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SWIMMING AGAINST A LEGAL CURRENT: A CRITICAL ANALYSIS OF THE *PACIFIC SALMON TREATY*

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The 1985 Pacific Salmon Treaty between the United States and Canada was intended to establish ongoing cooperative management of the west coast salmon stocks. In recent years, however, disputes over Pacific salmon have recurred, and relations between the parties have become increasingly acrimonious. This paper critically reviews the Pacific Salmon Treaty and identifies aspects of the Treaty which tend to frustrate cooperative relations. From this analysis, it is concluded that concerns over long-term resource conservation and short-term resource allocation are poorly reconciled under the Treaty. Finally recommendations for improving the bilateral salmon management effort are outlined.

Le Traité sur le saumon du Pacifique mis sur pied entre les États-Unis et le Canada en 1985 avait pour mission d'établir une coopération permanente dans l'administration des réserves de saumon de la côte ouest. Tout récemment, les conflits à l'égard du saumon du Pacifique ont cependant refait surface et les relations entre les deux pays se sont envenimées. Cet ouvrage propose une revue critique du Traité sur le saumon du Pacifique et une identification des aspects annihilant les efforts de coopération. À la suite de cette analyse, l'auteur conclut que les intérêts relatifs à la conservation des ressources à long terme et la distribution des ressources immédiates s'avèrent improprement réconciliés par l'entremise de ce Traité. L'auteur termine en soumettant certaines recommandations dans le but d'améliorer l'effort d'administration bilatérale des réserves de saumon.

Modern management of living marine resources must balance significant economic, cultural, and political factors while at the same time ensuring against resource depletion. Although challenging in themselves, these factors assume a greater complexity in relation to anadromous species management which must contend with legitimate but competing claims of national jurisdiction. This scenario is perhaps best exemplified by the case of Canadian and

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American salmon management on the west coast of North America.

In 1985, after more than a decade of negotiations, the United States and Canada signed the *Pacific Salmon Treaty*¹ in an effort to provide for the joint management of west coast salmon. The fundamental objective of the *Treaty* is to provide fishery management regimes which are based on fair allocation and conservation of the resource and which are capable of responding to changes in Pacific salmon stocks. As such, the agreement represents a legal response to an international marine resource management issue and endeavors to foster an unprecedented measure of cooperation and coordination between the signatories. The *Pacific Salmon Treaty* has been the primary regulatory apparatus governing the two countries' use of salmon on the west coast since 1985.

For the past four consecutive years, however, the two countries have been unable to arrive at mutually agreeable salmon management regimes under the *Treaty*.² This has led to political action which has been perceived as indicating the general collapse of the agreement. In June 1994, Canada imposed a license requirement aimed at U.S. salmon fishers for vessels crossing selected west coast waters.³ One year later salmon fishers from British Columbia obstructed the route of an Alaskan state ferry and, more recently, the United States government unilaterally declared a right of U.S. passage through the waters between Vancouver Island and the British Columbia mainland.⁴ For the most part, these events transpired amidst allegations of overfishing, disregard for international law, and negotiating in bad faith.⁵

Despite intervention by high ranking political officials, the appointment of Yves Fortier as Canada's lead negotiator, and an

¹ *Fisheries Treaty Between Canada and the United States of America* (18 March 1985), Canada Treaty Series 1985 No.7 [hereinafter cited as *Pacific Salmon Treaty* or *Treaty*](in force 18 March 1985).

² See T. McDorman, "The West Coast Salmon Dispute: A Canadian View of the Breakdown of the 1985 Treaty and the Transit License Measure" (1995) 17:3 *Loy. L.A. Int'l & Comp.L.J.* 477.

³ *Ibid.*

⁴ "U.S. Challenges Canadian Boat Fee" *The [Toronto] Globe and Mail* (6 March 1996) A-1.

⁵ See McDorman, *supra* note 2 and Alison Arnot "Stalemate in the *Pacific Salmon Treaty* Negotiations" Internet address: www.westcoast.com/augfish.html (visited October, 1996).

effort at formal mediation between the parties, progress on salmon management agreements under the *Pacific Salmon Treaty* has remained extremely difficult, if not impossible.⁶ A sense of the frustration generated by the constant struggle between the parties is effectively conveyed in the introduction to the Pacific Salmon Commission's 1995/96 Annual Report. The Commission writes:

The challenges facing the Commission in 1996 and beyond remain difficult. Prodigious efforts will have to be advanced by all concerned to ensure that the cornerstone principles of the Treaty are developed and implemented to their full potential to provide security for the future of the combined fisheries resources of the two countries as well as improved opportunities for the many diverse groups who rely on Pacific salmon for sustenance, pleasure, and profit.⁷

This paper attempts to contribute to the relatively sparse literature on the *Pacific Salmon Treaty* by providing a critical analysis of the *Treaty* in light of particular issues surrounding recent breakdowns in bilateral salmon management on the west coast. To what extent can failed efforts at agreeing on salmon management be traced to the scheme of the *Pacific Salmon Treaty*? Has the *Pacific Salmon Treaty* fallen short of effectively ensuring ongoing cooperative management?

The examination is in four parts. The first part briefly surveys the background to the *Pacific Salmon Treaty* and identifies the factors which motivated its formation. This includes a cursory review of the first effective bilateral agreement between the parties. The second part provides a thorough overview of the terms and structure of the *Treaty*, the applicable provisions of the *Law of the Sea Convention*,⁸ and, to a limited degree, United States implementing legislation. Attention is given to the *LOS Convention* as the general international legal frame of reference for the *Pacific Salmon Treaty*. The third part critically analyses the scheme of the

⁶ See Ted McDorman, *supra* note 2 and John Crosbie, Minister of Fisheries and Oceans, Remarks (Media Conference on the *Pacific Salmon Treaty* 17 June 1993) [unpublished].

⁷ Pacific Salmon Commission, *1995/96 Eleventh Annual Report* at xii.

⁸ *Law of the Sea Convention*, UN Doc. A/Conf. 62/122 (7 October 1982), 21 I.L.M. 161 [hereinafter *Law of the Sea Convention* or *LOS Convention*].

Treaty with reference to particular difficulties experienced by Canada and the United State in *Treaty* negotiations. Finally, the fourth part concludes the analysis by outlining recommendations for improving the effectiveness of bilateral salmon species management between the two countries.

It is ultimately argued that although the *Treaty* is concerned in principle to ensure long-term, balanced salmon management, the *Treaty's* form and structure demonstrate a general reluctance on the part of the signatories to "jeopardize" short-term interests. Essentially, this amounts to a tension within the *Treaty* between long-term resource conservation and short-term resource allocation. Until this tension is more effectively reconciled, Canadian-American relations over west coast salmon management are likely to remain discordant.

I. THE NEED FOR BILATERAL COOPERATION ON THE WEST COAST

International legal regimes such as the *Pacific Salmon Treaty* are products of particular international circumstances and, by their very existence, they reflect a desire for inter-state cooperation. As such, a critical analysis of the scheme of the *Treaty* in light of the breakdown in cooperative management would be incomplete without at least a cursory overview of the circumstances which led to its formation.

1. The Nature of Anadromous Species

The basis for Canadian-American efforts to coordinate the management of Pacific salmon lies first with the nature of the resource. Salmon, being anadromous, begin their existence in fresh-water rivers, spend most of their lives in the ocean, and return after one to seven years to spawn in their fresh-water habitats.⁹ Each of the five species of Pacific salmon (chinook, chum, coho, sockeye, and pink) is genetically adapted to the environment in which it resides and exhibits unique characteristics such as migration route,

⁹ See D. McRae & G. Munro, eds., *Canadian Oceans Policy: National Strategies and the New Law of the Sea* (Vancouver: University of British Columbia Press, 1989) 19; T. Jensen, "The United-States Canada Pacific Interception *Treaty*: An Historical and Legal Overview" (1986) 16 *Envtl. L.* 363 at 369.

migration timing, and productivity.¹⁰ Often, the migration routes can take salmon thousands of miles from their rivers of origin.¹¹ The dependence of salmon on fresh water, however, requires protected inland habitats and unobstructed water routes from the ocean to inland spawning grounds. Clearly, this can only effectively be provided for by the state in which the habitats and water routes are located.

2. The Importance of the Salmon Resource

The harvesting of salmon has always been a significant component of Pacific coast economies and cultures. During 1990-1994, the total landed value of the five major salmon species harvested commercially in British Columbia, Washington, Oregon, and Southeast Alaska was approximately U.S.\$300 million.¹² In British Columbia, the commercial fishery provides over 15,000 jobs and the 1989 recreational fishery, of which salmon fishing was a major component, generated \$1.3 billion.¹³ In both the U.S. and Canada, many small communities are almost wholly reliant on the salmon fishery.

Additionally, salmon have an immense cultural importance to the First Nations peoples of the west coast.¹⁴ The relationship between the First Nations people and the salmon resource is legally protected in both the United States and Canada resulting in both countries having a designated Aboriginal or tribal fishery.¹⁵ The economic, cultural, and social importance of the salmon along the

¹⁰ Pacific Salmon Commission, *The Pacific Salmon Treaty* (Vancouver: Pacific Salmon Publication, 1988).

¹¹ See J. Yanagida, "The Pacific Salmon Treaty" (1987) 81 Am. J. Int'l L. 577 at 577.

¹² See D. Huppert, "U.S./Canada Salmon Wars: Why the Pacific Salmon Treaty Has Not Brought Peace" (1996) 1 New Directions in Marine Affairs (report series of the University of Washington) 1.

¹³ See Crosbie, *supra* note 6.

¹⁴ See Jensen, *supra* note 9 at 368.

¹⁵ C. Wilkinson & D. Connor, "The Law of the Pacific Salmon Fishery: Conservation and Allocation of a Transboundary Common Property Resource" (1983) 32 U. Kan. L. Rev. 17 at 26-30.

west coast has, as a result, made salmon management a high political priority for both countries.¹⁶

3. The Interception Problem

Given the anadromous nature and lengthy migration patterns of salmon, west coast salmon management is complicated by the implications of the region's geo-political divisions for the salmon fisheries. Dozens of rivers and streams along the west coast of North America between Alaska and Northern California produce salmon and serve as salmon habitats.¹⁷ As salmon migrate, they depart the rivers of one country and pass through the ocean waters of the other country. Thus, salmon which originate in Canadian rivers migrate into American waters and vice versa. Interception occurs when salmon originating in one country are harvested by fishers of the other country.¹⁸

For west coast salmon management, interception presents a substantial complication and examples of "the perplexing result when human-drawn jurisdictions are superimposed upon the salmon's migratory instinct" are numerous.¹⁹ Various stocks which spawn in Canadian stretches of rivers that rise in British Columbia but enter the sea through the Alaskan panhandle are intercepted by Alaskan fishers.²⁰ Chinook stocks spawned on the northern coast of Oregon and the upper Columbia river are harvested by Canadian and Alaskan fishers off northern B.C. and southeastern Alaska.²¹ Canadian fishers harvest chinook, coho, and chum stocks of Washington state origin in the waters between Vancouver Island and the B.C. mainland.²² While these examples are by no means exhaustive, they illustrate the extent to which the United States and Canada have overlapping and interdependent interests in Pacific salmon.

¹⁶ For a thorough survey of the political import of salmon, see Jensen, *supra* note 9.

¹⁷ *Ibid.* 370.

¹⁸ "Interception" is defined in art. I, para. 4 of the *Pacific Salmon Treaty* as "the harvesting of salmon originating in the waters of one Party by a fishery of the other Party."

¹⁹ See Jensen, *supra* note 9 at 371.

²⁰ *Ibid.* see also Pacific Salmon Commission, *supra* note 10.

²¹ See Jensen, *supra* note 9 at 371.

²² *Ibid.* at 370

4. Early Cooperation: The *Fraser River Convention*

Historically, as long as the salmon resource continued to satisfy each country's demands, interception was not an issue for fisheries management.²³ Neither country was concerned where salmon originated as long as each country was able to secure as much of the resource as it required. However, once habitat destruction and new fishing technologies began to depress the supply of salmon, the delicate and trans-boundary nature of the resource was firmly underscored.²⁴ In 1913, a disaster at Hells Gate Canyon²⁵ resulted in the destruction of tens of thousands of Fraser River salmon and, as a consequence, provided the impetus for the first effective effort at bilateral salmon management.²⁶

In May 1930, Canada and the United States signed a convention aimed at the restoration and equal harvest sharing of Fraser River salmon.²⁷ This convention established the International Pacific Salmon Fisheries Commission (IPSFC)²⁸ which was composed of three members from each country and was charged with the task of regulating the sockeye and pink salmon²⁹ fisheries

²³ *Ibid.*

²⁴ In 1908, the countries made an effort at joint management through the *Bryce-Root Treaty*, although the *Treaty* was, as one commentator has written, "stillborn": D. McRae & G. Munro, *supra* note 9, see also Marilyn Twitchell, "Implementing the U.S.-Canada *Pacific Salmon Treaty*: The Struggle to Move from 'Fish Wars' to Cooperative Fishery Management" (1989), 20 *Ocean Dev. & Int'l L.* 409 at 410.

²⁵ On the Hells Gate Canyon disaster, see Jensen, *supra* note 9 at 373.

²⁶ The Fraser River, which is entirely within British Columbia, drains much of southern and central British Columbia and enters northern Puget Sound at Vancouver. The river has been described as "the western hemisphere's most important salmon river": D. McRae & G. Munro, *supra* note 9 at 21.

²⁷ *United States-Canada Convention for the Protection, Preservation, and Expansion of the Sockeye Salmon Fishery in the Fraser River System*, 26 May 1930, 50 Stat. 1355 (1930), 8 U.S.T. 1058, T.I.A.S. No. 3867 [hereinafter *Fraser River Convention*]. The agreement did not enter into force, however, until 28 July 1937, due to a supplementary agreement being required in order to secure U.S. Senate approval: see A. Koers, *International Regulation of Marine Fisheries: A Study of Regional Fisheries Organizations* (London: Fishing News Books Ltd., 1973) at 84.

²⁸ Art. II, *Fraser River Convention*, *supra* note 27.

²⁹ While the Convention was originally limited to sockeye salmon, it was amended in 1956 to include pink salmon as a result of mutual overfishing: art. I of the *Protocol between the Government of the United States and the Government of Canada to the Convention for the Protection, Preservation, and Extension of the*

within a defined marine area.³⁰ Approval of at least two of each country's appointees was required in order for the IPSFC to act.³¹ Essentially, the "compromise" at the heart of the *Convention* involved providing the United States with fifty percent of the Fraser River sockeye harvest in exchange for American financial and technical contributions.³²

The strength of the *Fraser River Convention* was its provision for direct and effective regulation of the salmon resource. The IPSFC was assigned the power to prescribe fishing gear³³ and to apply measures to limit or prohibit the sockeye (and, later, pink) salmon fishery.³⁴ Moreover, the signatories agreed to assume responsibility for the enforcement of orders and regulations passed by the IPSFC³⁵ and to provide penalties for violations.³⁶ The fact that the IPSFC did not operate by consensus reduced the likelihood of both deadlock and diluted action. These characteristics appear to have given the IPSFC greater clout than would accompany a strictly advisory mandate; rather than simply making recommendations, the IPSFC determined measures which bound fishers immediately and which were, by agreement, to be upheld and enforced by the signatories to the *Convention*.³⁷

The IPSFC proved effective. It rebuilt stocks of Fraser River salmon³⁸ while earning and maintaining the support of the fishing

Sockeye Salmon Fisheries in the Fraser River System, 28 December 1956, 8 U.S.T. 1057, T.I.A.S. No. 3867 and see also Jensen, *supra* note 9 at 375.

³⁰ This area not only included the Fraser River and its tributary streams and lakes, but also certain territorial waters and high seas: *Fraser River Convention*, art. I, paras. 1-3).

³¹ *Fraser River Convention*, art. VI.

³² See Jensen, *supra* note 9 at 374.

³³ Art. V of the *Fraser River Convention* provides that "the Commission may prescribe the size of the meshes in all fishing gear."

³⁴ Art. IV provided that the IPSFC was "empowered to limit or prohibit taking sockeye salmon."

³⁵ Art. VIII provides: "Each Contracting Party shall be responsible for the enforcement of the orders and regulations adopted by the [IPSFC] under the authority of this Convention...."

³⁶ Art. X.

³⁷ See Koers, *supra* note 27 at 84: "The [IPSFC] is one of the few organizations with the explicit responsibility of allocating the catch between the fishermen [sic] of the two member states ...[and] it has the unique power to make certain decisions that are directly binding on the fishermen [sic]."

³⁸ *Ibid.*

industry dependent on the Fraser runs.³⁹ Importantly, much of its success has been attributed to it being "a fisheries commission with a comprehensive delegation of authority to manage a resource."⁴⁰

5. Lead up to the *Pacific Salmon Treaty*

Despite the achievements of the IPSFC, its narrow scope⁴¹ meant that a large number of salmon interceptions escaped its reach. In addition, Canada was becoming increasingly dissatisfied with the uneven distribution of indirect costs arising from the *Treaty* such as foregone Fraser River hydroelectric projects.⁴² This led to Canada's perception that the equal division of Fraser River stocks was burdensome and unfair.⁴³ Finally, in the 1960s, an increase in Canadian harvests of American-produced Chinook and Coho stocks and the extension by both countries of their fishing zones from three to twelve miles underscored the already existing need for renewed discussions over transboundary salmon management.⁴⁴

In 1970, Canada and the United States entered into a bilateral reciprocal fishing accord primarily as a consequence of the countries' extended fisheries jurisdictions.⁴⁵ The agreement included the Pacific salmon species; specifically, it permitted United States fishers to continue to troll for salmon within the Canadian three-to-twelve mile zone off the west coast of Vancouver Island and allowed Canadian fishers to troll for salmon within the same jurisdictional zone off of Washington state.⁴⁶ In addition, the accord required consultation within one year on the Pacific salmon fisheries.⁴⁷ Under this requirement, negotiations commenced in 1971 which led ultimately to the *Pacific Salmon Treaty* of 1985.⁴⁸

³⁹ See Wilkinson & Conner, *supra* note 15 at 58.

⁴⁰ See E. Miles *et al.*, *The Management of Marine Regions: The North Pacific* (Berkeley: University of California Press, 1982) at 74.

⁴¹ As noted above, the IPSFC applied to a limited marine area and to only two of five species of salmon.

⁴² See McRae & Munro, *supra* note 9 at 21.

⁴³ *Ibid.*

⁴⁴ See Twitchell, *supra* note 24 at 411.

⁴⁵ *Agreement on Reciprocal Fishing Privileges in Certain Areas off Their Coasts*, 24 April 1970, United States-Canada, 21 U.S.T. 1283.

⁴⁶ *Ibid.* at 1284. See also Jensen, *supra* note 9 at 379-81.

⁴⁷ *Ibid.* at 1285.

⁴⁸ See Jensen, *supra* note 9 at 380.

The IPSFC was finally eliminated one year after the *Pacific Salmon Treaty* entered into force.⁴⁹

6. Issues in *Pacific Salmon Treaty* Negotiations

Although the impetus for the *Pacific Salmon Treaty* stemmed from the factors identified above, other factors also played an influential role in the consultations leading to the agreement. Two circumstances are of particular significance since, as will be seen, they remain points of contention between the parties.

First, although the parties were initially satisfied with sustaining the then-prevailing levels of interceptions,⁵⁰ regard for environmental degradation⁵¹ and salmon enhancement initiatives⁵² led to a change in strategy during the mid 1970s.⁵³ The parties became increasingly occupied with ensuring that the benefits of their efforts in respect of environmental management and fisheries enhancement accrued to their fishers and not to the fishers of the other country.⁵⁴ As a consequence, negotiations focused on developing a formula by which the parties could account for the quantity of salmon produced in their waters and the quantity harvested by their fishers.⁵⁵ A lack of mutually acceptable progress on this issue plagued the parties throughout the negotiations.⁵⁶

Second, in the early 1980s, scientists in both countries noted a dramatic decline in United States and Canadian chinook and coho stocks. For instance, chinook stocks from the upper Columbia River declined from 72,100 fish in 1971 to 34,200 fish in 1979.⁵⁷ In 1982, Canada reported that ocean escapements⁵⁸ of chinook to B.C. rivers and streams were less than 50 percent of that required for

⁴⁹ *Pacific Salmon Treaty*, *supra* art. XV, para. 3.

⁵⁰ See Twitchell, *supra* note 24 at 112.

⁵¹ For an extensive discussion of the effect of dams on salmon habitat up to and during the early 1970s, see Wilkinson & Conner, *supra* note 15 at 35–43.

⁵² New hatcheries were being proposed on the Fraser River, in Washington State, and on the Columbia River in Oregon. See E. Miles, *supra* note 39 at 70–71.

⁵³ See Jensen, *supra* note 9 at 382. See also Twitchell, *supra* note 24 at 112.

⁵⁴ See Twitchell, *ibid.* at 111.

⁵⁵ This ultimately led to the parties seeking a mathematical model which proved to be impossible at the time due to the complexity and range of variables and the competing interpretations placed on available data: Jensen, *supra* note 9 at 384.

⁵⁶ *Ibid.*

⁵⁷ *Ibid.* at 387–8.

⁵⁸ “Escapement” is when the fish pass through (escape) the ocean fisheries and return to coastal streams and rivers to spawn.

optimal production.⁵⁹ Research revealed that the depressed chinook stocks were attributable to the combined effects of environmental degradation and over-harvesting. This introduced a sense of urgency into the negotiations.⁶⁰

In summary, bilateral cooperation in west coast salmon management stems from the anadromous nature of salmon, the economic and historical importance of salmon stocks, the interception phenomenon and a recognition of the transnational impact of local and national environmental and fisheries issues. The initial desire for cooperation led to the *Fraser River Convention* which appears to have provided for effective but limited management. Moreover, as will be seen, the issues of chinook management and harvest allowances which plagued the negotiations leading to the *Treaty* persist as current difficulties. It is perhaps somewhat ironic that while the shortcomings of the *Fraser River Convention* contributed to the *Pacific Salmon Treaty* negotiations, the notable success of the *Convention* may well have reinforced for the parties the potential for effective salmon management through bilateral legal accord.

II. THE *LOS CONVENTION* AND THE *PACIFIC SALMON TREATY*: A PORTRAIT OF THE CONTEMPORARY LEGAL FRAMEWORK FOR WEST COAST SALMON MANAGEMENT

A critical assessment of the *Pacific Salmon Treaty* in light of failed bilateral management efforts first requires an overview of the agreement's principles, provisions and structure. Before undertaking this discussion, however, it is to be noted that the *Pacific Salmon Treaty* did not emerge into a legal vacuum. Although the accord is very much a product of particular circumstances shared historically by the United States and Canada, the *Law of the Sea Convention* provides an international legal backdrop for bilateral fisheries management and, as a result, delimits the basic parameters of the

⁵⁹ Canada, Department of Fisheries and Oceans, News Release/Communique NR-PR-95-29E "Department of Fisheries and Oceans Announces New Measures to Save Chinook Salmon Stocks in B.C." (23 April 1992).

⁶⁰ *Ibid.*

Pacific Salmon Treaty.⁶¹ It is appropriate, therefore, to examine the *LOS Convention* in order to assess whether the *Pacific Salmon Treaty* is congruous with general international law on anadromous species management.

1. The *Law of the Sea Convention*

As a result of the economic, cultural, and historical interests of states where anadromous species originate, anadromous species occupied a prominent position in fisheries negotiations from the outset of the third United Nations Conference on the Law of the Sea (UNCLOS III).⁶² In fact, both Canada and the United States emerged as leaders at UNCLOS III in the push for special recognition for anadromous species within the *LOS Convention*.⁶³

Although neither the United States nor Canada has ratified the *LOS Convention* and, of the two, only Canada is a signatory, the *LOS* provisions on anadromous species nonetheless warrant discussion. It is observed that state practice in relation to anadromous species appears to closely follow the *LOS Convention* and, as William Burke argues, this supports the view that the *Convention's* anadromous species provisions reflect customary international law principles.⁶⁴ Moreover, the fact that there was a high level of consensus and careful negotiation over the issue of anadromous species contributes to this conclusion.⁶⁵ Hence, while the general legality of the *LOS Convention* in relation to the United States and Canada is beyond the scope of this paper, there are strong arguments that the anadromous species provision represents customary international law principles by which both countries are obligated to abide.

2. Article 66: The Anadromous Species Regime

The *Convention* recognizes that different species of living resources feature unique natural characteristics and thereby require different legal classifications for effective regulation.⁶⁶ In particular, there was consensus among the parties to UNCLOS III on the special interest of

⁶¹ See McDorman, *supra* note 2.

⁶² See W. Burke, "Anadromous Species and the New International Law of the Sea" (1991) 22 *Ocean Dev. & Int'l L.* 95 at 100.

⁶³ *Ibid.* at 100.

⁶⁴ *Ibid.* at 118.

⁶⁵ See McDorman, *supra* note 2 at 485.

⁶⁶ *Ibid.*

the state of origin and its role throughout the migratory range of anadromous species.⁶⁷ This consensus led to article 66(1) which acknowledges that the state of origin "shall have the primary interest in and responsibility for [anadromous] stocks."⁶⁸

Article 66(2) imposes on the state of origin the responsibility to take appropriate measures for conservation of anadromous stocks "through regulatory measures for fishing" within the 200 nautical mile zone⁶⁹ and on the high seas.⁷⁰ It is further provided under paragraph 2 that "[t]he state of origin may, after consultations with the other states referred to in paragraphs 3 and 4 fishing these stocks, establish total allowable catches [TAC] for stocks originating in its rivers."

Paragraph 3 deals with high seas fishing of anadromous stocks. In essence, high seas fishing for anadromous species is prohibited by paragraph 3(a) except where such a prohibition would "result in economic dislocation."⁷¹ Furthermore, where a state brings itself within the exception of paragraph 3(a), high seas fishing can only be undertaken pursuant to an agreement with the state of origin.⁷² The state of origin does, however, have an obligation under paragraph 3(b) to minimize economic dislocation in such circumstances.⁷³

Paragraph 4 specifically contemplates the situation of adjacent coastal states by requiring cooperation in relation to management and conservation. It provides:

In cases where anadromous stocks migrate into or through the waters landward of the outer limits of the exclusive economic zone of a State other than the State of origin, such state shall co-operate with the State of origin and the other States concerned.⁷⁴

⁶⁷ See Burke, *supra* note 62.

⁶⁸ *Law of the Sea Convention*, art. 66(1).

⁶⁹ The *Convention* through art. 56 provides signatory states with the ability to declare jurisdiction over resources within a 200 n.m. "exclusive economic zone."

⁷⁰ The *LOS Convention*, *supra* note 67 at art. 66(2), by reference to para. 3(b), extends state of origin jurisdiction to the high seas. See Burke, *supra* note 62 at 103.

⁷¹ Art. 66(3)(a). See also McDorman, *supra* note 2 at 482.

⁷² Art. 66(3)(a),(c)–(d). See Burke, *supra* note 61 at 105.

⁷³ Art. 66(3)(b).

⁷⁴ Art. 66(4).

The emphasis on cooperation continues in paragraph 5 where “regional organizations” are required in order to implement the provisions of article 66.

In summary, article 66 establishes the state of origin principle, the principle of conservation and the duty to cooperate in relation to international anadromous species management as general principles of international salmon fisheries.⁷⁵ In addition, the limits placed by article 66 on the state of origin’s control over anadromous stocks is significant for bilateral salmon management. Article 66(2), while providing the state of origin with the power to regulate any high seas salmon fishing allowed under paragraph 3, does not extend this power to salmon produced in their waters and found within another coastal state’s jurisdiction. With respect to such stocks, the state of origin is only entitled to determine TAC after consultation with the coastal state (approval of the coastal state does not appear to be compulsory).

Therefore, in a sense, management of transboundary anadromous stocks is made complicated by the scheme of article 66: while the state of origin is arguably in the best position to know what is required for the conservation of the stocks and is competent to regulate salmon fishing on the high seas, it cannot prescribe regulations concerning its stocks within another coastal state’s jurisdiction. Rather, in such circumstances, the state of origin is required to assert the requirement for cooperation in order to attempt to give effect to its management needs. Article 66 therefore seems to support the proposition that while a state from which anadromous stocks originate has the primary interest and responsibility for those stocks, the state’s ability to manage them yields to an adjacent state’s 200 nautical mile jurisdiction. In such circumstances, the general international law of anadromous species management prescribes cooperation.

3. The *Pacific Salmon Treaty*

i. Governing Framework and Principles

The 1985 *Treaty* establishes two basic principles under which salmon fisheries by both parties are to be conducted pursuant to the agreement. First, the parties are to “prevent overfishing and provide

⁷⁵ See McDorman, *supra* note 2 at 483.

for optimum production”⁷⁶ and, second, they are to “provide for each party to receive benefits equivalent to the production of salmon originating in its waters.”⁷⁷ The second principle, known as the “equity” principle, derived from the above mentioned concern over ensuring fair salmon returns in accordance with national production and conservation efforts.⁷⁸

The equity principle reflects the state of origin principle in article 66(1) of the *Law of the Sea Convention* by providing that each country should benefit from the salmon originating in its own waters. At the same time, in providing each party with “benefits” rather than specifically with “salmon,” it subtly modifies the principle by acknowledging that salmon interceptions between the two countries are unavoidable.

The word “benefits” encompasses not only economic benefits arising from post-*Treaty* conservation and enhancement measures but also economic benefits in relation to the number of then-prevailing interceptions.⁷⁹ The difficulties involved in determining levels of interceptions led the parties to append a Memorandum of Understanding to the *Treaty* which allows for the implementation of the equity principle to be phased. The Memorandum provides:

[I]t is recognized that data on the extent of interceptions in some areas are imprecise and that it is therefore not possible to determine with certainty the total production of salmon from each country's rivers. It is also recognized that methods of evaluating benefits accruing within each country may differ. For these reasons, it is anticipated that it will be some time before the Commission can develop programs to implement the [equity principle].⁸⁰

Therefore, the equity principle, although an underlying tenet of the *Treaty*, was rendered temporarily impotent, ostensibly by informational and technical realities.

In exercising their rights and discharging their obligations under the *Treaty* according to the conservation and equity

⁷⁶ *Pacific Salmon Treaty*, art. III(1)(a). This has come to be seen as a focus on conservation. See also Pacific Salmon Commission, *supra* note 10.

⁷⁷ *Pacific Salmon Treaty* art. III(1)(b).

⁷⁸ See Jensen, *supra* note 9 at 382.

⁷⁹ See McRae & Munro, *supra* note 9 at 28.

⁸⁰ *Pacific Salmon Treaty*, *supra* note 1 at Memorandum of Understanding.

principles, article III requires the parties to consider: (1) the desirability of reducing interceptions, (2) the avoidance of "undue disruption" to existing fisheries, and (3) annual variations in stock abundance.⁸¹ The recognition granted to existing fisheries reflects the principle in article 66(3)(a) of the *LOS Convention* that states should not be economically dislocated by state of origin regulation of anadromous species⁸². The inclusion of the concept of "existing" fisheries appears to contemplate the long standing American reliance on Fraser River stocks which is in part both the product and consequence of the 1930 *Fraser River Convention*.⁸³ However, as is seen below, the inclusion of this principle has been a source of some difficulty.

Articles IV, and X attempt to give practical expression to the overarching principles of cooperation and coordination and, as such, are among the ways in which the substance of the *Treaty* mirrors Articles 66(4) and 63(1) of the *LOS Convention*. Under Article IV, each party is required to report annually on its fishing activities to the other party.⁸⁴ The parties are to share data on stock interrelationships, required escapement levels, estimated total allowable catch, run size estimates, and each country's management objectives.⁸⁵

Bilateral research coordination is provided for by Article X which requires joint research into the "migratory and exploitation patterns [and] the productivity and status of stocks of common concern."⁸⁶ Furthermore, paragraph 3 allows research to be done by the "nationals, equipment, and vessels" of one country in the waters of the other country with the approval of the bilateral commission established under the *Treaty*.⁸⁷

Article V permits the parties to undertake salmon enhancement programs,⁸⁸ yet does not require their creation.⁸⁹ Where they are

⁸¹ *Ibid.* at art. III(3).

⁸² It is not, however, a direct parallel since art. 66(3)(a) deals with high seas salmon fishing.

⁸³ See McRae and Munro, *supra* note 8 at 30.

⁸⁴ *Pacific Salmon Treaty supra* note 1 at art. IV(1).

⁸⁵ *Ibid.* at art. IV(3).

⁸⁶ Art. X(1).

⁸⁷ This is discussed below.

⁸⁸ *Pacific Salmon Treaty*, art. I(1) defines "enhancement" as "man-made [sic] improvements to natural habitats or application of artificial fish culture technology that will lead to the increase of salmon stocks."

established, however, the parties must ensure that they are conducted in accordance with the principles and associated qualifications contained in Article III.⁹⁰ As well, cooperation and coordination are again emphasized as the parties are required to share information concerning the operation and planning of such programs.⁹¹ It is somewhat curious that while the parties have specifically encouraged salmon enhancement, there is no particular obligation to ensure the preservation of salmon habitats. This issue is explored below.

ii. The Pacific Salmon Commission: a Bilateral Management Regime

Article II establishes the Pacific Salmon Commission (PSC) for the purpose of implementing the *Treaty* and providing regulatory advice and recommendations to the two countries.⁹² The dual principles of conservation and equity are to guide the Commission in carrying out its functions.⁹³ Furthermore, the PSC appears to represent a "regional organization" akin to those contemplated by Article 66(5) of the *LOS Convention*.

a. Constitution and Operating Structure of the Pacific Salmon Commission

Article II, paragraph 1 establishes a United States section and a Canada Section as the constituent bodies of the Commission. Pursuant to paragraph 3, the Commission consists of eight Commissioners, of whom four are appointed by each party to sit in their respective sections. Paragraph 6 assigns one vote to each section and requires the approval of both sections before a decision or recommendation of the Commission is made.

The constitution of the United States Section is provided for in the *Pacific Salmon Treaty Act of 1985*.⁹⁴ Subsection 3(a) of the Act directs that one of the four commissioners is to be from the United States Government, one from the state of Alaska, one from the

⁸⁹ *Ibid.* at art. V(1).

⁹⁰ *Ibid.*

⁹¹ *Ibid.* at art. V(2).

⁹² *Ibid.* at art. II(8). See also the Pacific Salmon Commission *supra* note 10 at 12.

⁹³ *Ibid.* Pacific Salmon Commission, *ibid.* at 12.

⁹⁴ *The Pacific Salmon Treaty Act of 1985*, Pub. L. 99-5, 99 Stat. 7, 16 U.S.C.A. paras. 3631-44.

Treaty Indian tribes of the States of Idaho, Oregon or Washington, and one from the State of Oregon or Washington. Significantly, section 3 designates the federal government commissioner as non-voting and stipulates that decisions of the United States Section cannot be taken with a dissenting vote.⁹⁵

The Canadian Section of the psc consists of one government official, one recreational fishing representative, one fishing union member, and one representative of the First Nations fishery.⁹⁶ While there is no legal requirement for the representation of these interests within the Canadian Section, the official position of the Canadian government is to take into account the concerns of native, commercial and recreational fishers as well as those of the province of British Columbia.⁹⁷ Nevertheless, the Canadian Section is "led" by the Federal Department of Fisheries and Oceans.⁹⁸

Article II, paragraph 18 provides for the establishment of three regional panels in accordance with annex I which sets out the geographic scope of the panels' responsibilities.⁹⁹ Pursuant to paragraph 19, the panels serve primarily as specialized advisory units to the Commission and provide recommendations to the psc with respect to "the functions of the Commission and carry out such other functions as the *Treaty* may specify or the Commission may direct."¹⁰⁰ Each panel consists of six members each from the United States and Canada.¹⁰¹ Only the Fraser River Panel has the power to directly effect in-season regulations.

⁹⁵ *The Pacific Salmon Treaty Act*, *ibid.* at sec. 3(g)(1).

⁹⁶ See Twitchell, *supra* note 24 at 413.

⁹⁷ Canada, Department of Fisheries and Oceans News Release NR-PR-93-25E "Crosbie Proposes Government-to-Government Discussions on Pacific Salmon Treaty" (19 May 1993).

⁹⁸ Canada, Department of Fisheries and Oceans, "The *Pacific Salmon Treaty*" Internet address: www.dfait-maeci.gc.ca/english/foreign/envIRON/salmon.htm (visited October 1996).

⁹⁹ The Southern Panel supervises salmon originating in rivers that enter the ocean south of Cape Caution, British Columbia, excluding the Fraser River. The Fraser River Panel is charged with overseeing harvests of sockeye and pink salmon in the geographic region outlined in Annex II. The Northern Panel is granted responsibility for salmon originating in rivers opening into the ocean between Cape Caution, British Columbia, and Cape Suckling, Alaska.

¹⁰⁰ *Pacific Salmon Treaty*, *supra* note 1 at art. II(19).

¹⁰¹ *Pacific Salmon Treaty Act*, *supra* note 92 at s.3(c)-(e) requires specific regional representation on the United States' Panels.

b. Powers and Duties of the Pacific Salmon Commission

In addition to setting out basic administrative duties, article II assigns several functional duties to the Commission. Paragraph 8 provides that "the Commission may make recommendations to or advise the parties in any matters relating to the *Treaty*." Furthermore, paragraph 18 empowers the Commission to "recommend to the parties the elimination or establishment of Panels as appropriate."

The Commission's principal responsibilities and, therefore, the practical operation of the *Treaty*, are set out in article IV. The Commission is to receive the technical information and fisheries reports¹⁰² shared by the parties and is to forward this information to the panels.¹⁰³ The panels are obligated to examine the information and report to the Commission on their recommendations for fishery regimes for the following year.¹⁰⁴ The Commission then has the responsibility to "review the reports of the Panels and ...recommend fishery regimes to the parties."¹⁰⁵ Of course, recommendation is subject to the voting requirements discussed above. Finally, once the fishery management regimes have been endorsed by the Commission, they only become part of the *Treaty* "[o]n adoption by both parties."¹⁰⁶

In practical terms, the fisheries management regimes established by the Commission constitute the essence of the *Treaty*.¹⁰⁷ The fishery regimes are to provide for agreed catch limits, escapement goals, fishing methods and other specifics pertaining to salmon management. Each regime establishes a Joint Technical Committee which assembles information¹⁰⁸ and reports to the appropriate regional panel or to the Commission. Moreover, the regimes differ in complexity, depending on the quantity and nature of data

¹⁰² *Pacific Salmon Treaty*, *supra* note 1 at art.IV(1).

¹⁰³ Article IV(3).

¹⁰⁴ Article IV(4).

¹⁰⁵ Article IV(5).

¹⁰⁶ Article IV(6).

¹⁰⁷ These are set out in the *Pacific Salmon Treaty* at Annex IV, ch. 1-6. Each chapter deals with a different regional intercepting fishery.

¹⁰⁸ The specific tasks of the Technical Committees vary between regimes. See *Pacific Salmon Treaty*, annex IV, chap. 1-6.

available.¹⁰⁹ Finally, the regimes may be renegotiated when their terms expire: every two years for chinook, coho, transboundary, and boundary area regimes; every year for chum; and every four years for the Fraser River.¹¹⁰ In practice, the parties have attempted to renegotiate regimes according to the schedule. In a sense, the *Treaty*'s governing principles find quantitative expression through the Pacific Salmon Commission and the salmon management regimes.

In summary, the *Pacific Salmon Treaty* provides for cooperative transboundary salmon regulation which is broader in scope and more ambitious in its objectives than the previous bilateral management efforts by Canada and the United States. All species of salmon and all salmon spawning and migratory areas within the 200 nautical mile jurisdiction of the parties are covered. Moreover, the conservation objective of the *Treaty* potentially has significant implications for the management of domestic rivers and water routes. The *Treaty* calls for collaboration in many aspects of west coast salmon management, including international research, data collection, and enhancement. Most importantly, it creates the Pacific Salmon Commission and charges it with the determination of quantitative fisheries management regimes on the basis of the *Treaty* principles.

The *Pacific Salmon Treaty* appears to be consistent with the framework for international anadromous species regulation contained in article 66 of the *LOS Convention*. The *Treaty* exemplifies the principle of cooperation as well as being grounded on the state of origin and conservation principles. Furthermore, in acknowledging each party's inability to regulate salmon within the other's jurisdiction, the *Treaty* would seem to mirror the limits set by article 66 on the state of origin's authority to regulate its salmon stocks.

¹⁰⁹ The Fraser River regime, for example, is able to provide for precise catch allocations largely as a result of the data accumulated by the IPSFC. See Twitchell, *supra* note 24 at 414.

¹¹⁰ *Pacific Salmon Treaty*, *supra* note 1 at Annex IV, chap. 1-6. See also Twitchell, *ibid.* at 113.

III. ANALYSIS: A CRITICAL ASSESSMENT OF THE PACIFIC SALMON TREATY

It has been seen that salmon management on the North American Pacific coast requires widespread cooperation and coordination as a matter of practical circumstance. Furthermore, the terms of the *Pacific Salmon Treaty* appears to indicate an unprecedented willingness on the parts of the United States and Canada to cooperate through the creation of a complex and specialized mechanism for effecting coordinated stock management. The psc appears to be designed so as to enable detailed salmon management decisions based on complete scientific information and principles of conservation and fairness. Nonetheless, reaching agreement on mutually satisfactory management regimes has been difficult and, frequently, altogether elusive. This section identifies numerous aspects of the *Treaty* which contribute to the persistent difficulties in realizing productive negotiations and establishing effective salmon management regimes. The analysis reveals a tension between the ideals of the *Treaty* and the ability of the structure of the *Treaty* to provide for their implementation.

1. The Non-Implementation of Article III(1)(b): the Equity Principle

One of the primary challenges to effective negotiations is the apparent unwillingness of the United States to implement the equity principle. In a position paper following the failed 1992 salmon negotiations,¹¹¹ Canada stated:

[I]t should be absolutely clear that Canada's position in the forthcoming negotiations will strongly oppose increases in interceptions and will not accept proposals that do not move towards providing each Party with

¹¹¹ These negotiations failed as a result of the inability of the parties to agree on a joint management plan for the Fraser River Salmon. The United States insisted on exceeding *Treaty* limits in respect of the Fraser River, while Canadian fishers harvested less chinook than they were entitled to. See McDorman, *supra* note 2 at 492.

"benefits equivalent to [each country's salmon] production."¹¹²

As a result, Canada's agreement on 1993 management regimes came only with assurances by the United States that negotiation on the meaning and implementation of the equity concept would take place independently during the 1994 negotiations.¹¹³ Nevertheless, a lack of progress on these negotiations caused the Canadian Section to abandon the bargaining table in 1994.¹¹⁴ The United States maintains that equity should only be given full effect when the parties are able to arrive at a fair means of quantifying interceptions as contemplated by the *Treaty's* Memorandum of Understanding.¹¹⁵ To date, the Canadian frustration with non-implementation of the equity principle continues, in part, to thwart negotiations.¹¹⁶

Struggles over equity can be traced to the manner in which the principle is provided for in the *Pacific Salmon Treaty*. Through the Memorandum of Understanding, the parties agreed to postpone the implementation of the equity principle because of the difficulty involved in assessing then prevailing levels of interceptions. Nonetheless, the equity principle presupposes the ultimate existence of a reliable and accurate method of quantifying interceptions in order to provide for fair compensatory benefits. Its non-implementation acknowledges the requirement of this capacity. Hence, without providing for a conceivable and realistic scheme through which the parties could arrive at mutually acceptable data on interceptions, the equity principle was flawed from the outset.

¹¹² Pacific Salmon Commission, 1992/93 *Eighth Annual Report*, "Statement Regarding the Canadian Position" at 6.

¹¹³ See McDorman, *supra* note 2 at 494.

¹¹⁴ See Brian Tobin, Minister of Fisheries and Oceans, Notes for an Address (Second Annual Coastal Communities Conference on Fisheries, Prince Rupert, B.C., 29 April, 1994).

¹¹⁵ *Supra*, note 112 at 16.

¹¹⁶ See Arnot, *supra* note 5.

i. The Equity Principle and the Production of Mutually Acceptable Information

There is evidence to show that the parties often either fail to concur on the accuracy of data¹¹⁷ or fail to concur on the appropriate scientific model for forecasting catches or stock returns.¹¹⁸ From this, it is possible to identify two aspects of the *Treaty* which hinder the generation of mutually acceptable information upon which the implementation of the equity principle could be based. First, the *Treaty* fails to provide for agreed upon data production methods; the parties are able to apply and rely on any scientific model that they choose. Second, while the *Treaty* does contain a mechanism for resolving technical disputes,¹¹⁹ this is not resorted to as a rule and, in any event, does not appear to be capable of resolving problems of competing methodology¹²⁰ In no circumstance can the psc determine methodology which can then be imposed upon the parties so as to avoid future disagreement over stock conditions and quantities of interceptions. Moreover, as was seen, much of the information considered by the psc when determining "equitable" management regimes derives from the parties themselves under article IV, paragraph 3. Thus, until the *Treaty* can ensure that the data confronting the parties reflects, as closely as possible, the true condition of the fisheries and that it has been arrived at in a

¹¹⁷ In addressing a disagreement over chinook stock abundance, Canada's Minister of Fisheries and Oceans recently remarked: "It is difficult to imagine how Alaska could come to one conclusion ...while Canada, a little farther south, could have a completely different experience with the same stocks of fish": Canada, Department of Fisheries and Oceans News Release NR-HQ-95-91E "Canada Surprised and Disappointed by Alaskan Chinook Harvest" (28 July 1995).

¹¹⁸ Canada, Department of Fisheries and Oceans, News Release NR-HQ-95-76E "Tobin Responds to Alaska Governor on Pacific Salmon Issues" (14 July 1995).

¹¹⁹ *Pacific Salmon Treaty* art. (1) provides: "Either Party may submit to the Chairman of the Commission, for referral to a Technical Dispute Settlement Board, any dispute concerning estimates of the extent of salmon interceptions and data related to questions of overfishing." Art. VII(2) then states: "The findings of the Board shall be final...and shall be accepted by the Commission as the best scientific information available." Notably, the parties are not bound by a finding of the Board in respect of their respective management decisions.

¹²⁰ While evidence on the perceived problems with the dispute settlement mechanism is scarce, its lack of use combined with relatively frequent informational disagreements suggests that neither party considers it to be a practical option.

mutually acceptable manner, giving practical effect to the equity principle will likely remain difficult.

ii. The Equity Principle and the Failure to Specifically Provide for its Implementation

While a lack of mutually acceptable methodology for data production inhibits giving the equity principle a measure of practical effect, it is suggested that the problems over equity have been exacerbated by the parties' failure to provide for a detailed scheme to implement the principle. The Memorandum of Understanding does not obligate the parties to negotiate over the implementation of equity, nor does it fix a particular schedule for the phasing in of the principle. Clearly, this is the source of much of Canada's frustration in continually trying to establish negotiations on equity.

It is further contended that in foreseeing the difficulties over interception quantification, the parties could have provided for a graduated implementation procedure ranging from informal bilateral discussions to binding mediation. The failure to do so appears to have assisted the United States in avoiding confronting the equity issue.

iii. Definition Difficulties in the Equity Principle

The parties' failure to provide for a definition of the word "benefits" contained in article III, paragraph 1(b)¹²¹ may be a contributory factor to the above noted problems, as this relates directly to the practical effect of the equity concept. As was seen, the "benefits" to which each Party is supposedly entitled under the equity principle are understood in economic terms. Nonetheless, this understanding does not appear to have assisted the parties in achieving progress on giving effect to the equity principle.¹²² It is suggested that had the parties provided explicitly for cash or trade concessions as compensation for imbalances in interceptions, some degree of incentive for compliance with the equity principle might have been introduced. Instead, the generally vague definition of the

¹²¹ See note 80 and accompanying text.

¹²² See Thomas Healy, "Where Artificial Constraints Kill: The Dispute Between Canada and the United States Over Pacific Salmon" (1995) 12 *Ariz. J. of Int'l & Comp. L.* at 319-20.

concept lends itself to problems with interpretation and, ultimately, to problems with implementation.

2. The Contradictory Effect of Article III, Paragraph 3(b): “avoiding undue disruption of existing fisheries”

A further difficulty with the *Treaty* is revealed by the dispute over the Alaskan chinook harvest.¹²³ When the *Treaty* was first signed in 1985, the chinook fishery regime included a rebuilding program which was to attain set escapement goals by 1998.¹²⁴ Yet, in 1995 it was clear that only 50% of the stocks were rebuilding and harvest rates continued to exceed established levels.¹²⁵ Moreover, it was evident that under the harvest ceilings provided for by the *Treaty*, only one third of the wild stocks were expected to attain their 1998 escapement goals.¹²⁶ This caused the Pacific Salmon Commission's Northern Panel to recommend a reduction in the annual harvest levels.¹²⁷

Notwithstanding this recommendation, in 1995 Alaska persisted in harvesting chinook in excess of *Treaty* limits. In 1996, although Alaska claimed that its revised chinook management plan complied with the *Treaty* requirements, Canada was adamant that the Alaskan proposal was in excess of the Panel's recommendation and that it represented a blatant disregard for conservation.¹²⁸

Alaska's position throughout has largely been based on Article III, paragraph 3(b) of the *Pacific Salmon Treaty* which, as discussed above, urges due regard for existing fisheries.

The Press Secretary for Alaska Governor Tony Knowles justified Alaska's 1996 management plan in the following terms:

This is why Alaska got involved in the *Treaty* process to begin with. The *Treaty* recognizes historic traditional

¹²³ The problems over this harvest stem from the fact that 75% to 90% of the chinook taken in Southeast Alaska's troll fishery originate in British Columbia, Washington, or Oregon. See Huppert, *supra* note 12 at 3.

¹²⁴ *Pacific Salmon Treaty*, *supra* note 1 at annex IV, chap. 3.

¹²⁵ See Huppert, *supra* note 12 at 2.

¹²⁶ *Ibid.*

¹²⁷ *Ibid.*

¹²⁸ Canada, Department of Fisheries and Oceans, News Release NR-HQ-96-52E “Canada Criticizes U.S. Chinook Management Plans for 1996” (27 June 1996).

fisheries and the *Treaty* says traditional fisheries should be maintained.¹²⁹

It is suggested that the manner in which the *Treaty* provides for recognition of existing fisheries is inconsistent with the general purpose of the accord and therefore amounts to a sharp circumscription of efforts to balance interceptions through the equity principle. The *Pacific Salmon Treaty* is designed to effect coast-wide salmon management regimes to ensure the conservation and equitable allocation of the salmon stocks. As was seen in the discussion of the background to the *Treaty*, the decline in salmon stocks and concern for interception stemmed in part from each nation pursuing their respective fisheries in the absence of bilateral cooperation. Thus, to provide non-prioritized, general protection within the *Pacific Salmon Treaty* for the very fisheries which contributed to the need for cooperation naturally risks frustrating the aims of the *Treaty*.

By the same token, there may be cases where the recognition of existing fisheries is mandated by, for example, compelling economic circumstances.¹³⁰ In such instances, it would seem appropriate that these fisheries be properly taken into account by a clearly worded provision. The breadth of the current provision, however, provides the parties to the *Treaty* with the argument that certain fisheries ought not to be limited on the basis that they are existing fisheries which stand to be “undu[ly]”disrupted. There is no definition of “undue” provided in the section, nor is there any qualification to “existing.” As a result, Alaska can pursue an interception fishery which is likely inconsistent with the conservation and equity principles of the *Pacific Salmon Treaty* while simultaneously asserting the same *Treaty* in defence of the policy.

In addition, where “existing fisheries” involve interceptions, article III, paragraph 3(b) is inconsistent with paragraph (a) which requires the parties to reduce interceptions. The *Treaty* does not provide any priority scheme to reconcile these provisions. Again, if paragraph (b) were better defined, it might be possible to see it as a limited exception to paragraph (a). In light of the principles of the *Treaty*, the requirement of reduction of interceptions can be argued to have priority. Nevertheless, since the parties have included article

¹²⁹ See Arnot, *supra* note 5.

¹³⁰ A separate provision to preserve domestic First Nations Treaty obligations from the operation of the *Pacific Salmon Treaty* is included in art. XI.

III as a general "guideline" section to the discharge of all *Treaty* rights and duties, it is not surprising that definition problems and inconsistencies between the provisions are capable of having significant effect on the operation of the agreement.

3. The Structure and Operation of the Pacific Salmon Commission

The recurring dispute over the Alaskan chinook harvest is also in part illustrative of deficiencies in the operation and structure of the Pacific Salmon Commission. In general, Canada has enjoyed the support of Washington and Oregon in its efforts to persuade Alaska to reduce its chinook fishery.¹³¹ Washington and Oregon have both experienced grave declines in the numbers of chinook spawning in their rivers and are concerned about ensuring sufficient escapement levels for chinook returning from south-east Alaska.¹³² Nonetheless, irrespective of the common interest between Washington, Oregon, and Canada, the Commission has been prevented from making recommendations for the management of chinook due to Alaska's ability to unilaterally prevent the United States Section from casting its vote in the Commission.¹³³

Canada has blamed these difficulties on the constitution of the United States Section as provided for in the *Pacific Salmon Treaty Act*. As Brian Tobin, then Canadian Minister of Fisheries and Oceans, stated: "There is a fatal flaw in the negotiation process...it is a flaw in the U.S. system that allows a single interest to hijack the outcome."¹³⁴ This, however, is a shortsighted view since the responsibility, it is suggested, is also with the structure of the psc.

In assigning only one vote per section yet in requiring four members for each section, the *Treaty's* provisions for the constitution of the Commission simultaneously encourage the representation of diverse interests and preclude these interests from

¹³¹ Canada Department of Fisheries and Oceans, News Release NR-PR-95-29E "Tobin Announces 1995 Pacific Salmon Fishing Plans Following Failed Negotiations With the U.S." (4 July 1995).

¹³² See Huppert, *supra* note 12 at 3.

¹³³ See Healy, *supra* note 122 at 317-19.

¹³⁴ Canada Department of Fisheries and Oceans, News Release NR-PR-95-29E "Tobin Announces 1995 Pacific Salmon Fishing Plans Following Failed Negotiations With the U.S." (July 4 1995).

effective participation unless they can control "their" section's single vote. It is suggested that in failing to contemplate the implications of this structure, the *Treaty* has dramatically undermined its own effectiveness since, where the parties choose to operate their respective sections by consensus, a single voting Commissioner is given the power to prevent the psc from recommending fishery regimes. This situation arises in the United States Section as a result of the requirements of the *Pacific Salmon Treaty Act*. The fact that the *Pacific Salmon Treaty* is capable of being controlled by the political agenda of a single United States commissioner is therefore as much a result of the constitution of the Commission as it is the result of the constitution of the United States Section.

By way of contrast with the structure of the IPSFC, it is contended that regional representation could have been provided for on the psc without having created as significant a potential for inaction due to single interest usurpation. As noted above, the *Fraser River Convention* provided each party with three members on the IPSFC, yet required only two votes from each set of three in order to act. As a result, the IPSFC was able to provide some degree of representation for regional interests (the parties were still at liberty to select their respective commissioners) yet it also foreclosed the possibility of complete inaction by way of a single dissenting view. Nevertheless, by virtue of the two-votes-per-side requirement, the IPSFC still ensured that national or broader interests could be taken into account.

A second point of contrast with the IPSFC involves operating powers and autonomy and relates generally to the incapacity of the psc. The IPSFC possessed a significant quantum of power independently from its government architects. As noted above, the success of the IPSFC was largely associated with its ability to provide direct regulatory measures which bound fishers of both parties. The psc on the other hand is merely vested with the power to make recommendations to the signatory governments.¹³⁵ Not only is the psc not assigned authority to implement management regimes, it does not possess even the relatively limited ability to generally prescribe in-season regulations.

This scheme presents obvious problems for effective bilateral salmon management. As the Alaskan chinook harvest dispute

¹³⁵ The only exception to this is in respect of Fraser River stocks and appears to underscore the parties' recognition of the source of the IPSFC's strengths.

reveals, the Commission is not free to respond quickly and effectively to sudden environmental or stock condition changes. It cannot give effective priority to conservation where conservation conflicts with politics. And, of course, in the event that the equity principle is ultimately implemented, the Commission will likely be frustrated from imposing measures to ensure balanced allocations of interceptions and/or benefits where those measures conflict with particular interests.

In a sense, it is difficult to understand why the Commission was not provided with a greater measure of authority. Since the constitution of the Commission is such that action is only possible where the representatives of both parties agree, both governments are assured that no decision will be taken and, thus, no powers exercised without their support. In any event, under the current scheme, even where the Commission can agree, the implementation of its agreed upon measures depends exclusively on governmental will.

A further difficulty related to the scheme of the psc involves the lack of a general dispute resolution forum. The parties have not provided in the *Treaty* for a general mechanism to resolve disputes both during negotiations and during the life of the management regimes. The technical dispute resolution mechanism appears to be too limited in its scope and potential to be of any practical use to the parties. Therefore, even where the psc's recommendations are adopted by the respective governments, any conflict arising during the term of an agreement is likely to remain unresolved unless the parties muster the political will to arrive at a solution. There is no requirement that the Commission even investigate general disputes and provide recommendations for their resolution to the parties.

4. The Lack of Habitat Protection Obligations

The decline in chinook stocks originating from rivers in Washington and Oregon has contributed to the dispute over the chinook harvest in south-east Alaska and also highlights a further difficulty with the scheme of the *Pacific Salmon Treaty*. It is noted above that one of the historical factors which gave rise to the need for cooperative management in respect of west coast salmon is environmental degradation. As revealed by the Fraser Canyon disaster in the early part of the century and dam construction

during the 1960s and 1970s, the destruction of inland salmon habitats can have a significant impact on ocean stocks. More recently, both the United States and Canada have acknowledged that "development" in Washington and Oregon has reduced and continues to depress chinook stocks which are an important part of both the United States' harvest and Canada's interception fisheries.¹³⁶

Given the experience with habitat destruction in the Pacific north-west, it is somewhat surprising that the *Treaty* does not contain an express habitat provision. Importantly, the failure to include habitat protection obligations appears to undermine the principle of conservation contained in article III, paragraph 1(a). Although this provision requires the parties in principle to ensure the "optimum production" of stocks, the parties are not made directly responsible under the *Treaty* for the protection of salmon environments within their boundaries.

This fact is significant for the overall operation of the *Treaty*. In both permitting and allocating salmon interceptions, the *Treaty* has effectively acknowledged the *de facto* sharing of the west coast salmon resources. Both parties are dependent on fish produced in the other parties rivers and tributaries. It follows from this that where one party destroys or corrupts salmon habitat within its territory, the other party's fisheries stand to be affected. Furthermore, a simple rebalancing of interceptions is not always a viable remedy to this dilemma since interception fisheries can be location specific. For example, where coastal community fishers in British Columbia are largely dependent on chinook spawned in Oregon and Washington, a compensatory increase in Canadian interceptions off Vancouver Island is, in practical terms, useless for the coastal fishers who have lost harvests due to poor habitat protection in the United States.

5. Insight from the Analysis: The Tension Between Allocation and Conservation

While the foregoing critical analysis of the *Pacific Salmon Treaty* is not exhaustive, it exposes the tension within the *Treaty* between competing emphases on balanced and conservative long-term

¹³⁶ See *Pacific Salmon Commission Eighth Annual Report 1992/93*, *supra* note 112 at 9.

management and a general reluctance to "jeopardize" short-term allocation interests.

First, it is contended that since the equity principle stems from an interest in the fair distribution of the salmon resource, it reflects a general determination to avoid international competition and consequential overfishing. It therefore represents a partial effort to provide for the long term preservation of the salmon stocks. At the same time, however, the failure to provide for both a scheme by which to implement the equity principle and a mutually acceptable framework for reaching agreement on quantifying and evaluating interceptions suggests an indisposition to effect a practical departure from existing fishing patterns. The parties cannot expect to achieve balanced, long term interception allocations without some modification of previous fishing practices since, as was seen, these practices contributed to the basic need for cooperative management.

The same tension between the principle of cooperative conservation and the reluctance to risk immediate interests is revealed explicitly in the incongruity between "avoiding undue disruption of existing fisheries" and the principles of equity and conservation. In requiring avoidance of disruption to existing fisheries, the *Treaty* clearly indicates a concern for the maintenance of established fisheries, at least for the short term. Nevertheless, long term sustainable interceptions may well require that existing fisheries be restructured or eliminated. Until there is relative priority assigned to these concepts, arguments based on the short-term maintenance of existing fisheries can continue to frustrate and conflict with efforts to provide for long-term conservation and balancing of west coast salmon harvests.

The structure and operation of the *Pacific Salmon Treaty* suggests an unwillingness by the parties to delegate any degree of general control over the salmon fisheries to an international body. As a result, the provisions of the *Treaty* in respect of direct fisheries management are not given effect without the full approval of the parties and short term political interests are able to take advantage of the structure to significantly influence the course of salmon management. Under this architecture, effective long term cooperative use of the salmon resource remains elusive and the

principle of conservation becomes increasingly subordinated to short-term allocation interests.

The tension between conservation and allocation in this respect results from the fact that the *Pacific Salmon Treaty* assumes that cooperation is a prerequisite for effective conservation; however, the structure and operation of the psc practically ensure *against* effective cooperation except in the event that it is mutually convenient. Thus, it is suggested that although the psc was established in order to effect coordinated management designed in part at the conservation of the resource, it is shackled by its constitution and operating powers which reserves the parties' independence and autonomy. Given the example of the Alaskan chinook breakdown, it appears that the national independence and autonomy under the *Treaty* often serves immediate allocation interests.

This tension is further highlighted by the failure of the parties to provide for habitat protection obligations within the *Treaty*. Given the anadromous nature of the salmon species, long term conservation of salmon stocks requires more than regulated ocean harvests and the development of artificial enhancement programs. History has shown that without the assurance of suitable inland habitats, the west coast salmon resource is imperiled. Nevertheless, even though conservation is one of the founding principles of the *Pacific Salmon Treaty*, inland habitat protection obligations are not included within the scheme of the accord. This is suggestive once again of a reservation on the part of both countries to restrain their autonomy for the purpose of effecting long-term, conservation-oriented salmon management.

In short, a critical analysis of the *Pacific Salmon Treaty* in light of recent breakdowns in bilateral salmon management relations reveals inconsistencies between the *Treaty's* governing principles and its practical scheme. While the spirit of the *Treaty* posits resource conservation and balance through the equity principle and the general recognition of the need for cooperation, aspects of the structure of the accord tend to frustrate these objectives. This stems primarily from the operation and structure of the psc, however, it is also underscored by a concern to prevent the disruption of both existing fisheries wherever possible and by a general reluctance to "undermine" the ability of protecting short(er)-term interests in resource allocation.

IV. CONCLUSION

The *Pacific Salmon Treaty* represents an ambitious attempt by Canada and the United States to cooperate over the management of west coast salmon. As noted, the need for cooperation stems from the anadromous nature of salmon and the general importance of the resource, as well as the international implications of regional management strategies and local environmental degradation. As was also noted that the international law on anadromous species management, while requiring cooperation in vague terms, contributes to the complexity of managing salmon stocks by simultaneously recognizing the state of origin principle and preserving the 200 nautical mile jurisdiction of the coastal state. The *Treaty* demonstrates the scope and complexity of the cooperative effort undertaken by Canada and the United States; however, a critical analysis of the *Treaty* in light of recent examples of bilateral breakdowns in salmon negotiations casts the tensions within the scheme of the *Treaty* into sharp relief.

While it is idealistic to maintain that effective cooperation can be absolutely guaranteed through an international legal accord, aspects of the *Pacific Salmon Treaty* clearly prevent optimum bilateral coordination. In order to move toward more effective joint management on the west coast, specific resolutions to these problems need to be ascertained. The following brief recommendations address some of the problems identified:

1. The parties must implement the equity principle. Until there is general agreement that salmon management and allocation is fair under the *Treaty*, the ongoing establishment of acceptable fishery regimes will remain challenging. Toward this end, the parties should negotiate equity independently with a view to establishing a practical, scientifically feasible, and agreeable implementation scheme.
2. The structure of the Pacific Salmon Commission should be reformed. The consensus requirement should be questioned and the possibility of providing each Commissioner with one vote should be explored.
3. As long as the constitution of the Pacific Salmon Commission remains unchanged, the United States Section should provide the United States government representative

with the power to determine a decision where the other Commissioners are unable to arrive at a consensus.

4. The parties need to reevaluate the manner in which the *Treaty* gives practical expression to the principle of conservation. This may include providing the PSC with the responsibility for overseeing designated salmon habitat areas or including an annex to the *Treaty* which outlines obligations to ensure against habitat degradation.

5. If the parties determine that a bilateral body is most appropriate for effective salmon management, the body must be provided with some independent ability to implement management measures.

6. Finally, and perhaps as a condition precedent to the above suggestions, the parties need to determine the extent to which they are prepared to forego more immediate local interests in order to obtain the long term goals of balance and conservation.

In essence, the *Pacific Salmon Treaty* represents an international legal response to a problem which derives from the imposition of "artificial" political divisions on the life cycle of a species which adheres only to natural boundaries. Since this is a common issue associated with the regulation and conservation of living resources, the study of one example at overcoming the dilemma may provide clues for future efforts. In generalized terms, the shortcomings of the *Pacific Salmon Treaty* identified in this examination reveal that the greater the distance is between the principles and the practical substance of an international resource management effort, the less likely it is that the cooperative effort will realize success. Although it is abundantly clear that effective management of marine resources cannot occur without international cooperation, nations that choose to cooperate must realistically confront the question of what compromises they are prepared to make. Cooperating states must ensure that any accord established consistently expresses both in principle and in substance the extent of their willingness to compromise in order to achieve effective coordinated management. Until the United States and Canada can achieve this balance, successful negotiations under the *Pacific Salmon Treaty* are likely to remain elusive.

V. POST SCRIPT

Since the time of writing, the most recent efforts to establish fishing regimes under the *Pacific Salmon Treaty* stalled and ultimately failed during the summer of 1997. In the midst of the stalemate, there was further protest action and political tension, including a blockade by B.C. fishers of an Alaskan ferry. As a result, a U.S. Senate resolution called for U.S. naval intervention to protect Alaska's passage rights, and independently established "aggressive" fishing policies.¹³⁷ Moreover, as the gulf between the U.S. and Canadian sides widened, the dispute was further complicated by division within Canada as the British Columbia government became increasingly disillusioned with the federal government's efforts to find an acceptable resolution.

The most recent dispute essentially stems from the Canadian view that Alaskan fishers take a far greater number of sockeye salmon than they are entitled to by the *Treaty*.¹³⁸ Indeed, it is widely recognized by all sides to the dispute that Alaskan fishers caught approximately four times the amount of sockeye in 1997 than the Alaskan fleet normally nets during the season.¹³⁹ The Alaskan government maintains that the increase in the sockeye catch is "incidental" to its catch of pink salmon and that it is abiding by the terms of the *Treaty*.¹⁴⁰ Nevertheless, Canada's belief in Alaskan overfishing led to an official Canadian "fish offensive" aimed in part at generating a protest from Washington and Oregon, which in turn was hoped would pressure Alaska into agreement with the Canadian position.¹⁴¹

As the political storm between the United States, British Columbia, and Canada continued into the fall of 1997, hopes for the possibility of future agreement rested largely with David Strangway and William Ruckelshaus. The individuals appointed in

¹³⁷ "Darn Yankees" *Maclean's* (4 August 1997) at 12-14.

¹³⁸ "Salmon war declared by B.C." *The [Toronto] Globe and Mail* (18 July 1997) A-1.

¹³⁹ "Alaskan salmon haul larger than feared" *The [Toronto] Globe and Mail* (26 July 1997) A-8.

¹⁴⁰ "Alaska asking for millions in salmon row" *The [Toronto] Globe and Mail* (29 July 1997) A-1.

¹⁴¹ "Canada Plans Fish Offensive" *The [Toronto] Globe and Mail* (30 July 1997) A-1.

July by Canada and the United States respectively as "emminent persons" assigned to identify a way to bring the Canadian and American sides together again.¹⁴² The pair is due to report in early 1998.

The latest conflict over Pacific salmon further underscores the shortcomings of the *Pacific Salmon Treaty* and reinforces the urgent need for reform. The equity principle is still not implemented. Canada remains adamant about the importance of this principle and committed to an interpretation of "equity" which would significantly reduce Alaska's current salmon fishery.¹⁴³ Predictably, Alaska presses a contrary interpretation of equity and continues to rely upon the ambiguous language of the *Treaty* to justify its position.¹⁴⁴ In any event, no effort has been taken to resolve the technical, definitional, and implementational difficulties associated with the principle. Thus, as the *Treaty* currently reads, Alaska and Canada can continue to reasonably rely upon it to defend contradictory positions.

Alaska's position of influence continues largely as a result of the structure of the Pacific Salmon Commission and the operation of the United States Section. A call for reform in these areas is thus reiterated. Unless and until reform occurs, an agreement under the *Treaty* which fails to meet Alaska's specifications remains most unlikely.

Finally, the relationship between the current salmon dispute and the defects in the *Treaty* was cast into sharp and explicit relief with the resignation of commissioner Robert Wright from the Pacific Salmon Commission in September, 1997. In an interview soon after his resignation, Mr. Wright remarked:

The salmon *Treaty* was doomed from the day of its being signed. I don't think we'll ever get an agreement on fish quotas the way it is written today....It [is] a bare bones document with no agreement on even simple concepts.¹⁴⁵

¹⁴² "Envoys hopes may be doomed, B.C. Premier says of salmon talks" *The Globe and Mail* (1 November 1997) A-4.

¹⁴³ *Supra* note 135 at 16.

¹⁴⁴ *Ibid.*

¹⁴⁵ "Salmon Treaty Member Resigns" *The [Toronto] Globe and Mail* (11 September 1997) A-1.

Mr. Wright was also particularly critical of the structure of the U.S. Section and the vague nature of the *Treaty*.

Thus, although the need for international cooperation in the management of west coast salmon fisheries has not diminished, the latest saga in the ongoing dispute under the *Pacific Salmon Treaty* suggests that the likelihood of an agreement is indeed remote. To the extent that the 1997 dispute continues to reflect significant deficiencies within the *Treaty*, effective international cooperation will only be achieved through substantial reform of the *Pacific Salmon Treaty* or, perhaps, a fresh effort in the form of a new agreement.