Note for the attention of Mr. Josep BORRELL FONTELLES,
Chair of the Committee on Development
(c/o Mr. Michael WOOD, Committee Secretariat)

Re. Fisheries Partnership Agreement between the European Community and the Kingdom of Morocco – Declaration by the Saharawi Arab Democratic Republic (SADR) of 21 January 2009 of jurisdiction over an Exclusive Economic Zone of 200 nautical miles off the Western Sahara- Catches taken by EU-flagged vessels fishing in the waters off the Western Sahara.

By letter dated 6 May 2009, received by the Legal Service on 7 May 2009, you requested a legal opinion on the legal consequences for the Fisheries Partnership (FPA) between the European Community and the Kingdom of Morocco of the declaration by the Saharawi Arab Democratic Republic (SADR) of 21 January 2009 of jurisdiction over an Exclusive Economic Zone of 200 nautical miles off the Western Sahara.

In light of the above, the Legal Service answers the two questions as follows:

“As for the declaration of jurisdiction over an EEZ of 200 nautical miles off the Western Sahara by SADR

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

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

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

3. In its previous legal opinion of 20 February 2006, the Legal Service noted that, failing a clear delimitation in the FPA of the fishing zones in which EU vessels were entitled to fish, it could not be excluded that Community vessels would operate in the waters off Western Sahara. The Legal Service considered however that it was not possible at that time to prejudge how the FPA would be implemented. The Legal Service observed that if it could not be said that the FPA is, as such, contrary to the principles of international law, the implementation of the FPA would determine if the principles of international law concerning the rights of the people of Western Sahara will or will not be complied with.
4. More than two years after the entry into force of the FPA (28 February 2007) a first assessment of the implementation of the FPA can now be done, especially with regard to the implementation of the sectoral fisheries policy referred to in Article 7(1)(b) of the Agreement and in Articles 6 and 7 of the Protocol. The matrix of objectives/results of the sectoral fisheries policy identifies both global and specific objectives and lists the actions programmed to attain those objectives over the period of application of the agreement.

5. One has to note from the outset that this matrix does not contain specific actions explicitly foreseen with a view to benefit the population of Western Sahara. It is true that some actions foreseen in the matrix target port towns situated in the territory of Western Sahara, such as Laayoune, Dakhla and Boujdour. However, it is not demonstrated that the EC financial contribution is used for the benefit of the people of Western Sahara. Yet, compliance with international law requires that economic activities related to the natural resources of a Non-Self-Governing Territory are carried out for the benefit of the people of such Territory, and in accordance with their wishes.

6. The actions mentioned in the matrix essentially aim at improving the infrastructure of the ports of Western Sahara. This is not necessarily equal to benefiting the people of Western Sahara insofar as they are not mentioned in the programming document and it is not known whether and to what extent they are able to take advantage of such improvements.

7. The Legal Service is not in a position to establish the facts on the ground and to conclude that the abovementioned actions targeting ports of Western Sahara actually benefit the population of Western Sahara. This assessment needs to be done in concrete terms on the basis of all relevant information, and the Joint Committee established in the FPA has a role to play in this context.

8. On the basis of the elements that are currently available (catches by EU flagged vessels in the waters of Western Sahara, lack of evidence in the annual and multiannual programming that the exploitation of fisheries resources in Western Sahara actually benefits the Saharawi people) it is strongly recommendable that the next annual meeting or a special meeting of the Joint Committee addresses these issues with a view to find an amicable settlement, fully respecting the rights of the Saharawi people under international law. If such an amicable settlement could not be found, the Community should envisage either the suspension of the agreement in conformity with its Article 15 and Article 9 of the Protocol, or to apply the agreement in such a way that EU flagged vessels are excluded from the exploitation of the waters of Western Sahara.

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

The Legal Service remains at your disposal for any further information you may require.

By delegation of the Jurisconsult
Johann SCHOO