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**THE POLICY OF THE EUROPEAN UNION
TOWARD WESTERN SAHARA A case-
study on the compatibility of the new
EU-Morocco Fisheries Protocol with
international law**

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international law

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1. Introduction

This Chapter focuses on the new Fisheries Protocol concluded by the EU and Morocco in 2013, which extends for another four-year term the 2007 Fisheries Partnership Agreement (FPA). Under this latter agreement, EU vessels will receive certain fishing rights in Moroccan waters in return for financial assistance by the EU to develop the Moroccan fishery sector. The new Protocol is not immune from criticism, as the significant opposition and reservations expressed both in the Council and in the European Parliament (EP) show. In particular, doubts remain as to the compatibility of the new Protocol with the principle of permanent sovereignty over natural resources of the Sahrawi people. Another legal issue arises as to whether the new Protocol can be considered a form of implied recognition by the EU of Morocco’s occupation in Western Sahara territories and, if this is the case, which will be the consequences for the EU under international law.

After a brief historical introduction to the 2007 FPA, the Chapter offers a legal analysis of the compatibility of the FPA and its subsequent Protocols with international law. A peculiar attention will be devoted to the Legal Opinions adopted during the years by the EP Legal Service and to the attitude of member States within European institutions towards the Western

Sahara question. It then concentrates on the obligations of non-recognition of the EU and on the recent legal action brought by Frente POLISARIO before the EU Court of First Instance (CFI) against the 2013 Protocol and offers some concluding remarks.

2. The conclusion of the new 2013 Fisheries Protocol between Morocco and EU: historical and legal framework

Among the agreements the EU has concluded with Morocco within the framework of the Euro-Mediterranean Partnership,¹ the fisheries agreements have raised several concerns as regards their compatibility with international law.²

The current³ FPA, together with a Protocol regulating its implementation, came into force in February 2007,⁴ providing fishing rights to EU countries in return for financial contribution to Morocco.⁵ The FPA and the First Protocol ran until 27 February 2011, when a new Protocol extended the FPA for one year. This latter Protocol – which had been approved by the Council,

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¹ The EU introduced the Euro-Mediterranean Partnership in 1995, then replaced by the Union for the Mediterranean at the Paris Summit of 13 July 2008 (along with the 28 EU member states, 15 Southern Mediterranean, African and Middle Eastern countries are members of the UfM: Albania, Algeria, Bosnia and Herzegovina, Egypt, Israel, Jordan, Lebanon, Mauritania, Monaco, Montenegro, Morocco, Palestine, Syria (suspended), Tunisia and Turkey). For a general introduction see U.B. Yildiz, “The European Union’s Position in the Western Sahara Conflict: a Barrier to Mediterranean Cooperation” 21 *Marmara Journal of European Studies* (2013), 38 and 43-45.

² The EU concludes fisheries agreements with third countries within the Common Fisheries Policy (CFP). As a general rule, fisheries agreements regulate financial payments in return for access to fisheries resources in the exclusive economic zones (EEZ) of third countries (on the EEZ see *infra*). See K. van den Bossche, N. Van der Burgt, “Fisheries Partnership Agreement under the European Common Fisheries Policy: an External Dimension of Sustainable Development?” 62 *Studia Diplomatica* (2009), 106.

³ The first fisheries agreement concluded between the EU and Morocco dates back to 1988 (Agreement on relations in the sea fisheries sector between the European Community and the Kingdom of Morocco, *Official Journal* L181 of 23 June 1988) and was concluded for the period 1988-1992; it was followed by the 1992-1995 (Agreement on relations in the sea fisheries sector between the European Community and the Kingdom of Morocco, *Official Journal* L407 31 December 1996) and the 1995-1999 agreements (Agreement in the sea fisheries sector between the European Community and the Kingdom of Morocco, *Official Journal* L30 of 31 January 1997). After that, the parties did not reach an agreement to renew the protocol in 1999. For an overview and historical background of the EU fisheries cooperation agreements see, among others, V.M. Kaczynski, D.L. Fluharty, “European Policies in West Africa: Who Benefit from Fisheries Agreements?” 26 *Marine Policy* (2006), 75-93.

⁴ Fisheries Partnership Agreement between the European Communities and the Kingdom of Morocco (FPA), in Council Regulation (EC) No 764 / 2006 of 22 May 2006, *Official Journal* L 141 (2006), 1–37. The 2007 FPA is a mixed agreement. On the conclusion and nature of mixed agreements, see, among others, C. Hillion, P. Koutrakos (eds.), *Mixed Agreements Revisited: the EU and its Member States in the World* (Oxford: Hart Publishing, 2010) and A. Rosas, “Mixed Union – Mixed Agreements”, in M. Koskenniemi (ed.), *International Law Aspects of the European Union* (The Hague: Martinus Nijhoff Publishers, 1998), 125–48.

⁵ For a comment on the 2007 FPA, see E. Milano, “The New Fisheries Partnership Agreement between the European Community and the Kingdom of Morocco: Fishing too South?” XXII *Anuario de derecho internacional* (2006), 413.

after a sharp debate, where Sweden, Denmark and The Netherlands voted against, while UK, Cyprus, Austria and Finland abstained –, was rejected in December 2011 by the EP,⁶ which among other considerations, called on the Commission “to ensure that the future Protocol fully respects international law and benefits all the local population groups affected”.⁷

After that, a new Protocol was adopted on 15 November 2013 by the Council by qualified majority⁸ and entered into force on 15 July 2014, following the completion of the internal ratification procedures by Morocco. Under this agreement, which extends for another four years the 2007 FPA, EU vessels will receive certain fishing rights in Moroccan waters in return for financial assistance by the EU to develop the Moroccan fishery sector.⁹ The total cost to the EU will be €30 million, €16 million of which compensating Morocco for access to the resource and €14 million directed towards supporting the fisheries sector in the country. In addition, the ship owners’ contribution is estimated at €10 million, giving a total financial envelope for Morocco of an estimated €40 million.¹⁰

Up to 120 vessels from 11 EU countries (Spain, Portugal, Italy, France, Germany, Lithuania, Latvia, Netherlands, Ireland, Poland and United Kingdom) are concerned by the new Protocol,¹¹ which has been presented as a new agreement to overcome the critics of its predecessor, especially as regards its incompatibility with international law.

Indeed, a human rights clause is included in the latter Protocol and a suspension mechanism ensures that the EU can unilaterally suspend the protocol in case of human rights violations.¹² Moreover, detailed and regular reporting obligations for Morocco will help to demonstrate the economic and social impact of the sectoral support on “the local populations”.¹³ According to the European Commissioner for Maritime Affairs and Fisheries, Maria Damanaki,

[t]his new protocol is an example for responsible international fisheries governance: we made sure that the EU’s fishing rights do not exceed the scientifically sound limit that ensures sustainable

⁶ Following a Legal Opinion by the EP Legal Service of 2009, on which *infra*.

⁷ European Parliament Resolution *on the future Protocol setting out the fishing opportunities and financial compensation provided for in the Fisheries Partnership Agreement between the European Community and the Kingdom of Morocco*, 2011/2949(RSP), 14 December 2011, para. 9. However, the term “population” may generate some confusion (on which, *infra* in the text).

⁸ On the different positions of member States within the Council see *infra* paragraph 3.4.

⁹ European Commission, “EU-Morocco Fisheries Partnership Agreement to Enter into Force” *Press Release*, IP/14/836 (15 July 2014), http://europa.eu/rapid/press-release_IP-14-836_en.htm

¹⁰ Article 3 of the 2013 Protocol.

¹¹ European Commission, “EU-Morocco Fisheries Partnership Agreement to Enter into Force” *Press Release*, IP/14/836 (15 July 2014), http://europa.eu/rapid/press-release_IP-14-836_en.htm.

¹² *Ibidem*.

¹³ *Ibidem*.

fisheries, and that European vessels do not compete with local fishermen. I am confident that the EU's financial support will help build a sustainable future for Moroccan fisheries through the targeted sectoral support.¹⁴

Nevertheless, the new Protocol is not immune from criticism, as the significant opposition and reservations expressed both in the Council and in the EP show.

3. The 2007 FPA and its subsequent Protocols under the scrutiny of international law

As already mentioned, the 2007 FPA and its subsequent Protocols have raised several problems of compatibility with international law. In particular, concerns arise as to their territorial applicability with regard to the waters off the coast of Western Sahara.

The following paragraphs give an overview of the legal questions involved, starting with a brief analysis on the legal status of Western Sahara under international law, followed by a reconstruction of the principle of permanent sovereignty over natural resources with regard to Non-Self-Governing Territories (NSGTs) and occupied territories and the relevant delimitation of the fishing zone and the exclusive economic zone (EEZ). Against this legal background, the approach of the EU institutions and member States will be assessed, together with an illustration of the legal grounds of incompatibility of the 2013 Protocol with international law.

3.1. The legal status of Western Sahara under international law

We should first briefly consider the Western Sahara question and its legal *status* under international law.¹⁵

Western Sahara is located in the north-west coast of Africa, covering 266,000 square kilometres and with a population of 531,000.¹⁶ The territory is rich in natural resources, particularly phosphates and uranium, while it has rich fish grounds off its long coastline (1,200-kilometer-long coastline on the Atlantic Ocean) and great potential for large offshore oil reserves.¹⁷

¹⁴ *Ibidem.*

¹⁵ The debate on the statehood of Western Sahara is instead outside the scope of this Chapter. For the general terms of such a debate, see, among others, J. Soreta Licerias, *International Law and the Western Sahara Conflict* (The Netherlands: Wolf Legal Publishers, 2014), 70-77.

¹⁶ Data from the UN website <http://www.un.org/en/decolonization/nonselvgovterritories.shtml>. The people consists primarily of the Sahrawi (see T. Maruhn, "Sahara" *Max Planck Encyclopedia of Public International Law* (May 2010), www.mpepil.com).

¹⁷ See S.M. Omar, "The Right to Self-determination and the Indigenous People of Western Sahara" 21 *Cambridge Review of International Affairs* (2008), 41-57.

Western Sahara became a Spanish protectorate in 1884¹⁸ and has been on the United Nations (UN) list of NSGTs¹⁹ since 1963.²⁰ When Spain withdrew from the territory in 1976,²¹ Western Sahara was immediately occupied by troops of Morocco and Mauritania (the latter withdrew from the territory later in 1979),²² notwithstanding the strong opposition of the *Frente popular para la Liberación de Saguiaat El Hamra y de Rio de Oro* (Frente POLISARIO)²³ and the repeated protests of the international community.²⁴ Additionally, Morocco started elevating a 2,600-kilometre-long military wall from southern Morocco to the south-western tip of Western Sahara. It is considered “the greatest functional military barrier in the world”;²⁵ the area west of the wall is under the *de facto* administration of Morocco and the area east is under the *de facto* administration of the Frente POLISARIO and the Sahrawi Arab Democratic Republic (SADR).²⁶

¹⁸ See Marauhn, *cit.*

¹⁹ Today, there are sixteen remaining non-self-governing territories in the list of the UN: (1) Anguilla, (2) Bermuda, (3) British Virgin Islands, (4) Cayman Islands, (5) Falkland Islands (Malvinas), (6) Montserrat, (7) St. Helena, (8) Turks and Caicos Islands, (9) United States Virgin Islands, (10) Gibraltar, (11) American Samoa, (12) French Polynesia, (13) Guam, (14) New Caledonia, (15) Pitcairn, (16) Tokelau. NGTs are to be distinguished by administration territories. Indeed, trusteeship territories were those territories or colonies placed under the administration of one or more States so commissioned by the UN, acting under the strict supervision of the UN Trusteeship Council. NSGTs, by contrast, are not to a system of strict and direct supervision by the UN. UN GA 1654 (XVI) of 27 November 1961 set up the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence of Colonial Countries and Peoples (also known as the Special Committee on decolonization or C-24), which annually reviews the list of NSGTs. For the historical background of this Committee, see in detail M. Moïse Mbengue, “Non-Self-Governing Territories” *Max Planck Encyclopedia of Public International Law* (February 2013), www.mpepil.com and the official website <http://www.un.org/en/decolonization/specialcommittee.shtml>.

²⁰ Following the transmission of information by Spain under Article 73(e) of the UN Charter. See *Official Records of the General Assembly*, Eighteenth Session, Annexes, Addendum to agenda item 23 (A/5446/Rev.1), annex I.A/5446/Rev.1, annex 1.

²¹ UN SC, *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, 12 February 2002 (2002 UN Legal Opinion), para. 7.

²² After the conclusion of a peace agreement between Frente POLISARIO and Mauritania on 10 August 1979.

²³ National liberation movement founded in 1973, which immediately gained support among the Sahrawi people and was later, recognized by the UN as the legitimate representative of the Sahrawi people (UN GA Res. 34/37 of 21 November 1979, para. 7). See, among others, Marauhn, *cit.* and, Soreta Licerias, *cit.*, 43.

²⁴ See UN GA Res. 34/37 of 21 November 1979 and UN GA Res. 35/19 of 11 November 1980.

²⁵ See S. Zunes, J. Mundy, *Western Sahara. War, Nationalism and Conflict Irresolution* (Syracuse, New York: Syracuse University Press, 2010), 21.

²⁶ The SADR was proclaimed on 27 February 1976; it was first recognized by Algeria on 6 March 1976, and subsequently by 84 States (as of January 2014), even though 44 of which have withdrawn or “frozen” their recognition (data from the Report A. Faupin, B. Guillaumin, “The Western Sahara Issue: A Security Stake for the European Union. European Security in Need of a Settled and Developed Western Sahara” *Report by the French Mediterranean Sub-Group EWG 11 bis* (2014), 36-43). When the AU replaced the OAU in 2002, the SADR was one of its founding members, while Morocco remains the only African State not within the AU. It is worth recalling that in 1988 Morocco and POLISARIO agreed on “the settlement proposals” 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. The plan was endorsed by the Security Council (UN SC Res. 658 of 27 June 1990), which, with Res. 690 of 29 April 1991, established the United Nations Mission for the Referendum in Western Sahara (MINURSO). The mandate of MINURSO has been, among others, to monitor the ceasefire; to take steps with the parties to ensure the release of all Western Saharan political prisoners or detainees; to identify and register

Under public international law, Western Sahara has currently the status of NSGT within the meaning of article 73 of the UN Charter; Spain does not play its administrative role and the territory west of the above mentioned wall is occupied by Morocco.²⁷

Morocco lacks any kind of sovereignty over the territory of Western Sahara.²⁸ This has been clearly affirmed by the International Court of Justice (ICJ) in its 1975 Advisory Opinion on Western Sahara, in which the Court re-affirmed the right to self-determination of the Sahrawi people and concluded (by 14 votes to 2) that Morocco had no sovereign claims over that territory.²⁹

Morocco is neither an administering Power in Western Sahara. Indeed, Spain remained the administering Power for Western Sahara until 1976,³⁰ and after that it did not transfer its *status* to Morocco or to other States.³¹ As rightly recalled by the UN Under-Secretary General and Legal Counsel Hans Corell in its legal opinion of 29 January 2002, “Morocco [...] is not listed as the administering Power of the territory in the United Nations list of Non-Self-Governing Territories”.³² Moreover, the UN GA has never used the expression “administering Power” referring to Morocco. Instead, it has identified its presence as an “occupation”.³³ Therefore, we

qualified voters and to organize and ensure a free and fair referendum and proclaim the results (the official website <http://www.un.org/en/peacekeeping-/missions/minurso/mandate.shtml>). Since its establishment in 1991, MINURSO’s mandate has been regularly prolonged by the UN Security Council with the latest mandate included in UN SC Res. 2218 (2015) of 28 April 2015, extending the mandate until 30 April 2016 (*ibidem*, para. 1). For a comment, see Marauhn, *cit.*, Soreta Licerias, *cit.*, 49-54 and E. Milano, *Unlawful Territorial Situations in International Law: Reconciling Effectiveness, Legality and Legitimacy* (Leiden: Martinus Nijhoff, 2006), 166-173.
²⁷ *Ibidem*, 421.

²⁸ *Ibidem*, 429.

²⁹ ICJ, *Western Sahara*, Advisory Opinion, 16 October 1975, *ICJ Reports* (1975), paras. 130, 149-152 and 158-162. The ICJ reached the same conclusion (with a vote of 15 to 1) with respect to Mauritania. For a comment, C. Feinaeugle, “Western Sahara (Advisory Opinion)”, *Max Planck Encyclopedia of Public International Law* (March 2007), <http://www.mpepil.com> and Milano, *cit.*, 416-417 and 429-430 and Marauhn, *cit.*.

³⁰ The UN GA has repeatedly affirmed that an administering power will have such a status as long as the GA declares it over. See in this respect GA Res. 40/51 of 2 December 1985, in which it “[r]eaffirms that, in the absence of a decision by the General Assembly itself that a [...] NSGT] has attained a full measure of self-government in terms of Chapter XI of the Charter, the administering Power concerned should continue to transmit information under Article 73 of the Charter with respect to that Territory” (*ibidem*, para. 2); see also in the same line GA’s *Annotated Preliminary List of Items to be Included in the Provisional Agenda of the Fiftieth Regular Session of the General Assembly*, A/50/100 of 6 July 1995, para. 88 and the GA’s *Information from Non-Self-Governing Territories Transmitted under Article 73 of the Charter of the United Nations. Report of the Secretary-General*, A/50/458 of 22 September 1995, Annex.

³¹ Milano, *cit.*, 430 and C. Ruiz Miguel, “Is the EU-Moroccan Fisheries Agreement an Attempt by Spain to Legalise the Moroccan Occupation of Western Sahara?” 97 *Grupo de Estudios Estratégicos* (7 March 2006), 3, http://www.fishelsewhere.eu/files/dated/2009-12-15/ruiz_fish_english_2006.pdf

³² UN SC, *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, 12 February 2002, para. 7.

³³ The dispositive part of Resolution 34/37 of 21 November 1979 gives Moroccan presence in the territory the quality of “occupation” (GA Res 34/37 of 21 November 1979, paras. 5-6, where the GA “deeply deplores the aggravation of the situation resulting from the continued occupation of Western Sahara by Morocco and the extension of that occupation to the territory recently evacuated by Mauritania” and “urges Morocco [...] to terminate the occupation of the Territory of Western Sahara”). Also UN GA Resolution 35/19 of 11 December

can easily conclude that, according to international law, Morocco is an “occupying” power in the area west of the above mentioned wall in Western Sahara.³⁴

Due to the fact that Western Sahara is a NSGT, one should consider the relevant normative framework of Chapter XI of the UN Charter.³⁵ Of particular importance is article 73 of the UN Charter, according to which UN members States which have or assume responsibilities for the administration of NSGTs accept as “a sacred trust” to ensure “their political, economic, social, and educational advancement, their just treatment, and their protection against abuses” as well as “to develop self-government” of the people in those territories.³⁶ Hence, with reference to Western Sahara, we could affirm that *de minimis*, the obligations deriving from the administration of a NSGT according to article 73 of the UN Charter should apply to Morocco (together with the relevant regulation deriving from its *status* of occupying power).³⁷

3.2. *The right of permanent sovereignty over natural resources of Sahrawi people*

When assessing the legal regime on the use of natural resources in Western Sahara, one should take into account the legal *status* of the territory, namely a NSGT under the occupation of Morocco (in the area west the above mentioned wall).

It should preliminarily recalled that the principle of permanent sovereignty over natural resources, as a corollary to the right of self-determination,³⁸ is recognized as part of customary

1980 goes along the same line (UN GA Resolution 35/19 of 11 December 1980, paras. 3 and 9. See Ruiz Miguel, *cit.*, 5).

³⁴ *Ibidem*, 9.

³⁵ M. Moïse Mbengue, “Non-Self-Governing Territories” *Max Planck Encyclopedia of Public International Law* (February 2013), www.mpepil.com.

³⁶ Article 73 of the UN Charter: “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; (b) to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions, according to the particular circumstances of each territory and its peoples and their varying stages of advancement; (c) to further international peace and security; (d) to promote constructive measures of development, to encourage research, and to co-operate 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; and (e) to transmit regularly to the Secretary-General for information purposes, subject to such limitation as security and constitutional considerations may require, statistical and other information of a technical nature relating to economic, social, and educational conditions in the territories for which they are respectively responsible other than those territories to which Chapters XII and XIII apply”.

³⁷ E. Milano, “Il nuovo Protocollo di pesca tra Unione europea e Marocco e diritti del popolo sahwawi sulle risorse naturali” 8 *Diritti umani e diritto internazionale* (2014), 509.

³⁸ See in this respect UN GA Res. 1514 (XV) of 14 December 1960 on Declaration on the Granting of Independence to Colonial Countries and Peoples, according to which “[a]ll peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development” and “[a]ll States shall [...] respect [...] the sovereign rights of all peoples and

international law.³⁹ As a general rule, exploitation of natural resources in NSGT should be conducted for the benefit and according to the wishes of the local people.⁴⁰ This has been clearly stated by the UN Under-SG for Legal Affairs and Legal Council Mr Correll, who prepared – upon the request of the President of the UN Security Council – an Opinion delivered on 12 February 2002 on the use of natural resources in NSGTs, with particular regard to Western Sahara.⁴¹ The Opinion stated that that economic activities related to NSGTs should be carried out in accordance with the wishes and interests of the people; indeed,

where resource exploitation activities are conducted in Non-Self-Governing Territories for the *benefit* of the peoples of those 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 (emphasis added).⁴²

On the other hand, “if [...] 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 principles of international law”.⁴³

their territorial integrity” (*ibidem*, paras. 2 and 7). For an analysis of the right to self-determination of Sahrawi people, see, among others, S.M. Omar, “The Legal Claim of the Sahrawi People to the Right to Self-determination and Decolonisation”, in N. Botha, M.E. Olivier, D. Van Tonder (eds.), *Multilateralism and International Law with Western Sahara as a Case Study* (Pretoria: VerLoren van Themaat Centre, University of South Africa, 2010), 56-69 and Soreta Licerias, *cit.*, 1-8.

³⁹ The origin of the principle can be traced back to various resolutions of the UN GA; it has then received recognition in several binding legal instruments, such as environmental conventions. The principle of permanent sovereignty is also reflected in human rights and as a component of the right of self-determination. The 1966 Human Rights Covenants formulate a right for peoples to dispose freely of their natural resources (articles 1, para. 2 of the two Covenants), like the African Charter on Human and People’s Rights (article 21). The ICJ in the case *DR Congo v. Uganda* recalled that “the principle of permanent sovereignty over natural resources is expressed in General Assembly resolution 1803 (XVII) of 14 December 1962 and further elaborated in the Declaration on the Establishment of a New International Economic Order (General Assembly resolution 3201 (S.VI) of 1 May 1974) and the Charter of Economic Rights and Duties of States (General Assembly resolution 3281 (XXIX) of 12 December 1974). [...]his principle [...]is part] of customary international law” (*Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, 19 December 2005, *ICJ Reports* (2005), para. 244). For a comment, K. Hossain, “Introduction”, in K. Hossain, S. Roy Chowdhury, *Permanent Sovereignty Over Natural Resources in International Law* (London: Frances Pinter, 1984), ix, S. Hobe, “Evolution of the Principle on Permanent Sovereignty Over Natural Resources”, in M. Bungenberg, S. Hobe (eds.), *Permanent Sovereignty over Natural Resources* (Heidelberg, New York, Dordrecht, London: Springer, 2015), 1 and D. Damde Jong, *International Law and Governance of Natural Resources in Conflict and Post-Conflict Situations* (Cambridge: Cambridge University Press, 2015), 46-47.

⁴⁰ Milano, *cit.* (2006), 449.

⁴¹ 2002 UN Legal Opinion, para. 1. For a comment, see Marauhn, *cit.*

⁴² 2002 UN Legal Opinion, para. 24. See Marauhn, *cit.*

⁴³ 2002 UN Legal Opinion, para. 25.

In a public intervention in 2008, while commenting the 2002 Legal Opinion, Hans Corell remembered the UN GA resolutions, which contained provisions designed to protect the “inalienable rights” of the peoples of those territories to their natural resources, and to establish and maintain control over the future development of those resources.⁴⁴ It should be recalled, in this respect, the series of resolutions on *Economic and other activities which affect the interests of the peoples of the Non-Self-Governing Territories* enacted by the UN GA since 1995, the last of which is dated 16 December 2014.⁴⁵ In the latter Resolution, the GA

[r]eaffirms the right of the peoples of the Non-Self-Governing Territories to self-determination in conformity with the Charter of the United Nations and with General Assembly resolution 1514 (XV), containing the Declaration on the Granting of Independence to Colonial Countries and Peoples, as well as their right to the enjoyment of their natural resources and their right to dispose of those resources in their best interest [...and a]ffirms the value of foreign economic investment undertaken *in collaboration* with the peoples of the Non-Self-Governing Territories *and in accordance with their wishes* (emphasis added).⁴⁶

The latter resolution also “[c]alls upon the administering Powers to ensure that the exploitation of the marine and other natural resources in the Non-Self-Governing Territories [...] does not adversely affect the interests of the peoples of those Territories”⁴⁷. This is a clear duty of the administering Powers of NSGTs. Nevertheless, the GA envisages a more general obligation for the international community as a whole: indeed, it

[c]alls [...] upon all Governments take [...] legislative, administrative or other measures in respect of their nationals and the bodies corporate under their jurisdiction that own and operate enterprises in the Non-Self-Governing Territories that are detrimental to the interests of the inhabitants of those Territories, in order to put an end to such enterprises [...and i]nvites all Governments and organizations of the United Nations system to take all possible measures to ensure that the permanent sovereignty of the peoples of the Non-Self-Governing Territories over their natural

⁴⁴ H. Corell, “The Legality of Exploring and Exploiting Natural Resources in Western Sahara”, in N. Botha, M.E. Olivier, D. Van Tonder (eds.), *Multilateralism and International Law with Western Sahara as a Case Study* (Pretoria: VerLoren van Themaat Centre, University of South Africa, 2010), 277.

⁴⁵ UN GA Res. 50/33 of 6 December 1995; latest resolution GA Res. 69/98 of 16 December 2014. For the list of all GA Resolutions on this item, see the official website http://www.un.org/en/decolonization/ga_res.shtml.

⁴⁶ GA Res. 69/98 of 16 December 2014, paras. 1-2.

⁴⁷ *Ibidem*, para. 7.

resources is fully respected and safeguarded in accordance with the relevant resolutions of the United Nations on decolonization.⁴⁸

These sentences resemble article 73 of the UN Charter,⁴⁹ which lays down the main principles applicable to NSGTs, according to which UN Member States “which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government” should

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 [...] the well-being of the inhabitants of these territories [...ensuring, in particular] their [...] economic [...] advancement.⁵⁰

Thus, in the case of Western Sahara, it can be easily affirmed that, even though Morocco is not the *de jure* administering Power of the territory (it is not enlisted as such in the relevant UN list), it has nevertheless an obligation, under international law, to respect the permanent sovereignty over natural resources of Sahrawi people; the same holds true also for the EU, which should not enact regulations which would “adversely affect the interests of the peoples” of Western Sahara.

As already stated, exploitation of natural resources in NSGTs should be carried out *with the consent* of the people living therein. In the case of Western Sahara, consent should be given by Frente POLISARIO, as the only legitimate representative of the Sahrawi people.⁵¹ This is of vital importance for the legitimate exploitation of natural resources under international law; as a matter of fact, neither Morocco nor the EU have ever consulted Frente POLISARIO when concluding (and implementing) the 2007 FPA and its subsequent Protocols. As such, Morocco and EU are in breach of an international obligation to the extent that they have concluded and are implementing an international agreement, which affects the use of natural resources of a NSGT, in a way which is not in line with the *wishes* of people living there (and it is not clear whether the same agreement *benefit* the same people, as it will be shown below).

⁴⁸ *Ibidem*, paras. 6 and 8.

⁴⁹ As also restated by Report of the UN Secretary General of April 2015: “in light of increased interests in the natural resources of Western Sahara, it is timely to call upon all the relevant actors to ‘recognize the principle that the interests of the inhabitants of these territories are permanent’ in accordance with article 73 of the UN Charter” (Report of the Secretary-General on the situation concerning Western Sahara, S/2015/246, 10 April 2015, para 80).

⁵⁰ Article 73, para. 1(a) of the UN Charter.

⁵¹ As recognised by the UN since 1979 (see *supra*).

As already stated, Western Sahara is a NSGT which is currently occupied by Morocco (in the area west of the above mentioned wall). In this respect, one should also consider whether, and to what extent, the law of occupation – in particular the Fourth Geneva Convention⁵² and the 1907 Hague Regulations –⁵³ is applicable in the case at hand.⁵⁴ In general terms, it can be easily affirmed that customary international law of military occupation applies to the areas of Western Sahara west of the wall. 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,⁵⁵ by stating that

the 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.

It follows that the occupying State is usufructuary of public immovable property in the occupied territory. The concept of usufruct implies that the occupying power may use the property in question, subject to the requirement to “safeguard the capital of these properties”.⁵⁶ Moreover, the occupant may use the property “to the extent necessary for the current administration of the territory and to meet the essential needs of the population”.⁵⁷

As regards the applicability of the principle of permanent sovereignty in the situation of belligerent occupation, one should recall the relevant UN GA Resolutions, especially those issued with regard to the Israeli occupation of Palestinian territory. In UN GA Res. 3336 (XXIX) of 17 December 1974, the GA has affirmed the principle of the permanent sovereignty of peoples over their natural resources applicable in the situation of foreign occupation,⁵⁸ which

⁵² Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), signed on 12 August 1949, entered into force on 21 October 1950, *United Nations Treaty Series*, 75 (1949) 287-416.

⁵³ Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, adopted on 18 October 1907. For the relevant text see <https://www.icrc.org>.

⁵⁴ For a general overview on this topic, see, among others, C. Chinkin, “Laws of Occupation”, in N. Botha, M. Olivier, D. van Tonder (eds.), *Multilateralism and International Law with Western Sahara as a Case-Study* (Pretoria, Unisa Press, 2010), 167-188.

⁵⁵ Milano, *cit.* (2006), 449.

⁵⁶ N.J. Schrijver, “Natural Resources, Permanent Sovereignty over” *Max Planck Encyclopedia of Public International Law* (June 2008), www.mpepil.com and Milano, *cit.* (2006), 449.

⁵⁷ The Institut de Droit international, *Bruges Declaration on the Use of Force* (2 September 2003), 3, http://www.idi-iil.org/idiE/navig_dec.html. For a comment, see, among others, E. Benvenisti, *The International Law of Occupation* (Oxford: Oxford University Press, 2012), 81-82.

⁵⁸ Schrijver, *cit.*

has been restated later in 2007⁵⁹. Also the International Court of Justice (ICJ)'s approach goes along the same line. Indeed, in the *Democratic Republic of the Congo v. Uganda* case, where the Court had to clarify whether the principle of permanent sovereignty over natural resources remains applicable during foreign occupation, it has been ruled that the occupant must "take appropriate measures to prevent the looting, plundering and exploitation of natural resources in the occupied territory".⁶⁰ Furthermore, as restated by UN GA Resolutions particularly with respect to the Israeli occupation of Palestinian territory, peoples under occupation are entitled to restitution and full compensation for the exploitation, the loss and the depletion of and damages to the natural resources in territory under occupation.⁶¹

Consequently, Morocco, as occupying power, may make arrangements with regard to the resources of Western Sahara, provided that they benefit the people of Western Sahara (subject to the *necessary* consent of the legitimate representative of the Western Sahara people, namely Frente POLISARIO); this is also true with regard to renewable resources, like sustainable fishing. Moreover, according to the right to self-determination and the principle of permanent sovereignty over natural resources, Sahrawi people should be consulted for the management of natural resources in their territories. In this sense, the law of NSGT and the law of occupation go along the same line in the protection (and promotion) of the right of permanent sovereignty of natural resources of the people in NSGT/occupied territories.⁶²

3.3. The delimitation of the "fishing zone" in the application of the 2007 FPA and its subsequent Protocols

According to article 2, lett a of the 2006 FPA, the "fishing zone" of Morocco comprises "waters falling within the *sovereignty* or *jurisdiction* of the Kingdom of Morocco" (emphasis added). In a public intervention in 2008, while commenting the 2002 Legal Opinion, the then Vice-Secretary General for Legal Affairs, Hans Corell suggested that *jurisdiction*⁶³ refers to the

⁵⁹ UN GA Res. 62/181 of 19 December 2007, para 3 of the Preamble.

⁶⁰ ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, 19 December 2005, *ICJ Reports* (2005), para. 248.

⁶¹ UN GA Resolution 3336 (XXIX) on *Permanent sovereignty over national resources in the occupied Arab territories* of 17 December 1974. For a comment see S. Hobe, "Evolution of the Principle on Permanent Sovereignty Over Natural Resources", in M. Bungenberg, S. Hobe (eds.), *Permanent Sovereignty over Natural Resources* (Heidelberg, New York, Dordrecht, London: Springer, 2015), 9 and Schrijver, *cit.*

⁶² It could be argued, more generally, that the regime applicable to NSGTs constitutes a *lex specialis* regime of the law of occupation, with particular regard to those situation in which occupation lasts for long time.

⁶³ Without entering into too detail on this issue, we can say that territorial sovereignty is the "supreme authority and control" over a delimited territorial space (G. Oduntan, *Sovereignty and Jurisdiction in the Airspace and Outer Space. Legal Criteria for Spacial Delimitation* (London, New York: Routledge, 2012), 21), while jurisdiction "denotes the authority to affect legal interests", that is, the authority a State exercises over natural and juridical persons and property within a delimited territory (*ibidem*, 31).

Moroccan EEZ;⁶⁴ however, he noted that the same term could be used to indicate the waters belonging to Western Sahara,⁶⁵ so that there is no distinction made with respect to the waters adjacent to Western Sahara. We do not find further specification from the following Protocols to the 2007 FPA; Appendix 4 of the 2013 Protocols (like the previous ones) breaks down Morocco's fishing zones according to the type of fishing: the southern-most zone is south 29°00', a geographical point north of the Morocco-Western Sahara international border. The EP Legal Opinion of 2006 rightly noted that the agreement *as it stands* neither includes nor excludes the waters off the coast of Western Sahara.⁶⁶

If the 2007 FPA and subsequent Protocol were applied so to allow the issuing of fishing licenses for the waters off Western Sahara, this would be compatible with international law (and with the right of permanent sovereignty over natural resources of Sahrawi people) *only* in the event that (1) Sahrawi people had been consulted during the negotiation of the agreements in this regards *and* that (2) Sahrawi people would benefit from this practice. In this respect, one should also consider that in early 2009 the SADR enacted its *Law establishing the Maritime Zones of the Sahrawi Arab Democratic Republic*.⁶⁷ The legislation provided for the creation of a 200-nautical mile EEZ, in accordance with international law, and the assertion of sovereignty to maritime resources. In a letter delivered through Namibia to the UN SC, Frente POLISARIO stated that “[p]ursuant to this legislation, the Government of the SADR renders illegal any

⁶⁴ The concept of the Exclusive Economic Zone (EEZ) was introduced within the framework of the international law of the sea with the United Nations Convention on the Law of the Sea (UNCLOS), concluded in Montego Bay, 10 December 1982, *United Nations Treaty Series* 1833, 3 f. The EEZ can be defined as a maritime zone beyond and adjacent to the territorial sea extending up to 200 nautical miles from the baseline of a coastal State (Article 57 UNCLOS) where the coastal State has sovereign rights (mainly of economic nature) over the living and non-living resources of the superjacent waters and its seabed and subsoil. It is for the aim of promoting the conservation and sustainable use of fisheries resources within the EEZ, States conclude fisheries access agreements (Article 56 UNCLOS: “1. In the exclusive economic zone, the coastal State has: (a) sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources [...] of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone [...]; (b) jurisdiction as provided for in the relevant provisions of this Convention [...]). For a comment see, among others, N. Dolliver, “Exclusive Economic Zone” *Max Planck Encyclopedia of Public International Law* (March 2008), www.mpepil.com.

⁶⁵ See Corell, *cit.*, 285 and also Milano, *cit.* (2006), 425.

⁶⁶ *Ibidem*, 508.

⁶⁷ Law No. 3 of 21 January 2009, www.arso.org/03-0.htm. It is also worth recalling a Statement made by HE Emhamed Khadad on 17 May 2005 at the Oil and Gas Licence Offering Meeting, London, according to which: “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. [...] 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” (the full statement is available at <http://www.sadroilandgas.com/pdfs/StatementHEEmhamedKhadad-17May2005.pdf>).

activities related to the exploration or exploitation of the marine living and non-living resources of Western Sahara conducted without its expressed authorisation”.⁶⁸

Still, Sahrawi people had not been consulted nor involved in the relevant negotiation process, so that the only way for the 2007 FPA and subsequent Protocols to comply with international law is by way of their application in the sense of *excluding* from the issuing of fishing licenses the waters off Western Sahara.⁶⁹ Yet, subsequent practice of the application of the above mentioned agreements shows that Morocco has released fishing licenses also for fishing in waters off Western Sahara. On the other hand, EU has given financial contribution for those licenses – and there is no clear evidence of how Morocco has used those financial contribution.⁷⁰

3.4. *The attitude of the EP and EU member States towards the Western Sahara question*

The negotiations and conclusion of the 2007 FPA have raised several concerns within EU institutions because of the above mentioned alleged extension of the territorial application of the FPA to the waters off the coast of Western Sahara. In this regard, two legal opinions have been requested and produced by the Legal Service of the EP⁷¹ and the Legal Service of the Council,⁷² respectively, on the compatibility of the FPA with international law. Despite the favorable position of the EP Legal Service (the Opinion of the Legal Service of the Council is not entirely public, but it can be inferred that it has reached quite the same conclusions than the

⁶⁸ Letter of the Representative of Frente POLISARIO to the UN, Ahmed Boukhari of 8 April 2012, UN Doc. A/63/871-S/2009/198. See also T. Goffinet, “Development and Fisheries Management: the Case of Northwest Africa” 17 *Ocean & Coastal Management* (1992), 122

⁶⁹ One should take into account article 31(3)(b) of the 1986 Vienna Convention on the Law of the Treaties between States and International Organizations or between International Organizations, which, equally to article 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”. Even though the 1986 Vienna Convention has not been ratified by Morocco and the EU, it has been widely considered expression of customary international law in most of its substantive parts, including that on interpretation of treaties. See Milano, *cit.* (2006), 425. For a general overview on the issue of subsequent practice see, among others, J. Arato, “Subsequent Practice and Evolutive Interpretation: Techniques of Treaty Interpretation over Time and Their Diverse Consequences” 9 *The Law and Practice of International Courts and Tribunals* (2010), 443-494.

⁷⁰ 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. For a comment, see Milano, *cit.* (2006), 426.

⁷¹ The Development Committee of the EP sought in January 2006 legal advice from the Legal Services of the EP on the compatibility of the FPA with international law. This resulted in the Legal Opinion of the Legal Services of the EP of 20 February 2006, EP, Doc- SJ-0085/06.

⁷² The Working Party on External Fisheries Policy asked the Council Legal Service for an opinion on the compatibility of the FPA with international law. This resulted in the Legal Opinion of the Legal Services of the Council of 22 February 2006. Doc. 6664/06.

Legal Opinion of the Legal Services of the EP),⁷³ a minority in the EP requested some amendments to the FPA, including the explicit exclusion of Western Sahara from the agreement. This attitude of the EP seems quite in line with the general approach displayed by the EP towards the Western Sahara question.⁷⁴ Indeed, at least since 1989, the EP has defined the Western Sahara question as a problem of decolonization which must be resolved in accordance with the right of the Sahrawi people to self-determination.⁷⁵

Nevertheless, when considering the approval of the 2007 FPA, despite the opposition of 167 and the abstention of 79 MEPs, the EP decided to follow the Opinion of the EP Legal Service and adopted the resolution drafted by the Fisheries Committee, with only some amendments requesting the strengthening of the monitoring mechanism⁷⁶. After that, on 22 May 2006, the EU Council adopted the FPA with Morocco: Sweden voted against – declaring that the FPA did not “take into full consideration that Western Sahara is not a part of the territory of Morocco under international law”⁷⁷, Finland abstained and together with the Netherlands issued a separate statement, while Ireland supported the agreement but issued a separate statement.⁷⁸

Member States have indeed adopted quite different positions within the Council concerning the question of Western Sahara. While many northern countries have held an approach favorable to the rights of the Sahrawi people, many southern countries have displayed a more

⁷³ Legal Opinion of the Legal Service of the Council, Doc. 6664/06, 22 February 2006, only available paras. 1-5.

⁷⁴ For a general overview on this issue, see J. Soroeta Licerias, “La posición de la Unión Europea en el conflicto del

Sahara Occidental, una muestra palpable (más) de la primacía de sus intereses económicos y políticos sobre la promoción de la democracia y de los derechos humanos” 34 *Revista de Derecho Comunitario Europeo* (2009), 823-864.

⁷⁵ See texts adopted by the EP, March 1989, Doc. A2-374/88 of 15 March, 1989. Since then, the EP has adopted a number of resolutions or declarations in the same line (see for instance the EP Resolution of 22 October 2013 on the situation of human rights in the Sahel region, P7_TA(2013)0431). See, more recently, Parliamentary questions, Answer given by High Representative/Vice-President Mogherini on behalf of the Commission, E-010478/2014 (2 March 2015), according to which “1. The EU is closely following developments in the Western Sahara and [...] supports the UN Secretary-General’s efforts to achieve a just, lasting and mutually acceptable political solution, which will provide for the self-determination of the people of Western Sahara [...]” (<http://www.europarl.europa.eu/sides/getAll-Answers.do?reference=E-2014-010478&language=EN>).

⁷⁶ EP Legislative Resolution on the proposal for a Council regulation on the conclusion of the Fisheries Partnership Agreement between the EU and the Kingdom of Morocco, P6 TA-PROV(2006)0201, 16 May 2006; see also Minutes of the Proceedings, Results of Roll-Call Votes, Annex, PE 373.293, 16 May 2006, <http://www.europarl.europa.eu/plenary/-/en/minutes.html?action=4&tabActif=tabResult#sidesForm>

⁷⁷ All the texts in the document of the Council of the EU, Draft Minutes. 2730th Meeting of the Council of the European Union (Agriculture and Fisheries) held in Brussels on 22 May 2006, PV/CONS 28 – AGRI 192 – PECHE 177, 4-5.

⁷⁸ Council of the EU, Press Release, 2730th Meeting, 22 May 2006, 18. See Milano, *cit.* (2006), 415.

careful approach, due to the will of maintaining good relations with Morocco (this is especially true for France and Spain).⁷⁹

The Legal Services concluded in its Legal Opinion of 20 February 2006 that the FPA did not exclude neither include water off Western Sahara,⁸⁰ so that it was up to Morocco to apply the agreement in conformity with international law and in conformity with its obligations towards Sahrawi people.⁸¹ Indeed, the Opinion made it clear, relying on 2002 Hans Corell Legal Opinion, that the “exploitation activities in Non-Self-Governing Territories violate the principles of international law if they disregard the interest and wishes of the people of Non-Self-Governing Territories”;⁸² consequently, “Morocco [...] is [...] under the obligation to comply with rights of the people of Western Sahara”.⁸³ It should be noted that the Legal Services of the EP here focused more on Morocco's obligations towards the people of Western Sahara, rather than on EU's obligations.⁸⁴

It has been recalled that the EP proposed some amendments to the FPA in a Report issued on 4 May 2006,⁸⁵ which was rejected by the Commission and ignored by the Council; in the end the 2007 FPA was approved without taking into consideration the amendments requested by the EP. The Commission, in particular, affirmed that

[t]he interpretation given by the UN legal adviser recognises the competence of Morocco to conclude these types of agreements and in this way implies that Morocco is a de facto administrative power of the territory of Western Sahara [...]. [T]he agreement itself already guarantees certain benefits for the local population.⁸⁶

However, the Commission here misinterpreted the 2002 UN Legal Opinion, since the FPA did not have the consent of the legitimate representative of Sahrawi people, Frente POLISARIO.

⁷⁹ J. Vaquer I Fanés, “The European Union and the Western Sahara Conflict: Managing the Colonial Heritage” in N. Casarini, C. Musu (eds.), *European Foreign Policy in an Evolving International System. The Road towards Convergence* (2007), 144 f.

⁸⁰ The Opinion concluded in the sense that “the agreement is [not], as such, contrary to the principles of international law. [...] It depends in how the agreement will be implemented” (2006 EP Legal Opinion, para. 42).

⁸¹ *Ibidem*, para. 45.

⁸² *Ibidem*, para. 40.

⁸³ *Ibidem*, para. 37.b.

⁸⁴ See Milano, *cit.* (2006), 437.

⁸⁵ *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*, PE 369.842v02-00, 4 May 2006. The Report was mandatory but not binding. See Soreta Licerias, *cit.*, 272-273.

⁸⁶ Intervention of J. Borg on behalf of the Commission in the EP Debate on the EC-Morocco Fisheries Partnership Agreement of 15 May 2006, <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+CRE+20060515-+ITEM-018+DOC+XML+V0//EN>.

Moreover, by referring to the “local populations”, the Commission was misleading. As a matter of fact, the term “population” is a demographical term, which refers to all people residing currently in Western Sahara, including Moroccan settlers, while excluding the Sahrawi refugees in Algeria and elsewhere. Instead, the term “people” should be used, since it is a political term associated with the political nature of the question.⁸⁷ The incorrect interpretation given by the Commission was highlighted also by the then Vice-Secretary General for Legal Affairs, Hans Corell in a public intervention in 2008:

I find it incomprehensible that the Commission could find any such support in the legal opinion, unless, of course, it had established that the people of Western Sahara had been consulted, had accepted the agreement, and the manner in which the profits from the activity were to benefit them. However, an examination of the agreement leads to a different conclusion.⁸⁸

The Legal Services of the EP issued another Legal Opinion on 13 July 2009, after the Council had disclosed information on the fisheries agreement also with regard to the fisheries zones off Western Sahara and after the enactment of the above mentioned *Law establishing the Maritime Zones of the Sahrawi Arab Democratic Republic* by SADR. This time, the EP Legal Service acknowledged that under 2007 Protocol EU-flagged vessels had fished in the waters off Western Sahara; denied that the declaration of independence of the Republic of Sahrawi on EEZ could have any legal effect (also given the status of NSGT under article 73 of the UN Charter); determined that there was lack of evidence of reporting benefits towards Western Sahara and that the EU should have called upon the Joint Committee to intervene so that the economic contribution of the EU could benefit Sahrawi people or should have stopped requesting fisheries licences or, again, should have suspended the agreement.⁸⁹ This Opinion, as already said, was quite decisive in the rejection by the EP of the 2011 Protocol.

Lastly, the Legal Service of the EP issued another Legal Opinion on 4 November 2013, where it re-affirms that the 2007 FPA and the following Protocols should be applied as to give a *benefit* to Sahrawi, according with international law obligations;⁹⁰ moreover, it re-states that Morocco is “responsible for the economic advancement of the territory of Western Sahara”, and that “by exploiting the waters off the coast of Western Sahara [...] Morocco is contributing

⁸⁷ Besides, Hans Corell’s Opinion, as well as the GA and Security Council resolutions refer to “the people of Western Sahara”, not the “populations of Western Sahara”.

⁸⁸ See Corell, *cit.*, 242 and also Milano, *cit.* (2014), 510 and Soreta Liceras, *cit.*, 273.

⁸⁹ SJ 0269/09 of 13 July 2009, paragraph 3.2. For a comment, see Milano, *cit.* (2014), 506.

⁹⁰ EP Legal Service, *Legal Opinion*, SJ 0665-133, 4 November 2013 (2013 EP Legal Opinion).

to the socio-economic advancement of those territories, within the meaning of Article 73(a) UN Charter”⁹¹, so that the “allocations and Union fishing activities have to benefit the population of Western Sahara”.⁹² The focus here is on the contribution to the economic development of NSGT; however, it should be recalled that it does not suffice that the people of NSGT *benefit* from the exploitation of its natural resources; they should also be *consulted*. This latter aspect has been indeed neglected by the EP Legal Service. This has instead been very clear, as already noticed, in the 2002 UN Legal Opinion, according to which,

where resource exploitation activities are conducted in Non-Self-Governing Territories for the benefit of the peoples of those 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.⁹³

It should be recalled that the 2013 Protocol was approved on 10 December 2013 by the EP, with 310 favor and 204 against; it was then adopted on 15 November 2013 by the Council by qualified majority.⁹⁴ Within the Council, The Netherlands abstained and expressly declared that

[t]he protocol does not explicitly refer to the Western Sahara, but allows for its application to maritime areas adjacent to the Western Sahara that are not under the sovereignty or jurisdiction of Morocco. [...] The Netherlands notes that the protocol does not contain any provisions ensuring that Moroccan authorities will use the amount paid for access to the resource in accordance with their obligations under international law owed to the people of the Western Sahara. [...] Compliance with international law will therefore depend on the implementation of the protocol by Moroccan authorities.⁹⁵

Also Finland abstained – and “emphasize[d] the need to take into account the interests and opinion of the people in Western Sahara”–,⁹⁶ as well as the UK, according to which “the protocol should [...] clarify Moroccan obligations, ensuring that the people of Western Sahara

⁹¹ *Ibidem*, para. 17.

⁹² *Ibidem*, para. 32.

⁹³ 2002 UN Legal Opinion, para. 22.

⁹⁴ See I. Katsarova, “EU-Morocco Fisheries Partnership Agreement” *Briefing of the European Parliamentary Service* (5 December 2013).

⁹⁵ For the relevant text see the Document of the Council, 15723/13/ADD 1/PECHE 505 of 14 November 2013, 6.

⁹⁶ *Ibidem*, 5.

would benefit from this protocol appropriately.”⁹⁷ Sweden and Denmark voted against. Sweden declared that “the changes made [to the 2013 Protocol] are insufficient to ensure that the obligations of international law are fulfilled in relation to the Sahrawi people in Western Sahara”,⁹⁸ while Denmark found “[i]t is imperative that international law is respected, including that the fisheries resources benefit the local population, including Western Sahara”. It is also worth recalling that Germany, Austria and Ireland required to the Commission, in a joint declaration, to “inform the Council comprehensively and regularly on the returns received by the West Saharan population as a result of the agreement”.⁹⁹

It remains to be seen how the new 2013 Protocol will be implemented by both Morocco and the EU; in this regard, the role of the Commission will be of paramount importance in reporting regularly on its application.

3.5. The compatibility of the new Protocol with international law: the (same) unresolved questions

As already seen, even though it includes an “humanitarian clause”¹⁰⁰ and reinforces the monitoring mechanism regarding the use of economic contribution by Morocco (following the 2009 Legal Opinion of the Legal Services of the EP), the 2013 Protocol still presents problems of compatibility with international law.¹⁰¹ Indeed, the Protocol does not refer to Western Sahara, nor to the Sahrawi people and the indication of the fisheries zone of Morocco is again quite ambiguous in not expressly excluding the waters off Western Sahara.¹⁰²

An agreement of this kind would have made a clear distinction of territories. In particular, three different solution could be envisaged: (1) the provision of two different legal regimes, one for Morocco and one for Western Sahara (the latter one, negotiated and agreed with Sahrawi people); (2) an *explicit exclusion* of the waters off Western Sahara in the agreement with Morocco or, again, (3) an *implicit exclusion* of the waters off Western Sahara when applying the agreement.

⁹⁷ *Ibidem*, 8.

⁹⁸ *Ibidem*, 7.

⁹⁹ *Ibidem*, 3. For the distinction between “population” as a demographical term and “people” as a political concept, see *supra* in the text.

¹⁰⁰ See article 1, para. 2 of the 2013 Protocol, according to which “[t]he Protocol is implemented in accordance with Article 1 of the Association Agreement on developing dialogue and cooperation and Article 2 of the same Agreement concerning the respect for democratic principles and fundamental human rights”.

¹⁰¹ Milano, *cit.* (2014), 507.

¹⁰² See Appendix 4 to the 2013 Protocol.

Also an official declaration by the EU of the exclusion of Western Sahara from the territorial application of the scope of the FPA could have been possible.¹⁰³

As already outlined, the 2013 Protocol does not respect the right of permanent sovereignty over natural resources of Sahrawi people, to the extent that they had not been consulted during the negotiation of the agreement. Indeed, Frente POLISARIO, the legitimate representative of the people of Western Sahara, has never given its consent for the conclusion of an international agreement by Morocco with third countries for the exploitation of natural resources; rather, it has often affirmed that no exploitation of Western Sahara natural resources may take place without its express authorisation.¹⁰⁴

The principle of permanent sovereignty over natural resources is an *erga omnes* right under international law; as a consequence, it is also up to the EU to respect such right. Indeed, the EU may not discharge its responsibility by saying that Morocco is the only responsible for the application of the agreement in accordance with international law, as the 2006 Legal Opinion of the EP seems to suggest; also the EU plays a role in the implementation of the agreement.

To be compatible with international law, the 2007 FPA and the subsequent Protocols (including the last 2013 Protocol) should have made it clear that they do not cover Western Sahara as a part of the territory of Morocco. Since they do not include such specification, but rather they are implemented as *implicitly* including the waters off the Western Sahara, they would be still compatible with international law only in the event they had been negotiated with the consent and to the benefit of the people of Western Sahara. However, Frente POLISARIO, the sole legitimate representative of Sahrawi people, had not been involved in the negotiation process; moreover, as also reported by the Legal Opinion of the EP Legal Services of 13 July 2009, there has been lack of evidence of reporting benefits towards Western Sahara.¹⁰⁵ In this regard, one could underline that the reporting system introduced in the 2013 Protocol is a positive sign.

¹⁰³ This has already been done in other international agreements; for example, in July 2004 Robert Zoellick, the United States Trade Representative, stated in reference to the recent Free Trade Agreement between the USA and Morocco that “[t]he Free Trade Agreement (FTA) will cover trade and investment in the territory of Morocco as recognised internationally and will not include Western Sahara” (As reported in the Statement by HE Emhamed Khadad, *cit.*).

¹⁰⁴ See Report of the UN Secretary-General on the situation concerning Western Sahara, UN Doc. S/2011/249, p. 4, para. 20; Letter dated 9 April 2009 from the Permanent Representative of Namibia to the UN on behalf of the Frente POLISARIO addressed to the Secretary-General, UN Doc. A/63/871-S/2009/198. For a comment, see M. Dawidowicz, “Trading Fish or Human Rights in Western Sahara? Self-determination, Non-recognition and the EC-Morocco Fisheries Agreement”, in D. French, *Statehood and Self-determination. Reconciling Tradition and Modernity in International Law* (Cambridge: Cambridge University Press, 2013), 271.

¹⁰⁵ SJ 0269/09 of 13 July 2009, paragraph 3.2.

Nevertheless, lacking the previous consent of Frente POLISARIO on the negotiation and conclusion of the Protocol, the only way the 2013 Protocol can be considered in accordance with international law is in the sense of an *implicit exclusion* of the waters off Western Sahara in its application.

4. The obligations of non-recognition of the EU under international law

Under general international law, third States are under an obligation not to recognize the illegal situation in the occupied territories.¹⁰⁶ This implies, in particular, that third States may not enter into treaty relations with an unlawful regime with regard to the territory in dispute.¹⁰⁷

The International Law Commission (ILC)'s Commentary to Articles 40 and 41 of the *Draft Articles on Responsibility of States for Internationally Wrongful Acts*¹⁰⁸ has stated that the duty of non-recognition

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.¹⁰⁹

In the *Namibia* Advisory Opinion the ICJ 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 the

¹⁰⁶ This is the application of the principle of non-recognition, which has been developed by the ICJ in its AO on *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* (I.C.J. Reports (1971) 16-66). After having determined that the continued presence of South Africa in the mandated territory of Namibia, following revocation of the mandate, was unlawful, the ICJ held that States were under an obligation not to recognize that unlawful situation *Legal Consequences for States of the Continued Presence of South Africa in Namibia* (*ibid.*, at 42-43, paras. 117-119). The obligation of non-recognition has been restated by the ICJ also in its *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, I.C.J. Reports, (2004) 136-203, at 199-200, para. 155-156 and 159.

¹⁰⁷ The ICJ set out the scope of the doctrine of non-recognition in the *Namibia Opinion*, *supra*, at 43-44, paras. 122-124.

¹⁰⁸ Article 40 of the ILC Draft Articles on State Responsibility: "1. This chapter applies to the international responsibility which is entailed by a serious breach by a State of an obligation arising under a peremptory norm of general international law. 2. A breach of such an obligation is serious if it involves a gross or systematic failure by the responsible State to fulfil the obligation"; article 41 of the ILC Draft Articles on State Responsibility: "1. States shall cooperate to bring to an end through lawful means any serious breach within the meaning of article 40. 2. No State shall recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation. 3. This article is without prejudice to the other consequences referred to in this Part and to such further consequences that a breach to which this chapter applies may entail under international law". The ILC Draft Articles on State Responsibility was adopted by the ILC at its fifty-third session, in 2001, and submitted to the UN GA as a part of the Commission's report covering the work of that session (A/56/10). The report, which also contains commentaries on the draft articles, appears in the *Yearbook of the International Law Commission* Vol. II, Part Two (2001), as corrected.

¹⁰⁹ J. Crawford (ed.), *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge: Cambridge University Press, 2002), 250.

occupied or annexed territory.¹¹⁰ According to article 42 of the *Draft Articles on the Responsibility of International Organizations* (DARIO), such obligation applies also to international organizations:

no State or international organization shall recognize as lawful a situation created by a serious breach [...] of an obligation arising under a peremptory norm of general international law] nor render aid or assistance in maintaining that situation.¹¹¹

Accordingly, 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 than States. This goes along with the fact that, as also restated by the European Court of Justice (ECJ),¹¹² the EU is bound to respect customary international law, as well as general international obligations.¹¹³ One should recall the *Kadi* case, where the ECJ restated that the EU “must respect international law in the exercise of its powers”, adding that “all [EU] acts must respect fundamental rights, that respect constituting a condition of their lawfulness which it is for the Court to review”.¹¹⁴ Furthermore, article 3 of the Treaty of the European Union (TEU) makes it clear that

[...] the Union [...] shall contribute [...] to the strict observance and the development of international law, including respect for the principles of the United Nations Charter.¹¹⁵

¹¹⁰ *Legal Consequences for States of the Continued Presence of South Africa in Namibia notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 21 June 1971, *ICJ Reports* 81971), 55.

¹¹¹ Article 42, para. 2 of the DARIO [adopted by the ILC at its sixty-third session, in 2011, and submitted to the UN GA as a part of the Commission’s report covering the work of that session (A/66/10). The report, which also contains commentaries to the draft articles (para. 88), appears in *Yearbook of the International Law Commission* Vol. II, Part Two (2011)].

¹¹² See in particular *Anklagemyndigheden v. Peter Michael Poulsen and Diva Navigation Corp.*, Case C-286/90, ECR I-6019 (1992), para. 9 (“the European Community must respect international law in the exercise of its powers”) and *Racke v Hauptzollamt Mainz*, Case C-162/96, ECR I-3655 (1998).

¹¹³ See E. Wouters, “Giving Effect to Customary International Law Through European Community Law” *Working Paper no. 25 – Institute for International Law, University of Leuven* (June 2002), 7-11 and E. Milano, “The doctrine(s) of non-recognition: theoretical underpinnings and policy implications in dealing with de-facto regimes”, *Paper presented at the 2nd ESIL Research Forum “The power of international law at times of European integration”*, Budapest (Hungary), 28-29 September 2007, 8, http://www.esil-sedi.eu/fichiers/en/Agora_Milano_060.pdf.

¹¹⁴ ECJ (Grand Chamber), *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities*, Joined Cases C-402/05 P and C-415/05 P, Judgment, 3 September 2008, ECR 2008 I-06351, para. 285.

¹¹⁵ Article 3, para. 5 of the TEU.

It follows that it is not only up to Moroccan authorities to respect the rights of Sahrawi people, but is it also an obligation of the EU deriving from international law to ensure that natural resources should be used in a manner so that to guarantee the interests of Sahrawi people (through consultation of the legitimate representatives of Sahrawi).¹¹⁶ Hence, if the 2007 FPA and the subsequent Protocols are applied so to allow fishing activities in the waters off Western Sahara, in that violating the principle of permanent sovereignty over natural resources of Sahrawi and *de facto* acknowledging (and supporting) the occupation by Morocco of the territory of Western Sahara, EU actions may be found in violation of its international obligation of non-recognition.

The same may be true also with regard to the support given to the 2007 FPA and its subsequent Protocols by member States within the Council.¹¹⁷ Indeed, one could make the point that member States may be held responsible for the breach of international obligations through their behavior within intergovernmental bodies, especially at the time of voting.¹¹⁸ To put it in another way, each and one member State should not be held responsible for the final decision undertaken by an international organizations (namely the Regulation adopted by the Council approving the 2007 FPA and its subsequent Protocols), rather for its conduct during the voting. Consequently, Sweden would not be held responsible, since it has always voted against; on the other hand, France, for instance, voted in favor of the agreement and its fishing fleet still benefits from it.¹¹⁹

Nevertheless, the application of the obligation of non-recognition entails an element of flexibility. Indeed, economic and other commercial or investment activities might be permitted to the extent that they do not serve to “entrench” authority over the territory; indeed, as the ICJ has stated, “the [obligation of] non-recognition [...] should not result in the depriving the people [...] of any advantages derived from inter-national co-operation”¹²⁰. This entails that the determination of the lawfulness of any behavior by international actors should be conducted on a case-by-case basis. In the case of Western Sahara, the EU (and its member States) would not

¹¹⁶ Milano, *cit.* (2014), 510.

¹¹⁷ Milano, *cit.* (2007), 10.

¹¹⁸ 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).

¹¹⁹ Milano, *cit.* (2006), 444.

¹²⁰ *Namibia Opinion, cit.*, paras. 125. A comprehensive theory of non-recognition can be better understood by relying on the principle of *ex iniuria ius non oritur*, which may create a presumption against any form of recognition of the illegal regime, save for the specific circumstances falling under the so-called “Namibia exception”. See E. Milano, “The Non-Recognition of Russia's Annexation of Crimea: Three Different Legal Approaches and One Unanswered Question” *1 Questions of International Law* (2014), 44.

be held responsible for breaching the obligation of non-recognition only in the event of a clear evidence that the 2007 FPA and its subsequent Protocols actually bring “advantages “ to the people of Western Sahara and that they had been consulted, which does not seem to be the case at hand.¹²¹

For this reason, the conclusion and application of the 2007 FPA and subsequent Protocols by the EU with Morocco seems in contrast with the general obligation of non-recognition;¹²² moreover, it is also inconsistent with the practice that the same EU has put in place in similar situations. One may recall the Association Agreement concluded with Israel, which is not applicable to the importation of goods from the Occupied Palestinian Territories¹²³ and the Association Agreement with Cyprus, which is not applicable to Northern Cyprus.¹²⁴

Therefore, the EU should re-negotiate with Morocco and amend the 2007 FPA and 2013 Protocol so to exclude the territory of Western Sahara from its application in order to conform with its duty of non-recognition. By failing to do so, the EU (together with its member States, at least those which had voted in favor of the adoption of the international agreement) will remain in violation of their duty of non-recognition.¹²⁵

5. Challenging the 2013 Protocol before the EU Court of First Instance: the state of play

¹²¹ Milano, *cit.* (2006), 446.

¹²² M. Dawidowicz, “Trading Fish or Human Rights in Western Sahara? Self-determination, Non-recognition and the EC-Morocco Fisheries Agreement”, in D. French, *Statehood and Self-determination. Reconciling Tradition and Modernity in International Law* (Cambridge: Cambridge University Press, 2013), 273.

¹²³ The EU concluded an Euro-Mediterranean Association Agreement with Israel, which was signed in Brussels on 20 November 1995. The Agreement was aimed at abolishing customs duties and quantitative restrictions between the parties (Article 8) and applies to the “territory of the State of Israel” (Article 83). The European Court of Justice has made it clear, in this respect, that this Agreement must be interpreted as meaning that products originating in the West Bank do not fall within the territorial scope of that agreement and do not therefore qualify for preferential treatment under that agreement (European Court of Justice (Fourth Chamber), *Firma Brita GmbH v Hauptzollamt Hamburg-Hafen*, Judgment, 25 February 2010, para. 53). Also several EU member States have maintained, in relation to Israel, that products manufactured in the occupied territories cannot be labeled as originating from the occupying power when exported to the EU. Moreover, the European Commission recently issued guidelines preventing any EU support in the form grants or aid to Israeli entities which operate in the occupied territories (See European Commission, *Guidelines on the eligibility of Israeli entities and their activities in the territories occupied by Israel since June 1967 for grants, prizes and financial instruments funded by the EU from 2014 onwards*, 2013/C 205/05, 19 July 2013. For a comment, E. Kontorovich, “Economic Dealings with Occupied Territories” 53 *Columbia Journal of Transnational Law* (2015), 594-595).

¹²⁴ ECJ, *The Queen v Minister of Agriculture, Fisheries and Food, ex parte S. P. Anastasiou (Pissouri) Ltd and others* (Anastasiou I), Case C-432/92, Judgment, 5 July 1994, ECR I-3087 (1994).

¹²⁵ See also S. Koury, “The European Community and Member States’ Duty of Non-Recognition under the EC-Morocco Association Agreement: State Responsibility and Customary International Law”, in K. Arts, P. Pinto Leite, *International Law and the Question of Western Sahara* (Leiden: The International Platform of Jurists for East Timor, 2007), 198.

The 2013 Protocol has been challenged by Frente POLISARIO before the CFI.¹²⁶ The action was filed under article 263 of the Treaty on the Functioning of the EU (TFEU) on 14 March 2014 against the Council Decision 2013/785/EU of 16 December 2013 on the conclusion of the 2013 Protocol. The case is still pending before the CFI.

Firstly, the applicant considers that, as the sole legitimate representative of the Sahrawi people, it is directly and individually affected by that act. More in particular, the applicant contests the breach of the principle of consultation, in that the Council had taken the decision without consulting the applicant, whereas international law requires that the exploitation of natural resources of the people of a NSGT be conducted in consultation with its representatives. Then, it is argued, the contested decision allows the entry into force of an international agreement which applies in the territory of the Western Sahara even though no member State has recognised the sovereignty of Morocco over those territories. Moreover, the decision would be contrary to the principle of permanent sovereignty over natural resources and of article 73 of the UN Charter, the applicant not having been consulted even though the contested decision permits the exploitation of natural resources in the territories of Western Sahara. In sum, the decision would engage the international responsibility of the EU.¹²⁷

Frente POLISARIO has started an action for annulment according to article 263 TFEU. Under article 263, para. 4 TFEU any natural or legal person may “institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures”.¹²⁸ With respect to the *locus standi* of Frente POLISARIO, as a non-privileged applicant,¹²⁹ there should be no obstacle to its claim, given that non-member States have filed actions for annulment before; moreover, the nationality of the applicant is irrelevant as far as the admissibility of the application is concerned.¹³⁰ As to the requirement that the act should be

¹²⁶ Court of First Instance, *Front POLISARIO v Council*, Case T-180/14. A first action for annulment under article 263 of the Treaty on the Functioning of the EU (TFEU) was filed by Frente POLISARIO on 19 November 2012 (Court of First Instance, *Front POLISARIO v Council*, Case T-512/12, filed on 19 November 2012), by which it challenges the Council Decision 2012/497/EU of 8 March 2012 approving the EU-Morocco Fisheries Partnership Agreement. The applicant is of the opinion that, as the representative of the Sahrawi people, it is directly and individually affected by those acts, which, among others, violated the right to self-determination of the Sahrawi people and the failure to respect the principle of consultation. See more in detail Legal Service of the Council, *Case before the General Court of the European Union: Case T-512/12 (Frente Popular de Liberación de Saguía-el-Hamra y Río de Oro (Front POLISARIO) v. Council of the European Union)*, 6771/13/JUR 96/RELEX 166/PESC 214/COMEM 43/CONOP 29, 22 February 2013.

¹²⁷ Action brought on 14 March 2014, *Front POLISARIO v Council*, Case T-180/14.

¹²⁸ Milano, *cit.* (2006), 451 and A. Steinbach, “The Western Sahara Dispute: a Case for the ECJ?” 18 *Columbia Journal of European Law* (2012), 420.

¹²⁹ See R. Geiger, D-E. Khan, M. Kotzur (eds.), *European Union Treaties* (Oxford: Beck-Hart, 2015), 879.

¹³⁰ See K. Lenaerts, D. Arts, I. Maselis, R. Bray (eds.), *Procedural Law of the European Union* (London: Sweet and Maxwell, 2006), 244 and G. Vidigal, “Trade Agreements, EU Law, and Occupied Territories – A Report on

“of direct and individual concern”, the European Court of Justice (ECJ) has confirmed in the *Inuit* case that

natural or legal persons satisfy the condition of individual concern only if the contested act affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons, and by virtue of these factors distinguishes them individually just as in the case of the person addressed [...]

[i]t is apparent, from the actual wording of the fourth paragraph of Article 263 TFEU and from settled case-law, that a natural or legal person is entitled to bring an action for annulment of an act which is not a decision addressed to that person only if the person is not only directly concerned by such an act but also individually concerned by it [...and only if] the[se] conditions [...] are cumulative.¹³¹

In the case at hand, the act in question should have a “direct and individual effect on the legal position” of Frente POLISARIO, and, in particular, it should be proved that the act produces legal effects which are of particular gravity for the applicants (comparing to the legal effects the same act produces to other persons to whom acts may apply).¹³² In general, an applicant is *individually* concerned where the act adversely affects the specific rights of the applicant;¹³³ moreover, the applicant may argue that, in adopting the legislative act under examination, the EU institutions were under a duty to take into account the specific circumstances at hand.¹³⁴ Finally, natural or legal persons may bring an action for annulment only in so far as they can establish that they have an interest, that is, that they will benefit from the annulment of the contested act.¹³⁵

POLISARIO v Council” EJIL:Talk! (1 July 2015), <http://www.ejiltalk.org/trade-agreements-eu-law-and-occupied-territories-a-report-on-POLISARIO-v-council>.

¹³¹ ECJ (Grand Chamber), *Inuit Tapiriit Kanatam et. al v. European Parliament and Council of the European Union*, Case C-583/11 P, Judgment, 3 October 2013, paras. 72 and 75-76. For a comment see, among others, Vidigal, *cit.*

¹³² See L. Daniele, *Diritto dell’Unione europea* (Milano: Giuffrè Editore, 4^oed. 2010), 307 and Vidigal, *cit.*

¹³³ See, among others, the following cases before the ECJ: *Codorniu v Council*, Case C-309/89, ECR I-1853 (1994), *Asocarne v Council*, Case C-10/95, Order, 23 November 1995, ECR I-4149 (1995) and Court of First Instance, *Confiserie du TECH and Biscuiterie Confiserie Lor v Commission*, Order, 26 March 1999, ECR II-913 (1999).

¹³⁴ See, among others, the following cases before the ECJ: *Piraiki-Patraiki v Commission*, Case C-11/82, ECR 207 (1985), *P. Buralux and Others v Council*, Case C-209/94, ECR I-615 (1996) and *Sofrimport v Commission*, Case C-152/88, ECR I-2477 (1990). For a comment, Lenaerts, Arts, Maselis, Bray, *cit.*, 258.

¹³⁵ See, among others, the following cases before the ECJ: *Europe Chemi-Con v Council*, Case T-89/00, ECR II-3651 (2002), para. 35 and *ATM v Commission*, Case T-184/94, ECR II-2529 (1997), paras. 62-63. For a comment, see Lenaerts, Arts, Maselis, Bray, *cit.*, 280-281.

In the case at hand, Frente POLISARIO should prove that the 2013 Protocol was concluded without its expressed consent – an essential requirement for the agreement to be valid under international law and in conformity with the principle of permanent sovereignty over natural resources – a circumstance which for sure EU institutions should have taken into consideration when adopting the legislative act at hand. It is also apparent that Frente POLISARIO would benefit from the annulment of the Protocol; without the Protocol, there would be any (other) legal grounds for Morocco to issue fishing licenses to EU vessels with regard to waters off the Western Sahara. In particular, the burden of proof that the 2013 Protocol has been implemented in the sense of *implicitly* including the waters off Western Sahara in its scope of application seems to be the most difficult task for Frente POLISARIO.

One of the judges has raised an interesting possibility:¹³⁶ rather than annulling the act, the Court could interpret the Protocol as featuring a provision similar to the one now obligatory for the EU in agreements with Israel, refusing preferential access to goods originating from the West Bank.¹³⁷

6. Some concluding remarks

The Chapter has shown the contradictory attitude of the EU towards the Western Sahara question: while the EP has several times acknowledged the right to self-determination of Sahrawi people and openly criticized Morocco's illegal occupation, the Council has adopted

¹³⁶ As reported by Geraldo Vidigal on EJIL:Talk!, *cit.*

¹³⁷ The West Bank exclusion was confirmed in the CJEU's 2010 Brita judgment (on which *supra*). Some scholars affirm also the possibility of a damage action before the ECJ. According to article 340 of the TFEU, the EU "shall, in accordance with the general principles common to the laws of the Member states, make good any damages caused by institutions". All natural and legal persons alleging to have suffered harm and be entitled to damages may submit a damage claim (see the case-law on this point, in particular *Birra Wührer SpA and Other v. Council*, Joined Cases 256, 257, 265 and 267/80, 5 and 51/81 and 282/82, ECR 789 (1987)), without any limitations on the nationality of the applicant. This means that Frente POLISARIO could well bring an action of this kind. According to well-established case law, the conditions for claiming damages require the applicant to prove that: (1) a breach of a rule conferring rights upon individuals by an EU institution has occurred (in the case of Western Sahara, we can affirm that the EU has acted inconsistently with the right to self-determination by violating its legal obligation to respect the Sahrawis' permanent sovereignty over their natural resources); (2) that breach has caused actual damage, and; (3) there exist of a causal link between the conduct and the alleged damage. The Court confirmed in *Odigitria v. Council* (Case T-572/93 of 1995) that these conditions also apply for determining EU liability in the field of external relations (*ibidem*, 2045). In the latter case, the claimants alleged that they incurred damage under a fishery agreement between the EU, Guinea-Bissau, and Senegal. While the Court ultimately rejected the claim due to a lack of a sufficiently serious breach of EU law, this precedent can be read as suggesting that the Court will generally admit an action claiming damages incurred following the conclusion of an international agreement. It is difficult to predict what would be the assessment by the ECJ in case of a claim of this kind, even though there are good reasons to believe, at least in principle, that this could be a successful judicial remedy in the hands of the POLISARIO. For a general overview on the requirements of the action for damages, see, among others, Lenaerts, Arts, Maselis, Bray, *cit.*, 369 f. and Geiger, Khan, Kotzur, *cit.*, 1024 and Daniele, *cit.*, 322. For the possibility for Frente POLISARIO to file an application for an action for damages see more in detail A. Steinbach, "The Western Sahara Dispute: a Case for the ECJ?" 18 *Columbia Journal of European Law* (2012), 423-439.

Regulations (even though some member States have openly criticised their compatibility with international law) enacting international agreements with Morocco which, in their implementation, have a detrimental effect to the right of permanent sovereignty of the Sahrawi people.¹³⁸

As it has been shown, even though 2007 FPA and the following Protocols are not *per se* contrary to international law, their interpretation and practice of implementation has evolved as to include also Western Sahara in the scope of their application; in this way, they have proven to be in breach of international law obligations, namely the right of permanent sovereignty of Sahrawi people and the obligation of non-recognition (on the side of the EU and the member States which had voted in favor of the adoption of the 2007 FPA and subsequent Protocols).

SADR and Frente POLISARIO continue to harshly criticise the fisheries agreements between EU and Morocco, as reported, among others, in the 2014 UN Report of the Secretary-General;¹³⁹ recently, as already seen, Frente POLISARIO has started an action for the annulment of the 2013 Protocol before the CFI.

One should also take note of the recent Legal Opinion released by the African Union on “[T]he Illegality of the Exploitation or Exploration of the Natural Resources of Western Sahara by Morocco as Occupying Force and any Other Entity, Company or Group”¹⁴⁰, which states very clearly that

Morocco has no right to explore and exploit any natural resources, renewable or non-renewable located in the occupied territories of Western Sahara or to enter into agreements /contracts with third parties concerning these resources. [...] Agreements entered into by Morocco should be limited exclusively to its territory internationally recognized under its sovereignty (which does not include Western Sahara); [...] Accordingly, the people of Western Sahara and their legitimate representatives must not only be consulted but they must consent and effectively participate in

¹³⁸ U.B. Yildiz, “The European Union’s Position in the Western Sahara Conflict: a Barrier to Mediterranean Cooperation” 21 *Marmara Journal of European Studies* (2013), 47.

¹³⁹ Report of the Secretary-General on the situation concerning Western Sahara, S/2014/258, 10 April 2014, para. 11 (“The Secretary-General of Frente POLISARIO wrote to me repeatedly to condemn Morocco’s exploitation of the Territory’s resources and publicly announced his intention to consider a possible judicial appeal against the agreement. The agreement was also the subject of some [...] demonstrations”). See also “Sahrawis continue to denounce the EU-Moroccan Fisheries Agreement” *Sahara Press Service* (15 July 2015), <http://www.spsrasd.info/en-/content/Sahrawis-continue-denounce-eu-moroccan-fisheries-agreement>.

¹⁴⁰ Legal Opinion by the African Union of 3 September 2015, reported in *Sahara Press Service* (3 September 2015), <http://www.spsrasd.info/en/content/au-legal-opinion-any-exploration-and-exploitation-natural-resources-western-sahara-morocco-i> (“AU Legal Opinion: Any Exploration and Exploitation of Natural Resources in Western Sahara by Morocco is Illegal”).

reaching any agreement that involves the exploitation of natural resources in the territory of Western Sahara.¹⁴¹

The hope is that the EU will apply the new 2013 Protocol in a way not to require fisheries licenses for waters off Western Sahara, thus *implicitly* excluding the territory of Western Sahara from the application of the Protocol (or excluding it by way of an official declaration) or that, at least, it will suspend the agreement when verifying that Morocco is breaching its international obligations.¹⁴²

¹⁴¹ Legal Opinion by the African Union of 3 September 2015, paras. 68 and 69 a) and c).

¹⁴² Milano, *cit.* (2006), 457.