

**FISHERIES SUBSIDIES:
NEW PROPOSALS REGARDING THE DISCIPLINE**

Communication from Japan

The following communication, dated 17 January 2011, is being circulated at the request of the Delegation of Japan.

I. INTRODUCTION

1. At the WTO Doha Round (the Doha Development Agenda), a series of negotiations is under way over various areas and there is the need to further accelerate the debate among Members, which is indispensable in order to complete the Round in the year 2011. To develop the discipline of fisheries subsidies is one of the items under the Rules Negotiations. Under the Chairmanship of Ambassador Valles and Ambassador Francis, active discussions have been taking place from many positions among Members including Japan.

2. As the fisheries subsidies negotiation is the first attempt for the WTO to develop a discipline dealing with an environmental issue right from the beginning, the progress of the negotiation is not as mature as that of other negotiations. This is also due to the difficulty caused by the technical complexity of the fisheries issues. The main and basic issue for this negotiation that is still pending is to decide on what kinds of fisheries subsidies are to be prohibited because of their contributions to overcapacity and overfishing. In addition, the nature and the extent of such overcapacity and overfishing caused by subsidies and how such phenomenon can be recognized and dealt with in the entire picture of global fisheries activities and fisheries management need to be fully taken into account in the development of the discipline.

3. Japan's view about the way to proceed negotiations has been to examine the relationship between subsidies and overcapacity/overfishing based on evidence using specific real statistical data first, and then, consideration and adjustment of other core issues such as exceptions and conditions should be taken into account. At the same time, Japan is fully aware of the current situation under which the Chairman and Members are required to intensify their work on text basis.

4. After having duly recognized the situation, Japan is hereby submitting its proposals in writing for making its position clear on the core issues of the discipline to be registered to the Rule Negotiations Group. In order to express its position on the issues, Japan has taken two different approaches in this paper: i.e., a combination of concept-based proposals and text-based ones.

5. For the purposes noted above, the following section (Section II) includes brief notes on Japan's basic views and positions on the discipline of fisheries subsidies. In Section III, various elements of Japan's specific ideas and proposals of a conceptual nature are provided across the

discipline. Further elaboration by Japan and other Members would be necessary for these concept-based proposals to be incorporated into the text. Section IV includes explanatory notes about the text-based proposals on core elements (i.e., Prohibitions, General Exceptions, and Special and Differential Treatment for Developing Country Members ("S&D")). To this document, Japan attaches the proposed text of the discipline, making a contrast with the texts drafted by former chairman Ambassador Valles in 2007¹ ("the Chair's text of 2007"). Japan believes that these proposals would contribute to the development of the discipline of the fisheries subsidies in its parts and as a whole.

6. It should be noted that, although these proposals are the reflections of Japan's views and positions on the discipline of fisheries subsidies, Japan reserves its right to further submit additional proposals which would add to or modify this document.

II. JAPAN'S BASIC POSITION ON THE DISCIPLINE OF FISHERIES SUBSIDIES

7. In submitting this document, Japan is reiterating its basic position on fisheries subsidies. Japan has committed itself to the long-term conservation and sustainable use of fisheries resources and has made various kinds of efforts for this common goal in many international fora. Japan has scrapped at least one thousand of its fishing vessels, thereby contributing to the significant reduction of world-wide fishing overcapacity. As a partner in the field of development of fisheries, Japan has also been cooperating with many developing countries for the development of their fisheries, in particular, with those of the Asia-Pacific region.

8. Japan's basic position on fisheries subsidies is based on a long history and a wide range of issues related to fisheries. Not only the scientific and technical aspects of fisheries and fisheries management, but also the socio-economic aspects of fisheries and fish products for coastal communities are important based on their reality. The discipline of fisheries subsidies should, therefore, take into account such socio-economic aspects and the impact on the coastal communities which depend on fisheries, while trying to ensure the long-term sustainability of fisheries resources.

9. In considering the discipline of fisheries subsidies, the Members have to bear in mind the fact that subsidies do not a priori contribute to overcapacity or overfishing. Capacity-enhancing or effort-enhancing effect, if any, caused by subsidies which was emphasized by some Members, is not as significant in its magnitude as was previously believed². Also, the implementation of effective fisheries management can prevent the negative effects on fisheries resources even if such enhancing effects are induced. It should be also noted that other factors, separate from subsidies, are contributing to overcapacity and overfishing. In particular, illegal, unreported or unregulated fishing ("IUU fishing") activities significantly contribute to overfishing³. These facts remind us that the global issues of overcapacity and overfishing should effectively be addressed through a holistic approach to fisheries management and associated schemes.

10. If the discipline of fisheries subsidies is confined to a mere list of prohibitions, it will be of little use in solving overcapacity and overfishing, contrary to the anticipation of the international community. At the same time, if the WTO proposes to tackle these issues solely by itself, it will not be effective in solving the problem. Therefore, developing a workable and cooperative international framework through which Members' fisheries management can be improved, using the subsidy discipline as a "leverage", would contribute to the long-term sustainability of fisheries resources. For

¹ TN/RL/W/213 (Draft Consolidated Chair Texts of the AD and SCM Agreement)

² In the Working Documents submitted by Japan for October 2010 session, Japan introduced a set of statistical analyses that subsidies do not always lead to overcapacity or overfishing.

³ The magnitude of IUU fishing is estimated to be between \$10 billion and \$23.5 billion annually. See, Agnew DJ, Pearce J, Pramod G, Peatman T, Watson R, et al. (2009) Estimating the Worldwide Extent of Illegal Fishing. PLoS ONE 4(2): e4570. doi:10.1371/journal.pone.0004570

this purpose, fisheries management should not be limited to the condition of exceptions, but should constitute the conceptual backbone of the discipline. For example, while remaining consistent with the provisions of the United Nations Convention on the Law of the Sea ("the 1982 UNCLOS"), cooperative frameworks with international fisheries organizations such as the Food and Agriculture Organization of the United Nations ("FAO") and Regional Fisheries Management Organizations ("RFMOs") need to be further explored.

11. At the same time, government subsidy programs entail various policy objectives such as resource management, environmental conservation, crew safety and accommodation, and the social welfare of fishworkers. The discipline should be carefully crafted so as not to obstruct the legitimate policy objectives of Members. In addition, taking into account the nature of the Doha Development Agenda, particular attention should be paid to the development needs of developing Members. When these perspectives are considered in the context of fisheries, an appropriate balance between the basic rights and obligations of Members should be maintained in terms of the WTO rules and international fisheries management.

III. CONCEPT-BASED PROPOSALS AND SUGGESTIONS

(Basic principles and definitions)

12. As reflected in the Ministerial Declarations, the basic purpose of the discipline of fisheries subsidies is to achieve and maintain the long-term sustainability of the fisheries resources by restricting overcapacity and overfishing⁴. It is not intended to deal with trade distortion effects. This new particular aspect, which does not appear in other existing WTO rules, should be expressly laid down in the discipline in order to provide predictability and accountability.

13. It should also be noted that the discipline of fisheries subsidies is drafted as an Annex to the Agreement on Subsidies and Countervailing Measures ("the SCM Agreement"), consistent with the mandate of the Doha Ministerial Declaration⁵. In developing the discipline in such a manner, the vertical relationship between the main body of the SCM Agreement and the discipline of fisheries subsidies in Annex VIII, including its different objectives in particular, should be clarified in the text. In the Chair's text of 2007, reference to Annex VIII within the main body of the SCM Agreement was made only in the prohibition part⁶ (i.e., Article 3.1(c)). This is not sufficient because Annex VIII provides for not only rules on the prohibition of certain forms of fisheries subsidies but also a set of comprehensive rules relating to fisheries subsidies. This adds a new feature to the SCM Agreement.

14. On the one hand, since the discipline of fisheries subsidies is an Annex of the SCM Agreement, it is naturally assumed that the discipline should be subject to the basic concepts and principles of the SCM Agreement. On the other hand, since the fisheries subsidies discipline deals with fisheries resource sustainability, different provisions and prescriptions may therefore be necessary to address such difference. In this sense, commonalities and disparities between the main body of the SCM Agreement and the fisheries subsidies discipline should be carefully identified and sorted out, thereby maintaining a good balance between the WTO rules in general and the fisheries subsidies discipline.

⁴ In fact, "overcapacity" and "overfishing" are symbolic terms which reflect global concerns about the degradation of the overall status of fisheries resources in the world. In both the Doha and Hong Kong Ministerial Declarations, the discipline of fisheries subsidies is referred to also in the context of trade and environment.

⁵ Paragraph 28 of the Declaration refers to the rule for negotiation including fisheries subsidies.

⁶ See, page 43 (English document) of TN/RL/W/213

15. For example, the scope of fisheries subsidies in relation to overcapacity and overfishing is an outstanding issue in the negotiation. The scope of fisheries subsidies need to be clearly and precisely defined so that they are applicable throughout the discipline including prohibition and "actionability" clauses. In any case, a technical disclaimer is necessary to exclude Member governments' activities which are an integral part of their fisheries management so that they are not targeted under the discipline⁷. If a certain fisheries management system or scheme is regarded as a subsidy, the entire fisheries management regime of those Members would be ruined.

16. The scope of fisheries activities which fall within the purview of the discipline should also be clearly defined. In the discussions to date, certain convergences have been observed among Members on the point that the scope should be confined to marine wild capture fishing activities and that inland freshwater fishing as well as aquaculture is not included. However, the geographical coverage of marine wild capture fishing is not entirely clear. In particular, whether or not it includes capture fishing activities in "internal waters"⁸ defined in accordance with the 1982 UNCLOS remains unclear. For the sake of clarity and predictability, Japan proposes that capture fishing activities in the internal waters of coastal states should be excluded from the scope of the discipline of fisheries subsidies.

17. Considering the above-mentioned aspects, the following points should at least be clearly defined in the text:

- The objectives of the discipline of fisheries subsidies
- The relationship between the main body of the SCM Agreement and its Annex VIII as a discipline of fisheries subsidies
- The scope of the subsidies to be covered by the Annex (including the disclaimer that fisheries management is not deemed as a subsidy in this context)
- The scope of fishing activities to be covered by the Annex
- The attribution of subsidies to the Member conferring them (Article IV.2 of the Chair's text of 2007)

Since these points need to be applicable throughout the discipline, it may be appropriate to deal with these provisions together and place them at the beginning of the discipline, for example, under the title of "General Provisions". These technical clarifications will also be useful to avoid systemic problems concerning the interpretation and implementation of the SCM Agreement and its Annex VIII.

(Prohibition)

18. With regard to the prohibition of certain fisheries subsidies, Japan has provided specific text-based proposals in the Attachment to this document. Explanatory notes for these text-based proposals are described in Section IV.

⁷ In this context, the submission by Australia (TN/RL/GEN/167) proposed that "governmental activity directly associated with the creation and implementation fisheries management systems...shall not be deemed to be subsidies."

⁸ "Internal waters" are defined in Article 8 of the 1982 UNCLOS.

(General Exceptions)

19. With regard to general exceptions, Japan has provided specific text-based proposals in the Attachment to this document. Explanatory notes for these text-based proposals are described in Section IV.

20. In this proposal, Japan intends to establish an exhaustive list of general exceptions. However, a need may arise for additional general exceptions which have not been explicitly covered herein. Furthermore, this positive listing approach might complicate matters and make the implementation of the discipline a burden to both the WTO and its Members. An alternative approach proposed by Canada⁹ in 2008 (called "*de minimis*"), which tried to accommodate such policy needs in a simple and comprehensive manner, is still worth consideration.

21. One issue regarding general exceptions which is not provided in the attached text but is presented as a concept is the possibility of provisional limitations or suspensions of the application of the discipline against certain fishing types or Members. Fishing activities all over the world differ widely and numerous government programs are in place to regulate or support these activities. Since it is the first time for the WTO to deal with the discipline of fisheries subsidies, the knowledge and resources of the matter are, for the time being, limited. At the early stages of the implementation, considerable confusion might arise among both the Members and the Secretariat. Hence, the smooth and swift operation of the discipline cannot be fully guaranteed. From a practical viewpoint, at least for a certain duration, it is therefore worth considering or even necessary to limit the application of the discipline to certain fishing types or to exempt the Members which do not have problems with their fisheries management from the application of the discipline of fisheries subsidies.

(S&D treatments for developing country Members)

22. With regard to the S&D treatment for developing country Members, Japan has provided specific text-based proposals in the Attachment to this document. Explanatory notes for these text-based proposals are described in Section IV.

23. One issue which has not been provided in the text but presented as a concept regarding S&D treatment is the classification of developing country Members into different categories. In the Chair's text of 2007, developing country Members are classified only into two categories (i.e., least-developed country ("LDC") Members and other developing country Members). Further classifications should be considered in accordance with certain criteria. With regard to marine wild capture fisheries, catches by developing country Members account for about 70% of the total catch in the world in weight¹⁰. Some developing country Members already possess considerable number of industrialized fishing vessels. The types of fishing activities and the degree of development of fishing activities in developing country Members also widely vary. Given these facts, the further classification of developing country Members and differentiated treatment according to such classification would be fair and reasonable.

24. At the same time, appropriate criteria require further discussion and must be determined with the utmost care. To this end, Japan, the Republic of Korea and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu ("Chinese Taipei") jointly proposed in 2006¹¹ that the developing country Members whose weight-based share of marine wild capture fisheries is [X] % or

⁹ TN/RL/GEN/156

¹⁰ According to FAO statistical data on marine capture fishing in 2008, non-OECD Members account for 70% in the total catch on a weight basis. See, Table 1 of the Working Documents submitted by Japan during the October 2010 session.

¹¹ TN/RL/GEN/114/Rev.1

more be required to gradually phase out their subsidies within a certain period. Submissions by the Small and Vulnerable Economies ("SVEs") group in 2010¹² proposed an additional category of developing country Members according to their marine wild capture fishing production and the world NAMA trade share. The proposal requested that similar treatment as LDC Members receive should be given to the Members in accordance with this new category. In addition to the above-mentioned criteria, other factors such as the degree of economic development and the total numbers or tonnage of certain fishing vessels registered in competent organizations of developing country Members should also be examined.

(General discipline / "Actionability")

25. With regard to the general discipline and "actionability," specific text-based proposals were tabled by Korea¹³, the USA¹⁴ and four developing country Members¹⁵. Substantial and constructive discussions in this regard were held during sessions in December 2010. Japan reserves the right to submit text-based proposals on Article IV of the Annex VIII, as necessary.

26. In order to ensure the validity and effectiveness of the discipline of fisheries subsidies, Japan will continue to cooperate with other Members. As mentioned in the negotiation, Japan is particularly interested in the following points:

- On what grounds the "standing" of "actionability" can be defined;
- What the technical criteria on which the status of certain fish stocks are assessed and determined are;
- What fisheries management instruments are referred to;
- In what manner the burden of proof should be distributed among the Members concerned; and
- How the WTO and its relevant organizations and mechanisms are utilized, in particular, how we can ensure that fisheries expertise is incorporated in the process.

(Fisheries management)

27. Japan stresses in this document that fisheries management is of particular importance in addressing overcapacity and overfishing. If the discipline of fisheries subsidies reinforces the fisheries management of each Member and promotes international cooperation, it will greatly contribute to sustainability of fisheries resources. Fisheries management not only has an overriding power over capacity/effort-enhancing effects by subsidies but also is effective in reducing and eliminating the overcapacity and overfishing caused by the factors not related to the subsidies.

28. On the elements of fisheries management on which the application of general exceptions referred to in Article II of the Annex VIII could be based, specific text-based proposals were tabled by Norway¹⁶, the USA and four developing country Members. Japan reserves the right to submit text-based proposal on Article V of the Annex VIII, as necessary. In the light of their effectiveness for conserving fisheries resources, there should be adequate prescriptions for fisheries management in the

¹² TN/RL/GEN/162.

¹³ TN/RL/GEN/168.

¹⁴ TN/RL/GEN/165.

¹⁵ TN/RL/GEN/163.

¹⁶ TN/RL/W/231.

discipline of fisheries subsidies. At the same time, considering the different nature and status of fishing activities and fish stocks, uniform standards of fisheries management are neither necessary nor feasible. In implementing fisheries management and under the review mechanism, certain discretion should be granted to the fisheries authorities of developing country Members, particularly for their small-scale fisheries. Japan will cooperate with other Members in developing appropriate and acceptable rules in this regard.

29. Japan has reiterated in this document that one of the objectives of the discipline of fisheries subsidies under the WTO should be to encourage cooperative framework to reinforce fisheries management in the world. To this end, the WTO and the FAO/RFMOs should coordinate their regimes to create a synergy of domestic and international fisheries management, as the WTO is, in itself, not a fisheries management organization. One possible option is a "peer" review mechanism operated by the FAO or other competent organizations. That said, Japan's intent is not to designate an authority outside the WTO, but to seek technical and scientific advice from groups composed of invited experts and the secretariats of the organizations. The decision-making mandate would still reside within the WTO.

(Notification and surveillance, and Transitional provisions)

30. Of equal importance but less urgent items at this stage are notification and surveillance, and transitional provisions. On the other hand, necessary adjustments to these aspects should be made only at a later stage. Japan believes that the existing provisions of the SCM Agreement should be applied in the systemic areas where the peculiarities of fisheries are not prominent.

31. As has been repeatedly pointed out, merely listing prohibitions will not be effective for sustainability of fisheries resource. Instead, the discipline of fisheries subsidies under the WTO should provide a positive mechanism to reinforce fisheries management by the Members. In this respect, the magnitude of IUU fishing in international fisheries should not be underestimated. While developing the discipline in terms of sustainability of fisheries resources, the Rules Negotiation Group has not paid adequate attention to this issue. In fact, the provisions related to IUU fishing are referred to only in Article I.1(h) in the Chair's text of 2007, and it remains unclear how this prohibition will be able to be implemented effectively.

32. In other words, the Chair's text of 2007 did not provide effective and strong legal framework for prevention and eradication of IUU fishing activities. IUU fishing could take advantage of legal flaws and fragmentations of international systems, and thus, continue to pose a threat to fisheries resources. In the light of this, additional elements of appropriately strong measures against IUU fishing, including trade restrictions consistent with the WTO rules, should be considered. Japan continues to consult with other Members on this matter.

IV. EXPLANATORY NOTES ON THE TEXTUAL PROPOSALS ON CORE PARTS OF THE DISCIPLINE

(Prohibition)

33. Japan does not believe that comprehensive and unconditional prohibitions of fisheries subsidies are appropriate for the purpose of conservation and sustainable use of fishery resources. Nor is Japan convinced that the items mentioned in Article I.1 of the Chair's text of 2007 are appropriate for prohibition for all Members. In any case, the fisheries subsidies to be prohibited should be decided by consensus within the Members. However, in order to help generating the bottom-up text, Japan is prepared to accept the prohibition of certain subsidies which are relatively related to overcapacity and overfishing, while reserving the right to revert to its original conservative position, unless the modifications of the Chair's text of 2007 proposed therein are accepted.

34. Japan is specifically prepared to consider prohibition of subsidies on the following items, with modifications to the corresponding texts of the Chair's text of 2007 and with appropriate general exceptions:

- vessel construction and repair;
- transfer of fishing vessels;
- certain forms of operating costs;
- price support; and
- further transfer of fishing access rights.

To this effect, Japan has provided specific text-based proposals as are attached to this proposal document. Explanatory notes for these text-based proposals are described in the following paragraphs (paragraphs 36-43).

35. Japan, however, maintains its position that the infrastructure (Article I.1(d) of the Chair's text of 2007), income support (Article I.1(e) of the Chair's text of 2007), and the so-called "catch-all provision" (Article I.2 of the Chair's text of 2007) should be crossed out as there are no sufficient grounds for the prohibitions because neither infrastructure nor income support is related to overcapacity/overfishing. On the contrary, they contribute to reducing overfishing¹⁷. Japan does not support such "catch-all provisions" as appeared in Article I.2 and some other proposals. This is because: (1) the pre-determination of specific prohibitions is extremely difficult; (2) prohibitions could be sweepingly wide, encompassing every fishing activity that inadvertently catch endangered fish species; and (3) even subsidies which are necessary for the stock recovery of such fish species could be prohibited, as a result.

36. Vessel construction and repair (Article I.1(a) of Japan's proposal): Japan is of the view that, as long as the registration and restrictions of fishing vessels by Members' authorities are appropriately established and administered, subsidies for vessel construction and repair do not lead to overcapacity. At the same time, Japan acknowledges the fact that overcapacity persists in increasing and that some Members lack effective systems for registration and control of fishing vessels. Japan is therefore prepared to include this item in the prohibition, on the condition that the general exceptions proposed in paragraphs 45-47 are ensured.

37. Transfer of fishing vessels (Article I.1(b) of Japan's proposal): In principle, Japan does not consider it advisable to transfer fishing vessels to other Members because it does not solve the overcapacity issue. On the contrary, it even worsens the situation because IUU fishing activities take advantage of the vulnerability of some Members' fisheries management capacities. The Government of Japan requires the scrapping of its fishing vessels to prevent them from being reused when the vessels are withdrawn under the government decommission programs. With due consideration of the situation, Japan supports this prohibition, on the condition that the necessary exceptions for the S&D treatments for developing country Members are secured (paragraphs 51 and 56).

38. Operating costs (Article I.1(c) of Japan's proposal): Japan has serious concerns about the proposed prohibition of subsidies on "operating costs" in Article I.1(c) of the Chair's text of 2007. In

¹⁷ For example, ports are used for the inspections of fish landing, fishing vessels and gears. They also facilitate collecting statistics data by fisheries authorities. Such utilization of ports and their facilities in terms of fisheries management are recognized in the "FAO Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing".

practice and in real terms, supports to the operating costs do not necessarily contribute to overfishing when effective fisheries management is in place. In fact, the Chair's text of 2007 lists an unreasonably far-reaching array of items to be restricted, extending to those that do not fall under operating costs. Since consensus on the details of "operational costs" is not reached yet, Japan's original position to completely eliminate this sub-paragraph stands.

39. However, if the scope of the operating costs is narrowed down to the "direct operating costs" of fishing activities such as fuel, ice, bait and gears, and the necessary general exceptions (paragraphs 48-50) are granted, Japan is prepared to maintain prohibition of subsidies on these operating costs. Where "fuel" is concerned, Japan recognizes that this item has political implications that require careful consideration. For the sake of clarity, Japan is against the prohibition of the latter half of this sub-paragraph ("*...of landing, handling or in- or near-port processing activities for products of marine wild capture fishing; or subsidies to cover operating losses of such vessels or activities*"). Japan has expressed the following reasons for this opposition in the previous sessions of the negotiations: (1) there is no convincing evidence that every listed item contributes to overfishing; (2) some of them are not directed to fishworkers; and (3) the social welfare of fishworkers is of paramount importance.

40. Price support (Article I.1(d) of Japan's proposal): Japan is prepared to accept prohibition of subsidies on price support for products of marine wild capture fishing in Article I.1(f) of the Chair's text of 2007 on the condition that each Member government's policies and measures to stabilize the supply of food to its nationals are not hindered. Every Member government assumes general responsibility for its domestic food security.

41. Transfer of fishing access rights (Article I.1(e) of Japan's proposal): During the sessions in October 2010, Japan pointed out that the clear and exact intent of Article I.1(g) of the Chair's text of 2007 has not been displayed and shared among Members. The fundamental question raised by this sub-paragraph is whether this sort of involvement by governments is regarded as a subsidy in a general context regardless of the determination of prohibition. Notwithstanding this concern, Japan is prepared to consider accepting this sub-paragraph, on the condition that: (1) fishing access rights to the exclusive economic zones of developing country Members are exempted from the application of this sub-paragraph for any Member; and (2) reciprocal provision of fishing access rights under bilateral fisheries agreements are considered outside the scope of this sub-paragraph.

42. The reason for the former is a reflection of the debate to date where developing country Members whose national incomes are considerably dependent on access fees derived from provision of their fishing access rights for other Members had strongly expressed their view that subsidies on transfer of fishing access rights to their exclusive economic zones should not be within the scope of the prohibition. The reason for the latter is the reciprocity of the fishing access rights agreement between geographically adjacent states. The bilateral fisheries agreement between Japan and the Republic of Korea is an example where the fishing interests of both parties are coordinated on an equal footing. The reciprocal provision of fishing access rights under such reciprocal fishing access agreements is not within the scope of the prohibition in the Chair's text of 2007.

43. IUU fishing (Article I.2 of Japan's proposal): Although Japan is aware that the effectiveness of this prohibition is questioned by some Members, Japan supports the inclusion of this item (i.e., subsidizations to fishing vessels engaged in IUU fishing) into Article I for symbolic reasons. In so doing, the international community's strong commitment against IUU fishing is reaffirmed. In the proposal, we provided amendments to this provision so that the Annex VIII to the SCM Agreement is not construed as authorizing to facilitate IUU fishing through the granting of any subsidy under the SCM Agreement.

(General exceptions)

44. With regard to general exceptions, Japan has consistently stated that the government measures necessary for their legitimate policy objectives should not be hindered. Besides fisheries management, such policies also include environmental conservation, safety and other labour standards, and the social welfare of coastal livelihoods. Japan's proposal stipulates that all general exceptions are conditional on both fisheries management and "actionability." Therefore, the concerns about the impacts on fisheries resources are addressed. In considering general exceptions in this proposal, Japan believes that vessel scrapping programs and outplacement supports for fishworkers do not belong to the prohibition clause as they have no impact on fisheries resources.

45. Vessel construction and repair (Articles II.1(a) and II.1(b) of Japan's proposal): Vessel construction and repair involve two different dimensions: one is the construction or acquisition of new vessels; the other is the repair, renewal, renovation or modernization of existing vessels. Japan's proposal provides for general exceptions of differentiated treatments based on the distinctions between them, which specify respective prescriptions in the following paragraphs and the Attachment to this document. Besides the general requirements of fisheries management and "actionability," additional conditions on vessel specifications are created for this exception so that fishing capacity does not increase significantly.

46. If a Member lacks the registration and restriction systems of fishing vessels, support for construction or acquisition of fishing vessels could pose concerns about overcapacity. However, certain government programs that offer incentives to reduce fishing capacity should be considered as exceptions. Japan's proposal includes the same provision as mentioned in the joint proposal with the Republic of Korea and Chinese Taipei in 2007¹⁸. In this document, Japan proposes that an exception is granted where the gross tonnage of the new vessel subject to the programs is not more than 50% of the sum of the gross tonnage of the withdrawn vessels in the same fishery category. The vessels to be withdrawn in this context are scrapped or otherwise permanently and effectively prevented from being used for fishing anywhere in the world.

47. With regard to repair, renewal, renovation or modernization to existing fishing vessels, certain "policy spaces" which accommodate measures for various policy objectives are necessary, on the condition that such measures do not significantly increase fishing capacity. In practice, it is necessary for each Member government to take appropriate measures for public policy needs in relation to the repair, renewal, renovation or modernization of existing vessels, including management of fisheries resources, preservation of marine environment, safety of crews and other labour standards. In this sense, Japan's proposal is essentially based on the previous joint proposal in 2007 mentioned above. First, support for repair, renewal, renovation or modernization which does not increase any of the gross tonnage, fish holds and engine power of the vessels should be permitted as general exceptions. Second, on the condition that there is no increase of both fish holds and engine power, public assistance is allowed if the repair, renewal, renovation or modernization is necessary for the purpose of: (1) safety of crews and other labour standards; (2) fisheries resource management including preservation of marine environment and mitigation of incidental catches; and (3) measures necessary for compliance with international agreements. The international agreements include not only the fisheries agreements at FAO and RFMOs but also the legal frameworks of non-fisheries purposes, such as addressing climate change, under the United Nations.

48. Small-scale fisheries (Article II.2 of Japan's proposal): An independent section for small-scale fisheries is established in this proposal as a specific category of general exceptions. This clause is applicable to both developing and developed country Members. It reflects commonly observed peculiarities associated with small-scale fisheries, such as the locality of the utilized resources,

¹⁸ TN/RL/GEN/114/Rev.2

vulnerability to natural and economic environment, and the socio-economic significances for coastal communities. Given the above, small-scale fisheries which satisfy the following conditions are exempted from the prohibitions of subsidies on both vessel construction/repair and operating costs:

- Fishing vessels not more than [X] gross tonnage and registered by the authorities, subject to the fisheries management system of the Member;
- Refrigerator used as a fish hold is not installed in the fishing vessels;
- The fishing vessels are operated within the exclusive economic zone of that Member and within the exclusive economic zone[s] of neighboring Member[s] in accordance with reciprocal fisheries agreement between them; and
- Landing the catches (fresh products) are conducted at designated domestic ports, without calling at foreign ports or transshipping the catches at sea.

49. Operating costs (Article II.3 of Japan's proposal): With regard to the support for operating costs, in return for accepting the prohibition, general exceptions should be established for Member governments to pursue their legitimate policy objectives. We believe that these "policy spaces" are commonly necessary for both developed and developing country Members. First, the Chair's text of 2007 purports to make the relief of "natural disaster", such as typhoons and earthquakes, out of the range of the discipline. But there are similar disaster-like phenomena which are not attributable to the responsibilities of fishworkers. For example, fluctuations or vanishments of fish stocks due to global environmental changes or other reasons are not generally regarded as natural disasters but do have long and considerable impacts on fishworkers. Similarly, human-induced disasters in natural environments as well as economic disasters due to the global economic environment are sorts of external impacts which are out of fishworkers control. Since each Member government is responsible for extending assistances to mitigate the socio-economic difficulties of their citizens when extraordinary incidents occur, the discipline should not obstruct these public interventions.

50. Second, as is explained in paragraph 47, a set of measures for fishworkers as an integral part of Member's fisheries management systems, including conservation and sustainable use of fish stocks, reduction of fishing capacity, and preservation of marine environment including mitigation of incidental catches, should be exempted also from this type of prohibition. Otherwise Member governments would lose their policy tools to realize their legitimate policy goals. Third, as has been emphasized by many Members, ensuring the social welfare of fishworkers in coastal communities is undoubtedly indispensable and a non-negotiable subject. These social supports should not be hindered simply because they are related to fisheries and correspond to operational costs in a direct or indirect manner.

(S&D treatments for developing country Members)

51. Differential treatment of LDC Members (Article III.1 of Japan's proposal): Taking into account the entire picture of the Doha Development Agenda, Japan is not against the exemption of basic discipline (Article I. 1 (a), (b), (c) and (d) of Japan's proposal) for LDC Members. Members, however, should be careful so that this treatment should not facilitate IUU fishing activities. In the past, the insufficient fisheries management capacities of certain flag states were abused by IUU fishing, thereby causing serious overfishing problems. Therefore, any subsidy for IUU fishing should not be justified for any Member including LDC Members. Consequently, Article I.2 of Japan's proposal, which originally appeared in Article I.1(h) of the Chair's text of 2007, is applicable to all Members.

52. For the same reason noted above, although Japan's proposal does not require LDC Members of fisheries management systems as conditioned under Article V of the Chair's text of 2007 in granting overall exceptions to them, as a minimum safeguard, application of the "actionability" clause, referred to in Article IV of the Chair's text of 2007, may be maintained in case a certain subsidy causes a resource problem. However, since such a problem is not likely to occur in a real situation, this does not place considerable burden on LDC Members. For the sake of policy coherence at a minimum level, Japan would like to seek acceptance of this idea by the Members concerned.

53. Differential treatment of non-LDC Members: With regard to the treatments of non-LDC Members, Japan proposes the following specific flexibilities in paragraphs 54 and 55, while making further classification of developing Members as conceptually suggested in paragraphs 23 and 24 of this document pending.

54. Flexibilities in the exclusive economic zone (Article III.2(a) of Japan's proposal): In accordance with the "sovereign rights" over natural resources of the exclusive economic zones of coastal states¹⁹, which are codified in the United Nations Convention on the Law of the Sea, certain subsidies (i.e., vessel construction and repair, operating costs, and price support) are not prohibited as long as fishing activities subject to government programs are confined within the exclusive economic zones of the developing country Members, on the condition that both fisheries management and "actionability" are applicable to such treatment. With this special treatment, developing country Members are able to pursue their development objectives in their exclusive economic zones.

55. Flexibilities for small-scale fisheries (Article III.2(b) of Japan's proposal): Special treatment for small-scale fisheries including its specifications applicable to both developed and developing country Members are provided for in the general exceptions section of Japan's proposal (Article II.2). In light of S&D, Japan proposes, as an additional treatment for the small-scale fisheries of developing country Members, that certain discretion be given to the fisheries management required as a conditionality of exceptions. This proposal reflects the reality and difficulty of the fisheries management of developing Members whose capacities are constrained as well as the prominence of the socio-economic importance of small-scale fisheries for coastal communities. As for the improvement of fisheries management of developing country Members, Japan has been cooperating through various mechanisms in this field and will continue to do so.

56. Transfer of fishing vessels (Article III.3 of Japan's proposal): As noted in paragraph 37, Japan is supportive of this prohibition. But responsible developing country Members may feel it necessary to receive fishing vessels from other Members and/or to establish joint-venture projects in order to develop their fisheries. In the light of S&D, Japan therefore proposes an exception to this prohibition, on the condition that the Members concerned have already joined relevant RFMO to implement with international fisheries management measures and to make such joint venture arrangements available in the public domain.

57. Transfer of fishing access rights (Article III.4 of Japan's proposal): Japan's proposal on the transfer of fishing access rights is not different from that of the Chair's text of 2007 in essence but intends to add clarity in terms for applicable Members. The Chair's text of 2007 is a reflection of the strong position of developing country Members such as small island states whose national incomes are considerably dependent on access fees derived from provision of their fishing access rights for other Members. Because in many cases payments of such fees are made by developed country Members, the exception in this context should be applicable to any Members in the interest of developing country Members.

¹⁹ In Part V of the United Nations Convention on the Law of the Sea, a set of prescriptions including the conservation and utilization of living resources in exclusive economic zones is provided.

58. Fisheries management on a regional basis (Article III.6 of Japan's proposal): Japan is of the view that the footnote 84 of the Chair's text of 2007, which allows developing country Members to operate fisheries management on a regional basis (not on a national basis), should be moved to the main operative part of the text, because it is related to rights and obligation for certain Members. For this purpose, Japan proposes that this provision should be established as a part of the S&D treatments for developing country Members, which may recognize a regional-based management to ensure compliance with requirements of fisheries management under Article V of the Chair's text of 2007. This provision should be provided for on the condition that basic rights and obligations under the WTO rules and other international agreements which each Member is a party to are not affected by this provision.

ATTACHMENT
TEXTUAL PROPOSAL: ARTICLES I, II, AND III

ANNEX VIII
FISHERIES SUBSIDIES

Article I

Prohibition of Certain Fisheries Subsidies

I.1 Except as provided for in Articles II and III, or in the exceptional case of natural disaster relief⁷⁷, the following subsidies within the meaning of paragraph 1 of Article 1, to the extent they are specific within the meaning of paragraph 2 of Article 1, shall be prohibited:

- (a) Subsidies ~~the benefits of which are conferred~~ on the acquisition, construction, repair, renewal, renovation, modernization, or any other **significant** modification of fishing vessels⁷⁸ or service vessels⁷⁹, including subsidies to boat building or shipbuilding facilities for these purposes.
- (b) Subsidies ~~the benefits of which are conferred~~ on transfer of fishing or service vessels to third countries, including through the creation of joint enterprises with third country partners.
- (c) Subsidies ~~the benefits of which are conferred~~ on **direct** operating costs of fishing or service vessels (**e.g., including licence fees or similar charges, fuel, ice, bait and; personnel, social charges, insurance, gear, and at sea support**); ~~or of landing, handling or in or near port processing activities for products of marine wild capture fishing; or subsidies to cover operating losses of such vessels or activities.~~
- (d) ~~Subsidies in respect of, or in the form of, port infrastructure or other physical port facilities exclusively or predominantly for activities related to marine wild capture fishing (for example, fish landing facilities, fish storage facilities, and in or near port fish processing facilities).~~
- (e) ~~Income support for natural or legal persons engaged in marine wild capture fishing.~~
- (d~~f~~) Price support for products of marine wild capture fishing.

⁷⁷ Subsidies referred to in this provision shall not be prohibited when limited to the relief of a particular natural disaster, provided that the subsidies are directly related to the effects of that disaster, are limited to the affected geographic area, are time-limited, and in the case of reconstruction subsidies, only restore the affected area, the affected fishery, and/or the affected fleet to its pre-disaster state, up to a sustainable level of fishing capacity as established through a science-based assessment of the post-disaster status of the fishery. Any such subsidies are subject to the provisions of Article VI.

⁷⁸ For the purposes of this Agreement, the term "fishing vessels" refers to vessels used for marine wild capture fishing and/or on-board processing of the products thereof.

⁷⁹ For the purposes of this Agreement, the term "service vessels" refers to vessels used to tranship the products of marine wild capture fishing from fishing vessels to on-shore facilities; and vessels used for at-sea refuelling, provisioning and other servicing of fishing vessels.

(eg) Subsidies arising from the further transfer, by a payer Member government, of access rights that it has acquired from another Member government to fisheries within the jurisdiction of such other Member.^{80, 80 bis}

(h) Subsidies the benefits of which are conferred on any vessel engaged in illegal, unreported or unregulated fishing.⁸¹

I.2 Nothing in this Annex shall be construed as authorizing to facilitate, in particular through the granting of any subsidy referred to Article 1, illegal, unreported or unregulated fishing.⁸¹ In addition to the prohibitions listed in paragraph 1, any subsidy referred to in paragraphs 1 and 2 of Article 1 the benefits of which are conferred on any fishing vessel or fishing activity affecting fish stocks that are in an unequivocally overfished condition shall be prohibited.

Article II

General Exceptions

II.1 Notwithstanding the provisions of Article I.1(a), subject to the provisions of Articles IV and V, the following subsidies shall not be prohibited.

- (a) With regard to subsidies on the acquisition or construction of new fishing or service vessels, subsidies for the purposes of reducing existing fishing capacity, where the gross tonnage of the new vessels is not more than fifty per cent of the sum of the gross tonnage of the withdrawn vessels in the same fishery category, provided that the withdrawn vessels are scrapped or otherwise permanently and effectively prevented from being used for fishing anywhere in the world.
- (b) With regard to subsidies on the repair, renewal, renovation, modernization or any other significant modification of existing fishing or service vessels, subsidies satisfying the following conditions.
 - (1) There is no increase in any of gross tonnage, volume of fish hold and engine power of the fishing or service vessels; or
 - (2) There is no increase in both volume of fish hold and engine power of the fishing or service vessels, provided that such subsidies are granted:
 - (i) for the purpose of improvement of vessel safety and accommodation for crews on-board;

⁸⁰ Government-to-government payments for access to marine fisheries shall not be deemed to be subsidies within the meaning of this Agreement.

^{80 bis} This provision shall not apply to reciprocal provision of fishing access rights granted under a bilateral reciprocal fisheries agreement.

⁸¹ The terms "illegal fishing", "unreported or fishing" and "unregulated fishing" shall have the same meaning as in Article 1(e) of the Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, adopted by the Conference of the Food and Agricultural Organization of the United Nations at its Thirty-sixth Session in November 2009 paragraph 3 of the International Plan of Action to Prevent, Deter and Eliminate Illegal Unreported and Unregulated Fishing of the United Nations Food and Agricultural Organization.

(ii) as a measure necessary for fisheries management, such as conservation, management and sustainable use of fish stocks including mitigation of incidental catches, reduction of fishing capacities, and protection and preservation of marine environment; or

(iii) as a measure necessary to ensure compliance with international agreements of the United Nations and its relevant specialized agencies, and regional fisheries management organizations ("RFMOs").

II.2 Notwithstanding the provisions of Articles I.1 (a) and I.1 (c), subject to the provisions of Articles IV and V, subsidies for marine wild capture fishing activities that satisfy all the following conditions shall not be prohibited.

- (a) Such activities are conducted by a fishing vessel of not more than [X] gross tonnage [note: [X] is specific numerical value to be decided by the Members], registered to the relevant authority of the Member which entitles the vessel to fly its flag, subject to an appropriate fisheries management system of that Member;
- (b) Any refrigerator used as a fish hold is not installed in the fishing vessel;
- (c) The fishing vessel is operated within the territorial sea and the exclusive economic zone ("EEZ") of the Member, and within the EEZ of another Member through reciprocal fishing access under the bilateral agreement between them.
- (d) The catches are landed at domestic ports designated by the relevant authority, without calling at any foreign port or transshipping the catches to another vessel at sea.

II.3 Notwithstanding the provisions of Article I.1 (c), subject to the provisions of Articles IV and V, the following subsidies shall not be prohibited.

- (a) measures to be implemented, in accordance with the national legislation, programmes or plans of a Member, to mitigate socio-economic damages which are not attributable to fishworkers⁸², such as natural disaster and unexpected change of economic situation;
- (b) supports for fishworkers, as an integral part of the fisheries management of a Member, such as conservation, management and sustainable use of fish stocks including mitigation of incidental catches, reduction of fishing capacities, and protection and preservation of marine environment;
- (c) measures necessary to ensure compliance with international agreements of the United Nations and its relevant specialized agencies, and RFMOs; or
- (d) measures necessary to ensure the social welfare of fishworkers.

⁸² For the purposes of this Agreement, the term "fishworker" shall refer to an individual employed in marine wild capture fishing and/or directly associated activities.

Article III

Special and Differential Treatment of Developing Country Members

III.1 Subject to the provisions of Article IV, ~~T~~the prohibition of Article 3.1(c) and Articles I.1 (a), I.1 (b), I.1 (c) and I.1 (d) shall not apply to least-developed country ("LDC") Members.

III.2 Subject to the provisions of Article IV, ~~F~~for developing country Members other than LDC Members, which are listed in Attachment [Y] to this Annex:

- (a) Subsidies referred to in Articles I.1 (a), I.1 (c) and I.1 (d) shall not be prohibited, subject to the provisions of Article V, where they relate exclusively to marine wild capture fishing performed within the territorial sea and the EEZ of the developing country Member.
- (b) For the purposes of Article II.2, developing country Members shall not be required to be subject to the provisions of Article V, provided that they shall endeavor to operate, to the extent possible, their fisheries management systems referred to in Article V, taking into consideration the nature of fisheries of that Member and the constraints of relevant fisheries management authority.

III.3 Notwithstanding the provisions of Article I.1(b), subject to the provisions of Articles IV and V, subsidies for transfer of fishing or service vessels to developing country Members shall not be prohibited, provided that:

- (a) both transferring Member and receiving Member which is a developing country Member are members of the same RFMO to be responsible for the management of fish stocks of the transferred vessels;
- (b) appropriate measures for conservation, management and sustainable use of fish stocks, including measures to prevent overcapacity and overfishing, are implemented by the receiving Member under the framework of the RFMO; and
- (c) arrangements necessary for such transfer, including the arrangement to establish joint ventures, are made public.

III.43 Subject to the provisions of Articles IV and V, ~~S~~subsidies referred to in Article I.1(e) shall not be prohibited for any Member to provide where the fishery in question is within the EEZ of a developing country Member, provided that the agreement pursuant to which the rights have been acquired is made public, and contains provisions designed to prevent overfishing in the area covered by the agreement based on internationally-recognized best practices for fisheries management and conservation as reflected in the relevant provisions of international instruments aimed at ensuring the sustainable use and conservation of marine species, such as, *inter alia*, 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* ("Fish Stocks Agreement"), the *Code of Conduct on Responsible Fisheries of the Food and Agriculture Organization* ("Code of Conduct"), the *Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas* ("Compliance Agreement"), and technical guidelines and plans of action (including criteria and precautionary reference points) for the implementation of these instruments, or other related or successor instruments. These provisions shall include requirements and support for science-based stock assessment before fishing is undertaken pursuant to the agreement and for regular assessments thereafter, for management and control measures, for vessel registries, for reporting of effort, catches

and discards to the national authorities of the host Member and to relevant international organizations, and for such other measures as may be appropriate.

III.54 Members shall give due regard to the needs of developing country Members in complying with the requirements of this Annex, including the conditions and criteria set forth in this Article and in Article V, and shall establish mechanisms for, and facilitate, the provision of technical assistance in this regard, bilaterally and/or through the appropriate international organizations.

III.6 With regard to the fisheries within the EEZ of a developing country Member, that developing country Member shall be free to operate the fisheries management system referred to in Article V, on a regional rather than a national basis, provided that all of the requirements under Article V are fulfilled in respect of and by each Member in the region. This provision shall not be construed to confer any exemption from obligations of developing country Members under the international agreements which they are parties to.
