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SWIMMING IN ECJ CASE LAW: THE ROCKY JOURNEY TO EU LAW APPLICABILITY IN THE CONTINENTAL SHELF AND EXCLUSIVE ECONOMIC ZONE

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Abstract

Regarding activities taking place at sea, the applicability of EU law depends on the nature and geographic location of the activity as well as on the formulation of the geographical scope of the legal instrument. With Member States' ever-increasing activity at sea, the ECJ is confronted with various questions on the application of EU law at sea; its case law is analysed in this article. Firstly, the foundation of EU competence at sea in public international law and EU law is explored. Secondly, the line of ECJ case law is analysed. Thirdly, the interplay between the legislature's formulations and the Court's reasoning is addressed, as well as the validity of the latter in light of public international law. The article concludes by reflecting on the consequences of the Court's reasoning, with recommendations regarding alternatives.

1. Introduction

International law of the sea provides the competences and rights of *States* at sea. However, the EU is not a State, nor does it have a territory of its own.[1] Whereas the EU Treaties and secondary law generally dictate their own geographical scope, it is often not sufficiently clear to what extent the scope of

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1. See Ziller, "The European Union and the territorial scope of European territories", 38 *Victoria University of Wellington Law Review* (2007), 51–64. See also Lenaerts and van Nuffel, *European Union Law* (Sweet & Maxwell, 2011), para 12-006.

application extends to *maritime* areas. This can create legal uncertainty for various activities at sea, which is notable for instance in the energy sector. This is of increasing importance as energy activities at sea are increasing at a rapid pace due to climate change considerations, and new activities are taking place which may not fit within the current legal framework. Thousands of wind turbines have been constructed at sea[2] to realize renewable energy and emission reduction targets.[3] The number of offshore wind turbines is expected to multiply within a short period of time as the North Sea area may provide as much as eight percent of EU electricity supply by 2030.[4] To improve the efficiency of these large-scale operations and promote cross-border trade, an offshore electricity grid and artificial islands may be constructed in the North Sea.[5] In addition, hundreds of offshore oil and gas production facilities will have to be removed or re-used in the coming decades.[6] Extensive research is carried out whether re-use is feasible, for example for the production of hydrogen or CO_2-storage, for which many fields in the North Sea are suitable.[7]

The Court of Justice has addressed the question of applicability of EU law at sea in a number of cases throughout the last decades. This line of case law

2. WindEurope, "Offshore wind in Europe. Key trends and statistics 2018", February 2019, <windeurope.org/about-wind/statistics/offshore/european-offshore-wind-industry-key-trends-statistics-2018/> (last visited 12 Mar. 2019).

3. The States bordering the North Sea have committed themselves to the Paris Agreement, to national renewable electricity production targets and at the EU level through Directive 2018/2001/EU of the European Parliament and of the Council of 11 Dec. 2018 on the promotion of the use of energy from renewable sources, O.J. 2018, L 328/82 (the RES Directive) and its predecessor, Directive 2009/28/EC.

4. See the national plans on offshore wind energy of the EU Member States and, in particular, Council of the EU, "Political declaration on energy cooperation between the North Seas Countries" 8673/16 of 13 May 2016, which echoes the 2016 Manifesto Northern Seas as the Power House of North Western Europe which was signed by 20 Members of the European Parliament from countries neighbouring the North Seas.

5. E.g. Müller, *A Legal Framework for a Transnational Offshore Grid in the North Sea* (Intersentia, 2016), pp. 68 et seq.; Müller, "Legal bases for offshore grid development under international and EU law: Why national regimes remain the determining factor", 38 EL Rev. (2013), 618–637; Nieuwenhout, *Designing the Target Legal Framework for a Meshed Offshore Grid*, PROMOTioN Deliverable 7.2, June 2019, available at <www.promotion-offshore.net/fileadmin/PDFs/D7.2_Designing_the_Target_Legal_Framework_for_a_Meshed_Offshore_Grid.pdf> (last visited 12 July 2019).

6. For an overview of expected decommissioning requirements in different States bordering the North Sea see e.g. Waverijn and Baljon, "Verslag 29^{e} European energy law seminar", 4 *Nederlands Tijdschrift voor Energierecht* (2018), 133–147.

7. Energy Technologies Institute (ETI), A picture of CO_2 storage in the UK, learnings from the ETI's UKSAP and derived projects, October 2013, <www.eti.co.uk/news/optimising-the-location-of-ccs-in-the-uk-and-a-picture-of-co2-storage-in-the-uk> (last visited 16 Sept. 2019); Nederlandse Olie en Gas Exploratie en Productie Associatie (NOGEPA), Potential for CO_2 storage in depleted gas fields on the Netherlands Continental Shelf, March 2009.

still leads to questions, mainly due to the debatable manner in which the ECJ handles concepts such as territory, sovereignty and sovereign rights. Due to the formulations used in different cases, some activities at sea are, perhaps unwittingly, excluded from EU law. However, the problem does not only lie with the ECJ: it starts with the drafting of EU legal instruments, as these often do not mention whether the instrument applies to activities at sea beyond the territorial waters.[8] This leads to cases in which the ECJ is expected to judge whether an instrument of EU law applies to a certain activity at sea, whereas this uncertainty could have been avoided by the legislature by including a clearer provision on the scope of application of the instrument.

Although the line of case law is not very recent, it has consequences for contemporary issues, for instance in the debate around Nord Stream II and offshore electricity grid developments. In addition, analysis of case law shows that it bears an impact on, for example, the construction of artificial islands, maritime scientific research and protection of the marine environment.[9] Based on the ECJ's interpretation of international law, these activities may be excluded from the applicability of EU law. This is the result of the development of a line of ECJ case law around the concept of "sovereign rights".

In legal academic literature, the relevant ECJ cases have been addressed individually,[10] or with a view to one specific topic.[11] The topic can be placed within the framework of extraterritoriality and territorial extension in EU law, as mapped by Scott in recent years.[12] In 2012, Mehta discussed the topic in this *Review* with a focus on the differing interpretations of the law by the ECJ, the

8. See *infra*, sections 2.1 and 4.1.

9. These activities are listed in Art. 56(1)b of the United Nations Convention on the Law of the Sea (hereinafter UNCLOS), Montego Bay, 10 Dec. 1982, 1833 U.N.T.S. 3.

10. Chaumette, "Conflit de juridictions pour un travail effectué dans les eaux territoriales et sur le plateau continental de deux Etats membres de l'Union européenne", (2002) *Le droit maritime français*, 640–648 (on Case C-37/00, *Herbert Weber* v. *Universal Ogden Services Ltd.*, EU:C:2002:122); Koers, "The external authority of the EEC in regard to marine fisheries", 14 CML Rev. (1977), 269–301 (on Joined Cases 3, 4 & 6–76, *Cornelis Kramer and others*, EU:C:1976:114); Reid and Woods, "Implementing EC conservation law", 18 *Journal of Environmental Law* (2006), 148–160 (on Case C-6/04, *Commission* v. *United Kingdom (Habitats Directive)*, EU:C:2005:626); Driguez, "Sécurité sociale des travailleurs des installations off-shore", (2012) *Europe Mai Comm*. nº 3, p. 17 (on Case C-347/10, *Salemink* v. *Raad van bestuur van het Uitvoeringsinstituut werknemersverzekeringen*, EU:C:2012:17).

11. E.g. Müller (2016), op. cit. *supra* note 5; Nieuwenhout, op. cit. *supra* note 5.

12. Scott, "The new EU 'extraterritoriality'", 51 CML Rev. (2014), 1343–1380; Scott, "Extraterritoriality and territorial extension in EU law", 62 AJCL (2014), 87–126; Scott, "The global reach of EU law: Is complicity the new effects?" in Cremona and Scott (Eds.), *EU Law Beyond EU Borders: The Extraterritorial Reach of EU Law*, vol. XXVII/2, Collected Courses of the Academy of European Law (OUP, 2019). As will be shown in this article, in line with Scott's definition of territorial extension, the ECJ applies EU law on the basis of a territorial connection to areas outside the territory of the Member States.

Commission, and different Member States with regard to the continental shelf.[13] The present article adds a systematic overview of the development of the interpretation of the Court in its case law and places that against the background of the applicable public international law.

To set the scene, this article starts with a short elaboration on the rules of public international law on State competences at sea in section 2. This section continues with an assessment of the relationship between law of the sea and EU law and of the geographical scope of application of the EU Treaties. Together with the provisions on the geographical scope of application of the legislation which the ECJ has to rule on, these rules form the framework which the ECJ has to take into account when ruling on the question whether certain legislative instruments apply to activities at sea. Section 3 sets out the development of the case law and the ECJ's reliance on sovereign rights as a basis for the applicability of EU law. Subsequently, the roles of the legislature and ECJ in this matter are discussed. The article concludes by reviewing the consequences of the limiting formulation used by the ECJ, setting out recommendations for the legislature and ECJ while briefly looking ahead.

2. The foundation of competence at sea

Before analysing the case law of the ECJ, we briefly discuss the rules of public international law, the foundation for any rule-making jurisdiction at sea, as well as the provisions on the geographical scope of application of the Treaties. These matters concern the basis and limits of Union competence and thus of secondary law, which, confusingly, often contains different terms on its geographical scope from those in the Treaties.

2.1. *Public international law*

Public international law governs the existence and limits of the sovereignty and jurisdiction of States. The law of the sea sets out specific rules as regards the competences of States at sea. Contemporary law of the sea can mainly be found in the UNCLOS.[14] UNCLOS is the international agreement that lays down the rights and duties of States at sea, both for coastal States and for landlocked States. UNCLOS has been ratified by 168 parties.[15] From a

13. Mehta, "The continental shelf: No longer a 'terra incognita' to the EU", 49 CML Rev. (2012), 1395–1422.

14. 1982 United Nations Convention on the Law of the Sea, known as UNCLOS.

15. At the moment of writing, May 2019, UNCLOS is signed and ratified by 167 States and by the European Union (originally by the EC), see <www.un.org/depts/los/reference_

historical perspective, customary international law and the 1958 Geneva Conventions were the main legal instruments on the law of the sea before UNCLOS entered into force.[16] This is relevant for the older cases discussed in this article.

A main reason why UNCLOS is a relevant instrument for the case law discussed in this article, is that UNCLOS specifies to what extent coastal States have jurisdiction at various distances from their shore. This is because UNCLOS provides for a differentiation in competence based on "maritime zones".[17] In short, the legal situation in the different maritime zones is as follows.

In the territorial sea, which extends to up to 12 nautical miles (22.2 kilometres) from the low-water line along the coast, also called the baseline,[18] the coastal State is sovereign.[19] As a result, the coastal State enjoys the same powers within the territorial sea as on land, subject to a few exceptions included in UNCLOS and other international law.[20] Thus, the coastal State has almost full jurisdiction.

Beyond the territorial sea, the jurisdiction of the coastal State is much more limited. Beyond territorial waters, the continental shelf and the Exclusive Economic Zone (EEZ) stretch for 200 nautical miles from the coastline.[21] The continental shelf comprises the seabed and its subsoil beyond the territorial sea. It exists *ipso facto* and *ab initio*,[22] and States enjoy *sovereign rights* to explore and exploit natural resources present in the continental shelf, such as natural gas, oil and mineral resources.[23] On the other hand, the EEZ grants

files/chronological_lists_of_ratifications.htm.)> (last visited Sept. 2019). Another 14 States have signed but not ratified the Convention.

16. The Geneva Conventions include the Convention on the High Seas, Geneva, 29 Apr. 1958, 450 U.N.T.S. 11 and the Convention on the Continental Shelf, 29 Apr. 1958, 499 U.N.T.S. 31. The cases judged under these conventions are Joined Cases 3, 4 & 6/76, *Kramer*; Case C-37/00, *Weber*.

17. UNCLOS' predecessors, the 1958 Geneva Conventions, also mention different maritime zones. A main difference is that in UNCLOS, an extra zone, namely the EEZ, is introduced.

18. Art. 5 UNCLOS.

19. Art. 2 UNCLOS.

20. Art. 2(3) UNCLOS, an important exception is the right of innocent passage, enshrined in UNCLOS Part II, Section 3. Other exceptions may be formed by international law, related to e.g. environmental law and the prevention of pollution.

21. Arts. 57 (EEZ) and 76 (Continental Shelf) UNCLOS. The latter contains a number of exceptions to the 200 nautical mile limit in case the continental shelf stretches further than 200 nautical miles from the coastline.

22. *North Sea Continental Shelf Cases (Federal Republic of Germany* v. *Denmark and the Netherlands)*, Judgment, ICJ Rep. 1969, p. 3, paras. 19, 39 and 43.

23. Art. 77 UNCLOS.

coastal States the same *sovereign rights* regarding the seabed and its subsoil, but also concerning the water column above it, allowing for the exploitation of living resources (fish and aquaculture) as well as other resources such as the production of energy from the currents and the winds.[24] The EEZ does not exist by itself; it needs to be claimed explicitly by the coastal State. The EEZ and continental shelf thus partially overlap as coastal States have *sovereign rights* to explore and exploit the natural resources of the seabed and subsoil on the basis of both regimes,[25] regarding which UNCLOS provides that the coastal State must exercise its EEZ rights in accordance with the provisions concerning the continental shelf.[26] For the purposes of this article, reference to the sovereign rights in the continental shelf or EEZ have the same legal consequences.

Beyond these zones, the legal regime of the High Seas is applicable.[27] On the high seas, coastal States are not sovereign nor do they enjoy sovereign rights. They can exercise the freedoms of the high seas, which include navigation and fishing as well as the freedom to lay cables and pipelines.[28] This maritime zone is not the focus area of this article and thus will not be discussed in detail.

The rights granted to coastal States based on the law of the sea cannot be appraised without taking the framework of customary international law on "sovereignty" and "jurisdiction" into account. Within their territory, States are sovereign. As a general rule, States enjoy exclusive control over property and persons *within* their territory.[29] *Outside* a State's territory, this is more difficult. Jurisdiction based on sovereign rights is more limited than jurisdiction based on territoriality. It is *functional* jurisdiction, meaning that their jurisdiction is limited *ratione materiae* to the matters explicitly mentioned in UNCLOS and *ratione loci* to the mentioned area. Another limitation of "sovereign rights" is that in the enjoyment of its sovereign rights, the coastal State cannot impede the freedom of navigation, overflight and the laying of pipelines and cables that are granted to all States and private actors alike. This holds for all maritime zones except for the territorial sea.[30]

24. Arts. 55–57 UNCLOS.
25. Arts. 56 and 77 UNCLOS.
26. Art. 56(3) UNCLOS.
27. It must be noted that many provisions of this regime do apply in the EEZ pursuant to Art. 58(2) UNCLOS. However, this is not of particular relevance for the purposes of this article. Moreover, the closest area to the EU beyond national jurisdiction is part of the Atlantic Ocean, as all closer areas are part of a continental shelf and/or EEZ.
28. Art. 87 UNCLOS.
29. Crawford, *Brownlie's Principles of International law*, 8th ed. (OUP, 2012), p. 448.
30. Arts. 56(2), 78 and 79, *juncto* Art. 87 UNCLOS.

2.2. *UNCLOS and EU law*

All Member States of the EU have signed and ratified UNCLOS. Moreover, the EU itself has also signed and ratified this convention.[31] Concerning the question of the relationship between international law and EU law, the ECJ has delivered a number of relevant judgments. In cases such as *Intertanko, ATAA, Racke* and *Aktiebolaget*, the ECJ recognizes that the EU – *inter alia* pursuant to Article 3(5) TEU – must respect international law.[32] In addition, in *Intertanko,* the ECJ ruled that international law may influence the validity of secondary EU law.[33] The ECJ considers that the EU, based on its obligation to act in accordance with international law, is also limited by the boundaries of UNCLOS and that UNCLOS therefore limits the powers of the EU in the same way as it limits the powers of the Member States.[34] The ECJ has ruled on the limitations provided by UNCLOS in several cases. In *Poulsen*, the Court spelled out that UNCLOS grants coastal States broad but not unlimited powers in the territorial sea, as coastal States have to respect third State rights such as the right of innocent passage.[35] In *Aktiebolaget*, the ECJ recognized that the sovereignty of the coastal States is limited in the EEZ and CS as a result of international law.[36]

In this context, the declaration made by the European Community at the time of ratification of UNCLOS, 1 April 1998, is also pertinent.[37] In this declaration, the Community accepted, for the matters for which competence

31. See Council Decision of 23 Mar. 1998 concerning the conclusion by the European Community of the United Nations Convention of 10 Dec. 1982 on the Law of the Sea and the Agreement of 28 July 1994 relating to the implementation of Part XI thereof, O.J. 1998, L 179/1. See further, Paasivirta, "The European Union and the United Nations Convention on the Law of the Sea", 38 *Fordham International Law Journal* (2015), 1045.

32. Case C-111/05, *Aktiebolaget NN.* v. *Skatteverket*, EU:C:2007:195; Case C-308/06, *The Queen, on the Application of International Association of Independent Tanker Owners (Intertanko) and Others* v. *Secretary of State for Transport*, EU:C:2008:312, para 51; Case C-286/90, *Anklagemyndigheden* v. *Peter Michael Poulsen and Diva Navigation Corp.*, EU:C:1992:453, paras. 9 and 10; Case C-405/92, *Etablissements Armand Mondiet SA* v. *Armement Islais SARL*, EU:C:1993:906, paras. 13–15; Case C-162/96, *A. Racke GmbH & Co.* v. *Hauptzollamt Mainz*, EU:C:1998:293, para 45; Case C-366/10, *Air Transport Association of America and Others* v. *Secretary of State for Energy and Climate Change (ATAA*), EU:C:2011:864, para 101.

33. Case C-308/06, *Intertanko*, paras. 43 and 45.

34. Case C-286/90, *Poulsen*, para 9.

35. Ibid., para 25.

36. Case C-111/05, *Aktiebolaget*, para 59.

37. Declaration concerning the competence of the European Community with regard to matters governed by the United Nations Convention on the Law of the Sea of 10 Dec. 1982 and the Agreement of 28 July 1994 relating to the implementation of Part XI of the Convention, O.J. 1998, L 179/129.

has been transferred to it by its Member States,[38] the rights and obligations that UNCLOS lays down for States. The declaration lists the areas in which the European Community has exclusive or shared competences with relevance to different activities at sea. Moreover, it provides an enumeration of all Community legislative acts relevant in this context that were applicable at the time of ratification.[39] This declaration was relied upon by the ECJ in the *Mox Plant* case[40] as a useful reference base for determining which subjects are covered by Community measures; these subjects fall within Community competence and should be adjudicated by the ECJ.[41] In *Mox plant,* the ECJ strongly emphasized that international agreements cannot affect the allocation of responsibilities defined in the Treaties and thus the autonomy of the legal system of the EU.[42] In extension thereof, it is no stretch to argue that the ECJ is of the opinion that UNCLOS also cannot affect the interpretation of the Treaties as regards the provisions dealing with the geographical scope of application.

2.3. *Geographical scope of the treaties and secondary law*

Any competence the EU enjoys is by the grace of its Member States, who have bestowed the EU therewith through the EU Treaties.[43] As the Member States can only confer this competence when they have competence in the first place, the Member States' jurisdiction under public international law is also discussed. Still, the Treaties serve as a starting point when discussing the legal basis of EU law applicability at sea.[44]

Article 52(1) TEU contains a general rule on the scope of application of the Treaties, providing that "the Treaties shall apply to the Kingdom of Belgium,

38. The transferral of competences from Member States to the EU is based on Arts. 1 and 5 TEU in conjunction with Arts. 3 and 4 TFEU.

39. <www.un.org/depts/los/convention_agreements/convention_declarations.htm#EuropeanCommunity> (last visited 1 May 2018), European Community, Declaration made upon formal confirmation.

40. Case C-459/03, *Commission* v. *Ireland (Mox Plant)*, EU:C:2006:345, paras. 99, 104–106 and 109.

41. Ibid., paras. 121 and 135.

42. Ibid., para 123.

43. Consolidated version of the Treaty of European Union, O.J. 2016, C 202/13 (TEU); Consolidated version of the Treaty on the Functioning of the European Union, O.J. 2016, C 202/47 (TFEU).

44. The treaties complement each other and there is no hierarchy between them. All EU action, and thus the entire EU law *acquis*, is governed by the rules enshrined in these two treaties.

the Republic of Bulgaria, the Czech Republic …" and continues listing the other Member States. Article 52(2) TEU mentions that the territorial scope of the Treaties is specified further in Article 355 TFEU. Article 355 TFEU, however, is concerned with specific territories, such as overseas islands and other territories which are not connected to the mainland of the Member States. For present purposes, this provision unfortunately does not offer further insight. The Treaties thus do not make explicit reference to whether the EU enjoys the competence to regulate matters on the continental shelf or in the EEZ of Member States.

In a long line of settled case law, the ECJ has established that secondary law applies in principle to the same geographical area as the Treaties themselves, unless the secondary law itself contains a provision explicitly providing otherwise.[45] In addition, secondary law could be interpreted as not extending to a certain area on the basis of its object and purpose.[46] As a result, the following discussion on the application of EU law at sea concerns not only the Treaties but also secondary law, unless otherwise stated.

Thus, where relevant, one would expect the geographical scope of secondary law to be mentioned in the instrument itself. This, however, is not always the case. In several instances, secondary law is silent on its geographical scope.[47] In other instances, references are made to the "territories to which the EC Treaty applies".[48] This is problematic, because, as mentioned above, the treaties do not provide specific information on geographical application, except in relation to overseas territories. The result of imprecision on the side of the legislature is that the ECJ has to be creative with the notions of territory, sovereignty and sovereign rights. The definition of these terms has been subject to heated debates in public international law

45. Case C-61/77, *Commission* v. *Ireland*, EU:C:1978:29, para 46; Case C-148/77, *H. Hansen jun. & O.C. Balle GmbH & Co.* v. *Hauptzollamt de Flensburg*, EU:C:1978:173, para 11; Joined Cases C-132-136/14, *Parliament and Commission* v. *Council*, EU:C:2015:813, paras. 76 and 77; Case C-17/16, *Oussama El Dakkak and Intercontinental SARL* v. *Administration des douanes et droits indirects*, EU:C:2017:341, para 23.

46. A.G. Opinion in Case C-6/04, *Habitats*, EU:C:2005:372, para 132, referring to Case C-61/77, *Commission* v. *Ireland*, para 30/33.

47. See *infra*, section 4.1.

48. The most interesting case where this wording is used is in the Declaration submitted by the EC at the moment of ratification of UNCLOS. The reference to territories in this context is problematic precisely because UNCLOS mentions areas where States have (functional) jurisdiction although these areas lie beyond their territory. The same wording is also used in the EEA Agreement, Brussels 1993, Art. 126. Thus, the same difficulties mentioned here for the EU may also apply to Iceland, Liechtenstein and Norway. It is beyond the scope of this article to investigate EEA case law on this matter.

discourse.[49] The ECJ has struggled with the interpretation and use of these terms in its case law as well, as the following analysis shows.

3. Development of ECJ case law: The Court's journey towards sovereignty

With case law stretching over several decades, the body of recent case law points towards a clear rule: EU law is applicable when the activity falls within the sovereignty of a Member State, which, according to the Court, includes the sovereign rights enjoyed by coastal States in their EEZ and their continental shelf. Looking at the historical development of the case law, a clear development of the reasoning of the Court towards this rule can be seen.

3.1. *Reliance on sovereign rights to determine the applicability of EU law*

The first case[50] in this context is Case C-37/00, *Weber*. In this case, concerning a person working on the Dutch continental shelf whose contract was terminated,[51] the ECJ reasoned that work carried out on the continental shelf should be considered as carried out on the territory of the Member State. The main question was whether Mr Weber could appeal against the decision to terminate his contract before Dutch courts on the basis of Article 5(1) of the Brussels Convention.[52] The question was whether the Dutch courts were "the courts of the place of performance of the obligation in question".[53] As the Brussels Convention does not contain provisions on its territorial scope, the ECJ turned to public international law to decide whether the scope of the Brussels Convention included activities carried out on the continental shelf,[54]

49. See for an overview on different theories concerning territorial sovereignty, e.g. Torres Bernardez, "Territorial Sovereignty" in Bernhardt (Ed.), *Encyclopedia of Public International Law* (North-Holland, 1987), pp. 823–830; Brownlie, *International Law*, 4th ed. (OUP, 1990), p. 287.

50. It could be argued that Joined Cases 3, 4 & 6/76, *Kramer* is the first case concerning the extension of Community law at sea. However, *Kramer* concerned different factual circumstances, as it concerned the conservation of certain fish species at the high seas, rather than relating to the continental shelf or EEZ. Despite its relevance, considering that the ECJ does not refer to *Kramer* in its later cases, it cannot be argued that *Kramer* is an integral part of or formed the start of the line of case law discussed here.

51. Case C-37/00, *Weber*, para 22.

52. Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Brussels, 27 Sept. 1968, O.J. 1972, L 299/32.

53. Art. 5 reads: "A person domiciled in a Contracting State may, in another Contracting State, be sued: 1. in matters relating to a contract, in the courts for the place of performance of the obligation in question".

54. Ibid., para 31.

and stated that the Vienna Convention on the Law of Treaties (VCLT) provides in Article 29 that "unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory".[55]

Thus, the ECJ had to judge whether the continental shelf could be considered part of the territory of a Member State. Referring to Article 5 of the Geneva Convention on the Continental Shelf,[56] and to the North Sea Continental Shelf Cases,[57] the Court observed that the continental shelf constitutes a natural prolongation of the land territory under the sea and that the rights of States in the continental shelf area exist *ipso facto* and *ab initio* by virtue of the State's sovereignty over the land and extension of that sovereignty to the seabed in the form of exercise of sovereign rights for the exploration of the seabed and the exploitation of its natural resources.[58] The ECJ concluded that the work carried out on the Dutch continental shelf should be regarded as being carried out in the territory of the Member State. The reasoning in *Weber* is the start of a reliance on sovereignty and sovereign rights instead of the broader rule-making jurisdiction which coastal States have under public international law.[59]

A subsequent case using similar reasoning is *Habitats,* which concerned the transposition of the Habitats Directive by the UK Government.[60] Article 2(1) of this Directive provides that "the aim of the directive is to contribute towards ensuring biodiversity . . . in the European *territory* of the Member States to which the EC Treaty applies".[61] The Commission alleged that the UK limited the application of the provisions transposing the Habitats Directive to "just natural territory and United Kingdom territorial waters", while, within their EEZ, Member States have an obligation to apply Community law in the

55. Ibid., para 29.

56. Convention on the Continental Shelf, cited *supra* note16. The facts of *Weber* took place between 1987 and 1993, thus before the entry into force of UNCLOS on 16 Nov. 1994.

57. *North Sea Continental Shelf Cases*, cited *supra* note 22, p. 3.

58. Case C-37/00, *Weber*, para 34. The ECJ also referred to the North Sea Continental Shelf Cases in Case C-347/10, *Salemink*.

59. The reasoning in *Weber* was referred to again in Case C-347/10, *Salemink.* The reasoning of *Salemink* was subsequently used in Case C-266/13, *L. Kik* v. *Staatssecretaris van Financiën*, EU:C:2015:188 and Case C-106/11, *M.J. Bakker* v. *Minister van Financiën*, EU:C:2012:328. *Kik* was then referred to again in the most recent case on this topic, Case C-631/17, *SF* v. *Inspecteur van de Belastingdienst*, EU:C:2019:381. In this last case, it was not relevant for the ECJ whether the activity at issue fell under the sovereign rights of the coastal State, as the Court could establish a sufficiently close link in another manner. In footnote 34 of his Opinion in this case, A.G. Pitruzzella (EU:C:2019:10) did refer to the nature of the activity and considered whether it fell under the sovereign rights of the coastal State.

60. Case C-6/04, *Habitats*.

61. Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (Habitats Directive), O.J. 1992, L 206/7, Art. 2(1) (emphasis added).

fields where they exercise sovereign powers.[62] The UK did not contest this claim. Thus, the ECJ ruled that it was common ground between the parties that the UK exercised sovereign rights in its EEZ and the continental shelf, and that it followed that the Habitats Directive was *to that extent* applicable beyond the Member State's territorial waters.[63] In other words, the ECJ followed the reasoning that Member States have to comply with EU law for the continental shelf and EEZ to the extent that they make use of their rights in these areas. The ECJ thus relied on the existence of sovereign rights and limited the application of EU law thereto.

3.2. *Lack of sovereign rights limits the applicability of EU law*

The development of the reasoning could be called complete when looking at *Aktiebolaget NN* v. *Skatteverket*.[64] This case concerned the application of the Sixth VAT Directive to the construction of a fibre-optic cable linking two Member States through different maritime zones.[65] Article 3(2) of the VAT Directive provided that it was applicable to the territory of the Member States as defined in Article 299 EC. Considering the limited wording of Article 299 EC (now Arts. 52 TEU and 355 TFEU), the ECJ ruled that the Treaties did not provide sufficient guidance on the application of EU law in these maritime zones, and formulated its own rule: "In the absence, in the Treaty, of a more precise definition of the territory falling within the sovereignty of each Member State, it is for each of the Member States to determine the extent and limits of that territory, in accordance with the rules of international public law".[66]

Interestingly, while the ECJ proclaimed that it was for the Member States to determine the limits of their territory, the Court continued to explore these limits itself through discussion of whether different maritime zones are part of the territory of Member States. In relation to the territorial sea, its bed and subsoil, Article 2(1) UNCLOS provides that the coastal State is sovereign in this area.[67] The ECJ stated that as a result, this maritime zone is part of the territory of the coastal State.[68] Considering the structure of the argumentation,

62. Case C-6/04, *Habitats*, para 115.
63. Ibid., para 117.
64. Case C-111/05, *Aktiebolaget*.
65. Council Directive 77/388 of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment, O.J. 1977, L 145/1, as amended by Council Directive 2002/93/EC of 3 Dec. 2002, O.J. 2002, L 331/27.
66. Case C-111/05, *Aktiebolaget*, para 54.
67. Ibid., para 56.
68. Ibid., para 57.

the territorial sea is part of the territory because the coastal State is sovereign: The ECJ equated sovereignty with the territory of the State in this instance, and decided that VAT was due for the parts of the fibre-optic cable that were buried in the seabed of the territorial sea.

The same fibre-optic cable continues beyond the territorial sea to the continental shelf and EEZ. The ECJ recognized that the sovereignty of coastal States is merely functional in these zones. It considers that in these zones, sovereignty is limited to the rights laid down in Articles 56 and 77 UNCLOS, which concern *inter alia* the exploration and exploitation of the natural resources of these zones.[69] Thus, the Court observed that to the extent that the supply and laying of an undersea cable are not listed in these articles, these activities do not fall within the sovereignty of the coastal State and thus fall outside the field of application of EU law.

The Court thus explicitly concluded that the sovereignty of the coastal State is limited to what is provided in Articles 56 and 77 UNCLOS and that, when the activity falls outside these provisions, it cannot be regarded as having been carried out within the territory of the coastal State in the sense of the Sixth Tax Directive. This is the case for the laying of submarine cables and pipelines, since, pursuant to the freedom to lay submarine pipelines and cables enshrined in Articles 58(1) and 79(1) UNCLOS, any State is allowed to lay them.

The Court has since also made this distinction in *Kik*, explicitly excluding the laying of cables and pipelines in the continental shelf and EEZ from Member State jurisdiction and thus from the applicability of EU law.[70]

3.3. *Consequences of the court's reasoning*

The case law shows a clear development towards sovereignty – which, according to the Court, includes sovereign rights. The reliance of the Court on sovereign rights goes so far that in *Aktiebolaget* activities falling outside the sovereign rights which Member States enjoy were explicitly ruled to fall outside the field of application of EU law. The exclusion of activities from the scope of application of EU law is correct in some cases, but not in others.

In the case of interconnectors,[71] and other cables and pipelines not used for the exploitation of resources, such as the fibre-optic cable in *Aktiebolaget,* the outcome of the case is arguably correct, as coastal States do not enjoy

69. Ibid., para 59.

70. Case C-266/13, *Kik*, para 41.

71. An interconnector pipeline is defined in EU law as a line which crosses or spans a border between Member States for the sole purpose of connecting the national transmission systems of those Member States: European Parliament and Council Directive 2009/73 of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55, O.J. 2009, L 211/94, Art. 2(17).

rule-making authority regarding these cables and pipelines on their continental shelf and thus may not charge VAT.[72]

UNCLOS thus creates a seemingly odd situation that a person working on a pipe-laying vessel sailing under a non-EU flag would in fact be protected by EU social legislation when the vessel lays pipelines for the extraction of mineral resources in the continental shelf instead, as this does fall under the sovereign rights of coastal States, while that same person would not be protected when working on the laying of a pipeline which functions as an interconnector.

It may be clear that the application of EU law in these maritime zones depends on the limitations of jurisdiction included in UNCLOS both *ratione loci* and *ratione materiae*. This means that if the rights of the coastal State are limited *ratione materiae* by UNCLOS, for example regarding interconnectors, this impacts the application of EU law dealing with these matters, as the Member States cannot confer rights on the EU which they do not enjoy themselves pursuant to public international law.[73] As such, the geographical area to which EU law applies is not uniform but depends on the subject matter. EU law may apply if the Member State has a form of jurisdiction on the basis of public international law and has conferred these powers on the EU. Considering the open formulation of Article 52(1) TEU[74] and the TEU provisions on the conferral of powers, the competence of the EU extends as far as the rule-making authority of its Member States if they have conferred this authority on the EU.[75]

However, as a result of the formulation used by the ECJ, limiting the application of EU law to sovereignty and sovereign rights, certain activities carried out by Member States and within their rule-making authority may be excluded from the application of EU law. This relates to activities beyond the territorial sea that States undertake on another legal basis than on the basis of sovereign rights. This is the case for example for activities described in Article 56(1)(b) UNCLOS, namely the construction of artificial islands, installations and structures, maritime scientific research and protection of the marine

72. The rights of the coastal State are limited to having to provide consent for the course for the laying of such pipelines (not cables) on the continental shelf pursuant to Art. 79(3) UNCLOS.

73. Considering the open formulation of Art. 52 TEU and Arts. 1 and 5 TEU on the conferral of powers, there is no reason to assume that the geographical scope of EU law is limited and thus should extend as far as its Member States can exercise powers and have conferred them on the EU.

74. Considering that Art. 52(2) TEU states that the territorial scope of the Treaties is specified in 355 TFEU, this implies that Art. 52(1) TEU concerns the material scope of the Treaties.

75. This is comparable to the approach taken by the ECJ in Joined Cases 3, 4 & 6–76, *Kramer*, paras. 30–33.

environment.[76] This could create *ex ante* legal uncertainty with regard to the question whether EU law is applicable to a variety of activities at sea, such as the re-use of offshore oil and gas installations for purposes not related to the exploitation of resources in the continental shelf or EEZ,[77] and for the construction of artificial islands.[78] When it is unclear whether EU law is applicable, this has a major impact on a wide range of rules – construction safety, taxation (VAT), labour law – this also influences the costs of projects and the attractiveness of these projects to investors.[79]

4. Interplay between the legislature and the court

The trouble the ECJ has with defining the scope of application of legislation is in the first place caused by the European legislature, which is not always clear on the geographical scope it has in mind. In some cases, a provision on the scope of the legislation is completely missing, in others, the scope is vague or ambiguous, and finally, in some cases the terminology used excludes, perhaps unwittingly, application of the instrument at sea, especially when the word "territory" is used. Thus, the legislature and the ECJ both have a role in clarifying the applicability of EU law at sea.

4.1. *The role of the legislature*

It may seem contradictory to focus on the EU legislature in an analysis of the ECJ's case law. However, the choices of the legislature play a large role in the case law under discussion. Mehta analysed that the Commission, the ECJ, and

76. It must be noted that the construction of interconnectors is also excluded from the applicability of EU law. This is not caused by the reasoning of the ECJ but rather by the structure of UNCLOS. The Commission, though, seems to be of the opinion that the applicability of EU law should stretch to interconnectors, for example in the discussion on Nord Stream II. This appears from the wording of recital 5 of Commission Proposal COM(2017)660 final, 2017/0294 (COD) of 8 Nov. 2017 amending Directive 2009/73/EC concerning common rules for the internal market in natural gas. In this amendment, the Commission proposes that EU law should apply to interconnectors in the EEZ as well. After trilogues, in the version of 5 Apr. 2019 (2017/0294 (COD) PE-CONS 58/19) this was changed to only the territorial waters, in recital 9.

77. For example, it is investigated whether this infrastructure can be used for the storage of CO_2. <www.nexstep.nl/re-use/> (last visited Sept. 2019).

78. See e.g. the website of the North Sea Wind Power Hub consortium (TenneT, Energinet, Gasunie and Port of Rotterdam) <northseawindpowerhub.eu> (last visited Sept. 2019).

79. Verburg and Waverijn, "Liberalizing the global supply chain of renewable energy technology: The role of international investment law in facilitating flows of foreign direct investment and trade", *Brill Open Law* (2019), 1–39.

the Member States have diverging opinions on the question when EU law is applicable to an activity at sea.[80] Moreover, in the cases coming before the Court, the legislature seemingly did not always properly consider the applicability of legislation to different maritime zones. In particular, in some cases, the legislature did not include a provision on the geographical scope of application; and where it did, it seemed unaware of the effects of the formulation of the provision with regard to the applicability of a legislative instrument at sea.

A good example of this is *Salemink*,[81] which concerned a regulation on the application of social security schemes to persons employed within the Community.[82] The question was whether the Dutch Government was responsible for persons working on installations situated on its continental shelf. The Regulation provides that persons to whom the Regulation applies can be subject to the national legislation of only one Member State.[83] The Regulation aimed at relatively wide application, providing that the legislation of a Member State applies inter alia to persons employed (a) in its territory, (b) on a ship flying its flag. The ECJ relied on sub (a) and, referring to Case C-37/00, *Weber*, concluded that "work carried out on fixed or floating installations positioned on the continental shelf, in the context of the prospecting and/or exploitation of natural resources, is to be regarded as work carried out in the territory of that State for the purposes of applying EU law".[84] In the following paragraph, the Court moved away from the definitions and used a teleological reasoning to justify its interpretation of territory. It stated that a "Member State which takes advantage of the economic rights to prospect and/or exploit natural resources on that part of the continental shelf which is adjacent to it cannot avoid the application of the EU law provisions designed to ensure the freedom of movement of persons working on such installations".[85] In a similar case, *Kik,* on the application of the same regulation to a person working on board a pipe-laying vessel, the Court again used a teleological interpretation to work around the specifically defined scope of the Regulation.[86]

80. Mehta, op. cit. *supra* note 13, at 1411 et seq.

81. Case C-347/10, *Salemink*.

82. Council Regulation 1407/71 in the version amended and updated by Council Regulation 118/97 of 2 Dec. 1996, O.J. 1997, L 28/1 (as amended by Council Regulation 1606/98 of 29 June 1998, O.J. 1998, L 209/1), Art. 13(2)(a) and (c).

83. Ibid., Art. 13(1), subject to Art. 14c and 14f.

84. Case C-347/10, *Salemink*, para 35.

85. Ibid., para 60.

86. Case C-266/13, *Kik*. In this case, the work was not carried out on the territory of the Member State, the vessel flew the Panamanian flag and the other criteria in the provision defining the applicability of the Regulation were also not satisfied. The Court therefore reasoned that there was a "sufficiently close connection with the Union" due to the fact that the

It thus seems that the Court tried to compensate the potentially undesirable consequences of the legislature's imprecision, namely the unforeseen exclusion of some activities at sea from EU law, with a teleological interpretation. From the viewpoint of legal certainty, it would have been preferable if the legislature had been more precise in drafting the provision on the applicability of the legislative instrument in the first place, rather than leaving it to the Court to judge the legislature's intentions.

The legislature's formulation concerning the applicability of EU law is more often focused on "territory". This is evidenced in several other cases, such as *Aktiebolaget* and *Habitats,* concerning respectively the Sixth VAT Directive and the Habitats Directive.[87] The reference to territory was not an incidental error made in one legislative instrument, but is a recurring phenomenon which causes problems when legislation is applied to offshore activities, as the territory of Member States does not extend beyond their territorial sea.

At the same time, it must be noted that there are also many instruments of secondary EU law and agreements entered into by the EU, of which the applicability is clearly defined, with or without the use of the word "territory". For example, in the Union Customs Code, the legislature clearly intended to exclude application to the EEZ and continental shelf when it formulated the provision on its applicability to include the territories, territorial waters, internal waters and airspace.[88] Another solution, which may be viable depending on the subject matter, is provided in the Common Fisheries Policy: application may specifically refer to vessels rather than to territory or maritime zones.[89] Finally, secondary EU law instruments can also refer to UNCLOS directly, which happened for example in the Marine Strategy Framework Directive, the applicability of which extends to "the outmost reach of the area where a Member State has and/or exercises jurisdictional rights, in

headquarters of Mr Kik's employer were located in Switzerland and that Switzerland was to be regarded a Member State for the purposes of this Regulation.

87. Respectively, Arts. 2 and 3 of Council Directive 77/388, cited *supra* note 65, and Art. 2(1) of Council Directive 92/43, cited *supra* note 61.

88. Regulation (EU) 952/2013 of the European Parliament and of the Council of 9 Oct. 2013 laying down the Union Customs Code (recast), O.J. 2013, L 269/1, Art. 4.

89. Council Regulation (EU) 2018/120 of 23 Jan. 2018 fixing for 2018 the fishing opportunities for certain fish stocks and groups of fish stocks, applicable in Union waters and, for Union fishing vessels, in certain non-Union waters, O.J. 2018, L 27/1, Art. 2. However, in Case C-266/13, *Kik*, this would not have helped, as the ship in this case flew the Panamanian flag.

accordance with the UNCLOS".[90] In light of the analysis above, direct reference to UNCLOS does not necessarily make the geographical scope clear beyond doubt, as the chosen wording is essential.

At the same time, we recognize that there may be (political) reasons why the legislature is not precise in the applicability of legal instruments. For example, in a case concerning the Western Sahara, the General Court mentioned that the reference to the Kingdom of Morocco in the relevant association agreement may have been understood by the Moroccan authorities as including the contested area the Western Sahara.[91] The General Court added that although the Council and Commission were aware that the authorities took this view, the Association Agreement with Morocco did not include any interpretation clause that would have the consequence of excluding that territory from its applicability.[92] By not adopting such a clause, the legislature leaves it to the Court to solve this politically sensitive matter. Notwithstanding the debate on the correct interpretation of the territory of the Kingdom of Morocco, the wording chosen in the Fisheries Partnership Agreement regarding application at sea, did not focus on territory, as it provides that it applies, *inter alia*, "to the territory of Morocco and to the waters under Moroccan jurisdiction".[93]

A look to the future shows that expectations concerning the applicability of EU law at sea during the drafting process may still lie far apart from the legal reality in the ECJ's interpretation. For example, in the original proposal of a recent amendment to the Gas Directive,[94] which seems to be linked directly to the possibility of constructing Nord Stream II, a new gas pipeline through the Baltic Sea,[95] the European Commission proposed to amend the field of application of the Directive, stating in Article 1 that "interconnector" as defined in the Directive "means a transmission line which crosses or spans a border between Member States or between Member States and third countries *up to the border of Union jurisdiction"*.[96] In the proposal, recital 5 provided the interpretation that: "The applicability of Directive 2009/73/EC for gas pipelines to and from third countries remains confined to the territorial limit

90. Directive 2008/56/EC of the European Parliament and of the Council of 17 June 2008 establishing a framework for community action in the field of marine environmental policy (Marine Strategy Framework Directive), O.J. 2008, L 164/19, Art. 2 and Art. 3(1).

91. Case T-512/12, *Front Polisario* v. *Council*, EU:T:2015:953, para 101.

92. Ibid., para 101; Case C-104/16 P, *Council* v. *Front Polisario*, EU:C:2016:973, para 84.

93. Fisheries Partnership Agreement between the European Communities and the Kingdom of Morocco, O.J. 2006, L 141/4, Art. 11. See also Kassoti, "The ECJ and the art of treaty interpretation: *Western Sahara Campaign UK*", 56 CML Rev. (2019), 209–236.

94. COM(2017)660 final, cited *supra* note 76; as to the Gas Directive, see Directive 2009/73, cited *supra* note 71.

95. This amendment follows the (leaked) Opinion of the Legal Service of the Council on a Mandate.

96. COM(2017)660 final, cited *supra* note 76, Art. 1(1) (emphasis added).

of the Union's jurisdiction. As regards offshore pipelines, it should be applicable in the territorial waters and exclusive economic zones of the Member States".[97] This interpretation conflicts with the Court's case law, as interconnectors are not linked to the exploitation of natural resources in the continental shelf or EEZ. Instead, they fall under Article 79 UNCLOS rather than under Article 56 UNCLOS, which provides that the coastal States do not have exclusive rights and they cannot regulate interconnectors beyond the territorial sea.[98] This means that EU law cannot be directly or independently applicable to these pipelines beyond the territorial sea, but only to pipelines that are used for the exploitation of natural resources.[99] In the final version of the Directive, the text has been amended to include only the territorial sea of the State in which the first connection point lies.[100] Moreover, the reference to "Union jurisdiction" was removed from Article 1.

In future legislative documents, it is recommendable to refrain from using the word "territory", except when explicitly required, such as in the case of the Union Customs Code. Instead, the legislature could refer to "the Member States", which implies that Union law applies where Member States have jurisdiction, regardless of the legal basis of their jurisdiction. Pursuant to Article 1 TEU, the Member States have transferred powers to the EU to attain objectives they have in common. Read in combination with Article 52 TEU, which provides that the Treaties apply to the Member States, the Treaties do not seem to provide reason to limit the application of the Treaties or EU law in general to the *territory* or the *sovereign rights* of the Member States. Rather, the full spectrum of the duties and powers of Member States could be taken into account. If the Member States want to include such limits or wish to do so in secondary law, they can accomplish this by elucidating these limits in the provisions on geographical scope.

97. Ibid., preamble, para 5.

98. Coastal States can regulate interconnectors as soon as they enter their territorial sea. On the basis of Art. 79 UNCLOS, coastal States do have the right to influence the route of pipelines on their continental shelf; however, for electricity interconnectors, this is not the case.

99. Cf. Case C-111/05, *Aktiebolaget*. As UNCLOS, Art. 79(4) confirms that the coastal State may establish conditions for cables and pipelines entering its territory or territorial sea – on the basis of UNCLOS, Art. 2 – EU law may apply depending on whether the rights in question have been conferred on the EU. Such conditions could affect the project as a whole, if the coastal State has the right to adopt such conditions on the basis of public international law. This analysis would require discussion of the conditions which the coastal State may adopt, the EU *acquis* in question and their effects, which goes beyond the scope of the current article.

100. Directive 2019/692 of the European Parliament and of the Council of 17 Apr. 2019 amending Directive 2009/73/EC concerning common rules for the internal market in natural gas, O.J. 2019, L 117/1, recital 9.

4.2. *Role of the ECJ*

While the legislature should take up its role to draft the provisions relating to the applicability of legislative instruments carefully, the ECJ also has to be careful with regard to the intricate differences between "sovereignty", "territory" and "sovereign rights" in international law. Three things are important in this regard.

4.2.1. *Conformity with public international law*

First, it is important that conclusions by the ECJ are in conformity with public international law. Doubt can be cast on whether this was the case for the reasoning of the ECJ in *Weber*, which supported the conclusion that work on the continental shelf can be regarded as being carried out as though in the territory of the coastal State in light of Article 29 VCLT.[101] Article 29 VCLT provides: "unless another intention appears from the treaty, a treaty is binding in respect of the entire territory of the contracting party".[102] The sensitivity of the definition of "territory" in public international law and in particular in the context of Article 29 VCLT is well illustrated by Akehurst. He noted that, during the VCLT negotiations, the delegate from the UK placed on record his "understanding that the expression 'its entire territory' applied solely to the territory over which a party to the treaty in question exercised its sovereignty", which was not challenged by any other delegate.[103]

Akehurst noted that this may give rise to difficulties as States may have international responsibility and treaty-making power in respect of a particular area, without necessarily having territorial sovereignty over this area.[104] The continental shelf and EEZ are examples of areas in which a State enjoys such international responsibility and treaty-making powers, without enjoying territorial sovereignty.

Despite the ECJ's efforts to link the sovereign rights which coastal States enjoy to territorial sovereignty and to view them as an extension thereof, neither the EEZ nor the continental shelf is part of the territory of the coastal State in accordance with public international law. When the EEZ was introduced, several theories were put forward regarding its legal status.[105] The claim that territorial sovereignty would extend to the EEZ received little

101. Case C-37/00, *Weber*.

102. Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331.

103. Akehurst, *Encyclopedia of International Law* (1980), referring to UN Conference on the Law of Treaties, First Session, Official Records, UN Doc. A/CONF. 39/11 (1969), p. 429.

104. Ibid., p. 990.

105. For an overview, see Kwiatkowska, *The Exclusive Economic Zone* (Martinus Nijhoff, 1989), pp. 230–234.

attention as the discussion focused on whether the EEZ was still part of the high seas or was a *sui generis* zone.[106] Following the interpretation of Article 29 VCLT, according to Akehurst and in the broader context of public international law as mentioned, the entire territory of a State does *not* include its EEZ or continental shelf. The ECJ thus seems to formulate a broader interpretation of Article 29 VCLT without clearly acknowledging this.

This raises the question regarding the available alternatives to the Court in this and other cases. To begin with, the Court could have ruled that the continental shelf falls outside the territory of the State involved and thus outside the scope of application of the Brussels Convention in line with Article 29 VCLT. While this may attract the required attention of the legislature, this would have significantly limited the rights of Mr Weber and others in similar positions. Depending on the drafting of the legal instrument and other circumstances involved, the ECJ may have different possibilities. For instance, the Court may be able to rely on the fact that Article 29 VCLT provides that a treaty is binding upon each party in respect of its entire territory "unless a different intention appears from the treaty or is otherwise established". Alternatively, where secondary law is concerned, the Court is not unfamiliar with reference to the object and purpose of the legislation when ruling on its applicability.[107]

In light of the available alternatives, it should be noted that the Court has been offered assistance by its Advocate General in several cases. One such occasion was the Opinion of Advocate General Cruz Villalón in *Salemink*. In the same vein as set out above, Mr Cruz Villalón clearly identified that there are no grounds to discriminate between the source of the powers conferred by the Member States to the EU.[108] He explained, for example, that it did not actually matter whether the source was sovereignty or sovereign rights by virtue of UNCLOS.[109] Referring to the decision in Habitats, Mr Cruz Villalón stated that the Court has relied on precisely this criterion (i.e. the competences actually conferred) in previous judgments.[110] However, as set out above, in Habitats the Court used a different line of reasoning to reach its decision.[111] Despite Mr Cruz Villalón's attention for the source of powers, his Opinion did not mark a turning point in the case law of the ECJ, as that case law continued to rely on sovereignty and sovereign rights.

106. Ibid.; see also, Churchill and Lowe, *The Law of the Sea*, 3rd ed. (Manchester University Press, 1999), pp. 165–166.

107. As mentioned *supra* in section 2.3.

108. Opinion of A.G. Cruz Villalón in Case C-347/10, *Salemink*, EU:C:2011:562, paras. 54–55.

109. Ibid., para 56.

110. Ibid., para 57.

111. Case C-6/04, *Habitats*, para 117.

4.2.2. *Coherence of the ECJ's reasoning*

The coherence of the ECJ's reasoning also deserves attention.

In *Weber*, the ECJ set itself the task of establishing whether the work carried out by Mr Weber in the Netherlands continental shelf area should be regarded as being carried out in the territory of the Netherlands in light of Article 5(1) of the Brussels Convention.[112] In paragraph 27, the ECJ started by stating that this provision does not apply to contracts carried out completely outside the territory of a contracting State, adding, in paragraph 28, that the contract must have a connection with the territory of a contracting State. In paragraph 29, the ECJ explicitly referenced Article 29 VCLT and included its text. The ECJ continued that those are the factors which determine whether or not work carried out in the Netherlands continental shelf area is to be regarded as being carried out in the territory of the Netherlands. The ECJ then ruled, in paragraph 31, that the Brussels Convention did not contain a provision governing that aspect of its scope. Following this reasoning of the ECJ, the logical consequence would be to apply Article 29 VCLT. Yet this provision was not mentioned again in the subsequent reasoning in the judgment, as the ECJ instead concluded that reference must be made to the legal regime applicable to the continental shelf, in particular the Geneva Convention.

The ECJ then stated, in paragraphs 32 to 34, that the coastal State enjoys exclusive sovereign rights for the purposes of exploitation and exploration of the natural resources of the continental shelf. The ECJ recalled that the International Court of Justice had ruled that as the continental shelf forms a natural prolongation of the land, these sovereign rights exist as an extension of and by virtue of the sovereignty of the coastal State over the land. In paragraph 35, the ECJ then observed that it was in conformity with those principles of public international law that a provision of Dutch law proclaimed that Dutch courts have jurisdiction in disputes regarding contracts of employees working on mining installations on the Dutch continental shelf. As a result, the ECJ concluded, in paragraph 36, that the work carried out by an employee on fixed or floating installations on or above the continental shelf of a contracting State for the mentioned purposes should be regarded as work carried out in the territory of that State for the purposes of applying Article 5(1) of the Brussels Convention.

The ECJ did not explicitly mention each step in its reasoning which could support its conclusion. The elaborate reference to the rules of public international law may support the finding that the work has a connection with one of the contracting States, a requirement the ECJ formulated (para 28). The ECJ did not refer back to this requirement, however. The ECJ ruled, in paragraphs 29 and 30, that in accordance with the VCLT, it should be tested

112. Case C-37/00, *Weber*, para 30.

whether the work was to be regarded as carried out in the territory of the Netherlands. With the choice of words in its conclusion, the ECJ seemed to directly try and answer this test based on Article 29 VCLT. Considering that the work was carried out above the continental shelf, application of Article 29 VCLT would require discussion of whether the continental shelf is part of the territory of a coastal State according to public international law. The ECJ did not discuss this but instead focused on sovereignty. Assuming the Court indeed applied Article 29 VCLT, the reference to Dutch law, in paragraph 35, seems out of place in an analysis on whether the continental shelf is part of the territory of the Netherlands in accordance with public international law.

4.2.3. *Accuracy*

Third, and finally, it is important that the ECJ is accurate and precise in its formulations. For example, in *Aktiebolaget,* the ECJ referred to "sea" as a maritime zone.[113] Based on the Court's description of this area as being "outside the sovereignty of any State" with reference to Article 89 UNCLOS on the freedom of the high seas, the ECJ must have intended to refer to the high seas as a maritime zone.[114] The Court stated that the part of the transaction carried out at "sea" falls outside the applicability of the Sixth Directive, even though there is no high seas area between Sweden and other Member States.[115] This reasoning by the ECJ is puzzling and seems inaccurate in both phrasing and applicability to the cable between Sweden and another Member State.

Another example of an issue in relation to accuracy concerns due regard to potential future consequences of a certain way of reasoning. For instance, the ECJ could have used a different formulation in *Habitats* leading to the same legal conclusion, namely applicability of the Habitats Directive to activities in the EEZ and the continental shelf, without limiting the applicability of EU law at sea to sovereign rights and thereby impacting subsequent cases. In her Opinion in the *Habitats* case, Advocate General Kokott mentioned that attainment of the goals of the Directive in the sense of the protection of species is impossible without application of the Directive beyond territorial seas. In that context she referred to the Convention on Biological Diversity (CBD),

113. Case C-111/05, *Aktiebolaget*, para 60. The exact formulation: "The same is true, a fortiori, of that part of the transaction which is carried out at sea, a zone which, pursuant to Article 89 of the Convention on the Law of the Sea, is outside the sovereignty of any State".

114. Art. 89 UNCLOS concerns the high seas. A comparable argument to that made by the ECJ, but correctly formulated, can be found in the Opinion of A.G. Cruz Villalón in Case C-347/10, *Salemink*.

115. The States around the North Sea and Baltic Sea all declared an EEZ and are located closer than 400 nautical miles to each other, which means that both seas are entirely divided in EEZs and do not feature an area of high seas beyond national jurisdiction of any State.

which applies to: "processes and activities, regardless of where their effects occur, carried out under [a Contracting Party's] jurisdiction or control, within the area of its national jurisdiction or beyond the limits of national jurisdiction".[116] This is formulated broadly, in order to avoid explicit exclusion of the powers which States enjoy, for example in the EEZ and continental shelf. However, the rule which Advocate General Kokott formulated in her Opinion reads as follows: "The Habitats Directive is therefore also to be transposed in respect of areas outside territorial waters, in so far as the Member States or the Community exercise sovereign rights there.".[117]

Unfortunately, the Court partly followed this formulation rather than that of the CDB. A small difference in formulation could have prevented many difficulties. If the words "sovereign rights" were replaced by "jurisdiction and control" or "rights or duties" in the reasoning above, this would have allowed for more room to extend the applicability of EU law to activities at sea and avoiding reliance on sovereign rights.

5. Conclusion

Analysis of the case law of the ECJ thus allows two trends to be discerned. First, in its case law, the ECJ has made the determining factor for the question whether EU law is applicable at sea whether an activity falls within the sovereign rights of coastal States in light of either Article 56 or 77 UNCLOS. The consequence is that activities which the coastal State is allowed or obligated to regulate pursuant to any other legal basis in UNCLOS fall outside the criterion defined by the ECJ and are systematically excluded from the field of application of EU legislation. This relates for example to maritime research, environmental conservation, and the construction of artificial islands and structures.

When reviewing the case law, it seems as if the limitation may initially have slipped accidentally into the reasoning of the ECJ, through cases such as *Weber*, *Habitats* and *Salemink*, where the reliance on sovereign rights acted as a means to include activities in the EEZ and above the continental shelf within the field of application of EU law. In *Aktiebolaget* and *Kik,* however, these sovereign rights were in turn explicitly used as outer limits of EU competence. This criterion thus excludes certain activities which coastal States carry out on another legal basis of UNCLOS than sovereign rights, such as jurisdiction.

116. Rio de Janiero, 5 June 1992, 1760 U.N.T.S. 79, Art. 4(b).
117. Opinion of A.G. Kokott in Case C-6/04, *Habitats*, para 135.

The second trend is the sometimes inconsistent use of terminology, both by the EU legislature and, subsequently, by the Court. The EU legislature sometimes refers to "territory" when defining the applicability of its legislation without assessing the consequences of this wording for activities at sea. In other instruments, the geographical scope is not mentioned at all. The Court has avoided the possibly undesired exclusion from EU law of all activities taking place outside the territory but within the jurisdiction of Member States.

From the point of view of legal certainty and consistency, the EU legislature should be more precise in its formulation of the applicability of legal instruments. For the same reasons of legal certainty and consistency, it is also recommended that the ECJ pays particular attention to its formulation, use and interpretation of the terms territory, sovereign rights and jurisdiction. The drafting needs to be more careful, and the reasoning better enunciated. In addition, it is essential that the ECJ provides appropriate legal reasoning when including or excluding a certain activity from the applicability of EU law.

To conclude: both the Court and the legislature have a responsibility to ensure that the applicability of EU legislation in the continental shelf and EEZ is clear. While both the Court and legislature have been presented with ample opportunities to change their course along the lines of our recommendations, the approach taken by Court and new legislative proposals emphasizes that their attention to these matters is required in order not to lose sight of port.