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Negotiating Group on Rules

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

*Communication from the Philippines*

*Addendum*

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

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**PHILIPPINE STATEMENT**

**WTO NG RULES FISHERIES SUBSIDIES NEGOTIATIONS, 4 NOVEMBER 2020**

At the outset, the Philippines would like to commend our esteemed Chair for his able leadership and to all colleagues who are continuously working very hard even in the most trying times of the lingering COVID-19 pandemic.

Despite the challenges that we continue to face, the Philippines continues to engage constructively and make contributions in the negotiations with a view to find solutions that could lead us finally to a breakthrough agreement in the earliest possibility in December 2020 – given the missed deadline of our leaders under SDG target 14.6.

Chair, we have specifically taken the floor today for two very important objectives:

**First and foremost**, we would like to remind Members that the Philippines do not have sufficient political basis to support any proposal (in law or in fact) that carves out (or affords a *carte blanche* exemption to) Members' IUUF infringements that are taking place in disputed jurisdictions – **under the guise and tutelage of "political sensitivities"**. For example, the Philippines regrets to inform that the second paragraph of Article 11.2 (b) of the Chair's revised text would not simply work for us.

**The second objective** is to introduce the latest Philippine proposal, contained in document RD/TN/RL/131 of 3 November 2020. This newest proposal from us seeks to strike the needed balance between: (a) the Members' objective of not changing the status quo with respect to the legal standings of Members' territorial or maritime disputes; and (ii) the leaders mandate to prohibit/eliminate subsidies that contribute to IUU fishing – which could be legally evaded through carving out IUU fishing from the subsidies prohibition.

Before we introduce our proposal in detail, let me first emphasize that the Philippine proposal in 2017 (TN/RL/GEN/196), which essentially seeks to prohibit subsidies to fishing in disputed jurisdictions or to jointly agree to subsidize, remains on the table that Members must continue to consider as it offers a more straightforward solution which is at the same time more aligned with the SDG target 14.6 to prohibit subsidies and more politically correct than permanently shielding infringements in disputed jurisdictions.

**Turning back to the latest Philippine proposal in RD/TN/RL/131** that is before us today, the Philippines seek to provide another option to the Chair's circulated five options to address the issue of territoriality or maritime jurisdiction in the context of WTO dispute settlement. The proposal contains two sentences and a footnote that works as follows:

**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** – a mere claim of a disputed jurisdiction is not sufficient to be considered as such in the context of the WTO, unless **the claim is not frivolous and is properly substantiated in accordance with international law**); 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.

Finally, the Philippines look forward to Members' constructive engagement as well as the opportunity to discuss and, if necessary, improve our proposal with them with a view to make it workable for everyone.

Thank you.