Law of the Sea Aspects of the Negotiations in the WTO to Harmonise Rules of Origin*

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ABSTRACT

A major source of controversy in the protracted Rules of Origin negotiations at the World Trade Organization is the origin to be ascribed to fish taken from the exclusive economic zone. Participants' positions are polarised between views recalling the old great divide between coastal States and distant-water fishing States, one camp seemingly oblivious to the past 50 years' developments in international fisheries law, the other adhering rigidly to a position elevating origin to the status of one of the coastal State's sovereign rights, even though practical considerations make such a rule unworkable. It is concluded that the rules of origin issue does not lend itself to use as a proxy vehicle for advancing legal and policy interests in international fisheries, and a compromise solution is offered that may enhance international fisheries commissions' authority in managing their species. Some problematic aspects of the much less controversial origin rules on minerals recovered from the deep seabed are also considered.

Introduction

It is one of the less remarked recent developments in international fisheries law, due perhaps principally to the central position accorded in the United Nations Fish Stocks Agreement¹ to international fisheries commissions in the management of straddling and highly migratory fish stocks,² that there are ever

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¹ 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, opened for signature at New York, 4 December 1995: *United Nations Treaty Series* (hereinafter UNTS) Vol. 2167, p. 3.

² See in particular *ibid.*, Articles 8 to 13. At the Review Conference held on 22–26 May 2006 in accordance with *ibid.* Article 36, many delegations called for new commissions to fill gaps in the area and species coverage of existing ones: see UN doc A/CONF.210/2006/15

fewer clashes between coastal States and distant-water fishing States of the type the textbooks still describe, and ever more instances within such commissions of the phenomenon of members, coastal and distant-water fishing States alike, combining to do all in their power to discourage new entrants into the fishery, likewise without distinction as to whether or not those new entrants are coastal States with respect to the stock concerned. This article, 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). It begins by outlining the nature of rules of origin and the history of those negotiations. After sketching the treatment of uncontentious parts of the draft text on fish, the focus shifts to the continuing controversy over the origin to be ascribed to fish taken from the exclusive economic zone (EEZ), describing the polarisation of participants' positions between two views that recall the great divide between coastal States and distant-water fishing States prior to the EEZ's advent in the 1970s, before a compromise solution is offered that may enhance the authority of international fisheries commissions in managing their species. The penultimate section discusses the quite different considerations informing the draft rules of origin for products of the continental shelf and the deep seabed beyond national jurisdiction; finally, conclusions are drawn.

Rules of Origin

In this sixth year of the current Doha Round,³ surprising though it may seem, the preceding Uruguay Round is still not completely finished. It lives on through its so-called built-in agenda⁴ of which the negotiations on harmonis-

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(5 July 2006). 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, paragraph 72. The calls were largely reflected as recommendations of the Conference in the Outcomes document which forms the Annex to the Report: see paragraphs 16 and 18(c). Especially noteworthy was that the main lines along which delegations divided in the Review Conference were not coastal States against distant-water fishing States, but parties to the Agreement against non-parties; in the latter States that have remained outside the Agreement because they consider it overly restrictive of coastal States' rights made common cause with those who are not parties because they regard the high seas boarding and inspection provisions as impinging unacceptably on the exclusive jurisdiction of the flag State on the high seas: see, e.g., the International Institute for Sustainable Development's *Earth Negotiations Bulletin* Vol. 7, No. 61, "Summary of the UN Fish Stocks Agreement Review Conference: 22–26 May 2006." <www.iisd.ca/vol07/enb0761e.html> (visited on 26 January 2007).

³ The Doha Round is named after the site of the WTO's Fourth Ministerial Meeting in November 2001 at which the decision was made to launch it: WTO doc WT/MIN(01)/DEC/W/1 (14 November 2001).

⁴ Apart from the rules of origin negotiations, the built-in agenda has, or originally had, over 30 items: the principal ones are listed at <http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact5_e.htm> (visited on 29 January 2007). For a useful general discussion of rules of ori-

ing rules of origin are but one part. It should be emphasised that it is only non-preferential rules whose harmonisation 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.⁵

The Agreement on Rules of Origin (ARO)⁶ defines rules of origin as “those laws, regulations and administrative determinations of general application applied by any Member [of the WTO] to determine the country of origin of goods”⁷—in other words, they are the criteria used to define where a product was made. A field of such technical complexity that even within the WTO fraternity those who specialise in it are regarded somewhat askance,⁸ for most ordinary people the only encounter with rules of origin they are ever likely to have is when they look at the “Made in . . .” labels that are printed on or attached to products they are considering buying. For present purposes it suffices to note that the governing legal instrument is the ARO, whose scope is laid down 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

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gin and the history of attempts to harmonise them, see M.J. Trebilcock and R. Howse, *The Regulation of International Trade: Political Economy and Legal Order*, 3rd edn. (London, New York: Routledge, 2004), at 189–192.

⁵ See, e.g., L. Block and R. Grynberg, “EU Rule of Origin for ACP Tuna Products (HS Chapter 16.04)”, in S. Bilal and R. Grynberg (eds), *Navigating New Waters: A Reader on ACP-EU Trade Relations* (London: Commonwealth Secretariat, 2007), Vol 2, pp 25–46, which criticises the rules of origin in the Cotonou Agreement (Partnership Agreement between the members of the African, Caribbean and Pacific Group of States, of the one part, and the European Community and its Member States, of the other part, Cotonou, 23 June 2000, Official Journal L 317, 15 December 2000, p. 3) as applied to canned tuna and tuna loins. Rules of origin for fish in the ACP-EU preferential context have been also been analysed in M. McQueen, “Lomé and the Protective Effect of Rules of Origin,” (1982) 16 *Journal of World Trade Law* 119 at 130 and R. Grynberg, *Handicapped Infants and Delinquent Parents: Lomé Convention Rules of Origin and the Solomon Islands Tuna Industry* (European Centre for Development Policy Management (ECDPM) Working Paper No. 37; Maastricht: ECDPM, 1997). The author is grateful to an anonymous referee for pointing out that the measures found to be inconsistent with GATT Article XI:1 by the Panel in the second Tuna-Dolphin case (United States—Restrictions on Imports of Tuna, GATT doc DS29/R, 16 June 1994) were in effect selective import prohibitions according to the country of origin of the product: see paragraph 4.1, paraphrasing Australia’s third-party submission. More germane to the matters canvassed in this article, the EEC as complainant also observed (*ibid.*, paragraph 3.87) that one of the measures, the “intermediate nation” embargo, struck more forcefully at the EEC than the US may have intended, as much of its imported tuna “was actually of EEC origin, since it was caught by EEC vessels although unloaded in ports of third states.”

⁶ The ARO forms part of Annex 1A to the Agreement Establishing the World Trade Organization, done at Marrakesh, 15 April 1994 (hereinafter the WTO Agreement), UNTS Vol. 1867, p. 154. The English text of the ARO begins at UNTS Vol. 1868, p. 397.

⁷ ARO, *supra* n. 6, Article I(1).

⁸ Views to this effect have been expressed independently of each other to the author by trade officials of both the Australian and New Zealand Governments.

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.⁹

The importance of rules of origin has increased with globalisation and the way that successive stages of the production process can be distributed across several countries. It lies precisely in the fact that, as several instruments among the suite of those just listed indicate, quite a number of departures are permitted from the basic principle of non-discrimination found in GATT Article I, paragraph 1.¹⁰ As emerges from the analysis by one commentator,¹¹ both preferential and non-preferential 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 either X or State Z, the intended export market, or has preferential trade access with Z; but 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 Articles 2 and 3 of the ARO require WTO members to ensure that their rules of origin are published so as to be transparent,¹² free of restricting, distorting or disruptive effects on international trade,¹³ administered in a consistent, uniform, impartial and reasonable manner¹⁴ and ordinarily based on a positive standard (i.e. they should state what does confer origin, not what does not).¹⁵

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

⁹ ARO, *supra* n. 6, Article 1(2). GATT 1994 consists of the original 1947 General Agreement on Tariffs and Trade (GATT 1947, UNTS Vol. 55, p. 187), together with a number of instruments and decisions of the contracting parties to GATT 1947 as maintained in force by the WTO Agreement, *supra* n. 6, specifically by the General Interpretative Note to Annex 1A, UNTS Vol. 1867, p. 187 at 190–191.

¹⁰ This provision reads, in relevant part:

With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation or exportation, . . . any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.

¹¹ J.A. LaNasa III, "Rules of Origin and the Uruguay Round's Effectiveness in Harmonizing and Regulating Them" (1996) 90 *American Journal of International Law* 625 at 627–629.

¹² ARO, *supra* n. 6, Articles 2(g) and 3(e).

¹³ *Ibid.*, Article 2(c).

¹⁴ *Ibid.*, Articles 2(e) and 3(d).

¹⁵ *Ibid.*, Article 2(f).

- (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 ARO, 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 WTO Agreement entered into force on 1 January 1995,¹⁶ the harmonisation 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, paragraph 1 of the ARO, working on the basis of a consolidated text known as the Integrated Negotiating Text for the Harmonization Work Programme.¹⁷

Origin of Products from the Exclusive Economic Zone

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

¹⁶ The date of entry into force is given at UNTS Vol. 1867, p. 154 by reference to Art. XIV(1) of the WTO Agreement, *supra* n. 6. and its cross-reference to paragraph 3 of the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations (whose English text is at UNTS Vol. 1867, p. 14).

¹⁷ The first integrated negotiating text, circulated as WTO Committee on Rules of Origin, Integrated Negotiating Text for the Harmonization Work Programme, Note by the Secretariat (WTO doc G/RO/W/13 (24 May 1996)), was updated several times before a further consolidated text was issued as WTO doc G/RO/41 (3 September 1999), itself since updated; see WTO Committee on Rules of Origin, Integrated Negotiation Text for the Harmonization Work Programme, Overall Architecture, Note by the Secretariat (WTO doc G/RO/45/Rev.2 (25 June 2002)) for WTO document numbers of the successive updates.

to venture a guess as to when, if ever, the goal of an agreement harmonising rules of origin will be reached. Worried by this state of affairs in the CRO, in late 2001 the WTO's General Council, to which the CRO reports, directed the latter 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.¹⁸ In his report to the General Council,¹⁹ 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 General Council's December 2002 meeting²⁰ indicates 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.

Evidence of this is provided by the minutes of the CRO's December 2003 meeting, which record "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"²¹—on which, yet again, it has not been possible to reach consensus. Mention is made 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."²² At the time of writing the CRO's mandate has been extended to December 2007, and while some 20 issues appear to have been resolved in the interim, fish from the EEZ is not among them.²³

¹⁸ WTO General Council, Minutes of Meeting held in the Centre William Rappard on 19–20 December 2001 (WTO doc WT/GC/M/72 (6 February 2002)), paragraphs 99 and 100.

¹⁹ Report by the Chairman of the Committee on Rules of Origin to the General Council, WTO doc G/RO/52 (15 July 2002).

²⁰ WTO General Council, Minutes of Meeting held in the Centre William Rappard on 10–12 and 20 December 2002 (WTO doc WT/GC/M/77 (13 February 2003)), at paragraph 158.

²¹ WTO Committee on Rules of Origin, Minutes of Meeting of 3 October 2003 (WTO doc G/RO/M/43 (9 December 2003)), at paragraphs 4.2 and 4.3. 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).

²² *Ibid.*, at paragraph 4.5.

²³ WTO General Council, Minutes of Meeting held in the Centre William Rappard on 27–28 July 2006 (WTO doc WT/GC/M/103 (10 October 2006)), at paragraphs 165–166.

The Text on Products of the Sea

The problem with which this article is concerned is found in the introductory section of the Integrated Negotiating Text,²⁴ known as its Overall Architecture. The latest version of this section²⁵ has been 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 are six competing texts on products of the sea, presented in the draft Overall Architecture 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 article reproduces the relevant part of the draft.

Subsequent to the referral to the General Council, India advised²⁶ the CRO that it, together with Argentina, Australia, Brazil, Chile, Colombia, Cuba, the Dominican Republic, Ecuador, Honduras, Pakistan, the Philippines and Uruguay had agreed on the following common text (hereinafter the 13-country 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

²⁴ *Supra* n. 17 (first-mentioned document).

²⁵ *Supra* n. 17 (last-mentioned document).

²⁶ In WTO doc G/RO/W/95 (28 November 2002).

advocate. It must displace Colombia's Alternative Text 3 altogether, as this would have let each WTO Member determine its own rule of origin based on its individual view of what the law of the sea required.²⁷

While this proliferation of alternatives may seem bewildering at first sight, two things emerge clearly from it: first, there is agreement that the territorial sea should be treated as though it were part of the State's land territory, thus making it unproblematic; second, there is similarly no controversy over the origin of fish caught on the high seas, which take the origin of the State of registration of the vessel.²⁸ Both of these are in line with the United Nations Convention on the Law of the Sea²⁹ (LOSC), whose Article 2, paragraph 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;³⁰ on the high seas, Article 92, paragraph 1 puts every vessel under the exclusive jurisdiction of its flag State.

This leaves the origin to be ascribed to fish taken from the EEZ.³¹ Here the positions taken by the competing texts are polarised 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 favour 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 own EEZ. There are, however, two identifiable 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 the LOSC;
- (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. Brazil is known to make extensive use of this practice,³² which explains the note

²⁷ This analysis of Colombia's proposed text is taken from the CRO Chairman's summary at p. 7 of WTO doc G/RO/52, *supra* n. 19. 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.

²⁸ For the latter see *ibid.*, at p. 6.

²⁹ Done at Montego Bay, 10 December 1982, UNTS Vol. 1833, p. 3.

³⁰ *Ibid.*, Article 19(1) and (2)(i).

³¹ Sedentary species in the EEZ are treated separately below.

³² See the interventions by Brazil in defence of its chartering interests in the 2002 meetings of the International Commission for the Conservation of Atlantic Tunas (ICCAT): "Report of the Joint Meeting of the Compliance Committee and PWG" (Annex 12 to *Proceedings of the 13th Special Meeting of the International Commission for the Conservation of Atlantic Tunas (Bilbao, Spain, October 28–November 4, 2002)* (hereinafter ICCATSM13 Report), in ICCAT, *Report for Biennial Period 2002–03 Part I (2002)*, 284 at 286 (paragraph 2.1.13), 287 (paragraph 2.2.6, echoed by Namibia at paragraph 2.2.15), 288 (paragraph 2.2.20) and

against its Alternative Text 4; a similar note is found against Colombia's Alternative Text 3.

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 shown by a report to a very early meeting of the CRO,³³ 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 derived from the State 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).³⁴

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."³⁵ Morocco also spoke of its concern to preserve the origin of

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289 (paragraph 2.2.29), as well as by Brazil and Namibia in the plenary meeting: ICCATSM13 Report, *ibid.*, 34 at 36 (paragraph 7.2). The EC had unsuccessfully proposed to restrict chartering of vessels to those flagged to States and entities that are members of, or formally cooperating with, ICCAT; see "Draft Resolution by ICCAT for a Bluefin Tuna, Swordfish and Bigeye Tuna Action Plan (Trade Measures for non-Contracting Parties, Entities or Fishing Entities) Proposed by EC," in Resolutions not Adopted (Annex 9 to ICCATSM13 Report), *ibid.*, 199 at 201 (paragraph 10(f)). The recommendation on chartering ultimately adopted (Recommendation by ICCAT on Vessel Chartering (Annex 8.21 to ICCATSM13 Report), *ibid.*, 184) allows chartering "predominantly as an initial step in the fisheries development of the chartering nation" for a period "consistent with the development schedule of the chartering nation" but places stringent conditions on it, including explicit agreement by the flag State of the chartered vessel to apply and enforce ICCAT's conservation and management measures: see paragraphs 1 and 3. The chapeau, however, completely exempts bareboat charters, presumably on the basis that these may involve a change of flag to that of the chartering State for the duration of the charter: see Ademun-Odeke, "An Examination of Bareboat Charter Registries and Flag of Convenience Registries in International Law" (2005) 36 *Ocean Development and International Law* 339 at 345.

³³ WTO Committee on Rules of Origin, First Report to the Committee on Rules of Origin: Results of the First Phase of the Rules of Origin Harmonization Work Programme, Note by the Secretariat (WTO doc G/RO/2 (3 November 1995)), in particular paragraphs 58 to 66.

³⁴ *Ibid.*, paragraph 60.

³⁵ *Ibid.*, paragraph 61.

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 authorising 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."³⁶

By contrast, the European Communities 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.³⁷ For its part, Japan 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.³⁸ This seems to have been sufficient to dispose of the controversy.

Analysis from First Principles 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

³⁶ *Ibid.*, paragraph 62. Morocco was doubtless referring to Articles 17(2) and 18(1) and (2) of the UN Fish Stocks Agreement, *supra* n. 1, and Article III(1)(a), (2) and (3) of the Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas, Rome, 24 November 1993, UNTS Vol. 2221, p. 93, both now providing in very similar terms that parties to them must not give that authorisation 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 or with which it is cooperating, and refrain from fishing for any stock managed by a commission of or with which it is not. The requirement of a positive act of licensing or authorisation 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 may well be the seeds of an incipient trend towards a broadening of the notion of State responsibility in 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 Responsibility of States for Internationally Wrongful Acts, in United Nations, *Report of the International Law Commission Fifty-third session (23 April–1 June and 2 July–10 August 2001, General Assembly Official Records, Fifty-sixth Session, Supplement No 10 (UN doc A/56/10)*, 43–59, 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, for States not party to the relevant treaty, of the more general customary international law obligation to cooperate on high seas fisheries elaborated in Articles 117–119 of the LOSC, *supra* n. 29.

³⁷ WTO doc G/RO/2, *supra* n. 33, paragraph 63.

³⁸ *Ibid.*, paragraph 64.

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 or other trade 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. If the flag State then argues in favour of flag State origin for fish caught in the EEZ, it 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 side of the ledger, the coastal State too could be expected to be ambivalent about origin on the basis of its 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 the fish are technically not "exported" should not alter this calculation, keen though States ordinarily are on promoting exports. 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 use their own vessels to supply distant-water fishing State markets, 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 own 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 to counteract the protectionist instinct to shield its fleet from foreign competitors.

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 removing. 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.³⁹

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 India and the Philippines: the rule of origin

³⁹ 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.

should be aligned with the position under the LOSC.⁴⁰ 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 coasts⁴¹ and succeeded in securing for the coastal State in its EEZ "sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources."⁴² 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 coastal State origin 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 then 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 fish of coastal State origin 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 a single 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 the catch. On the other hand, there is no reason to expect the proportions taken from the EEZ and high seas to 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 boundary. Fishing operators face incentives to underdeclare what they have caught in the

⁴⁰ WTO General Council, Minutes of Meeting held in the Centre William Rappard on 8 and 31 July 2002 (WTO doc WT/GC/M/75 (27 September 2002)), paragraphs 173 (India) and 180 (Philippines).

⁴¹ R.R. Churchill and A.V. Lowe, *The law of the sea* (3rd edn.) (Manchester: Manchester University Press, 1999), at 160–161.

⁴² LOSC, *supra* n. 29, Article 56(1)(a).