote political or economic union with Germany, or to impair its territorial integrity or political or economic independence. Austria further undertakes to prevent within its territory any act likely, directly or indirectly, to promote such union and shall prevent the existence, resurgence and activities of any organisations having as their aim political or economic union with Germany, and pan-German propaganda in favour of union with Germany."\(^42\)

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\(^41\) The close parallel between the two cases has been noted in the literature: see JH Wolfe, (1984) *Proc ASIL* 111.

\(^42\) UNTS No 2949 (1955). Art 4 is even more detailed and explicit than were Art 88 of the Treaty of St Germain of 1919, or Geneva Protocol No 1 of 4 October 1922, which were the subject of the decision of the Permanent Court of International Justice in the *Austro-German Customs Union Case* PCIJ Ser A/B No 41 (1931). The majority judgment in that case concluded that the customs union constituted a "special regime" granting "exclusive advantages calculated to threaten [Austria's] independence" contrary to the Protocol of 1922 (at p. 52). Judge Anzilotti, who made up the slender majority in that case, disagreed. In his separate opinion he expressed the view that it was the fact of entering into an exclusive union with Germany (as distinct from some other state or states) which constituted the actual threat to Austrian independence, having regard to the strong political movement for Anschluss: at pp 68-72.
25. Although the matter was discussed following Austria’s application in 1989 for EC membership, the view taken was that membership was in no way inconsistent with Article 4 paragraph 2 of the State Treaty. Of the parties to the State Treaty, the USSR initially objected to EU membership, but it did so primarily because EU membership was inconsistent with Austrian neutrality, a subject deliberately not dealt with in the State Treaty. As to the issue of indirect union with Germany, the position of the Austrian Government was that Article 4 was “irrelevant”. The EC Commission evidently agreed: in its lengthy report on the Austrian application, it too regarded the State Treaty as irrelevant and focussed exclusively on the issue of neutrality.

26. Austrian and foreign commentators equally dismissed the argument. For example, Lernhardt wrote that Article 4...

"clearly refers to the bilateral relationship between Austria and Germany. Membership in an association of states could at best be affected by the article if this association were entirely dominated by Germany. In the EC, Germany is only one of twelve member states, without coming even closely to having a majority of votes. With complete justification each of the present EC members would strictly reject any interpretation of its accession as ‘Anschluss with Germany’.”

As early as 1963, Ermacora came to the conclusion that the accession to the EEC would not contradict Article 4 of the State Treaty: in his view the prohibition of "Anschluß" related to union with a state, not to a supranational community. Similar conclusions were drawn by Seidl-Hohenveldern with regard to the pro-

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43 Cyprus is under no equivalent obligation of neutrality, under the Treaty of Guarantee or otherwise.


47 F Ermacora, Akademische Vereingung für Außenpolitik, Universität Innsbruck, Österreich und die EWG. Das Salzburger Expertengespräch (1963) 1-58.
posed association agreement. On the question whether EU membership would amount indirectly to union with Germany, the question was whether German influence or control over the EEC (now EU) amounted to domination, so as to produce indirectly what Article 4 directly prohibited. Again, the unanimous answer was that it would not: on the contrary, the exclusion of Austria from the Common Market, it was concluded, would weaken the economic survival capacity of Austria and, consequently, undermine the objective of Article 4 (2) of the State Treaty. In the event, Austria was admitted to the EU in 1994, without Russian objection and with no amendment having been made to Article 4 of the State Treaty.

27. Similar conclusions apply to the question of the compatibility of an accession of the Republic of Cyprus to the EU. No single member state of the EU has or claims to have such an influence in either a formal or a material sense over the decision-making procedure of the EU that it could be seen as dominating the EU. Hence, accession of the Republic of Cyprus to the European Union cannot be qualified as an “economic or political union with any State whatsoever”.

**Article 50 of the 1960 Constitution**

28. We turn to the arguments relating to the Constitution of 1960. Article 50

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49 See e.g. HF Köck, Ist ein EWG-Beitritt Österreichs zulässig? (Orac, Vienna, 1987); see also Azizi (1989) 270.

50 The practice of the various parties to the State Treaty supported these conclusions. No objections were made when Austria and Germany both became members of economic and political international organisations such as GATT or OECD, or when Austria concluded the Free Trade Agreement with the EEC in 1972 (BGBI. Nr.446/1972;Azizi (1989)/268).

51 In a Supplementary Note of 21 July 1997, Professor Mendelson seeks to explain the Austrian case by arguing that the Soviet Union consented to release Austria from the constraints of Article 4 of the State Treaty on entry into the EU. This ignores the fact that neither the Soviet Union, nor any other state, suggested at the time that Art IV prevented Austria’s entry, notwithstanding that the possibility was expressly considered, and dismissed, in the literature. The Soviet Union was concerned with Austrian neutrality, not with Art IV.
of the Constitution provides, in part, as follows:

"1. The President and the Vice-President of the Republic, separately or conjointly, shall have the right of final veto on any law or decision of the House of Representatives or any part thereof concerning -

(a) foreign affairs, except the participation of the Republic in international organisations and pacts of alliance in which the Kingdom of Greece and the Republic of Turkey both participate...

2. The above right of veto may be exercised either against the whole of a law or decision or against any part thereof, and in the latter case such law or decision shall be returned to the House of Representatives for a decision whether the remaining part thereof will be submitted, under the relevant provisions of this Constitution, for promulgation."

Article 50 defines "foreign affairs" broadly, including "the conclusion of international treaties, conventions and agreements". Under Articles 50 (3) and 52, the right of veto must be exercised within 15 days of the transmission of the law or decision.\(^{52}\)

29. As a matter of form, we note that Article 50 does not allow the President or Vice-President to veto a law or decision in advance of its consideration by the House of Representatives. More important, however, are certain matters of fact. The first Vice-President of the Republic was Mr Kutchuk, who was elected under Article 39 of the Constitution in December 1959. There has never been another election for the Vice-Presidency.\(^{53}\) From 1963 constitutional difficulties arose, and the Turkish Cypriot office holders under the Constitution progressively withdrew from participation. Moreover since the Turkish invasion of 1974 the leadership of the Turkish Cypriot community has been seeking the partition of Cyprus and the establishment of a separate Turkish Cypriot state.\(^{54}\) Accordingly

\(^{52}\) These provisions give effect to Point 8 of the "Basic Structure of the Republic of Cyprus" of 1959. Art 57(3) of the Constitution also gives a veto in relation to decisions of the Council of Ministers on these matters, to be exercised within 4 days.

\(^{53}\) Under Art 43, the President and Vice-President have a 5-year term, but they continue to hold office "until the next elected President and Vice-President are invested". Under Art 44, their office becomes vacant on death, resignation or "(d) upon... such absence, other than temporary, as would prevent him to perform effectively his duties". Mr Kutchuk ceased to perform his duties in 1963, and died in 1984. Thus there is no longer a person holding the office of Vice-President.

\(^{54}\) For our purposes it is not necessary to take sides on the controversies that arose between the two communities over constitutioonal issues in the period before 1974 (but cf Mendelson Opinion, 39 where a different approach is taken). It is sufficient to note the facts that (a) there is currently no Vice-President; (b) the present leadership of the Turkish Cypriot community is seeking partition and independence, contrary to the Constitution and the Treaty of Guarantee.
the position in fact is that the provisions of the 1960 Constitution dealing with the Vice-Presidency, as with other provisions for Turkish Cypriot representation in the Government of Cyprus, are presently inoperative. Despite this, as we have noted, the international community continues to recognise that the Government of Cyprus has the normal capacity to represent Cyprus and to conduct its foreign affairs.

30. The question is whether, in these circumstances, Cyprus is prevented from validly acceding to the EU. The answer, in our opinion, is clearly no. Article 50 of the Constitution recognises that Cyprus has the normal capacity of a state to enter into "international treaties, conventions and agreements" and to become a member of all kinds of international organisations and alliances. It provides a procedural veto on such decisions, the veto to be cast by a Vice-President elected and effectively performing his functions under the Constitution. In the absence of a veto duly cast in accordance with Article 50, the decision to accede is valid and effective.

31. Reference should be made here to Articles 27 and 46 of the Vienna Convention on the Law of Treaties. Article 27 provides:

"A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46."

Article 46 in turn provides:

"1. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.

2. A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith."

Thus the general rule is that a breach of internal law, including constitutional law, is no excuse for failure to comply with international obligations. Moreover such a breach can only be relied upon as a basis for challenging the validity of a treaty in quite exceptional circumstances. Only the state whose constitutional rules have been breached may rely on the breach, and it can only do so in a case of manifest violation. The rule under general international law may be even stricter.55

55 See Case concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Jurisdiction and Admissibility) ICJ Rep 1994 p 112,122.
32. Thus even if it could be argued that the accession of Cyprus to the EU would be against the expressed wishes of the Turkish community, the fact remains that, under Article 50, the veto power is vested not in that community as such but in a Vice-President duly elected and effectively performing his functions under the Constitution. At present there is no such person, and Article 50 is simply inapplicable. In any event, in present circumstances an alleged violation of Article 50 would not be “manifest”. This was the position taken by the EC when the Association Agreement of 1972 was concluded, and again in its consideration of Cyprus’s application for membership. It was confirmed by the European Court of Justice in 1994. It has been the consistent position of the United Nations, for example in the periodic resolutions extending the mandate of UNFICYP, which resolutions have been based expressly on the agreement of the Government of the Republic of Cyprus without any reference to Article 50 of the Constitution.

33. The 1960 Constitution is no doubt unusual in that the three guarantor states have a legally recognised interest in its implementation. But neither the Constitution nor the Treaty of Guarantee give the guarantor states themselves any veto over decisions by the Government of the Republic in the field of foreign affairs, and specifically over decisions to apply for membership of international organisations. The veto power is vested in certain high officials of the Government of Cyprus itself, and that power cannot be transformed into a wholly different and unexpressed veto power to be exercised by the present leadership of the Turkish Cypriots which is seeking to secede from Cyprus (contrary both to the Constitution and the Treaty of Guarantee), let alone by one of the guarantor powers itself. The position in present circumstances is that no Vice-President exists to exercise the veto, and in the absence of a validly exercised veto in accordance with Article 50, the constitutional authority of the Government to carry on the foreign affairs of Cyprus is unquestionable.

34. That this is the case has been widely recognised. If the argument drawn from Article 50 were valid, this would mean that no treaty concluded by the Republic of Cyprus since 1963 could be valid. This is obviously contradicted by

56 See above, para 17.
57 See above, para 21.
58 See above, para 3.
59 From the first such resolution (SC Res 186 (1964), 4 March 1964) to the most recent (SC Res 1092 (1966), 23 December 1996, preambular para 3).
the fact that Cyprus has entered into hundreds of treaties since that date with virtually all states in the world, and their validity has never been challenged despite the impossibility of applying Article 50 of the Constitution.

**Article 170 of the 1960 Constitution**

35. Article 170 (1) of the 1960 Constitution is also invoked. It provides as follows:

> "1. The Republic shall, by agreement on appropriate terms, accord most-favoured-nation treatment to the Kingdom of Greece, the Republic of Turkey and the United Kingdom of Great Britain and Northern Ireland for all agreements whatever their nature may be."

It is said that, in the event of its accession to the EU, Cyprus will not be in a position to comply with Article 170 so far as Turkey is concerned. But this ignores, inter alia, the language of Article 170 itself. Most-favoured nation ("mfn") treatment has only to be extended "by agreement on appropriate terms". In common with other most-favoured-nation clauses, Article 170 does not prohibit Cyprus from entering into agreements which confer benefits on third states. It merely requires that treatment extended to the most-favoured-nation also be extended to each of the guarantors. Moreover, unlike most mfn clauses in treaties, the unilateral undertaking in Article 170 is conditional. Mfn treatment was only to be extended under a subsequent agreement with Cyprus: it was to be a matter for the parties to reach agreement in particular "on appropriate terms" for granting such treatment.

36. It is understood that Turkey has never claimed the benefit of Article 170 of the Constitution. Moreover it is well understood, both among EU members and third states, that entry to the EU does not trigger the general mfn obligations

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60 Art 170 (2) exempts from the mfn requirement the provisions concerning British bases and military facilities in Cyprus. It reflects point 23 of the "Basic Structure of the Republic of Cyprus" (1959), and Annex F, Part II of the Treaty of Establishment. The Mendelson Opinion, p 38 cites a discussion at the London meeting of 12 February 1959, where it was said that "The intention was to exclude more favourable bilateral agreements between Cyprus and countries other than the Three Powers, and also to avoid the possibility of either Greece or Turkey securing a more favourable economic position in Cyprus than the other - of Greece, for example, establishing a kind of economic enosis." The key point about this passage is its emphasis on bilateral agreements, whether with Greece or third states. Nor does Professor Mendelson discuss the crucial phrase in Article 170, "by agreement on appropriate terms".
of the entrant to third states. This is consistent with Article XXIV (5) of the GATT, and it is a position which Turkey itself, as a WTO member and an applicant for EU membership, must be taken to have accepted. Indeed, such a position has been expressly accepted in bilateral trade agreements entered into by Cyprus with both Turkey and Greece. The Trade Agreement between Cyprus and Turkey of 9 November 1963 provides in Article 1 for mfn treatment to be extended to duties or charges of any kind on importation of the goods of either country to the other. Article 1 further provides that:

“The above most-favoured-nation treatment shall not apply:

... (c) to privileges, exemptions from taxes (fees), preferences or concessions which each of the Contracting countries has granted or will grant in the future to other countries on account of a present or future participation, entry or association by them to a customs union, a free trade area or an economic community.”

Article 1 thus expressly recognises that the mfn obligation in respect of taxes or charges on import of goods is not triggered by more favourable treatment extended by either state to its partners in a free trade area or economic community. The economic community that was envisaged at the time was, of course, the EEC. In the light of this Agreement, as well as of the network of relations created under the association agreements between both Cyprus and Turkey and the EU, it is clear that Article 170 of the Constitution would not require any more favourable treatment to be extended to Turkey in the event of Cyprus becoming an EU member.

37. It should be noted in passing that Article 1 of the 1963 Trade Agreement between Cyprus and Turkey expressly envisages that Cyprus will or may enter an economic community such as the EEC. This contradicts the argument now made that Article 1 paragraph 2 of the Treaty of Guarantee permanently prevents such entry.

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62 See also the identically phrased Trade Agreement between Cyprus and Greece of 24 August 1962. The Agreements are still in force, neither having been denounced under their Art II.
Conclusions

38. It has not been necessary in this opinion to deal with any questions that would arise if Article 1 of the Treaty of Guarantee, or Articles 50 or 170 of the Constitution, were to be interpreted so as to preclude Cyprus from acceding to the EU. Even on that assumption, it would be very doubtful whether Turkey could raise any objection, because of its own breaches of the Treaty of Guarantee. But in our opinion the meaning of the three provisions is clear. Thus questions of estoppel, or of the application of the principle that a party in breach of a treaty provision may not itself rely on it, simply do not arise.

39. For the reasons we have given, there is no basis for the view that Cyprus is prevented by the Treaty of Guarantee, or by any provisions of the Constitution of 1960, from becoming a member of the EU.


64 Sometimes formulated in the following terms: nullus commodum capere de sua injuria propria.
The Eligibility of the Republic of Cyprus for EU Membership

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17 November 2001

Summary

1. In an Opinion of 24 September 1997 which was circulated as a Security Council and General Assembly document, the three undersigned advised that Cyprus was eligible, as a matter of international law, to become a member of the European Union, and that its becoming a member would not violate any existing treaty obligation of Cyprus.

2. In particular we advised that:

- Article 1 paragraph 2 of the Treaty of Guarantee does not prohibit Cyprus from becoming a member of a regional economic organisation such as the European Union. Membership of the EU would not constitute participation "in any political or economic union with any state whatsoever" within the meaning of Article 1 paragraph 2.

- Article 50 of the Constitution of 1960 (which requires participation by the Vice-President in treaty-making) could not subsequently be invoked by Cyprus as a basis for invalidating its consent to be bound by the EU treaties.

- Likewise, Article 170 of the Constitution (which requires most-favoured-nation treatment for Turkey in respect of certain treaties of Cyprus) does not constitute a barrier to Cyprus’ entry, for a number of reasons. Perhaps the most important of these is that EC membership is not regarded as triggering general most-favoured-nation obligations, under the GATT/WTO or otherwise. Turkey as a GATT/WTO member and applicant for EU member-

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ship is well aware of this practice. Thus Article 170 would not require Cyprus to extend any additional benefits of EU membership to Turkey.

This advice conforms with what is now the generally accepted position. The European Union itself has acted on the same basis, and accession negotiations have been in progress for some time.

3. By a letter of 5 October 2001, the Permanent Representative of Turkey to the United Nations forwarded a Further Opinion by Professor Maurice Mendelson QC, dated 12 September 2001. The reasons given by Professor Mendelson for adhering to his earlier view that Cyprus’s admission to the EU would be "illegal" do not, however, involve any new arguments supporting that conclusion. We set out below the reasons for maintaining – as the EU itself maintains – that there is no legal impediment to the admission of Cyprus.

The Treaty of Guarantee

4. By Article I (2) of the Treaty of Guarantee, Cyprus undertook "not to participate, in whole or in part, in any political or economic union with any state whatever or partition of the island". By Article II (2), Greece, Turkey and the United Kingdom agreed "to prohibit, so far as concerns them, any activity aimed at promoting, directly or indirectly, either union of Cyprus with any other state or partition of the Island". The question is whether the accession of Cyprus to the EU would involve “union of Cyprus with any other state”.

5. In our earlier opinion, we concluded that Articles I (2) and II (2) are irrelevant to Cyprus’ EU eligibility, for the following reasons:

(a) On their literal interpretation, these Articles are not concerned with membership in regional economic associations but union with another state (“with any state whatever”). The term “state” was deliberately used in the singular.

(b) The purpose of these Articles was to prevent the union of Cyprus, or of any part of Cyprus, with Greece or Turkey, as well as the partition of the Island. It was not to prevent Cyprus entering international organisations, including regional economic unions such as the European Coal and Steel Community (ECSC), the European Free Trade Area (EFTA) or, now, the EU.

(c) This is confirmed by the travaux of the Treaty of Guarantee. As the Turkish delegate at the London Joint Committee assured the other negotiators, by Article I (2)...
"it was certainly not intended that Cyprus should be precluded from membership of the [European] Free Trade Area or multilateral organisations. What was meant was that Cyprus should not be politically united with Greece or Turkey, or even economically in the narrow sense of customs union; but that could not really be said in a Treaty."  

The use of the singular term "any other state" was clearly deliberate. A contrast was intended to be drawn between multilateral arrangements, including economic organisations and free trade areas, on the one hand, and political and/or economic unions with a single state (in fact, Greece or Turkey), on the other hand.

(d) This interpretation is further confirmed by the terms of the Constitution of 1960, which is expressly referred to in the Treaty of Guarantee. Article 185 (2) of the Constitution also uses the singular "any other state" in the prohibition on "integral or partial union". Articles 50 and 169 refer to and permit Cyprus to become a party to international organisations and economic cooperation agreements. There is a clear contrast between multilateral international organisations and economic cooperation with a number of states, on the one hand, and the union of Cyprus with any particular state, on the other hand.

(e) In any event, arguments based on Articles I and II of the Treaty of Guarantee misconceive the character of the European Union. The EU is not a state. Membership of the EU does not entail member states uniting with each other on any individual basis. Under the EU, France is not united with Germany, nor Britain with Sweden. Cyprus as a member of the EU would not be united with any other particular state. Yet it is only Cyprus' union with any other particular state which Articles I and II of the Treaty of Guarantee prohibit. In this context it should be stressed that according to Article 2 TEU, the principle of subsidiarity limits the competences of the EU so that one cannot speak of a "common law-making process" with an all-encompassing scope. Furthermore the EU has to respect the national identities of its member states according to Article 6 (3) TEU.

3 London Committee on Cyprus, Corrected Minutes of the 26th Meeting of the Committee of Deputies, LC (MD), 19 October 1959, p 6.
4 Mendelson, Further Opinion, para. 24.
(f) Our interpretation of Articles I and II is supported by the subsequent practice of the parties to the Treaty of Guarantee. Thus neither the United Kingdom nor Turkey objected on that ground when Cyprus entered into a customs union with the EEC in 1972.\(^5\) Turkey's concerns at possible discrimination against Turkish Cypriots were addressed by Article 5 of the Association Agreement of 19 December 1972.\(^6\) The situation of Cyprus under the Association Agreement and its Protocols was subsequently addressed by the European Court of Justice in 1994, in terms which cast no doubt upon the legality of the situation so far as the EU is concerned.\(^7\)

(g) This interpretation is also supported at the international level. The European Commission has accepted that Cyprus is eligible for membership,\(^8\) and the member states have so agreed, most recently in the agreement for EU enlargement reached in conjunction with the Treaty of Nice.\(^9\) The Security Council has affirmed that a Cyprus settlement "must exclude union in whole or in part with any other country or any form of partition or secession" and has welcomed "the decision of the European Union concerning the opening of accession negotiations with Cyprus" as "an important development that should facilitate an overall settlement".\(^10\) Obviously the Security Council does not regard the accession negotiations as a breach of an essential condition of a Cyprus settlement.

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5 OJEC No L 133/1 (1973). There have been 6 amendments to the Agreement, most recently in 1987 (OJEC No L 393/13 (1987)) and 1995 (OJEC No L 278 (1995)). The 1987 Protocol initiated the second stage of association, with a view to a complete customs union within 15 years (Art. 31).

6 The Turkish objections in 1972 are summarised in Europe No 986, 16 February 1972. As Professor Mendelson recognises, Turkey did not rely on Article I of the Treaty of Guarantee. He argues that Turkey's failure to object should be overlooked because the 1972 Agreement was "a relatively modest affair": Further Opinion, para. 28. But this cannot be said as to the 1987 Protocol; and anyway, even in 1972, there was a customs union which, in his view, was prohibited by the Treaty of Guarantee.


(h) In addition we noted that Austria joined the EU in 1995, despite the prohibition in Article 4 of the Austrian State Treaty of 1955 against its entering into "political or economic union with Germany in any form whatever". Neither the European Commission nor any existing member state argued that Article 4 of the Austrian State Treaty prohibited Austrian membership of the EU. Nor did the Soviet Union (or the Russian Federation, after the break-up of the USSR); its concern was with the neutrality of Austria.

6. Thus the literal terms of Articles I and II of the Treaty of Guarantee, interpreted in the light of their object and purpose, support our conclusion. So too does the negotiating history of the Treaty, the subsequent practice of the parties, and the unanimous Opinion of the EU members as well as the European Commission. Among states which are not members of the EU, only Turkey seems to take the opposite position. Certainly the Security Council does not, despite its continuing preoccupation with the situation in Cyprus and with the preconditions for a settlement of the Cyprus question which "must exclude union in whole or in part with any other country or any form of partition or secession".\footnote{Security Council Res. 1251, 29 June 1999, para. 11.}

7. In opposition to this virtually unanimous view of Cyprus' eligibility for membership, notwithstanding the Treaty of Guarantee, Professor Mendelson makes a number of arguments in his most recent opinion. These include the following:

(a) Applying the principle of literal interpretation, he argues that because the EU is "an economic union, as well as (increasingly) a form of political union", therefore membership of the EU is prohibited.\footnote{Mendelson, Further Opinion, para. 10.} But literal interpretation requires one to interpret all the words, not just some of them, and to interpret all the words together in their context. The question is not whether the EU is an economic union, but whether a state which joins the EU is entering into an economic union "with another state" within the meaning of the Treaty of Guarantee.

(b) He argues that "in legal drafting in English" (and in French) the singular includes the plural, so that Article I should be read as prohibiting economic union "with any state or states".\footnote{Mendelson, Further Opinion, para. 13.} But not even under the Acts Interpretation
Act 1889 (UK) is there a rule that the singular includes the plural; it depends on the context. And of course we are dealing with a treaty, albeit one drafted in the English language. There was a reason for the emphasis on the singular: the concern was political or economic union of Cyprus with a single state (i.e., Greece) or of part of Cyprus with another state (Turkey). It was not a concern with such things as the European Free Trade Agreement.

(c) He argues that the veto provisions in Article 50 of the Constitution show that "international organisations are covered by the [Treaty of Guarantee] and, if both the two named States are not members of the organisation, by the veto". This confuses the veto powers exercisable by an elected Turkish Cypriot Vice-President and the rights of the three guarantor states under Article I of the Treaty of Guarantee. If a treaty involves political or economic union with another state, Cyprus may not enter into that treaty, even with the consent of the Vice-President. Moreover whether Turkey and/or Greece are parties to such a treaty is irrelevant in terms of the application of Articles I and II of the Treaty of Guarantee. Cyprus may not enter into such a treaty, whatever the position of the other states may be.

(d) He then argues that the EU is an economic and political union of states, even if it is not itself a state, and that in entering into the EU Cyprus is entering into a union with each of those other states in just the same way it would do if it entered into a federation. That argument assumes, of course, that we are wrong in emphasising that Article I is limited to union with another particular state rather than a large group. But even on that assumption, it is not the case that Greece or the United Kingdom would exercise authority in Cyprus as part of the EU. The decisions and literature on the Maastricht Treaty, cited in our earlier Opinion, demonstrate that this is not the case. All sorts of international organisations involve coordination of activity, the "joint" pursuit of "common" policies in the political and economic field. The EU is no doubt a very advanced example, but it is not, directly or indirectly, a vehicle for the exercise by one member state or its officials of public authority over another. The organs of the EU are not organs of any member state or states. The context of the Treaty of Guarantee and related

14 Mendelson, Further Opinion, para. 17 (emphasis in original).
instruments show that, although there were to be controls on Cyprus becoming a member of international organisations including free trade areas, Article I was intended to address the separate and much narrower issue of a union with another state.

e) Then he argues that, even if EU entry would not involve political or economic union with other states, it would "indirectly promote union with another state or states".\textsuperscript{18} Of course the phrase "or states" does not appear in Articles I and II of the Treaty of Guarantee. But in any event we fail to see what indirect aim EU membership might have for Cyprus, i.e. how it would tend to produce union with any other state or states, or what indirect tendency it might foster which the Treaty of Guarantee seeks to prohibit. No doubt in 1959-60, Turkey sought to vest in an organ elected by the Turkish Cypriot community veto powers over joining organisations of which Turkey is not a member. But – we repeat – this separate Turkish aim was achieved by Article 50 of the Constitution, and not by the Treaty of Guarantee’s prohibition on political union. We discuss this further in paragraphs 8-10 below.

8. There is also a note provided by Professor Mendelson dated 21 July 1997 in which he dismisses the Austrian case as only superficially similar. His main argument is that the other parties to the Austrian State Treaty of 1955 waived the provisions of Article 4 at the time.\textsuperscript{19} In other words, his view is that Austrian membership of the EU would have been a breach of the Article 4 of the Austrian State Treaty but for the consent of all the other parties to it. He does not cite any statement to that effect by any of the other states parties, nor any of the extensive literature on the subject in English or German.\textsuperscript{20} There is simply no evidence that the Soviet Union (or later the Russian Federation) considered that it was waiving rights under Article 4 of the State Treaty, or that its individual consent to Austrian accession was required. There is no suggestion that the consent of the other states parties to the Treaty of 1955 was sought or required to what would otherwise have been a breach of Article 4. Russian objections as articulated at the time, concerned not Article 4, but the issue of neutrality. Similarly, Russian literature at the time of the accession stressed Austria’s neutrality as a potential problem, but not Article 4.\textsuperscript{21} The European Commission did

\textsuperscript{18} Mendelson, Further Opinion, para. 25.
\textsuperscript{19} M. Mendelson, "Note on Austria’s Accession to the European Union", para. 1 and concluding para.
\textsuperscript{20} We referred to this material in 24-27 of our Opinion of 24 September 1997.
not believe that Article 4 presented any difficulty, either. In short, Professor Mendelson cites no evidence in support of his "waiver" theory, and we are aware of none.

**Article 50 of the 1960 Constitution**

9. A second issue concerns Article 50 of the Constitution of 1960, which provides for the President and Vice-President to have, separately and conjointly, a right of veto in decisions concerning, *inter alia*, "foreign affairs, except the participation of the Republic in international organisations and pacts of alliance in which the Kingdom of Greece and the Republic of Turkey both participate". Unlike Articles I and II of the Treaty of Guarantee, which are expressed as absolute prohibitions, Article 50 distinguishes between international organisations and pacts of alliance in which Greece and Turkey are, and those in which they are not, parties. It thus addresses what we understand to be Turkey's essential concern, which is that it does not wish Cyprus to become a party to the EU before it does. In other words, its real concern is one of timing, not the application of an absolute prohibition.

10. The difficulty, however, with Article 50 is that it is presently inoperative since no person holds or exercises the office of Vice-President, for reasons that are well known. The question is whether this fact prevents Cyprus from applying to or becoming a member of the EU, and the answer is clearly no. As Article

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23 Professor Mendelson’s other arguments can be dealt with more briefly. He seeks to distinguish Article 4 of the Austrian State Treaty from the Treaty of Guarantee because the former specifically mentions Germany whereas the latter refers in general terms to “any other State”. But the failure to mention Greece and Turkey specifically does not affect the matter. As everyone knows and as the travaux préparatoires show (see paragraph 4 (c) above), the problem in 1959-60 was union with one of those States, especially Greece. Then he argues that there has at least arguably been a fundamental change of circumstances between 1955 and 1991. But no party to the Austrian State Treaty has purported to rely on fundamental change of circumstances as a ground for the termination of the treaty, and as Article 62 of the Vienna Convention on the Law of Treaties makes clear, treaties do not automatically lapse on grounds of fundamental change; the change has to be invoked by a party. Finally he argues that “two wrongs do not make a right”: of course we agree, but that has nothing to do with the issue whether Austrian accession was a breach of Article 4, and the fact is that none of the concerned parties at the time so considered it.
24 They are briefly set out in our Opinion of 24 September 1997, para. 29.
50 of the Constitution recognises, Cyprus has the normal capacity of a State to enter into "international treaties, conventions and agreements" and to become a member of all kinds of international organisations and alliances. It provides for a procedural veto on such decisions, the veto to be cast within a prescribed period by a Vice-President elected under the Constitution. In the absence of a veto duly cast in accordance with Article 50, the decision to accede is valid and effective. Nor could Cyprus, if it did accede to the EU, subsequently rely on Article 46 of the Vienna Convention on the Law of Treaties as a ground for disputing the validity of its accession. The simple reason is that, in the absence of a veto cast by a person holding the office of Vice President in accordance with the Constitution, there is no breach, and certainly no manifest breach within the meaning of Article 46.

11. On this point, Professor Mendelson emphasises the international aspect of the Cyprus Constitution, the element of international guarantee involved, and the overlap between the Constitution, especially Article 50, and the Treaty of Guarantee. With some of this we agree, but it is hardly relevant to the present point. There is a clear distinction between the existence of an international guarantee and the scope or application of particular provisions of a constitution which is subject to the guarantee. We have already pointed out the distinction between Article 50 of the Constitution (which is an important procedural provision concerned with treaty-making, even if it is for the time being inoperative) and Article I of the Treaty of Guarantee which is a prohibition on the making of a certain limited class of treaties at all, by any authority in Cyprus whatever. Professor Mendelson elides the distinction entirely.

**Article 170 of the 1960 Constitution**

12. A third issue concerns Article 170 (1) of the 1960 Constitution, which entitles Greece, Turkey and the United Kingdom to seek most favoured nation (mfn)
treatment from Cyprus, "by agreement on appropriate terms" in respect of "all agreements whatever their nature may be." It has been argued that Cyprus as an EU member will not be in a position to comply with Article 170 so far as Turkey is concerned. The short answer to this is that there is a general understanding that entry to the EU does not trigger general mfn obligations of the entrant so far as third states are concerned. This is consistent with Article XXIV (5) of the GATT. It is a position which Turkey itself has accepted, both as a GATT member, as an applicant for EU membership, and in bilateral arrangements with Cyprus.

13. In any event, Article 170 only operates by agreement, which agreement has to be "on appropriate terms". Even if it were applicable in principle to EU membership (which it is not), all Article 170 would do, would be to call on the parties to reach agreement in particular "on appropriate terms" for granting mfn treatment.

14. Professor Mendelson regards this issue as "subsidiary", and we agree. He does not argue that "the entry of Cyprus into the EU without Turkey would violate some existing right of Turkey to mfn treatment"; again we agree. He does however argue that Greece and Greek citizens will be advantaged in Cyprus compared to Turkey and Turkish citizens, and to some extent this is true. Our point was that, purely as a question of law and of the application of Article 170, entry into a regional economic union does not trigger mfn obligations, and that Turkey itself accepts this. The economic disadvantages for Turkey of its non-membership of the EU remain matters to be addressed at the level of policy by the EU, as well as by Turkey. No doubt they will be, since the long-term interests of the region can only be addressed by a policy of inclusion.

29 Cyprus-Turkey, Trade Agreement, 9 November 1963, Art. 1. See also the identically phrased Trade Agreement between Greece and Cyprus, 24 August 1962.
30 Mendelson, Further Opinion, para. 39.
31 Ibid.
32 So, apparently, does Professor Mendelson; at least he does not argue the contrary.
33 Professor Mendelson also points to the difficulties of applying EU law uniformly within Cyprus: Further Opinion, para. 42. We understand this issue is being addressed in the accession negotiations. Again, however, it is not a legal barrier to eligibility.
Conclusions

15. For the reasons we have given, we remain firmly of the opinion that there is no legal basis for the argument that Cyprus is prevented by the Treaty of Guarantee, or by any provisions of the Constitution of 1960, from becoming a member of the EU or from complying with its treaty obligations towards Turkey once it becomes a member.
Letter dated 5 November 2001 from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland in the United Nations addressed to the Secretary-General

Dear Sir,

I refer to your letter dated 5 October 2001 (A/56/459-S/2001/1058), in which you informed the Permanent Representative of Turkey, and I am aware of a further letter transmitted to you by Professor Master Mustafa QC. That letter, and Mr. Patur’s letter, alleged that Cyprus’ application to join the European Union was illegal, and that the United Kingdom was obliged by the terms of the 1960 Treaty of Guarantee to veto Cyprus’ accession to the European Union.

The United Kingdom disagrees with both of those arguments. In our view, there is no legal barrier to Cyprus’ membership of the European Union. Membership does not constitute “unions with another State” and is therefore not ruled out by the provisions of the 1960 Treaty of Guarantee. The United Kingdom does not consider the provisions of the Treaty to be ambiguous in any way. The fact that there is no legal barrier to Cyprus’ membership is clear from the wording and spirit of the European Union member States’ Guarantee and the Helsinki Final Act.

The United Kingdom fully supports your efforts to bring about a settlement on the island. As the Helsinki European Council made clear, a settlement leading to independence would facilitate Cyprus’ accession. But a settlement is not a precondition for Cyprus’ accession. We urge all parties to engage constructively in reaching a settlement, and recall the press statement by the President of the Security Council of 7 September 2001, which asked all concerned to support the effort in work towards that goal.

I would be grateful if you would circulate this present letter as a document of the General Assembly under agenda item 67, and of the Security Council.

(Signed) Anthony Clarmond

Security Council
Fifty-sixth year

United Nations
General Assembly
Security Council

A/56/112-S/2001/125
A. Introduction

1. We are asked to advise on Cyprus’ proposed contribution to the Headline Goals of the European Union, both in the period prior to Cyprus becoming a member and subsequently. The objection has been made that the proposed contribution is inconsistent with Cyprus’ treaty obligations, or the treaty rights of Turkey, under the Treaty of Lausanne of 1923, as well as the three Treaties of 1960 which accompanied the independence of Cyprus, viz., the Treaty of Guarantee, the Treaty of Establishment and the Treaty of Alliance. Specifically, we are asked as follows:

   (1) Does the Treaty of Lausanne of 1923 confer on Turkey (as the latter publicly asserts) any specific rights with respect to Cyprus in particular or the Eastern Mediterranean region in general? If so, what rights?

   (2) Do the Treaty of Guarantee, the Treaty of Establishment or the Treaty of Alliance and, depending on the answer to the previous question, the Treaty of Lausanne legally preclude the participation of the Republic of Cyprus in defence arrangements under the auspices of the European Union?

Before dealing with these questions in turn, it is necessary to set out some of the background.

2. After 1878 Cyprus, while remaining under Turkish sovereignty, was adminis-
tered by the British government. The United Kingdom proclaimed the annexation of Cyprus in 1914. By the Treaty of Peace with Turkey signed at Lausanne on 24 July 1923, Turkey recognised the annexation of Cyprus and renounced any right or title concerning this territory.

3. After various conflicts which could not be resolved by resort to the United Nations, steps were taken by the Greek and Turkish governments, which resulted in February 1959 in an agreement reached between them in Zurich. In 1960 treaties embodying this agreement were ratified by Cyprus, Greece, Turkey and (with the exception of the Treaty of Alliance) by the United Kingdom.\(^1\) Cyprus became an independent republic and a member of the United Nations, while Britain retained two “sovereign base areas”, viz., the military bases at Akrotiri and Dhekelia.

4. As a consequence of the conflicts which broke out in 1963 the United Nations sent peace-keeping forces to Cyprus; these are still present in Cyprus today, pursuant to consecutive renewals of their mandate by the Security Council.

5. The application of Cyprus to join the European Union in August 1970 resulted in the Cyprus-European Economic Community Association Agreement. The agreement provided the gradual abolition of tariffs and other restrictions on trade by both sides. Ultimately the agreement was intended to lead to a customs union, through two subsequent stages.

6. In 1974, Turkey intervened militarily in Cyprus, invoking the Treaty of Guarantee. Subsequently it purported to establish the northern Turkish part of Cyprus as a separate state. No other state has, however, recognised this entity as a state.

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\(^1\) See: United Kingdom of Great Britain and Northern Ireland, Kingdom of Greece, Turkey and Republic of Cyprus: Treaty (with annexes, schedules and detailed plans) concerning the Establishment of the Republic of Cyprus. Signed in Nicosia on 16 August 1960. Came into force on 16 August 1960, the date of signature, in accordance with article 12 (further: Treaty of Establishment), U.N.T.S. Reg. Nr. 5476;


On 4 July 1990 Cyprus made a new application for membership of the European Union. The European Union has accepted in principle the eligibility of Cyprus to become a member, and accession negotiations are continuing. On the occasion of the contribution conference organised by the European Union in November 2000, to which EU Member States and membership candidates were invited, Cyprus offered certain contributions to the Headline Goals of the European Union, within the framework of the Common European Security and Defence Policy (“CESDP”). Again Turkey has argued that the treaty obligations of Cyprus preclude it offering or making such contributions. In particular it has referred to the Treaty of Lausanne and the three Treaties of 1960.

In considering the questions thereby raised, two preliminary points should be made. First, there is some question about the continued force and effect of at least certain aspects of the three Treaties of 1960 so far as Cyprus is concerned. In 1964, Cyprus took certain steps to terminate the Treaty of Alliance with regard to Turkey, invoking alleged breaches of the Treaty by Turkey. Turkey never recognized this termination and considers the Treaty as still in force. For the purposes of this opinion, we will assume that the three Treaties remain in force.

Secondly, we should note that the issue is not the validity or binding effect of commitments made by Cyprus to the European Union (which is not a party to the treaties in question). Rather it is whether Cyprus can, consistently with those treaties, enter into such commitments. As a general matter, participation in one treaty does not exclude a state from becoming a party to some other treaty with third states; the issue is rather whether the participation in one treaty would entail a breach of the other.

The question is in some respects similar to that discussed by the Permanent Court of International Justice in the case of Austro-German Customs Regime. In this regard, the Court asked whether, from the point of view of law, Austria could, without the consent of the Council of the League of Nations, conclude with Germany the customs union contemplated in the Vienna Protocol of March 19th, 1931, without committing an act which would be incompatible with the

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2 Turkey has argued that, by reason of the Treaty of Guarantee and the Constitution of Cyprus, Cyprus is ineligible to become a member of the European Union unless Turkey is also a Member. This argument is untenable (see J. Crawford, G. Hafner and A. Pellet, “Republic of Cyprus Membership”, UN Doc. A/52/481, S/1997/805, 17 October 1997) and has not been accepted by the European Union. [Ed.’s note: The Opinion and a Further Opinion, dated 17 November 2001, are reproduced supra as items 1 and 2 of this booklet.]

obligations she has assumed under the provisions quoted above.\textsuperscript{4} Applied to the present case, the question is whether the contributions to the EU Military Headline Goals offered by Cyprus on the occasion of the Contribution Conference of the EU in November 2000 conflict with the obligations incumbent upon Cyprus under the Treaties of 1960, or with the rights of Turkey, opposable to Cyprus, arising under the Treaty of Lausanne.

11. Furthermore, the question that has been raised is limited to measures involving military aspects and does not imply issues of a merely political nature, such as representation and other measures falling short of military activities, which are also addressed in Article IV of the Treaty of Guarantee.

**B. The Treaty of Lausanne, 1923**

12. Turkey has argued that the accession of Cyprus to the EU would upset the balance achieved in the Treaty of Lausanne. In its view:

"Turkey is not yet a member of the EU. It is evident that the accession of 'Cyprus' to the EU will upset the balance between Turkey and Greece established by the Lausanne Treaty of 1923 and the Treaties of 1960. Such an accession will be tantamount to an economic and political union (ensois) between Greece and the Greek Cypriot administration inside the EU."

13. There was no unanimity as to the legal position of Great Britain in respect of Cyprus during the period from its occupation in 1878 till its annexation in 1914.\textsuperscript{6} The legal situation was, however, clarified by article 20 of the Treaty of Lausanne, by which Turkey recognised the annexation.

14. So far as relevant to the present question, the Treaty of Lausanne provides:

"**ARTICLE 16**

Turkey hereby renounces all rights and title whatsoever over or respecting the territories situated outside the frontiers laid down in the present Treaty and the islands other than those over which her sovereignty is recognised by the said Treaty, the future of these territories and islands being settled or to be settled by the parties concerned.

The provisions of the present Article do not prejudice any special arrangements arising from neighbourly relations which have been or may be concluded between Turkey and any limitrophe countries.

\textsuperscript{4} Ibid., p. 45.

\textsuperscript{5} Letter of The Embassy of Turkey to the member states of the European Union, 23 May 2001.

\textsuperscript{6} See CG Tornaritis, *Cyprus and its Constitutional and Other Legal Problems* (Nicosia 1980), 17.
ARTICLE 20

Turkey hereby recognises the annexation of Cyprus proclaimed by the British Government on the 5th November, 1914.

ARTICLE 21

Turkish nationals ordinarily resident in Cyprus on the 5th November, 1914, will acquire British nationality subject to the conditions laid down in the local law, and will thereupon lose their Turkish nationality. They will, however, have the right to opt for Turkish nationality within two years from the coming into force of the present Treaty, provided that they leave Cyprus within twelve months after having so opted.

Turkish nationals ordinarily resident in Cyprus on the coming into force of the present Treaty who, at that date, have acquired or are in the process of acquiring British nationality in consequence of a request made in accordance with the local law, will also thereupon lose their Turkish nationality.

It is understood that the Government of Cyprus will be entitled to refuse British nationality to inhabitants of the island who, being Turkish nationals, had formerly acquired another nationality without the consent of the Turkish Government."

The Treaty of Lausanne is still in force.

15. The issue in the present case is whether the participation of the Republic of Cyprus in defence arrangements under the auspices of the European Union, and in particular, contributions by Cyprus to the Headline Goals of the European Union in that context, would impair any rights granted to Turkey by the Treaty of Lausanne in the maintenance of a "balance" in the eastern Mediterranean region. In answering this question of treaty interpretation it is appropriate to apply articles 31-33 of the Vienna Convention on the Law of Treaties of 1969.

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These articles reflect customary international law, as confirmed by the International Court of Justice on several occasions.\(^8\)

16. The Vienna Convention requires that emphasis must in the first place be put on the actual wording of a treaty provision. According to article 31:

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
   
   (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

   (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:
   
   (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

   (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

   (c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

17. The wording of the Treaty of Lausanne neither grants Turkey any right concerning the maintenance of a “balance” which goes beyond the territorial regulation spelled out in the Treaty, nor does it in terms purport to establish such a balance. By recognising Cyprus’ annexation, according to article 20, Turkey renounced all rights with respect to Cyprus. As to rights of Turkey in the area in vicinity to the territory of Turkey as recognised by the Treaty of Lausanne, arti-

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\(^8\) See most recently Kasikili/Sedudu Island, ICJ Reports 1999, para. 20. See also Gabcikovo-Nagymaros case, ICJ Reports 1997, at para. 46.
Article 16 only establishes that existing (and future) treaties resulting from neighbourly relations with neighbouring (limitrophe) countries remain unaffected by the Lausanne Treaty. Turkey has not referred to any such treaty as being relevant in the present case.

18. No other rights arising from the Treaty of Lausanne could have an impact on the political situation in the area surrounding Cyprus. The Treaty does not contain any express provision concerning the establishment of a certain "balance". Nor is there any indication of which we are aware, in the travaux préparatoires of the Treaty of Lausanne or otherwise, that it had any such aim. Rather it was a treaty making territorial and other dispositions in order to bring to an end the state of war between Turkey and the Allied and Associated Powers. In this respect it is relevant to note that the Treaty of Lausanne made more summary provision for a territorial settlement of the affairs of the former Ottoman Empire, following Turkey's refusal to ratify the Treaty of Sèvres. That unratified Treaty contained no provision concerning continued Turkish rights over Cyprus, or in the strategic balance in the region, and there is no indication that the Treaty of Lausanne intended to go further. For these reasons, any change in the "strategic balance" resulting from the Treaty of Lausanne could only give rise to a legal question if at the same time it concerned a breach of an operative provision of the Treaty. As long as the stipulations of the Treaty remain unimpaired, there is no legal infringement.

19. In any event, the Treaty of Lausanne does not contain any obligations concerning the future existence of a new state on the island of Cyprus. By article 16 Turkey simply renounced all rights to territories outside its boundaries as laid down in the Treaty of Lausanne; by article 20 it recognized the annexation of Cyprus by Great Britain. Thus article 16 terminated all rights Turkey had formerly possessed in such areas and did not establish new ones. Nor did the recognition of British annexation expressed by article 20 impose any obligation on any of the States Parties to maintain the status achieved by it. Unless otherwise expressly provided, the recognition of the sovereignty of a state over territory is without prejudice to the right of that state subsequently to dispose of that territory or to grant it independence. It is by no means uncommon for a state in ceding territory to another to stipulate for a right of reversion in the event that the other

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state wishes to dispose of the territory. By contrast no right of reversion to Turkey, or any other limitation as to the future disposition of Cyprus by Great Britain, was expressed in the Treaty of Lausanne, and none is to be implied.

20. For these reasons the Treaty of Lausanne of 1923 neither provides any rights in favour of Turkey relating to the maintenance of a "balance" in the region of the eastern Mediterranean nor does it purport to establish such a balance. No rights in this regard can be derived from the Treaty, and it is accordingly unnecessary to ask whether, if such rights had existed, they would have been opposable to Cyprus after its independence in 1960...*

* Ed.'s Note: The Opinion continues with an examination of the Treaties of 1960 and concludes that

"since the CFSP (Common Foreign and Security Policy) does not entail common defence in the sense of collective self-defence, any incompatibility between the offer made by Cyprus at the Contribution Conference and the Treaties of 1960 is effectively excluded. In particular, the rule of unanimity would enable Cyprus, even as an EU member, to respect the obligations arising under those Treaties".

The section of the Opinion, dealing with the 1960 Treaties and the Headline Goals of the EU and explaining the reasoning for the above conclusion, is not reproduced here, because that technical section is not relevant to the legal issues which are the focus of this booklet.

10 So, for instance, states acquiring new territory by cession undertook not to alienate it or only to do it sub modo; e.g. the cession to Denmark in 1920 a portion of Slesvig, R. Jennings, A. Watts, *Oppenheim's International Law*, 1992, p. 679. Or there may be a right of retrocession if the territory is disposed of, as with Gibraltar under the Treaty of Utrecht, 1713. The Treaty of Lausanne contains no such provisions with respect to Cyprus.
OPINION
Implications of Membership in the European Union for a Constitutional Settlement in Cyprus

By Professors George A. Bermann, Dieter Blumenwitz, Antonio Cassese, Jeane-Pierre Cot, James Crawford, Alan Dashwood, Pierre-Marie Dupuy, Lori Fisler-Damrosch, Cees Flintermans, Thomas M. Franck, Christopher Greenwood, Gerhard Hafner, Meinhard Hilf, Vaughan Lowe, Donald M. McRae, Alain Pellet, Joel Rideau, Henry G. Schermers, Bruno Simma, Christian Tomuschat, Walter van Gerven, and Derrick Wyatt

29 March 2001

I. Scope of Opinion

1. We have been asked to consider the implications of membership by Cyprus in the European Union/European Communities for the constitutional arrangements which might be adopted as part of a Cyprus settlement. In particular, we are asked to consider the implications of EU membership for –

   (a) the division of powers between the Federation of Cyprus (referred to in some proposals as "the common state") and the two federated states (referred to in some proposals as "the component states") which would be the members of that federation; and

   (b) the arrangements for power sharing at the federal level.

2. We have proceeded on the assumption that Cyprus is not debarred by the Treaty of Guarantee from becoming a member of the EU and have taken as our starting point that, as we understand the United Nations Secretary-General has expressly acknowledged, any new constitution for Cyprus must be compatible

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1 For convenience, the term "EU" is used in this Opinion to refer to the European Union and the European Communities. Since the meeting at which this Opinion was discussed in draft was held in December 2000, before the conclusion of the Nice Intergovernmental Conference on the European Union, we have not attempted to take account of changes in the EU and European Communities Treaties agreed at that Conference.

2 In this Opinion we have referred to "the Federation" and "the federated states". This choice of terms is for convenience only and is not intended to preclude any questions about the nature of the constitution which might be adopted or the acceptability of specific proposals.

3 This question has already been the subject of an expert opinion by Professors Crawford, Hafner and Pellet, dated.
with Cyprus being able to be an effective member of international organisations. The Opinion is necessarily of a fairly general character. The negotiations for a settlement in Cyprus are still in progress and we have not attempted to comment on specific proposals (many of which are confidential) at this stage. We have not, therefore, explored in detail the precise institutional arrangements which might be adopted in order to meet the concerns which we consider below. We have concentrated, instead, on issues of broad principle.

3. Nevertheless, we have proceeded on the basis that any constitutional settlement in Cyprus will be of a federal character and that it will entail an element of power-sharing between the two Cypriot communities. We have also taken for granted that the principle that EU law must be fully and uniformly implemented throughout each member state, irrespective of the provisions of that state’s internal law, will remain one of the fundamental principles of EU law.

4. The EU does not, of course, purport to prescribe the form of constitutional arrangements which a state must adopt in order to become a member and the existing member states possess a wide variety of constitutions. Nevertheless, it seems to us that membership of the EU has two major implications for a constitutional settlement in Cyprus. First, as a matter of law, Cyprus must be able to comply with its obligations as a member state of the EU. This requirement has both positive and negative aspects. Cyprus must take whatever action is needed to implement and give effect to EC law. It must not take actions which are contrary to EU law. It follows that the constitutional settlement must be such that Cyprus is able to meet these obligations. We discuss this matter in greater detail in Part III of this Opinion. Secondly, if Cyprus is to enjoy the benefits of EU membership, it must be able to function effectively as a participant in the decision-making processes of the EU. While this consideration is a practical, political one, it has important legal implications and is at least as significant as the first issue. Only in this way can Cyprus be confident that its interests and those of its population will be properly taken into account in EU decisions. We consider participation in EU decision-making in Part IV, below.

II. A prospective settlement in Cyprus

5. It seems clear that any settlement in Cyprus will be based upon the principle, set forth in paragraph 11 of Security Council resolution 1251 (1999) that –

A Cyprus settlement must be based on a state of Cyprus with a single sovereignty and international personality and a single citizenship, with its
independence and territorial integrity safeguarded, and comprising two politically equal communities as described in the relevant Security Council resolutions, in a bi-communal and bi-zonal federation, and that such a settlement must exclude union in whole or in part with any other country or any form of partition or secession...  

6. The single state would be the state of Cyprus, which alone would have international legal personality. That state would be composed of the two federated states and the federation. However, the proposals currently under consideration would allocate most legislative, executive and judicial powers to the two federated states. The federation would be competent only in respect of specific matters expressly allocated to it. All other powers would be vested in the two federated states. The precise powers to be allocated to the federation remain a matter for discussion. Nevertheless, in common with practice in other federal states and in keeping with the principle that only the federation will have international legal personality, it is clear that treaty-making power and the conduct of external relations will be among the powers of the federation. On the other hand, most internal matters covered by EU law would be the responsibility of the two federated states, rather than of the federation.

7. Moreover, the constitution envisaged for the federation would be based upon power sharing between the two communities. Accordingly, decisions at the level of the federation would require support from both federated States or from the representatives in the federation institutions of both communities. It follows that, at least in some areas, even where responsibility for implementing EU law will rest with the federation, action could be blocked by opposition in either federated state or in either community.

8. It is, of course, beyond argument that there is no incompatibility between the concept of a federal constitution and membership of the European Union. Several of the existing member states (eg Germany) have federal constitutions and one (Belgium) has a bi-communal, bi-zonal constitution which is not unlike some of the proposals for Cyprus. Nor does EU law prescribe a blueprint for the

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4 This principle can, however, be traced back to many earlier United Nations proposals, in particular, the Set of Ideas put forward by the United Nations Secretary-General in 1992 (UN Doc. S/24472, 21 August 1992).

5 The term “state of Cyprus” is used here as a convenient term to denote the international legal personality. It is not intended to prejudge the name which the State would eventually bear. The state will be a continuation of the existing Republic of Cyprus which will be converted into a federation on the adoption of the new constitution.
distribution of power between the central organs of a member state and components.

9. Nevertheless, the degree of decentralization envisaged in the current proposals for Cyprus and the possibility that power-sharing at the federation level could lead to deadlock raise important practical questions about how a federal state of Cyprus could comply with its obligations under EU law. Moreover, the historical background in Cyprus is unique and it would be naïve to assume that, at least in the initial stages, there would inevitably be harmony between the two federated states, or between the two communities at the federation level, even in matters concerning EU law.

10. We do not question the willingness, in principle, of the authorities of the federation and the authorities in each federated state to comply with EU law. However, EU law covers a wide range of subject-matter (eg, the economy, rights of movement and establishment, VAT collection, customs policy and agriculture) over which the Greek Cypriot and Turkish Cypriot communities might have strong political differences. The result would inevitably have repercussions for compliance with Cyprus’ EU obligations. Moreover, deadlock between the federation and a federated state or within the institutions of the federation, whatever the reason, could impair the ability of Cyprus to comply with its EU obligations or to function effectively as a member of the EU.

**III. Requirements of compliance with EU Law**

11. As stated in Part I, above, it is undoubtedly the case that each member state is free to adopt and to modify its own constitution and that EU law does not require or preclude the adoption of any particular constitutional arrangement. Nevertheless, there is a clear and precise obligation on each member state to comply with EU law and to ensure compliance with that law throughout its jurisdiction. This obligation is reflected in Article 10 (formerly Article 5) of the EC Treaty, which provides that:

"Member states shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community’s tasks.

They shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty."
12. In considering the implications of this general duty to ensure compliance, two fundamental principles need to be borne in mind. First, EU law enjoys supremacy over national law. This principle is firmly established in the jurisprudence of the European Court of Justice; see, eg., the decisions in *Costa v. ENEL* (Case 6/64) [1964] ECR 585 and *Simmenthal (No. 2)* (Case 106/77) [1978] ECR 629. It applies irrespective of the status of the national law concerned within the national legal order and thus applies to constitutional provisions within the member states *Internationale Handelsgesellschaft* (Case 11/70) [1970] ECR 1125). It follows that whatever may be written into the constitution of Cyprus, EU law will take priority over it.

13. Secondly, the principle of direct effect, first identified by the Court of Justice in *Van Gend en Loos* (Case 26/62) [1963] ECR 31, means that, where a rule of EU law has direct effect, individuals may rely upon it in proceedings before national courts at all levels. Those courts are required to apply that law and, in light of the principle of supremacy, to do so irrespective of any rule of national law (including as constitutional rule) to the contrary.

14. The combination of these two principles means that the courts in the federated states (which under the current proposals would have jurisdiction in the overwhelming majority of cases) would be required to give effect to directly effective EU law in any case which came before them and to give it priority over any rule of Cyprus law, whether contained in state or federation legislation or in the constitution of the federated state or the constitution of the federation. In the event of a violation of a directly effective rule of EU law by the authorities of one of the federated states, the courts of that federated state would be under an obligation to give effect to the EU rule in any proceedings brought by individuals or companies against the relevant authority.

15. Moreover, the decisions in *Francovich* (Cases C-6 and 9/90) [1991] ECR I-5357 and *Factortame* (Cases C-221/89 and 48/93) [1991] ECR I-3905 and [1996] ECR I-1029 mean that the court in the federated state might be required to award damages against the relevant authority for non-compliance with EU law. The courts of the federation would have a similar duty in respect of violations by the federation authorities.

16. In view of the arrangements for the division of power between the two communities which are likely to be a feature of any constitution of Cyprus, we suggest that the principles of supremacy and direct effect should be expressly incorporated into the constitution of the federation and the constitution of each federated state.
17. Nevertheless, it would be the state of Cyprus, ie the international legal person, which would become party to the various EU Treaties and which would be admitted to membership of the EU. It would therefore be the state of Cyprus which would be the subject of legal obligations under the Treaties as a matter of international law. While the nature of EU law is such that some of those obligations will be binding upon all levels of government within the state of Cyprus, that fact does not in itself remove from the state the obligation to ensure compliance with obligations arising under the treaties. Moreover, in accordance with well established principles of international law which are also applicable in the EU legal framework, a state cannot rely upon its own internal law as a justification for a failure to comply with its international obligations.

18. It follows that the state of Cyprus could be held accountable in the European Court of Justice for a violation of EU law, notwithstanding that the act or omission which constituted the violation was performed by one of the federated states and concerned a matter in respect of which the federation had no powers. A similar situation arose in the case of Commission v. Belgium (Case C-2/90) [1992] ECR I-4431, where Belgium was held to account for legislation adopted by the Walloon regional parliament which prevented imports into the Walloon region from the Flemish region of Belgium as well as from other member states. The fact that, as a matter of the constitutional law of Cyprus, the power to deal with a particular matter was allocated to a federated state rather than the federation would not constitute a defence to an action for non-compliance which was brought against the state of Cyprus itself.

19. Such a situation could arise if the Commission brought enforcement proceedings against the state of Cyprus under EC Treaty Article 226 (formerly Article 169) or if another member state initiated enforcement proceedings under Article 227 (formerly Article 170). Such proceedings can be brought only against the state member of the EU – in this case the state of Cyprus – not the component of that state which may have committed the unlawful act of which complaint is made. In the event of the Court of Justice upholding such an action, Article 228 (formerly Article 171) gives it power to require the defendant State to take whatever measures are necessary to comply with the judgment of the Court. In the event of a failure to take those measures, the Court may impose a fine. In other words, the state of Cyprus could find itself called upon by the Court to take measures which the only state-wide institutions (those of the federation) had no power under the constitution to take. In the event that the federated state which had the capacity to take those measures failed to do so
within the required time scale, the state of Cyprus could be fined for that failure.

20. It follows that there is a real risk that cases will arise in which the constitutional power to ensure compliance with a particular EU obligation will be divorced from the liability for failure to exercise that power, the former residing with the federated states while the latter resides with the state of Cyprus, represented in international matters by the federation.

21. The nature and extent of this danger can be illustrated by reference to the case of payments due from a member state to the EU and the use by a member State of funds provided by the EU.

22. Each member state has an obligation to make available to the EU the funds which are known as ‘own resources’. These resources include customs duties, and various other charges levied within the framework of the common agricultural policy, which are imposed on imports of goods from countries outside the EU. These amounts, less a 10% collection charge, are paid over by member states to the European Commission. The member state is liable to account to the EU for the receipts due from all eligible transactions, irrespective of whether that state’s authorities have actually recovered the money in question from the parties, such as importers, liable to make payment to it. A number of serious problems could arise if the collection of duties was under the control of authorities other than those responsible for accounting to the Commission for receipts unless, at the very least, the two sets of authorities enjoyed a very close and harmonious working relationship. The effect of authorities in a federated state failing to collect duty or to pursue importers for overdue payments or payments incorrectly waived would be to impose upon the federation liability for any shortfall.

23. The "own resources" referred to above, which each member state is bound to make available to the European Commission, include contributions calculated by reference to (a) a proportion (subject to a maximum rate of call of 0.5% with effect from 2004) of an amount calculated by reference to hypothetical VAT receipts by that state, and (b) a proportion, fixed annually within the budgetary procedure, of the GNP of each member state. If the federation were dependent on the federated states for raising revenue without having its own power of taxation, there would be a serious mis-match between liability on the one hand and the power to effect compliance on the other.

24. The same problem could arise in respect of EC funds paid to Cyprus, in par-
ticular through the European Agricultural Guidance and Guarantee Fund. If expenditure is not in strict compliance with the applicable European rules, it is "disallowed" by the European Commission, which obliges the member state to repay the money in question. If the management of EAGGF expenditure were in the hands of the federated states, this could result in failures of financial control on their part imposing an obligation on the federation to compensate the Community.

25. In the light of these considerations, we believe that it will be necessary for the constitutional arrangements regarding legislative, executive and judicial powers in the Cyprus constitution to make provision for ensuring that Cyprus can and does comply with the obligations which she will assume on becoming a member of the EU. We consider that this has implications for the balance of power between the federation and federated states, for judicial control over the legislative and executive activities of the federation and of the federated states and for the arrangements within the federation institutions. While we have dealt separately with these three issues, they are closely related and there is a degree of overlap between the three sections which follow.

(1) Implications for the distribution of powers between the federation and the federated states

26. The fact that in most cases it will be the federation which will be called to account – as the entity which is entrusted with the international representation of Cyprus – for non-compliance with EU law requires, in our view, that there should be a strong federation at least in certain areas of governmental activity.

27. As paragraphs 21-24 suggest, that is most obviously necessary in the area of finance. In our opinion, a divorce between accountability and the capacity to ensure compliance with the requirements of the EU would be particularly damaging in this area both for the position of Cyprus within the EU and because of its potential for creating friction between the different governmental institutions. We consider that the collection of customs duties, and other charges on imports from countries outside the EU, should be a matter of federation competence. This is not just a matter of formal power but also of effective control. It will be necessary that the entire process of collection, enforcement and accounting be in the hands of the federation.

28. Similarly, we consider that there should be some form of federation power to oversee the use of EU funds in agriculture and to ensure that the federated states act in conformity with EU law in this area. One practical possibility would
be the establishment of a federation body with responsibility for implementing expenditure under the EAGGF (an example of such a body is the Intervention Board for Agricultural Produce in the United Kingdom).

29. The payment of own resources from member states to the European Commission, for example, involves substantial monthly transfers of money from each member state. European law currently provides that "each member state shall credit its own resources to the account opened in the name of the Commission with its Treasury or the body it has appointed." In the event of late payment it is obligatory to pay interest and the rate of interest automatically increases with each month of delay, with the increased rate being payable in respect of the entire period of delay. It is to be noted that Community law presumes that a single central body will be responsible for and will ensure payment. We consider that it would be necessary for that single body to be a federation body. And we do not see how such a body could guarantee payment of Cyprus's contributions to the EU unless it had at its disposal sufficient revenue raising powers, of one kind or another, to meet its obligations under European law.

30. We also consider that international relations should be a matter of federation competence. This is not only in accordance with the normal practice in federal constitutions, it also avoids the possibility of a federated state undertaking international commitments which might compromise the legal and political position of the state of Cyprus as a whole both in EU law and in international law.

31. More generally, we believe that the federation must possess sufficient powers of last resort to ensure that Cyprus complies with its obligations under EU law, even though the power to ensure compliance would rest initially with the federated states in most matters.

32. It is important to note, in this context, that concern has already been expressed by the Commission of the European Communities. In its Opinion, dated 30 June 1993, on the application for membership from Cyprus (COM (93) 313, EC Bulletin 6-1993 and EC Bulletin Supplement 4/93) the Commission stated that –

   In this context, care should therefore be taken with a view of the possibility of Community membership to ensure that the decision-making

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6 Similar problems could arise in other areas, e.g., if state aids were granted to an undertaking by one of the federated states and were subsequently held to be unlawful.
process of the executive and legislature is compatible with the Community’s discussion and decision-making apparatus and will enable the Cypriot authorities to adopt the *acquis communautaire* and to implement it effectively throughout the island. (para. 21)

33. These concerns have implications for the division of legislative, executive and judicial power. As a minimum, we consider that they require –

(a) that the institutions of the federation should have power to ensure compliance with EU law. This power will be particularly important where a judgment is given against the state of Cyprus by the European Court of Justice under Article 226 or 227 but is not confined to such a case;

(b) that there should be some means of scrutinising federated state legislation – perhaps by means of reference to a Constitutional Court which might include judges from outside Cyprus – to ensure that such legislation complied with EU law;

(c) that there should be the means to challenge a persistent refusal by the courts of a federated state to comply with their obligations under EU law (including the obligation to order preliminary references to the European Court of Justice under EC Article 234 (formerly Article 177));

(d) that there should be some means of ensuring that executive action in the federated states complies with EU law and that where such action is required in order to achieve the goals of the EU or to meet the requirements of EU law it is taken.

34. We would, however, go further than that minimum. It would be desirable that the federation should have a reserve legislative power to override legislation in a federated state which was incompatible with EU law, even in the absence of a decision against Cyprus by the Court of Justice. For example, where a decision of the Court of Justice in Article 234 proceedings or in an enforcement action against another member state demonstrated that a particular law in force in one or both of the federated states was incompatible with EU law and the legislature in that federated state declined to repeal or amend that law so as to bring it into line with EU law. We note that such powers exist in the constitutions of certain other member states.

35. Similarly, we suggest that consideration be given to the possibility that the federation should have the power, again as a matter of last resort, to ensure
that legislative or executive action is taken in a matter normally falling within the competence of the federated states, where positive steps are required for compliance with EU law. Such a power should come into operation only where there was a clear and persistent refusal to act on the part of the relevant federated state authorities.

36. These steps would not be incompatible with the allocation of extensive powers to the federated states, since the responsibility for ensuring compliance with EU law would continue to reside with the federated states in the first instance. It would only be in a case in which the authorities of a federated state declined to take the action necessary to ensure compliance with EU law in a matter within their powers that the reserve powers of the federation would come into play. It might be wise, in this context, to consider the possibility of creating some independent body which could determine whether the circumstances requiring the use of such powers existed in any given situation.

(2) Control of the legislative and executive acts of the federation and the federated states

37. We have already suggested in paragraph 15, above, that the constitutions of the Federation and of the federated states (if these are to be separate documents) should contain express provision for the principles of the supremacy and direct effect of EU law. We consider that it would be a valuable step towards ensuring compliance with EU law to ensure that there is a constitutional right for each individual to have his or her EU rights respected by all levels of authority within Cyprus.

38. While all courts within Cyprus would therefore be required to treat legislation (whether emanating from a federated state or from the federation) as ineffective insofar as it conflicted with directly effective EU law, we consider that there is a case for putting in place additional safeguards to ensure that legislation complies with EU law. As suggested above, this could take the form of scrutiny by a Constitutional Court either after the enactment of legislation or, as we understand is done at present in constitutional cases, at an earlier, pre-enactment stage. This scrutiny should apply to both federation and federated state legislation.

39. In order to comply with EU law (see paragraphs 14-15, above) the courts in Cyprus will, in any event, have to fashion remedies against federation and federated state authorities which violate EU law. It may be useful, however, to
incorporate express provision for such remedies in the new constitutional documents.

(3) The functioning of the federation institutions

40. While this question is considered at greater length in Part IV, below, we consider it essential that some mechanism be built into the Constitution to break a deadlock within the Federation institutions in cases where action is needed in order for Cyprus to comply with a requirement of EU law, e.g., where Federation legislation was required. Such a provision is necessary in order to ensure that legislative and executive action necessary to meet obligations under EU law are taken and that one community cannot use deadlock on such matters as a means of leverage in relation to other, possibly unrelated, matters.

IV. The need for Cyprus to function as an effective member state

41. Another aspect of EU membership which would have implications for the constitutional settlement is that Cyprus would need to be able to ensure that it could participate in the decision-making processes of the EU. This is both a matter of Cyprus being able effectively to pursue its own interests within the EU and a question of compliance with the general duty, implicit in Article 10 (which is quoted in paragraph 11, above) on all member states to co-operate in good faith in the governance of the EU.

42. This consideration covers a wide range of matters, including, eg, determining who should represent Cyprus in the Council and in COREPER and the numerous other committees, how Cyprus should cast its votes in the Council, electing members of the European Parliament and so forth. So far as participation in the meetings of the Council is concerned, Cyprus would, of course, be free to determine for itself, in accordance with whatever arrangements it adopted, who should represent it at meetings and how its representatives should cast their votes.

43. The question of elections to the European Parliament is bound up with wider questions about elections in a newly federal Cyprus and we do no more than mention that provision would have to be made for European Parliament elections and that those arrangements would have to be compatible with EU law.

44. If Cyprus is to secure to itself the full benefits of membership, it is obviously important that its federation institutions should not become so paralysed that
they are unable to decide upon such questions. If Cyprus were not to be represented at a meeting because its institutions could not decide who should be its representative, or if it were unable to cast its votes for similar reasons, then its influence would suffer. For the most part, this would harm Cyprus rather than the EU as a whole (although in matters where the Council is required to act by common accord, the failure of a state to take part in the vote would prevent a decision from being taken). That does not, however, make it any the less important. The damage to Cyprus and to the interests of its population and economy in such an event could be extremely serious both in respect of decisions on particular issues and because such a failure on the part of Cyprus would harm its standing in the EU. Cyprus would, in any event, be one of the smallest member states. Strong and effective participation in all the EU institutions at all levels is therefore essential if the interests of Cyprus are to be safeguarded.

45. We suggest, therefore, that although it is not a matter of compliance with an EU legal obligation (except perhaps in the case of decisions by common accord), it is of utmost importance that Cyprus be able to make its voice heard and play an effective part in the institutions of the EU. That will not happen if decision-making within Cyprus on such questions can be paralysed. We therefore urge that some mechanism for resolving deadlock within the federation institutions in matters of EU participation must be included in the new constitutional documents.

V. Conclusions

46. In our opinion, a decentralised federal structure for Cyprus is not incompatible with membership of the EU and compliance with the obligations which that entails.

47. It will, however, be necessary to ensure that the federation retains sufficient power to ensure that Cyprus complies with its EU obligations.

48. It will also be necessary to ensure that the institutions of the federation are able to take whatever action is needed in this regard and whatever action is needed to enable Cyprus to perform its functions as a member of the EU and that those institutions do not become deadlocked on such issues.
The joint opinion of 29 March 2001 was prepared by a group of European law experts and international and federal constitutional lawyers, at a consultation held at The Hague on 13-15 December 2000, convened by the Government of the Republic of Cyprus. The views set out were expressed independently and the final draft was agreed by all co-signatories. Three invited experts (Professors Flintermans, Hafner and Lowe) were unable to be present during the actual discussions, but approved the text of the final opinion and each indicated his willingness to be a co-signatory. The signatories are as follows:

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