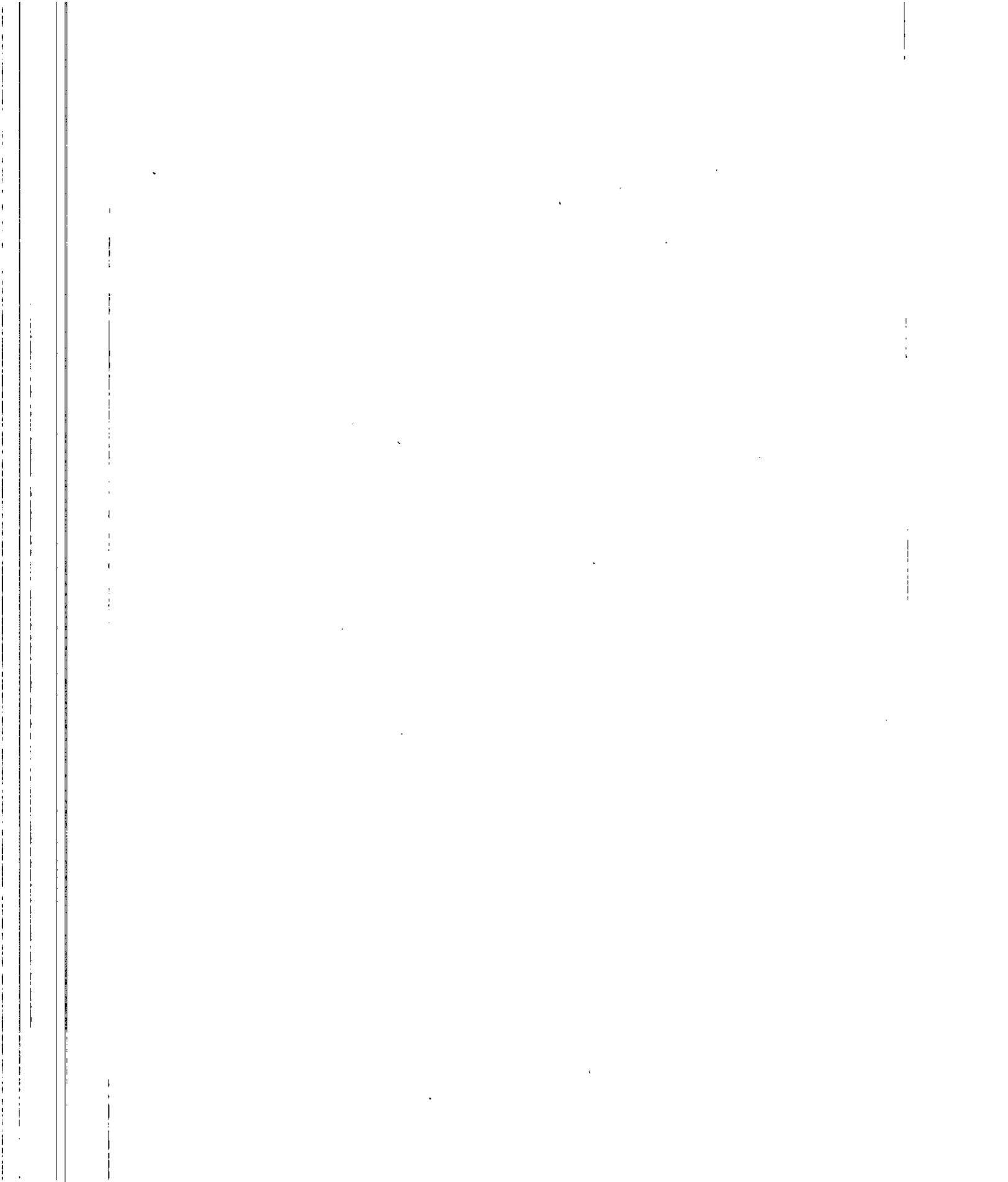


SECTION II
(pages 29 to 53)

**Report of the Working Group on Dispute Settlement
Procedures (DSP)
22-24 April 1998
Dartmouth, N.S., Canada**

Report of the Working Group	31
1. Opening by the Chairman.....	31
2. Appointment of Rapporteur.....	31
3. Adoption of Agenda	31
4. Review of Papers and proposals by Contracting Parties on a NAFO Dispute Settlement Mechanism	31
5. Examination of the desirability and, as appropriate, of the development of DSP	32
6. Report to the General Council.....	35
7. Other Matters.....	35
8. Adjournment.....	35
 Annex 1. List of Participants.....	 36
Annex 2. Agenda.....	39
Annex 3. Proposed Canadian Protocol on the Settlement of Disputes under NAFO Convention Article XII	40
Annex 4. Explanatory Note to the Canadian Proposal for a Protocol on the Settlement of Disputes under Article XII of the Convention.....	42
Annex 5. EU Proposal for a new Article relating to the settlement of disputes to be introduced by way of an amendment pursuant to Article XXI of the NAFO Convention.....	50
Annex 6. Explanatory Memorandum to the EU Proposal.....	53



**Report of the Working Group on
Dispute Settlement Procedures (DSP)**
(GC Doc. 98/4)

**22-24 April 1998
Dartmouth, N. S., Canada**

The DSP Working Group met in accordance with the decision taken by the General Council at the 19th Annual Meeting, September 1997 (GC Doc. 97.9, Part I, item 4.11).

1. Opening by the Chairman

The Meeting was opened by the Chairman, Mr. Stein Owc (Norway), who welcomed all delegates. The following Contracting Parties were represented at the Meeting: Canada, Denmark (in respect of Faroe Islands and Greenland), Estonia, European Union, Iceland, Japan, Latvia, Lithuania, Norway, Poland, the Russian Federation and the United States of America (Annex 1).

In his welcoming remarks, the Chairman noted that the first meeting of the Working Group identified several key issues through an analysis of relevant international texts and an examination of submitted proposals. By exploring these issues further he hoped to build consensus on individual elements that together could establish NAFO DSP.

2. Appointment of Rapporteur

Mr. Fred Kingston (EU) was appointed Rapporteur.

3. Adoption of the Agenda

The Agenda set out in Annex 2 was adopted.

**4. Review of Papers and Proposals by Contracting Parties
on a NAFO Dispute Settlement Mechanism**

The Working Group considered two proposals on DSP, namely a Canadian paper entitled "Proposed Canadian Protocol on the Settlement of Disputes under NAFO Convention Article XII" (GC Working Group W.P. 97/1 - Annex 3), along with an "Explanatory Note" (GC Working Group W.P. 97/2 - Annex 4), and an EU paper entitled "Proposal for a new Article related to the settlement of disputes to be introduced by way of an amendment pursuant to Article XXI of the NAFO Convention" with an Annex (DSP W.G. Working Paper 98/1 - Annex 5).

(i) Canadian Paper

The Canadian paper was the same as that which was reviewed extensively at the last meeting of the Working Group (NAFO/GC Doc. 97/3). By way of introduction, Canada stated that it remains convinced of the need to prevent the misuse of the NAFO objection procedure by adopting a mechanism that deals with objections that threaten the conservation of NAFO stocks. In any future NAFO DSP, the criteria for objecting and the basis for the review of an objection need to be addressed. Moreover, any NAFO DSP should apply to both straddling and discrete stocks and should be expeditious in order to resolve any dispute before it has a damaging effect on fish stocks. Canada added that it is only with regard to the misuse of the NAFO objection procedure that it sees any immediate need for DSP in NAFO. Other disputes could be adequately covered

under the United Nations Convention on the Law of the Sea, done at Montego Bay on December 10, 1982 ("UNCLOS") or the Agreement for 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 in New York on December 4, 1995 ("UN Agreement").

(ii) EU Paper

The EU stated that its paper expresses in operative language the elements laid down in the EU paper entitled "Broad Strategy to be Considered for a Possible NAFO Working Group" presented at last year's session of the Working Group (see Annex 5 of NAFO/GC Doc 97/3). Last year's paper should now be considered an explanatory memorandum to the current EU paper (DSP WG Working Paper 98/2 - Annex 6). The main idea of this proposal is for NAFO to incorporate, by way of an amendment to the NAFO Convention, the existing DSP set out in UNCLOS. This DSP should apply to all NAFO Contacting Parties and to all kinds of disputes. It should also cover discrete stocks.

The EU then gave a short introduction to each of the provisions in its proposed amendment as follows :

- Article 1 similar to Article 27 of the UN Agreement;
- Article 2 similar to the technique used in Article 30(2) of the UN Agreement, which incorporates UNCLOS procedures to cover the settlement of disputes under the UN Agreement. Under this proposed Article, UNCLOS procedures, or, if a dispute concerns straddling fish stocks, procedures under the UN Agreement *would be applied*;
- Article 3 allows for the possibility for a dispute to be submitted to an ad hoc Panel for issues related to Article XI of the NAFO Convention (i.e. management and conservation measures). In order to resolve the dispute such a Panel will have the power to make non-binding recommendations. If a party is not satisfied, it can still use the general procedures outlined in the proposed Article 2;
- Article 4 if such conciliation does not resolve the dispute, the Panel's recommendation will be applied on a provisional basis pending the final settlement of the dispute, unless the parties agree to "measures of equivalent effect" or unless one party asks the appropriate UNCLOS or UN Agreement tribunal (to which the dispute has been subsequently referred under the procedures foreseen in the proposed Article 2) to *prescribe provisional measures*; and
- Article 5 specifies the law to be applied in such disputes. The applicable law will include relevant provisions of the NAFO Convention, UNCLOS and, as appropriate, the UN Agreement.

5. Examination of the desirability and, as appropriate, of the development of DSP

The Working Group had an extensive and wide-ranging discussion on these matters.

Concerning the issue of **whether NAFO DSP were desirable**, delegates either declared that such procedures were desirable or were prepared to keep the issue open for future consideration.

Without prejudice to any such final decision in this regard, the Working Group agreed to proceed with an examination of possible elements on the development of DSP.

Certain delegates remarked upon the desirability for parties to resolve their differences by peaceful means and pointed to the obligations to consult and cooperate under Article II of the NAFO Convention.

During the discussion on this issue, certain delegates questioned the immediate need for general DSP in NAFO, noting that it may be sufficient to await the entry into force of the UN Agreement and that, as some NAFO members were parties to UNCLOS, use of these instruments might be sufficient. In this regard, concern was expressed at the potential proliferation of DSP outside UNCLOS or the UN Agreement. On the other hand, other delegates noted that not all NAFO Contracting Parties have signed or ratified either UNCLOS or the UN Agreement. This could present problems for the resolution of any dispute involving at least one such Contracting Party in terms of both the appropriate procedure and the substantive law to be applied. A general NAFO DSP applied consistently to all Contracting Parties would resolve any such problems (assuming that all NAFO Contracting Parties would become party to an instrument creating a NAFO DSP).

Concerning **the development of such DSP**, much of the discussion focused on issues arising out of the EU paper. These included the following:

- the **type of dispute** to be covered under any DSP. This coverage could be limited solely to certain conservation and management measures under Article XI of the NAFO Convention or to all types of disputes. Delegates who preferred the former noted that disputes concerning issues arising outside these conservation and management measures can be adequately resolved by existing means. In any case they noted that any real need in NAFO for DSP concerns disputes surrounding such conservation and management measures. On the other hand, other delegates pointed to potential difficulties in differentiating between types of disputes, as well as in prejudging those disputes in which there is a real need for NAFO DSP. In this regard it was noted that the EU paper proposes NAFO DSP to cover all disputes, but a “fast track” procedure for those disputes arising out of Art. XI of the NAFO Convention.

In a situation in which there is disagreement over whether there is, in fact, a dispute, many delegates suggested that this should be determined by any Panel set up to consider the matter;

- Concerning the **objection procedure** under Article XII of the NAFO Convention, the Working Group agreed that any DSP should not challenge a Contracting Party’s right to object but rather focus on its “post-objection behavior”. In this context, there was an extensive discussion concerning the type of post-objection behavior sufficient to trigger any NAFO DSP. Delegates considered that in such a situation any DSP should be triggered as soon as possible, given the possible threat to conservation of fish stocks if a dispute is not resolved expeditiously. Discussion focused on whether a party objecting should also be required to give an explanation for the objection and/or state its intended behaviour (e.g. a fishing plan), which would then be the subject of a possible dispute. Some delegates expressed concern that this may limit a Contracting Party’s sovereign right to object;
- the **binding nature of any decision** arising out of any possible NAFO DSP Panel process. Some delegates favoured a non-binding decision, but this decision could be applied provisionally until the final arbiter under the UNCLOS system makes a decision

whether provisional or final. Other delegates preferred such a NAFO Panel decision be binding in itself.

Other delegates stated that they would be better prepared to discuss this issue once the type of disputes to be covered by any NAFO DSP was determined;

- the **competence** of any NAFO DSP Panel. Delegates agreed that a NAFO DSP Panel cannot function as a court of appeal for any Fisheries Commission decisions. However, some delegates expressed concern that the decision of any NAFO DSP Panel could, in effect, challenge the relevant decision of the Fisheries Commission. Other delegates responded that a Panel should only consider any autonomous measures in light of whether a Party is fulfilling its obligations or whether such measures are undermining NAFO's conservation and management measures. There was also discussion as to whether such a Panel should merely be able to give "yes or no" answers or be given the power to make further recommendations or impose broader remedies;
- the **applicable law**, particularly whether the UN Agreement should be applied also to discrete stocks. Certain delegates noted that the UN Agreement was negotiated in the context of straddling fish stocks and highly migratory fish stocks only and, consequently, it would be inappropriate, and possibly imprudent, to extend it to discrete stocks, particularly when this Agreement is not yet in force and may not be ratified by some NAFO Contracting Parties. Other delegates expressed concern that the same rules should be applied to all disputes and that nothing prevents NAFO Contracting Parties from applying the principles of the UN Agreement to discrete stocks if they all agree to do so;
- **time-lines**. The Working Group agreed on the importance of an expeditious procedure in order to resolve a dispute concerning conservation and management measures before the start of the relevant fishing season. However, concerning a dispute arising out of an objection to any measure decided at a September NAFO Annual Meeting, most delegates stated that, realistically, a Panel decision could not be given before the end of that year and probably not before March the following year. In these circumstances, certain delegates suggested that the objecting party should apply the contested measure (i.e. *status quo ante*) until the Panel makes its decision;
- **burden of proof**. In the case of a dispute arising out of an objection, certain delegates stated that the party contesting the objection should have the burden to show that the objecting party is wrong, while other delegates stated that the objecting party should have the burden to demonstrate that its post-objection behaviour is responsible, while still others suggested that this issue should be determined on a case-by-case basis;
- **establishment of Panel**. Issues discussed included how Panelists are selected, whether a Panelist needs to have an arms-length relationship with the disputing Parties and/or with the dispute, what qualifications are necessary to be a Panelist and how these are to be established and should nationals of non-Contracting Parties also be allowed to be Panelist. Concern was expressed that certain Contracting Parties might have particular difficulties in providing Panelists;
- **costs**. Two options were briefly discussed, namely that NAFO would pay the costs of any Panel established or that the disputing parties would pay in equal shares; and
- **legal form** for NAFO to incorporate any DSP. The options discussed were an amendment to the NAFO Convention and a Protocol. Most delegates were, in principle,

in favour of an amendment since all Contracting Parties would be subject to the same rules, but recognized that a Protocol would make it easier to put any DSP into effect at least for those Contracting Parties that became party to the Protocol. The Working Group agreed that this issue may have to be addressed later, depending upon the degree of consensus achieved in the development of NAFO DSP.

6. Report to the General Council

Following the discussion at this meeting, the Chairman informed the Working Group that he intends to prepare a paper to serve as a basis for the further work of the Working Group. He will distribute this paper in advance of the next NAFO Annual Meeting. The Working Group agreed to meet on 14 September 1998 in Lisbon, Portugal, in order for the Chairman to present his paper and to respond to any questions thereon.

The Working Group agreed to recommend that the General Council, on the basis of the discussions of the Working Group, should examine the issue of a possible NAFO DSP at the next NAFO Annual Meeting.

Furthermore, the Working Group agreed to recommend that the General Council authorize it to continue its work and to convene a meeting before the subsequent NAFO Annual Meeting. (On a preliminary basis it was suggested to convene such a meeting in early 1999.)

7. Other Matters

There were no other matters for discussion.

8. Adjournment

The Meeting adjourned at 1310 hrs. on 24 April 1998.

Annex 1. List of Participants

CANADA

Head of Delegation

R. J. Rochon, Director General, Legal Affairs Bureau (JCD), Dept. of Foreign Affairs and International Trade Canada, 125 Sussex Drive, Ottawa, Ontario K1A 0G2

Advisers

N. Bouffard, Dept. of Fisheries and Oceans, 200 Kent St., 13th Floor, Ottawa, Ontario K1A 0E6

A. Donohue, Department of Justice, 284 Wellington Street, Ottawa, Ontario K1A 0J1

M. Harvey, Dept. of Foreign Affairs and International Trade Canada, 125 Sussex Drive, Ottawa, Ontario K1A 0G2

DENMARK (IN RESPECT OF FAROE ISLANDS & GREENLAND)

Head of Delegation

E. Lemche, Director, Gronlands Hjemmestyre, Pilestraede 52, Box 2151, DK-1016 Copenhagen, Denmark

Alternate

K. P. Mortensen, Foroya Landsstyri, P. O. Box 64, FR-110 Torshavn, Faroe Islands

Adviser

M. Vilhelmsdottir, Greenland Home Rule, Box 269, 3900 Nuuk, Greenland

ESTONIA

Head of Delegation

L. Vaarja, Director General, Fisheries Dept., Ministry of the Environment, Kopli 76, EE-0004 Tallinn

EUROPEAN UNION (EU)

Head of Delegation

O. Tougaard, European Commission, Directorate General for Fisheries, Rue de la Loi 200, B-1049 Brussels, Belgium

Alternate

F. Wieland, European Commission, Directorate General for Fisheries, Rue de la Loi 200, B-1049 Brussels, Belgium

Advisers

T. VanRijn, European Commission, Legal Service, Nerv 85, 3/31, Wetstraat 200, 1049 Brussels, Belgium

G. F. Kingston, Senior Adviser (Economic and Commercial Affairs), Delegation of the European Commission, 330-111 Albert Street, Ottawa, Ontario K1P 1A5

F. Florindo, General Secretariat of the Council, Rue de la Loi 175, B-1048 Brussels, Belgium

S. Whitehead, Room 427, Nobel House, Ministry of Agriculture, Fisheries and Food, 17 Smith Square, London SW1P 3JR, United Kingdom

S. Feldthaus, Ministry of Food, Agriculture and Fisheries, Holbergsgade 2, 1057 Copenhagen K, Denmark

C. LeVillain, Ministère de l'Agriculture et de la Pêche, Direction des Pêches Maritimes, 3 Place de Fontenoy, 75007 Paris, France

A. Holzenberger, Embassy of Germany, 1 Waverley Street, Ottawa, Ontario K2P 0T8

M. Folque, Direcção Geral das Pescas e Aquicultura, Edifício Vasco da Gama, Alcantara, 1350 Lisbon, Portugal

M. I. Aragon, Secretaria General de Pesca Marítima, Jose Ortega y Gasset, 57, 28006 Madrid, Spain

C. Dominguez, Secretaria General de Pesca Marítima, Jose Ortega y Gasset, 57, 28006 Madrid, Spain

R. Akesson, Ministry of Agriculture, 10333 Stockholm, Sweden

ICELAND

Head of Delegation

T. H. Heidar, Ministry for Foreign Affairs, Raudararstigur 25, 150 Reykjavik

Alternate

K. Haraldsdottir, Ministry of Fisheries, Skulagata 4, 150 Reykjavik

JAPAN

Head of Delegation

A. Umezawa, Embassy of Japan, 255 Sussex Drive, Ottawa, Ontario K1N 9E6

LATVIA

Head of Delegation

N. Riekstins, Director, National Board of Fisheries, Ministry of Agriculture, 63, Kr. Valdemara Str., LV-1142 Riga

Adviser

U. Rinkis, National Board of Fisheries, Ministry of Agriculture, 63, Kr. Valdemara Str., LV-1142 Riga

LITHUANIA

Head of Delegation

R. Survila, Fisheries Dept., Ministry of Agriculture, 19 Gedimino pr., 2600 Vilnius

Alternate

A. Rusakevicius, Chief Specialist-International Relations, Fisheries Dept., Ministry of Agriculture, 19 Gedimino pr., 2600 Vilnius

NORWAY

Head of Delegation

K. Eliassen, Ministry of Foreign Affairs, P. O. Box 8114 DEP., 0032 Oslo 1

Alternate

T. Lobach, Directorate of Fisheries, P. O. Box 185, N-5002 Bergen

Adviser

S. Owe, Norwegian Embassy, 2720 34th Street, N.W., Washington, DC 20008, USA

POLAND

Head of Delegation

J. L. Kleniewski, General Consulate of Poland, 233 Madison Avenue, New York, NY 10016 USA

RUSSIA

Head of Delegation

K. A. Bekiachev, Legal Adviser of the Ministry of Agriculture and Food of the Russian Federation, Professor of International Law, 12 Rozhdestvensky Blvd., Moscow

Advisers

G. V. Gusev, Senior Officer, Ministry of Agriculture and Food of the Russian Federation, Fisheries Dept., 12 Rozhdestvensky Blvd., Moscow

E. M. Gontchar, Representative of the Russian Federation in Canada on Fisheries, Welsford Place, 2202-2074 Robie Street, Halifax, N.S., Canada B3K 5L3

UNITED STATES OF AMERICA

Head of Delegation

V. Botet, U.S. Department of State, 2201 C Street NW, Washington, DC 20520

Adviser

G. S. Martin, Office of the General Counsel, Northeast Region, National Oceanic and Atmospheric Administration, U.S. Dept. of Commerce, 1 Blackburn Dr., Gloucester, MA 01930

SECRETARIAT

L. I. Chepel, Executive Secretary

B. Cruikshank, Senior Secretary

Annex 2. Agenda

1. Opening by the Chairman, Stein Owe (Norway)
2. Appointment of Rapporteur
3. Adoption of the Agenda
4. Review of papers and proposals by Contracting Parties on a NAFO dispute settlement mechanism
5. Examination of the desirability and possible elements in a NAFO dispute settlement mechanism
6. Report to the General Council
7. Other matters
8. Adjournment

**Annex 3. Proposed Canadian Protocol on the Settlement of Disputes
Under NAFO Convention Article XII
(GC Working Group W.P. 97/1)**

Background:

At the 1996 NAFO Annual Meeting in St. Petersburg, Canada circulated a proposal for the adoption of a dispute settlement mechanism to deal with objections under the NAFO Convention (GC Working Paper 96/3). This proposal is intended to address a problem identified in NAFO as long ago as 1988.

In 1988 the General Council recognized that the inappropriate use of the NAFO objection procedure *"may lead to damage of the living resources of the Northwest Atlantic"* and called on Contracting Parties to *"avoid excessive or inappropriate use of the objection procedure against the regulatory measures adopted by the Fisheries Commission"* (GC Doc. 88/8).

In 1989 the General Council developed this theme further by calling for *"compliance with the NAFO management framework in place since 1979, and compliance with NAFO decisions in order to provide for conservation and maintain the traditional spirit of cooperation and mutual understanding in the Organization"* (Resolution found at GC Doc. 89/4, Appendix 10).

Canada first proposed the creation of a dispute settlement mechanism in NAFO at the 1992 NAFO Annual Meeting (GC Working Paper 92/6). Canada's 1992 proposal called for the creation of a dispute settlement mechanism as an amendment to the NAFO Convention. The current Canadian proposal, which supersedes the 1992 proposal, calls for the establishment of a Protocol to provide for dispute settlement with respect to the objection procedure.

Canada's Proposed Protocol:

Canada wishes to make it clear that it is not the purpose of the proposed Protocol to override or to eliminate the NAFO objection procedure. The Protocol is aimed at enhancing the long-term conservation and sustainable use of the fishery resources of the NAFO Regulatory Area ("NRA"). The Protocol therefore reflects the objectives of the NAFO Convention, which was established to implement the clear desire of NAFO Parties to conserve fish stocks in the NRA. It builds upon the conservation objectives of both the 1982 *United Nations Convention on the Law of the Sea* ("UNCLOS") and the 1994 *Agreement for the Implementation of the Provisions of the United Nations Convention of the Law of the Sea of 10 December 1982, Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks* (commonly referred to as the UN Fish Agreement or "UNFA"). It was never the intention of the NAFO Convention to allow a Party to object arbitrarily to a proposal of, or a measure adopted by, the Fisheries Commission. The Canadian Protocol therefore seeks to ensure the responsible use of the objection procedure in situations where a Party considers that a proposal of, or a measure adopted by, the Fisheries Commission:

- (a) is inconsistent with the provisions of the NAFO Convention or UNFA;
- (b) unjustifiably discriminates in form or in fact against the Objecting Party; or
- (c) does not adequately take into consideration the provisions of Article XI(3) and (4) of the NAFO Convention with respect to quotas in the Regulatory Area.

Other key features of the Canadian Protocol are:

- the establishment of expert Panels to resolve disputes concerning the validity of specific objections;
- provision for the participation in the dispute settlement proceedings by third Parties (i.e. other Parties to the Protocol) and non-Parties (i.e. NAFO members that are not Parties to the Protocol);
- rapid timelines for the presentation of written and oral argument before the Panel and for the rendering of a decision, in order to ensure that disputes are resolved during a current fishing season; and
- the expert Panels must consider the interests of all NAFO Contracting Parties, including those that are not Parties to the Protocol.

The Protocol would be binding only on those NAFO Contracting Parties that have accepted it.

The Advantages of Dispute Settlement Protocol:

The intention of the Canadian proposal is to minimize conflicts by providing an objective third party mechanism to resolve disagreements which can lead to overfishing and confrontation. The Protocol thus supports cooperation and mutual understanding within NAFO.

UNFA provides for binding dispute settlement related to straddling stocks and highly migratory stocks (Article 30). The Canadian proposal is not intended to supplant the procedures provided for in UNFA. However, the principal advantages of the proposed specific dispute settlement mechanism under the NAFO Convention over the more general dispute settlement procedures under UNFA are:

- a tight time-frame which is intended to provide decisions before excessive fishing can affect NAFO-managed stocks; and
- applicability to discrete high seas stocks in the Flemish Cap which are not subject to UNFA.

As noted above, the objective of the current Canadian proposal is not to eliminate the objection procedure under Article XII of the NAFO Convention, but to establish clear guidelines for its use. Canada is of the view that the excessive or inappropriate use of the objection procedure should be open to challenge, and that it is in the interest of all Contracting Parties to have disputes resolved through a quick and effective binding dispute settlement process designed specifically for NAFO.

**Annex 4. Explanatory Note to the Canadian Proposal for a Protocol
on the Settlement of Disputes Under Article XII of the Convention
(GC Working Group W.P. 97/2)**

Canada is proposing the establishment of a Protocol to the NAFO Convention to provide for dispute settlement with respect to the "objection procedure" under Article XII of the Convention. The purpose of the Protocol is to prevent abuse of the objection procedure by seeking to ensure that objections are made only on clear, justifiable grounds. This will enhance the long-term conservation and sustainable use of the fishery resources of the NAFO Convention Area, an objective shared by all NAFO Contracting Parties.

The main features of the Canadian draft Protocol are as follows:

- an agreement by the Parties to the Protocol to limit their use of the objection procedure to the grounds set out in the Protocol;
- the establishment of expert panels to resolve disputes over the use of the objection procedure;
- rapid timelines for the presentation of written and oral argument before the panel and for the rendering of a decision, to ensure that disputes are resolved during a current fishing season;
- provision for the participation in the dispute settlement proceedings by Third Parties and non-Parties; and
- affirmation that the Protocol is without prejudice to the rights of the Parties under the 1982 Law of the Sea Convention or the 1994 U.N. Fish Agreement.

Canada first proposed the creation of a dispute settlement mechanism in NAFO at the 1992 annual meeting. The attached text is intended to supersede Canada's 1992 proposal (GC Working Paper 92/6).

CANADIAN PROPOSAL

PROTOCOL ON THE SETTLEMENT OF DISPUTES UNDER ARTICLE XII OF THE CONVENTION

THE PARTIES TO THIS PROTOCOL,

RECOGNIZING the importance of achieving the conservation and management objectives of the Northwest Atlantic Fisheries Organization (NAFO),

TAKING INTO ACCOUNT 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* opened for signature in New York on December 4, 1995, in particular the Agreement's provisions on compulsory and binding settlement of disputes, its provisions obligating States to pursue cooperation either directly or through appropriate fisheries management organizations or arrangements, and its provisions obligating States to cooperate to strengthen existing organizations and arrangements to improve their effectiveness for the conservation and management of the stocks subject to their authority,

RECOGNIZING that disputes may arise from time to time regarding the use of the objection procedure provided in Article XII of the NAFO Convention, and that it is in the interest of conservation, and of all NAFO Contracting Parties, to have such disputes resolved through a quick and effective compulsory and binding dispute settlement process designed specifically for NAFO,

HAVE AGREED as follows:

ARTICLE I: DEFINITIONS

In this Protocol:

NAFO Convention means the *Convention of Future Multilateral Co-operation in the Northwest Atlantic Fisheries*, done at Ottawa on October 24, 1978;

Party means a Party to this Protocol;

Objection means:

- (i) an objection by a Party to a proposal of the Fisheries Commission, pursuant to Article XII(1) of the NAFO Convention; or
- (ii) a notice by a Party of its intention not to be bound by a measure adopted by the Fisheries Commission, pursuant to Article XII(3) of the NAFO Convention.

Objecting Party means a Party that has presented an Objection;

Contesting Party means a Party, including an Objecting Party, that requests the establishment of a Panel to determine the validity of an Objection;

UNFA means 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* opened for signature in New York on December 4, 1995; and

UNCLOS Convention means the United Nations Convention on the Law of the Sea, done at Montego Bay on December 10, 1982.

ARTICLE II: OBJECTIVES

The objectives of this Protocol, as elaborated more specifically through its provisions, are to:

- (a) enhance the long-term conservation and sustainable use of the fishery resources of the NAFO Convention Area; and
- (b) provide for a prompt and effective method to resolve disputes arising under Article XII of the NAFO Convention.

ARTICLE III: LIMITS ON THE RIGHT TO PRESENT OBJECTIONS

1. A Party may present an Objection only if it considers that a proposal of, or a measure adopted by, the Fisheries Commission:
 - (a) is inconsistent with the provisions of the NAFO Convention or the UNFA;
 - (b) unjustifiably discriminates in form or in fact against the Objecting Party; or
 - (c) does not adequately take into consideration the provisions of Article XI, paragraphs 3 and 4, of the NAFO Convention with respect to quotas established in the Regulatory Area.

ARTICLE IV: ROSTER

1. The Executive Secretary shall establish by _____, and maintain a roster of individuals who are willing and able to serve as Panelists. Each Party may submit up to five nominees for inclusion in the roster, and shall describe the relevant qualifications and experience of each of its nominees.
2. Roster members shall have expertise or experience in fisheries conservation or management, international law, other areas covered by the NAFO Convention or the resolution of disputes arising under international agreements, and shall be chosen on the basis of objectivity, reliability and sound judgement.

ARTICLE V: REQUEST FOR A PANEL

1. Following receipt by the Executive Secretary of an Objection, a Contesting Party may request in writing the establishment of a Panel to determine the validity of the Objection. The Contesting Party shall deliver the request to the Chairman of the General Council. The Chairman of the General Council shall promptly transmit a copy of the request, through the Executive Secretary of NAFO, to each NAFO Contracting Party.
2. Where more than one Contesting Party requests the establishment of a Panel related to the same Objection, a single Panel shall be established.

ARTICLE VI: PANEL SELECTION

1. Except as provided elsewhere in this Protocol, the procedures set out in this Article shall apply to Panel selection.
2. Where a Contesting Party requests the establishment of a Panel:
 - (a) The Panel shall comprise three members.
 - (b) Within ten days of the date on which the request for a Panel is transmitted to the NAFO Contracting Parties pursuant to Article V, the Contesting Party and the Objecting Party shall each select one Panelist from the roster.
 - (c) Within twenty days of the date on which the request for a Panel is transmitted to the NAFO Contracting Parties pursuant to Article V, the Contesting Party and the Objecting Party shall agree on the selection of the third Panelist, who shall serve as Chair of the Panel. If the Contesting Party and the Objecting Party cannot agree on the Chair, they shall decide by lot which of them shall select the Chair from the roster. The Chair shall not be a citizen of either the Contesting Party or the Objecting Party.
3. Where there is more than one Contesting Party, the Contesting Parties shall seek to agree on the selection of a single Panelist. If the Contesting Parties are unable to agree, the Chairman of the General Council shall, within five days of the end of the ten day period specified in paragraph 1, select a Panelist from the roster on behalf of such Contesting Parties.
4. Where there is more than one Objecting Party, the Objecting Parties shall seek to agree on the selection of a single Panelist. If the Objecting Parties are unable to agree, the Chairman of the General Council shall, within five days of the end of the ten day period specified in paragraph 1, select a Panelist from the roster on behalf of such Objecting Parties.
5. Where an Objecting Party alone requests the establishment of a Panel, that Party shall select one Panelist from the roster and notify the Chairman of the General Council of its choice within ten days of the date on which the request for a Panel is transmitted to the NAFO Contracting Parties pursuant to Article V. The Chairman of the General Council shall, within five days of the end of the ten day period, select a second Panelist from the roster. Within twenty days of the date on which the request for a Panel is transmitted to the NAFO Contracting Parties pursuant to Article V, the two Panelists shall appoint a third Panelist who shall serve as Chair.

ARTICLE VII: PARTICIPATION BY THIRD PARTIES

Any Party that is not a Contesting Party or an Objecting Party, on delivery of a written notice to the Chairman of the General Council, shall be entitled to attend all hearings of the Panel, to make written and oral submissions to the Panel, and to receive written submissions of each Contesting and Objecting Party.

ARTICLE VIII: PARTICIPATION BY NON-PARTIES

Any NAFO Contracting Party that is not a Party to this Protocol, on delivery of a written notice to the Chairman of the General Council, may attend all hearings of the Panel, make written and oral

submissions to the Panel, and receive written submissions of each Contesting and Objecting Party, provided that the Contesting and Objecting Parties so agree.

ARTICLE IX: ROLE OF EXPERTS

On request of a Contesting or Objecting Party, or on its own initiative, the Panel may seek information and technical advice from any person or body that it deems appropriate, provided that the Contesting and Objecting Parties so agree.

ARTICLE X: DECISION OF THE PANEL

1. Unless the Contesting and Objecting Parties otherwise agree, the Panel shall, within fifteen days of the conclusion of the hearing, present its decision to the Chairman of the General Council, through the Executive Secretary. Decisions of a Panel shall be by majority.
2. If the Panel determines that the Objection does not meet the criteria of Article III, it shall declare the Objection to be invalid. If the Panel determines that the Objection meets the criteria of Article III, it shall declare the Objection to be valid.
3. If the Panel determines the Objection to be invalid:
 - (i) on the expiration of ten days following the date of the decision, or on such date as may be specified in the decision, the proposal of the Fisheries Commission shall become a binding measure on the Objecting Party; or
 - (ii) the measure adopted by the Fisheries Commission shall continue to be binding on the Objecting Party.
4. If the Panel determines the Objection to be valid:
 - (i) the proposal shall not become a binding measure on the Objecting Party, pursuant to Article XII(1) of the NAFO Convention; or
 - (ii) the measure shall cease to be binding on the Objecting Party, pursuant to Article XII(3) of the NAFO Convention.
5. In making its determination, the Panel shall consider the interests of all NAFO Contracting Parties, including those that are not Parties to this Protocol.

ARTICLE XI: RELATION TO OTHER AGREEMENTS

This Protocol shall be without prejudice to the rights and obligations of Parties under the UNFA Agreement or the UNCLOS Convention.

ARTICLE XII: RULES OF PROCEDURE

The Panel proceedings shall be conducted in accordance with the Rules of Procedure set out in the Annex. The Panel may adopt such additional rules of procedure, consistent with the NAFO Convention and this Protocol, as it deems necessary.

ARTICLE XIII: ACCEPTANCE

Any Contracting Party to the NAFO Convention may become a Party to this Protocol by written notification of acceptance to the Depositary.

ARTICLE XIV: DEPOSITARY

The Government of Canada shall be the Depositary.

ARTICLE XV: ENTRY INTO FORCE

This Protocol shall enter into force on the date of receipt by the Depositary of the notification of acceptance which brings the number of notifications of acceptances to _____

ARTICLE XVI: WITHDRAWAL

1. Any Party may withdraw from this Protocol on December 31 of any year by giving notice to the Depositary on or before the preceding June 30.
2. Any other Party may withdraw from this Protocol on the same December 31 by giving notice to the Depositary within one month of the receipt of a copy of a notice of withdrawal given pursuant to paragraph 1.

ARTICLE XVII: NOTIFICATION

The Depositary shall promptly notify the Executive Secretary in writing of the receipt of each notification of acceptance or withdrawal. The Executive Secretary shall thereupon transmit the information to all Contracting Parties to the NAFO Convention.

ARTICLE XVIII: RESERVATIONS

This Protocol shall not be subject to reservations.

ANNEX: RULES OF PROCEDURE

OPERATION OF PANELS

1. The Chair of the Panel shall preside at all of its meetings. A Panel may delegate to the Chair authority to make administrative and procedural decisions.
2. Except as otherwise provided in these rules, the Panel may conduct its business by any means, including by telephone, facsimile transmission or computer links.
3. If a Panelist dies, withdraws or is removed, a replacement shall be selected as expeditiously as possible in accordance with the selection procedure followed to select the Panelist.
4. Any time period applicable to the Panel proceeding shall be suspended for a period beginning on the date the Panelist dies, withdraws or is removed and ending on the date the replacement is selected.

PLEADINGS

5. The Objecting Party shall deliver its written submission to the Executive Secretary of NAFO no later than 10 days after the date on which the last Panelist is selected. The Objecting Party shall describe in its submission how the proposal or measure that is subject of the Objection is inconsistent with the provisions of the NAFO Convention or the UNFA Agreement, unjustifiably discriminates in form or in fact against the Objecting Party, or does not adequately take into consideration the provisions of Article XI, paragraphs 3 and 4, of the NAFO Convention with respect to quotas established in the Regulatory Area.
6. The Contesting Party shall deliver its written submission to the Executive Secretary no later than 10 days after the date of delivery of the written submission of the Objecting Party. Each Third Party and non-Party shall deliver its written submission to the Executive Secretary no later than the date on which the submission of the Contesting Party is due.
7. The Executive Secretary shall forward the written submissions immediately upon receipt by the most expeditious means practicable to the other participating Parties and to the members of the Panel.

HEARING

8. The Chair shall fix the date and time of the hearing in consultation with the participating Parties and the other members of the Panel.
9. The hearing shall be convened at the headquarters of NAFO, or at such other place as may be agreed by the Contesting and Objecting Parties, no later than thirty days following the formation of the Panel.
10. The hearing shall be conducted by the Panel in the following manner, ensuring that the Objecting Party or Parties and the Contesting Party or Parties are afforded equal time:
 - (i) Argument of the Objecting Party or Parties;
 - (ii) Argument of the Contesting Party or Parties;
 - (iii) Presentation of the Third Party or Parties; and
 - (iv) Presentation of the non-Party or Parties.

DECISION OF THE PANEL

11. Upon receipt of the decision of the Panel pursuant to Article X, the Chairman of the General Council, through the Executive Secretary, shall forthwith transmit the decision to all NAFO Contracting Parties. Reasons in writing shall be communicated to the Chairman of the General Council within ninety days of the decision. The Chairman of the General Council shall, through the Executive Secretary, promptly transmit such reasons to all Contracting Parties to the NAFO Convention.

CLERK

12. The Executive Secretary of NAFO shall serve as clerk to the Panel and provide for all necessary facilities and arrangements.

EXPENSES, FEES AND COSTS

13. The rules regarding expenses and the level of fees for Panelists and experts shall be established by the General Council.

**Annex 5. EU Proposal for a new Article relating to the settlement of
disputes to be introduced by way of an amendment pursuant to
Article XXI of the NAFO Convention
(DSP Working Group W.P. 98/1)**

Article...

1. Contracting Parties shall cooperate in order to prevent disputes.
2. The provisions relating to the settlement of disputes set out in Part XV of the United Nations Convention on the Law of the Sea of 10 December 1982 (hereafter referred to as the "1982 UN Convention") or, where a dispute concerns one or more straddling fish stocks, in Part VIII of the United Nations 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 of 4 August 1995 (hereafter referred to as the "1995 UN Agreement") shall apply mutatis mutandis to any dispute between Contracting Parties concerning the interpretation or application of this Convention, whether or not they are also Parties to the 1982 UN Convention or the 1995 UN Agreement.
3. Without prejudice to paragraph 2, any dispute concerning the interpretation or application of a proposal adopted by the Commission pursuant to Article XI of this Convention, or a matter related thereto, shall first be submitted to an ad hoc panel constituted as provided in Annex... to this Convention at the request of a Contracting Party. The panel shall confer with the Contracting Parties concerned and shall endeavour to resolve the dispute expeditiously without recourse to binding procedures for the settlement of disputes. To this end, the panel may make recommendations which it considers appropriate to preserve the respective rights of the Contracting Parties concerned and to prevent damage to the fish stocks in question. Any dispute of this character not so resolved shall, if one of the Contracting Parties concerned so requests, be referred to binding procedures for the settlement of disputes as provided in paragraph 2.
4. Pending the settlement of a dispute referred to in paragraph 3, the parties to the dispute shall apply provisionally any recommendation made by a panel, unless they otherwise agree on arrangements of equivalent effect or one of the parties concerned requests the court or tribunal to which the dispute has been submitted in accordance with paragraph 2 to prescribe any appropriate provisional measure.
5. Any court, tribunal or panel to which a dispute has been submitted under this Article shall apply the relevant provisions of this Convention, of the 1982 UN Convention and, as appropriate, of the 1995 UN Agreement, as well as generally accepted standards for the conservation and management of living marine resources and other rules of international law not incompatible with the 1982 UN Convention, with a view to ensuring the conservation of the fish stocks concerned.

Annex...to the Convention – Panel referred to in paragraph 3 of Article...

1. The Executive Secretary shall establish and maintain a list of experts who are willing and able to serve as panelists. Each Contracting Party shall be entitled to nominate up to five experts whose competence in the legal, scientific or technical aspects of fisheries covered by this Convention is established.
2. A Contracting Party may request, by written notification addressed to the Chairman of the General Council, the establishment of a panel referred to in paragraph 3 of Article... . The notification shall be accompanied by a statement of the claim and the grounds on which it is based. The Chairman of the General Council shall promptly transmit a copy of the request, through the Executive Secretary, to each Contracting Party.
3. The panel shall consist of three members, unless the Parties to the dispute otherwise agree. Within [] days of the date of the transmission of the request to the Contracting Parties, the Party instituting proceedings and the other Party shall each select one panelist. Both Parties shall, within a period of [] days following the selection of the second panelist, agree on the selection of the third panelist, who shall not be a national of either Party and shall not be of the same nationality as either of the first two panelists. The third panelist shall chair the panel. If the Parties have not reached agreement within the prescribed period on the selection of the third panelist, that panelist shall be selected from the list, at the request of either Party and within [] days of the notification of this request, by a joint decision of the Chairman of the General Council and the Chairman of the Fisheries Commission, unless the Parties agree on any other means of selection of the third panelist.
4. Where more than one Contracting Party request the establishment of a panel related to the same subject-matter, a single panel shall be established. In disputes between more than two Contracting Parties, Parties of the same interest shall select one panelist jointly by agreement.
5. Any Contracting Party which is not a Party to the dispute may attend all hearings of the panel, make written and oral submissions to the panel and receive the submissions of each Party to the dispute.
6. On request of a Party to the dispute, or on its own initiative, the panel may seek information and technical advice from any person or body that it deems appropriate, provided that the parties to the dispute so agree.
7. Unless the Parties to the dispute otherwise agree, the panel shall, within [] days of the conclusion of the hearing, make its recommendation referred to in paragraph 3 of Article... . The recommendation shall be confined to the subject-matter of the dispute and state the reasons on which it is based. Reasons in writing shall be communicated to the Chairman of the General Council, through the Executive Secretary, within [] days of the recommendation.
8. The recommendation of the panel shall be made by a majority of its members, who may not abstain from voting.
9. The General Council shall establish the rules of procedure, ensuring that each Party to the dispute shall be given full opportunity to be heard and to present its case. The panel may adopt such additional rules of procedure as it deems necessary.

10. The rules regarding expenses and the level of fees for panelists shall be established by the General Council.

Annex 6. Explanatory Memorandum to the EU Proposal
(DSP W.G. Working Paper 98/2)

**Broad Strategy to be Considered for a Possible NAFO
Dispute Settlement Mechanism**

Disputes may arise in situations in which Contracting Parties hold clearly opposite views concerning the question of the performance or non-performance of obligations under the NAFO Convention. Whether there exists a dispute is a matter for objective determination. The mere claim of the existence of a dispute by a Contracting Party does not prove its existence.

The objection procedure under Article XII of the NAFO Convention grants a Contracting Party a conventional right, the assertion of which cannot be construed as giving rise to a dispute in the proper sense.

A possible NAFO dispute settlement mechanism should cover all kinds of disputes, e.g. disputes concerning the conservation and management of both straddling fish stocks and "discrete stocks", enforcement issues, budgetary matters or rights of membership.

A possible NAFO dispute settlement mechanism could consist of an agreement of the Contracting Parties to apply *mutatis mutandis* the provision relating to the compulsory and binding settlement of disputes set out in Part XV of UNCLOS to any dispute arising within NAFO.

With a view to ensuring a timely dispute settlement mechanism for NAFO, consideration might be given to the incorporation of a pre-trial process through an ad hoc expert panel in order to resolve the dispute expeditiously. The decisions of such a panel, while not binding in nature, could form the basis for renewed consideration by the parties concerned of the matter out of which the dispute arose. If, as the result of this procedure the dispute is not settled, the decisions of the panel could be applied as provisional measures, pending the outcome of a final dispute settlement procedure if the parties concerned wish to pursue the matter through recourse to binding procedures for the settlement of disputes under Part XV of UNCLOS.

A possible NAFO dispute settlement mechanism should be applicable to all Contracting Parties, by way of an amendment pursuant to Article XXI of the NAFO Convention.

