# OPINION OF ADVOCATE GENERAL VAN GERVEN

delivered on 28 April 1993 *

*Mr President,*
*Members of the Court,*

1. In this case the Bundessozialgericht is asking the Court whether the Community prohibition of discrimination on grounds of nationality requires a Member State which has concluded a bilateral social security convention with a third country to extend the advantages resulting for its own nationals from the provisions of the convention to the nationals of all other Member States if they work in the territory of the Member State concerned and are subject to a social security scheme there. More specifically the question is whether the principle of equal treatment laid down in Articles 7 and 48 of the EEC Treaty and in Article 3 of Regulation No 1408/71 [1] has that scope.

## Background to the case

2. Maria Grana-Novoa is of Spanish nationality. She has never pursued in Spain any activity on the basis of which she was compulsorily insured. From December 1970 to June 1975 she worked in Switzerland, where she was compulsorily insured. In November 1976 she went to the Federal Republic of Germany where she worked from February 1979 to October 1982 (a total of 44 months), as a result of which she was compulsorily insured. Since then she has been incapacitated. A doctor established that she was suffering from a form of disseminated encephalomyelitis — mainly located in the brain — and on 10 August 1983 she applied for an invalidity pension to the Landesversicherungsanstalt Hessen (hereinafter 'the LVA Hessen'), which, by a decision of 11 November 1983, rejected the application, stating that Ms Grana-Novoa had indeed been unable to work since 25 August 1983, but that the qualifying period was not yet completed. The German Social Security Law (in particular paragraph 1247 of the Reichsversicherungsordnung) lays down as a condition for an invalidity pension that the insured must have completed a qualifying period of 60 months' insurance before the onset of the incapacity for work or 240 months' insurance before the application for the invalidity pension is made.

Ms Grana-Novoa's appeal against that decision was dismissed by the Sozialgericht Frankfurt on 18 March 1985. Her further appeal, to the Hessisches Landessozialgericht, was dismissed by judgment of 17 March 1989. On 7 June 1989 she applied to the Bundessozialgericht for leave to appeal on a point of law, contending *inter alia* that a Spanish-Swiss social security convention had been infringed and that under Article 9 of that convention Switzerland was required to treat Spanish and Swiss nationals equally with regard to calculation of qualifying periods and hence to recognize her insurance

* Original language: Dutch

1 Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons, to self employed persons and to members of their families moving within the Community. For this case reference may be made to the consolidated version of 1983 (OJ 1983 L 230, p. 6); in the meantime a more recent consolidated version has appeared in OJ 1992 C 325, p. 1.

periods. In addition Ms Grana-Novoa relied upon the Convention of 4 December 1973 between the Federal Republic of Germany and the Spanish State on social security, [2] which, she claimed, gave her the right to be assimilated to a German national for the application of the Convention of 25 February 1964 between the Federal Republic of Germany and the Swiss Confederation on social security. [3] The result of that would be that she could aggregate the Swiss and German insurance periods and thus complete the qualifying period required by German law.

In an interim judgment of 28 August 1991 the Bundessozialgericht dismissed Ms Gran-Novoa's application for leave to appeal on a point of law as regards the period prior to 31 December 1985. [4] On the other hand, for the period from 1 January 1986, the date of Spain's accession to the European Communities, it suspended judgment pending the Court's answer to the questions referred to it for a preliminary ruling.

3. Before going into those questions I should like to outline briefly the provisions of the relevant international conventions. The aforementioned *Convention between Germany and Switzerland* of 25 February 1964 (hereinafter referred to as 'the Convention'), supplemented by a convention of 9 September 1975, [5] prescribes *inter alia* that, with a view to the acquisition of a right to social security benefits under the German legislation, account must also be taken of the insurance periods completed under Swiss law where the insurance periods to be considered under German law amount to at least 12 months.

Under Article 3 of the Convention that right to aggregation of insurance periods is available only to German and Swiss nationals.

On the other hand Article 4(1) of the aforesaid *Convention between Germany and Spain* prescribes that the nationals of both contracting States must be treated on an equal footing. However, the Bundessozialgericht observes in its order for reference that that provision does not make it possible to count the Swiss insurance periods, since that is precluded by an *exclusion clause* contained in paragraph 2 of the final protocol to the Convention, which reads as follows:

'Where, in addition to the conditions to which the application of this Convention is subject, the conditions for the application of another convention or of supranational rules are also met, the German institution shall not take account, for the application of this Convention, of that other convention or of those supranational rules unless otherwise provided therein.'

According to the Bundessozialgericht it follows from that provision that in the

2 — *Bundesgesetzblatt* 1977, II, pp. 687 and 722.

3 — BGBl. 1965, II, p. 1294.

4 — See the reasoning on this point in the Report for the Hearing in section 7.

5 — BGBl. 1976, II, p. 1372.

application of the Convention no account may be taken of the provision in the German-Spanish convention unless 'otherwise provided' in the latter convention.

4. However, the Bundessozialgericht thinks it is not impossible that the principle of equal treatment laid down by Community law, namely by Article 7 of the EEC Treaty and Article 3(1) of Regulation No 1408/71, prevents the application of the said exclusion clause. In that respect it refers the following two questions to the Court for a preliminary ruling:

'1. Are Articles 3(1) and 1(j) of Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community to be interpreted as meaning that "legislation" within the meaning of Article 3(1) extends to the provisions of international conventions between a Member State and a non-member country which have been incorporated as statute law into the domestic legal order of that Member State?

2. If so, are Article 7 of the EEC Treaty and Article 3(1) of Regulation No 1408/71 to be interpreted as preventing a Member State from including in a convention with a non-member country arrangements whereby supra-national provisions are to be disregarded in the application of the convention if the aggregation of insurance periods completed under domestic pensions-insurance provisions with those completed under the pensions insurance of a non-member country, effected pursuant to the domestic law of that Member State for the purpose of applying the convention, is thereby denied to the nationals of other Member States of the EEC?'

**Is a bilateral convention concluded by a Member State with a third country 'legislation' within the meaning of Article 3(1) of Regulation No 1408/71?**

5. The Bundessozialgericht's first question is whether a convention concluded by a Member State with a third country, which has become, as a statute, part of the national law of that Member State, falls as such within the scope of Regulation No 1408/71 and more particularly of the principle of equal treatment contained therein. I would mention that that principle is expressed in Article 3(1) of the regulation in the following terms:

'Subject to the special provisions of this regulation, persons resident in the territory of one of the Member States to whom this regulation applies shall be subject to the same obligations and enjoy the same benefits under the legislation of any Member State as the nationals of that State.'

For the purposes of the application of the regulation the definition of *legislation* (or legal rules) is given by Article 1(j) as:

'statutes, regulations and other provisions and all other implementing measures, present or future, relating to the branches and schemes of social security covered by Article 4(1) and (2) or those special non-contributory benefits covered by Article 4(2a)'.

6. There are two diametrically opposed views before the Court with regard to this first question: that of the LVA Hessen and the German and United Kingdom Governments, joined at the hearing by the Netherlands Government, all of which think that a negative answer should be given, and that of Ms Grana-Novoa, the Italian and Portuguese Governments and the Commission, according to whom the answer should be in the affirmative.

Let me give my own view straight away: like the first-named parties, my opinion is that the question requires a negative answer. But first I should like to mention that the requirement in some Member States [6] that a treaty must be transposed into a national Law in order to produce legal effects in the domestic legal order is not, in my view, relevant to the answer to this question. That idea is linked to the so-called dualistic or monistic view which a *State* takes with regard to the relationship between the domestic legal order and international law. It should therefore have no influence on the Court's interpretation of a concept of *Community law*, which must operate uniformly irrespective of the view prevailing in a Member State with regard to the effect of international rules. [7]

The reasons why a bilateral convention between a Member State and a third country do not constitute 'legislation' within the meaning of Article 3(1) in conjunction with Article 1(j) of Regulation No 1408/71 are to be found in the wording and structure of the regulation, in the case-law of the Court and in the very nature of such a bilateral convention.

7. As regards the *text* of Regulation No 1408/71, I must point straight away to the distinction which the regulation makes with regard to the definitions given at the beginning between the concept of 'legislation' on the one hand (Article 1(j); see section 5 above) and that of 'social security convention' on the other hand. The latter includes, according to Article 1(k):

'any bilateral or multilateral instrument which binds or will bind two or more Member States exclusively, and any other multilateral instrument which binds or will bind at least two Member States and one or more other States in the field of social security, for all or part of the branches and schemes set out in Article 4(1) and (2), together with agreements, of whatever kind, concluded pursuant to the said instruments'.

6 — Including, according to the order for reference, the Federal Republic, at least as regards international conventions laying down rights and obligations in the sphere of social security.

7 — With regard to the problems to which a dualistic system may lead as regards possible conflicts of laws and the application of the principle 'lex posterior derogat legi priori', see *inter alia* P. J. G. Kapteyn and P. VerLoren van Themaat, *Introduction to the law of the European Communities*, L. W. Gormley (ed.), Deventer, Kluwer Law & Taxation, 1988, pp. 40 and 41, and, with more particular reference to the German context, O. Kimminich, *Einführung in das Völkerrecht*, München, Saur, 1987, p. 265 et seq. See also the observations of M. Waelbroeck putting the matter in perspective: 'Enforceability of the EEC-EFTA Free Trade Agreements: A Reply', *Eur. L. Rev.*, 1978, pp. 27, 28 and 29.

From that it may be seen that the Community legislature, though paying special attention to bilateral or multilateral social security conventions as distinct from 'legislation', has made no mention of bilateral conventions which a single Member State has concluded with a third country. Only bilateral conventions between Member States and multilateral conventions between at least two Member States and one or more third countries are mentioned.

8. The reason for this restricted definition of the concept of 'social security convention' becomes clear when it is related to the *system* for which Regulation No 1408/71 provides with regard to such conventions in Article 3(3) and Articles 6, 7 and 8 of the regulation.

To summarize it briefly, this is what the system amounts to. Article 6 lays down the general rule: Regulation No 1408/71 replaces *any* social security convention linking either two or more Member States exclusively or at least two Member States and one or more third countries, at least — in the latter case, dealt with in subparagraph (b) of the article — where settlement of the cases concerned does not involve any institution of one of the latter States. [8] However, Article 7 makes a limited exception for a number of *existing* international provisions, including the provisions of the social security conventions listed in Annex III to the regulation (Article 7(2)(c)). As regards the conclusion of *new* conventions between two or more Member States with each other, Article 8(1) provides that the Member States may conclude such conventions in so far as they are 'based on the principles and in the spirit of this regulation'.

With regard to the category of the *existing* bilateral social security conventions between Member States which, in accordance with the said exception in Article 7(2)(c) are not replaced by Regulation No 1408/71 (as for new conventions concluded in accordance with the provisions of the said Article 8(1)), Article 3(3) provides that the principle of equal treatment shall apply to those conventions too 'save as provided in Annex III'.

If Annex III is considered more closely it becomes apparent that it concerns *exclusively* a series of provisions of bilateral social security conventions concluded *by Member States with each other* 'remaining applicable notwithstanding Article 6 of the regulation' (List A), in other words which Regulation No 1408/71 does not replace, or 'which do not apply to all persons to whom the regulation applies' (List B), in other words to whom the principle of equal treatment does not extend.

8 — The Court has repeatedly confirmed that this principle of substitution is of an imperative nature which permits of no exceptions apart from the cases expressly mentioned in the regulation: see (with regard to the analogous provision of Article 5 of Regulation No 3) the judgments in Case 32/72 *Walder* v *Sociale Verzekeringsbank* [1973] ECR 599 at paragraphs 6 and 7 and in Case C 227/89 *Ronfeldt* [1991] ECR I 323 at paragraph 22.

9. It appears from this brief survey that Regulation No 1408/71 does not settle the position of bilateral conventions concluded by *a single* Member State *with a third country* in the field of social security as regards either the question of the replacement or the continued validity of international conventions or the application of the principle of equal treatment in respect thereof. Can it in these circumstances have been the intention of the Community legislature to regulate the status of such bilateral conventions by implication and to bring them within the field of application of Regulation No 1408/71 by allowing them to come within the concept of 'legislation' in Article 1(j)? I find that hard to imagine.

Such an interpretation of the concept of 'legislation' covering also bilateral conventions between one Member State and a third country would mean that Regulation No 1408/71, as far as the Member State in question is concerned, would replace the bilateral agreement without any consultation with the third country. Moreover no reservation would then apply to such replacement, not even one comparable with Article 6(b) (see section 8 above), in which the application of Regulation No 1408/71 is simply subject to provisions which may be applied without involving any institution of the third country. Such an interpretation would also mean that the principle of equal treatment was applied without reservation to bilateral conventions between one Member State and a third country without any possibility of an exception comparable with that provided in Article 3(3) of the regulation in respect of the bilateral conventions between Member States listed in Annex III.

10. The idea that bilateral conventions concluded between a Member State and a third country do not come within the concept of 'legislation' in Article 1(j) of Regulation No 1408/71 is moreover confirmed by the *case-law* of the Court, in which respect I may refer above all to the judgments in Cases 16/72 *Ortskrankenkasse Hamburg*, in Case 75/76 *Kaucic* v *Institut Assurances Maladie-Invalidité* and in Case 21/87 *Borowitz* v *Bundesversicherungsanstalt für Angestellte*.

In *Ortskrankenkasse Hamburg* the Bundessozialgericht had asked the Court *inter alia* whether an insurance organization of a Member State, in that instance Germany, must, for the acquisition of a right to certain benefits under Regulation No 3 (that is, the predecessor of Regulation No 1408/71), also take into account insurance periods which an insurance organization in another Member State (Italy) was bound to consider under a bilateral convention which that country had concluded with a third country (in that case Switzerland). The Court pointed out that Article 16 of Regulation No 3 (laying down the rules relating to aggregation for sickness and maternity benefits) referred only to insurance periods 'completed under the legislation of each of the Member States' and that Article 1(b) of that regulation (which was very similar to Article 1(j) of Regulation No 1408/71) stated that 'legislation' meant only 'laws, regulations and other enforceable provisions *(dispositions statutaires)* present and future of each Member State relating to the social security schemes and branches of social security'. The Court therefore concluded that:

'for the purposes of acquiring a right to social security benefits, social security

organizations in the Member States are not bound to take into account affiliation periods completed in third countries'. [9]

The *Kaucic* case concerned an invalidity pension payable in Belgium to the persons entitled under a deceased Italian worker who had worked in Italy, Belgium and Austria and had acquired in Austria an invalidity pension calculated in accordance with a bilateral social security convention between Italy and Austria. The Court confirmed that the application of a national rule prohibiting aggregation in such a situation was compatible with Regulations Nos 3 and 4 (which at that time were still applicable):

'The provisions of Regulations Nos 3 and 4 concerning the aggregation of insurance periods refer only to periods completed under the legislation of the Member States.

Periods completed in a third country, whether or not such country has entered into a social security convention with one or more of the relevant Member States, are not covered by any provision of the Community regulations relating to the harmonization by the Member States of their systems of social security.' [10]

11. The fact that Community law, in particular Regulation No 1408/71, does not require Member States to take account of insurance periods completed in third countries, but *permits* them to do so on a voluntary basis or pursuant to a bilateral convention between the Member State and the third country in question was confirmed in the *Borowitz* judgment. In that case the Bundessozialgericht had asked the Court whether the regulation prevented a German insurance institution, in deciding whether to include periods of non-payment of contribution within the meaning of the German legislation, from assimilating premiums, contributions and affiliation to an insurance scheme in a third country, namely Poland, with which the Federal Republic had concluded a bilateral convention on reciprocal assimilation of insurance periods, to compulsory premiums, contributions and affiliation to pension insurance in Germany (as it was required to do for premiums and contributions paid in other Member States and affiliation to insurance schemes there). The Court came to the conclusion that no provision of Regulation No 1408/71 precluded the German institution from treating periods of insurance completed under Polish legislation as equivalent to periods of insurance completed under its own legislation. [11] The Court added:

'On the other hand, such periods completed under the legislation of a non-member country do not, merely because they have been taken into account by the German institution pursuant to a bilateral convention concluded by the Federal Republic of Germany,

9 Judgment in Case 16/72 [1972] ECR 1141, at paragraph 12

10 Judgment in Case 75/76 [1977] ECR 495 at paragraphs 8 and 9.

11 Judgment in Case 21/87 *Borowitz* [1988] ECR 3715 at paragraph 25

become periods "completed under the legislation of the Member States" within the meaning of Article 46 of the regulation. Consequently, no provision requires the institutions of the other Member States to take account of them when making calculations under Article 46 and the fact that the German institution has taken those periods into account does not entail any increase in their obligations.' [12]

The Court thus confirmed, by implication but certainly, the point of view adopted by Advocate General Sir Gordon Slynn in his Opinion in that case with regard to the interpretation of the concept of 'legislation' under Article 1(j) of Regulation No 1408/71. On the basis of the judgments in *Ortskrankenkasse Hamburg* and *Kaucic*, the Advocate General had expressed the view that

'On the other hand, getting away from the literal wording it does not seem to me that this article was intended to cover, and it should not be read as covering, periods spent in a third State which are merely recognized as equivalent to periods covered by contributions in the Member State for the purposes of calculating a pension under domestic law. Even if such periods in a third State are taken into account for the purposes of the domestic calculation they cannot affect the obligations of other Member States on an apportionment following the aggregation of relevant periods.' [13]

12. Finally the solution suggested here is supported also by the *special nature* of a bilateral convention between a Member State and a third country. Such an agreement is the result of a process of negotiation between both States in which the respective contracting parties' rights and duties are usually based on the principle of reciprocity. That means that such conventions are based on a well-defined equilibrium — also as regards the financial consequences. There can be no doubt that the striking of such a balance would be seriously hampered and that the scope for negotiation of Member States and third countries would be severely restricted if the Member State in question were to work on the basis that the rights which it stipulates for its own nationals were also to be granted to all other Community citizens. In saying that I am not thinking solely of the position of social security conventions but also of other bilateral agreements based on a form of (financial) equilibrium of the reciprocal benefits, for example as with double taxation agreements.

13. Unlike the Italian and Portuguese Governments and the Commission, I do not think that any arguments to the contrary can be drawn from the judgments along the lines of *Bozzone* and the more recent judgment in *Rönfeldt.*

As regards the first group of judgments, it is true that the Court has developed a broad

12 — Judgment in *Borowitz* at paragraph 26. From that paragraph it also seems to me that the Member State concerned which, on the basis of the bilateral convention, and so of an obligation which it has accepted itself, is required to take account of 'third' periods, is not required to do so on the basis of Regulation No 1408/71 any more than are the other Member States.

13 — [1988] ECR at p. 3729.

interpretation of the concept of 'legislation' in Article 1(j) of Regulation No 1408/71. Thus since the judgment in *Bozzone* the Court has repeatedly declared:

'This definition is remarkable for its breadth, including as it does all provisions laid down by law, regulation and administrative action by the Member States and must be taken to cover all the national measures applicable in this case.' [14]

However, none of the judgments in which the Court has adopted this broad interpretation concerns a bilateral convention between a Member State and a third country. Thus in *Bozzone* the question was whether a Belgian colonial decree, subsequently confirmed by a national Law, [15] was to be regarded as legislation within the meaning of the regulation. In *van Roosmalen* the question was whether a Netherlands Law on incapacity for work, the effect of which extended to regions outside Community territory (namely to activities in a developing country), constituted legislation within the meaning of the regulation. Finally in *Laborero and Sabato* v *OSSOM* the Court had to decide *inter alia* whether a Belgian Law concerning periods of employment exclusively completed in third countries (namely Zaire) was legislation falling within the scope of Regulation No 1408/71. It is therefore hard to regard those judgments as a precedent for this case.

14. I come to the same conclusion with regard to the *Rönfeldt* judgment on which the Portuguese Government and the Commission to some extent base their arguments. [16] That case did not concern, either, the question whether a bilateral convention between a Member State and a third country falls within the field of application of Regulation No 1408/71 as legislation. On the contrary, the central question was whether it was compatible with Articles 48(2) and 51 of the EEC Treaty for workers to lose social security advantages because a convention *between two Member States* was rendered inoperative by the entry into force of Regulation No 1408/71. [17] The Court answered the question in the negative on the basis of its settled case-law in which it was deduced from a teleological reading of Articles 48 and 51 of the Treaty that Community law could not bring about a reduction in the benefits awarded by virtue of the legislation of a single Member State. For those reasons the Court decided that, in spite of Article 6 of the regulation previously discussed (in section 8) account should *nevertheless* be taken of such conventions between Member States as were more favourable to workers than the Community rules. [18] The Court therefore stated:

14 — Judgments in Case 87/76 *Bozzone* [1977] ECR 687 at paragraph 10; in Case 150/79 *Commission* v *Belgium* [1980] ECR 2621 at paragraph 4; in Case 300/84 *van Roosmalen* [1986] ECR 3097 at paragraph 28; and in Joined Cases 82 and 103/86 *Laborero* and *Sabato* [1987] ECR 3401 at paragraph 23. In other judgments too the Court shows that it interprets this definition broadly, particularly in the light of the objectives of Article 51 of the EEC Treaty: see the judgment in Case 139/76 *Blottner* [1977] ECR 1141 at paragraph 9 et seq.

15 It was precisely because of that Law that the Commission subsequently brought before the Court an action against Belgium for failure to fulfil its obligations: see the judgment in *Commission* v *Belgium*, previously cited

16 Previously cited in footnote 8.

17 Cf. the Court's reformulation of the question in paragraph 21 of the judgment.

18 Judgment in *Ronfeldt*, paragraph 28.

'"Benefits awarded by virtue of the legislation of a single Member State" must mean not only the benefits provided under national law alone, as formulated by national legislators, but also the benefits available under the provisions of the international social security conventions in force between two or more Member States and incorporated in their national law, which have the effect of placing the worker concerned in a more favourable position than is accorded by Community provisions.' [19]

However, the Court did not give its opinion here either on a bilateral convention *between a Member State and a third country.*

In the alternative: scope of the principle of equal treatment in case Regulation No 1408/71 is applicable

15. If, in spite of the arguments set out above, the Court were to decide that bilateral conventions between a Member State and a third country were to be regarded as 'legislation' for the application of Regulation No 1408/71, then the Bundessozialgericht's second question should in my view be answered in the affirmative. By that question the national court is asking whether, if the first question is answered in the affirmative, the principle of equal treatment laid down in Article 7 of the EEC Treaty and in Article 3(1) of Regulation No 1408/71 prevents the German insurance institutions to which application has been made for an old-age or invalidity pension-on the basis of the Convention and more specifically of paragraph 2 of the final protocol thereto (see section 3) — from taking account for German nationals only (and not for other EEC citizens) of the insurance periods completed in Switzerland.

16. If an agreement such as the Convention is to be regarded as legislation within the meaning of Article 1(j), then the principle of equal treatment as laid down in Article 3(1) of the regulation must indeed be applied in its entirety. On that basis the German insurance institutions would then be required to take account of insurance periods completed in Switzerland for all Community citizens. The contrary arguments of the LVA Hessen and the German and United Kingdom Governments cannot prevent that. For the sake of completeness I shall briefly state why.

17. The idea that, as the LVA Hessen contends, the principles underlying Article 234 of the EEC Treaty must apply here too, in view of the fact in particular that the Community is not empowered to conclude an international social security convention finds no support in Community legislation or case-law. Even though it is for the Member States to conclude international conventions in a given field, they must, in exercising that power, take account of imperative provisions of Community law. Article 234 which, according to its own wording, is restricted to the rights and obligations resulting from

19 — Judgment in *Rönfeldt*, paragraph 27.

conventions concluded by a Member State and a third country *before the entry into force* of the Treaty — and in this case the convention at issue is one concluded after the Treaty entered into force in Germany — cannot affect the position.

18. Nor is it possible to accept the argument put forward by the German Government that Articles 48 and 51 of the EEC Treaty and Regulation No 1408/71 can in no case be applied with regard to insurance periods completed *outside* the Community. In the judgment in *Walrave* the Court already recognized, with regard to the Community prohibition of discrimination, as expressed *inter alia* in Articles 7 and 48 of the Treaty, that the rule of non-discrimination, in view of its imperative nature, applies in judging all legal relationships in so far as, by reason either of the place where they are entered into or of the place where they take effect, they may be located within the territory of the Community. [20]

I do not think that the fact that Ms Grana-Novoa, before working in Germany, worked in Switzerland and that this case originates in the problems of taking into account insurance periods completed there provides any compelling reason for locating the legal relationship at issue outside the Community. In the judgments in *van Roosmalen* and *Laborero and Sabato* the Court declared:

'Since the decisive criterion for the applicability of Regulation No 1408/71 is the fact that the insured person is affiliated to a social security scheme in a Member State, it is of no importance whether or not he pursued his activities exclusively outside the territory of the Member States of the Community.' [21]

In *Laborero and Sabato* the Court deduced that a national scheme 'is not removed from the scope of application of that regulation and in particular from the principle of equal treatment expressed in Article 3(1) thereof merely because the benefits provided for can be based only on insurance periods completed outside the Community'. [22]

The Belgian Government's argument in that case to the effect that such an interpretation would be contrary to Article 227 of the Treaty — which restricts the application of the Treaty to the territory of the Member States — was rejected without difficulty by the Court since Regulation No 1408/71 imposes requirements on national legislation or legal rules 'only in so far as the scheme produces effects within the Community'. [23]

19. I should like to add that in my view it is not possible, either, to base a valid argument against the application of Community law

20 Judgment in Case 36/74 *Walrave* [1974] ECR 1405 at paragraph 28

21 Judgments in *van Roosmalen* at paragraph 30, in *Laborero and Sabato* at paragraph 25, and in Case C-105/89 *Buhari Haji* [1990] ECR I-4211 at paragraph 15

22 Judgment in *laborero and Sabato* at paragraph 26

23 Judgment in *Laborero and Sabato* at paragraph 27

on the fact that, in a case such as this, there would be no *obstacle to free movement of workers*. If Ms Grana-Novoa had worked in Spain instead of in Germany, the insurance periods completed both in Switzerland and in Spain would have been taken into account on the basis of the convention between Spain and Switzerland (see section 2 above). It was therefore because she had worked in Germany, in other words because she exercised her right to freedom of movement, [24] that the insurance periods which she had completed in Switzerland were lost.

20. On the supposition that the first question referred to the Court, contrary to my views put forward earlier, requires an answer in the affirmative, the answer to the second question should then be that the exclusion clause contained in paragraph 2 of the final protocol to the Convention cannot be applied. It follows from the principle of the primacy of Community law that any contrary provision of existing national law, including the international Convention, which on this supposition would form part of it, cannot be applied. [25]

## Conclusion

21. Having regard to the foregoing arguments, I suggest that the Court should reply as follows:

(1) A bilateral convention between a Member State and a third country, even if it has been incorporated by statute into the domestic legal order of the Member State concerned, is not to be regarded as 'legislation' within the meaning of Article 1(j) of Regulation No 1408/71.

(2) In view of the answer to the first question, there is no need to answer the second question.

24 — In this respect I am disregarding the fact-which incidentally has not been raised by any of those who have submitted observations to the Court-that Ms Grana-Novoa worked in Switzerland and subsequently settled in Germany before Spain's accession to the Communities. Consequently, as the court of reference correctly observes, her situation is governed by Article 94 of Regulation No 1408/71: Ms Grana-Novoa can acquire rights under the regulation only as from 1 January 1986 (Article 94(1)), but in this case account must be taken also, with retroactive effect, of insurance periods completed or of contingencies which materialized prior to that date (Article 94(2) and (3).

25 — Cf. the judgment in Case 106/77 *Simmenthal* [1978] ECR 629 at paragraph 17.