

INTERNATIONAL FISHERIES LAW ASPECTS OF THE NEGOTIATIONS IN THE WORLD TRADE ORGANIZATION FOR AN AGREEMENT ON RULES OF ORIGIN

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ABSTRACT

This paper begins by outlining the history of the Rules of Origin negotiations in the World Trade Organization (WTO), unfinished business from the Uruguay Round that is separate from the current Doha Round. The treatment of products of the sea is one of a large number of unresolved issues; progress on settling these has been so slow that the goal of an agreement harmonizing rules of origin may never be reached. After sketching the treatment of uncontentious parts of the text on fish, the paper turns to the focus of controversy for the last several years: the origin to be ascribed to fish taken from the exclusive economic zone (EEZ). Participants' positions are polarized between two views recalling the great divide between coastal States and distant-water fishing States before the EEZ's advent in the 1970s. To an extent no longer seen in debates within international fisheries commissions, one camp is seemingly oblivious to the developments of the past 50 years in international fisheries law, while the other adheres rigidly to a position elevating origin to the status of one of the coastal State's sovereign rights over resources in the EEZ, even though practical considerations make such a purist rule unworkable. While the basic conclusion is that the rules of origin issue does not lend itself to use as a proxy vehicle for advancing legal and policy interests in relation to international fisheries, a compromise solution is offered that may enhance the authority of international fisheries commissions in managing their species.

Keywords: rules of origin, WTO, coastal States, distant-water fishing States, exclusive economic zone, high seas, international fisheries commissions, quotas.

INTRODUCTION

The distinguishing feature of the present post-modern era of international fisheries law is that there are ever fewer clashes between coastal States and distant-water fishing States of the type the textbooks still describe, and ever more instances within international fisheries commissions of a phenomenon that might be termed a conspiracy of the "ins" against the "outs". This paper, however, focuses on possibly the last forum still dominated by old-fashioned 1970s-style debates from the previous era, namely the Rules of Origin negotiations in the World Trade Organization (WTO).

In this fifth year of the current Doha Round, surprising though it may seem, the preceding Uruguay Round is still not completely finished. It lives on through its so-called built-in agenda^a of which the negotiations on harmonizing rules of origin are a part. It should be emphasized that it is only non-preferential rules whose harmonization is being sought – though the subject of rules of origin for fish in a preferential context is now starting to receive some attention in the literature, e.g. [1].

According to the WTO website [2], rules of origin are the criteria used to define where a product was made. Annexed to the Agreement Establishing the World Trade Organization [3] is the Agreement on Rules of Origin (ARO),^b whose scope is laid down in Article 1(2) as including "all rules of origin used in non-preferential commercial policy instruments, such as in the application of: most-favoured-nation treatment under Articles I, II, III, XI and XIII of GATT 1994; anti-dumping and countervailing duties under Article VI of GATT 1994; safeguard measures under Article XIX of GATT 1994; origin marking

requirements under Article IX of GATT 1994; and any discriminatory quantitative restrictions or tariff quotas. They shall also include rules of origin used for government procurement and trade statistics.”^c

The importance of rules of origin has increased with globalization and the way that successive stages of the production process can be distributed across several countries. It lies precisely in the fact that, as the suite of instruments just listed indicates, there are a great many departures from the basic principle of non-discrimination found in Article I(1) of GATT 1994. As one commentator [4] writes, rules of origin are a potential trap for the unwary company investing abroad if they are not taken into account: a company from State X may decide to build a factory in State Y because Y is physically close to and cheaper than, or has preferential trade access with, State Z, the intended export market; that investment will go to waste if Z’s rules of origin treat goods produced by the factory as originating from X despite its location in Y. It is partly for this reason that Article 4 of the ARO requires WTO members to ensure that their rules of origin are transparent, free of restricting, distorting or disruptive effects on international trade, administered in a consistent, uniform, impartial and reasonable manner and based on a positive standard (i.e. they should state what does confer origin, not what does not). Rules of origin are also used for “made in ...” labels that are attached to products.

“With the objectives of harmonizing rules of origin and, *inter alia*, providing more certainty in the conduct of world trade”, Article 9(1) of the ARO establishes a work programme on the basis of seven principles. Rules of origin should:

- (a) be applied equally for all purposes...;
- (b) provide for the country to be determined as the origin of a particular good to be either the country where the good has been wholly obtained or, when more than one country is concerned in the production of the good, the country where the last substantial transformation has been carried out;
- (c) be objective, understandable and predictable;
- (d) notwithstanding the measure or instrument to which they may be linked, not be used as instruments to pursue trade objectives directly or indirectly. They should not themselves create restrictive, distorting or disruptive effects on international trade. They should not pose unduly strict requirements or require the fulfilment of a certain condition not relating to manufacturing or processing as a prerequisite for the determination of the country of origin...;
- (e) be administrable in a consistent, uniform, impartial and reasonable manner;
- (f) be coherent;
- (g) be based on a positive standard. Negative standards may be used to clarify a positive standard.

Subparagraph 2(a) of the same Article states that “The work programme shall be initiated as soon after the entry into force of the WTO Agreement as possible and will be completed within three years of initiation.” Paragraph 4 contemplates that the results of the work programme will become an annex to the Agreement, binding on WTO Members as an integral part of it. The outcome will be a single set of rules of origin to be applied under non-preferential trading conditions by all WTO members in all circumstances.

Since the Agreement entered into force on 1 January 1995, the harmonization work ought to have been completed some time during 1998. Several deadlines, however, have come and gone since then.

For the first few years the work programme was pursued by the Committee on Rules of Origin (CRO), established in part for this purpose by Article 4(1) of the ARO, working on the basis of a consolidated text known as the Integrated Negotiating Text for the Harmonization Work Programme [5].^d

The treatment of products of the sea is one of a large number of unresolved issues, progress on settling which has been so slow that it is no longer sensible to venture a guess as to when, if ever, the goal of an agreement harmonizing rules of origin will be reached. Worried by this state of affairs in the CRO, in late 2001 the WTO's General Council directed it to identify a limited number of core policy-level issues that in its view needed to be reported to the General Council for discussion and decision at that higher level [6]. In his report to the General Council [7], the Chairman of the CRO listed in an 85-page annex 94 "core policy issues" submitted to the General Council for consideration and recommended (at paragraph 5.1) that the General Council focus its attention on twelve "crucial" issues from among these, of which "Fish taken from the sea of the exclusive economic zone" was one. The report of the December 2002 meeting of the General Council [8] indicates at paragraph 158 that the General Council had held two informal meetings in October and November to discuss these issues, and at its Chair's request and on his behalf, both the Chair and Vice-Chair of the CRO had been pursuing informal consultations on these issues. Nothing substantive was resolved by this General Council meeting, however, and since then the issues have remained in an informal process of consultations overseen by the Chair of the CRO.

Thus the minutes of the CRO's December 2003 meeting [9] record at paragraphs 4.2 and 4.3 "intense consultations on the 94 issues with Members this year" by the Chairman and his deputy, including "extensive, one-to-one small groups and open-ended consultations held with Members" in an effort to bridge the gaps, culminating in his circulation of a proposal "intended as a balanced package"^e – on which, yet again, it has not been possible to reach consensus. At paragraph 4.5 there is mention of "several genuinely political issues, the resolution of which appeared impossible at the present stage, such as the issue of fish taken from the Exclusive Economic Zone".

THE TEXT ON PRODUCTS OF THE SEA

The problem with which we are concerned is found in the introductory section of [5], known as its Overall Architecture. The latest version of this is in [10], separated for ease of handling from the much longer full document. The Overall Architecture is in the form of six General Rules and two Appendices. General Rule 3, headed DETERMINATION OF ORIGIN, states that

The country of origin of a good shall be determined in accordance with these General Rules and in accordance with the provisions of Appendix 1 and Appendix 2, applied in sequence.

Appendix 1 sets out the circumstances in which goods are taken to be "wholly obtained" in a country; hence, if it supplies the answer to a given question, there is no need to continue to Appendix 2, which deals with product-specific rules. It is in Appendix 1 that the particular issue of present interest lies.

Competing texts on fish from the EEZ

There six competing texts on products of the sea, presented in [10] in tabular form, and all square-bracketed to indicate lack of agreement. The texts are proposed by the European Communities (EC), Argentina, Colombia, Brazil, the Philippines and India. There are a number of comments beside all but one of them in the adjacent column. The Appendix to this paper reproduces the relevant part of [10].

Subsequent to the referral to the General Council, India advised^f the CRO that it, together with Argentina, Australia, Brazil, Colombia, Chile, Cuba, the Dominican Republic, Ecuador, Honduras, Pakistan, the Philippines and Uruguay had agreed on the following common text:

- (i) Products of sea-fishing and other products taken within the territorial sea and/or exclusive economic zone of a coastal state are considered to be wholly obtained in that coastal state.
- (ii) Goods obtained or produced on board a factory ship, within the territorial sea and/or exclusive economic zone of a coastal state, are considered to be wholly obtained in that coastal state provided that these goods are manufactured from products referred to in subparagraph (i) originating in the same coastal state.

Although the document does not say so, it implicitly supersedes paragraphs (i) and (ii) of Alternative text 6, India's own. It is compatible with Alternative texts 2, 4 and 5 as a preface to them, as these treat the EEZ only by implication *a contrario* from the flag-State origin rule for the high seas which they advocate. It displaces Colombia's Alternative text 3 altogether, as this would have let each WTO Member determine its own rule of origin based on its view of what the law of the sea required.^g

While this proliferation of alternatives may seem bewildering at first sight, two things emerge clearly from it: there is agreement that the territorial sea should be treated as though it were part of the land territory, thus making it unproblematic; similarly, there is no controversy over the origin of fish caught on the high seas, which take the origin of the State of registration of the vessel (see p.6 of [6]). Both of these are in line with the United Nations Convention on the Law of the Sea [11] (UNCLOS), whose Article 2(1) essentially gives the coastal State complete sovereignty over its territorial sea, subject only to foreign ships' right of innocent passage (Article 17), a concept that does not include fishing: Article 19(1) and (2)(i); on the high seas Article 92(1) puts every vessel under the exclusive jurisdiction of its flag State.

This leaves the origin to be ascribed to fish taken from the exclusive economic zone (EEZ).^h Here the positions taken by the competing texts are polarized between two views that recall the great divide of the post-war era between coastal States and distant-water fishing States before the advent of the EEZ in the 1970s. The coastal States favor giving origin to the coastal State, the distant-water States to the flag State of the vessel. Of course, in many circumstances these might be one and the same – most obviously where a vessel of the coastal State exploits the stocks of that State's EEZ. There are two situations when they will be different:

- (a) access granted by the coastal State to foreign vessels to fish in its EEZ for surplus stocks pursuant to Article 62 of UNCLOS;
- (b) chartering of foreign-flagged vessels by a coastal State with a view to building up its own capacity to exploit the fish stocks of its EEZ, normally under a bareboat charter. Brazil is known to make extensive use of this practice, which explains the note against Alternative text 2.

Considerations relating to both these situations have marked the debate within the CRO, but (b) was, as explained below, settled relatively early, so only (a) has gone forward into the subsequent informal attempts under the auspices of the General Council to arrive at a compromise.

Chartering

As evidenced by a report to a very early meeting of the CRO [12] (see in particular paragraphs 58 to 66), many WTO Members raised the problem of countries dependent on chartered vessels for their fishing fleet as highlighting a deficiency of the Secretariat's initial textual proposal, under which origin would have followed the country in which the vessel was registered. A number of them made alternative proposals and India's was accompanied by an explanatory note arguing that:

Chartering, hiring or leasing of fishing vessels...by countries (or by firms established in a country) is an economic reality. The goods obtained by such vessels...should have the origin of the country which has chartered, leased or hired the vessel...(or the country in which the chartering, hiring or leasing firm is established).

Jamaica, Malaysia and Colombia agreed with India, Colombia commenting that reference to the hiring or chartering of vessels was “vitally important” as “the only fair means of guaranteeing the origin of products obtained in the high seas”. Morocco ([13], at paragraph 62) spoke of its concern to preserve the origin of fishery products caught in a State’s EEZ which, when the fishing was undertaken by foreign vessels, stood to lose that origin and take on that of their flag State even where the vessels were chartered by economic interests based in the coastal State. Presenting amendments designed to reflect the link that must exist between the vessel (whether or not chartered) and the State authorizing the fishing, the Moroccan delegation pointed out that the right to fish in the EEZ was always issued by a State, which would “probably also be the case in respect of the high seas in the near future, given recent trends in international fishery conventions”.ⁱ

By contrast, the European Communities ([13], at paragraph 63) preferred the original Secretariat proposal to base origin on the country of registration of the vessel and to leave out the concepts of charter and leasing, citing support from the International Chamber of Commerce for registration as the only practicable solution. For its part, Japan ([13], at paragraph 64) argued for a solution “based on ownership to reflect the reality of a Japanese boat that might be registered in Panama”, but favoured inclusion of the idea of chartering. This seems to have been sufficient to dispose of the controversy.

ANALYSIS OF THE OPPOSING VIEWS

The dogged pursuit of origin by each of the coastal State and distant-water fishing State camps is unlikely to be directly related to the economic interests of those States. The only clear economic interest is that of a distant-water fishing fleet serving its home market in which imported fish face tariff barriers. Understandably the fleet would not want to add those tariffs to its cost base through having the fish classified by its own authorities as imports from the coastal States in whose EEZ they were caught. On one hand the flag State may be assuming that its own interest is coincident with that of its fleet, but this will not inevitably be the case if, say, it derives considerable revenue from the tariffs. On the other the coastal State too could be expected to be ambivalent about origin on the basis of economic interests. The access fees it can secure from foreign vessels would be diminished if their profitability were affected by the tariff, hence it is conceivable that, in the short term, it might actually be advantaged by flag-State origin as a way of securing duty-free entry for its fish to the flag State’s market; the mere fact that they are technically not exported should not alter this calculation. Why, then, do coastal States seem insistent on claiming the origin for themselves?

Coastal States’ views

One possible explanation is that they wish in due course to supply distant-water fishing State markets with their own vessels, and are taking the long view, starting from the premise that the fleet of such a State ventures far from its own shores only because the sustainable catch from its EEZ cannot satisfy the demand for fish in its market. Such a State, on this reasoning, should accept the reality of its position as a permanent net importer of fish by abolishing the tariff on fish imports – but accepting flag-State origin for EEZ-caught fish would relieve the pressure from consumers in the distant-water State to this end.

Another reason might be that origin is seen as a lever through which to extract information from the distant-water fishing State and its fleet about how much of its fish resources the fleet is actually

extracting. This could be quite difficult if the coastal State simply allows the fleet as a whole, or a specified number of vessels, to enter its EEZ, catch fish and depart without a post-fishing inspection by which its own authorities can verify the quantity of their catch.^j

More likely, however, is that the view is taken for reasons grounded in past controversies over the modern law of the sea, exemplified by the stance put to the WTO General Council by the Philippines ([13], at paragraph 180): the rule of origin should be aligned with the position under UNCLOS. Coastal States, particularly developing ones, were instrumental in bringing about the extension of fisheries jurisdiction to 200 nautical miles precisely because they wanted to control the resources off their coasts; in its EEZ the coastal State now has “sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources”: UNCLOS Article 56(1)(a). There is a natural tendency for them to be keenly sensitive to anything that might undermine these rights, even if on closer analysis that would be unlikely – and they perceive, rightly or wrongly, such a risk as inherent in yielding origin to the flag State.

Practical problems with coastal-State origin

Yet this solicitous attitude can be taken too far, into an attachment to the sovereign rights for their own sake. It is not clear whether the proponents of the coastal-State origin view have thought through the practical difficulties unique to this rule. Two of these are particularly noteworthy:

(i) The “mixed fish” scenario. Short of instituting a requirement to land the fish in the coastal State, or some equally intrusive and economically inefficient control over the operations of the vessel, it will not be possible to guarantee that a foreign vessel fishing in the coastal State’s EEZ with its permission does not, on the way to or from that EEZ, also fish on the high seas for the same or another species. Mixed in its holds one may find fish of the same species caught on either side of the high seas/EEZ boundary. Under a coastal-State origin rule, however, it will not be possible to distinguish between those fish when they are landed, and it is thus likely that some coastal-State origin fish will be wrongly marketed as having flag-State origin, and/or *vice versa*. True, where the size of individual fish does not affect the price per kilogram, fish of one species are in effect a fungible commodity, so that no great inaccuracy need result from reliance on the master’s declaration on landing that so much of the catch was taken in the EEZ and the remainder on the high seas – provided that this species makes up the bulk of catch. On the other hand, there is no reason to expect the proportions taken from the EEZ and high seas will be the same for each species in the catch. It is also debatable whether confidence should in fact be placed in the master’s declaration on landing of how much of the catch was taken on each side of the line. Fishing operators face incentives to underdeclare what they have caught in the EEZ so that the access fees charged by the coastal State assume a less productive resource than actually exists.

(ii) Illegal foreign fishing in a State’s EEZ. For obvious reasons, those in charge of a vessel fishing illegally in a State’s EEZ will always claim when landing the fish to have caught them either on the high seas or in some other ocean area in which they are entitled to fish. While it would be useful for stock management purposes to know where the fish actually were caught, it is only the detection of the offence, not the attribution of coastal State origin to the fish, that achieves this. Indeed, insisting on reattribution of origin to the coastal State might have the perverse effect of penalizing that State if its exports of that species of fish, or fish in general, to the WTO member at whose port they were landed are limited by any sort of quota – for in this case some of the coastal State’s quota would be lost to the interloper.

Thus, while from a purely law of the sea perspective the 13-country text has a pleasing congruence with the sovereign rights of the coastal State in its EEZ, it is vulnerable, in ways that flag State origin is not, to origin ceasing to be meaningful through fish entering the market under a falsified or simply wrong origin. This suggests that some compromise with the flag-State view would not be misplaced. The author’s

participation from the sidelines (advising from the capital Australia's Geneva-based WTO delegation) in the negotiations that led to the 13-country text, however, left him with the impression that none of Australia's 12 bedfellows were moved by this consideration to contemplate any such step. No purpose is served by speculating on the reason for their insouciance, but one must hope that it is not because they are more interested in the notional "Keep Out" signs at the 200-mile line than in the sound fisheries management landward of that line that the institution of the EEZ was intended to make possible.

SUGGESTED SOLUTION

Since the investment-related considerations canvassed in the Introduction have no great relevance to foreign fisheries in the EEZ, it is not clear what concrete harm – apart from a regrettable untidiness – has arisen from the present unharmonized rules for fish taken in the EEZ. This is not to deny the need for commercial certainty and predictability that is the underlying aim of harmonizing the rules, but these can if necessary be achieved without actually harmonizing them. Hence the simplest solution might be to draw a line under the negotiations, banking the agreements on the territorial sea and high seas and leaving each WTO Member free to follow its own preferred rule for fish taken in an EEZ, provided only that it publishes it through the WTO Secretariat and thereafter follows it consistently, with a year's notice required for any change so as at least to ensure the commercial desiderata. It ought, however, to be possible to do better than this.

Given the mixed fish problem,^k the illegal fishing problem but also the apparent symbolic value attached to origin by developing coastal States, is there a way out of the impasse? There would seem to be merit in establishing a hierarchy of rules relegating the current competing texts based on division of the world's oceans into territorial sea, EEZ and high seas to the status of default rules. In the EEZ the default rule would place origin with the coastal State, but the scheme would make it easy for origin to shift to the flag State, for example by a specific proviso to the effect that, in the case of a foreign vessel fishing in the EEZ with the coastal State's knowledge and consent, the origin may by agreement with be transferred to the flag State of the vessel. At the top of the hierarchy, as more and more straddling and highly migratory fish stocks come under international management as a result of the United Nations Fish Stocks Agreement [14],^l it would be more sensible to take one's origin cue from the conservation and management measures that international fisheries commissions adopt. That is, the primary basis for attribution of origin would be alignment with any multilateral measures in existence aimed at conserving the fish stock. Typically these will take the form of a total allowable catch divided into national allocations. Commissions nowadays very often employ trade documentation or certification schemes as a means of monitoring how much fish is taken by non-members or illegal operators, and these are often backed by prohibitions on imports of fish shipments not accompanied by the necessary documentation to show that the fish was taken in accordance with international law.^m The rule of origin should thus be that, irrespective of the location of the catch or the flag flown by the vessel concerned, the fish should be deemed to be wholly obtained in the country against whose national allocation the catch is to be debited. This would serve to reinforce the authority of international fisheries commissions to manage their species. In the absence of such measures, the next step down the hierarchy should be to see whether any bilateral agreement exists allocating origin for the product of a particular fishery, such as foreign vessel access to a coastal State's EEZ, and if so apply that. Only failing both of these should the default rule come into play: origin goes with the flag State on the high seas, but remains with the coastal State anywhere else.

CONCLUSION

One of the main reasons for the failure to resolve the issue to date is that the negotiations remain mired in the old coastal States/fishing States divide, with one camp seemingly oblivious to the developments of the past 50 years in international fisheries law, while the other adheres rigidly to a position that elevates

origin to the status of one of the coastal State's sovereign rights over resources in the EEZ, even though the practical considerations outlined above would make such a purist rule unworkable. It is an oversimplification, however, to see origin under harmonized rules as necessarily always conferring a benefit on the State to which origin of the fish is assigned. This is because in a non-preferential context origin will as often as not be used to define which fish will temporarily be denied access to markets or have other restrictions such as anti-dumping duties or safeguard measures imposed on them, while under bilateral fishing access agreements it has been shown that the commercial interests of the coastal State may in many cases be served by *not* insisting on maintaining origin. Nor does attributing the coastal State's origin to the fish directly assist that State in controlling the operation of the vessels that catch them in its EEZ, although it may have some marginal indirect value as a bargaining counter if the fishing State has its own reasons, distinct from those of its fleet, for wanting origin. (The author is not wholly convinced that origin would have much worth as a bargaining chip in the coastal State's hands, and it would not be under any compulsion to use it even if it did.) Seen in this light, the rules of origin negotiations do not lend themselves to use as a proxy vehicle for advancing legal and policy interests in relation to international fisheries, but are better left to be decided as a technical question of accounting, ensuring that there is some rule – and from this point of view virtually any rule would do – for unambiguously deriving the origin of any shipment of fish on first landing and when it subsequently crosses a customs barrier. The search for a solution is thus likely to be assisted by looking to the recent developments in international fisheries law [14, 15], which give the relevant international fisheries commission primacy over all matters affecting conservation and management of the stock concerned – for within the commission, as the post-modernists might say, “we are all coastal States now.”

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APPENDIX

Table I: Alternative Texts on Fish from the EEZ

<u>Definitions</u>	<u>Notes</u>
<p><u>Alternative Text 1 (EC)</u></p> <p>(i) Products of sea-fishing and other products taken from the sea, outside the territorial sea of a country, are considered to be wholly obtained in the country whose flag the vessel that carries out those operations is entitled to fly.</p> <p>(ii) Goods obtained or produced on board a factory ship outside the territorial sea of a country are considered to be wholly obtained in the country whose flag the ship that carries out those operations is entitled to fly, provided that these goods are manufactured from products referred to in subparagraph (i) originating in the same country.</p> <p>(iii) Products taken from the sea bed or subsoil beneath the sea bed, outside the territorial sea of a country, are considered to be wholly</p>	<p>[For the purposes of point (2), the term "territorial sea of a country" is that as referred to in the United Nations Convention on the Law of the Sea.]</p>

<p>obtained in the country that has the rights to exploit that sea bed or subsoil in accordance with the provisions of the UN Convention on the Law of the Sea.]</p> <p>(Canada, Japan, Republic of Korea, Morocco, Norway, United States)</p> <p><u>Japan's alternative text for (iii)</u></p> <p>[(iii) Products taken from the continental shelf of a country are considered to be wholly obtained in the coastal state, and the products taken from the sea bed or subsoil beneath the sea bed beyond the limits of the jurisdiction of a country are considered to be wholly obtained in the country that has the right to exploit that sea bed or subsoil in accordance with the provisions of the UN Convention on the Law of the Sea.]</p>	
<p><u>Alternative Text 2 (Argentina)</u></p> <p>[(i) Products of sea fishing and other products taken from waters beyond the sovereignty and jurisdiction of a State are considered to be wholly obtained in the country whose flag the vessel that carries out those operations is entitled to fly.</p> <p>(ii) Goods obtained or produced on board a factory ship in the high seas are considered to be wholly obtained in the country whose flag the ship is entitled to fly, provided that those goods are manufactured from the products referred to in subparagraph (i) above and according to that same subparagraph originating in the same country.</p> <p>(iii) Mineral products obtained from the sea bed and subsoil beyond the limits of national jurisdiction (the Zone) are considered:</p> <p>(a) obtained wholly in the State that has exploitation rights, granted by the International Seabed Authority,</p> <p>(b) obtained wholly in the sponsoring State of natural or juridical persona which has exploitation rights, granted by the Seabed Authority.]</p>	<p>[In conformity with the 1982 UN Convention on the Law of the Sea (UNCLOS), the coastal State has customs jurisdiction in the Contiguous Zone. Thus any operation therein performed should be considered as carried out in that State.</p> <p>No provision of this paragraph/part shall be interpreted in contradiction of the provisions of the 1982 Convention on the Law of the Sea.]</p>
<p><u>Alternative Text 3 (Colombia)</u></p> <p>[(i) Products of sea-fishing and other products taken from the sea outside a country are considered to be wholly obtained in the country of registration of the vessel that carries out those operations.</p> <p>(ii) Goods obtained or produced on board factory ships are considered to be wholly obtained in the country of registration of the factory ship, provided that those goods are manufactured from the products referred to in subparagraph (i) originating in the same country.</p> <p>(iii) Products taken from the sea-bed or subsoil beneath the sea-bed outside a country are considered to be wholly obtained in the country that has the rights to exploit that sea-bed or subsoil.]</p>	<p>[The term "registration" in Definition 2(i) and (ii) includes registration that a country grants to chartered vessels or factory ships, provided this registration is in accordance with the requirements of that country.]</p>
<p><u>Alternative Text 4 (Brazil)</u></p> <p>[(i) Products of sea-fishing and other products taken from the sea outside the exclusive economic zones, over which the coastal State has jurisdiction, are considered to be wholly obtained in the country whose flag the vessel that carries out those operations is entitled to fly.</p> <p>(ii) Goods obtained or produced on board factory ships in the high seas</p>	<p>[1. The term "flag" in Definition (i) and (ii) includes the registration that a country grants to chartered vessels or factory ships, provided this registration is in accordance with the requirements of that country.</p>

<p>are considered to be wholly obtained in the country whose flag the ship is entitled to fly, provided that those goods are manufactured from the products referred to in subparagraph (i) originating in the same country.</p> <p>(iii) Products taken from the sea-bed or subsoil beneath the limits of the continental shelf of a coastal State are considered to be wholly obtained in the country that has the rights to exploit that sea-bed or subsoil.]</p>	<p>2. Use of terms and scope for the purposes of this point (2) as defined in accordance with the provisions of the United Nations Convention on the Law of the Sea.]</p>
<p><u>Alternative Text 5 (Philippines)</u></p> <p>[(i) Products of sea-fishing and other products taken from waters beyond the sovereignty and jurisdiction of a State are considered to be wholly obtained in the country of registration of the vessel that carries out those operations.</p> <p>(ii) Goods obtained or produced on board a factory ship from waters beyond the sovereignty and jurisdiction of a State are considered to be wholly obtained in the country of registration of the factory ship that carries out those operations, provided that these goods are manufactured from products referred to in subparagraph (i) originating in the same country.</p> <p>(iii) Products taken from the sea bed or subsoil beneath the sea bed in waters beyond the sovereignty and jurisdiction of a State, are considered to be wholly obtained in the country that has the rights to exploit that sea bed or subsoil in accordance with the provisions of the UN Convention on the Law of the Sea.]</p>	
<p><u>Alternative Text 6 (India)</u></p> <p>[(i) Products of sea-fishing and other products taken from the sea outside the territorial sea of a country but within its exclusive economic zone, are considered to be wholly obtained in that country.</p> <p>(ii) Goods obtained or produced on board a factory ship, outside the territorial sea of a country but within its exclusive economic zone, are considered to be wholly obtained in the country, provided that these goods are manufactured from products referred to in subparagraph (i) originating in the same country.</p> <p>(iii) Products of sea-fishing and other products taken from waters in the high seas are considered to be wholly obtained in the country whose flag the vessel that obtains such products is entitled to fly.</p> <p>(iv) Goods obtained or produced on board a factory ship in the high seas are considered to be wholly obtained in the country whose flag the ship is entitled to fly, provided that those goods are manufactured from the products referred to in subparagraph (iii) originating in the same country.</p> <p>(v) Products taken from the sea bed, ocean floor or subsoil thereof, outside the territorial sea but within the continental shelf of a country, are considered to be wholly obtained in that country.</p> <p>(vi) Products taken from the sea bed, ocean floor or subsoil thereof beyond the limits of national jurisdiction, are considered to be wholly obtained in the country that has the rights to exploit that sea bed, ocean floor or subsoil thereof.]</p>	<p>The terms "territorial sea of a country", "exclusive economic zone", "continental shelf" and "high seas" have the same meaning as in the United Nations Convention on the Law of the Sea.</p>

From [10] with minor adaptations.

ENDNOTES

^a Apart from the rules of origin negotiations, the built-in agenda has, or originally had, some 20 items: see [16]. For a useful general discussion of rules of origin and the history of attempts to harmonize them, see [17], at pp.189-192.

^b The ARO forms part of Annex 1A to the WTO Agreement [3].

^c GATT 1994 consists of the original 1947 General Agreement on Tariffs and Trade (GATT 1947), together with a number of instruments and decisions of the contracting parties to GATT 1947 as maintained in force by the WTO Agreement [3], specifically by the General Interpretative Note to Annex 1A, UNTS vol 1867, p.187 at 190-191.

^d The first integrated negotiating text, circulated as [5], was updated several times before a further consolidated text was issued as WTO doc G/RO/41 (3 September 1999), itself since updated; see [10] for WTO document numbers.

^e The Chairman's proposal is referred to in this report by a document number, but it is not a public document (anonymous personal e-mail communication from the WTO Secretariat, 6 July 2006).

^f In WTO doc G/RO/W/95 (28 November 2002).

^g This analysis is taken from the CRO Chairman's summary at p.7 of [7]. Alternative text 3 itself is opaque in its wording, but the Chairman's view is one possible reading of it, and he will have had the benefit of listening to the debate, including no doubt Colombia's explanation of its text, in the meetings of the CRO.

^h Sedentary species in the EEZ, beyond the scope of this paper, would presumably be covered by the rule of origin for products of the continental shelf; the few texts in [10] that mention the shelf would give the coastal State origin.

ⁱ Morocco was referring no doubt to Articles 17(2), 18(1) and (2) of the UN Fish Stocks Agreement [14] and Article III(1)(a), (2) and (3) of the FAO Compliance Agreement [15], both now providing in very similar terms that parties to them must not give that authorization unless they can effectively exercise their responsibilities in relation to these vessels. The State party must ensure that its vessels comply with the conservation and management measures adopted by any fisheries commission of which it is a member, and refrain from fishing for any stock managed by a commission of which it is not. The requirement of a positive act of licensing or authorization ensures at least some level of consciousness by the flag State of the level of fishing pressure it exerts on the high seas, and engenders awareness that it is internationally responsible for fishing activities on the high seas by vessels it flags. These are the seeds of an incipient trend towards introduction of the notion of State responsibility into international fisheries law. In general, States are not responsible for the activities of persons or vessels having their nationality – but the provisions just cited could be used as the basis of an argument that high seas fishing is an exception. Although State responsibility is usually conceived as confined to the context of a breach of international law, e.g. in the International Law Commission's Articles on State Responsibility [18], which *inter alia* set out rules for attributing responsibility for acts to States in certain circumstances where a breach of an international obligation has occurred, this need not be a serious obstacle to this trend. It should not be excessively difficult to establish a breach either of the obligations cited above, or of the more general obligation to cooperate on high seas fisheries in Articles 117-119 of UNCLOS, now thought to bind all States, even non-parties, as customary international law.

^j Making such an inspection mandatory would be a sensible step if the foreign fishing is limited by catch (limitation by effort is more effectively monitored in other ways). A pre-fishing inspection would be optional – vessels would be informed that their holds would be deemed to have been empty on arrival in the EEZ unless they reported the amount of fish in them at the time of entry and proceeded to a coastal State port for verification of this.

^k Note that the problem would also arise under a flag-State origin rule in the EEZ for vessels permitted to fish in the coastal State's territorial sea (although, this close to the coast, the loss in efficiency from a pre- or post-fishing port call to separate coastal State origin fish from flag-State origin fish might well be much smaller).

^l Articles 8 and 17 of [14] give international fisheries commissions a central role in managing such stocks. At the 22-26 May 2006 Review Conference many delegations called for new commissions to fill gaps in the existing ones' area and species coverage (see paragraph 72 of the draft report ("Report of the Review Conference on the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks"), http://www.un.org/Depts/los/convention_agreements/reviewconf/reviewconferencedraftreport.pdf (visited on 6 July 2006), largely reflected as recommendations of the Conference in the Outcomes document (Annex II to the report; see paragraphs 16 and 36); the final will become UN doc A/CONF.210/2006/15: see entry of 16 June 2006 in http://www.un.org/Depts/los/reference_files/new_developments_and_recent_adds.htm (visited on 6 July 2006)).

^m Conservation Measure 10-05 (2005) of the Commission for the Conservation of Antarctic Marine Living Resources, *Catch Documentation Scheme for Dissostichus spp.* <http://www.ccamlr.org/pu/e/e_pubs/cm/05-06/10-05.pdf> (visited on 10 July 2006) seems to be the most stringent of its type in this regard.