REPORT ON LEGAL ISSUES INVOLVED IN THE WESTERN SAHARA DISPUTE: USE OF NATURAL RESOURCES

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ABSTRACT

The present report, issued by the Association of the Bar of the City of New York (the "Association") and prepared by the Association's United Nations Committee, examines the legal issues involved in the use by Morocco of the natural resources within the territory of Western Sahara. The report is the result of more than 16 months of research, fact gathering and analysis. While acknowledging the well-known dispute as to the legal status of Morocco's presence within Western Sahara, the report concludes that assuming the legal status most favorable to the Moroccan position – that is, treating Morocco as an administering power in the territory – to the extent Morocco is using natural resources located within the territory of Western Sahara, unless such use is in consultation with and to the direct benefit of the people of Western Sahara, Morocco's use of the natural resources of the territory constitutes a violation of international law.

I. INTRODUCTION

Western Sahara, known as Spanish Sahara when it was a colony of Spain, is a territory roughly the size of Colorado situated between Morocco to the north, Mauritania to the south, and Algeria to the east. It is mostly desert, and was, until the very recent past, the ancestral home of nomadic tribes. For more than thirty years the process of Western Sahara's decolonization has raised serious implications for the application of principles of international law and United States policy.

Since the mid-1970s sovereignty over the territory has been in dispute. The 1950s and '60s had seen the independence from colonial rule of most of the states of northwest Africa: first, Morocco in 1956; then Mauritania in 1960; and finally Algeria in 1962. By 1970 Western Sahara remained the only colony left in the region, and both the United Nations and the Organization of African Unity (now the African Union) began to exert considerable pressure on Spain to withdraw from the territory and permit the people native to the Western Sahara (often referred to as "People of the Western Sahara or "Sahrawis"), to determine their political future

through a referendum. Spain assented to international pressures in 1974, when it conducted a census of the population and began to formulate plans for such a referendum.[1] However, Morocco and Mauritania—which had asserted claims to the territory based upon alleged ties between the inhabitants of the region and their countries prior to the Spanish colonization—requested that the international community postpone the referendum while Morocco and Mauritania had their claims adjudicated by the International Court of Justice ("ICJ").[2]

In 1975 the ICJ issued an Advisory Opinion denying the claims of Morocco and Mauritania and affirming the right of the Sahrawis to self determination under international law.[3] Within days following the issuance of the ICJ opinion, 350,000 Moroccan civilians, organized by

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[1] Spain announced its intentions to the United Nations in a letter dated 20 August 1974 from the Permanent Representative of Spain to the United Nations to the Secretary General, UN Document A/9714.

[2] Morocco and Mauritania first persuaded the members of the Fourth Committee of the UN General Assembly to request the postponement of the referendum. The General Assembly acceded to this request in Resolution 3292 (XXIX), 29 GAOR Supp. 31, at 103-104, UN Doc. A/9631 (1974). The questions it requested to be presented to the International Court of Justice were:

I. Was Western Sahara (Rio de Oro and Sakiet El Hamra) at the time of colonization by Spain a territory belonging to no one (*terra nullius*)?

II. If the answer to the first question is in the negative, what were the legal ties between this territory and the Kingdom of Morocco and the Mauritanian entity?

[3] After an examination of evidence of political, military, religious, and economic ties between the claimants and the inhabitants of the territory before Spain's arrival, the ICJ judges found that "the information before the Court does not support Morocco's claim to have exercised territorial sovereignty over Western Sahara." Advisory Opinion on Western Sahara (1975) (hereinafter "ICJ Opinion"), International Court of Justice Reports, at 48.

The Court explained that while the evidence showed that the Sultan exercised "some authority" over "some, but only some," of the nomadic tribes of the region, it "does not establish any tie of territorial sovereignty between Western Sahara and that State. It does not show that Morocco displayed effective and exclusive State activity in the Western Sahara." ICJ Opinion at 49. The Court's response to Mauritania's claim was virtually the same. ICJ Opinion at 68. The Court concluded that it had not found legal ties of such a nature "as might affect the application of resolution 1514(XV) in the decolonization of Western Sahara and, in particular, of the principle of self determination through the free and genuine expression of the will of the peoples of the Territory…." ICJ Opinion at 60.

the Moroccan government, crossed the borders into Western Sahara in a show of support for Morocco's position.[4] At around this time, Spain entered into an agreement with Morocco and Mauritania, known as the Madrid Accords, which purported to authorize Spain's withdrawal from the territory and permit its occupation by Morocco and Mauritania.[5]

Following the Madrid Accords, in late 1975, Moroccan and Mauritanian forces entered Western Sahara, setting off a war with Sahrawi led by an independence movement called the Polisario. The war further led to a mass exodus of a majority of the Sahrawi civilian population to refugee camps in Algeria,[6] where they remain to this day.

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4 King Hassan II of Morocco indicated that he would organize a march of civilians in a letter from the Permanent Representative of Morocco to the United Nations addressed to the President of the Security Council dated October 18, 1975. UN Doc. S/11852 (1975). On November 6, 1975, the Moroccan march, later called the "Green March" after the holy color of Islam, crossed the frontier.

That same day Morocco informed Spain that the March into Western Sahara would continue unless Spain agreed to bilateral negotiations concerning a transfer of sovereignty over Western Sahara to Morocco. 30 U.N. SCOR, Supp. (Oct.-Dec. 1975), U.N. Doc. S/11871 (1975); *see also,* R. Vance, *Recognition as an Affirmative Step in the Decolonization Process: The Case of Western Sahara,* 7 Yale J. World Pub. Ord. (1980-1981) 45 at 58.

5 On November 14 the governments of Morocco, Mauritania and Spain issued a joint communiqué notifying the world of certain agreements reached as a result of negotiations on the Western Sahara issue. The precise terms of the Madrid Accords remained secret. What was made public was a "declaration of principles" which stated that Spain would withdraw from Western Sahara by the end of February 1976 and in the meantime it would institute a "temporary" administration in the Territory in which Morocco, Mauritania and the Djemaa (a council of Sahrawi elders) would also participate. No mention was made of what would transpire after this "temporary" period and there was no reference to a referendum. *See* T. Hodges "Western Sahara: The Roots of a Desert War" (Lawrence Hill & Co. 1983), at 223. According to a noted law professor Spain agreed to a decolonization formula that allowed the Sahara to be partitioned in the way previously agreed between Morocco and Mauritania and the referendum "would be quietly buried." *See* T. Franck, *The Stealing of the Sahara*, 70 AJIL 694 (1976), at 715.

6 Although it is difficult to estimate precisely the number of Sahrawis who had fled the territory in 1975-76, according to an article in *The Times* (London), April 2, 1976, at 7, some 60,000 Sahrawis had by that time become refugees. *See* T. Franck, *supra*, note 5,at 695. Since the census conducted by the Spanish in 1974 only counted 73,497 Sahrawis, this would have constituted the majority of the civilian population. Spanish journalists in El Ayoun were reporting that by the end of February, 1976, barely more than one-fifth of the 29,000 who had

The war between the Polisario, Morocco and Mauritania dragged on for several years. Finally, in 1979, Mauritania agreed to withdraw from the territory and renounce its claims. The Polisario, which by that time controlled more than one third of the territory, was able to direct its full force against Moroccan troops both within Western Sahara and in Morocco itself. Morocco, aided by the United States[7] and France, stemmed the Polsario's advances somewhat but was not able to win a decisive battle against them. In 1988, the war between the Polisario and Morocco reached a stalemate. Later that year the United Nations and the OAU persuaded the parties to agree to a cease-fire and a plan, known as the Settlement Plan, under whose terms the issue of sovereignty over the territory would be settled by a referendum. Inhabitants of the region that were reflected in the census conducted by the Spanish in 1974 would be able to choose between integration into Morocco and independence.[8]

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been registered there during the 1974 census had remained and that the other Sahrawi towns were starting to "look like ghost towns." The International Red Cross and the League of Red Cross societies announced in Geneva that 40,000 Saharawi's had fled their homes. When the Algerian government presented a memorandum on relief needs to the executive committee of the UNHCR in 1978 it reported that 50,000 Saharawi refugees had settled in its territory in 11 scattered camps. *See* T. Hodges, *supra*, note 5, at 232-233.

7 Between 1975 and 1988 the United States provided to Morocco more than $1 billion in arms, in addition to $1.3 billion in security and economic assistance programs. U.N. General Assembly, Special Committee Records, 1337th Meeting, August 9, 1988, pp. 2-16, report from John Zindar, Center for Defense Information. According to Hodges, President Carter's arms agreements with Morocco in 1979 and 1980 were twenty times what they had been in 1978. Although Carter had restricted the use of such weapons in Western Sahara, this restriction was removed by Ronald Reagan when he took office. Shortly after taking office in 1981 Reagan announced additional arms sales to Morocco worth $182 million, as well as the lifting of the restrictions placed by Carter on the delivery of some other goods. *See* T. Hodges, *supra*, note 5, at 358-9.

8 On August 11, 1998 the Secretary General of the UN and a representative of the President of the OAU presented an outline of a plan to both parties, which was accepted in principle by both parties on August 30, 1988.

On June 18, 1990 the Secretary General issued a report outlining further details of the Settlement Plan agreed with the parties. S/21360/1990 (18 June 1990). The Report of the Secretary General confirmed the agreement in principle of the parties that the future of the territory would be

Despite pressure from the international community, the Settlement Plan was never fully implemented. After years of haggling over the details of the Plan—in particular the eligibility criteria and the process of identifying potential voters—and despite the publication in 1999 of a provisional voters' list,[9] the process came to a halt. Morocco declared that it was unwilling to proceed with any referendum that offered the option of independence.[10] Instead, Morocco proposed a "negotiated" solution under which it would offer to integrate Western Sahara into Morocco as an "autonomous region."[11]

In April 2007, the UN Security Council issued a resolution that supported the concept of negotiations,[12] and since that time, Morocco and the Polisario have been engaging in direct talks under the auspices of the United Nations for the purpose of discussing such a solution. However,

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determined by a referendum conducted under the auspices of the United Nations and the OAU, in which the indigenous population, defined as "all Sahrawis included on the Spanish census of 1974 eighteen years of age or older" would be allowed to vote. *Id*. at 5. The terms of the Settlement Plan were further delineated in the next Report of the Secretary General, issued on April 19, 1991, S/22464/1991 (April 19, 1991), again confirming the parties' agreement in principle to a referendum in which all Sahrawis listed on the Spanish census who were 18 years or older would be allowed to vote between independence and integration with Morocco. Later the parties agreed to expand the criteria for eligibility to include close members of the family of those on the Spanish census and certain others. On April 29, 1991 the Security Council, in resolution 690, approved the Settlement Plan, established MINURSO, and established an estimated time table for the transitional period preceding the referendum, which was expected to last no more than 20 weeks. On September 6, 1991 the cease fire went into effect.

9 S/2000/131 (17 February 2000).

10 On April 15, 2004 Morocco delivered its final response to the Settlement Plan, indicating that it would only agree to a plan that provided for "autonomy within the framework of Moroccan sovereignty," that is, a plan which ruled out once and for all the option of independence for the territory. In his General Report in April of 2004 UN Secretary General Kofi Anan confirmed that "Morocco does not accept the Settlement Plan to which it had agreed for many years…. It accepts nothing but negotiations about the autonomy of Western Sahara 'in the framework of Moroccan sovereignty.'" UN Doc. S/2004/325.

11 The *Moroccan Initiative for Negotiating an Autonomy Statute for the Sahara Region,* April 11, 2007.

12 S/RES/1754, 30 April 2007.

these talks are at an impasse[13] since the Moroccans are willing to discuss only a plan for an autonomous region whereas the Polisario are unwilling to discuss any solution that did not permit the Sahrawi the option of choosing independence for the territory.

Throughout these discussions and its more than 35 years in Western Sahara, Morocco has been in control of the natural resources of the territory—abundant fisheries, phosphates and possibly oil. A significant portion of the Sahrawi population, however, remains in refugee camps in Algeria.

Two years ago the United Nations Committee of the Association of the Bar of the City of New York began a study of the legal issues involved in the dispute over Western Sahara in order to give United States policy makers some guidance on these issues when framing their policies towards the dispute. This report addresses whether Morocco has a right under international law to utilize the natural resources of Western Sahara pending a resolution of sovereignty over the territory, and if so, what are the contours of this right under international law.

The report will be referring to "Sahrawi Arab Democratic Republic" or the abbreviated form "SADR". The Polisario Front, the independence movement and political organization consisting of People of the Western Sahara who have advocated for the independence of Western Sahara since the Spanish occupation of the territory and whom the United Nations recognized as the representative of the people of the Western Sahara in 1979[14], formed what it has identified as a government in-exile called the Sahrawi Arab Democratic Republic headquartered in Tindouf,

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[13] A lack of progress in these talks is reflected in all the reports of the Secretary General since 2008. *See, e.g.*, Report of the Secretary General, S/2010/175, issued in 2010, at 4 ("It was clear to my Personal Envoy that the fundamental and, to date, non-negotiable difference between the two parties lies in the issue of self-determination. The Frente Polisario, with the support of Algeria, insists on a referendum with multiple options, including independence, while Morocco insists on a negotiated autonomy regime and a referendum of confirmation with one option.").

[14] *See* G.A. Res. 34/37, 34 U.S. GAOR, Supp. (No. 46) 203, U.N. Doc. A/34/46 (1979).

Algeria. The United Nations, the United States and the League of Arab States, do not consider SADR to be the government of an independent state, however it is a member of the African Union and has been recognized by approximately one-third of the world's countries. The report's use of Sahrawi Arab Democratic Republic or SADR does not reflect any position on the part of the Association of the Bar of the City of New York on whether or not this entity is the government of an independent state.

II. LEGAL STATUS OF MOROCCO'S USE OF THE NATURAL RESOURCES OF WESTERN SAHARA

A. Factual Background

When Morocco entered Western Sahara in the 1970s, the major resources being exploited in the territory were the phosphate reserves in the Bou Craa mines[15] and the fisheries contained in Western Sahara's coastal waters.[16] More recently, commercial interests in the region have also focused on oil exploration in the waters off the coast of Western Sahara. A summary of the

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15 Morocco is the single largest exporter of phosphates (used primarily in fertilizers) in the world, and Western Sahara contains large phosphate deposits, most notably at Bou Craa. According to the United Nations Environment Programme (UNEP), Morocco jointly operates the mine with Spanish interests. While the mine amounts to only two or three per cent of Morocco's phosphate production, the reserves are valuable because of the uranium that can be extracted from them (http://www.na.unep.net/atlas/webatlas.php?id=369, accessed May 16, 2010). Reports indicate that two American fertilizer companies may have received up to one-third of all the phosphates extracted from the Bou Craa mines (C. Wilson, *Foreign Companies Plundering Western Sahara Resources: Who is Involved and What is Being Done to Stop This?*, International Law and the Question of Western Sahara, The Hague, 2006 at 270).

16 U.S. Geological Survey, *2008 Minerals Yearbook: Morocco and Western Sahara [Advance Release]*, February 2010 at 5 (http://minerals.usgs.gov/minerals/pubs/country/2008/myb3-2008-mo-wi.pdf, accessed May 16, 2010).

facts pertaining to the legal issues surrounding Morocco's use of the natural resources of Western Sahara is set forth below.[17]

1. Oil and Gas Resources

a. Oil Exploration in Western Sahara's Waters

Western Sahara's territory and coastal region sit primarily on the Aaiun Basin, a sedimentary basin that extends for almost 1100km from northern Mauritania, north through Western Sahara into southern Morocco.[18] The Aaiun Basin consists of two discrete sub-basins: the Boujdour sub-basin to the north, and the Dakhla sub-basin to the south. (See Figure 1.1.) According to representatives of the government of the Sahrawi Arab Democratic Republic ("SADR"), all the key elements—reservoir, source, seal and trap—necessary for the successful exploration and exploitation of oil and gas resources are present within certain regions of the Aaiun Basin, which is believed to be one of the last frontier sedimentary basins remaining in Africa.[19] Although the amount of oil and gas contained in the Aaiun Basin is not known, it is believed to be vast, making its potential value great in a world of increasing competition for ever dwindling energy resources.

Figure 1.1

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17 The Committee's conclusions are based on its understandings from publicly available documentary evidence. The Committee is mindful that it is not in a position to make factual findings as to the situation in the territory of Western Sahara as it has not conducted any first-hand investigation into the facts addressed in this report. Nevertheless, there is significant, independent documentary evidence of the activities detailed in this report. In drafting this report the Committee has relied on these independent sources, as well as on interviews with representatives of both sides of this issue.

18 Sahrawi Arab Democratic Republic Oil and Gas Exploration, Geological Summary (http://sadroilandgas.com/geosum.htm, accessed on November 28, 2010).

19 *Id.*

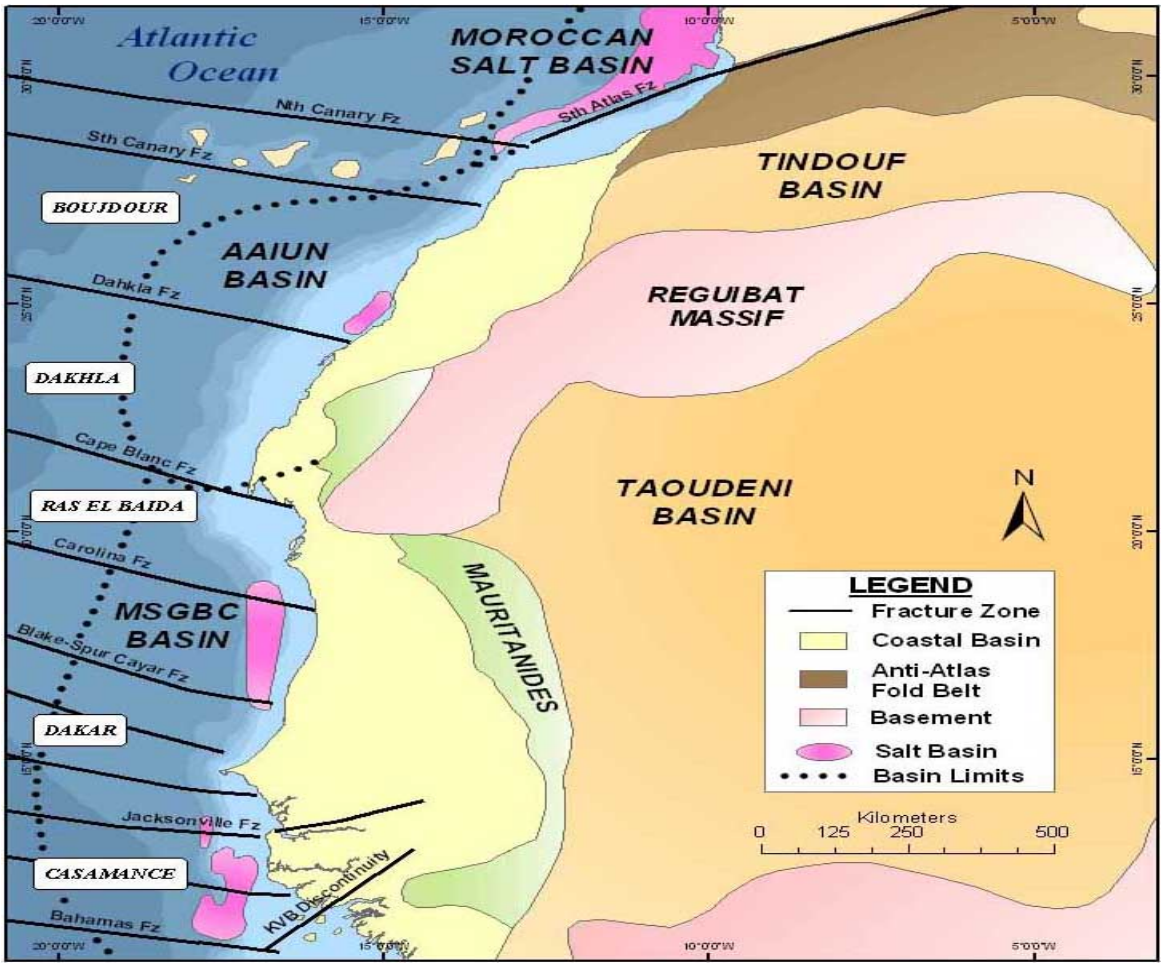

Image source: http://www.sadroilandgas.com/images/WebsiteMapRegionalBasins.jpg

b. Activities by Morocco and International Business Interests

In October 2001, the Moroccan state oil company, ONHYM,[20] entered into agreements with an American company, the Kerr-McGee Corporation[21] ("Kerr-McGee"), and a French company, TotalFinaElf S.A. ("TotalFinaElf"), to engage in pre-exploration activities in the oil reserves off the coast of Western Sahara.[22] The agreement with Kerr-McGee would have

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20 Office National des Hydrocarbures et des Mines (http://www.onhym.com).

21 In 2006, the Kerr-McGee Corporation was purchased by the Houston-based Anadarko Petroleum Corporation.

22 BBC News Online, Oil: Western Sahara's Future, March 4, 2003 (http://news.bbc.co.uk/2/hi/business/2758829.stm, accessed on May 16, 2010); Petroleum Exploration Society of Australia, Fusion provides 200,000 km^2 study for new African

allowed the company to explore approximately 110,000 square kilometers of deep water off the coast of Western Sahara, while the agreement with TotalFinaElf was for exploration of a 115,000 square kilometer area off the coast of the Dakhla region.

At the request of the UN Security Council, Hans Corell, UN Legal Counsel and Under-Secretary-General for Legal Affairs, conducted a legal analysis of the agreements that resulted in an Advisory Opinion, dated February 12, 2002, on the legality of the October 2001 exploration contracts under international law (the "Corell Opinion").[23] In conducting his analysis Corell did not address the issue of whether Morocco should be considered an "occupying" or "administering" power under international law. Rather, he analyzed the issue under the assumption that Morocco possessed the most expansive rights possible under the circumstances. The Corell Opinion concluded that

> [. . .] the contracts for oil reconnaissance and evaluation do not entail exploitation or the physical removal of the mineral resources, and no benefits have as of yet accrued. The conclusion is, therefore, that, while the specific contracts which are the subject of the Security Council's request are not in themselves illegal, if further exploration and exploitation activities were to proceed in disregard of the interests and wishes of the people of Western Sahara, they would be in violation of the principles of international law applicable to mineral resource activities in Non-Self-Governing Territories.[24]

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acreage chance, April/May 2003, at 5-6 (http://www.pesa.com.au/publications/pesa_news/april_03/sahara.htm, accessed on May 13, 2010).

23 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, dated February 12, 2002.

24 *Id*. at ¶ 25.

The principles of law outlined by the Corell Opinion have been supported by the General Assembly in a number of resolutions, most recently A/RES/61/123, of December 14, 2006 in which *inter alia*, the General Assembly stated that it:

> "1. *Reaffirms* the right of peoples of Non-Self-Governing Territories to self determination … as well as their right to the enjoyment of their natural resources and their right to dispose of those resources in their best interest;
>
> 2. *Affirms* the value of foreign economic investment undertaken in collaboration with the peoples of the Non-Self-Governing Territories and in accordance with their wishes…."

Following the release of the Corell Opinion, both Kerr-McGee and Total S.A. (successor to TotalFinaElf) engaged in research and evaluation work in the territory, including geological and geophysical studies.[25] However, as reported in the press, both companies eventually abandoned exploration activities in the region after receiving negative publicity.[26] The withdrawal of Kerr-McGee in particular came after the Norwegian Government's Petroleum Fund, one of the largest investment funds in the world, liquidated its $52 million investment in the company on the basis of the conclusion of the Fund's Council on Ethics that Kerr-McGee's

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[25] Petroleum Exploration Society of Australia, Fusion provides 200,000 km^2 study for new African acreage chance, April/May 2003, at 5-6 (http://www.pesa.com.au/publications/pesa_news/april_03/sahara.htm, accessed on May 13, 2010). Kerr McGee du Maroc Ltd., a subsidiary of Kerr McGee Corporation, entered into a reconnaissance permit with ONHYM for the Boujdour area offshore from the portion of Western Sahara currently occupied by Morocco. The permit was renewed on several occasions and the contract was valid through 2006. *See* C. Wilson, *supra*, note 15, at 254. In its 2006 SEC filing, the company listed the Boujdour block as being part of Moroccan territory and within its exploration plans.

[26] *See, e.g.*, Le Journal Hebdomadaire, *Kerr-McGee Folds*, January 12, 2005; SADR Petroleum Authority, Press Release dated May 3, 2006 (http://www.sadroilandgas.com/pdfs/kerr_mcgee_withdrawl.pdf, accessed on May 16, 2010); Afrol News, "No oil off Sahara" says withdrawing Total, November 29, 2004 (http://www.afrol.com/articles/14879, accessed on May 16, 2010).

activities in Western Sahara "constitute[d] an unacceptable risk for contributing to other particularly serious violations of fundamental ethical norms."[27]

At the present time, several companies are involved in oil and gas exploration off the coast of Western Sahara. According to the website of ONHYM, as of October 2010, it had at least four corporate partners engaged in exploratory activities in regions that include Western Saharan territory: [28]

- In 2004, U.S.-based Kosmos Energy and its affiliate Kosmos Energy Offshore Morocco (collectively, "Kosmos") purchased a 30% interest in the Boujdour sub-basin from ONHYM.[29] In 2006, Kosmos entered into a Petroleum Agreement with ONHYM granting it a 75% interest in the Boujdour sub-basin.[30] These projects are still in the exploratory phase.

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27 Recommendation on Exclusion from the Government Petroleum Fund's Investment Universe of the Company Kerr-McGee Corporation, Petroleum Fund's Council on Ethics, Ministry of Finance, Norway, April 12, 2005 (http://www.regjeringen.no/nb/dep/fin/tema/statens_pensjonsfond/ansvarlige-investeringer/tilradninger-og-brev-fra-etikkradet/Recommendation-on-Exclusion-from-the-Government-Petroleum-Funds-Investment-Universe-of-the-Company-Kerr-McGee-Corporation.html?id=419582).

28 ONHYM, Liste des sociétés partenaires de l'ONHYM au 10/15/2010 (http://www.onhym.com/en/HYDROCARBURES/PartenariatetCoop%C3%A9rationP%C3%A9trole/Listedespartenaires/tabid/325/language/en-US/Default.aspx?Cat=30, accessed on November 28, 2010); *see also* ONHYM Activity Report 2008 (http://www.onhym.com/ONHYM/pdf/ONHYM_2008_Ang.pdf, accessed on November 29, 2010). As detailed below, company websites for Kosmos Energy, San Leon Energy, Longreach Oil & Gas Ventures, and DVM International seem to indicate that they continue to hold exploration interests in on- and offshore territory in Moroccan-occupied Western Sahara.

29 ONHYM Activity Report 2005 (http://www.onhym.com/ONHYM/pdf/Rapport-Annuel-Anglais-2005.pdf, accessed on November 29, 2010); Kosmos Energy Presentation, 5th Maghreb and Mediterranean Conference, May 2007 (www.kosmosenergy.com/pres/Maroc5-2007.pdf, accessed on November 28, 2010).

30 Kosmos Energy, Our Assets: Morocco, Boujdour Offshore Block (http://www.kosmosenergy.com/morocco.html, accessed on May 16, 2010); Kosmos Energy Presentation, 5th Maghreb and Mediterranean Conference, May 2007 (www.kosmosenergy.com/pres/Maroc5-2007.pdf, accessed on November 28, 2010).

- In 2008, the Irish energy firm, San Leon Energy Plc ("SLE"), through its subsidiary, San Leon Morocco Ltd, entered into 8-year licenses with ONHYM regarding the Zag Basin and Tarfaya Onshore basins.[31] These projects are still in the exploratory phase.

- In 2008 and 2009, U.K.-based Longreach Oil & Gas Ventures Ltd. entered into licenses with ONHYM relating to the exploration of the Zag Basin and Tarfaya Onshore block.[32] These projects are still in the exploratory phase.

- In February 2010, Australian-based DVM International, Ltd. acquired a 75% working interest and operatorship in the Tarfaya Offshore Block.[33] This project is still in exploratory phase.

c. Activities by SADR/Polisario

In the early 2000s, SADR announced an oil and gas licensing initiative for offshore exploration adjacent to Western Sahara.[34] SADR divided the area into onshore and offshore blocks. (See Figure 1.2.)

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31 San Leon Energy, Moroccan Operational Update, February 25, 2009 (http://www.sanleonenergy.com/sanleon/communications/Moroccan_Operational_Update.php?ln=en, accessed on May 16, 2010); *see also* San Leon Energy, Press Release: Award of full Exploration license in Sag, Morocco, July 19, 2009 (http://www.sanleonenergy.com/sanleon/communications/Award_of_full_Exploration_licence_in_Zag_Morocco.php?ln=en, accessed on May 16, 2010); San Leon Energy Presentation, May 2010, pp 11-17 (*available at* http://www.wsrw.org/files/dated/2010-04-07/san-leon_presentation_march_2010.pdf, accessed on November 28, 2010).

32 Longreach Oil and Gas Ventures, Ltd. Operations (http://www.longreachoilandgas.com/operations.php, accessed on November 28, 2010).

33 DVM International, Tarfaya Offshore Block, Morocco, Large Prospects – Low Risk (http://www.dvminternational.com/projects/tarfaya.shtml, accessed on November 28, 2010); DVM International, Ltd. Press Release dated February 8, 2010 (http://www.dvminternational.com.au/pdf/2010/2010.02.08_Acquisition%20of%20Tarfaya%20Offshore%20Morocco.pdf, accessed on November 28, 2010).

34 SADR Petroleum Authority, Press Release dated May 17, 2005 (http://www.sadroilandgas.com/press_releases/Media%20Pack%20-%20Press%20Release%20English.pdf, accessed on May 16, 2010).

Figure 1.2

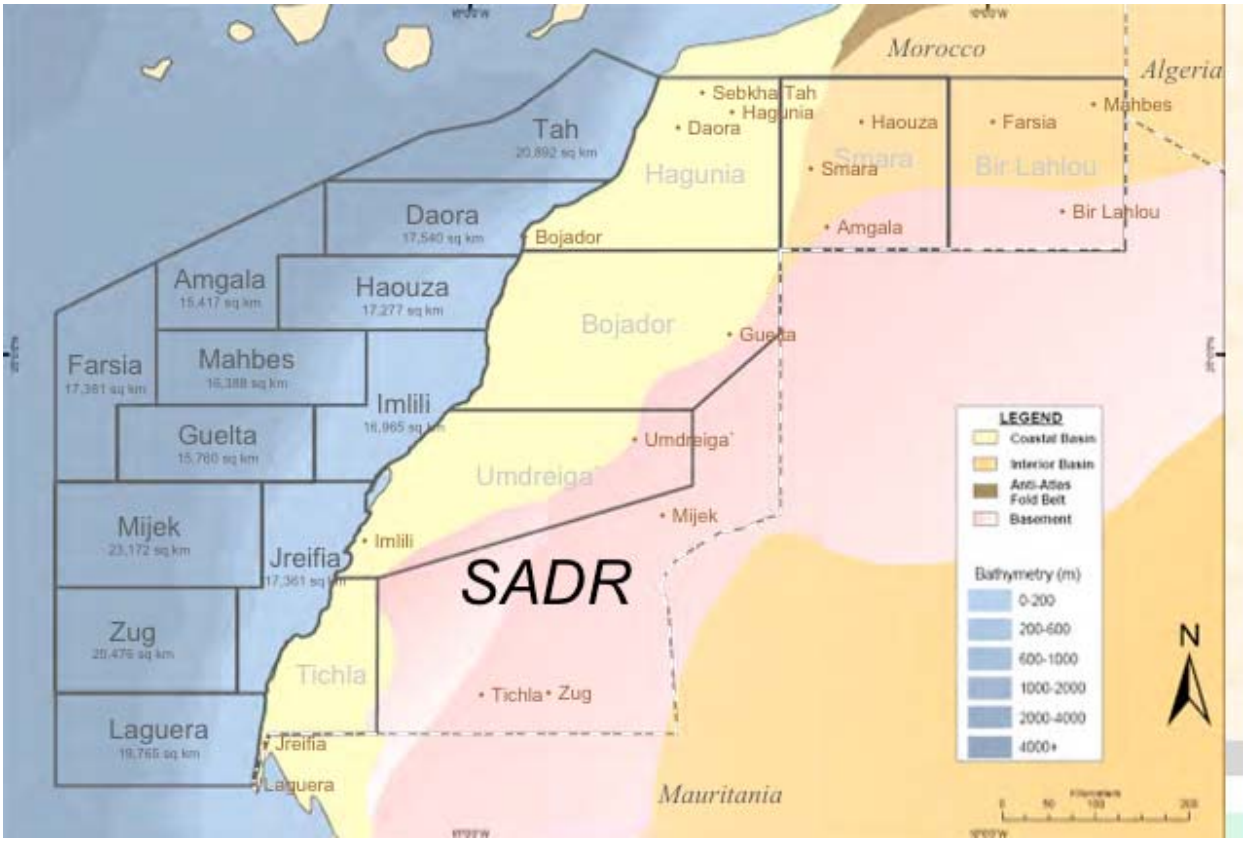

Image source: http://www.sadroilandgas.com/pdfs/Oil_GasLicenceOffering17_5_05.pdf

In 2006, SADR commenced a similar licensing initiative for onshore oil and gas exploration in the territory of Western Sahara.[35] This latter initiative related to the Aaiun and Tindouf basins, which had been relatively unexplored since Spanish colonial occupation.[36]

In late 2007, SADR launched a second round of petroleum and natural gas licensing for nine offshore and onshore blocks in Western Sahara, most of which were located in the relatively

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35 SADR Petroleum Authority, Press Release dated January 17, 2006 (http://www.sadroilandgas.com/pdfs/SADR%202006%20Onshore%20Oil%20Gas%20License%20Offering.pdf, accessed on May 16, 2010).

36 *Id.*

unexplored Mesozoic and Tertiary Aaiun Basin.[37] SADR extended the closing date of the second licensing offering to March 31, 2009.[38]

An Australian oil and gas exploration company, Fusion Oil & Gas NL, in contracting with SADR, stated that it entered into a "technical co-operation agreement" pending issuance of licenses.[39] Under the terms of the SADR licensing initiatives, any contracts issued will not come into force until the political status of Western Sahara is resolved.[40] On January 21, 2009, SADR issued Law 03/2009, which declared a 200-mile "Exclusive Economic Zone (EEZ)" for maritime areas in and off Western Sahara with the intent to assert exclusive jurisdiction over offshore natural resources, including mineral and petroleum seabed resources.[41]

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37 This second licensing round consisted of six offshore blocks (Tah, Zug, Jreifia, Farsia, Imlili, and Amgala) and three onshore blocks (Umdreiga, Smara, and Tichla) (U.S. Geological Survey, 2008 Minerals Yearbook: Morocco and Western Sahara [Advance Release], February 2010 at 5).

38 U.S. Geological Survey, 2008 Minerals Yearbook: Morocco and Western Sahara [Advance Release], February 2010 at 5; SADR Petroleum Authority, Press Release dated November 14, 2008 (http:www.sadroilandgas.com/pdfs/08_11_18_saharawi_arab.pdf, accessed on May 16, 2010).

39 Petroleum Exploration Society of Australia, Fusion provides 200,000 km^2 study for new African acreage chance, April/May 2003 (http://www.pesa.com.au/publications/pesa_news/april_03/sahara.htm, accessed on May 13, 2010).

40 *Id.* [USGS at 5]; SADR Petroleum Authority, Frequently Asked Questions dated June 8, 2005 (http://www.sadroilandgas.com/pdfs/FAQ.pdf, accessed on May 16, 2010); CIA World Factbook – Western Sahara, updated November 22, 2010 (https://www.cia.gov/library/publications/the-world-factbook/geos/wi.html, accessed on November 29, 2010).

41 Law No. 03/2009 of 21 January 2009, Establishing the Maritime Zones of the Sahrawi Arab Democratic Republic (http://www.sadroilandgas.com/pdfs/09_04_28_eez_law.pdf, accessed on May 16, 2010); SADR Petroleum Authority, Press Release dated April 28, 2009 (http://www.sadroilandgas.com/pdfs/09_04_28_eez_media.pdf, accessed on May 16, 2010).

2. Fisheries

In addition to oil and gas exploration, in recent years the Moroccan government appears to have engaged in commercial fishing activity in waters off the coast of Western Sahara. Evidence of this activity can be found in an examination of the fisheries treaties with Morocco entered into by the European Union ("EU") and its predecessors, the European Economic Community ("EEC") and the European Community "(EC").

a) *Treaty Obligations*

Since Morocco entered Western Sahara in the 1970s, the EU, EEC, and EC have been parties to several fisheries agreements with Morocco, pursuant to which financial contributions to Morocco have been a key component. In 1985, the EEC undertook to assume responsibility for existing fisheries agreements by Spain (entered into in 1983) and Portugal (entered into in 1976) with Morocco, as part of the conditions of the two countries' accession to the EEC.[42] Thereafter, the EEC entered into its own fisheries sector agreements with Morocco in 1988 and 1992, to provide "fishing opportunities for fishermen of the enlarged Community in the waters over which Morocco has sovereignty or jurisdiction."[43] The protocol to the 1988 agreement provided for the EEC to make financial contributions to Morocco, including direct disbursements to its Ministry of Maritime Fishing and Merchant Navy.[44] Articles 2 and 6 of the 1992

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42 OJ L 302, November 15, 1985, page 128; OJ L 232, August 19, 1987, page 18-19; OJ L 346, December 10, 1987, page 35.

43 OJ L 99, April 16, 1988, page 45. *See also id.* at 47, 61; OJ L 181, July 12, 1988, pages 1-17; OJ L 218, August 1, 1992, pages 137-138; OJ L 407, December 31, 1992, at pages 3-14

44 OJ L 99, April 16, 1988, page 61.

agreement provide for financial contributions to Morocco to build up scientific research, and develop Morocco's human resources and training facilities for the maritime industry.[45]

The EC entered into a new fisheries agreement with Morocco in 1995. The scope of the agreement also expressly covered waters "of which the Kingdom of Morocco has sovereignty or jurisdiction" (Article 1); it does not mention Western Sahara, but contains direct references to benefits and direct financial contributions to Morocco.[46]

In 2006, Morocco and the EU signed a four-year agreement allowing European vessels to fish off the coast of Morocco, which, according to the U.S. Central Intelligence Agency, included waters off the coast of Western Sahara.[47] The Fisheries Partnership Agreement ("FPA")[48] sets forth a scheme in which the government of Morocco shall receive direct financial contributions from the EU in exchange for issuing fishing licenses for EU vessels. Article 2 provides that the "Moroccan fishing zone" governed by the agreement "means the waters falling within the sovereignty or jurisdiction of the Kingdom of Morocco"; there is no reference to Western Sahara or the Sahrawis in the FPA. Article 7(1) of the Agreement and Article 2 of its Protocol provides that the EU will pay Morocco 144.4 million Euros for the four-year contract

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45 OJ L 407, December 31, 1992, at pages 3-14.

46 OJ L 306, December 19, 1995, at pages 7-43. For example, Article 3 provides that the parties shall undertake the sustainable development of Morocco's fisheries sector, including "development of port infrastructure and the improvement of conditions for the reception of fishing fleets in Moroccan ports"; Article 4 provides for a financial contribution for "Morocco's needs in the matter of vocational training of seamen."

47 CIA World Factbook – Western Sahara, updated April 20, 2010 (https://www.cia.gov/library/publications/the-world-factbook/geos/wi.html, accessed on May 13, 2010).

48 The agreement can be linked to here: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:141:0004:0037:EN:PDF. OJ L 141, May 29, 2006, page 4 et seq., adopted pursuant to Council Regulation (EC) No. 764/2006 (OJ L 141, May 29, 2006, at 1).

term, both as compensation for access to the fishing zones and to support a sustainable national fisheries policy. Morocco has "full discretion" regarding the use of the funds.[49]

The text of the FPA does not describe the boundary of the maritime areas covered in the agreement.[50] The current list of ports and fishing companies accepted under the agreement, which were devised for the prior 1995 EC-Morocco fisheries agreement, includes companies operating out of Sahrawi ports, including Dakhla, Boujdour, and Laayoune.[51] In February 2006, the European Parliament Legal Service issued an unpublished opinion cautioning that, given the lack of clarity in the text of the agreement as to whether fishing would take place in waters off Western Sahara, implementation of the FPA should be carefully monitored to ensure compliance with international law.[52] The opinion had been requested by the European Parliament's Development Committee, which had assumed that the FPA would allow EU vessels to fish off of

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49 OJ L 141, pages 6 and 9.

50 *See* Legal Opinion of the European Parliament Legal Service, SJ-0085/06, dated February 20, 2006, ¶ 45, at 9 (available by unofficial copy at http://www.arso.org/LegalopinionUE200206.pdf, accessed on May 16, 2010); San Martin, Pablo, EU-Morocco Fisheries Agreement: The Unforeseen Consequences of a Very Dangerous Turn, Colaboraciones del Grupo de Estudios Estrategicos (GEES), no. 1013 (http://www.gees.org/articulos/eu_morocco_fisheries_agreement_the_unforeseen_consequences_of_a_very_dangerous_turn_2601, accessed May 16, 2010).

51 Annex B to European Community Decision 95/30/EC, amended DU 08/07/2005.

52 *See* Legal Opinion of the European Parliament Legal Service, SJ-0085/06, dated February 20, 2006, ¶ 45, at 9 (available by unofficial copy at http://www.arso.org/LegalopinionUE200206.pdf, accessed on May 16, 2010); see also the report, dated May 4, 2006, of the European Parliament Committee on Fisheries, A6-0163/2006 (http://www.europarl.europa.eu/sides/getDoc.do?language=EN&reference=A6-0163/2006, accessed November 29, 2010).

Western Sahara.[53] In its analysis of the FPA's compatibility with international law, the Legal Service relied on two points: (1) that Western Sahara has the status of a non-self-governing territory under Article 73 of the UN Charter and that Morocco was its *de facto* administrator; and (2) that Western Sahara "enjoys the right to the natural resources of the territory, in the sense that economic activities concerning those resources shall not be carried out in disregard of the interests and wishes of the local population."[54] On the second point, the Legal Service adopted the analysis of the UN Legal Counsel in the Corell Opinion.[55] It also noted that this approach to the principle of sovereignty over natural resources was consistent with the United Nations Conference on the Law of the Sea (UNCLOS) and general principles of public international law.[56]

The Legal Service concluded that the FPA's compliance with international law would depend on the way in which the Moroccan authorities implemented the agreement and the extent to which it foresaw benefits to the people of Western Sahara, noting that such information would need to be obtained from Morocco.[57]

Most recently, on February 11, 2011, the European Commission recommended that the European Council grant it a mandate to renew the fisheries protocol with Morocco, which expired on February 27, 2011, for a one year period, without including any provisions dealing with the legal issues raised by the fishing occurring in Western Saharan waters, while it "assesses" information about Morocco's compliance with international law that was provided to

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53 Legal Opinion of the European Parliament Legal Service, *supra* note 52 at ¶ 1.

54 *Id.* at ¶ 37.

55 *Id.* at ¶ 16-21.

56 *Id.* at ¶ 21 and 37(b).

57 *Id.* at ¶ 49, Conclusions (b)-(d).

it by Morocco on December 13, 2010.[58] The one-year extension has been initialed by the Commission, thus allowing current fishing activities to continue for up to six months pending a final decision by the Council on whether to extend the protocol.[59]

b) *Implementation of the Treaty and Current Fishing Activities*

The FPA went into effect in 2007, and issues raised in the 2006 European Parliament Legal Service opinion have repeatedly been the subject of inquiry within the European Parliament. First, a series of written Parliamentary questions and answers with the Committee on Fisheries confirms that, according to data reported under the FPA, EU member states have declared that catches are taking place in areas (subdivision 34.1.3) off the coast of Western Sahara.[60]

In addition, there has been significant Parliamentary discussion regarding the EU's pursuit of information from Morocco, within the context of the Joint Committee under the FPA, about the socioeconomic effects of the fishing activities and the industry support provided by the EU under the terms of the agreement.[61] According to the Commission, it "has used every possible official and unofficial occasion to solicit relevant information from the Moroccan authorities."[62] It has also stated that measures such as suspension of the agreement or

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58 *See* SEC/2011/0170, available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=SEC:2011:0170:FIN:EN:PDF.

59 *See* "Fisheries: EU initials extension of the fisheries protocol with Morocco," European Parliament Press Release, dated February 28, 2011, available at http://ec.europa.eu/fisheries/news_and_events/press_releases/2011/20110228/index_en.htm#.

60 *See* written questions E-1073/08 of March 4, 2008, E-4295/08 of July 25, 2008, and E-0717/10 of February 16, 2010, and the written answers thereto by Commissioner Borg.

61 *See* written questions E-1758/10 of March 22, 2010, E-2633/10 of April 20, 2010, and E-5723/10 of July 22, 2010, and the written answers thereto by Commissioner Damanaki.

62 *See* written answer E-5723/10.

negotiation of additional protocols might be required when the information became available, but that its opinion was that it is Morocco's responsibility to ensure compliance with the rights of the people of Western Sahara under international law.[63]

As discussed above, SADR's January 2009 resolution declaring an EEZ also claims jurisdiction over fisheries resources in the 200-nautical mile area off Western Sahara.[64] In February 2010, the European Parliament Legal Service issued a second legal opinion concerning the legality of the EEZ and an assessment of whether the implementation of the FPA to date was in compliance with international law.[65]

As a preliminary matter, the opinion found that "EU-flagged vessels [appear to] have fished in the waters off Western Sahara."[66] Further, the Legal Service concluded that (1)

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63 See written answer E-2633/10.

64 Law No. 03/2009 of 21 January 2009, Establishing the Maritime Zones of the Sahrawi Arab Democratic Republic (http://www.sadroilandgas.com/pdfs/09_04_28_eez_law.pdf, accessed on May 16, 2010); SADR Petroleum Authority, Press Release dated April 28, 2009 (http://www.sadroilandgas.com/pdfs/09_04_28_eez_media.pdf, accessed on May 16, 2010). It should be noted that the Polisario strongly opposes the FPA. *See also* Polisario statement regarding EU-Morocco FPA, statement made by Mohamed Sidati, Polisario Minister Delegate for Europe, May 22, 2006 (http:/groups.yahoo.com/group/Sahara-Update/message/1757, accessed on November 29, 2010).

65 Associated Press (Brussels), EU assembly report questions Morocco fishing deal, February 23, 2010 (http://finance.yahoo.com/EU-assembly-report-questions-apf-3855611862.html?x=0&.v=1, accessed on May 16, 2010); *see also* the written Parliamentary question to the Commission on Fisheries, confirming the content of the legal opinion (E-1758/10, dated March 22, 2010). A leaked, unofficial copy of this Legal Services opinion, which is dated July 13, 2009, can be accessed at http://www.wsrw.org/index.php?parse_news=single&cat=105&art=1346 (accessed on May 16, 2010).

66 Legal Services opinion, dated July 13, 2009, at ¶ 5; *see also* paragraph 15 ("Not only can this be deducted from the data provided by the Member States to the [European] Commission pursuant to their obligations established by Community legislation on 'control,' but also it has been explicitly acknowledged in several Commission declarations.") (internal footnote omitted).

SADR's declaration of an EEZ had no legal effect on the FPA; and (2) as it is not in a position to establish the "facts on the ground," an assessment of whether acts carried out under the FPA "actually benefit the people of Western Sahara" and otherwise comply with international law should be carried out under the auspices of the Joint Committee established in the FPA to monitor compliance.[67]

In reaching its conclusion in (2) above, the Legal Service analyzed the provisions related to the implementation of a sectoral fisheries policy in Article 7(1) (b) of the FPA and Articles 6 and 7 of its Protocol. It concluded that it could not be demonstrated that the financial contributions under the FPA are being used for the benefit of the people of Western Sahara because the sectoral fisheries policy's matrix of objectives and results did not contain "specific actions explicitly foreseen with a view to benefit the population of Western Sahara"; nor were actions foreseen to target Western Sahara ports such as Laayoune, Dakhla, and Boujdour sufficient, because those ports were "undisputed" to be in territory controlled by Morocco and the demography of those regions had been substantially modified due to Moroccan settlement and lack of integration of the Saharawi population.[68]

It should be noted that in this 2009 opinion, the European Parliament Legal Service (as it did in its 2006 opinion) adopted the approach taken by the UN Legal Counsel in the Corell Opinion, finding that activities under the FPA would be prohibited under international law so long as "those activities are carried out in disregard of the interests and of the wishes of the people" of Western Sahara.[69]

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67 Legal Services opinion, dated July 13, 2009, at ¶ 38(7)-(9).

68 *Id.* at ¶ 25-29.

69 *Id.* at ¶ 18,

B. Morocco's Status in Western Sahara

Morocco's legal status in Western Sahara is disputed. Formerly a Spanish colony, and now a territory claimed by both the Kingdom of Morocco and the SADR government, its legal status, according to the UN, is as a non-decolonized territory and it is included on the UN's list of non-self-governing territories. For the past 35 years, parts of Western Sahara have been under the de facto control of Morocco (Mauritania entered into a peace treaty with SADR in 1979 and withdrew from the territory that same year), while another section of the territory, known as the Free Zone, has been administered by the SADR. A UN-monitored cease-fire has been in effect since September 1991. In order to resolve the sovereignty issue, the UN has attempted to hold a referendum through the United Nations Mission for the Referendum in Western Sahara (MINURSO), which to date, despite the efforts of a number of special envoys including James Baker, former U.S. Secretary of State, and despite efforts at direct talks undertaken by current envoy Christopher Ross, has not been successful.

At the present time the Committee does not take a position with respect to the sovereignty dispute or Morocco's present status in the territory. Instead, the Committee sets forth below a legal analysis of Morocco's use of the natural resources of Western Sahara under the status most favorable to the Moroccan position, that of an administering power in the territory. The analysis concludes that Morocco may use the natural resources of Western Sahara only in the best interests and to the benefit of the Sahrawis themselves.[70]

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[70] If Morocco is ever recognized as having sovereign rights over Western Sahara, there would appear to be no limits under international law on Morocco's exploration and exploitation of the natural resources of Western Sahara. The principle of permanent sovereignty over natural resources would apply without limitation in such circumstances. *See* "Declaration of Permanent Sovereignty over Natural Resources," UNGA Resolution 1803 (XVI), 14 December 1962; Article 1(2) of the International Covenant on Civil and Political Rights (1976) and Article 1(2) of the International Covenant on Economic,

(a) *Legal Precedent*

Although there is limited authority under international law addressing the use of natural resources by an administering power, the Correll Opinion offers guidance for assessing Morocco's activities with respect to natural resources in the territory of Western Sahara. According to the Corell Opinion, administering powers are obligated "to ensure that all economic activities in the Non-Self-Governing Territories under their administration do not adversely affect the interests of the peoples of such territories, but are instead directed to assist them in the exercise of their right to self-determination."[71]

In coming to this legal conclusion, the Corell Opinion examined both traditional and "soft law" sources of international law. Corell noted that the rights of "administering powers" are limited; that they have the obligation "to ensure that all economic activities in the Non-Self-Governing Territories under their administration do not adversely affect the interests of the peoples of such territories, but are instead directed to assist them in the exercise of their right to

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Social and Cultural Rights (1976); United Nations Council for Namibia, "Decree No. 1 for the Protection of Natural Resources of Namibia," adopted in UNGA Res. 3295, 13 December 1974, and UNGA Res. 57/132, 25 February 2003. For a further discussion of this right, *see* Catriona Drew, *The East Timor Story: International Law on Trial*, 12 European Journal of International Law, 2001, at 651-684, and Stephanie Koury, *The European Community and Member States' Duty of Non-Recognition under the EC-Morocco Association Agreement: State Responsibility and Customary International Law*, International Law and the Question of Western Sahara (The Hague 2006), at 170-172. We do not analyze, and take no position on, whether Morocco can be an occupying power. Article 55 of the Hague Regulations, reflecting customary international law, provides that an occupying power "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."

71 Corell Opinion, citing GA res. 35/118 of 11 Dec. 1980l 52/78 of 10 Dec. 1997; 54/91 of 6 Dec. 1999; 55/147 of 8 Dec. 2000; and 56/74 of 10 Dec. 2001. The full text of the Corell Opinion is attached hereto as Exhibit TK.

self-determination."[72] Corell also noted the resolutions declaring that "the exploitation and plundering of the marine and other natural resources of colonial and Non-Self-Governing Territories by foreign economic interests, in violation of the relevant resolutions of the United Nations, is a threat to the integrity and prosperity of these Territories" and that "any administering Power that deprives the colonial peoples of Non-Self-Governing Territories of the exercise of their legitimate rights over their natural resources … violates the solemn obligations it has assumed under the Charter of the United Nations."[73]

After concluding that the case law of the ICJ was inconclusive on the extent to which "administering powers" may utilize natural resources during their period of occupation in the two cases in which that issue had been presented,[74] he then referred to the practice of States and noted that such precedent was also inconclusive: in the case of Namibia, the exploitation of uranium and other natural resources by South Africa was condemned,[75] whereas in the case of

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72 Citing GA res. 35/118 of 11 December 1980; 52/78 of 10 December 21997; 54/91 of 6 December 1999; 55/147 of 8 December 2000; and 56/74 of 10 December 2001.

73 Citing GA res. 48/46 of 10 December 1992 and 49/40 of 9 December 1994.

74 In the Case of East Timor, Portugal argued that in negotiating with Indonesia an agreement on the exploration and exploitation of the continental shelf in the area of the Timor Gap, Australia had failed to respect the right of the people of East Timor to permanent sovereignty over its natural wealth and resources, and the powers and rights of Portugal as the administering power of East Timor. In the absence of Indonesia's participation in the proceedings, however, the ICJ concluded that it lacked jurisdiction. In the Nauru Phosphate Case, Nauru claimed the rehabilitation of certain phosphate lands worked out before independence in the period of the Trusteeship administered by Australia, New Zealand and the United Kingdom. Nauru argued that the principle of permanent sovereignty over natural resources was breached in circumstances in which a major resource was depleted on grossly inequitable terms and its extraction involved the physical reduction of the land. Following the Judgment on the Preliminary Objections, the parties reached a settlement and a Judgment on the merits was no longer required.

75 Corell noted that the exploitation of uranium and other natural resources in Namibia by South Africa and a number of Western multinational corporations was considered illegal under Decree No. 1 for the Protection of the Natural Resources of Namibia, enacted in 1974 by the United Nations Council for Namibia, and was condemned by the General Assembly

East Timor an arrangement with Australia for the exploitation of oil and natural gas deposits was approved on the basis that representatives of the East Timorese people had actively participated in the arrangement.[76]

Despite the inconclusive nature of State practice concerning this issue, Corell nevertheless distilled certain legal principles from existing law: where resource exploitation activities are conducted for the benefit of the peoples of Non-Self-Governing territories, on their behalf, or in consultation with their representatives, those activities are considered compatible with the UN 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. On the other hand, when such activities are conducted in disregard of the needs and interests of the people of the Non-Self-Governing Territories and without the participation of those people, those activities are illegal under international law.

Addressing Morocco's activities in relation to the natural resources of Western Sahara in 2002, the Corell Opinion stated that the specific contracts then under consideration (namely,

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(GA res. 36/51 of 24 November 1981, and 39/42 of 5 December 1984). He suggested, however, that the case of Namibia "must be seen in the light of Security Council resolution 278 (1970) of 30 January 1970, which declared that the continued presence of South Africa in Namibia was illegal and that consequently all acts taken by the Government of South Africa were illegal and invalid."

76 Corell suggested that the case of East Timor under the United Nations Transitional Administration in East Timor (UNTAET) was "unique" in that it involved the decisions of a UN body, not an "administering power." By the time UNTAET was established in October 1999, the Timor Gap Treaty was fully operational and concessions had been granted in the Zone of Cooperation by Indonesia and Australia. In order to ensure the continuity of the practical arrangements under this Treaty, UNTAET concluded an Exchange of Letters with Australia for the continued operation of the terms of the Treaty. Two years later, in anticipation of independence, UNTAET negotiated with Australia a draft "Timor Sea Arrangement" which was to replace the Treaty. On both occasions, according to Corell, UNTAET "consulted fully" with representatives of the East Timorese people, who "participated actively" in the negotiations.

Morocco's contracts for oil reconnaissance and evaluation with Kerr-McGee and TotalFinaElf) were not in themselves illegal because they "do not entail exploitation or the physical removal of the mineral resources, and no benefits have as of yet accrued."[77] However, he considered that should

> further exploration and exploitation activities … proceed in disregard of the interests and wishes of the people of Western Sahara, those activities would be in violation of the international law principles applicable to mineral resource activities in Non-Self-Governing Territories.

(b) *Legal Analysis*

The Committee agrees with the analysis of the legal issues and the conclusions reached in the Corell Opinion. As discussed above, as of the end of 2010, Morocco had at least four corporate partners engaged in oil and gas exploration in regions that include Western Saharan territory. As it appears from publicly available information that, to date, such activities remain exploratory, these relationships with corporate partners arguably are consistent with Morocco's obligations as an administering power under international law. Should these agreements be expanded to include, or should new agreements be concluded for, the extraction of oil and/or gas from the territory of Western Sahara, such exploitation of natural resources would be unlawful, unless it resulted from consultation with and involvement of the people of Western Sahara and was done for their benefit.

In addition, to the extent Morocco may have received payments or accrued benefits under any of the above-mentioned oil reconnaissance and evaluation contracts separate and apart from actual exploitation and extraction—for instance, if any contracting parties provided Morocco payments or provided resources for oil exploration or infrastructure development—in the

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[77] *Id*. at ¶ 25.

absence of the participation of and benefit to the people of Western Sahara, Morocco may be considered to have violated international law. A decisive conclusion would require more information regarding any such payments or accrued benefits.

Certain of Morocco's commercial fishing activities in waters off the coast of Western Sahara may be in violation of the State's obligations under international law. In particular, the EU-Morocco FPA currently in force grants Morocco complete discretion with respect to the use of funds paid by the EU to Morocco in part as compensation for access to territorial waters including those adjacent to Western Sahara. The Committee is unable to ascertain any information regarding Morocco's use of sums received under the FPA; indeed, the European Commission has also been unable to obtain this information.[78] The Committee is of the opinion that retention by Morocco of any portion of those sums relating to fishing activities in Western Sahara's territorial waters, or disbursement of such funds without consideration for the interests of Western Sahara or the Sahrawi people, would violate international law. Further, to the extent commercial fishing activities are currently taking place in Western Saharan waters, such activities must be done in consultation with the Sahrawi population and any benefits from the activities must flow to the Sahrawi people.

In this regard, the Committee notes with approval the approach taken in certain free trade agreements concluded with Morocco in recent years. The 2004 United States-Morocco Free Trade Agreement excludes Western Sahara from its scope.[79] In particular, as exemplified in a

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78 *See* written questions E-1758/10 of March 22, 2010, E-2633/10 of April 20, 2010, and E-5723/10 of July 22, 2010, and the written answers thereto by Commissioner Damanaki.

79 Congressional Record, 108th Congress (2003-2004), UNITED STATES-MOROCCO FREE TRADE AGREEMENT IMPLEMENTATION ACT -- (House of Representatives - July 22, 2004), Page H6627 (http://thomas.loc.gov/cgi-bin/query/C?r108:./temp/~r108jDzL9J, accessed on November 29, 2010).

letter submitted by the U.S. Trade Representative's Office to Congressman Joseph R. Pitts of the U.S. House of Representatives and dated July 20, 2004, detailing the Bush Administration's position with respect to Western Sahara, because "the United States [does] not recognize Morocco's sovereignty over Western Sahara," the U.S. Free Trade Agreement with Morocco explicitly "will not include Western Sahara."[80]

The EU fisheries agreement, by contrast, appears to include products from Western Sahara. If that is the case, it is incumbent upon the EU to ensure that the agreement does not condone or permit its member states to benefit from violations of international law. This would require, at a minimum, that any future agreement between the EU and Morocco include a clause providing that the agreement shall be in conformity with international law and that Morocco shall have the duty to provide evidence that the agreement, to the extent it involves fisheries resources from Western Saharan waters, inures primarily to the benefit of the Sahrawis and meets with their approval.[81]

If such evidence is not forthcoming, we suggest that the EU, at a minimum, follow the advice of its Legal Service and refrain from allowing vessels to fish in the waters off Western

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80 *See* Letter dated July 20, 2004, from U.S. Trade Representative Robert B. Zoelick to Congressman Joseph R. Pitts.

81 For additional consideration of this matter, *see* the legal opinion entitled "Western Sahara and the EU-Morocco Fisheries Partnership Agreement (FPA)," dated 16 February 2011 and issued by seven professors of international law Swedish universities in Uppsala, Gotehnburg, Stockholm, and Lund, available at http://www.wsrw.org/index.php?parse_news=single&cat=105&art=1860. The opinion warns that "[a] renewed FPA may make the EU and its member states liable for a violation of international law, namely as a recognition of and assistance to serious breaches of international law by Morocco." *Id.* Among the conclusions reached in the opinion is that "[a]n FPA with Morocco that covers waters outside [Western Sahara] must conform with the following conditions: The agreement should make clear that it does not cover [Western Sahara] as a part of the territory of Morocco [and] the agreement must be in accordance with the wishes and interests of the people of [Western Sahara]."

Sahara by requesting fisheries licenses only for fishing zones that are situated in the waters off Morocco. We would also suggest that the EU prohibit the importation of fisheries resources coming from Moroccan vessels operating in the waters of Western Sahara.[82]

III. CONCLUSION

The present report is intended as an assessment under international law of Morocco's use of the natural resources within the territory of Western Sahara. Such an assessment, of course, is related to and dependent upon the legal status of Morocco's presence in Western Sahara. At the present time the Committee does not take a position with respect to this urgent and important question. However, as borne out in the analysis set forth in this report, because even under the most generous interpretation of Morocco's legal status in Western Sahara—that is, treating Morocco as an administering power in the territory—Morocco may use the natural resources within the territory only in so far as such use is with the participation of and in the best interests and for the benefit of the Sahrawi people; any use by Morocco of those resources that is not in the benefit of the Sahrawi people constitutes a violation of international law.

Based on the information available to the Committee, it appears that, to date, Morocco's activities relating to oil and gas exploration are only exploratory and have not become exploitative. To the extent this is the case, such activities are arguably consistent with Morocco's obligations as an administering power or an occupying power under international

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82 In the report it issued in 2009 the Legal Service found "[i]n 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 Sahrawi 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 licenses only for fishing zones that are situated in the waters off Morocco." Legal Services opinion, *supra*, note 81, at ¶ 37.

law. However, should these activities be expanded to include, or should new agreements be concluded for, the extraction of oil and/or gas from the territory of Western Sahara, such exploitation of natural resources would be unlawful, unless it resulted from consultation with and involvement of the people of Western Sahara and was done for their benefit. Further, to the extent Morocco may have received payments or accrued benefits under any of the existing oil reconnaissance and evaluation contracts separate and apart from actual exploitation and extraction—for instance, if any contracting parties provided Morocco payments or provided resources for oil exploration or infrastructure development—in the absence of the participation of and benefit to the people of Western Sahara, Morocco may be considered to have violated international law.

With respect to certain of Morocco's commercial fishing activities in waters off the coast of Western Sahara, some of these activities may be in violation of Morocco's obligations as an administering or occupying power under international law. In particular, the EU-Morocco FPA currently in force grants Morocco complete discretion with respect to the use of funds paid by the EU to Morocco in part as compensation for access to territorial waters including those adjacent to Western Sahara. From our review of available information, commercial fishing activities may be occurring in waters off of the coast of Western Sahara. While the Committee has been unable to ascertain any information regarding Morocco's use of sums received under the FPA, it is of the opinion that retention by Morocco of any portion of those sums relating to fishing activities in Western Sahara's territorial waters, or disbursement of such funds without consideration for the interests of Western Sahara or the Sahrawi people, would violate international law. To the extent commercial fishing activities are currently taking place in Western Saharan waters, such activities must be in consultation with the Sahrawi population and

any benefits from the activities must flow to the Sahrawi people. If they are not, such activities are illegal under international law.

Finally, with respect to the use of the phosphates extracted from the Bou Craa mines in Western Sahara, while the U.S. Trade Representative has confirmed that the free trade agreement entered into by Morocco and the United States excludes the territory of Western Sahara, such exclusion does not necessarily prevent the importation of products and resources extracted from Western Sahara into the United States. To the extent Bou Craa phosphates are declared on U.S. customs declarations to be from Morocco, such importation may be in violation of both international law and U.S. customs regulations. In any event, unless and until the U.S. Congress promulgates laws or the President issues executive decisions that explicitly prohibit such imports into the United States, it is unclear whether U.S. companies can, in the absence of enabling legislation or executive order, be prosecuted for what would constitute a violation of international law.

There is much that is not known about Morocco's activities relating to the resources of Western Sahara. The United Nations has issued its legal opinion regarding the responsibilities of Morocco as a de facto administering power but has not followed this opinion with a further investigation and evaluation of whether Morocco is operating consistently with the legal opinion. We urge the United Nations to investigate and evaluate whether the local population has actually benefited from the exploitation of Western Sahara resources by Morocco and whether Morocco is fulfilling its responsibilities in this regard.

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