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LEGAL OPINION

Re: Proposal for a Council Regulation on the conclusion of the Fisheries Partnership Agreement between the European Community and the Kingdom of Morocco - Compatibility with the principles of international law

I. Introduction

1. By letter dated 25 January 2006,¹ received by the Legal Service on 27 January 2006, Mr van den BERG, Vice-Chairman of the Committee on Development, requested a legal opinion as to whether "*the Council Regulation concluding an Agreement with Morocco that would allow EU vessels to fish in the waters of the Western Sahara is compatible with the principles of International Law*".²

II. Historical and political background concerning Western Sahara

2. The territory of Western Sahara, located along the North African Atlantic Coast and bordering Morocco in the North, Mauritania in the South and the East and, to a very limited extent, Algeria on the Eastern border, became a Spanish colony in 1884.
3. During the later period of the Spanish administration, the region was contended on the one hand by Morocco and Mauritania, both claiming respectively the Northern part and the Southern part as their own territory, and on the other hand by an indigenous Saharawi organization named Polisario Front, which had called for a self determination referendum.

¹ The text of the letter is attached.

² See COM(2005)692 of 23.12.2005 for the text of the Agreement.

4. After Spain withdrew in 1976, Western Sahara remained *de facto* under the control of Morocco and Mauritania, whose troops invaded the territory from North and South respectively. Due to pressures by the Polisario Front, in 1979 Mauritania abandoned the occupied regions to which Morocco extended its control, thus becoming the only administrator of Western Sahara.
5. The situation led to a war between Morocco and the Polisario Front which in 1976 had set up the Saharawi Arab Democratic Republic (SADR). The war ended in 1991 when a UN Settlement Plan was agreed upon by the two Parties and the United Nations Mission for the Referendum in Western Sahara (MINURSO) was established.
6. The Settlement Plan had foreseen a referendum aimed at determining the will of the Saharawian people either to be integrated with Morocco or to be independent. Notwithstanding UN efforts and commitments over the years, the referendum has not yet been held, due to longstanding disputes over the conditions qualifying the persons as indigenous voters.³

III. Legal framework

a. UN law on non self-governing territories

7. Chapter XI of the United Nations Charter is entitled "*Declaration regarding non self-governing territories*" and Article 73 states as follows:

"Members of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government recognize the principle that the interests of the inhabitants of these territories are paramount, and accept as a sacred trust the obligation to promote to the utmost, within the system of international peace and security established by the present Charter, the well-being of the inhabitants of these territories, and, to this end:

(...)

e. to transmit regularly to the Secretary-General for information purposes, subject to such limitation as security and constitutional considerations may require, statistical and other information of a technical nature relating to economic, social, and educational conditions in the territories for which they are respectively responsible other than those territories to which Chapters XII and XIII apply."⁴

³ For further and more detailed information see Report from the *ad hoc* delegation of the European Parliament to the Western Sahara (PE 313.354) and 'Western Sahara', in *Encyclopedia of the United Nations and International Agreements*, 3rd edition, volume 4, 2003, p. 2683.

⁴ Emphasis added by us.

8. This provision of the Charter, laying down the essential principles applicable to non self-governing territories, has been subsequently clarified, implemented and developed in the practice of the United Nations by various resolutions and declarations of the General Assembly.⁵⁻⁶
9. In 1963, during the Spanish administration, Western Sahara was included in the list of non-self governing territories under the abovementioned Chapter XI of the Charter. As an administering power, Spain duly fulfilled its obligations pursuant to Article 73 (e) of the Charter relating to the transmission of technical and statistical information.
10. After Spain had withdrawn from Western Sahara on 26 February 1976, it formally abandoned its responsibilities over the territory.⁷ Nonetheless, Western Sahara is still considered to date a non self-governing territory within the meaning of Article 73 of the Charter and Spain is still reported on the list of the *de jure* administering powers.⁸
11. In addition, despite the *de facto* control exercised over the largest part of the territory, Morocco has never formally acquired the status of administering power as shown by the UN list of non self-governing territories⁹ and has therefore not transmitted information on the territory pursuant to Article 73 (e).

⁵ The following are among the most important and significant resolutions of the General Assembly in this context: the Declaration on the granting of independence to colonial countries and people (Resolution 1514 (XV) of 14 December 1960); the Resolution on the principles which should guide Members in determining whether or not an obligation exists to transmit the information called for under Article 73 (e) of the Charter, determining the possible ways for non self-governing territories to attain a full measure of self-government (Resolution 1541 (XV) of 15 December 1960); the Resolution on the situation with regard to the implementation of the Declaration on the granting of independence to colonial countries and people, establishing a Special Committee whose main task is to overlook the implementation of the Declaration on decolonization (Resolution 1654 (XVI) of 27 November 1961); the Declaration on principles of international law concerning friendly relations and co-operation among States in accordance with the Charter of the United Nations, stating, *inter alia*, the separate and distinct status of a colony or a non self-governing territory from the territory of the State administering it until the people of the concerned territory have exercised their right of self-determination (Resolution 2625 (XXV) of 24 October 1970).

⁶ See for a comment on Article 73 BEDJAOUÏ, in COT-PELLET (sous la direction de), *La Charte des Nations Unies. Commentaire article par article*, 3rd edition, 2005, volume II, p. 1752; CONFORTI, *Le Nazioni Unite*, 7th edition, 2005, p. 266; FASTENRATH, in SIMMA (edited by), *The Charter of the United Nations. A Commentary*, 2nd edition, 2002, volume II, p. 1089.

⁷ On that date the Permanent Representative of Spain to the United Nations informed the UN Secretary-General that "*the Spanish Government, as of today, definitely terminates its presence in the Territory of the Sahara and deems it necessary to place the following on record:...(a) Spain considers itself henceforth exempt from any responsibility of an international nature in connection with the administration of the said Territory, in view of the cessation of its participation in the temporary administration established for the Territory*" (A/31/56-S/11997).

⁸ In this regard, the signature on 14 November 1975 of a tripartite Agreement with Mauritania and Morocco (known as Madrid Agreement), transferring "*all the responsibilities and powers*" relating to Spain's status as administering power, did not affect its position.

⁹ The last updated list can be found in the Annex to the report of the Secretary-General to the General Assembly, dated 8 June 2005, on the Information from Non Self-Governing Territories transmitted under Article 73 (e) of the Charter of the United Nations (A/60/69): in this list no reports are recorded on Western Sahara by Spain.

b. International Court of Justice advisory opinion of 16 October 1975

12. By resolution of 13 December 1974 the General Assembly decided to ask the International Court of Justice an advisory opinion to clarify the legal situation of the territory of Western Sahara with regard to two specific questions: i) whether Western Sahara was a *terra nullius* at the time of colonization by Spain; and, in case of negative answer to the first question, ii) what were the legal ties between Western Sahara and both Morocco and Mauritania.
13. The Court replied to the first question by saying that at the time of the colonization by Spain the territory was not a *terra nullius* in the light of the State practice of that period, which did not consider a territory as belonging to no one if it was inhabited by tribes or people having a social and political organization. The Court found that this was the case for Western Sahara.
14. Addressing the second question, the Court concluded as follows:

"(...) the materials and information presented (...) do not establish any tie of territorial sovereignty between the territory of Western Sahara and the Kingdom of Morocco or the Mauritanian entity. Thus the Court has not found legal ties of such a nature as might affect the application of General Assembly resolution 1514 (XV) in the decolonization of Western Sahara and, in particular, of the principle of self-determination through the free and genuine expression of the will of the peoples of the Territory".¹⁰

15. In other words, while confirming the legal and binding character of the right of self-determination, the Court found that the applicability of this right with regard to the specific situation of Western Sahara is not put into question by Morocco's and Mauritania's claims.

c. Opinion of 12 February 2002 by Mr H. Corell, UN Under-Secretary-General for Legal Affairs and Legal Counsel

16. By letter addressed to the Under-Secretary-General for Legal Affairs and Legal Counsel, Mr H. Corell, the Security Council requested an opinion on the legality in the context of international law of two contracts concluded in October 2001 by Morocco with foreign companies for the exploration of mineral resources in Western Sahara.
17. Taking into account the status of Western Sahara as a non self-governing territory and the principle of "permanent sovereignty over natural resources" developed by the General Assembly in its resolutions,¹¹ the UN Legal Counsel observes that *"the legal nature of the core principle of 'permanent sovereignty over natural resources', as a corollary to the principle of territorial sovereignty or the right of self-determination, is indisputably part of customary international law"*.

¹⁰ Advisory Opinion of 16 October 1975 (Western Sahara). Emphasis added by us.

¹¹ See, for example, Resolution 1314 (XIII) of 12 December 1958 and, in particular, Resolution on permanent sovereignty over natural resources (Resolution 1803 (XVII) of 14 December 1962). On the specific binding character of this last declaration see CONFORTI, *op. cit.*, p. 309. The principle is also embodied in other acts, such as the 1966 International Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights (Article 1).

18. However, as to the exact legal scope of this principle, the point to be clarified is "*whether the principle of "permanent sovereignty" prohibits any activities related to natural resources undertaken by an administering Power (...) in a Non-Self-Governing Territory, or only those which are undertaken in disregard of the needs, interests and benefits of the people of that territory.*"
19. The UN Legal Counsel concludes that the specific contracts examined "*are not in themselves illegal*", because they did neither entail exploitation nor physical removal of the mineral resources. In fact, the principle of sovereignty over natural resources has to be understood in the sense that it opposes only those economic activities which are not undertaken in accordance with the interests and the wishes of the people of the territory and deprive them of their legitimate rights over their natural resources.¹²
20. However, according to the Legal Counsel "*if further exploration and exploitation activities were to proceed in disregard of the interests and wishes of the people of Western Sahara, they would be in violation of the international law principles applicable to mineral resource activities in Non-Self-Governing Territories.*"
21. This interpretation of the extent of the principle of sovereignty over natural resources is confirmed by Resolution III, annexed to the Final Act of the Third United Nations Conference on the Law of the Sea (UNCLOS).¹³

IV. Legal analysis

a. The text of the Agreement

22. The first question to consider is whether, on the basis of the provisions of the Agreement, the waters of Western Sahara are included or not in its area of application.
23. The Agreement is composed of the text of the Agreement itself, a Protocol and its Annex, containing 8 Appendixes, which form an integral part of the Agreement (Article 16). Article 1 (purpose) states that the Agreement "*establishes the principles, rules and procedures governing (...) the conditions governing access by Community fishing vessels to Moroccan fishing zones*".
24. "*For the purposes of this Agreement, the Annex and the Protocol*", the 'Moroccan fishing zone' is defined by Article 2 (Definitions) as the "*waters falling within the sovereignty or jurisdiction of the Kingdom of Morocco*".¹⁴

¹² This interpretation of the principle of sovereignty over natural resources is provided by the Legal Counsel after considering two cases brought before the International Court of Justice (on *East Timor* and *Nauru* resources exploitation), the (sporadic) recent practice of States about natural resources exploitation in non-self governing territories and the General Assembly resolutions on economic activities in non self-governing territories.

¹³ "*In the case of a territory whose people have not attained full independence or other self-governing status recognized by the United Nations, or a territory under colonial domination, provisions concerning rights and interests under the Convention shall be implemented for the benefit of the people of the territory with a view to promoting their well-being and development*" (emphasis added).

¹⁴ This expression seems to be a quite common standard formula in the text of fisheries Agreements concluded by the EU: see, for recent examples, Article 2 of the partnership Agreements with the Federated States of Micronesia (COM(2005)502) and the Solomon Islands (COM(2005)404), but also Article 2 of the 1996 Agreement with Mauritania (OJ L 334, 23.12.1996, p. 20).

25. Article 7 (Financial contribution) indicates in its paragraph 1 that the Community shall grant Morocco a financial contribution which shall be composed of two related elements, namely: (a) a financial contribution for access to Moroccan fishing zones and (b) a "*Community financial support for introducing a national fisheries policy based on responsible fishing and on the sustainable exploitation of fisheries resources in Moroccan waters*".
26. Article 11 (Area of application) reiterates that the "*Agreement shall apply (...) to the territory of Morocco and to the waters under Morocco jurisdiction*".
27. Under Article 10 (Joint Committee), a Joint Committee shall be set up between the two parties. It meets at least once a year and monitors the implementation of the Agreement.
28. Article 13 (Settlement of disputes) states that the "*contracting parties shall consult each other on any dispute concerning the interpretation or application of (the) Agreement*". However, under the terms of Article 15 (Suspension) "*application of (the) Agreement may be suspended at the initiative of one of the parties in the event of a serious disagreement as to the application of provisions laid down in (the) Agreement*".
29. Article 2 of the Protocol indicates that "*the financial contribution shall be paid to the Treasurer-General of the Kingdom of Morocco*" (paragraph 5) and that "*subject to Article 6 of this Protocol, the Moroccan authorities shall have full discretion regarding the use to which this financial contribution is put*".
30. According to Chapter III of the Annex, "*the fishing zones for each type of fishery in Morocco's Atlantic zone are defined in the datasheets*" listed in Appendix 2.
31. The six Datasheets referred to in the abovementioned Chapter III provide, among other information, the geographical limits of the fishing zones. These geographical limits are confirmed in Appendix 4 of the Annex, headed "*Limits of Moroccan fishing zones - Coordinates of fishing zones*".
32. While the latitudes set out for "small-scale fishing/north: pelagic species and longline" (Datasheets 1 and 2) define a fishing zone falling clearly within Moroccan territorial waters, the latitudes set out for "small-scale fishing/south", "demersal fishing", "tuna fishing" and "industrial pelagic fishing" (Datasheets 3 to 6) do not provide a clear indication as to the southern limit of each of the fishing zones.
33. Datasheets 3, 4 and 6 limit themselves to indicate "*South of 30°40'00''*" and "*South of 29°0'00''*", without laying down the latitudes of the fishing zones in the South. On a similar basis, while stating that tuna fishing can be carried out in "*the entire Atlantic*" apart from a specific delimited area, Datasheet 5 does not make clear up to which point Morocco's Atlantic zone extends.
34. Thus, the text of the Agreement is not sufficiently clear as to its territorial area of application, because it does not entail any element stating that the fishing activities allowed under the Agreement south of the parallel 29°0'00" cannot in anyway extend to the area south of the parallel 27° 40', which is approximately the latitude of the southern limit of Moroccan territorial waters.

35. Even though in the text of the Agreement or of its integral parts, no mention is made of the waters of Western Sahara, the formulation chosen presents the risk that EU vessels will actually fish beyond Morocco "territorial" waters, notably in the waters of Western Sahara.
36. If Morocco claims jurisdiction over waters that, according to international law, belong to a non self-governing territory within the meaning of Article 73 of the UN Charter (Western Sahara), it would be necessary to assess whether the fishing Agreement complies with the rules of international law resulting from Article 73 of the UN Charter and the interpretation thereof.

b. Compatibility with international law

37. In order to assess the compatibility of the Agreement with international law, the following elements will be taken into account:
 - a) Western Sahara has the status of a non self-governing territory under Article 73 of the UN Charter; Spain no longer fulfils its role as (*de jure*) administering power and the territory is *de facto* administered by Morocco;
 - b) as a non self-governing territory, Western Sahara enjoys the right to the natural resources of the territory, in the sense that economic activities concerning those resources shall not be carried out in disregard of the interests and of the wishes of the local population¹⁵; the *de facto* administration of Morocco in Western Sahara is therefore under the legal obligation to comply with the rights of the people of the Western Sahara.
38. As far as the European Community is concerned, in the exercise of its powers, notably in concluding the fisheries Agreement in question, it must also respect the rules of international law. Indeed, as the Court of First Instance has recently held, "*the Community may not infringe the obligations imposed on its Member States by the Charter of the United Nations or impede their performance and (...) in the exercise of its powers it is bound, by the very Treaty by which it was established, to adopt all the measures necessary to enable its Member States to fulfil those obligations*".¹⁶

¹⁵ As to the legal character of this right, see BROWNLIE, *Principles of public international law*, 1990, 4 th edition, p. 513. For a similar opinion see also HEINTZE, Self-determination, Right of, in VOLGER (edited by), *A concise Encyclopedia of the United Nations*, 2002, p. 506.

¹⁶ Judgement of 21 September 2005, Case 306/01, Yusuf and Al Barakaat International Foundation v Council and Commission, not yet published in the ECR, paragraphs 239 following, in particular 249, 253, 254.

39. According to the various resolutions of the General Assembly of the United Nations, the rights of the non self-governing territories to self determination and to natural resources are deemed to be respected only if economic activities are undertaken in collaboration with the indigenous peoples and in a way that would permit them to fully benefit from the exploitation of their natural resources.¹⁷ It should be recalled, however, that these resolutions, even if they may have an important political significance, cannot be considered, as such, as a source of international law, because they are not legally binding.
40. According to the UN Under-Secretary-General for Legal Affairs and Legal Counsel, the exploration and exploitation activities in Non-Self-Governing Territories violate the principles of international law if they disregard the interests and wishes of the people of the Non-Self-Governing Territory¹⁸.
41. The Fisheries Agreement under consideration does not explicitly foresee that the waters of Western Sahara are included in its area of application, but nor does it expressly exclude Moroccan authorities from issuing fishing licenses to Community vessels to operate in the waters which are geographically in front of Western Sahara¹⁹.
42. This does not mean that the agreement is, as such, contrary to the principles of international law. At this stage, it cannot be prejudged that Morocco will not comply with its obligations under international law vis-à-vis the people of Western Sahara. It depends on how the agreement will be implemented. In this respect, the Agreement explicitly acknowledges that the Moroccan authorities have a "*full discretion*" regarding the use to which this financial contribution is put (Article 2 (6) of the Protocol). It is therefore up to them to assume their responsibilities in that respect.
43. As to the effects of the agreement for the people of Western Sahara, the way in which the Moroccan authorities intend to implement this agreement and the extent to which they foresee the benefits that it brings to the local people, it would be useful for Parliament to receive indications from the Commission and/or from the Council.
44. If the implementation of the agreement raises difficulties, it should be noted that a Joint Committee is set up in order to supervise the implementation of the agreement (Article 10 of the Agreement). In case the Moroccan authorities disregard manifestly their obligations under international law vis-à-vis the people of Western Sahara, the Community could eventually enter into bilateral consultations with a view to suspending the agreement (Article 15 of the Agreement and article 9 of the Protocol).

¹⁷ See, for instance, several resolutions on economic and other activities which affect the interests of the peoples of the Non-Self Governing Territories: among the most recent, 60/111 of 18 January 2006, 59/128 of 25 January 2005, 58/103 of 17 December 2003. They show concern on the exploitation *tout court* of the natural resources to the detriment of the interests of the indigenous populations - irrespective of the entity carrying out the activity (be it the administering power or not) - and reaffirm that "*any economic or other activity that has a negative impact on the interests of the peoples of the Non-Self-Governing Territories and on the exercise of their right to self-determination (...) is contrary to the purposes and principles of the Charter*".

¹⁸ See the abovementioned opinion, paragraphs 16-20 of the present legal opinion.

¹⁹ It seems that, although the previous Fisheries Agreements with Morocco did not mention the waters of Western Sahara, Morocco issued fishing licences authorising Community vessels to operate in these waters.

V. Conclusions

45. In light of the above, the Legal Service reaches the following conclusions:

- a) Even if the Fisheries Agreement under consideration does not explicitly foresee that the waters of the Western Sahara are included in its area of application, nor does it expressly exclude Moroccan authorities from issuing fishing licenses to Community vessels to operate in the waters which are geographically in front of Western Sahara;
- b) This does not mean that the agreement is, as such, contrary to the principles of international law. At this stage, it cannot be prejudged that Morocco will not comply with its obligations under international law vis-à-vis the people of Western Sahara. It depends on how the agreement will be implemented;
- c) In this respect, the Agreement explicitly acknowledges that the Moroccan authorities have a "full discretion" regarding the use to which the financial contribution is put (Article 2 (6) of the Protocol). It is therefore up to them to assume their responsibilities in that respect;
- d) As to the effects of the agreement for the people of Western Sahara, the way in which the Moroccan authorities intend to implement this agreement and the extent to which they foresee the benefits that it brings to the local people, it would be useful for Parliament to receive indications from the Commission and/or from the Council;
- e) If the implementation of the agreement raises difficulties, it should be noted that a Joint Committee is set up in order to supervise the implementation of the agreement (Article 10 of the Agreement). In case the Moroccan authorities disregard manifestly their obligations under international law vis-à-vis the people of Western Sahara, the Community could eventually enter into bilateral consultations with a view to suspending the agreement (Article 15 of the Agreement and article 9 of the Protocol).

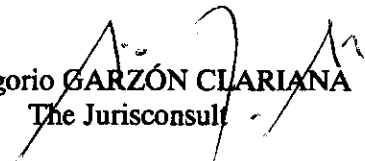


Ricardo PASSOS



Gabriele MAZZINI

Visa :



Gregorio GARZÓN CLARIANA
The Jurisconsult

Annex

PARLAMENTO PARLAMENT PARLAMENTET
KOINOBOYΛIO PARLIAMENT PARLEMENT
PARLAMENTS PARLAMENTAS
IL-PARLAMENT PARLAMENTTI



COMMITTEE ON DEVELOPMENT
THE CHAIR

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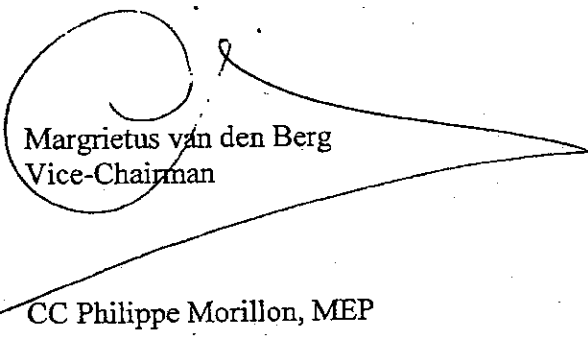
Request for an opinion of the Legal Service

Dear Mr Garzón Clariana,

The Coordinators of the Development Committee decided today to request the opinion of the Legal Service on the question whether the Council Decision concluding an agreement with Morocco that would allow EU vessels to fish in the waters of the Western Sahara is compatible with the principles of International Law (COM(2005) 692 - 2005/0280(CNS)).

As it would be useful to have the Legal Opinion in time for the meeting of the Committee on Development on 20 February 2006, I would request that it be delivered by 16 February at the latest.

Yours sincerely,


Margrietus van den Berg
Vice-Chairman

Arrivé Service Juridique
le 27 JAN. 2006

CC Philippe Morillon, MEP