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Legal Service

SJ-0665/13

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LEGAL OPINION

Re: Protocol between the European Union and the Kingdom of Morocco setting out the fishing opportunities and financial contribution provided for in the Fisheries Partnership Agreement in force between the two Parties - 2013/0315(NLE)

I. Introduction

1. By letter of 8 October 2013, Mr Gabriel MATO ADROVER, Chairman of the Committee on Fisheries, requested a legal opinion on the following questions:
 - Has Morocco declared an exclusive economic zone off the waters of Western Sahara (i.e. south of 27.40 N latitude)?
 - If not, would Morocco have the legal basis upon which to make a claim of an EEZ there, and what would it be?
 - If not, what is the legal requirement for the EU to pay for fishing in international waters?
2. The Legal Service has previously delivered two legal opinions on fisheries protocols between the European Union and the Kingdom of Morocco.
3. In its opinion SJ-0085/06 of 20 February 2006, the Legal Service reached the following conclusions:
 - a) *The Fisheries Agreement under consideration does not explicitly foresee that the waters of the Western Sahara are included in its area of application, nor does it expressly exclude Moroccan authorities from issuing fishing licenses to Community vessels to operate in the waters which are geographically in front of Western Sahara:*

- b) *This does not mean that the agreement is, as such, contrary to the principles of international law. At this stage, it cannot be prejudged that Morocco will not comply with its obligations under international law vis-à-vis the people of Western Sahara. It depends on how the agreement will be implemented;*
- c) *In this respect, the Agreement explicitly acknowledges that the Moroccan authorities have a "full discretion" regarding the use to which the financial contribution is put (Article 2 (6) of the Protocol). It is therefore up to them to assume their responsibilities in that respect;*
- d) *As to the effects of the agreement for the people of Western Sahara, the way in which the Moroccan authorities intend to implement this agreement and the extent to which they foresee the benefits that it brings to the local people, it would be useful for Parliament to receive indications from the Commission and/or from the Council;*
- e) *If the implementation of the agreement raises difficulties, it should be noted that a Joint Committee is set up in order to supervise the implementation of the agreement (Article 10 of the Agreement). In case the Moroccan authorities disregard manifestly their obligations under international law vis-à-vis the people of Western Sahara, the Community could eventually enter into bilateral consultations with a view to suspending the agreement (Article 15 of the Agreement and article 9 of the Protocol).*

4. In its opinion SJ-0269/09 of 13 July 2009, the Legal Service reached the following conclusions:

As for the declaration of jurisdiction over an EEZ of 200 nautical miles off the Western Sahara by the Saharawi Arab Democratic Republic (SADR)

- a) *The declaration of jurisdiction over an EEZ off Western Sahara by SADR does not produce legal consequences on the FPA with Morocco. Such declaration cannot produce legal effects for three different reasons:*
 - *SADR does not enjoy the characteristics of statehood;*
 - *it is not and cannot be a signatory party of UNCLOS;*
 - *the territory which it claims not only is barely to a limited extent subject to its control, but is considered as a whole to be a Non Self-Governing Territory within the meaning of Article 73 of the United Nations Charter.*

As for the catches taken by EU-flagged vessels fishing in the waters off the Western Sahara

- b) *Following a series of parliamentary questions to the Commission, it appears that EU-flagged vessels have fished in the waters off Western Sahara. Not only this can be deducted from the data provided by the Member States to the Commission pursuant to their obligations established by Community legislation on "control", but also it has also been explicitly acknowledged in several Commission declarations.*

- c) *In its previous legal opinion of 20 February 2006, the Legal Service noted that, failing a clear delimitation in the FPA of the fishing zones in which EU vessels were entitled to fish, it could not be excluded that Community vessels would operate in the waters off Western Sahara. The Legal Service considered however that it was not possible at that time to prejudge how the FPA would be implemented. The Legal Service observed that if it could not be said that the FPA is, as such, contrary to the principles of international law, the implementation of the FPA would determine if the principles of international law concerning the rights of the people of Western Sahara will or will not be complied with.*
- d) *More than two years after the entry into force of the FPA (28 February 2007) a first assessment of the implementation of the FPA can now be done, especially with regard to the implementation of the sectoral fisheries policy referred to in Article 7(1)(b) of the Agreement and in Articles 6 and 7 of the Protocol. The matrix of objectives/results of the sectoral fisheries policy identifies both global and specific objectives and lists the actions programmed to attain those objectives over the period of application of the agreement.*
- e) *One has to note from the outset that this matrix does not contain specific actions explicitly foreseen with a view to benefit the population of Western Sahara. It is true that some actions foreseen in the matrix target port towns situated in the territory of Western Sahara, such as Laayoune, Dakhla and Boujdour. However, it is not demonstrated that the EC financial contribution is used for the benefit of the people of Western Sahara. Yet, compliance with international law requires that economic activities related to the natural resources of a Non Self-Governing Territory are carried out for the benefits of the people of such Territory, and in accordance to their wishes.*
- f) *The actions mentioned in the matrix essentially aim at improving the infrastructure of the ports of Western Sahara. This is not necessarily equal to benefiting the people of Western Sahara insofar as they are not mentioned in the programming document and it is not known whether and to what extent they are able to take advantage of such improvements.*
- g) *The Legal Service is not in a position to establish the facts on the ground and to conclude that the abovementioned actions targeting ports of Western Sahara actually benefit the population of Western Sahara. This assessment needs to be done in concrete terms on the basis of all relevant information, and the Joint Committee established in the FPA has a role to play in this context.*
- h) *On the basis of the elements that are currently available (catches by EU flagged vessels in the waters of Western Sahara, lack of evidence in the annual and multiannual programming that the exploitation of fisheries resources in Western Sahara actually benefits the Saharawi people) it is strongly recommendable that the next annual meeting or a special meeting of the Joint Committee addresses these issues with a view to find an amicable settlement, fully respecting the rights of the Saharawi people under international law. If such an amicable settlement could not be found, the Community should envisage either the suspension of the agreement in conformity with its Article 15 and Article 9 of the Protocol, or to*

apply the agreement in such a way that EU flagged vessels are excluded from the exploitation of the waters of Western Sahara.

i) In the event that it could not be demonstrated that the FPA was implemented in conformity with the principles of international law concerning the rights of the Saharawi people over their natural resources, principles which the Community is bound to respect, the Community should refrain from allowing vessels to fish in the waters off Western Sahara by requesting fishing licences only for fishing zones that are situated in the waters off Morocco

5. On 21 January 2011, the Legal Service delivered another legal opinion (SJ-0699/10) to the INTA Committee, in particular on the question whether a proposed Agreement between the EU and Morocco concerning reciprocal liberalisation measures on agricultural products was in conformity with the EU's obligations under international law, given the fact that the Western Sahara is a non self-governing territory. In its legal opinion, the Legal Service noted that it lacked information on whether and how the proposed Agreement would be applied to the territories of Western Sahara and how it would benefit the local people of Western Sahara. Under these circumstances, the Legal Service advised INTA to clarify these questions with the Commission before taking a position on the consent to the conclusion of the proposed agreement.

II. Legal analysis

Question No 1: *Has Morocco declared an exclusive economic zone off the waters of Western Sahara (i.e. south of 27.40 N latitude)?*

6. The international legal regime governing all uses of world's ocean, seas and related resources, including the rules on the exclusive economic zone (hereinafter: EEZ), is established by the United Nations Convention on the Law of the Sea (hereinafter: the UNCLOS). The European Union and Morocco are Contracting Parties to the UNCLOS.¹
7. Rights and obligations of the Contracting Parties relating to the EEZ are regulated in Part V of the UNCLOS. Article 55 holds that "*the exclusive economic zone is an area beyond and adjacent to the territorial sea, subject to the specific legal regime established in this part, under which the rights and jurisdiction of the coastal State and the rights and freedoms of other States are governed by the relevant provisions of this Convention.*" Pursuant to Article 57 UNCLOS, "*the exclusive economic zone shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured.*"
8. Article 75 UNCLOS provides the procedure for the States to declare their EEZ. It holds *inter alia* that "*the outer limit lines of the exclusive economic zone (...) shall be shown on charts of a scale or scales adequate for ascertaining their position*" and that "*the coastal State shall give due publicity to such charts or lists of geographical coordinates*

¹ European Union acceded to the UNCLOS on 01.04.1998. Morocco ratified the UNCLOS on 31.05.2007. See also: http://www.un.org/depts/los/reference_files/status2010.pdf.

and shall deposit a copy of each such chart or list with the Secretary-General of the United Nations.”

9. Morocco has established the list of its exclusive fishing zones in 1975, at the time when Spain was exercising administrative power over the territory of the Western Sahara. The most southern latitude coordinate of those zones is 27°42' N, which corresponds to the border between Morocco and Western Sahara.² In 1980, Morocco established also its own exclusive economic zone to be 200 nautical miles,³ and replaced the term “exclusive fishing zone” with the term “exclusive economic zone” in its internal legislation on fishing at seas. The most southern latitude coordinate, referred above, was not changed.
10. However, according to the UN official database, Morocco does not appear among the States that have deposited their maritime limits under the UNCLOS concerning in particular the EEZ relating to the waters off the coast of Western Sahara.⁴
11. Therefore it can be inferred that Morocco has not claimed an EEZ for the waters off the coast of Western Sahara. It has not made the declaration foreseen in Article 75 UNCLOS specifying the geographical coordinates of the EEZ relating to those waters.

Question No 2: *If not, would Morocco have the legal basis upon which to make a claim of an EEZ there, and what would it be?*

12. Western Sahara has the status of a non self-governing territory under Article 73 of the UN Charter.⁵ Morocco is exercising the responsibilities of *de facto* administration of that territory.
13. In principle, under international law and in conformity with the UNCLOS, the coastal State, in this case Morocco, acting as *de facto* administrating the territory of the Western Sahara, must make the claim on the geographical coordinates of the respective zone in order to establish an EEZ.
14. Where the coastal State establishes the EEZ, that State has the right to exploit all marine living resources in the zone. In principle, it can be argued that where the coastal State has not claimed an EEZ, the superjacent waters above the continental shelf are the high seas.⁶ It follows that, in principle, Morocco should make the claim in conformity with Article 75 UNCLOS relating to the EEZ on behalf of Western Sahara, acting as a *de facto* administrator of that non self-governing territory.

² Decree No. 2.75.211 of 11 Rajab 1395 (21 July 1975) defining the Closing Lines of Bays on the Coasts of Morocco and the Geographical Co-ordinates of the Limit of Territorial Waters and the Exclusive Fishing Zone, available at:

http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/MAR_1975_Decree.pdf.

³ Act No. 1-81 of 18 December 1980, Promulgated by Dahir No. 1-81-179 of 8 April 1981, establishing a 200-nautical-mile Exclusive Economic Zone off the Moroccan coasts. Available at: http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/MAR_1981_Act.pdf.

⁴ Available at: <http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/depositpublicity.htm>.

⁵ See the Information from Non Self-Governing Territories transmitted under Article 73 (e) of the UN Charter. Available at: <http://www.un.org/en/decolonization/nonselfgovterritories.shtml>.

⁶ See: Yoshifumi Tanaka, **The international law of the sea**, Cambridge University Press, 2012, p. 145.

15. Does it mean that, because it did not make the referred claim, Morocco is not entitled to exploit the waters off the coast of Western Sahara corresponding to the EEZ? In order to answer to this question, it is necessary to take into account Article 73 of the UN Charter.
16. Chapter XI of the United Nations Charter is entitled "*Declaration regarding non self-governing territories*" and Article 73 states as follows: "*Members of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government recognize the principle that the interests of the inhabitants of these territories are paramount, and accept as a sacred trust the obligation to promote to the utmost, within the system of international peace and security established by the present Charter, the well-being of the inhabitants of these territories, and to this end:*
- a. *to ensure, with due respect for the culture of the peoples concerned, their political, economic, social, and educational advancement, their just treatment, and their protection against abuses;*
/.../
 - c. *to further international peace and security;*
 - d. *to promote constructive measures of development, to encourage research, and to cooperate with one another and, when and where appropriate, with specialized international bodies with a view to the practical achievement of the social, economic, and scientific purposes set forth in this Article;*
/.../
17. This provision creates an obligation to promote the development of the Western Sahara territory. Morocco, as *de facto* administering power is responsible for the economic advancement of the territory of Western Sahara. By exploiting the waters off the coast of Western Sahara corresponding to the EEZ, it can be advanced that Morocco is contributing to the socio-economic advancement of those territories, within the meaning of Article 73(a) UN Charter. This is the duty of the administering power of the non self-governing territory, in order to contribute "*to promote to the utmost, within the system of international peace and security established by the present Charter, the well-being of the inhabitants of these territories*", within the meaning of this provision. The promotion to the utmost of the well-being of the inhabitants of Western Sahara constitutes the main condition enabling the exploitation of those waters of Western Sahara.
18. In line with the position taken by the UN Under-Secretary-General for Legal Affairs and Legal Counsel, the exploration and exploitation activities in non self-governing territories violate the principles of international law if they disregard the interests and wishes of the people of the non self-governing territory.⁷ At the same time, international law does not prevent the *de facto* administering power from undertaking activities related to the natural resources in a non self-governing territory, but this must be done in full compliance with international law.

⁷ See in that regard opinion of 12 February 2002 by Hans Corell, UN Under-Secretary for Legal Affairs and Legal Counsel. For more information, see: legal opinion SJ-0085/06 of 20 February 2006, paragraphs 16-21.

19. Moreover, it is also true that although Morocco has not deposited in accordance with Article 75 UNCLOS any declaration as to the EEZ off the coast of Western Sahara, it has in the past, namely in its relations with the EU, implemented the fisheries protocols as authorising access to fish resources in these areas. The EU has paid financial compensation for this access. It appears that another fisheries agreement, concluded by Morocco with Russia, is also applied in the waters corresponding to the EEZ off the coast of Western Sahara.⁸
20. Consequently nothing prevents Morocco to exercise its jurisdiction as a *de facto* administering power over the waters off the coast of Western Sahara corresponding to the EEZ, but only if it at the same time fulfils its obligations vis-à-vis the people of Western Sahara, which stem from international law, and from Article 73 of UN Charter in particular. The legal basis for a possible declaration of the EEZ over the waters of Western Sahara would be Article 75 UNCLOS, in conjunction with Article 73 UN Charter.

Question No 3: *If not, what is the legal requirement for the EU to pay for fishing which are in international waters?*

21. As mentioned above, nothing prevents Morocco to exploit the waters off the coast of Western Sahara provided it respects its obligations under international law.
22. It must thus be analysed, at the outset, whether the Western Sahara waters fall under the area of application of the Fisheries Partnership Agreement between the European Communities and the Kingdom of Morocco (hereinafter: FPA)⁹ and its Protocol, and whether the Union is under obligation to pay for using these resources.
23. The FPA entered into force on 28 February 2007. The Protocol under consideration, once concluded, will form an integral part of the FPA.
24. Article 2(a) FPA holds that “*for the purposes of this Agreement, the Protocol and the Annex, ‘Moroccan fishing zone’ means the waters falling within the sovereignty or jurisdiction of the Kingdom of Morocco*”. Article 11 FPA defines the area of application of the FPA, holding that: “*this Agreement shall apply (...) to the territory of Morocco and to the waters under Moroccan jurisdiction.*”
25. Under Article 5(1) FPA, Morocco authorises the EU vessels to “*engage in fishing activities in its fishing zones in accordance with this Agreement, including the Protocol and Annex thereto*”. Article 5(4) provides that the Union “*undertakes all the appropriate steps required to ensure that its vessels comply with this Agreement and the legislation governing fisheries in the waters over which Morocco has jurisdiction, in accordance with the UNCLOS*”.

⁸ The text of the Morocco-Russia fisheries agreement is available at: <http://www.wsrw.org/files/dated/2013-04-30/rasporyazhenie-5-fevralya-rossiya-marokko.pdf>.

⁹ OJ L 141, 29.5.2006

26. The expression 'waters under its jurisdiction' is a customary term used in the context of various FPAs¹⁰ and refers, in accordance with the use of the terms in the UNCLOS, to the exclusive 12-mile zone on the one hand (territorial sea in the sense of Article 2 of the UNCLOS), but generally also to the EEZ (Article 55 of the UNCLOS).
27. As it follows from the answer to question 2, it must be in principle interpreted as referring to the waters declared by Morocco as its EEZ. Morocco has not declared waters off the coast of Western Sahara as EEZ, but the precedent protocols were applied in a way that it authorised the access to the waters off the coast of Western Sahara corresponding to the EEZ. However, as mentioned before, these waters may only fall under the area of application of the FPA and its Protocol, provided that Morocco respects its obligations under international law. In particular Morocco is under the obligation to ensure that the financial allocations resulting from fishing in the EEZ waters off the coast of Western Sahara actually benefit the Western Sahara population.
28. Chapter III of the Annex to the Protocol states that "*Morocco shall inform the EU, prior to the date of application of the Protocol, of the geographical coordinates of [...] its fishing zone*". The pertinent Fishing Datasheets for different fisheries in Appendix 2 to the Annex to the Protocol, namely No 3 to 6, either only specify the geographical limit of the authorised zone as 'south of' a given latitude without specifying its southern limit (sheets No 3 and 4) or do not give any specific indication as to the coordinates for the authorised zone (sheets No 5 and 6 for tuna and pelagic fisheries).¹¹
29. It is not clearly indicated in the FPA or in the Protocol whether the fishing zones which Morocco authorises the EU vessels to operate include also the waters off the Western Sahara coast. Neither is it clearly stated that those zones are excluded. In this respect, it should be recalled that the same situation arose when the Legal Service examined the FPA in 2006, in its legal opinion SJ-0085/06 of 20 February 2006. At that time the Protocol did not specify that the Union vessels were authorised to fish in the Western Sahara waters. It was afterwards acknowledged by the Commission itself that that was the case.¹²
30. It must however be stressed that the FPA and the Protocol do not oblige the Union to allocate some of its contribution for the access to Western Sahara waters. The Protocol provides for lump-sum payments and does not distinguish at the level of the contribution for resources between different fishing zones.¹³ Thus it cannot be determined whether any quote-part of the financial contribution provided in the Protocol has to be paid for access to these waters.

¹⁰ See Legal Opinion SJ-0085/06, paragraph 24 and footnote 14.

¹¹ This was also the case under the previously applicable Protocol. See Legal Opinion SJ-0085/06, paragraphs 32 to 34.

¹² See statement of Mrs Ferrero-Waldner, Commissioner for External Relations, of 12 September 2008, quoted in the Legal Opinion SJ-0268/09 of 13 July 2009, annexed to this legal opinion, paragraph 16, as well as written reply by the Commission of 12/03/2009 to question n°67 by J. Holm (loc. cit.).

¹³ Appendixes to the Protocol differentiate the fees owed by shipowners in different geographical zones, but this contribution does not form the part of the financial contribution paid by the Union to Morocco.

31. Should it appear that the Protocol is applied in the sense of also granting access to fish in the waters off the coast of the Western Sahara, then the conditions set in Article 73 of the UN Charter fully apply: the payment for access to these waters and the activities carried out by the Union fleet there must benefit the population of Western Sahara. In this case, a certain amount of the financial contribution must be allocated by Morocco to the benefit of Western Sahara population to recompense for fishing activities in the Western Saharan waters. It is for the PECH committee to assess whether the Protocol under examination does or does not indicate how and to what extent this compensation to the population of Western Sahara is foreseen.
32. In conclusion, if the Protocol is applied in a way that Morocco issues licences authorising the Union vessels to fish in the waters off the coast of Western Sahara, which were not declared as falling under the Morocco's EEZ, then the respective allocations and Union fishing activities have to benefit the population of Western Sahara. It is for the PECH committee to assess whether the Protocol under examination does or does not entail any more explicit indication concerning the benefits for the population of Western Sahara than the previous protocols. It is true that Article 6(6) of the Protocol states that Morocco shall "*submit a report to the Joint Committee on the implementation of the projects*", including "*information on any social and economic consequences, particularly the impact on employment, investment and any other quantifiable repercussions of the measures taken, together with the geographical distribution.*" The PECH committee should thus examine the way in which the Moroccan authorities intend to implement the Protocol and the extent to which they foresee the benefits that it brings to the local people of Western Sahara.

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* * *

III. Conclusions

33. The Legal Service reaches the following conclusions:

- a) Morocco has not claimed an EEZ for the waters off the coast of Western Sahara. It has not made the declaration foreseen in Article 75 UNCLOS specifying the geographical coordinates of the EEZ relating to those waters.
- b) In spite of that, and taking due account of its role as a *de facto* administering power, Morocco can exploit the waters off the coast of Western Sahara corresponding to the EEZ, provided that it respects its obligations vis-à-vis the people of Western Sahara, which stem from international law, and from Article 73 of UN Charter in particular. The legal basis for declaring the EEZ over those waters would be Article 75 UNCLOS, in conjunction with Article 73 UN Charter.
- c) It is not indicated in the FPA or the Protocol under examination, whether the fishing zones which Morocco authorises the Union vessels to operate include also the waters off the Western Sahara coast corresponding to the EEZ. Neither is it clearly stated that those zones are excluded. However, the previous Protocols were implemented in a way that the Union vessels were authorised to fish in those zones.
- d) If the Protocol is applied in a way that the Union vessels will be authorised to fish in the waters off the coast of Western Sahara (including the EEZ), which were not declared as falling under the Morocco's EEZ, then the respective payments and Union fishing activities have to benefit the population of Western Sahara, in accordance with Moroccan obligations under international law.

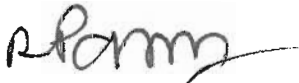


Daniel WARIN



Mihkel ALLIK

Visa: *By delegation of the Jurisconsult,*



Ricardo PASSOS
Director

Annex: Request for a legal opinion of 8 October 2013
Legal opinion SJ-0085/06 of 20 February 2006
Legal opinion SJ-0269/09 of 13 July 2009