



12 November 2020

(20-8127)

Page: 1/3

Negotiating Group on Rules

Original: English

**PROPOSED SOLUTION CONCERNING DISPUTE SETTLEMENT INVOLVING
A TERRITORIALITY OR MARITIME DISPUTE**

Communication from the Philippines

The following communication, dated 8 November 2020, is being circulated at the request of the delegation of the Philippines.

...

Article X. *Dispute Settlement Involving a Territorial or Maritime Dispute*

An IUU determination concerning waters subject to a territorial or maritime dispute¹ between two or more Members shall be considered to be a determination for purposes of Article [X] of this [instrument], provided that it is made by one of the parties involved in that dispute and that it is otherwise in accordance with Article [XX]. Neither this [instrument] nor any decisions or recommendations of any WTO adjudicatory bodies established under this [instrument] or any other WTO agreement shall have any legal implications or consequences regarding territoriality or the delimitation of maritime jurisdictions.

¹ For purposes of this [instrument], a territorial or maritime dispute regarding the waters in which the relevant vessel was found to engage in IUU fishing shall be one that is not frivolous and that is properly substantiated under the relevant rules of international law.

NOTE: Article [X] above refers to the provision that introduces the concept of IUU determination (paragraph 3.2 in the Chair's text of June 2020). Article [XX] above refers to the provision stating that an IUU determination must be made on the basis of positive evidence, fair, transparent and non-discriminatory procedures, etc. (paragraph 3.3 in the Chair's text of June 2020).

EXPLANATION: This draft provision contains two sentences. The first addresses the legal status of an IUU determination concerning disputed waters. This provision states that an IUU determination made by any of the Members disputing sovereignty/jurisdiction over the relevant waters would trigger the subsidy prohibition under the IUU provision. The second provides that any WTO determination regarding an IUU determination involving disputed waters would have no legal consequences for the territoriality issue.

What would the first sentence mean in practical terms? Imagine the following scenario:

- Member A is the flag State of vessel X;
- Vessel X is fishing in waters disputed by Members A and Z;

- Member Z makes an IUU determination with respect to the fishing activities of vessel X in the disputed waters;
- Member Z (or any other Member) requests Member A to remove any subsidies to vessel X on the grounds that it has engaged in IUU activities as determined by Member Z;
- Member A refuses to withdraw the subsidy because it considers that Member Z has no jurisdiction over the disputed waters and, therefore, its IUU determination against vessel X is not valid;
- Member Z brings a WTO dispute against Member A arguing that the latter has refused to withdraw a subsidy despite the fact that there is an IUU determination against vessel X; and
- Member A argues, in response, that Member Z's IUU determination has been inappropriately made because it had no jurisdiction over these waters and, therefore, the obligation to withdraw the subsidy from vessel X has not been triggered.

What would be expected of a WTO panel in this scenario? Under the first sentence of the draft provision, the panel would have to find (1) whether the waters under which the IUU determination was made are disputed (in accordance with the footnote), and (2) whether the IUU determination was made by one of the Members involved in the territorial/maritime dispute. If the answer to these questions is yes, the panel would then assess whether that IUU determination meets the requirements of: positive evidence; fair, transparent and non-discriminatory procedures; and notification of the initiation of the investigation (paragraph 3.3 in the Chair's text of June 2020). If the answer to this is also yes, the IUU determination would then trigger the obligation to withdraw the subsidy. Accordingly, under this draft provision, a panel would not have to address the issue of whether the Member making the IUU determination has jurisdiction over those waters.

The second sentence of the draft provision has the same intended effect as Option 4 of the Chair's proposed options, with some changes for clarity. It states that the recommendations of the WTO dispute settlement bodies (panels, the Appellate Body and the Dispute Settlement Body) must not have any legal effects on territorial or maritime disputes.

**EXPLANATION OF FOOTNOTE 1 OF THE PHILIPPINE PROPOSAL
DSU INVOLVING TERRITORIAL & MARITIME DISPUTE
(RD/TN/RL/131 OF 3 NOV 2020)**

Footnote 1 provides an understanding of "territorial or maritime dispute" for purposes of the draft provision as one that is not "**frivolous**" and "**properly substantiated under the relevant rules of international law**". The term "frivolous" has been imported from the options that the Chair had circulated and was added to give continuity to these options. In general, a claim is "frivolous" when factual allegations are clearly baseless and/or the claim is grounded on an indisputably meritless legal basis. The reference to a "frivolous claim" (or similar expressions) is common in several domestic legal systems as well as under international dispute resolution mechanisms, such as Rule 41(5) of the ICSID Convention Arbitration Rules and Article 3.7, first sentence, of the WTO Dispute Settlement Understanding.

In addition to the term "frivolous", Footnote 1 states that a "territorial or maritime dispute" is one that is "properly substantiated under the relevant rules of international law". The term "dispute" has been defined by the International Court of Justice as "a disagreement on a point of law or fact, a conflict of legal views or of interests between parties".¹ This disagreement must be expressed by the disputing parties and there must be evidence of it.² For instance, the parties may express this disagreement bilaterally, regionally or multilaterally, such as at meetings of the UN General Assembly. This disagreement may also be expressed by filing a dispute with a competent adjudicatory body. In that case, however, a dispute that is "properly substantiated under the relevant rules of international law" would exist to the extent that the relevant body has not yet rendered its decision. On the contrary, if a decision has been rendered, and the parties have at any time accepted it as mandatory and final, there would no longer be a "properly substantiated [dispute] under the relevant rules of international law".

Accordingly, under Footnote 1, the expressions "frivolous" and "properly substantiated under the relevant rules of international law" inform one another. A dispute that is not "properly substantiated under the relevant rules of international law" would be "frivolous".

¹ *Mavrommatis Palestine Concessions*, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2, p. 11.

² *South West Africa (Ethiopia v. South Africa; Liberia v. South Africa)*, Preliminary Objections, Judgment, I.C.J. Reports 1962, p. 328.