# THE NEW FISHERIES PARTNERSHIP AGREEMENT BETWEEN THE EUROPEAN COMMUNITY AND THE KINGDOM OF MOROCCO: FISHING TOO SOUTH?

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SUMMARY:



## 1. INTRODUCTION

On the 1st of June 2006 a Fisheries Partnership Agreement (FPA) between the European Community (EC) and Morocco was signed in Brussels[1]. The agreement had been originally initialled on 28 July 2005 by the European Commission and the Kingdom of Morocco and represented the result of a long period of difficult negotiations which had followed the termination of the previous bilateral fisheries agreement between the EC and Morocco in 1999[2].

The agreement will last for a period of four years and it allows access for Community vessels to Morocco's Atlantic fisheries. It provides for the

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1. Fisheries Partnership Agreement between the European Communities and the Kingdom of Morocco (FPA), in Council Regulation (EC) No 764/2006 of 22 May 2006, in *Official Journal of the European Union*, L 141 (2006), p. 1.

2. See Agreement on Cooperation in the sea fisheries sector between the European Community and the Kingdom of Morocco. Protocol setting out fishing opportunities and the financial compensation and financial contributions, 19 December 1995, in *Official Journal of the European Union*, L306 (1995), p. 7. This agreement lacked a renewal clause.

granting of 119 fishing licenses for Community vessels (mostly Spanish vessels, but also including vessels from a variety of other EC countries, such as Portugal, France, Italy) and a maximum of 60000 tonnes of pelagic fish shared according to an allocation key between Germany, Latvia, Lithuania, Netherlands, United Kingdom, Poland, Ireland, Spain, France and Portugal[3]. In exchange, the Protocol included in the agreement provides for a financial contribution paid by the Community over the four years set at EUR 144.4 millions plus the fees to be paid by shipowners –around EUR 13.6 millions–[4].

What appears to be a rather uncontroversial and standard technical agreement –which is very similar in all its major aspects to the many bilateral agreements entered into by the EC with non-Member States in the exercise of its competence in the field of fisheries– has sparked at Community level strong criticism, especially by MEPs and the civil society, because of the alleged extension of the geographical scope of the FPA to the waters off the coast of Western Sahara. If the agreement is implemented in the same way as previous agreements were implemented, it will allow EC vessels to fish in Western Sahara's territorial waters and EEZ thanks to licences granted by the Moroccan authorities[5]. A recurrent claim has been that the agreement and such practice are contrary to international law as they fail to respect the right of self-determination of the people of Western Sahara. As a result of these objections, two legal opinions have been produced by the Legal Service of the

3. Council Regulation No. 764, supra n. 1, Art. 2.

4. FPA, supra n. 1, Protocol, Art. 2.

5. While sovereignty over territorial waters accrues automatically as a result of the separate status of Western Sahara, the interesting question should be raised whether we can justifiably refer to an EEZ with regard to a NSGT, where self-determination has not been exercised yet. In this respect, one can refer to the claim made by the Saharawi Arab Democratic Republic and POLISARIO as legitimate representatives of the people of Western Sahara, which may be considered at least sufficient to extend the legal regime over the exploitation of natural resources in NSGTs to Western Sahara's EEZ: "The Saharawi Arab Democratic Republic (SADR) has an obvious and inherent right to develop and conserve the resources of the sea off its coast. That area of the Atlantic Ocean which is to be preserved free of fishing and oil development by other States is clear: it is the area of the sea extending from north to south along the SADR coast –from our land frontier with Morocco to the frontier with Mauritania, all seaward to a distance of 200 nautical miles from this coast–. Case after case in international law, together with the practice of coastal States throughout the world and the provisions of the 1982 United Nations Law of the Sea Convention make clear this right to an offshore area. The Saharan Arab Democratic Republic is committed to peaceful and shared uses of the seas –and to asserting a sovereign jurisdiction over those resources which are found within what would be our 200 nautical mile exclusive economic zone–". Statement by HE Emhamed Khadad, 17 May 2005, Oil and Gas Licence Offering Meeting, London, available at http://www.sadroilandgas.com/pdfs/StatementHEEmhamedKhadad-17May2005.pdf.

Parliament and the Legal Service of the Council, respectively, on the compatibility of the agreement with international law, some amendments have been proposed by the Parliament (and still a large group of MEPs have refused to approve the agreement) and one Member State, Sweden, has eventually decided to cast a negative vote in the Council[6]. However, at the end, the agreement has been approved by the Council without any major amendment, which means that it does not exclude Western Sahara from its geographical scope of application nor that it strengthens the monitoring mechanisms as requested by the Parliament.

The present contribution aims at providing an exhaustive legal analysis of the issues involved in an assessment of the compatibility of the FPA with international law, with special consideration for the distinct status of Western Sahara as a Non-Self-Governing Territory (NSGT) and the principle of sovereignty over natural resources of the people of Western Sahara. The article starts off setting out the historical and legal background of the question of Western Sahara. It then focuses on the analysis of the FPA and the practice related to previous fisheries agreement entered into by Morocco and EC. In the third section it concentrates on the question of validity of the FPA, with special reference to the competence of Morocco to enter into an international agreement conferring rights and obligations with respect to Western Sahara and to the applicability of the grounds of invalidity related to the infringement of *jus cogens* rules. In the fourth section it focuses on the compatibility of the FPA with international law, especially focusing on the obligations of Morocco and the EC towards Western Sahara: special regard is given to the question of sovereignty over natural resources in Western Sahara and to the legal opinions rendered in 2002 by the UN Legal Office and in 2006 by the EU Council's and Parliament's Legal Services. Moreover, the question of the application of the law of belligerent occupation to Western Sahara is addressed, with a view to identifying the rights and obligations imposed upon Morocco by such application, with special regard to the use of natural resources found on the territory of Western Sahara. Finally, the article concludes by reflecting on the possibilities of challenging the FPA before the In-

6. See Legal Opinion of the Legal Service of the Parliament, Doc. SJ-0085/06, 20 February 2006, available at http://www.fishelsewhere.org/legal.htm; Legal Opinion of the Legal Service of the Council, Doc. 6664/06, 22 February 2006 (only available paras. 1-5); European Parliament legislative resolution on the proposal for a Council regulation on the conclusion of the Fisheries Partnership Agreement between the European Community and the Kingdom of Morocco, P6_TA-PROV(2006)0201, 16 May 2006; Council of the European Union, Press Release, 2730th Meeting, 22 May 2006, p. 18.

ternational Court of Justice (ICJ), the European Court of Justice (ECJ) or a domestic court and on the broader implications of its signature for the present diplomatic stalemate in the solution of the Western Sahara dispute.

The main thesis presented is that the agreement is not *per se* contrary to international law as its text does not include Western Sahara; however, if its interpretation and practice should evolve to include Western Sahara in its geographical scope of application, as it occurred with previous EC-Morocco fisheries agreements, it may be considered invalid with regard to Western Sahara due to a manifest lack of legal competence of Morocco related to the Territory and contrary to international law, insofar as it does not keep into due account the will of the people of Western Sahara. As a result, the agreement may be considered non-opposable with regard to the Western Sahara and may give rise in the future to a right to compensation against the European Community for the use of natural resources by the people of Western Sahara and a possible future State of Western Sahara. As things stand today, the chances that such right may be enforced are very slim.

## 2. A SHORT REHEARSAL OF THE WESTERN SAHARA QUESTION

We shall recall briefly the fundamental historical and legal issues involved in the Western Sahara question[7]. Western Sahara, a very large, mostly deserted, territory stretching for over 1000 km. along the north-western Atlantic coast of Africa and sparsely populated by nomadic tribes united by a common cultural and linguistic heritage, was colonised by Spain in 1884[8]. After obtaining membership of the United Nations, Spain soon began considering Western Sahara as a Non-Self-Governing Territory and was in turn

7. For a general study on Western Sahara from the point of view of international law see SOROETA LICERAS, J.: *El Conflicto del Sahara Occidental, reflejo de las contradiciones y carencias del Derecho Internacional*, 2001, Bilbao. Other general works dealing with the history and politics of the Western Sahara question are e.g. JENSEN, E.: *Western Sahara: Anatomy of a Stalemate*, 2004, Boulder; SHELLEY, T.: *Endgame in the Western Sahara: what Future for Africa's last Colony*, 2004, London.

8. According to the latest estimates (June 2006) there are about 273000 people living in Western Sahara, the large majority being people settled by Morocco in the last decades (CIA, The World Factbook, at http://www.cia.gov/cia/publications/factbook/geos/wi.html#Intro). Approximately 165000 Saharawi refugees live in the camps in the Algerian province of Tindouf at the border with Western Sahara (source Wikipedia, at http://en.wikipedia.org/wiki/Tindouf_Province).

qualified by the General Assembly (GA) as "administering Power"[9]. The GA also demanded Spain to undertake immediate steps to guarantee the exercise of self-determination by the people of the Spanish Sahara[10].

While most of the international community was united in asking an unconditional support for speeding-up the process of self-determination in the Territory in the face of Spain's reluctance to relinquish its grip on the region, two neighbouring States began putting forward their claims. Morocco and Mauritania, despite initially not recognising each other's claim and despite re-affirming their commitment to self-determination, considered the Spanish Sahara to come "naturally" under their sovereignty because of the cultural ties and historical ties with the region, which had been broken by the expansionist policy of European colonial powers and especially Spain[11]. By 1974, in the wake of Franco's illness, Spain was bowing to international pressure and eventually had to commit itself to the organisation a referendum on self-determination; on the other hand, Morocco and Mauritania were becoming more vocal about their sovereign rights over the territory.

That resulted the following year in Morocco and Mauritania leading the way to a request by the GA to the International Court of Justice for an advisory opinion on the status of Western Sahara, with an aim at receiving at least an implicit legal endorsement for their claim. GA Resolution 3292 drafted the question in the following narrow terms, i.e. whether Western Sahara was *terra nullius* at the time of the Spanish colonisation and, if the answer was in the negative, what were the legal ties between the Sahara and the Kingdom of Morocco and the Mauritanian entity[12]. The reply of the Court did not however meet Morocco's and Mauritania's expectations. The Court avoided following a narrow approach dictated by the type of question and confirmed the applicability of the right of self-determination to the people of Western Sahara, regardless of the legal situation at the time of colonisation[13]. Furthermore, after having answered negatively to the first question, it concluded by 14 votes to 2 that there was little evidence indicating effective and exclusive authority exercised by Morocco over the territory in the period preceding the Spanish settlement, thus Morocco could not rely on any legal tie of territorial sover-

9. GA Res. 2072 (XX), 17 December 1965.

10. GA Res. 2229 (XXI), 20 December 1966, 2354 (XXII) 19 December 1967, 2428 (XXIII) 27 December 1968, 2591 (XXIV) 16 December 1969, 2711 (XXV) 14 December 1970, 2983 (XXVII) 14 December 1972, 3162 (XXVIII) 14 December 1973.

11. See FRANCK, T.: "The Stealing of the Sahara", 70 *AJIL* (1996), p. 702.

12. GA Res. 3292 (XXIX), 13 December 1974.

13. *Westen Sahara*, Advisory Opinion, ICJ Reports (1975), p. 12, at 34-37.

eignty over the territory[14]; the same conclusion, by 15 to 1 and on the same legal grounds, was reached with respect to Mauritania[15].

The response by Morocco to the publication of the advisory opinion was baffling, as it read in the opinion an endorsement to its claim[16]. Moreover, within weeks, Morocco first announced and then put into practice a "Green march", that is a massive, peaceful march of 350,000 Moroccan civilians into Western Sahara in order "to gain recognition of [its] right to national unity and territorial integrity"[17]. In the face of Security Council's division on the issue and of Spain's reluctance to forcefully protect the territory, the Green march was the first act of occupation by Morocco of Western Sahara[18].

The second act that gave some form of legitimation to the carving out of Western Sahara between Morocco and Mauritania was a Tripartite Agreement entered into by Spain with the two African States ten days after the Green March and six days after Franco's death[19]. The agreement consisted of a declaration and some secret annexes. In the declaration Spain confirmed its resolve to terminate as soon as possible the administration of Western Sahara and to that end it instituted a temporary administration together with Morocco and Mauritania and in consultation with the Djemaa (the advisory body set up by Spain and made of representatives of the Saharawi people friendly to the colonial power) to which all its powers and responsibilities as Administering Power would be transferred[20]. Through the secret annexes, Spain would gain participation at a 35% rate in the phosphate industry, it would maintain access to the fisheries of Western Sahara and it would obtain a renunciation by Morocco of all this latter's claims over Ceuta and Melilla until the question of Gibraltar would be settled (sic). In exchange, the agreement

14. *Ibid*., p. 48 and pp. 56-57.

15. *Ibid*., p. 68.

16. "...the opinion of the Court can only mean one thing: the so-called Western Sahara was part of Moroccan territory over which the sovereignty was exercised by the Kings of Morocco and that the population of this territory considered themselves and were considered to be Moroccans... To-day Moroccan demands have been recognised by the legal advisory organ of the United Nations". Press release of the Permanent Mission of Morocco to the United Nations on 16 October 1975, quoted in UN Doc. S/PV.1849, at 11, cit. in Franck, supra n. 11, p. 711.

17. *Ibid*., p. 712.

18. The response of the Security Council was "toothless" according to Franck (Franck, supra n. 11, 714). It must however be mentioned that the Council, while not acting under Ch. VII, "deplored" the March and called upon Morocco to withdraw from the Territory. See SC Res. 380 (1975), 6 November 1975.

19. Declaration of principles between Spain, Morocco and Mauritania on the Western Sahara, Madrid, 14 November 1975, UNTS Vol. 988, I-14450.

20. *Ibid*., Art. 2.

allegedly provided for the ultimate division of the Territory between the two African States, with Morocco retaining two-third and Mauritania gaining control over the southern part. The response given by the General Assembly to the agreement was contradictory: on the one hand, the Assembly re-affirmed the inalienable right of self-determination of the people of Western and the responsibilities of Spain with regard to the organisation of a referendum[21]; on the other, the Assembly took note of the Tripartite Agreement and called on the Secretary-General to appoint a representative to establish contacts with the interim administration in order to assist it in holding a free consultation with the Saharan population[22].

The entry of Moroccan and Mauritanian forces in Western Sahara was met by heavy resistance from the national liberation movement, POLISARIO, which received military equipment from Algeria, the Soviet Union and North Korea. What ensued was a high intensity guerrilla warfare, in which despite initial territorial gains by POLISARIO, Morocco and Mauritania gained control of all major towns and most of the coast and the majority of the Saharawi population found shelter in refugee camps established in the Algerian desert. Notwithstanding the final withdrawal of Spain and the declaration of independence of the Saharawi Arab Democratic Republic (SADR) by POLISARIO in February 1976, Morocco and Mauritania formalised the annexation of Western Sahara in April 1976, when the two countries signed an agreement of boundary delimitation in which Western Sahara was carved out in accordance with the ratio 2/3 for Morocco and 1/3 for Mauritania[23].

Due to the heavy military losses caused by POLISARIO's guerrilla warfare and the realisation of the limited natural resources available in the south of Western Sahara, Mauritania decided in 1979 to drop its legal claim to part of the Territory, to recognise the SADR as the legitimate authority in Western Sahara and to withdraw from Western Sahara[24]. The military success was for

21. GA Res. 3458(A) (XXX), 10 December 1975.

22. GA Res. 3458(B) (XXX), 10 December 1975.

23. See Convention concerning the State frontier line established between the Islamic Republic of Mauritania and the Kingdom of Morocco, Rabat, 14 April 1976, in UNTS Vol. 1035, I-15406. The Saharawi Arab Democratic Republic *de facto* exercises authority over the Tindouf refugee camps and control the eastern part (largely unpopulated) of Western Sahara. It has its governmental seat in the refugee camps in Tindouf and is a member of the Organization of African Union. At the time of writing, it is recognised by 47 States (not including Western States), 35 other States, many of which in the last few years, having withdrawn or "frozen" their recognition pending the final solution of the dispute.

24. A/34/427-S/13503, Annex I and II, Official Record of the Security Council, Thirty-Fourth Year, Supplement for July, August and September 1979.

POLISARIO short-lived as Moroccan forces soon moved to occupy the southern part of the Territory vacated by Mauritania, despite the repeated protests of the international community[25]. The diplomatic deadlock and the hostilities between POLISARIO and the Moroccan forces continued in the following years: Morocco responded to the increasing military losses by elevating a sand wall of over three metres cutting diagonally for over 2000 km. the territory of Western Sahara and by positioning an estimated three millions landmines on the their side of the wall.

Also in the face of a military situation increasingly stabilised by the completion of the berm, a step forward was made in 1988 with the signature by Morocco and POLISARIO of a Settlement Plan promoted by the UN and the Organization of African Union for the organisation of a referendum and the exercise of self-determination of the people of Western Sahara, as identified by the 1974 Spanish census[26]. The plan was endorsed by the Security Council in 1990 and led to the conclusion of a cease-fire between Morocco and POLISARIO in 1991. The 1990s saw the unfolding of a new phase in the Western Sahara conflict, in which all efforts were devoted to the implementation of the Settlement Plan, including the appointment of a Secretary General's Special Representative for Western Sahara and the deployment of a small UN peace-keeping mission (MINURSO). The main stumbling block revealed to be the identification of those entitled to vote with the attempt of Morocco to include the many settlers who had been moved from Morocco in the successful attempt to change the demography of the Territory and with the problems related to the thousands of Saharawi refugees living in other countries[27]. Another problem identified by the Personal Envoy of the Secretary-General, James Baker, was the lack of enforcement mechanisms, should the referendum have resulted in a result in favour of independence[28]. In sum, while the cease-fire continued to hold, the political process did not make any major progress as the parties failed to reach an agreement on the technical details of the referendum.

The latest phase of the Western Sahara crisis has been characterised by the elaboration by the Personal Envoy of the Secretary-General of two peace plans, one in 2001 and one in 2003. The 2001 Draft Framework Agreement

25. See GA Res. 34/37, 21 November 1979; GA Res. 35/19, 11 November 1980.

26. The plan was approved by the Security Council in 1990. See SC Res. 658 (1990) and SC Res. 690 (1991).

27. MILANO: *Unlawful Territorial Situations in International Law: Reconciling Effectiveness, Legality and Legitimacy*, Leiden, 2006, pp. 168-169.

28. SG Report of 13 February 2000, S/2000/131.

provided for a transitional period of five years in which a Western Sahara Executive Authority would be created, while leaving Morocco exclusive competence for foreign affairs, national security and external defence; in the referendum all residents in Western Sahara for the preceding year would be entitled to vote[29]. The plan proved unacceptable for POLISARIO and Algeria, as it would have represented a radical departure from the Settlement Plan and given full weight to the policy of settlements pursued by Morocco for over 20 years.

The second and latest plan, the Peace Plan for the Self-Determination of the People of Western Sahara has been proposed in 2003, and it has gone some way in meeting POLISARIO's demands[30]. It still provides for a transitional period in which a Western Sahara Executive Authority would be formed and it still leaves some vital areas in the hands of Morocco, but it makes the residence requirement for voting in the referendum stricter (voters must be residents in the Territory continuously since 30 December 1999). After some initial hesitance, POLISARIO has lent its support to the plan; but, this time, Morocco has made known that while conceiving fully fledged autonomy for the region, it remains opposed to any solution of statehood and independence[31].

In conclusion, after 16 years of bloody conflict and decades of diplomatic efforts to realise the right of self-determination for the people of Western Sahara, there is little indication that any final solution may soon be reached. After so many years of struggle and deprivation, the POLISARIO and the Saharawi are showing resilience to any solution short of independence; Morocco, on the other hand, pays little costs in maintaining the *status quo* (the subject of the present analysis is evidence of that) and shows no willingness to reach a solution in the short term. More worryingly for the final solution of the dispute, there is little evidence that the international community is willing to step up its pressure on Morocco to make sure it eventually co-operates in the organisation and holding of the referendum on self-determination.

## 3. THE 2006 FISHERIES PARTNERSHIP AGREEMENT

Fishing in the waters off the Atlantic coast of Morocco and Western Sahara has been a time-honoured practice for Spanish fishermen, especially for

29. S/2001/613, Annex 1.
30. S/2003/565, Annex 2.
31. SG Report of 13 October 2005, S/2005/648.

small-scale fishers from Andalusia and the Canary Islands. Larger-scale fishing from other Spanish regions, especially Galicia, began in the 1960s, when the Spanish fishing industry started developing[32]. Spain, when entering into the 1975 Tripartite Agreement on Western Sahara, sought and obtained a commitment by Morocco to the effect that access for Spanish vessels to the fish-rich waters of Western Sahara would not be impaired, despite the declaration by Morocco two years earlier of a 70 mile-wide exclusive fishing zone[33].

The first fisheries treaty signed by Morocco and Spain in 1977 provided for the creation of joint ventures between Spanish and Moroccan fishermen, but it never entered into force due to the lack of ratification by the Moroccan parliament. Spanish vessels continued fishing in those years despite all the uncertainties surrounding the legal regime of the waters off the coast of Western Sahara and the continuous tensions with Moroccan patrols. Moreover, a number of incidents occurred in which Spanish vessels were attacked by POLISARIO boats and Spanish fishermen hijacked by POLISARIO. The first fisheries agreement between Morocco and Spain to enter into force was signed in 1983[34]. The agreement distinguished in terms of fishing rights two areas, that north of Cape Noun and the Mediterranean and that south of Cape Noun. This latter corresponds to the waters off the coast of Western Sahara. According to the then Secretary of State of Spain, the differentiation was intentionally made in order to distinguish Morocco's waters and the fisheries of Western Sahara and the conclusion of the agreement should not have been interpreted as a recognition of Morocco's sovereignty over the territory[35]. Again, in the following years, POLISARIO made clear its claim to the natural resources in the waters of Western Sahara: a number of grave incidents occurred in which POLISARIO gunned down Spanish fishing vessels and took hostage numerous crew members, as a result of which the offices of POLISARIO in Madrid were shut down[36].

In 1986, with its entry into the EC, Spain had to relinquish to the Community its competence to enter into fisheries agreements, which is why from

32. BARREIRA, A., FABRA, A., MARTINEZ, A., TUDELA, S.: *Local Communities and Fishing Disputes in Saharan and Moroccan Waters: Opportunities for New Dispute Resolution Mechanisms*, The Earth Council, San José, April 1998, p. 5.

33. Soroeta Liceras, supra n. 7, p. 227. See Dahir, No. 1.73.211 establishing the Limits of the Territorial Waters and the Exclusive Fishing Zone of Morocco, 2 March 1973, available at http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/MAR_1973_Act.pdf, as supplemented by Dahir concerning Act No. 1.73.255 of 23 Novembre 1975.

34. *Ibid*., p. 229.

35. *Ibid*., p. 230.

36. *Ibid*., p. 231.

then onwards we find a series of fisheries agreements concluded between Morocco and the EC. On the other hand, the Spanish interest remained prominent. The EC, in the exercise of its exclusive competence in the field of fisheries, entered into bilateral agreements with Morocco in 1988 with the conclusion of the 1988-1992 fisheries agreement, in 1992 with the conclusion of the 1992-1995 agreement and in 1995 with the conclusion of the 1995-1999 agreement[37]. After 1999 it became impossible to reach an agreement on renewal and official fisheries relations were broken off until 2005: as a result of that especially the affected Spanish fleet (244 vessels employing almost 4000 crew members) had to undergo a restructuring plan[38].

The main difference between the 2006 FPA and the previous fisheries agreement is that the former is much less ambitious both in terms of financial contributions offered by the EC and in terms of number of licenses and diversity of pelagic species included. This is the result of the increasing reluctance of Morocco since the 1990s to grant access to foreign vessels to the fishing zones under its jurisdiction, both due to the depletion of certain species such as the cephalopods (octopus and squid) and due to the efforts of Morocco to develop its own industrial fishing fleet and to boost its own exports of fish. As of today, Morocco has become the top fish exporter in Africa[39]. On the other hand, while the Spanish fleet remains the main beneficiary of the agreement, access to industrial pelagic fishing is granted to vessels from a considerably higher number of EC member States, including new Members. Except for that, the 2006 FPA re-introduces most of the features characterising the previous EC-Morocco agreement.

The FPA (incorporated into the Community legal order through a Council regulation) is made of the agreement proper, plus a Protocol and an Annex thereto in which are laid down the technical and financial terms regulating fishing by EC vessels in Moroccan waters[40]. Like most of the bilateral fish-

37. 1988 Agreement on relations in the sea fisheries sector between the European Community and the Kingdom of Morocco, OJ L181 (23/06/1988); 1992 Agreement on relations in the sea fisheries sector between the European Community and the Kingdom of Morocco, OJ L407 (31/12/1996); 1995 Agreement in the sea fisheries sector between the European Community and the Kingdom of Morocco, OJ L30 (31/01/1997).

38. Report on the proposal for a Council regulation on the conclusion of the Fisheries Partnership Agreement between the European Community and the Kingdom of Morocco, Fisheries Committee, Rapporteur Daniel Varela Suanzes-Carpegna, A6-0163/2006, Explanatory Statement, p. 11.

39. See BARREIRA *et al.*, pp. 11-12; American Chamber of Commerce in Morocco, Trade and Investment, Guide 2004, at http://www.moroccousafta.com/amchamguide.htm, p. 65.

40. FPA, supra n. 1.

eries agreements concluded between the EC and third countries, the main feature of the agreement is that it provides for a net financial contribution of €144.4 million to be paid by the EC over the five years of the duration of the agreement[41]. Within this amount, €13.5 million per year shall be put "towards defining and implementing a sectoral fisheries policy in Morocco with a view to introducing responsible fishing in its waters"[42]. As already mentioned, the EC receives 119 fishing licenses for Community vessels (mostly Spanish vessels, but also including vessels from few other EC countries, such as Portugal, France, Italy) and a maximum of 60000 tonnes of pelagic species for industrial fishing shared according to an allocation key between Germany, Latvia, Lithuania, Netherlands, United Kingdom, Poland, Ireland, Spain, France and Portugal[43]. Unlike for previous agreements, access for EC vessels to some of the most economically valuable species such as cephalopods (octopus and squid) and crustaceans (prawns, langoustines and lobsters) is denied. The same applies for fishing in Morocco's Mediterranean waters. Moreover, while vessels landing part of their catch are granted a reduction on their fee, landings are compulsory for certain species as set out in Appendix 2[44].

The other important feature for the purpose of this article (for the reasons explained in a following section) is the procedure through which the licenses are issued, which is also analogous to that used under previous agreements. The applications for licenses are submitted by relevant Community authorities on behalf of the shipowners to Morocco's Fisheries Department, with all details concerning the category of fishing, the zone, the tonnage used, the number of vessels; individual applications are also possible in accordance with Art. 1(5) and (6) of the Annex[45]. Morocco's Fisheries Department shall issue fishing licenses to the Delegation of the EC Commission in Morocco for all vessels[46].

But certainly the most vital issue in terms of the agreement's implications for the Western Sahara question is its geographical scope. The controversial question is whether the geographical scope includes the waters of Western Sahara as well. In Art. 2(a) the FPA defines the Moroccan fishing zone as "the waters falling within the sovereignty or jurisdiction of the King-

41. *Ibid*., Protocol, Art. 2(1)
42. *Ibid*., Protocol, Art. 6(1)
43. *Ibid*., Council Regulation, Art. 2.
44. *Ibid*., Appendix 2.
45. *Ibid*., Annex, Art. 1
46. *Ibid*., Annex, Art. 2.

dom of Morocco"[47]. The formula is the same used in previous EC-Morocco agreements. While the term "sovereignty" is certainly indicative of the territorial waters of Morocco, the term "jurisdiction" is more neutral and it may indicate the whole of the areas in which an EEZ is enforced by Morocco, including the waters off the coast of Western Sahara[48]. No indication can be derived from other parts of the agreement, especially Appendix 4, which breaks down Morocco's fishing zones according to the type of fishing: the southernmost zone is south of 29º00', a geographical point north of the Morocco-Western Sahara international border. It is also noteworthy that the Commission has carefully avoided any answer to that question, leaving the "burden" of deciding on Morocco[49]. In conclusion, it is impossible to disagree with the European Parliament Legal Service's opinion that the agreement, as it stands, neither includes nor excludes the waters of Western Sahara[50].

One should then wait and see whether the practice of Morocco and the EC with regard to the FPA will lead to an inclusion in the agreement of the waters of Western Sahara. This is especially important with regard to the interpretation of Art. 2(a). Art. 31(3)(b) of the 1986 Vienna Convention on the Law of the Treaties between States and International Organizations or between International Organizations, equally to Art. 31(3)(b) of the 1969 Vienna Convention on the Law of the Treaties, provides that in establishing the intention of the parties "there shall be taken into account... any subsequent practice in the interpretation of the treaty which establishes the agreement of the parties regarding its interpretation"[51]. Despite not having entered into force yet and despite not having been the ratified by Morocco and the EC, the 1986 Vienna Convention is widely considered expression of customary international law in most of its substantive parts, including that on interpretation of treaties. Should the practice related to the agreement lead the EC to request

47. *Ibid*., Art. 2(a).

48. Act No. 1-81of 18 December 1980, Promulgated by Dahir No. 1-81-179 of 8 April 1981, establishing a 200-mile-nautical Exclusive Economic Zone off the Moroccan coast, available at http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/MAR_1981_Act.pdf.

49. Answer of Commissioner Joe Borg, European Parliament, Debate of 15 May 2006, available at http://www.europarl.europa.eu/omk/sipade3?PUBREF=-//EP//TEXT+CRE+20060515+ITEM-018+DOC+XML+V0//EN&LEVEL=2&NAV=S&L=EN; Answer of Commissioner Joe Borg, European Parliament, 22 June 2006, E-1745/06, available at http://www.europarl.europa.eu/omk/sipade3?L=EN&OBJID=123215&LEVEL=3&SAME_LEVEL=1&NAV=S&LSTDOC=Y.

50. Legal Opinion of the Legal Service of the European Parliament, 20 February 2006, SJ-0085/06, available at http://www.fishelsewhere.org/legal.htm (last visited 7 May 2006)

51. 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, 21 March 1986, 25 *ILM* (1986), p. 543.

and Morocco to grant licenses concerning the waters of Western Sahara, the word "jurisdiction" in Art. 2(a) should be interpreted as including those waters.

In all likelihood, the practice related to the agreement will include the waters off the coast of Western Sahara especially with regard to industrial fishing. Reportedly, this was the case with the previous agreements between the EC and Morocco especially because of the specific interests of the Spanish fleet in the region to fish the valuable species excluded from the current agreement[52]. Unfortunately, the details of the implementation of the previous fisheries agreements have never been published by the Commission and we were unable to track down any public documentation proving the granting of these licenses for Western Sahara. But at least one element in the 1992-1995 Agreement did indeed indicate the inclusion of Western Sahara in the geographical scope of the agreement, i.e. the inclusion of the port of Dakhla, situated on the coast of Western Sahara, in Annex I, paragraph H(2) concerning "Technical inspection"[53].

The Commission has been very reticent in providing data on the implementation of previous agreements even to MEPs and an amendment approved by the Parliament requiring the Commission to draw up an annual report on the implementation of the agreement was not taken up by the Council[54]. Another indicator is that Morocco is also investing considerably in the renovation and expansion of the ports of El-Aaiun and Dakhla, based in Western Sahara, which according to 2006 statistics were already first and fourth respectively in terms of landings of fish nation-wide[55]. In any case, while past practice as well as predictions of future practice are not legally rel-

52. See for istance the Legal Opinion of the Legal Service of the Council, 22 February 2006, para. 4.

53. See European Parliament, Report of the Committee on Agriculture, Fisheries and Rural Development on the Commission proposal for a Council regulation on the conclusion of the Agreement on relations in the sea fisheries sector between the European Economic Community and the Kingdom of Morocco and laying down provisions for its application, 4 December 1992, A3-0394/92.

54. See Report Varela, supra n. 38, Draft European Parliament Legislative Resolution, Amendments 5 and 7. See also the answer of Commission Joe Borg, European Parliament, 17 July 2006, E-1744/06, stating with regard to the 1995-1999 agreement that "[n]o data exists that would make it possible to identify the precise location of the fishing effort under this Agreement" (available at http://www.europarl.europa.eu/omk/sipade3?L=EN&OBJID=124834&LEVEL=3&SAME_LEVEL=1&NAV=S&LSTDOC=Y).

55. Office National des Pêches du Maroc, Pêche Côtière et Artisanale au Maroc, Rapport Statistique Année 2006, at http://www.onp.co.ma/images/Pdf/direct/Rapport%20Statistique_Mars%202006+++++.pdf.

evant for the interpretation of the present agreement, the practice of the Commission is indicative of the Community attitude towards the question which has been to go on with fishing business keeping the lowest profile possible in order to avoid the diplomatic dimension of the Western Sahara question.

However, the diplomatic dimension of the agreement has not escaped the attention of many MEPs and of some member States. The Development Committee of the European Parliament sought in January 2006 legal advice from the Legal Service of the Parliament on the compatibility of the agreement with international law[56]. The Legal Service responded that the agreement does neither include nor exclude the waters of Western Sahara, that it would be up to Morocco to comply with its international obligations *vis-a-vis* the people of Western Sahara and that the Community could eventually enter into consultations with a view to suspending the agreement, should the implementation by Morocco disregard the interests of the people of Western Sahara[57]. Despite the green light given by the legal opinion, a large minority formed in the Parliament requesting the explicit exclusion of Western Sahara from the agreement[58]. A request put forward by some Member States and the Commission to approve the agreement through the emergency procedure (hence avoiding Parliament's scrutiny) was rejected by the Parliament[59]. Eventually, despite the opposition of 167 and the abstention of 79 MEPs, the Parliament decided to follow the advice of the Legal Service and adopt the resolution drafted by the Fisheries Committee, which requested only some amendments strengthening the monitoring mechanisms[60].

The agreement was also controversial within the Council. Almost simultaneously with the request by the for a legal opinion by the Parliament's Development Committee, the Working Party on External Fisheries Policy, after pressure from Nordic countries, asked the Council Legal Service for a written opinion on the compatibility of the FPA with international law. The opin-

56. Request for an opinion of the Legal Service, Committee on Development, European Parliament, 25 January 2006.

57. Legal Opinion of the Legal Service of European Parliament, supra n. 50, para. 45.

58. This large minority included most members of the European Greens, of the European United Left, of the Liberal Democrats, some independents and a part of the MEPs from the Socialist Party (mostly from Nordic countries, Britain and the Netherlands).

59. See FISHELSEWHERE: "European Parliament delays attempts to force through 'illegal' Agreement; Rift between Member States intensifies", 4 April 2006, at http://www.fishelsewhere.org/documents/EP%20delays%20Commission.doc

60. See Minutes of Proceedings, Results of Roll-Call Votes, Annex, 16 May 2006, at http://www.europarl.europa.eu/omk/sipade3?PUBREF=-//EP//NONSGML+PV+20060516+RES-RCV+DOC+PDF+V0//EN&LEVEL=2&NAV=S&L=EN

ion has not been made public, but first-hand information indicates that the response of the Legal Service reached the same conclusions reached by the Parliament's Legal Service. Despite the reassurances from the Council's Legal Service, Sweden eventually decided to cast its negative vote and issue a separate statement, Finland abstained and together with the Netherlands issued also a separate statement, Ireland supported the agreement but issued a separate statement[61]. Eventually, the agreement was approved in the form pro-

61. Despite indications in the Council that it would abstain, Sweden eventually voted against the agreement as a result of a decision made by the Swedish parliament. This is the text of the Swedish declaration: "Sweden has decided to vote against the Council Regulation on the conclusion of the Fisheries Partnership Agreement between the European Community and Morocco as it does not take into full consideration that Western Sahara is not a part of the territory of Morocco under international law and a process is underway to find a just, lasting and mutually accepted political solution to the conflict, which will allow for the self-determination of the people of Western Sahara, as envisaged by the UN Security Council; *all concerned are not ensured to benefit from the implementation of this agreement in accordance with the will of the people of Western Sahara, as provided by international law*. Sweden considers that the Joint Committee shall make use of all available instruments to ensure that the implementation of this Fisheries Partnership Agreement will be in conformity with the rules and principles of international law (emphasis added)". The joint statement by the Netherlands and Finland is the following: "With regard to the Council Regulation on the conclusion of the Fisheries Partnership Agreement between the European Community and the Kingdom of Morocco, the Netherlands and Finland wish to: *Recall* that the EU fully supports the efforts of the UN, and in particular of the Personal Envoy of its SG, Mr Peter van Walsum, to mediate between the various parties with an interest in Western Sahara towards a just, lasting and mutually accepted political solution of the conflict which will allow for the self-determination of the people of Western Sahara as envisaged by the UN Security Council [ ] *Underline* that the conclusion of a FPA may not be construed to be diminishing support for this process, and does in no way prejudge the outcome of this process with regard to the status of Western Sahara. In particular, the FPA may not be considered as acceptance of territorial claims not supported by international law. *Consider* that future dialogue within the FPA's Joint Committee will be of special importance and that the Joint Committee shall endeavour to make use of all available instruments to ensure that the implementation of this FPA will be in conformity with the rules and principles of international law, including the principle of 'permanent sovereignty over natural resources', and thus that activities under the agreement in the territory of Western Sahara will be conducted for the benefit of the original population, on their behalf or in consultation with their representatives". Finally, the statement of Ireland should be fully quoted: "Ireland supports the conclusion of the Fisheries Partnership Agreement between the European Community and the Kingdom of Morocco on the basis that it does not prejudice the longstanding position of the EU on the status of the Western Sahara. The EU continues to support the efforts of the UN Secretary General to encourage a negotiated solution which will allow the people of Western Sahara to exercise their right to self-determination. Ireland emphasises the importance of the future dialogue within the EU-Morocco Joint Committee foreseen under this agreement. It is essential that the Joint Committee make use of all instruments under the Agreement to ensure that the Agreement is implemented to the benefit of all the people concerned and in accordance with the principles of international law".

posed by the Commission and all amendments requested by the Parliament were dropped by the Council, most likely with a view to avoiding any further negotiation on the implementation and monitoring mechanisms with Morocco.

The FPA has been officially signed by a delegation of the Council and Morocco on the 30th of May in an official ceremony in Brussels, with the necessary ratification soon expected by the Moroccan Parliament in Rabat.

## 4. THE LEGAL VALIDITY OF THE FPA WITH REGARD TO WESTERN SAHARA

The analysis here must follow the hypothesis (with all likelihood realised) that the practice related to the agreement will cover the waters of Western Sahara. It goes without saying that should the agreement end up not including Western Sahara, no problem concerning the validity and/or legality of the agreement would arise.

We shall start by considering the question of validity of the agreement, i.e. its "ability" to create legal rights and obligations with regard to Western Sahara. While it is obviously the case that Western Sahara is beyond the geographical scope of EU and EC legal competence, we must first analyse the position of Morocco with regard to Western Sahara and whether it is indeed in the position to create international legal rights and obligations with regard to the Territory. The answer must be answered in the negative as Morocco does not have sovereignty over the Territory, it is not an administering Power, nor is its presence justified by other legal means, such as a consent expressed by the Saharawi people, by the former administering power Spain or a Ch. VII mandate by the Security Council.

The most authoritative statement on the lack of sovereignty by Morocco over Western Sahara can be found in the 1975 ICJ advisory opinion. As seen above, the core of the Court's opinion was that the people of Western Sahara enjoy the right to self-determination and that despite the historical and cultural ties between Morocco and Western Sahara the former does not enjoy sovereign rights over the Territory[62]. As a consequence of the lack of exercise of their right of self-determination by the people of Western Sahara –who may have ultimately opted for the incorporation or association with Morocco– nothing has changed in this respect in over thirty years. The universal lack of

62. *Western Sahara*, see supra section 2.

recognition of the Moroccan annexation by the international community and the continuing practice of the UN General Assembly to enlist Western Sahara among the NSGTs are further evidence of the unchanged status of Western Sahara and the lack of sovereignty by Morocco[63]. In conclusion, sovereignty cannot be the legal justification for Morocco to confer international legal rights and obligations with regard to Western Sahara.

May we consider Morocco an administering Power having competence to enter into international agreements with regard to the administered territory? Again, the answer must be in the negative. As argued elsewhere and explained above, Spain remained *de facto* and *de jure* the administering Power for Western Sahara until 1976, but it never transferred its status to Morocco or other States[64]. The 1975 Madrid Tripartite Agreement, whose validity has been rightly doubted because of the incompatibility of one of the secret annexes with the right to self-determination of the people of Western Sahara[65], created a joint temporary administration between Morocco, Mauritania and Spain with a view to Spain "terminating the responsibilities and powers [...] over that Territory as administering Power"[66]. Even conceding *ex hypothesis* that Spain had the power to transfer its Charter's obligations to a third party without the General Assembly's consent –a controversial assertion in itself–[67], the wording of the agreement shows that Spain did not intend to transfer the competence of administering Power to Morocco and Mauritania, but only to create a joint temporary administration for the transitional period leading to Spain's withdrawal. In fact, if one wished to look for the real "intention" of Spain concerning the final status of Western Sahara at that point in time, the point of reference should be the secret annex in which Spain committed itself to a transfer of sovereignty to Morocco and Mauritania. The annex remained secret because politically unfit to stand scrutiny from the international community and blatantly contrary to the right of self-determination of the people of Western Sahara from a legal point of view.

63. E.g. see 2005 Report of the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to the Colonial Countries and Peoples, General Assembly, Official Records, 60th Session, Supplement no. 23, A/60/23.

64. RUIZ MIGUEL, C.: "Is the EU-Morocco fishing agreement an attempt by Spain to legalise Moroccan occupation of the Western Sahara?", Grupo de Estudios Estratégicos, Analysis n. 97, at http://www.gees.org/english/pdf/2232/.

65. See Soroeta Liceras, supra n. 7, pp. 158ff.

66. Tripartite Agreement, supra n. 19, paras. 1-2.

67. For a negative answer to this question see Soroeta Liceras, supra n. 7, pp. 151ff.

It must be also underlined that the United Nations, both through the General Assembly and the Secretary-General and his Special Representatives for Western Sahara never recognised the status of Morocco as administering Power; in fact, in 1979 and 1980 Morocco was twice characterised by the General Assembly as "occupying power"[68]. Nor has such status been officially recognised by Spain since 1975 or any other country. As of today, Spain is still reported as the *de jure* administering Power[69]. Some recent statements of the Spanish Foreign Minister Miguel Angel Moratinos indicate a change in attitude on the part of the new Spanish government, towards recognising a new role for Morocco as administering Power: at this stage it is premature to conclude that this represents an historical turn in the Spanish position on Western Sahara or whether it was only dictated by contingent calculations related to the conclusion of the FPA[70]. For the sake of completeness, one has to observe the use of the expression of "puissance administrante" (administering power) in the French version of a 2001 reports by the UN Secretary-General on Western Sahara: but as rightly observed elsewhere, the English version adopts consistently the expression "administrative Power", avoiding the use of the General Assembly's denomination "administering Power", moreover the Security Council has simply "considered" the two reports, without welcoming or endorsing them[71].

Australia's successfull defence in the *East Timor* case concedes to the argument that a State occupying a NSGT without a proper legal basis lacks legal capacity to create international legal rights and obligations concerning that territory. While Portugal made a differentiation between the validity of the East Timor Gap Treaty and its legality (only this latter being the subject of its application to the Court), Australia denied the significance of that differentiation to the dispute claiming that the issue at hand could be only one of

68. See GA Res. 34/37, 21 November 1979; GA Res. 35/19 of 11 December 1980, 11 December 1980.

69. See Information from Non-Self-Governing Territories transmitted under Article 73(e) of the Charter of the United Nations (A/60/69), 8 June 2005.

70. RUIZ MIGUEL (supra n. 64, pp. 1-2) refers to four occasions –in the period between June and August 2005 leading to the conclusion of the FPA– in which Spain's Foreign Minister stated that the Madrid Agreement gave Morocco the quality of administering Power with regard to Western Sahara. Again, one must observe that art. 73 of the UN Charter provides for a number of legal obligations of "good governance" incumbent upon administering Powers with regard to NSGTs, including the submission of periodical reports to the Secretary-General on the progress towards self-government of the territory in question. Morocco has not acted or even only claimed to act in compliance with these obligations.

71. S/2001/613, cit. in *ibid.*, pp. 6-7.

validity: either Indonesia did have legal capacity to enter into treaties concerning East Timor, hence the treaty was valid, or Indonesia's presence was unlawful rendering treaties concerning East Timor invalid[72]. Thus the precondition for adjudicating any legal dispute concerning the East Timor Gap Treaty was the exercise of jurisdiction over the actions and acts of Indonesia, an exercise that was prevented by the lack of consent given by Indonesia. The Court was ready to follow Australia's argument. According to the Court:

> "...the very subject-matter of the Court's decision would necessarily be a determination whether, *having regard to the circumstances in which Indonesia entered and remained in East Timor*, it could or could not have acquired the power to enter into treaties on behalf of East Timor relating to the resources of its continental shelf. The Court could not make such a determination in the absence of the consent of Indonesia." (emphasis added)[73]

But even in the unlikely scenario where the international community started considering Morocco the new administering Power for Western Sahara, there is little support in law for the assertion that at this stage of the dispute it could enter into treaties creating rights and obligations with regard to the natural resources of the Territory. This point was illustrated by the Arbitral Tribunal in the case *Affaire de la Délimitation de la Frontière maritime entre la Guinée-Bissau et le Sénégal*[74]. Guinea-Bissau contested the validity of an agreement concluded in 1960 by France and Portugal, the former colonial powers, concerning the delimitation of the maritime zones between Guinea-Bissau and Senegal on the basis that the principle of self-determination of peoples would entail as a corollary the restriction on the colonial power to enter into treaties concerning the territory once a process of national liberation has been started[75]. While the Tribunal accepted Guinea-Bissau's general proposition (also conceded by Senegal), it rejected Guinea-Bissau's argument on the basis that the process of national liberation in Guinea-Bissau had not acquired an international relevance (*portée internationale*) at the time of the conclusion of the exchange of letters between France and Portugal, so to restrict the competence of the colonial power to enter into international

72. *East Timor Case* (Portugal/Australia), ICJ Reports 1995, 90, Counter-memorial of Australia, Part II, Chap. 1, pp. 88ff.

73. *Ibid*., Judgment of 30 June 1995, p. 102.

74. *Affaire de la Délimitation de la Frontière maritime entre la Guinée-Bissau et le Sénégal* (Guinea Bissau/Senegal), Decision of 31 July 1989, RIAA (Vol. XX), p. 119.

75. *Ibid*., p. 135.

agreements concerning the fundamental rights of the people[76]. According to the Tribunal, national liberation movements acquire international relevance "à partir du moment où elles constituent dans la vie institutionnelle de l'Etat territorial un événement anormale qui la force à prendre des mesures exceptionelles, c'est-à-dire lorsque, pour dominer ou essayer de dominer les événements, il se voit amené à recourir à des moyens qui ne sont pas ceux qu'on emploie d'ordinaire pour fair face à des troubles occasionnels" and it is only from that moment onwards that the adminstering Power loses its competence to conclude treaties concerning the essential rights of the people[77]. Measuring the situation of Western Sahara, there is little doubt that the national liberation struggle conducted by POLISARIO for over 30 years acquired from the very beginning an international relevance, and that the POLISARIO has continued to represent internationally the Saharawi people until today. One must conclude that even conceding Morocco's status as administering Power, its competence to enter into international agreements concerning Western Sahara's natural resources is legally curtailed by the clear willingness of the people of Western Sahara to pursue their route to self-determination. Hence, the FPA may be found invalid to the extent that it intends to create international rights concerning the use of fisheries in Western Sahara's waters.

By contrast, it is impossible to identify in the agreement a conflict with any *jus cogens* norm as a further ground of invalidity and distinct ground of illegality[78]. In the same arbitration just mentioned, the panel made also clear that the rule preventing colonial powers to enter into treaties concerning NSGTs after the rising of a national liberation movement could not be considered a *jus cogens* rule deriving from the principle of self-determination, thus no question of treaty invalidity could arise as a result of the breach of a *jus cogens* norm[79]. Equally, no claim of invalidity may be justified on the basis

76. *Ibid*., p. 138.

77. *Ibid*.

78. Quite interestingly, the conflict of a treaty with a norm of *jus cogens* is at the same time a ground of invalidity and a ground of illegality. Art. 53 of both the 1969 Vienna Convention on the Law of Treaties and the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (supra n. 51) provides that "[A] treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character".

79. *Ibid*., pp. 135-136.

that the FPA breaches the right of self-determination of the Saharawi people, as the FPA simply does not touch upon the issue and it would not touch upon it even if its practice was to extend to the waters of Western Sahara. Finally, while the principle of permanent sovereignty over natural resources by the people of NSGT is part of customary international law[80] and it applies to the situation at hand, the rules deriving from it can be hardly characterised as *jus cogens* norms.

To sum up, there is a clear chance that the FPA may be considered invalid to the extent that it would cover the waters of Western Sahara. What would that mean in practice? Apart from the distinct but remote possibility that an international or domestic court found the agreement to be invalid, a more likely scenario would be the general non-opposibility of the FPA with regard to Western Sahara. In other words, the EC could not rely on the agreement to demand Morocco the granting of fishing licenses for the waters of Western Sahara, despite the fulfilment of its obligations towards Morocco such as the payment of its financial contribution. On the other hand, Morocco could not oppose the agreement to the EC to complain for or sanction conducts of European fishermen in the waters of Western Sahara which do not comply with the requirements set out in the agreement. To counter that, either party to the agreement could potentially raise the principles of good faith and estoppel to contest the claim of invalidity and non-performance of the other party, but this claim should be substantiated by clear evidence that Western Sahara was included in the geographical scope of the agreement already at the negotiation stage or during its implementation; at any rate, the application of these principles in the bilateral relation between Morocco and the EC does not seem sufficient to discard the objective character of the invalidity produced by the lack of treaty-making competence of Morocco with regard to Western Sahara. A more adequate legal ground on which to counter a claim of invalidity would be the expression of consent by the people of Western Sahara through their legitimate representatives[81]. More importantly and regardless of issues of succession to treaties[82], the EC could not oppose the agreement as binding upon a new Western Sahara's administration, be it international or

80. See the *obiter dictum* to that effect in *Case Concerning the Armed Activities in the Territory of the Congo* (Democratic Republic of the Congo/Rwanda), Judgment of 19 December 2005, para. 244, at http://www.icj-cij.org/icjwww/idocket/ico/icoframe.htm

81. See infra section 5.

82. For a discussion on the question of treaty succession with regards to NSGTs see D.M. Ong, "The Legal Status of the 1989 Australia-Indonesia Timor Gap Treaty Following the End of Indonesian Rule in East Timor" XXXI *NYIL* (2000), p. 67, at p. 93.

local, that may arise within the progress of the political process before the date of termination of the treaty.

## 5. THE COMPATIBILITY OF THE FPA WITH INTERNATIONAL LAW

The other important and distinct question to address is the compatibility of the agreement with international law, i.e. whether the FPA and its execution may be considered in breach of any rule of international law. As already mentioned, the question was already debated within the European Parliament and within the Council and it sparked two requests for legal opinions, from the Parliament's Development Committee to the Legal Service of the Parliament, and from the Working Party on External Fisheries Policy of the Council to the Legal Service of the Council[83]. While both opinions are for most part covered by confidentiality rules, the opinion of the Parliament's Legal Service was leaked to the public. Reportedly, the Council's Legal Service reached the same conclusion using similar arguments.

The Parliament's Legal Service's opinion of 20 February 2006 starts by considering the political and historical background of the Western Sahara question. The first important admissions in the legal opinion are those indicating the lack of sovereignty by Morocco over Western Sahara and the lack of status as administering Power for Morocco[84]. However, the Legal Service fails to draw from those findings any particular legal consequences on the competence of Morocco to enter into treaties with regard to Western Sahara. Also, and rightly so, it does not refer on this specific point to the legal opinion rendered by the UN Legal Office on 12 February 2002 on the legality under international law of two contracts concluded in 2001 by Morocco with two foreign oil companies for the exploration of oil and gas resources in the continental shelf of Western Sahara, as that opinion was concerned with contracts between Morocco and foreign companies and did not touch upon the question of treaty-making power of Morocco in Western Sahara[85]. Nonethe-

83. European Parliament, Committee on Development, Request for an opinion of the Legal Service, 25 January 2006; Council of the European Union, Working Party on External Fisheries Policy, Request of 19 January 2006.

84. Legal Service of the European Parliament, Legal Opinion, supra n. 6, para. 11.

85. The opinion was sought by the UN Security Council in relation to contracts concluded between the Moroccan authorities and two oil companies, Kerr Mc-Gee and Total Fina, concerning the exploration and future exploitation of oil resources in the continental shelf of Western Sahara. See Letter dated 29 January 2002 from the Under-Secretary-General for Legal Affairs, the Legal Counsel, addressed to the President of the Security Council, S/2002/161.

less in his parliamentary written answer of 15 March 2006, the EU Commissioner for Fisheries Mr Borg stated:

> "[R]egarding the question whether Morocco can conclude agreements concerning the exploitation of natural resources of Western Sahara, the opinion of the UN legal adviser gives a clear answer. [...] agreements can be concluded with the Kingdom of Morocco concerning the natural resources of Western Sahara. This is so because the interpretation given by the UN legal adviser implies that Morocco is a 'de facto' administrative power of the territory of Western Sahara and consequently has the competence to conclude such type of agreement"[86].

In our opinion, the Commission underestimates the difference between Morocco's power to enter into a contract or concession (potentially wrongful, but still regulated by Moroccan law) and Morocco's power to enter into an international agreement concerning Western Sahara (regulated under international law) and eventually tends to draw unwarranted conclusions from the UN legal opinion. As seen above and in accordance with the findings of the Arbitral Tribunal in *Guinea-Bissau/Senegal*, there is a clear case to be made that there exists a rule under international law that the *jus tractatus* of (even) an administering Power concerning the essential rights of a people, such as that over its natural resources, is limited once a national liberation movement has developed. *A fortiori* that limitation should apply to a "de facto authority", whose legal basis has not been recognised by any State or international body. The consequence of Morocco entering into the FPA with a view to regulating the access of foreign vessels to Western Sahara's fisheries is that it is violating the rights of the people of Western Sahara; thus, the FPA may be found in violation of the rule of international law identified by the Arbitral Tribunal in *Guinea Bissau/Senegal*[87].

The Parliament's Legal Service's opinion rightly devotes full attention to the UN legal advice on another point of international law. The opinion identifies the main thread of the UN opinion in the lack of an absolute prohibition on the use of natural resources in a NSGT by foreign interests and in the conclusion that the principle of permanent sovereignty over natural re-

86. See Written Question by Caroline Lucas (Verts/ALE) and Raul Romeva y Rueda (Verts/ALE) to the Commission of 15 February 2006; Answer given by Mr Borg on behalf of the Commission, 15 March 2006, para. 2.

87. As we have seen above (section 4) the rule identified by the Arbitral Tribunal in *Guinea Bissau v. Senegal* represents not only a ground of illegality, but also a ground of invalidity.

sources "has to be understood in the sense that it opposes only those economic activities which are not undertaken in accordance with the interests and wishes of the people of the territory and deprive them of their legitimate rights over their natural resources"[88]. Departing from the UN opinion, it argues that the rules of international law such as those deriving from the principle of permanent sovereignty over natural resources should be respected also by the EC when exercising its powers in place of its Member States[89].

However, specifically relating these findings to the FPA, the Legal Service appears to identify a number of obligations which apply only to Morocco, especially the duty to conduct any exploitation of natural resources for the benefit of the local population. The Legal Service states that "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"[90]. The monitoring mechanisms created under the FPA are considered by the Legal Service a possible tool in the hands of the EC to ensure that Morocco complies with its obligations vis-à-vis the people of Western Sahara in using the financial contribution paid to Morocco. Eventually, the legal opinion suggests, should "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)"[91].

These important findings of the Legal Service deserve some comments. One is that the Legal Service appears to "move the goal post", by focusing on Morocco's obligations towards the people of Western Sahara, rather than the Community obligations. While conceding the obligation to carry out economic activities in a NSGT for the benefit of the people of that territory, the Legal Service appears to indicate that such obligation should apply to Morocco in the case at hand. As for the monitoring mechanisms at the EC's disposal, it is unclear whether the opinion suggests a due diligence obligation in-

88. UN Legal Advice, supra n. 85, para. 19
89. Legal Service of the European Parliament, Legal Opinion, supra n. 6, para. 38.
90. *Ibid*., para. 42.
91. *Ibid*., para. 44.

cumbent on the Community concerning the way it lends its financial support to fishing activities in the waters of Western Sahara or whether it only wishes to suggest ways in which the Community could hold Morocco's accountable for the fulfilment of its international obligations owed to the people of Western Sahara. The language of the relevant passages seems to suggest the latter interpretation. The underlying rationale seems to be that Morocco exercises jurisdiction on Western Sahara, thus it is up to the African country to make sure that natural resources are exploited in accordance with international law.

But such rationale entails a very narrow reading of the rights of the people of Western Sahara and the corresponding obligations of third parties. The reading of the Legal Service would be warranted if the Community had entered into a development and co-operation agreement to finance the development of fisheries in Morocco's southern provinces, possibly including Western Sahara. However, one cannot fail to observe that the fishing, i.e. the actual catch of natural resources, is carried out by Community vessels and that the Community has an active role in ensuring the exercise of this economic activity in accordance with the terms of the FPA. Indeed, as seen above, the Community both requests the licenses for specific areas on behalf of the fishermen and receives the licenses from Morocco's authorities, which are then handed over to the fishing vessels. In other words, because of the Community leading role in negotiating, concluding and implementing the agreement, one can easily dispense with the argument that the agreement provides only for economic activities involving Morocco and private parties, for whose actions the Community cannot be held responsible. In sum, when entering into a fisheries partnership agreement extending to a NSGT and when ensuring its proper implementation, the Community is bound to respect its international obligations owed to the people of that territory. But what is the exact content of these obligations?

In a nutshell we could condense the Community's duties with regard to the natural resources of Western Sahara in one legal obligation, identified by both the UN Legal Advisor in 2002 and the Parliament's Legal Service in 2006, i.e. that economic activities related to the NSGT should be carried out in accordance *with the wishes and interests* of the people of the NSGT[92]. It is interesting to note that even with regard to the application of this obligation to Morocco, the EC Legal Services, the Parliament's Fisheries Committee,

92. UN Legal Opinion, supra n. 85, para. 25.

most States in the Council and the Commission emphasise the benefit that the implementation of the agreement should bring to the local people for the obligation to be fulfilled. Most actors within the Community while concerned with the beneficial effect of the FPA for the people of Western Sahara, that is the need for the FPA to respect the *interests* of the local people, neglected the need to respect the *wishes* of the people of Western Sahara, as if the term "wishes" was not part of the legal obligation. Reportedly, the reading given of the legal obligation was that of an "or" linking "wishes" and "interests", as if the two elements represented an alternative. This interpretation is clear in the separate statement of the Netherlands and Finland in the Council, where the two countries demanded that "activities under the agreement in the territory of Western Sahara will be conducted for the benefit of the original population, on their behalf *or in consultation with their representatives*" (emphasis added)[93]. This interpretation was self-serving as it afforded fully discounting in the assessment of legality the opposition expressed by POLISARIO to the FPA in a letter sent in May 2005 by its Delegate for Europe to the Commission[94]. Only Sweden continued to maintain throughout that the two terms "interests" and "wishes" should be read in conjunction, hence its final stance to cast a negative vote in the Council.

The interpretation defended in the Council and leniently endorsed by the Legal Services finds little support in a full reading the 2002 UN legal opinion and indeed in the body of practice analysed in that opinion. The only statement to that effect in the opinion may be found in the conclusions where the Legal Counsel states that

> "State practice, though limited, is illustrative of an opinio juris on the part of both administering Powers and third States: where resource exploitation activities are concluded in Non-Self-Governing Territories for the benefit of the peoples of these territories, on their behalf, or in consultation with their representatives, they are considered compatible with the Charter obligations of the administering Power, and in conformity with the General Assembly resolutions and the principle of 'permanent sovereignty over natural resources' enshrined therein"[95].

The State practice referred to by the Legal Counsel in an earlier section of the advice refer to an instance of State practice by Spain and two instances of

93. Separate Statement of the Finland and the Netherlands, supra n. 61.

94. Letter of the POLISARIO Representative to the EU Commissioner Mr Borg, Brussels, 18 May 2005.

95. UN Legal Opinion, supra n. 85, para. 24.

State practice by UN transitional administrations: according to the Counsel, "cases of resources exploitation in Non-Self-Governing Territories have, for obvious reasons, been few and far apart"[96]. The instance related to the Spanish economic interests in the phosphate industry in Western Sahara shows Spain's commitment at that time to use the revenues derived from mining for the development of the territory and the benefit of the population. The case related to uranium exploitation in Namibia shows an instance where the UN Council for Namibia considered any form of foreign exploitation of natural resources in Namibia illegal, but that, according to the Counsel, was due to the resolutions and sanctions adopted by the Security Council during the crisis. Finally, the Counsel analyses the practice of UNTAET with regard to the continuation of the East Timor Gap Treaty and the conclusion of the draft 2002 Timor Sea Arrangement: in both occasions UNTAET consulted fully with with representatives of the East Timorese people, who had an active role in the negotiation process[97].

According to the UN Counsel, this State practice is matched by a number of General Assembly resolutions that show a development in the doctrine of permanent sovereignty over natural resources: from a stricter interpretation emphasising the inalienable rights of the people under colonial domination to their natural resources, the General Assembly directs itself to a new interpretation that differentiates between economic activities which are detrimental to the people and economic activities which are beneficial to them[98]. The annual General Assembly resolution entitled "Economic and other activities which affect the interests of the peoples of the Non-Self-Governing Territories" has since 1995 reiterated "the value of foreign economic investment undertaken *in collaboration with the peoples of Non-Self-Governing Territories and in accordance with their wishes* in order to make a valid contribution to the socio-economic development of the Territories" (emphasis added)[99].

96. *Ibid*., para. 18.
97. *Ibid*., paras. 18-20.
98. *Ibid*., paras. 9-14.
99. See GA Res. 50/33 of 6 December 1995, reiterated annually, latest resolution GA Res. 60/111 of 8 December 2005. These resolutions have been approved by a very large majority of States, with the odd abstention or negative vote cast by Western States and Israel. The EP Legal Service seems to cast doubts over the legal significance of these resolutions. At para. 39 of its opinion it states 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". While the observation of the Legal Service is strictly speaking correct, one should not underestimate the value of legal principles consistently reiterated by the GA on a regular basis with a very large majority. Together with the 2002 UN Legal Opinion –which is also as such "not legally legally binding"– they shed light on a State practice which is scarce and far from consistent.

Taking into account all these factors, the UN Legal Counsel rightly comes to the final conclusion that "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"[100]. The same principle is re-affirmed in the Legal Service's opinion more than once, save for then failing to draw some consequences and conclusions with regard to the conclusion of the FPA and the lack of regard for the view expressed by the POLISARIO front, as legitimate representative of the Saharawi people, by both Morocco and the Commission.

In sum, while there are some ambiguities in both legal opinions that may have warranted the interpretation given by most actors at Community level, we believe that the most tenable interpretation of the position of international law with regard to the exploitation of natural resources in Western Sahara is that it should be conducted for the interests of the people of the territory and giving due regard to their wishes. Should the Community and Morocco interprets the agreement to extend to the waters of Western Sahara and should they continue to disregard the views of POLISARIO and the SADR with regard to the FPA[101], they would violate the international legal obligations owed by both subjects to the people of Western Sahara. Such obligation to respect the views expressed by the legitimate representatives of the people of Western Sahara is all-the-more important given the fact that any financial contribution granted by the EC to Morocco under the FPA for the development of the fisheries sector with all likelihood will mostly benefit the population imported from Morocco (making a majority of the population of the main port towns on the coast of Western Sahara), rather than the Saharawi people (mostly living in refugee camps in Algeria)[102].

100. UN Legal Opinion, supra n. 85, para. 25.

101. It is hardly disputable that POLISARIO as a national liberation movement and the SADR as a political and territorial organisation which has proclaimed independence and sovereignty over Western Sahara are both legitimate representatives of the people of Western Sahara. Such role has been recognised by the UN in all its diplomatic efforts to solve the dispute. It must be also reiterated that the SADR has been recognised by many countries and it is a member of the African Union.

102. That the benefit envisaged for the "local population" relates to the coastal population only is conceded by the Commission in its answer of 8 August 2006 (parliamentary question E-3357/06): "With regard to the industrial pelagic fishery, the Agreement foresees the compulsory landing of 25% of catches. The main aim of this provision is to contribute to a better supply of pelagic fish to the local processing industry which has been suffering in recent years from short and irregular supplies of raw material. Additional economic incentives

In conclusion, there are two distinct legal grounds on which the FPA and its extension to Western Sahara may be found in violation of international law: its non-compliance with the restriction on *jus tractatus* vested on administering Powers and *a fortiori* on a de facto authority in a NSGT; and the violation of the principle of permanent sovereignty over natural resources as applied to NSGTs.

## 6. THE EC AND THE OBLIGATION OF NON-RECOGNITION APPLIED TO WESTERN SAHARA

Another aspect that deserves a close inspection is that concerning a possible duty of non-recognition by the Community and the consequent breach of that duty by entering into an international agreement with Morocco extending to Western Sahara. This aspect presents in substance two distinct legal questions, firstly whether an international organisation, such as the EC, should be held bound by an obligation of non-recognition under general international law, and secondly whether such obligation applies to the case at hand.

As for the first question, an answer may be found in the proposition that international organisations are bound to respect the obligation of non-recognition of situations resulting from a serious violation of peremptory norms under general international law to the same extent that States are bound in accordance with Artt. 40 and 41 of the 2001 ILC Articles on State responsibility[103]. It is yet to be seen whether and how the ILC will deal with the matter in its current project on the international responsibility of international organi-

are foreseen to encourage vessels fishing for pelagic species to land an even larger percentage of their catches (in addition to the compulsory 25%) in the local ports. Furthermore, in the context of the compulsory landings of 25%, the Agreement stipulates the use of local port services and infrastructures. This will stimulate the activities of ports and the supply industry and lead to additional earnings, thereby contributing to the development of such ports. Finally, the development of coastal areas should benefit under the agreement from the following financial measures: An amount of at least €4.75 million per year for the modernisation and upgrading of the coastal fleet; A clause foreseeing that a part of the financial contribution should be used for the restructuring of small-scale fishing, training and support of professional organisations". Available at http://www.europarl.europa.eu/omk/sipade3?L=EN&OBJID=126024&LEVEL=3&SAME_LEVEL=1&NAV=S&LSTDOC=Y.

103. See ILC Articles on State Responsibility, Arts. 40 and 41, in Crawford (ed.), *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (2002).

sations; but there is little to suggest that international organisations, often at the forefront in sanctioning situations deriving from grave violations of international law, should not be bound by the same legal obligations States are bound by under general international law. With specific regard to the EC, the European Court of Justice (ECJ), while reluctant to assert powers of judicial review of Community acts against rules of general international law, has held in a number of judgements, the most important being *Poulsen* and *Racke*, that the Community is bound to respect customary international law and that customary international law may represent a limitation in the exercise of powers by its organs[104].

Moreover, it is arguable that Member States of the EC have not freed themselves of their obligation not to recognise situations deriving from serious breaches of peremptory norms, when acting within international organisations. The question of the subsidiary responsibility of Member States for the actions of international organisations of which they are members is a very controversial legal question which is currently being dealt by the ILC, under the leadership of Professor Giorgio Gaja[105]. In general and in accordance with the provision already proposed by the Special Rapporteur in his fourth report, we may assert that Member States should not be held responsible for the acts of the EC when the organisation acts within its area of exclusive competence[106]. However, one should make the useful distinction between the subsidiary responsibility of the States for the action of the organisation –for which the Member States can bear responsibility only under the specific exceptions identified by the Special Rapporteur– and the separate responsibility for breach of obligations incumbent upon them also when acting within inter-governmental bodies. In this latter perspective, the action of Member States must not be assessed on the basis of the institutional outcome (i.e. the approval and signature by the Council and the FPA as such), but in terms of their individual conduct at the time of voting. Thus, no violation can be envisaged with regard to Sweden, since they expressed their opposition to the FPA; the same applies to Finland, which has abstained in the vote and does

104. See WOUTERS, E., "Giving Effect to Customary International Law Through European Community Law", Institute for International Law, University of Leuven, Working Paper no. 25, June 2002, pp. 7-11.

105. See especially Second report on responsibility of international organizations, by Mr Giorgio Gaja, UN Doc. A/CN.4/541.

106. See draft Art. 29 of the ILC project on responsibility of international organizations and commentary by Special Rapporteur, Mr Giorgio Gaja, in the second addendum to his Fourth Report (UN Doc. A/CN.4/564/Add.2).

not accrue any fishing right under the terms of agreement. As for the other States, the Netherlands could hardly oppose with success its disclaimer that "the FPA may not be considered as acceptance of territorial claims not supported by international law", since it voted in favour of the agreement and its fishing fleet benefits from it[107]. Regardless of the non-recognition of Morocco's territorial claim, the entering into an agreement extending to the waters of Western Sahara remains an act of implied recognition of Morocco's authority over the NSGT. Generally, all States voting in favour and accruing fishing rights could plausibly argue that they had voted for the FPA in the good faith expectation that it would not extend to Western Sahara; however, this latter defence should be also rejected due to the clear unwillingness on the part of any of the relevant EC institutions to exclude Western Sahara from the geographical scope of the FPA, hence the awareness on the part of all Member States in the Council that the FPA may end up including Western Sahara, as it was the case with previous EC-Morocco agreements.

The second fundamental question relates to the applicability of the duty of non-recognition to Morocco's de facto administration of Western Sahara. The ILC commentary to Articles 40 and 41 on the law of state responsibility states that this obligation "applies to 'situations'...such as, for example, attempted acquisition of sovereignty over territory through the denial of the right of self-determination of peoples. It not only refers to the formal recognition of these situations, but also prohibits acts which would imply such recognition"[108]. In the *Namibia* advisory opinion the Court pointed out that third States are not allowed to enter into treaty relations in all cases in which the wrongdoing State purports to act on behalf of or concerning the occupied or annexed territory[109]. These descriptions fit the situation of Western Sahara and the extension of the FPA by the EC to Western Sahara. While the lack of a binding determination under Chapter VII and the imposition of a duty not to recognise the situation by the Security Council makes the implementation of a multilateral policy of non-recognition difficult to realise in practice, the obligation of non-recognition under general international law arises independently of the action by the Security Council[110]. That is confirmed by the

107. See Joint Statement by the Netherlands and Finland, supra n. 61.

108. CRAWFORD, supra n. 103, 250.

109. *Legal Consequences for States of the Continued Presence of South Africa in Namibia notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, ICJ Reports, 6, at p. 55.

110. See MILANO, supra n. 27, pp. 139-142; TALMON, "The Duty Not to 'Recognize as Lawful' a Situation Created by the Illegal Use of Force or Other Serious Breaches of a Jus

letter of Articles 40 and 41 of the ILC Articles on State responsibility which does not lay down any procedure for determining whether or not a serious breach has been committed, nor, apart from the case of aggression, does it acknowledge an exclusive competence by the Security Council or the General Assembly. Also, in its *Wall in Palestine* advisory opinion, the ICJ derived the obligation of non-recognition for States from its determination of illegality without referring to any determination, let alone binding, of political organs of the United Nations[111].

In practice, in the lack of a binding determination by the Security Council and in the lack of a judicial determination by the ICJ, any third party will have to make its own assessment of the situation in Western Sahara. The universal lack of recognition of the annexation of Western Sahara by Morocco indicates a clear stance taken by the international community on the legal of Morocco's formal claim. While some States like the United States have followed through in avoiding any form of implied recognition too, other actors like the EC, Russia and Japan have taken a more unclear stance and found a *modus vivendi* that would not sacrifice their fishing interests in the area[112]. More generally, the EC practice with regard to its relations with occupied territories or unrecognised entities seems to be based on economic and political convenience, rather than abidance by its obligations of non-recognition under

Cogens Obligation: an Obligation without Real Substance?", in TOMUSCHAT and THOUVENIN (eds.), *The Fundamental Rules of the International Legal Order: Jus Cogens and Obligations Erga Omnes* (2006, Leiden), p. 99, at pp. 121-122; CRAWFORD, *The Creation of States in International Law* (Oxford, 2006, 2nd ed.), p. 162-173.

111. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, at http://www.icj-cij.org/icjwww/idocket/imwp/imwpframe.htm, paras. 154-160; see also Judge Higgins Separate Opinion, para. 38. One should then avoid interpreting some passages of the *East Timor* decision (supra note 72, especially paras. 31-33) as implying the lack of "objective" illegality of territorial situations in international law: what the Court was simply stating was the impossibility of a *determination* of objective illegality due to the lack of consent to its jurisdiction by the occupying power.

112. See the Letter of the United States Trade Representative, Robert B. Zoellick, of 20 July 2004, to Congressman Joseph R. Pitts (available at http://www.house.gov/pitts/temporary/040719l-ustr-moroccoFTA.pdf), in which the Trade Representative set out the Administration's position concerning the geographical scope of the Free Trade Agreement between the US and Morocco: "The United States and many other countries do not recognize Moroccan sovereignty over Western Sahara and have consistently urged the parties to work with the United Nations to resolve the conflict by peaceful means. The FTA will cover trade and investment in the territory of Morocco as recognized internationally, and will not include Western Sahara". On the other hand, there is evidence that both Japan and Russia have in recent years entered into fishing agreements with Morocco, extending in their practice to the waters of Western Sahara.

general international law. With regard to the West Bank and Gaza, the EC refusal to grant preferential treatment to goods imported from Israel under the 1995 Association Treaty between Israel and the EC seems to be based on the willingness of the Community to recognise the Palestinian Authority (PA) as the legitimate trading partner for the West Bank and Gaza and its conclusion with Palestinian Authority of a trade agreement in 1997, rather than an *opinio juris sive necessitatis* that Israel's authority should receive no *de facto* recognition on the occupied territories[113]. In fact, before the conclusion of the trade agreement with the PA, the West Bank and Gaza were treated by the EC as *de facto* part of Israel under the terms and practice of previous trade agreements between the EC and Israel. With regard to the Turkish Republic of Northern Cyprus (TRNC) and to the scope of the 1972 Association Agreement between the Republic of Cyprus and the EC, until 1994 the practice of the Commission had been to extend the application to certificates of origin issued by the TRNC's authorities. Despite the Commission's opposition, the ECJ ruled in the case *Anastasiou I* that non-recognition of the TRNC's authorities would imply an obligation on the EC authorities and the authorities of member-States not to recognise such certificates[114]. While member States' and the Commission's practice had eventually to fall in line with the ruling of the ECJ with regard to the TRNC, the Commission has continued to accept certificates of origin from unrecognised entities such as the Republic of China (Taiwan)[115].

In conclusion, subject to the FPA actually extending in practice to the waters of Western Sahara and as a consequence of the practice tending to sacrifice legal prudence in favour of political and economic convenience, the EC actions may be also found in violation of its obligation of non-recognition. The same may be held for the support given to the FPA by Member States within the Council. A denial of wrongfulness based on the *Namibia* exception –i.e. that non-recognition "should not result in depriving the people... of any advantages derived from international co-operation"–[116] should rest on the evidence the FPA actually brings a benefit to the people of Western Sahara: as mentioned above, there is little to suggest that that will happen given the

113. See HAUSWALDT: "Problems under the EC-Israel Association Agreement: The Export of Goods Produced in the West Bank and the Gaza Strip under the EC-Israel Association Agreement" 14 *EJIL* (2003), pp. 591-611.

114. Case C-432/92 *Anastasiou I* [1994] ECR I-3087.

115. TALMON: "The Cyprus Question before the European Court of Justice" 12 *EJIL* (2001), p. 727, at pp. 747-748.

116. *Namibia* advisory opinion, supra n. 109, p. 56.

demographic composition of the coastal population and the burden of proof rests on the EC.

## 7. THE LAW OF OCCUPATION AND THE USE OF NATURAL RESOURCES BY MOROCCO

An argument could be made that Morocco's right to use Western Sahara's fisheries should be framed under the law of occupation, rather than a vague principle such as that of permanent sovereignty over natural resources. That was the ICJ's approach in the recent decision *Armed Activities on the Territory of the Congo*, where the Court rejected the DRC's use of the principle of permanent sovereignty over natural resources to test the use of natural resources by the army of Uganda and reverted to the applicable international humanitarian law[117]. After all, article 55 of the 1907 Hague Regulations provides for a right of usufruct of natural resources by the occupant, and the conclusion of an agreement with a third party for the optimal utilisation of fisheries may be considered compatible with the exercise of its rights by the usufructary as long as it does not lead to the depletion of fisheries in waters of Western Sahara[118]. We believe that this argument is weak when tested against the law applicable to the case at hand.

The first question that should be raised is the applicability at all of the law of occupation to Morocco's presence in Western Sahara. Morocco denies the applicability of such law, as it considers Western Sahara under its own sovereignty. Yet, as we have seen, Morocco's claim to sovereignty over the province finds no support under international law. Instead, the General Assembly has twice characterised Morocco's presence in Western Sahara as occupation[119]. Moreover, article 42 of the 1907 Hague Regulations, which are generally considered expression of customary international law, provides that "[T]erritory is

117. *Case Concerning the Armed Activities in the Territory of the Congo*, supra n. 80, paras. 244-250.

118. See Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907. Article 55 of the Hague Regulations provides that "[T]he occupying State shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile State, and situated in the occupied country. It must safeguard the capital of these properties, and administer them in accordance with the rules of usufruct".

119. See GA Res. 34/37, 21 November 1979; GA Res. 35/19 of 11 December 1980, 11 December 1980.

considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised". Because of Western Sahara's disputed nature and because of Morocco's military control over it, there is a strong case to be made that the customary international law of military occupation applies to the areas of Western Sahara west of the berm. Such customary international law includes article 55 of the 1907 Regulations, which provides for a limited use of the natural resources present on the occupied territory.

More problematic is the extension of the 1949 Fourth Geneva Convention to Western Sahara. Article 33 of that Convention prohibits pillage by the occupying power. While Morocco is party to this instrument, Art. 2 states that "[T]he Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party". Western Sahara is not and has never been a High Contracting Party, nor can or could be considered territory of Spain during the 30 years in which it has been under Morocco's occupation. Furthermore, there has never been an armed conflict between Morocco and Spain (or any other contracting Party for that matter) for the control of Western Sahara[120].

By contrast, it is possible to identify the 1977 Protocol I as the instrument of international humanitarian law applicable *ratione materiae* due to Western Sahara's status as NSGT[121]. Art. 54 of Protocol I appears to set a threshold of usufruct of natural resources, which is compatible with the obligations of the occupying power. Article 1(4) of the 1977 Protocol I extends the application of the Geneva Conventions to "armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations". However, Morocco has failed to ratify the 1977 Protocols, arguably due to its willingness to avoid accountability under that instrument for its conduct in Western Sahara. Thus, we must conclude that not even the 1977 Protocol I is applicable to Morocco's occupation of Western Sahara.

In sum, while no conventional instrument regulating military occupations regulates directly the Moroccan occupation of Western Sahara, there is

120. *Legality of Wall*, supra n. 111, paras. 95-101.

121. Protocol Additional to the Geneva Conventions of 12 August 1949 and applicable to the Protection of Victims of International Conflicts (Protocol I), 8 June 1977, 1125 UNTS 3.

a strong argument to be made that the customary international law of military occupation as codified in the Hague Regulations should apply, including the principle of usufruct for the use of natural resources in the part of the Territory under Moroccan control. However, we believe that such rules of usufruct should be interpreted in the light of more recent applicable rules related to the use of natural resources in NSGTs, not in derogation of them. In other words, the conclusions reached above on the legality of the FPA are not affected by the finding that the customary international law of military occupations applies to Morocco's occupation of Western Sahara. This proposition is reinforced by the fact that the territorial situation of Western Sahara has not been and is not at the time of writing that of a mere temporary military occupation of a State's territory by another State, but also that in which military occupation and a 30 years-long civil administration of a NSGT have gone hand in hand: in other words, the situation of Western Sahara hardly fits in concrete the standard features of military occupations which were indeed present in Uganda's occupation of the eastern part of the DRC[122]. It is perhaps not a coincidence that the UN Legal Advisor in his legal opinion of 2002 has not mentioned at all the rules related to military occupation[123]. While the rules of usufruct do apply in our opinion to the case under examination, the special status of the Territory and the nature of the occupation lead us to conclude that they should be interpreted in light of other applicable rules, such as that of permanent sovereignty over natural resources in NSGTs, hence to prohibit any exploitation of natural resources which is not conducted for the benefit and is not in accordance with the wishes of the local population.

## 8. POSSIBLE CHALLENGES OF THE FPA BEFORE JUDICIAL INSTITUTIONS

Finally, some thoughts must be devoted to the possibility that the FPA may be challenged before a judicial institution and reviewed by it. Many impediments stand in the way of a realistic and successful challenge of the FPA,

122. But even in standard military occupations, such as that of Uganda in the DRC or that of the Coalition Forces in Iraq, there is a clear obligation to interpret the rules of usufruct under Article 55 of the Hague Regulations to make sure that the use of natural resources fully satisfies the needs of the local population. See the discussion on this point Benvenisti: "Water Conflicts during the Occupation of Iraq" 97 *AJIL* (2003), 860, at 863-864, 867-868

123. UN Legal Opinion, supra n. 85.

but there are certainly a few venues that could be used to submit a claim to the effect that the FPA breaches international law.

On the international plane, the obvious and more immediate solution would be a claim before the ICJ, the main judicial organ of the United Nations: the ICJ has already rendered an advisory opinion on Western Sahara and it has more than once engaged with the right of self-determination of peoples and the duty of non-recognition of situations created by serious violations of peremptory norms. While the ICJ would be most probably the best suited tribunal for the purpose of adjudicating the substance of the claim, there are serious doubts over the possibility that it could assert jurisdiction.

In one respect, the actors who are mostly interested in the safeguarding the rights of the people of Western Sahara lack *locus standi*: that is especially the case for any legitimate representatives, such as POLISARIO or the SADR, which do not have the pre-requisite of statehood necessary to file a claim before the Court. Another possibility would be a claim brought by the *de jure* administering Power against Morocco or the EC Member States, similarly to Portugal's action against Australia in the *East Timor* case[124]. Again, this possibility appears quite unrealistic due to the fact that Spain, the *de jure* administering Power, was the main driving force behind the conclusion of the FPA and it may become the main driving force in the extension of the agreement to the waters of Western Sahara. Besides, even if Spain was willing to bring a claim, the Court would be most likely faced with the same situation it was faced in the *East Timor* case and would have to deny jurisdiction on the grounds that Morocco has not accepted the compulsory jurisdiction of the Court; in other words, the Court would not be able to "isolate" a legal dispute between Spain and other EC States fishing in the waters of Western Sahara under the terms of the FPA without assessing the position of Morocco.

One must also rule out the possibility that a third interested State may bring a claim against an EC Member States challenging the FPA and the conduct of fishing in the waters of Western Sahara, as there is little to suggest that the obligation to respect NSGTs permanent sovereignty over natural resources and the rules related to it are obligations *erga omnes*, conferring on all members of the international community a right to claim a breach of those rules. A possible venue to overcome the *East Timor* jurisdiction restraints would be for a third State, which has accepted the compulsory jurisdiction of the ICJ, to place the burden on the *de jure* administering Power Spain and

124. *East Timor*, supra n. 72.

challenge its contribution to the conclusion of the FPA with Morocco, together with other alleged violations of its Art. 73 obligations under the UN Charter. In this case, the main impediment would be the need for the Court to look at the history of Spain's role as administering Power of Western Sahara and the "control" of that history by Spain's Art. 36(2) declaration made on 29 October 1990, specifically para. 1, lett. d) which excludes disputes "arising prior to the date on which this Declaration was deposited or *relating to events or situations which occurred prior to that date, even if such events or situations may continue to occur or to have effects thereafter* (emphasis added)"[125].

Possibly the most realistic venue would be a challenge by either a Member State or the European Parliament before the ECJ under Art. 230 of the EC Treaty. By no means, this kind of challenge would be straight-forward. The option to challenge the decision of the Council of 22 May 2006 to authorise the signature of the FPA would be impaired by the two months time-limit set by paragraph 5 of Art. 230 to bring an action against the contested act. The Council Regulation as such, which may be covered by the grounds of invocability set out in Art. 241 of the EC Treaty, would be hard to challenge given that it only allocates fishing quotas between Member States for internal purposes and it does not refer, either explicitly or implicitly, to the geographical areas where fishing is allowed. The more realistic challenge would concern the FPA once it enters into force and any practice by the Commission of requesting and passing on licenses concerning the waters of Western Sahara to European fishermen. In our opinion, this latter ground of invocability would be necessary, given the FPA lack of references to Western Sahara. In such action, the substantive claim should concern the infringement by the EC of rules of general international law concerning the sovereignty over natural resources in NSGTs and the duty of non-recognition with regard to situations stemming from serious violations of peremptory norms.

With regard to this latter aspect, while State practice is far from clear on the extent and applicability of the duty of non-recognition in economic relations with unrecognised States or *de facto* annexed territories, the ECJ in *Anastasiou I* did indeed uphold an interpretation of the 1972 Association Agreement between the EC and Cyprus which would exclude movement and phytosanitary certificates issued by the custom authorities of the Turkish Re-

125. See Declaration of Spain of 15 October 1990 accepting the compulsory jurisdiction of the Court, at http://www.icj-cij.org/icjwww/ibasicdocuments/ibasictext/ibasicdeclarations.htm#espa.

public of Northern Cyprus due to the lack of recognition of the Turkish Cypriot entity[126]. While in terms of practical implications the *Anastasiou* claim is by no means comparable to a possible challenge by a Member State or the European Parliament and it may be more burdensome to argue the illegality of fishing licenses from a recognised State for a *de facto* annexed territory than the illegality of custom certificates from an unrecognised Entity, the *ratio decidendi* of the Luxembourg Court in that case suggests that the Court would be ready to uphold an interpretation of the FPA excluding Western Sahara from its geographical scope, due to the lack of recognition by the EC and its Member States of the legality of Morocco's administration of the Territory.

More problematic would be an action under Art. 230, para. 4, as the private person would have to prove a direct and individual concern, i.e. a direct effect on its rights of the decision of the Commission to requests and obtain fishing licenses for the waters of Western Sahara. In theory, we could have a scenario where one or more fishermen based in Western Sahara would bring an action before the Court of First Instance. There is little to suggest that the Court would be ready to accept a claim to the effect that the FPA and the granting of licenses in Western Sahara would directly affect the fishing rights of fishermen in Western Sahara; in particular, it would be hardly possible for those fishermen to bring evidence that the fishing of European boats in the waters of Western Sahara is preventing them from exercising their fishing rights.

Perhaps a more viable solution for an individual request of review of the legality of the FPA and the practice of the Commission related to it would be an action before a domestic court in a domestic legal system having less stringent admissibility requirements than those set out under the EC Treaty. But even in the most "monistic" domestic legal systems, the procedural and substantive obstacles would be difficult to overcome. For example, in the case of the Netherlands, an NGO supporting the rights of the people of Western Sahara may bring a tort action against the State of the Netherlands before a civil court –most plausibly for its failure to uphold its duty of non-recognition by voting in favour of the FPA within the Council, as well as holding it accountable for the exploitation of natural resources– and seek a declaratory judgement to the effect that the defendant is in violation of international

126. *Anastasiou I*, supra n. 114, and comment in Talmon, supra n. 115, p. 727; ELIAS, "General International Law in the European Court of Justice: from Hypothesis to Reality?", XXXI *NYIL* (2000), p. 3, at p. 23-24.

law[127]. The preliminary legal condition the claimant would have to meet is the admissibility of its claim before a civil court: in particular, the court would have to be satisfied that the international norms whose breach is invoked confer rights to the individuals concerned, i.e. they are self-executing[128]. The NGO acting on behalf of the people of Western Sahara could possibly claim that the obligation of non-recognition and the obligations related to the use of natural resources in a NSGT are owed by the Netherlands to the NSGT and the people based thereon, hence it should be admissible to invoke this type of violation before a civil court. Yet, in the absence of a specific and clearly identifiable individual right to be protected, it is doubtful that a court would accept this type of argument. An alternative ground may be to argue on the basis of a due care standard, where international law would give effect to that standard; but, again, judicial practice and constitutional history in the Netherlands does not seem to be supportive of this type of claims.

Even if the civil court found the claim admissible on either of these bases, other obstacles would come in the way of a successful legal action. With regard to the obligations related to the exploitation of natural resources in Western Sahara, the claimants would find themselves in the uncomfortable position of having to rebut the presumption that Member States are not responsible for the actions of the EC, when it acts in the exercise of its exclusive competence. With regard to the obligation of non-recognition incumbent upon the Netherlands, while voting in favour of the FPA in the competent international organisation may be considered as such an act of implied recognition in violation of the obligation of non-recognition under customary international law, one would have to consider the weight that the national judge may give to the Netherlands' disclaimer that "the FPA may not be considered as acceptance of territorial claims not supported by international law"[129]. The practice of courts in the Netherlands –similarly to the practice of domestic courts in most countries– is to show a large degree of restraint and deference to the executive in assessing applications related to acts with a clear foreign

127. See Articles 93 and 112 of the 1983 Constitution of the Netherlands. Art. 93 is especially interesting as it provides for the direct applicability of treaty provisions and resolutions of international organisations which are self-executing because of their normative content. See also Article 305a of Book 3 of the Dutch Civil Code that provides that a legal person ("vereniging of stiching met volleldige rechtspersoonlijkheid") can bring a claim for a wrongful act with a view to the protection of certain interests, if that legal person protects these interests according to its statutes.

128. E.g. Supreme Court Decision of 6 February 2004, LJN: AN8071 (available in Dutch).

129. See Joint Statement by the Netherlands and Finland, supra n. 61.

policy dimension[130]. Even if voting in favour of a bilateral fisheries agreement within a regional economic organisation does not entail as such a clear foreign policy dimension, the declaration issued by the Netherlands shows that the implications in terms of national foreign policy should not be easily discounted. It is hard to believe that a civil court or the Supreme Court would do that.

## 9. CONCLUSIONS

In the recent *Ali Yusuf* case, the Court of First Instance of the European Community has reiterated that "the Community must respect international law in the exercise of its powers and, consequently, Community law must be interpreted, and its scope limited, in the light of the relevant rules of international law"[131]. This passage was in our opinion perfectly interpreted and applied *ante litteram* by the Commission to the case of the fisheries agreements between the EC and Morocco in 1988, when the then Commissioner for Fisheries answered a parliamentary question on the geographic scope of the 1988 Fisheries agreement between the EC and Morocco and its possible extension to Western Sahara. This was the position of the Commission at that time: "[...] the recent agreement initialled with the Kingdom of Morocco concerns the fishing rights granted to the Community in the waters under the jurisdiction or sovereignty of the third country in question. *The extent of these waters must be determined in accordance with international law* (emphasis added)"[132]. On a straight-forward question on the geographical scope of the fisheries agreement, the Commission responded by referring to a geographical determination based on international law.

We believe that this latter principle should have been the starting point of any renewed legal discussion of the implications of the FPA for the Western Sahara issue. The preliminary questions should have been the extent of

130. See Association for Lawyers for Peace, "Millions are Against" Foundation and others v. the State of the Netherlands, Supreme Court Decision of 21 December 2001, LJN No. ZC3693, para. 3.3. English translation available in XXXIV *NYIL* (2003), p. 383.

131. Ahmed Ali Yusuf, Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities, supported by the United Kingdom of Great Britain and Northern Ireland, Case T-206/01, Judgment of 21 September 2005, para. 249.

132. Question no. 67, by Mrs Le Roux (H-1002/87), Answer of the Commission of 9 March 1988, OJ 2-363/191.

Moroccan fisheries under international law, the treaty-making power of Morocco with regard to the fisheries located off the coast of Western Sahara and the validity of any treaty thereto related. As we have seen above, the likely conclusion on the legal analysis of this question would have been that Morocco does not have the capacity under international law to enter into treaties concerning the territory of Western Sahara and the essential rights of the people of that Territory.

The Legal Services of the Parliament and the Council, respectively, have instead taken as a point of reference the UN Legal Opinion of 2002. While the UN Legal Opinion is certainly relevant to the legal question of the use of natural resources in Western Sahara and was rightly given full attention in the two legal opinions, the Legal Services have too easily discounted the difference between the legality under international law of concessions or contracts entered into by Morocco with private companies under Moroccan law or some standard international contract forms –the subject of the legal request by the UN Security Council in 2002– and the legality of a treaty entered into by Morocco with an international organisation having international legal personality –the subject of both requests within the EU Council and the Parliament–. It is submitted that this latter case demands a distinct formal analysis, that albeit not necessarily leading to a blunt denial of any treaty-making power, should have required addressing a whole set of different legal questions.

But even the focus on the UN Legal Opinion is not entirely satisfactory. The Legal Service of the Parliament appears to have interpreted the UN Legal Opinion as considering Morocco the only addressee of international legal obligations concerning the use of natural resources in Western Sahara, as if, under the terms of the FPA, the Community did not play any relevant role in the "actual fishing" of natural resources. It has also decided to disregard the element "wishes" in the proposition identified in the UN Legal Opinion that any exploitation of natural resource should not be conducted "in disregard of the interests and wishes of the people of Western Sahara"[133]; as seen, this has allowed the Community to discount the opinion expressed by POLISARIO on the desirability and the effects of the conclusion of such agreement. Furthermore, the Parliament's Legal Service, as well as EC institutions, should be aware that any benefit accruing on the coastal population will hardly cover the Saharawi population, which lives for most part in the refugee camps set in the Tindouf region in Algeria; it will rather accrue on the Moroccan peo-

133. UN Legal Opinion, supra n. 85, para. 25.

ple, whose settlement in the coastal areas of Western Sahara has been consistently pursued by the Moroccan government throughout the years.

Apart from and beyond the legal issues involved in the signature and implementation of the FPA, the broader policy implications for the Western Sahara dispute finally deserve some comments. The Rapporteur of the Committee on Fisheries, Mr Daniel Varela Suanzes-Carpegna, observes in his last report on the FPA that "in this Agreement too the EU adopts the same political stance vis-à-vis Western Sahara as in all previous fisheries agreements with Morocco. He urges that this stance should remain unchanged, so not to alter the international status quo prevailing in respect of the dispute, undermine the UN's principles or infringe international law"[134]. However, it is frankly difficult to infer any political stance taken by the EU, or the EC for that matter, in the conclusion of the agreement; if anything, the EC seems very keen to fully avoid the political dimension of the Western Sahara dispute. What is possible to infer from the EC institutions is a prevailing will to ignore the special status of Western Sahara and deal with the *status quo* in the interest of its relations with a neighbouring country, Morocco, and in the interest of the development of fisheries common policy. In this respect, two observations must be made.

Firstly, it is in our opinion the maintenance and consolidation of the *status quo*, that the EC accepts and contributes to strengthen, that undermines the UN's principles, especially that of self-determination of peoples, and infringes international law. At the present state of affairs, there is little hope that Morocco will accept the organisation and implementation of the results of a referendum, providing the option for full independence of Western Sahara. While the entering into the FPA and the extension of its geographical scope to Western Sahara does not breach as such any rule of *jus cogens*, it represents an act of implied recognition by the EC of an unlawful territorial situation, that has arguably represented a continuing violation of *jus cogens* norms for over thirty years. Apart from the possible violation of international norms that such act may entail, the policy behind this act may undermine the claim that the EU plays and will play in the future a neutral and even-handed role in the solution of the Western Sahara dispute.

Secondly, and perhaps more importantly, while with previous agreements an argument could be made that the economic benefits of entering a fisheries agreement with Morocco extending to Western Sahara outweighed

134. See Report of the Committee on Fisheries, supra n. 38, Explanatory Statement.

the costs of being perceived as compromising on international law and principles of international justice, such argument is much less tenable with the present FPA. As we have seen, Morocco has severely restricted the possibility of EC vessels fishing the most valuable species found in the waters of Western Sahara, such as cephalopods and crustaceans. While industrial fishing in the waters of Western Sahara has important economic potentials and, unlike with previous agreements, is now extended to many EC countries, alternatives could have been found by negotiating better terms with other countries in the Eastern Atlantic or even by promoting joint ventures between Moroccan and European fishermen for fishing activities in Western Sahara. In other words, the economic benefits of fishing in Western Sahara are this time clearly outweighed by the damaging perception that the EC is ready to compromise on its commitments to the compliance with international law, when that suits its economic interest; such conclusion is especially warranted when one compares the US position on the extension of its Free Trade Agreement to Western Sahara.

In conclusion, we must repeat that the present analysis is based on the hypothesis that the practice related to the FPA will extend to the waters off the coast of Western Sahara; while the hypothesis is likely to be realised in the future, there is nothing inevitable about its realisation. On the contrary, we believe that by not seeking licenses for fishing in the waters of Western Sahara the EC would have much to gain in terms of its compliance with international law and of how it is perceived world-wide and little to loose in terms of economic costs. Such policy would make sure that the EC does not risk violating any rule of international and indeed, if that is one of its declared objectives, that it truly avoids interfering with the solution of the Western Sahara dispute. This policy would not even require any official statement or declaration by the Commission to the extent that the geographical scope of the FPA does not include the waters of Western Sahara because of its contested status, which may be indeed too costly in terms of its bilateral relations with Morocco, especially at a time when Morocco has not ratified the FPA yet. The terms of the equation should be reverted: the FPA does neither include nor exclude the waters of Western Sahara and it is up to the EC to decide whether to apply for licenses in its waters.