Notes on Chairman's Draft Agreement for the Implementaion of the Provisions of the UN Convention on the Law of the Sea.

Form of document

1. A general point of major importance entailing a significant improvement over previous taxts is that the new document is in the form of a binding international treaty and not merely a hortatory declaration. It follows , of course, that this change makes it essential that the substantive provisions of the Draft Agreement be adequate to protect the interests of Newfoundland and Canada, since the agreement would virtually amend the 1982 LOS Convention. Thus the term "adequate" is intended to mean that the agreement would produce better protection than is afforded by the 1982 LOS Convention, (coupled with the existing structure of NAFO, the type of regional organization envisaged by Article 63 of the 1982 Convention). A further consideration to be taken into acxcount in weighing the value of the draft agreement and any later revisions is the additional protection afforded Newfoundland and Canada by Canada's recent unilateral legislation.

Article 2

2. The Objective set forth in Article 2 is consistent with the interests of Newfoundland and Canada and could prove important in event of disputes as to the interpretation or application of the agreement.

Article 3

3. Article 3 makes clear that coastal states must assume and discharge the obligations of the precautionary approach outlined in Article 6 as well as the conservation and management measures outlined in Article 7. A question for determination is whether these obligations would derogate from the coastal state sovereign rights under the 1982 LOS Convention, particularly the sole right of coastal states to manage stocks within the area of its jurisdiction.

Articles 6 and 7

4. If it is considered that Articles 6 and 7 derogate from coastal state sovereign rights, then Articles 3, 6 and 7 taken to-gether would not be acceptable, in spite of the importance of the obligations these articles would place on distant water fishing states.

Articles 3 and 5

5. A related point requiring careful consideration is whether the provisions in Article 3 (2) lay down too heavy an obligation on coastal states in providing that they apply mutatis mutandis the measures enumerated in Article 5 of the draft agreement.

Article 4

6. The saving clause in Article 4 that nothing in the agreement prejudices the provisions of the 1982 Convention protects flag states as much as coastal states. (Why does the second but not the first sentence refer to the interpretation and application of the 1982 Convention?)

Article 7 (1)

7. The chapeau paragraph (1) of Article 7 which reads "Without prejudice to the sovereign rights of coastal states" must also be taken into account in determining whether the draft agreement erodes coastal sovereign rights. This saving clause must, however be read in the context of the substantive effects of the agreement.

Articles 5 and 8

8. A puzzling point is why the draft agreement does not impose a duty to co-operate in the "Objective" article.It is instead imposed in Article 5 through incorporation by reference of "their duty to co-operate in accordance with the Convention".(Article 61 (2)of the Convention imposes the duty to co-operate with

regional organizations, "as appropriate".) It is not clear whether the new duty is confined to the high seas. Article 8, on co-operation and management, directly imposes a duty to co-operate, which may apply only to the high seas, but this question deserves careful consideration, (ideally, in separate consultations with the USA and Australian delegations.) The question might be raised of the legal effect of omitting the Canadian language.

Article 5

9. A point of some importance not discussed in this memorandum, which is raised in Mr. Noseworthy's note, is the practical effects of omitting a reference to an "effective combination" of specific management measures, Mr. Noseworthy's view on the need for specificity seems to be well founded.

10. Conclusion

A very preliminary conclusion is that the cumulative effect of Articles 3, 4,5,6 and 7 is to impose a precautionary conservation and management regime on coastal states, which may be highly desirable in order to fulfil the objective of the agreement (long-term conservation and sustainable use) but which nontheless erodes the sovereign rights of coastal states as reflected in the 1982 Convention. This conclusion is subject to further reflection, and should not be considered in isolation from other "overarching" considerations, such as the enforcement provisions and the third party settlement regime. (Article 59 of the 1982 Convention should also be taken into account in considering the significance of binding dispute settlement provisions, as it might be applied differently on the basis of the draft agreement than would the 1982 Convention alone, a point discussed below.)

Annex 1 & Article 6

11. I concur with Mr. Noseworthy's observations on the Annex, particularly his suggestions on how new fisheries should be handled.Ideally, interim management should be by the coastal state, but failing such a solution, there should be no fishing pending a regional agreement or arrangement. (Such a proposal would provide a useful test-case of the bona fides of distant water fishing states; anything less could seriously erode the Objective set out in Article 2 of ensuring long-term conservation and sustainable use.)

ARTICLE 7

12. I concur also with Mr. Noseworthy's observations on Article 7(4) concerning the reference "reasonable period of time". Similarly with respect to the need to take into account coastal state management action within 200 miles for the same or associated stocks, referred to in article 7(6).

Articles 9 to 17 inclusive

13. The articles on regional and subregional fisheries organizations should be examined carefully by Nafo experts to determine whether they enhance, erode or maintain the coastal (Canadian) position in Nafo. The emphasis on scientific information, while obviously desirable, does not resolve the problem of how to ensure that scientific advice is not overridden by political considerations. Article 9, for example, provides for the collection and review of scientific advice, but does not go further. Similarly, Article 10, enumerates a series of useful measures on which state shall "agree" and "adopt", but decision-making procedures (Article 10(j)) and peaceful settlement procedures (Article 10(k)) are left to be agreed by states,(as an obligation, but not specified in the draft agreement). Thus these articles of the draft agreement might be interpreted as having no significant impact upon the structure and process of Nafo.

Article 11

14. Article 11 enunciates the important objective of cooperation (as an obligation) to strengthen regional and sub-regional fisheries management organizations. It does not, however, spell out the specifics of how to do this. Thus, seemingly, the Objections procedure in Nafo would remain unaltered.

Article 17

15. As pointed out Mr. Noseworthy's note, the provision in the Canadian draft in Annex IV to the effect that " vessels refrain from activities which undermine the effectiveness of international conservation and management measures" has been omitted from the draft agreement. It may be that the provision has been omitted on the grounds that all signatories to the draft agreement would be obliged (pursuant to Article 18 of the Law of Treaties Convention) to refrain from action which would defeat the object and purpose of the treaty, defined in Article 2 as to ensure the long term conservation and management of stocks. Nontheless the point should be pursued with the Chairman. Similarly, with respect to Mr. Noseworthy's reference to compliance with quotas and control measures contained in Annex IV of the Canadian draft.

Conclusion

16. A second preliminary conclusion is that the draft agreement would not resolve the Nafo Objections loop-hole in its decision-making process. The dispute settlement provisions discussed below might enable Canada to challenge the mis-use of the Objections procedure, but that is merely a "right to a law-suit". If the coastal states are obliged to accept stringent stipulations on management in the economic zone, which may or may not be subject to binding dispute-resolution procedures, then it is essential that an effective international regime be elaborated. The draft agreement does not do this; thus Article 9 to 17 inclusive do not

significantly strengthen Canada's position in Nafo. What would do so is a provision modelled on the Norwegian-Canadian proposal on reciprocal enforcement (not to be confused with the Canada-USA arrangements). Such a provision might stipulate that unless states have otherwise agreed, when they become parties to a regional or sub-regional fisheries management organization they automatically opt into and accept the obligations of a reciprocal enforcement regime (beyond 200 miles). As suggested earlier, the Norwegian reciprocal enforcement proposal to Canada could be used to good effect in the conference to illustrate this point. (The fact that Norway's recent unilateral legislation is subject to as much of a legal challenge as is Canada's recent unilateral action is not an obstacle to making this argument.)

Articles 18 to 21 inclusive

17. Part V on compliance and enforcement by the flag states and port states does not strengthen the position of coastal states much beyond the provisions of the 1982 Law of the Sea Convention, in spite of new provisions on port state enforcement. Even in the case of port state enforcement provided for in the proposed Article 21, control of enforcement remains almost solely in the hands of the flag state, except for temporary measures pending the assumption of control by the flag state, (in spite of the provision that nothing in the agreement affects the sovereignty of states over ports in their territory).

Article 18

18. The clear cut obligations imposed on flag states in Article 18 to ensure compliance "irrespective of where violations occur" is a step in the right direction, but the whole of Article 18 is weakened by Article 18(11(h)) which requires that it be established "in accordance with the laws of the flag state".

Article 19 19. The provisions of Article 19 on International co-operation on enforcement are useful, but are not enough to offset the lack of any real rights for coastal state enforcement. Mr. Noseworthy's note points out that Articles 19 and 20 are unacceptably weak, in comparison with earlier texts, particularly the Canadian proposals. Here too, states are to act "to the extent permitted by national laws", clearly a self-judging exemption, comprising, as he points out, "an excuse for inaction". (it should be noted that the issue of flag state versus coastal state enforcement was one of the most controversial issues in the Law of the Sea negotiations, and flag states may be expected to resist strongly any diminution of their absolute flag state jurisdiction beyond 200 miles).

Article 20

20. Article 20 setting out proposed rules for regional agreements and arrangements on compliance and enforcement could be of real value if flag states would implement them in good-faith, particularly if states would automatically accept reciprocal enforcement upon joining the organizations. In case of stateless vessels or flags of convenience vessels, not surprisingly, the provisions do not go as far as Canada's unilateral legislation, which must also be used (in addition to the 1982 Convention and the existing Nafo process) as a yardstick to measure the effectiveness of the draft agreement.

Article 21

21. The provisions on port state enforcement remain weak, leaving virtually all but interim enforcement powers in the hands of the flag state. (A comparison with the provisions of Article 218 of the 1982 Law of the Sea Convention on port state enforcement of anti pollution measures is instructive). Nontheless, it should be noted that if Article 21 is compared to the fisheries enforcement provisions of the 1982 Convention

(rather than the Canadian proposals submited in the current conference) the draft agreement does not derogate from pre-existing coastal enforcement rights. Neither, however, does it add much.

Preliminary Conclusion

22. It is recommended that Newfoundland and Canada make clear that the provisions of the draft agreement on compliance and enforcement are weak and unsatisfactory. This point should be emphasized before the close of the current session.

Articles 25 to 31

13. The provisions on Peaceful Settlement of Disputes, modelled on those of the 1982 Law of the Sea Convention, are acceptable, and highly desirable. It should be noted, however, that they constitute a two-edged sword, as Canada may find itself in the position of "defendant" as much as in the position of "plaintiff". Thus, while the provisions may benefit Newfoundland and Canada on the Nafo Objections procedures, they could conceivably be invoked against Canada, not only with respect to Canada's recent unilateral legislation but also to challenge Canada's management of stocks within 200 miles, unless this latter possibility is specifically ruled out, either by the substantive provisions on coastal management or by the dispute settlement provisions. (Presumably, reservations not specified in Article 297 of the 1982 Convention will not be allowed, absent such an exeption in the agreement; see Article 41). It is important to take into account also Article 59 of the 1982 Convention on the Law of the Sea, which provides that where that Convention does not attribute rights or jurisdiction within the economic zone, "conflicts should be resolved on the basis of equity and in the light of all the relevant circumstances, taking into account the respective importance of the interests involved to the parties as well as to the international community as a

whole." Article 297 of the 1982 Convention (incorporated into the draft agreement by Article 31) must be taken carefully into account, particularly 297 (3) exempting the coastal state from challenges to its sovereign rights.

Preliminary Conclusion

24. The dispute-settlement provisions are acceptable. Their inclusion makes it essential, however, to ensure that the substantive provisions of the draft agreement are equally acceptable to Newfoundland and Canada. They should be read also in the context of the relevant rules of international law concerning the application of conflicting agreements concluded by the same parties and whether the proposed agreement is deamed to amrnd the 1982 Convention.

General Conclusion

25. The draft agreement represents an advance in some respects over previous texts (other than the Canadian text, which is better) but it does not adequately protect the interests of Newfoundland and Canada. The major defects should be pointed out in Plenary by the Canadian delegation before the close of the present session, but discussion of specific drafting points should be avoided until a thorough "article by article" analysis of the draft agreement is carried out.

Victoria, B.C., August 25, 1994 J. Alan Beesley, O.C.,Q.C.