Reports of Cases

OPINION OF ADVOCATE GENERAL
CRUZ VILLALÓN
delivered on 8 September 2011 [1]

Case C-347/10

A. Salemink
v
Raad van bestuur van het Uitvoeringsinstituut werknemersverzekeringen

(Reference for a preliminary ruling from the Rechtbank Amsterdam (Netherlands))

(Social security for migrant workers — Compulsory insurance — Refusal of invalidity benefit — Workers employed on gas drilling platforms located on the continental shelf adjacent to the territorial sea of a Member State)

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1. The rule set out in Prodest [2] and Aldewereld, [3] may suggest a solution to this case on the basis of the special link between an employment relationship and the law of a Member State. Alternatively, however, the question referred by the Rechtbank (District Court) Amsterdam may also allow the Court of Justice to rule on whether the continental shelf [4] is an area over which the Member States may exercise sovereignty and, hence, an area which falls within the territorial scope of EU law (Article 52(1) TEU).

2. If, as I advocate in this Opinion, the continental shelf must be regarded as 'EU territory' for the purposes of the applicability of Community law within the areas of competence conferred on the Union by the Member States, the legal position of workers employed in the exploitation of its resources can be no different from that of those working within the territory of the State as more strictly defined. Or, to be more precise, the social security scheme for such employees can differ only to the extent that such differences can be shown to be compatible with the freedoms guaranteed by the Treaties, in the light of Regulation No 1408/71.

I – Legal framework

A – *International law*

3. Article 77(1) UNCLOS provides:

'The coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources.'

4. Using identical wording, Article 2(1) of the Convention on the Continental Shelf [5] states:

'The coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources.'

2 — Case 237/83 *Prodest* [1984] ECR 3153.

3 — Case C-60/93 *Aldewereld* [1994] ECR I-2991.

4 — An area which 'comprises the seabed and subsoil of the submarine areas that extend beyond [the] territorial sea throughout the natural prolongation of [the] land territory [of a coastal State] to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance' (Article 76(1) of the United Nations Convention on the Law of the Sea ('UNCLOS'), which was signed in Montego Bay, Jamaica, on 10 December 1982, entered into force on 16 November 1994, was ratified by the Netherlands on 28 June 1996 and approved on behalf of the European Community by Council Decision 98/392/EC of 23 March 1998 (OJ 1998 L 179, p. 1)).

5 — Done at Geneva on 29 April 1958 and in force since 10 June 1964 (United Nations, *Treaty Series*, vol. 499, p. 311).

B – *EU law*

5. Article 13 of Regulation (EEC) No 1408/71 [6] provides:

‘1. Subject to Articles 14c and 14f, persons to whom this Regulation applies shall be subject to the legislation of a single Member State only. That legislation shall be determined in accordance with the provisions of this Title.

2. Subject to Articles 14 to 17:

(a) a person employed in the territory of one Member State shall be subject to the legislation of that State even if he resides in the territory of another Member State or if the registered office or place of business of the undertaking or individual employing him is situated in the territory of another Member State;

…’

C – *National law*

6. Under Article 3(1) of the Ziektewet (Law on sickness insurance, ‘ZW’), an ‘employee’ is defined as a natural person under the age of 65 years who is employed in a position governed by private law or public law. Article 3(2) of the ZW provides that a person who works outside the Netherlands is not regarded as an employee unless that person resides in the Netherlands and the employer also has its place of business or is established in the Netherlands.

Article 7(1) of the Wet werk en inkomen naar arbeidsvermogen (Law on work and income according to capacity for work, ‘WIA’) stipulates that insurance is compulsory for employees. Pursuant to Article 8(1) of the WIA, for the purposes of the WIA, an employee is defined as ‘an employee within the meaning of the ZW’.

7. Articles 18(1) and 18(2) of the WIA, provide for the possibility of voluntary insurance in the case of a person below the age of 65 who does not fall within the definition of an employee under the ZW, whose compulsory insurance has ended, who is resident outside the Netherlands and who has an employment contract for a maximum term of five years with an employer who is resident or established in the Netherlands.

8. The Wet arbeid mijnbouw Noordzee (Law relating to Employment in Extraction Industries in the North Sea, ‘WAMN’) makes no provision for compulsory social insurance for employees working in the Netherlands section of the continental shelf. Article 2 of that Law provides that Netherlands law on employment contracts applies in relation to an employee’s employment contract. For the purposes of the rules of private international law, work performed by an employee is deemed to be performed in Netherlands territory. The WAMN does not include a similar provision concerning social security.

9. Under Article 7 of the Treaty on social security of 5 February 1974 between the Netherlands and Spain, employees working in the territory of one of the parties to the treaty are subject to the legislation of that party, even if they reside in the territory of the other party or if their employer or the registered office of the undertaking that employs them is located in the territory of the other party.

6 — 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, as amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996 (OJ 1997, L 28, p. 1), as amended by Council Regulation (EC) No 1606/98 of 29 June 1998 (OJ 1998 L 209, p. 1).

II – Facts

10. Mr Salemink, a Netherlands national, has worked since 1996 for a Netherlands undertaking as a nurse on a gas drilling platform located on the continental shelf adjacent to the territorial sea of the Netherlands.

11. On 10 September 2004 Mr Salemink, who until that point had been resident in the Netherlands, moved to Spain.

12. While he had been resident in the Netherlands Mr Salemink was covered by compulsory insurance pursuant to Netherlands legislation applying to employees (Article 3 of the ZW).

13. At his own request, and with effect from 4 October 2004, Mr Salemink was covered by voluntary insurance in accordance with the Wet op de arbeidsongeschiktheidsverzekering (Law on occupational disability insurance, 'WAO').

14. By a decision of 15 July 2005, the Raad van bestuur van het Uitvoeringsinstituut werknemersverzekeringen (Management Board of the Employee Insurance Agency, 'UWV') terminated this cover with effect from 4 December 2004 on account of Mr Salemink's failure to pay the relevant contribution. Mr Salemink did not seek to challenge this decision.

15. On 15 May 2006 Mr Salemink once again applied to the UWV for voluntary insurance cover but, by a decision of 11 July 2006, his application was refused on the grounds that it was out of time. On 11 March 2008 the UWV held the objection filed by Mr Salemink against this refusal inadmissible on the grounds that it was out of time. Mr Salemink did not appeal against this declaration of inadmissibility.

16. On 24 October 2006 Mr Salemink took sick leave and, on 11 September 2007, applied for the relevant benefit pursuant to the WIA. By a decision of 11 October 2007 the UWV rejected his claim on the grounds that he had not been covered by compulsory insurance since moving to Spain.

17. By decision of 12 March 2008 the UWV dismissed as unfounded the objection lodged by Mr Salemink against the decision of 11 October 2007. Mr Salemink then brought a legal action against that decision.

18. Before the referring court Mr Salemink argues that he is eligible for invalidity benefit and invokes Regulation No 1408/71. In his view, the UWV should regard the Netherlands section of the continental shelf as part of Netherlands territory and in this regard he relies on *Aldewereld* and on the policy followed by the Sociale Verzekeringsbank (Social Insurance Agency) which, with effect from 1 January 2006, has regarded employees working on the Netherlands section of the continental shelf as being covered by social insurance (known as the 'broader policy').

19. The UWV's argument before the referring court is that Mr Salemink was not insured under the WIA on the first day the WIA came into operation (24 October 2008, two years after he first took sick leave).

20. Furthermore, in its view, *Aldewereld* is not applicable to the case under consideration in that there is no positive conflict between different States, each claiming jurisdiction, but, on the contrary, there is a negative conflict. Nor is *Weber*[7] applicable, as it was ruling on jurisdiction rather than on the determination of the applicable legislation, as here.

7 — Case C-37/00 *Weber* [2002] ECR I-2013.

III – The question referred for a preliminary ruling

21. In the light of the above, the referring court has decided to refer the following question:

'Do the rules forming part of European Community law which are designed to bring about free movement for workers, in particular the rules set out in Titles I and II of Regulation (EEC) No 1408/71 as well as in Articles 39 and 299 of the EC Treaty (now respectively Articles 45 TFEU and 52 TEU, in conjunction with Article 355 TFEU) preclude an employee working outside Netherlands territory on a fixed installation on the Netherlands section of the continental shelf for an employer established in the Netherlands from being in a position in which he is not insured under national statutory employee insurance solely on the ground that he is not resident in the Netherlands but in another Member State (in this case, Spain), even if he has Netherlands nationality and can also avail himself of the option to take out voluntary insurance under essentially the same conditions as those which apply to compulsory insurance?'

22. The referring court indicates that, in letters of 11 July and 30 September 2009, the Commission put forward a number of arguments in connection with the proceedings instituted against the Netherlands for its alleged failure to fulfil its obligations under Articles 13(2)(a) and 3(1) of Regulation No 1408/71 and Articles 45 to 48 TFEU: [8]

(a) Concerning the scope of Regulation No 1408/71, the Commission stated that, as the Regulation itself is silent on the matter, work carried out in the part of the continental shelf belonging to a Member State must be regarded as work that is carried out within the territory of that Member State, since this can be inferred from the principles of public international law concerning the rules relating to the continental shelf. For the purposes of the exploitation of natural resources, the continental shelf therefore forms part of Netherlands territory and Netherlands social security law is applicable there. Furthermore, the geographical scope of the EC Treaty may extend beyond the territory of a Member State in so far as a Member State exercises its sovereign rights, as the Court of Justice indicated in its judgment in Joined Cases 3/76, 4/76 and 6/76 *Kramer and Others* [1976] ECR 1279.

(b) Regarding Regulation No 1408/71, the Commission took the view, relying on *Aldewereld*, that it was applicable to the case in point even if it were assumed that the continental shelf did not form part of Netherlands territory.

(c) The Commission emphasised that, according to the case-law, the Community law rules against discrimination can even be applied to professional activities pursued outside Community territory if the employment relationship nevertheless has a sufficiently close link to that territory (judgments in *Prodest*, *Lopes da Veiga* [9] and *Aldewereld*). In the present case, according to *Weber*, there is a close connecting link with the Netherlands legal system. The Commission takes the view that, in practice, the special regime applicable to drilling platforms results in indirect discrimination contrary to Article 39(2) of the EC Treaty and Article 3(1) of Regulation No 1408/71, since the regime is in practically all instances applicable only to migrant employees and not to Netherlands employees working on the same drilling platforms and residing in the Netherlands. General Netherlands social security legislation is applicable to this group, meaning that these employees qualify for all Netherlands social security benefits. As all employees working on drilling platforms must be put on the same footing as employees working in Netherlands territory, the imposition of a residence requirement in order for them to gain access to extensive social security protection constitutes a disguised form of discrimination on grounds of nationality.

8 — Case C-141/10 *Commission* v *Netherlands*; case pending (OJ 2010 C 161, p. 19).

9 — Case 9/88 *Lopes da Veiga* [1989] ECR 2989.

23. The referring court notes that Article 3a ZW provides for entitlements to insurance only in so far as they result from international law. It therefore raises the question of the extent to which international law (in particular European Union law) provides a basis for such entitlements.

24. According to the court, the *Weber* judgment could be interpreted in such a way as to mean that the territorial scope of Regulation No 1408/71 is not limited to the territory of the Member States of the European Union, but extends also to the continental shelf. However, the Rechtbank doubts whether this interpretation is correct.

25. The referring court accepts that the national law in question might be incompatible with the principle of free movement of workers, since Mr Salemink no longer has an advantage which he enjoyed when living in the Netherlands. However, it raises the question whether this incompatibility might be mitigated by the fact that Mr Salemink had the option of taking out voluntary insurance.

IV – Procedure before the Court of Justice

26. The order for reference was lodged at the Court on 8 July 2010.

27. Observations were submitted by Mr Salemink, the UWV, the Commission and the Spanish, Greek and Netherlands Governments.

28. At the hearing on 14 June 2011 the legal representatives of Mr Salemink, the UWV, the Netherlands, Greek and Spanish Governments and the Commission presented oral argument.

V – Arguments of the parties

29. Mr Salemink argues that Netherlands law is applicable and asserts that his position is similar to that of the crew of a Netherlands ship, for whom affiliation to the Netherlands social security system is compulsory.

30. The UWV, the Spanish, Greek and Netherlands Governments and the Commission address the issue of the scheme applicable to the continental shelf and, specifically, the question of whether work carried out on the continental shelf must be regarded as work that is carried out within the territory of the Netherlands.

31. The UWV and the Netherlands Government deny that this can be the case, citing on the one hand the limited nature of the sovereign rights exercised by States over the continental shelf and, on the other, the fact that the territorial scope of Regulation No 1408/71 is limited to the territory of the Member States. These two parties also agree that the rule in *Weber* and *Aldewereld* does not apply to this case. In any event, according to the Netherlands Government, even assuming that Mr Salemink worked on Netherlands territory, Regulation No 1408/71, in so far as it is concerned only with the conflict of laws, does not prevent Member States from adopting different social security schemes for different situations and does not require the application on the continental shelf of the same scheme that applies in Netherlands territory as strictly defined.

32. The Netherlands Government also disputes that the domestic legislation discriminates, directly or indirectly, on grounds of nationality or that it hinders the free movement of workers. This is because, first of all, nationality is not a condition of eligibility for compulsory insurance and it is always open to anyone who is not eligible for it to take out voluntary insurance or, if preferred, to take advantage of the provisions of the WAMN. Secondly, EU law does not require that persons who are neither resident nor working in the Netherlands should have the right to compulsory insurance and thus any difference in treatment would in any event be justified on grounds of the nature of work on gas drilling

platforms, which are sometimes moved to areas of the continental shelf which are not adjacent to the Netherlands. Ultimately, the Netherlands Government denies that there can be any hindrance to free movement (which, even if it exists, would still be justified), since the damage suffered by Mr Salemink was caused by his own actions, as it was open to him to take out voluntary insurance.

33. The Commission and the Spanish and Greek Governments maintain that EU law is fully applicable to a worker in Mr Salemink's position, who works on the continental shelf adjacent to a Member State.

34. If, for the purposes of the application of EU law, the continental shelf were not to form part of Netherlands territory, the Commission takes the view that, in the light of the rules established in *Aldewereld*, there is a sufficiently close connecting link with the Netherlands legal system.

35. The Greek Government shares the view that, within the limits of a coastal State's exercise of its rights over the continental shelf, the latter must be equated with its own territory for the purposes of determining the applicable law.

36. The Spanish Government argues that if the coastal State has exclusive rights to exploit the continental shelf, all matters relating to employment in that area, including social security cover, fall within its authority.

37. The Commission and the Spanish and Greek Governments all make the point that the national legislation is discriminatory and hinders the free movement of workers. The Commission draws particular attention to the proceedings for failure to fulfil obligations instituted against the Netherlands on those grounds and emphasises that the option of taking out voluntary insurance does not alter matters. The Greek Government makes the same point whilst the Spanish Government argues that, in a worst case scenario, a link with EU territory would be a sufficient basis on which to determine that Regulation No 1408/71 is applicable, and for these purposes it is enough, in its view, that Mr Salemink's employer is resident in the Netherlands.

VI – Assessment

A – *Preliminary remark*

38. In my view, there are two ways of looking at this case, each with very different implications. On the one hand, it is possible to take what might be called the 'status quo approach' under which, leaving aside all issues relating to how the continental shelf is linked to the 'territory' of the Member States and thus to the EU, the focus is exclusively on the fact that the work carried out by Mr Salemink has the necessary connection with Netherlands law.

39. From this point of view, the unequivocal case-law established in *Prodest* and *Aldewereld* would provide sufficient grounds on which to base a reply to the referring court stating that where there is an employment relationship with an undertaking established in a Member State, it is irrelevant, for the purposes of the application of Regulation No 1408/71, that the work is actually carried out outside the territory of that Member State. Under that rule, which was confirmed in *Habelt*,[10] the existence of a sufficiently close link between the employment relationship and the law of a Member State is enough for EU employment law to be regarded as applicable.

10 — Joined Cases C-396/05, C-419/05 and C-450/05 *Habelt* [2007] ECR I-11895, paragraph 122.

40. Thus, in the present circumstances, the issue would be to ascertain whether, in the light of this case-law, the employment relationship between Mr Salemink and his employer constitutes, as seems obviously to be the case, a degree of connection with the Netherlands such that, as a result of it, the requirement that Mr Salemink himself should also be resident in the Netherlands in order to be eligible for compulsory insurance constitutes, in reality, a restriction on his freedom of movement as a worker.

41. Alternatively, it is also possible, as demonstrated by the positions adopted by the parties to these proceedings, to take another approach and address the problem more directly, from the point of view of the 'territorial status' of the continental shelf. This would perhaps be a more innovative approach, although only outwardly, as we shall see, since it involves, in a sense, trying to rationalise and strip down to the essentials the responses already provided by the Court of Justice when tackling various questions concerned with defining the scope of EU law.

42. I do not think that the case-law to which I have just referred needs particular analysis on my part. However, the fact remains that this case may be regarded by the Court of Justice as an opportunity to further develop the very sensitive question of how to define the 'territorial' scope of competences. The following analysis is therefore intended to serve that purpose.

B – *Public international law as a starting point: the scope of State sovereign powers on the continental shelf*

43. EU law applies to the Member States (Article 52(1) TEU), whose territory thus corresponds to the 'territorial scope of the Treaties'.[11] Consequently, there is no separate definition of 'EU territory',[12] which is instead made up of all the territories of the Member States, the delimitation of which in terms of physical space under State sovereignty can be ascertained only within the framework of international law by means of treaties establishing boundaries.[13]

44. As a physical space under the sovereignty of a State, the concept of territory covers territorial space as such and also airspace and maritime space. In all cases it consists of areas, recognised by international law, where each State exercises exclusive sovereignty, although these areas do not represent the full extent of the domain in which States can exercise their sovereign powers, since international law also recognises the existence of extraterritorial State powers.[14]

45. Just as the area in which State sovereignty can be exercised does not necessarily coincide exactly with the extent of its territory, neither do the competences of a State which derive from sovereignty always exhibit the exclusivity and absolute nature which are characteristic of sovereign power. On the contrary, precisely as a result of the progressive legal regulation of the international community, the exercise of sovereignty is subject to variations in intensity, becoming less pronounced as the connection between the area of exercise and the territorial base of the State becomes weaker.

11 — Which scope, pursuant to Article 52(2) TEU, 'is specified in Article 355 of the Treaty on the Functioning of the European Union'. This specification is not relevant for the present purposes.

12 — Lenaerts, K. and van Nuffel, P., *European Union Law*, 3rd edition, Sweet & Maxwell, London, 2011 (12-006).

13 — Under international law, a boundary established by treaty 'achieves a permanence which the treaty itself does not necessarily enjoy. The treaty can cease to be in force without in any way affecting the continuance of the boundary' (judgment of the International Court of Justice of 3 February 1994, *Libyan Arab Jamahiriya/Chad* (I.C.J.Reports of judgments, advisory opinions and orders 1994, p. 37). That boundaries have greater permanence than the treaties which establish them shows the extraordinary importance of territorial limits as a factor in the stability of the international community.

14 — See, generally, González Campos, J.D., Sánchez Rodríguez, L.I., and Andrés Sáenz de Santa María, P.A., *Curso de Derecho Internacional Público*, 4th revised edition, Thomson-Civitas, Cizur Menor, 2008.

46. In particular, where the exercise of sovereignty over the sea is concerned, international law does not give States the same degree of power as it permits over territorial space as strictly defined; and this is so even in the case of 'territorial sea',[15] where '[t]he sovereignty... is exercised subject to this Convention and to other rules of international law', in the words of Article 2(3) UNCLOS, and where, unusually, the right of ships of all States to enjoy innocent passage must be respected (Article 17 UNCLOS), suggesting a limitation in principle on the jurisdiction of the coastal State, as the Court of Justice recognised in the *Poulsen* case.[16]

47. If State sovereignty over territorial sea is already restricted in the way I have indicated, the characteristic powers of a sovereign State diminish progressively the further one travels, so to speak, from 'dry land', such powers becoming reduced in the case of the continental shelf, as we shall go on to see in more detail, to a collection of 'sovereign rights' intended to be used for particular purposes, and diluted to the mere exercise of certain freedoms upon reaching the high seas,[17] where any claim to sovereignty is quite simply invalid.[18]

48. Regarding the Exclusive Economic Zone[19] in particular, the coastal State has, first, certain sovereign rights which are listed in Article 56(1)(a) UNCLOS, 'for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds'. Furthermore, the coastal State also has jurisdiction with regard to the establishment and use of artificial islands, installations and structures; marine scientific research; and the protection and preservation of the marine environment. The foregoing is, however, expressed to be 'as provided for in the relevant provisions of this Convention' (Article 56(1)(b) UNCLOS). Finally, in addition to the above, the coastal State has 'other rights and duties provided for in this Convention' (Article 56(1)(c) UNCLOS).

49. With regard to the continental shelf, which is the area of particular interest here,[20] the coastal State exercises sovereign rights only 'for the purpose of exploring it and exploiting its natural resources'[21] (Article 77(1) UNCLOS). According to UNCLOS, these sovereign rights are 'exclusive'[22] and 'do not depend on occupation, effective or notional, or on any express proclamation' (Article 77(2) and (3)) UNCLOS),[23] they do not in any circumstances affect the legal status of the superjacent waters or of the air space above them (Article 78(1) UNCLOS) and must not infringe or result in any unjustifiable interference with navigation and other rights and freedoms of other States (Article 78(2) UNCLOS), and in particular the laying of submarine cables and pipelines (Article 79 UNCLOS).

15 — The belt of sea adjacent to the coast, whose breadth must not exceed 12 nautical miles, measured from baselines determined in accordance with UNCLOS (Articles 2 and 3 UNCLOS).

16 — Case C-286/90 *Poulsen* [1992] ECR I-6019, paragraph 25.

17 — These freedoms are listed in Article 87 UNCLOS and belong to 'all States, whether coastal or land-locked': '(a) freedom of navigation; (b) freedom of overflight; (c) freedom to lay submarine cables and pipelines...; (d) freedom to construct artificial islands and other installations permitted under international law …; (e) freedom of fishing …; (f) freedom of scientific research …'.

18 — By virtue of Article 89 UNCLOS '[n]o State may validly purport to subject any part of the high seas to its sovereignty'. As for 'the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction', which make up the 'Area' defined and regulated by UNCLOS, this, together with its resources, is stated to be the common heritage of mankind (Article 136 UNCLOS), and no claim or exercise of sovereignty or sovereign rights on the part of any State is permitted (Article 137(1) UNCLOS).

19 — Which 'shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured' (Article 57 UNCLOS).

20 — And which, by virtue of Article 76(1) UNCLOS, 'comprises the seabed and subsoil of the submarine areas that extend beyond [the] territorial sea throughout the [natural] prolongation of [the] land territory [of the coastal State] to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance'.

21 — Defined as 'the mineral and other non-living resources of the seabed and subsoil...' (Article 77(4) UNCLOS).

22 — '… in the sense that if the coastal State does not explore the continental shelf or exploit its natural resources, no one may undertake these activities without the express consent of the coastal State' (Article 77(2) UNCLOS).

23 — As the International Court of Justice has stated, they are rights which exist *ipso facto* and *ab initio*, by virtue of the sovereignty of the State, and as an extension of it for the purpose of exploring the seabed and exploiting its resources (Judgment of 20 February 1969, *North Sea Continental Shelf*, I.C.J. Reports 1969, p. 3, paragraph 19).

50. These, then, are the sovereign rights of coastal Member States which are recognised by international maritime law under UNCLOS, which is binding on both the Netherlands and the EU.

51. These rights, being evidence of their entitlement legitimately to exercise official authority, form part of the body of powers which make the Member States subjects of international law and, more importantly in this context, constitutive parties to the European Union.

52. Thus, in addition to sovereignty in the sense of a characteristic allowing the exclusive exercise of official authority with absolute jurisdiction, there also exist under international law and within the framework of its legal order, 'sovereign rights', or entitlements to exercise official authority, on a conditional and limited basis, in areas which do not in principle fall under State sovereignty. If sovereignty is the expression of a primary official authority, which is recognised and delimited by international law, sovereign rights derive from the will of the international community and it is here that their basis, content and limits can be found.

53. In the case of both sovereignty itself and sovereign rights, however, the fact that they are vested in the State implies the power to exercise official authority, in other words, to regulate in areas over which the incontestable authority of the sovereign effectively extends.

C – *Implications for EU law*

54. As stated in Article 1 TEU, the European Union is the result of the desire of the States establishing it to attain their common objectives by conferring on it certain competences. Whether such competences belong to the Member States by virtue of their sovereignty or were originally the result of international law conferring a sovereign right is immaterial for the purposes of defining the limits of Union competences, as the Union will exercise precisely those competences conferred on it (Article 5 TEU), on the terms agreed in the Treaties, having regard to the content and extent of such competences when exercised by the States themselves prior to entering into the Union.

55. The determining factor in defining the scope of EU law is, therefore, the extent of the competences lawfully exercised by the Member States within the framework of international law. EU law will apply to whatever extent the Member States exercise official authority in the areas of competence conferred on the Union, subject to conditions established by EU law and irrespective of the source of the entitlement to the State competence transferred to the EU; in other words, irrespective of whether the source of the entitlement was State sovereignty itself (as recognised and protected by international law) or the conferral by the international community of a sovereign right.

56. In order to reply to the question referred in these proceedings, we must therefore look to the specific collection of competences actually conferred on the Union in the substantive area at issue, and the question of whether they are exercised over the territory of the Netherlands in the strict sense or in a different geographical area and in the guise of sovereign rights is immaterial for these purposes. In other words, for EU purposes, the 'territory' of the Member States is the area (not necessarily territorial, in the spatial or geographical sense) of exercise of the competences of the Union. [24]

57. In line with this approach, when ruling on the scope of EU law in the past, the Court of Justice has relied on precisely the criterion indicated above. Thus, it has been able to hold that Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, [25] should be regarded as applicable beyond the Member States' territorial waters to the extent that the Member States exercise sovereign rights in certain defined areas and are therefore also responsible for conserving the biodiversity of such areas. [26]

D – *The competences of the Netherlands on the continental shelf*

58. In this case, where it is not disputed that the gas drilling platform on which Mr Salemink worked is located on the continental shelf adjacent to the Netherlands coast, it is also common ground that the Netherlands exercises sovereign rights over this area 'for the purpose of exploring it and exploiting its … resources' (Article 77(1) UNCLOS).

24 — The fact that the history of State power in the modern age is essentially that of the progressive imposition of territorial power means that we instinctively associate the area of exercise of State power with the territory over which a State can lawfully exercise its sovereignty (see, generally, Hespanha, A. M., 'El espacio político', *La gracia del Derecho. Economía de la cultura en la Edad Media*, Centro de Estudios Políticos y Constitucionales, Madrid, 1993, p. 85 et seq.). It is true that the area of exercise is basically a territorial area, but it is not limited to territory. In the context of international law, the power of a State can legitimately extend beyond its territory, in the same way that, vice versa, the advent of an emergency gives the international community a certain right to interfere in the affairs of a State on humanitarian grounds, which also leads us to question the traditional idea that a State has exclusive rights to exercise its competences in its own territory (Liakopoulos, D., *L'ingerenza umanitaria nel Diritto internazionale e comunitario*, Cedam, Padua, 2007). Both of these phenomena demonstrate a breakdown in the until recently almost perfect match of territory in terms of a physical space, on the one hand, and the area of exercise of sovereignty on the other. In reality, however, this match was the result of the historical development of the modern State and it is therefore a phenomenon which is more in the nature of a contingent truth than a necessary one.
That aside, in terms of necessity, it is true that sovereignty, as a characteristic of a legal order, requires an area of exercise for the legal authority which it characterises. That legal authority, by definition, results in the creation of legal rules whose effectiveness must depend on the ability of whoever exercises such authority to impose their mandates. The fact that this ability is seen to be effective mainly within the confines of a physical territory does not mean that it cannot lay claim to (and achieve) 'extraterritorial' effectiveness. Indeed, as an expression of what ought to be (the *sollen*), what is (the *sein*) does not represent either the basis for the existence of a legal order or the limits of its aspirations, which are, by definition, always ideals, but only its subject-matter, being the behaviours sought to be regulated. Consequently, the fact that such regulation is effective only within the boundaries of a territory does not mean that it is only legally valid within them. This is not to say that we should forget that 'territoriality is not a special component of State power, but only a condition and a characteristic of that power' (Carré de Malberg, R., *Contribution à la théorie générale de l'État*, I, Sirey, Paris, 1920, p. 4).
Evidence that this is more than just a theoretical debate is to be found in the problems of State enforcement of, for example, domestic legislation on gaming in the face of the impact of the internet. Advocate General Mengozzi referred to this problem in his Opinion of 4 March 2010 in Joined Cases C-316/07, C-358/07, C-359/07, C-360/07, C-409/07 and C-410/07 *Markus Stoß* [2010] ECR I-8069, stating at point 79 that 'the difficulties that a State may encounter in securing compliance with national law are not relevant with regard to judging its compatibility with Community law. A restriction laid down by national law is in itself either compatible or incompatible with the Treaty and the ease with which it is possible to act contrary to national rules is irrelevant in that connection …'.

25 — OJ 1992 L 206, p. 7.

26 — Case C-6/04 *Commission* v *United Kingdom* [2005] ECR I-9017, paragraph 117. This approach had been taken even before this, in Joined Cases 3/76, 4/76 and 6/76 *Kramer and others* [1976] ECR 1279, paragraphs 30 to 33, where it had been stated that a particular authority of the Community *ratione materiae* extended, 'in so far as the Member States have similar authority under public international law' (paragraph 31), to fishing on the high seas. On EU law and maritime spaces in general, see Michael, M., *L'applicabilité du Traité instituant la CEE. et du Droit dérivé au plateau continental des États membres*, Librairie Général de Droit et de Jurisprudence, Paris, 1984, and Blanquet, M. and de Grove-Valdeyron, N., 'Zones côtières et Droit Communautaire', *Revue Juridique de l'Environnement*, special 2001 edition, pp. 53 to 84. More specifically, see Jarass, H. D., *Naturschutz in der Ausschließlichen Wirtschaftszone*, Nomos, Baden-Baden, 2002, and Czybulka, D., 'Die Anwendung der Umwelthaftungsrichtlinie in der Ausschließlichen Wirtschaftszone und auf dem Festlandsockel', *Natur und Recht* (2008) 30, pp. 304 to 311.

59. It is true, as the UWV has pointed out in paragraph 13 of its observations, that international law confers on coastal States only 'functional' jurisdiction or sovereignty over the continental shelf and does not treat it as an integral part of the territory of that State. However, this point is irrelevant, since what matters is the scope of the competence conferred on the coastal State, on the one hand, and the degree to which the exercise of such competence has been transferred to the European Union, on the other.

60. The power to exploit the resources of the continental shelf implies an exclusive competence to carry out activities for the utilisation of the area's resources using labour which must necessarily be subject to the employment legislation of the coastal State.

61. In this particular respect, namely for the purposes of exercising its competence in the field of employment, the coastal State is entitled to exercise sovereignty on an equivalent basis, in principle, to the basis on which it is entitled to regulate in that field within its own territory.

E – *The possible existence of more than one social security scheme and the basis for this*

62. In paragraph 22 of its written observations, the Netherlands Government recognises that, since 1990, it has regarded the Law on the minimum wage and minimum holiday allowance (Wet minimumloon en minimumvakantiebijslag), as well as certain tax laws, as applicable on the continental shelf, while from 2007 onwards the Law on working time (Arbeidstijdenwet) and the Law on working conditions (Arbeidsomstandighedenwet) have applied there. However, in paragraph 23 of its written observations, it maintains that UNCLOS does not require States to apply the same social security scheme to work carried out on the continental shelf as to work carried out in the national territory as strictly defined.

63. The real question is therefore whether Member States are free to decide on the extent of the sovereign rights vested in them on the continental shelf, in the sense that it is legitimate to exercise their official authority selectively in this area. In other words, whether they can apply different legislative regimes relating to the same field depending on whether the official authority exercised derives from primary State sovereignty or from a sovereign right conferred by international law.

64. I would agree with the Netherlands Government that UNCLOS does not require States to apply a particular social security scheme to continental shelf workers. In fact, the convention does not impose any obligations on States regarding the content of the substantive law which is the result of exercising the sovereign right conferred by it, but rather it merely constitutes the basis on which such sovereign right can legitimately be exercised. Requirements relating to the content of such substantive law must therefore be sought within the legal order of the coastal State and also in EU law where that legal order has conferred the relevant law-making competence on the Union.

65. It follows, therefore, that differences in the origin of the basis on which the official authority is legitimately exercised by a Member State in the field of employment do not of themselves justify substantive differences in employment legislation. Thus, for the purposes of all aspects of employment legislation, the EU regards the geographical areas over which the Member States legitimately exercise their sovereign power as forming part of the 'territory' of the Member States.

66. A different question is whether, having regard to the characteristics of the work being carried out on the continental shelf, the employment law which is applied by the coastal Member State can be modulated or varied vis-à-vis the standard regime applicable in respect of work carried out within its own territory, as strictly defined, and specifically, as far as this case is concerned, in the field of the social protection of workers. However, this would always be on the understanding that such variants cannot be the result of a difference in the scope of the State competence exercised or, put another way, of a qualitative difference in the nature of the relevant law-making power for the regulation of employment. Such power will only ever be the exclusive power vested in the State as an official authority.

67. In other words, a difference may sometimes exist by reason of the work, in and of itself, but not by reason of the area of sovereignty in which the Member State in question is exercising its competences.

F – *Netherlands law as the national law applicable on the continental shelf adjacent to the Netherlands coast. Implications of the applicability of EU law*

68. The Netherlands Government is correct in its assertion that Regulation No 1408/71 merely regulates conflicts of laws in the field of social security and does not impose any particular level of protection for workers, this being a matter for the Member States.

69. It is settled case-law of the Court of Justice that '[t]he sole purpose of Article 13(2) of Regulation No 1408/71 is to determine the national legislation applicable to persons who are in one of the situations referred to in subparagraphs (a) to (f) of that provision. It is not intended to lay down the conditions creating the right or the obligation to become affiliated to a social security scheme or to a particular branch under such a scheme. It is for the legislature of each Member State to lay down those conditions, including those concerning termination of insurance …' (*van Pommeren-Bourgondiën*).[27]

70. In the present case, as I have mentioned, Article 13(2)(a) of Regulation No 1408/71 identifies the legislation of the Netherlands as the legislation applicable to the situation in question, since Mr Salemink has been 'employed in the territory' of that Member State, despite being resident in the territory of another Member State. The 'territory of employment' was the continental shelf adjacent to the Netherlands, which, for the present purposes, being an area where the Netherlands exercises official authority under international law, is, in that sense, Netherlands territory and, consequently, EU territory. In other words, it is within the scope of Community law when the competences conferred on it by the Treaties are being exercised.

71. While it is true, as the Netherlands Government maintains, that it is for the Member States to determine the extent of the protection given to workers, it is also true that the Member States do not have unrestricted scope to define the social security scheme applicable to workers, as this is primarily and fundamentally limited by the right of workers to freedom of movement under Article 45 TFEU, in the light of which the provisions of Regulation No 1408/71 must be interpreted (*Bestuur van de Sociale Verzekeringsbank*).[28] In other words, only variations in the social security schemes applying to workers which do not prejudice their freedom of movement will be lawful and compatible with EU law.

72. Both the Netherlands Government and the UWV have cited the special characteristics of employment on the continental shelf by way of justification for the difference in treatment accorded to those not resident in the Netherlands as compared with Netherlands residents. In particular, they have referred to its dynamic nature, the wide variety of types of contract used and even the fact that the platforms themselves can be moved and are not always located in areas adjacent to the same territorial sea.

73. That the special characteristics of work on the continental shelf may justify a specific social security scheme, different from the one applying to employment relationships in Netherlands territory as strictly defined cannot, of course, be ruled out. However, it should be borne in mind that in the present case the important factor for the Netherlands legislature was not so much the type of work involved as simply the worker's place of residence.

27 — Case C-227/03 *van Pommeren-Bourgondiën* [2005] ECR I-6101, paragraph 33.

28 — Case C-282/91 *Bestuur van de Sociale Verzekeringsbank* [1993] ECR I-1221, paragraph 16.

74. In the circumstances under consideration, the difference in treatment by the Netherlands legislature ultimately comes down to residence alone. Of all the employees working on the continental shelf, the dividing line between those who form part of the standard scheme and therefore have compulsory insurance, and those who have the alternative of taking out voluntary insurance or, as the case may be, enjoying certain additional benefits, is determined by whether they are resident in the Netherlands or in another State, even where in both cases they work for an employer who is resident in the Netherlands.

75. At this juncture it is worth mentioning that this difference is not without significance from the point of view of the workers in question, even if only because the employer is always involved in the administrative side of compulsory insurance, whereas in the case of voluntary insurance the worker must attend to taking out the insurance and keeping it up-to-date, thus taking on a personal responsibility which, as demonstrated in the present case, can sometimes give rise to situations which are particularly prejudicial to the worker's interests and which are not necessarily attributable to him or her, a fact which, bearing in mind the weaker position of the worker in the context of the employment relationship, must be a matter of concern to the authorities. Neither is it without significance from the point of view of EU law if this less advantageous position ultimately proves to be the result of a difference in treatment affecting only persons who are not resident in the territory of a Member State, as strictly defined.

76. In summary, the Netherlands legislature has chosen, even within a geographical area that is clearly unusual, a basis of differentiation which is highly suspect from the point of view of the free movement of workers.[29] Moreover, it has done so in a legislative context in which work carried out in the North Sea drilling industries is deemed even by national law to be carried out within Netherlands territory, as Netherlands law relating to employment contracts is applicable (Article 2 WAMN). In short, this is a context in which the links of the employment relationship with Netherlands law are particularly strong and thus there is no justification for an additional requirement, such as the residence of the worker, which constitutes an obstacle to the freedom of movement of employees within the territory of the Union.

77. In my view, the link of the employment relationship under consideration is not merely sufficient — as the Court of Justice found in the case of work carried out abroad for employers who were resident in the Member State[30] — but more than sufficient, given that in this case the continental shelf is functionally equivalent to State territory. If territory is defined as the space where the sovereign power of the State manifests itself through the exercise of the competences legitimately vested in it under international law, then the continental shelf adjacent to its coast is the territory of the Member State within this meaning, that is to say, it is the space over which the Member State exercises exclusive competence in relation to, in this case, employment relationships entered into for the purpose of the economic exploitation of such space. Furthermore, as State 'territory' within that precise meaning, it is also EU 'territory' for the purposes of the application of EU law.

29 — This suspect condition is one which I also referred to, in another context, in my Opinion in Case C-503/09 *Stewart* [2011] ECR I-6497, at point 36, and which is relevant in the case at issue, even though Mr Salemink has Dutch nationality. The fact is that the national legislation mentioned by the Rechtbank Amsterdam affects mainly foreign workers, to a large extent. As the Commission has stated, at the present time there is even a pending action against the Kingdom of the Netherlands under Article 258 TFEU (Case C-141/10) which seeks to establish that this Member State has failed to comply with its obligations to the Union by refusing to pay certain social security benefits to nationals of other Member States who, like Mr Salemink, work on drilling platforms located on the Netherlands continental shelf and are not resident in the Netherlands.

30 — See, for example, *Habelt*, paragraph 122.

78. Given that correlation, there is, in my view, no alternative but to apply the settled case-law on Regulation No 1408/71. Consequently, in the words of the judgment in *Kits van Heijningen*,[31] it should be remembered that when the Member States lay down the conditions creating the right to become affiliated to a social security scheme, they cannot '[exclude] from the scope of the legislation … persons to whom it applies pursuant to Regulation No 1408/71'.

79. Thus, on that occasion it was held that 'Article 13(2)(a) of Regulation No 1408/71 expressly provides that a person employed in the territory of one Member State is to be subject to the legislation of that State "even if he resides in the territory of another Member State". That provision would have no practical effect if the residence condition laid down by the legislation of the Member State in whose territory the person is employed for affiliation to the insurance scheme which it establishes could be relied on against the persons referred to in Article 13(2)(a). With regard to those persons, the effect of Article 13(2)(a) is to replace the residence condition with a condition based on employment in the territory of the Member State concerned'.

VII – Conclusion

80. In the light of the foregoing, I propose that the Court reply as follows to the question submitted to it by the Rechtbank Amsterdam:

The rules forming part of European Community law which are designed to bring about free movement for workers, in particular the rules set out in Titles I and II of Regulation (EEC) No 1408/71 as well as in Articles 39 and 299 of the EC Treaty (now respectively Articles 45 TFEU and 52 TEU, in conjunction with Article 355 TFEU) preclude an employee working outside Netherlands territory, as strictly defined, on a fixed installation on the Netherlands section of the continental shelf for an employer established in the Netherlands from being in a position in which he is not insured under national compulsory employee insurance solely on the ground that he is not resident in the Netherlands but in another Member State, even if he can avail himself of the option to take out voluntary insurance.

31 — Case C-2/89 *Kits van Heijningen* [1990] ECR I-1755, paragraphs 20 and 21.