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Salmon Recovery and the Pacific Salmon Treaty

Sunny Knight*

Transboundary management of Pacific salmon is governed by the Pacific Salmon Treaty. In 1999, the United States and Canada negotiated several long-term Annexes to the Treaty regarding specific management regimes. The Annexes address the previous failure to provide adequately for conservation by adopting an abundance-based allocation mechanism, by creating two Restoration and Enhancement Funds, and by adopting declarations of intent regarding scientific cooperation and habitat restoration. The new agreement does not, however, address the perennial lack of cooperation among the stakeholders. This potential weakness poses a threat to the stability of the Treaty and to the health of the Pacific salmon.

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INTRODUCTION

Pacific salmon represent a unique challenge for both fisheries management and conservation. As an anadromous, transboundary resource, Pacific salmon management requires not only joint action between the United States and Canada in the form of an international treaty but also cooperation between upstream conservation efforts and the downstream fishing industry. This situation is further complicated by two factors: first, the dire situation of Pacific salmon runs in the continental United States;¹ and second, the control over fisheries management exercised by the U.S. parties, namely, Alaska, Washington, Oregon, and the treaty tribes, all of which have different and often competing interests at stake.

Despite these complications, after 14 years of negotiations, the United States and Canada signed the 1985 Pacific Salmon Treaty. This treaty represented a hard fought, ambitious attempt to comprehensively regulate the salmon fisheries. Unfortunately, the Treaty also covered issues so contentious that, to achieve consensus on the Treaty itself, the actual details of fisheries management were left for the stakeholders to negotiate in the future.

Not surprisingly, conflicts over the implementation of the 1985 Treaty severely hampered its effectiveness. Tensions escalated as the years passed and, by the early 1990s, the management annexes negotiated under the Treaty expired without being renewed. Subsequent United States and Canadian negotiations lasted for four years, during which time coherent regulation of the fishery was impossible. Finally, in 1999, the parties finalized a new agreement under the Treaty that consists of several long-term Annexes implementing specific management regimes.

This Note will analyze the 1999 agreement, discussing its

successes and its failures. Part I provides a brief background on the current circumstances of the Pacific salmon. Part II examines the history of U.S./Canadian relations over the salmon fisheries, thus providing a foundation for the current disputes. Part III outlines the 1999 treaty revisions, and Part IV provides an analysis of the revisions, focusing on its attempts to improve conservation and cooperation between the parties. In particular, the 1999 agreement addresses the failure of the 1985 Treaty to provide adequately for conservation. The agreement does so by adopting an abundance-based allocation mechanism, by creating two U.S.-funded Restoration and Enhancement Funds, and by adopting declarations of intent regarding scientific cooperation and habitat restoration. The new agreement fails, however, to alter the cumbersome consensus-based decisionmaking framework adopted in the Pacific Salmon Treaty, a weakness that poses a threat to the stability of the Treaty and to the health of the Pacific salmon.

I

BACKGROUND

A. The State of the Pacific Northwest Salmon

Pacific salmon are an anadromous species, meaning that they “spawn in freshwater, migrate to sea, and return to freshwater to spawn and complete their lifecycle.” There are seven species of Pacific salmon (including cutthroat and steelhead trout) of which five, the chinook, coho, chum, pink, and sockeye, are addressed here. These species are classified into runs or stocks for fishery management purposes. A run is a group of fish, usually migrating upstream as a unit. Each run returns to the river of its origin to spawn at a slightly different time. Salmon “partition” themselves into runs based on the

2. COMMITTEE ON PROTECTION AND MANAGEMENT OF PACIFIC NORTHWEST ANADROMOUS SALMONIDS, COMMISSION ON LIFE SCIENCES, UPSTREAM 20 (1996) [hereinafter COMMITTEE].
3. See id. at 2.
5. See id. Each species prefers different size spawning gravel and different water velocity. See id. at 4. Chinook spawn in main streams and large tributaries and often travel hundreds of miles. See id. Spring runs enter freshwater as early as March or April, fall runs in September or October. See id. Coho spawn in virtually all stream types entering freshwater in September through November and spawning until as late as February. See id. Chum and pink salmon spawn in coastal streams, with pinks travelling farther than chum. See id. Finally, juvenile sockeye rear in lakes, so they spawn in streams that are inlets or outlets to lakes. See id.
availability of food resources in the rivers. A "stock" is a population or group of salmon that is recognized as a unit for management purposes.

The United States and Canada allocate harvest rights for Pacific salmon to the "state of origin," the state in whose freshwater river the salmon spawn. By virtue of the salmon's migration patterns, each nation invariably catches a percentage of the salmon that originate in the rivers of the other nation, a phenomenon called interception. For example, northward migrating chinook originating in British Columbia, Canada are caught in Alaskan waters; Fraser River sockeye originating in British Columbia are caught in Washington waters; and Columbia River chinook, currently a listed species under the Endangered Species Act, are caught in both Alaskan and British Columbian waters. In addition, British Columbia and Alaska share runs originating in the transboundary rivers of Canada and Southeast Alaska. Consequently, interceptions constitute the major source of conflict surrounding Pacific salmon fisheries— with Alaska enjoying a significant geographic advantage over Washington and Oregon, with Canada caught in the middle.

Salmon populations in the Pacific Northwest have fallen dramatically in the past 25 years, a decline that began in the 19th century with the expansion of fisheries within the Pacific Northwest's major river systems. The deterioration, however,

6. Id.
7. COMMITTEE, supra note 2, at 78.
8. Treaty between the Government of the United States and the Government of Canada Concerning Pacific Salmon, Jan. 28, 1985, U.S.-Can., T.I.A.S. 11091 (hereinafter Pacific Salmon Treaty): see generally Law of the Sea Convention, Dec. 10, 1982, 21 I.L.M. 1261. Originally, ownership of salmon stocks, like other high seas fisheries, did not attach until the fish were caught. See Schmidt, supra note 1, at 100 n.21. This changed with the Law of the Sea Convention, which developed the "state of origin" principle. Id. The change raised issues "as to the distribution of Fraser River stocks, which now clearly belong to Canada but which historically were utilized by both the United States and Canada." Id.
9. The concept of interception derives from the "state of origin" principle adopted by the 1982 Law of the Sea Convention and subsequently incorporated into the Pacific Salmon Treaty. An interception is defined as the harvesting of salmon originating in the waters of one party by a fishery of the other party. See Pacific Salmon Treaty, supra note 8, Art. 1 (Definitions), ¶ 4.
10. See COMMITTEE, supra note 2, at 140.
11. See JOHN C. RYAN, STATE OF THE NORTHWEST, NORTHWEST ENVIRONMENT WATCH REPORT No. 1 (1994) (noting that 10 to 16 million salmon once returned to the Columbia River, a number that had dropped to 1.1 million, of which two-thirds were hatchery fish, by 1994).
has not occurred uniformly across all populations or all regions. Salmon stocks in Southeast Alaska remain relatively strong, as do most of the Canadian stocks in British Columbia. In contrast, recent estimates show salmon stocks in the lower 48 states to be in good condition in only six percent of their range. Furthermore, "in 38% of this range all salmon are extinct, and in 56% most stocks are imperiled or extinct." What once seemed an inexhaustible resource has been reduced to the point that currently 26 populations of Pacific salmon are listed as threatened or endangered, the bulk of them in Washington State and the Columbia River Basin.

This disparity in the strength of the various stocks results in a dilemma for international fisheries management because the Washington and Oregon stocks originating in the Columbia River that Canadian fishers depend on to offset United States' interceptions of Fraser River stocks no longer represent a viable fishery. The means by which this imbalance should be corrected is the central dispute surrounding efforts at cooperation in salmon fisheries management.

B. U.S. Control of Salmon Fisheries

Cooperation is further complicated by the fact that, domestically, responsibility over salmon fisheries in the United States is disbursed between federal, state, and tribal officials. The Magnuson Fishery Conservation and Management Act limits the role of the federal government to the exclusive economic zone, which extends from three to two hundred nautical miles from the coast. State jurisdiction covers internal waters out to the 3-mile point and is subject to limited federal preemption if

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13. See Schmidt, supra note 1, at 122.
14. See generally COMMITTEE, supra note 2.
15. RYAN, supra note 11, at 82 (stating that at least 106 major salmon stocks in California, Washington, and Oregon are extinct and another 200 are at some risk).
international obligations are jeopardized. Native American tribes retain control "within their usual and accustomed fishing grounds," subject to federal preemption for conservation purposes. In practice, therefore, U.S. domestic fishery regulation occurs primarily at the state and tribal level, making the cooperation of these entities vital to international agreement. Because of this wide distribution of jurisdiction over salmon fisheries, an international agreement must represent the interests of Alaska, Washington, Oregon, and various tribal groups to be politically feasible and practically enforceable. This reality has made international cooperation exceedingly difficult.

II
DIFFICULTY REACHING INTERNATIONAL COOPERATION

The realities of interceptions and the varying strengths of salmon populations complicate international fishery regulation. Even limited agreement has proven difficult. Canada and the United States signed the first Convention regarding Pacific salmon fisheries in 1930 after 17 years of negotiation. The Fraser River Convention created an international commission to restore Fraser River sockeye and to divide annual harvests equally between the two nations. Even with coverage limited to the division of the Fraser River sockeye, negotiating a mutually satisfactory deal did not come easily.

The Fraser River Convention achieved its limited mandate to restore Fraser River stocks and to allocate them evenly with

20. Sohapy v. Smith, 529 F.2d 570, 572-73 (9th Cir. 1976) (finding that any preemption action must use the least restrictive measures available under the Treaty); see also Yanagida, supra note 17, at 578 (summarizing jurisdiction regarding fisheries management in the United States).
21. See Yanagida, supra note 17, at 577.
23. See THE NORTHWEST SALMON CRISIS: A DOCUMENTARY HISTORY 272 (Joseph Cone & Sandy Ridlington eds., 1996) [hereinafter SALMON CRISIS]. In return for a 50% allocation of the catch, which originated in Canada, the United States agreed to support Canadian efforts to repair the habitat damaged by the 1913 and 1914 blasting accidents on the Fraser River. See Thomas C. Jensen, The United States-Canada Pacific Salmon Interception Treaty: A Historical and Legal Overview, 16 ENVTL. L. 363, 373 (1986).
resounding success. Nevertheless, despite the addition of pink salmon to the regulatory scheme in 1957, the agreement lacked the breadth to address the disputes over other salmon runs that continued to plague U.S./Canadian fisheries relations. Additionally, after some initial U.S. support for habitat restoration, Canada bore the full costs of habitat maintenance for the Fraser River. Under these circumstances, Canada became increasingly dissatisfied with allocating half of the yearly catch to the United States. Finally, Alaskan interceptions of Canadian origin and transboundary salmon not covered by the Fraser River Convention increasingly concerned Canada—a problem that would continue to impede cooperation in the years to come.

A. Negotiating a Comprehensive Treaty (the Pacific Salmon Treaty)

In 1971, the dissatisfaction with the current regulatory scheme led the United States and Canada to begin negotiations on a new, more comprehensive agreement. Much of the impetus behind cooperation on both sides came from the expansion of expensive hatchery programs intended to supplement dwindling wild stocks. Both Canada and the United States sought to ensure that the benefits of these investments would accrue primarily to their own fisheries and would not be taken advantage of by the other nation.

Initially, salmon harvests were stable and the negotiations focused primarily on limiting interceptions, but as fish runs began to plummet in the early 1980s, the focus expanded to encompass conservation efforts. Fluctuations in run and harvest size caused both nations to question the other's poor

25. See Jensen, supra note 23, at 375 (describing the "high degree of credibility" and support accorded the management institution under the Fraser River Convention).
26. See id.
27. See SALMON CRISIS, supra note 23, at 274.
28. See supra text accompanying note 23.
30. See id.
31. See Jensen, supra note 23, at 380.
32. See generally COMMITTEE, supra note 2, at 11-12, 302-23 (discussing the problems related to supplementation of wild stocks with hatchery stocks).
33. See Jensen, supra note 23, at 381.
34. See id. at 391 (discussing the effect of the chinook crisis on the negotiations).
salmon management practices. The need to negotiate an agreement took on greater force. The possibility of overharvesting was problematic, but the continued lack of incentive to invest in habitat protection because substantial benefits would also accrue to the other nation was even more damaging. Thus, the need to limit interceptions combined with a new concern over conservation of the salmon populations served to motivate the negotiation of the Treaty.

Although the forces driving cooperation changed and expanded during the negotiation process, several factors undermined cooperation throughout the entire 14-year process. The lack of centralized decisionmaking within the United States regarding salmon fisheries severely compromised its ability to reach any agreement. Not only did the United States and Canada dispute each other's positions, the stakeholders within the United States failed to come to a consensus even among themselves. Decentralized control of the process became particularly problematic with regard to the allocation of Fraser River stocks. A number of stakeholders in the United States, particularly in the Puget Sound, had a vested interest in maintaining the status quo because they benefited greatly from the 50/50 split of Fraser River sockeye and pink salmon under the 1930 Convention. As important Columbia River stocks faltered, both tribal and non-tribal fishers in the Puget Sound became increasingly dependent on interceptions of the relatively healthy Fraser River stocks. Thus, they were extremely reluctant to agree to any reduction in the Convention allocations.

Inadequate science and data regarding catches exacerbated this problem, impeding fishery management and generating disputes on both sides. Fluctuation in salmon populations, possibly due to unpredictable interdecadal climate changes affecting salmon abundance, produced further uncertainty

35. See de Zwager Brown, supra note 29, at 623.
36. See id.
37. The problem was limited to the United States because the federal government in Canada controlled the decisionmaking regarding salmon fisheries issues. The lack of centralized decisionmaking still constituted a serious weakness in the negotiations. See generally Ted L. McDorman, The Canada-United States West Coast Salmon Dispute: the Role of the Substate Units, 92 AM. SOC'Y INT'L L. PROC. 345 (1998).
38. See Jensen, supra note 23, at 387-88. Recall that under the Fraser River Convention, the United States received a 50% allocation of the harvest coming out of the Fraser River. This meant that both tribal and non-tribal fishers in Washington and Oregon were taking large numbers of Canadian origin salmon each year. See id.
39. See Schmidt, supra note 1, at 104.
40. See de Zwager Brown, supra note 29, at 623.
41. See COMMITTEE, supra note 2, at 28. "Interdecadal changes in the ocean
regarding population levels. The effect of human development on salmon populations was unpredictable in itself, but in combination with uncertainties, sustainable management became very complex. This inherent uncertainty, along with each party's mistrust of the other's catch data, created an atmosphere that made agreement on management options extremely difficult.

Despite these complications, after 11 years of negotiation, Canadian and U.S. representatives initialed a Draft Treaty in late 1982. Canada firmly supported the Draft, as did Washington and Oregon (with the exception of Washington fishers dependent on Fraser River interceptions). Alaska's representatives initially supported the agreement but succumbed to strong pressure from local fishing lobbies and eventually withdrew their support. Alaska's Congressional delegation effectively blocked the draft's ratification, bottling it up in the State Department; by mid-1983, the Draft Treaty appeared dead, never having reached the U.S. Senate for consideration. Canadian negotiators, understandably frustrated with the failure of the compromise after years of work, called an end to the negotiations.

The situation remained a total stalemate until two events in the mid-1980s. First, in 1984, the Reagan Administration reopened negotiations on the Draft Treaty in an attempt to improve the strained U.S./Canada relations resulting from the growing dispute over U.S. inaction regarding acid rain. Second, a lawsuit by the Northwest Treaty Tribes threatened reductions to Alaska's harvests, which dramatically altered Alaska's incentives to cooperate. The tribes settled the lawsuit in return

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environment—especially in water temperature and currents and associated biological communities—influence growth and survival rates and thus the return of adults. . . . Ocean effects are logistically difficult to observe because they occur over such large spatial and temporal scales and they are not easy to observe directly." Id. at 39.

42. See Jensen, supra note 23, at 394.
43. See Schmidt, supra note 1, at 105 n.59.
45. See Jensen, supra note 23, at 395 n.89. The Oregonian reported on April 4, 1983 that "ratification of the treaty is being held up in the U.S. Senate because of political considerations." Don't Delay Fish Treaty, OREGONIAN, Apr. 4, 1983, at B6.
46. See Don't Delay Fish Treaty, supra note 45, at B6.
47. See Jensen, supra note 23, at 397.
for Alaska’s support of the Treaty and, upon ratification, for representation equal to Washington, Oregon, and Alaska within the U.S. Section of the Pacific Salmon Commission created to administer the Treaty. The final settlement granted Native American tribes veto power over chinook allocations, but enjoined them from seeking judicial intervention to further reduce Alaskan harvests. In return, Alaska agreed to the 1985 Pacific Salmon Treaty, which retained the basic structure of the 1982 Draft Treaty with specific new regulatory provisions added as Annexes.

B. The Pacific Salmon Treaty

The 1985 Pacific Salmon Treaty represented the first comprehensive regulatory regime to allocate annual salmon catches between the United States and Canada. It created the Pacific Salmon Commission, a bilateral commission with primary responsibility for overseeing conservation and equitable passing through their traditional fishing grounds. United States v. Washington, 384 F. Supp. 312 (W.D. Wash. 1974). The application of this decision to Alaska remained unclear. Inclusion of Alaskan fisheries into the 50% calculation would have required them to reduce their chinook harvest by 50%, while only a 30% reduction was called for by the Treaty. See Jensen, supra note 23, at 399 n.100.

49. The Confederated Tribes lawsuit ostensibly aimed at clarifying that status, but a victory in the suit would have been meaningless without a binding agreement limiting Canadian interceptions. The extension of the 50% calculation would force Alaska to reduce harvest ceilings and forego a portion of its catch, but without a binding international agreement, these fish would be harvested by the intervening Canadian fishery as they traveled south rather than by the Native American Tribes in Washington. See Yanagida, supra note 17, at 584.

50. See Yanagida, supra note 17, at 579. As long as the Pacific Salmon Treaty is in force, the tribes may participate by voting to establish some chinook allocations. They may veto such allocations but have forgone the right to litigate them. See id. at 584.


52. See Jensen, supra note 23, at 380 (noting that the body of the final treaty was unchanged from the 1982 draft; however, it was supplemented by Annexes to the original text).
allocation.53 The Treaty further directed the Commission to establish three Panels to deal with the specific salmon runs regulated under the agreement.54 Thus, the Treaty essentially provided for two levels of administration. At each of these levels, the Treaty mandated consensus-based decisionmaking.55 The Treaty also set up a permanent framework under which the parties negotiate decisions regarding conservation and allocation. These decisions are incorporated through the operational provisions in the Annexes to the Treaty. The Annexes set limits on where, when, how, and how many salmon may be harvested in a given area.

The Annexes are periodically renegotiated through the Commission. As part of its responsibilities, it recommends the catch ceilings and determines the details of fishery regimes to be submitted to each nation for acceptance.56 Upon adoption by both nations, these fishery regimes are attached to the Treaty as Annex IV.57 The functioning of the Commission, therefore, is the core of cooperation under the Treaty. Within the Commission, the United States and Canada each have a voting Section composed of four members; each Section receives one vote.58 Decisions and recommendations require the approval of both, thereby granting each nation veto power over any proposed action.59

The same is true for the three Panels, each of which is composed of two six-member Sections.60 Each nation submits an annual report to the Commission regarding the status of its fisheries; the Commission forwards this report to the appropriate Panel, and each Panel reviews the information on its region in detail and reports its views to the Commission.61 The Commission uses these reports to make its recommendations to

53. See Pacific Salmon Treaty, supra note 8, art. II (Commission and Panels).
54. Id. Annex I (Panels). The three panels created are the Southern Panel (for salmon originating in rivers with mouths south of Cape Caution), the Fraser River Panel (for Fraser River sockeye and pink salmon harvested in the area specified in Annex II), and the Northern Panel (for salmon originating in rivers with mouths between Cape Caution and Cape Suckling). See id.
55. The only body established under the Treaty that does not provide for consensus-based decisionmaking is the Technical Dispute Settlement Board, which provides for decisions made by majority vote. See id. Annex III (Technical Dispute Settlement Board).
56. See id. art. IV (Conduct of Fisheries) ¶ 5.
57. See id. art. IV (Conduct of Fisheries) ¶ 6.
58. See id. art. II (Commissions and Panels) ¶¶ 3, 6.
59. See id. ¶ 6.
60. See id. ¶ 21.
61. See id. art. IV (Conduct of Fisheries) ¶¶ 1-5.
the parties. Thus, cooperation within the Panels is vital to the functioning of the Treaty and, like the Commission, that cooperation is bounded by the need to achieve consensus.

The recommendations of the Commission are constrained and informed by the general principles that govern implementation of the Treaty. The first principle articulated in the Treaty, the so-called "conservation" principle, directs the Commission to conduct fisheries and enhancement programs so as to "prevent overfishing and provide for optimum production." Although conservation is recognized as a fundamental principle, it is not expressly provided for anywhere else in the Treaty. The second principle deals with the apportionment of the harvest between the two nations and, abandoning the 50/50 division used in the Fraser River Convention, provides for "each Party to receive benefits equivalent to the production of salmon originating in its waters." In other words, the Treaty calls for an "equitable" distribution of salmon stocks based on the "state of origin" principle. The division of the harvest occurs according to the percentage of the run originating in the spawning habitat of each nation. Interceptions that do not correspond to this division are offset by the allocation of an increased percentage of the harvest of another stock. For example, if the Puget Sound fishery in the United States intercepts a larger number of Fraser River sockeye than what is allocated under the Treaty, then Canadian fishers to the north intercept more Columbia River chinook to offset this. Finally, the Treaty provides that the fundamental principles of conservation and equity are to be tempered by consideration of annual variations in stock abundance, the desirability of reducing interceptions, and the need to avoid undue disruption of existing fisheries.

The Pacific Salmon Treaty creates international obligations for Canada and the United States and sets up binding fisheries regimes under Annex IV. However, the Treaty commits responsibility for domestic implementation to each party individually. The United States, through the Pacific Salmon Treaty Act, vests authority for this implementation primarily in local government and authority for regulation primarily with the
states and tribes.\textsuperscript{66} The Act grants each state and the Northwest Treaty Tribes representation in the U.S. Section of the Commission. Like the Treaty itself, the Act provides for consensus-based decisionmaking within the U.S. Section. This consensus structure was adopted in response to Alaska's concerns regarding loss of state-level control over fisheries management and in an attempt to ensure support for ratification.\textsuperscript{67} Once again, the necessities of coalition building led Congress to limit the power each stakeholder conceded to the cooperative effort.

\textbf{C. Failure of the Pacific Salmon Treaty}

While the principle of equitable apportionment made sense theoretically, in practice the Treaty failed to prevent continued conflict over interceptions. The weak decisionmaking framework was unable to correct the inequitable allocations resulting from the imbalance in the health of salmon runs in the various regions. Strong runs in Alaska and Canada were paired with Endangered Species Act listings in Washington State.\textsuperscript{68} This dramatically reduced the number of Washington origin salmon intercepted by Canadian fisheries, while at the same time, both Washington and Alaskan interceptions of Canadian origin salmon remained high.\textsuperscript{69} Washington fisheries were willing to reduce interceptions of Canadian fish to address this imbalance, but Alaska refused.\textsuperscript{70} This lack of consensus within the United States led to large harvests in Alaska, while the rest of the Pacific salmon fishery was sharply limited. Canada responded by increasing its fishing activity off the west coast of Vancouver Island in an attempt to balance the interceptions occurring in Alaska.\textsuperscript{71}

Cooperation under the Treaty broke down entirely by the mid-1990s. In 1994, the tensions reached a new high when Canada required all U.S. fishing vessels passing through Canadian waters to obtain a permit.\textsuperscript{72} At one point, Canadian

\begin{itemize}
\item \textsuperscript{66} See Pacific Salmon Treaty Act, Pub. L. No. 99-5, 99 Stat. 5 (1985); see also Yanagida, supra note 17, at 586 (discussing federal-state relationships in fisheries regulation).
\item \textsuperscript{67} See McDorman, supra note 37, at 348.
\item \textsuperscript{68} See de Zwager-Brown, supra note 29, at 637.
\item \textsuperscript{69} See id. at 642.
\item \textsuperscript{70} See id.
\item \textsuperscript{71} See Schmidt, supra note 1, at 120.
\item \textsuperscript{72} See generally Ted L. McDorman, The West Coast Salmon Dispute: A Canadian View of the Breakdown of the 1985 Treaty and the Transit License Measure, 17 LOY.
\end{itemize}
fishermen actually blockaded an Alaskan ferry and held it hostage in a Canadian port for several days in protest over Alaskan interceptions.\textsuperscript{73} The 1985 salmon management agreement under Annex IV of the Treaty expired in 1995 and was not renewed.\textsuperscript{74} Mounting hostility between the parties, along with inadequate fishery regulation due to lack of cooperation on both sides, pervaded U.S./Canadian relations with regard to salmon management. Salmon populations remained perilously low and the conflict further undermined their survival.

III

A NEW AGREEMENT UNDER THE PACIFIC SALMON TREATY

A. Overview

Tensions had escalated to the point that it took four years to negotiate a new agreement. The new agreement, reached in June 1999, replaces the old Annex IV management regime and amends Annex I to create a new Transboundary Panel for salmon originating in the transboundary rivers of Canada and Southeast Alaska.\textsuperscript{75} The agreement also provides for a new plan regarding the management of northern boundary coho, a subject not covered in previous agreements.\textsuperscript{76} In addition, the 1999 agreement creates Southern and Northern Restoration and Enhancement Funds to improve resource management, habitat restoration, and enhancement of wild stocks.\textsuperscript{77} Finally, the agreement includes declarations of intent regarding Renewed Cooperation on Scientific and Institutional Matter and on Habitat and Restoration.\textsuperscript{78}

\textsuperscript{73} See de Zwager Brown, \textit{supra} note 29, at 663; see also Kim Murphy, \textit{Fish Wars Have Created a Real Stink Between the U.S. and Canada}, \textit{L.A. Times}, July 30, 1997, at A5.


\textsuperscript{77} Pacific Salmon Agreement, Attachment C (Funds), \textit{supra} note 75 (the Southern Fund focuses on southern British Columbia, Washington, Oregon, and the Snake River Basin. The Northern Fund focuses on northern British Columbia and Alaska).

\textsuperscript{78} See id. Attachments D & E.
The new Annex IV management regime actually combines a ten-year plan for chinook, coho, and chum salmon and a twelve-year plan for sockeye and pink salmon. It redraws the percentages of various stocks allocated to each nation in an attempt to provide for equity and it alters the basis for calculation of the annual harvest to be allocated. The agreement also changes the way in which the harvests themselves will be calculated season to season. Annual harvests will be based on the number of salmon available rather than on set catch ceilings.

The new allocation mechanism in the agreement is complemented by the establishment of two Restoration and Enhancement Funds and by the declarations of intent regarding habitat restoration and scientific cooperation. The funds are created through initial United States grants of 75 million U.S. dollars for the Northern Fund and 65 million U.S. dollars for the Southern Fund. The money will support "development of improved information for resource management . . . rehabilitation and restoration of habitat . . . and enhancement of wild stock production." The declarations of intent represent a formal recognition by both the United States and Canadian governments that an increased commitment to conservation is necessary. Thus, although the 1999 agreement deals primarily with fish harvests, it reflects the current focus on salmon preservation by establishing principles of research and restoration and by funding cooperative salmon recovery science.

B. Congressional Action Jeopardizing Treaty

The new agreement reached under the Treaty was threatened by the lack of consensus within the United States during the Congressional budget debates in the fall of 1999. The agreement represents an addition to the Treaty and as such does not require new implementing legislation. However, the agreement in general, and the new Restoration and Enhancement Funds in particular, require Senate appropriations for implementation. This has proven problematic given Alaska Senator Ted Stevens' position as Chairman of the Senate Appropriations Committee. In November 1999, Congress
passed a spending bill containing a rider attached by Senator Stevens that would have "waive[ed] endangered species protection for fish migrating into Alaskan waters." Canada is not subject to the Endangered Species Act but has conceded under the new agreement to abide by the same protections the Act imposes in the United States. Exempting Alaska from these protections would have forced Canada to submit to limitations that the United States failed to impose on its own states.

More importantly, the spending bill failed to appropriate adequate money for the conservation funds, which have been described by former Canadian Fisheries Minister David Anderson as "the linchpin of the deal for Canada." The bill contained only $10 million of the $60 million requested by the Clinton Administration and called for by the new agreement. Senator Stevens claimed that the bill did not violate the Treaty, but Canadian officials felt it sent the "wrong signals about U.S. commitment to the agreement." Alaska Governor Tony Knowles claimed that the federal government failed to address adequately the threat to salmon posed by hydroelectric systems in Washington and Oregon rivers and instead placed the burden of conservation unfairly on Alaskan fisheries. The governors of Washington and Oregon, together with regional fisheries representatives, tribal leaders, and the NMFS, argued that the bill undercut the Treaty and encouraged Canada to ignore the endangered species protections. President Clinton vetoed the bill in early November 1999, in part due to the lack of funding for Pacific salmon. Congressional and White House negotiators eventually reached agreement on a "watered down" version of Alaska's proposed rider, providing that the NMFS can enforce the Endangered Species Act against Alaska after completing several procedural steps. Finally, although the status of Treaty

84. See Editorial, Alaska First, Salmon Last: Alaska Strategy in Congress Would Hold Salmon Hostage, Then Blame the Decline on Snake River Dams, PORTLAND OREGONIAN, Oct. 29, 1999 [hereinafter Alaska First].
87. McKenna, supra note 85, at A4.
88. See Alaska First, supra note 84.
89. See Grossman, supra note 16.
90. See Hughes, supra note 86, at A4.
91. Editorial, Interior Approves Deal Near As Progress Made On Riders, NAT'L J. CONGRESS DAILY, Nov. 16, 1999. This version of the rider "does not waive the basic tenants of the law as the original rider did." Id.
funding, and consequently the Treaty itself, remained unclear throughout the budget debate, Congress eventually agreed to the necessary appropriations.\textsuperscript{92}

IV
ANALYSIS

Although human development and industry theoretically constitute a greater threat to the health of salmon stocks than overfishing,\textsuperscript{93} as a practical matter, fishery regulation is vital to maintaining salmon populations. Fisheries are relatively easy to control and represent a direct contribution to the number of fish returning to the river to spawn.\textsuperscript{94} More importantly perhaps, coherent fisheries management creates incentive for cooperation regarding conservation in upstream development by ensuring that any gains achieved will not simply be taken advantage of by the fishing industry, particularly the fishing industry of another state or nation. Thus, the new agreement between Canada and the United States is vital to overall salmon recovery and especially to the survival of the threatened and endangered species. The 1999 agreement improves salmon conservation measures in the three ways discussed above: (1) by adopting an abundance-based allocation mechanism; (2) by creating two U.S.-funded Restoration and Enhancement Funds; and (3) by adopting declarations of intent regarding scientific cooperation and habitat restoration. The new agreement does not, however, address the perennial weakness of the Pacific Salmon Treaty, namely the lack of cooperation among the stakeholders. This weakness poses a threat to the stability of the Treaty and to the health of the Pacific Northwest salmon.

A. Conservation

The new agreement represents a significant change from salmon management in the past because conservation and equity have finally been made equal partners in the actual allocation process.\textsuperscript{95} First, abundance-based quotas bring

\textsuperscript{93} See \textit{COMMITIEE}, supra note 2, at 254.  
\textsuperscript{94} See \textit{id.} Fishing, for the most part, occurs when the fish have reached maturity and are returning to the river of their origin to spawn. Thus, reducing these catches represents a direct contribution of the number of fish that make it upstream, also know as escapement. See \textit{id.} at 86.  
\textsuperscript{95} See generally \textit{Pacific Salmon Agreement}, supra note 75; see also Governor
conservation into the equation in determining the actual amount of fish harvested.\textsuperscript{96} Second, the equitable division agreement addresses the need to conserve dwindling stocks while still providing for some degree of fairness in the allocation of the percentage of harvest belonging to each nation.\textsuperscript{97}

The Pacific Salmon Treaty has always recognized the interdependence of conservation and equity, but previously made no provision for it in its original allocation mechanisms.\textsuperscript{98} The concrete agreement worked out in past Annexes to the Treaty based allocation on the principle of equity alone and set catch ceilings corresponding to the needs of people and industry rather than conservation.\textsuperscript{99} Annual harvests were determined based on predetermined catch ceilings that, once negotiated by the Commission, were set until renegotiation regardless of fluctuations in the salmon populations.\textsuperscript{100} When put into practice, these quotas lacked the flexibility necessary to respond to the Pacific salmon’s fluctuating population.

The new agreement, in contrast, is premised upon the use of variable quotas based on conservation.\textsuperscript{101} Annual harvests will be determined by run size, not the demands of the fishing industry.\textsuperscript{102} When the fish are plentiful, catch ceilings will be high. When fish populations are low, catch ceilings will be limited accordingly.\textsuperscript{103} This change represents a major step forward in bringing the twin goals of conservation and equity into balance.

Conservation also plays a role in the actual long-term percentage allocations to ensure equitable apportionment.\textsuperscript{104} In the past, the contentiousness of the allocation debate has placed the focus on equity and relegated conservation to a secondary goal. The realities of the current threats to the survival of certain

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\textsuperscript{96} See Pacific Salmon Agreement, supra note 75.

\textsuperscript{97} See id.

\textsuperscript{98} Pacific Salmon Treaty, supra note 8, art. III (Principles).

\textsuperscript{99} See id.

\textsuperscript{100} See Backgrounder: Abundance Based Management Regimes, Canadian Department of Fisheries and Oceans (visited Aug. 6, 2000) <http://www.nrc.dfo.ca/communic/backgrou/1999/hq29(102)_e.htm>.

\textsuperscript{101} See Washington Department of Fish and Wildlife, Fact Sheet: 1999 Pacific Salmon Treaty (1999) [hereinafter WDFW Fact Sheet].

\textsuperscript{102} See Backgrounder, supra note 100 (explaining that “since catch ceilings were routinely regarded as guaranteed quotas, this resulted in a tendency to overfish when stocks declined”).

\textsuperscript{103} See id.

\textsuperscript{104} See Governor Locke’s Press Release, supra note 74.
runs, however, can no longer be ignored. Consequently, the new agreement provides for equitable apportionment with the goal of simultaneously reducing the catch of threatened species. It moves toward achieving this by requiring Washington and Alaskan fisheries to cut back their interceptions of Canadian stocks in return for a reduction of the Canadian allotment of the threatened runs. Specifically, the Canadian fishery gave up 30% of its allocation of these endangered runs in exchange for a 6% decrease in Washington’s harvest of Fraser River sockeye and a more favorable allocation of the Southeast Alaska harvest.

For the first time, the agreement incorporates both equity and conservation into a coordinated plan for salmon management. This new mandate serves to bring into balance the two original underlying policies of the Pacific Salmon Treaty by putting greater emphasis on conservation. No longer relegated to empty rhetoric as a principle underlying the Treaty, conservation has finally been incorporated significantly into the framework of the decisionmaking process. These changes represent a move toward re-conceptualizing salmon management in the fisheries context.

B. Cooperation

On the other hand, the Pacific Salmon Treaty is based on ongoing negotiations within the Pacific Salmon Commission, and the new agreement makes no concrete changes to the decisionmaking framework under which such negotiations will take place. Further, the United States has made no move away from consensus-based decisionmaking within its Section. While the new focus on abundance-based allocations represents a move towards a more conservation-oriented management regime, it will necessitate more frequent negotiation at the Commission level, thereby exacerbating the cooperation problem. This makes domestic politics within the United States key to the success of the agreement.

105. See supra text p. 889 regarding ESA listings; see also supra text accompanying note 1.
106. See Pacific Salmon Agreement, supra note 75, Annex IV.
107. See generally Governor Locke’s Press Release, supra note 74.
108. Compare this to the Independent Scientific Group (advisor to NPPC) 1998 report calling for just this sort of re-conceptualization, specifically in the electric power context, but also more generally focusing in a more holistic sense on the life cycle of the salmon in shaping management plans rather than on the needs of people.
The lack of consensus among the United States stakeholders has been an historic stumbling block preventing agreement in general and inhibiting the development of the Pacific Salmon Treaty in particular. For example, while the proposed 1982 agreement represented a solid compromise at the international level, it failed to reflect the political realities of the situation within the United States. An agreement that was equitable for the United States as a whole remained unworkable unless it was equitable for each state and tribal stakeholder individually.\textsuperscript{109} Canada and the states of Washington and Oregon had clear incentives to compromise. Salmon originating in the habitat of each of these parties are subject to interception.\textsuperscript{110} A binding, well-enforced agreement represented the end to the "prisoner's dilemma" situation that had controlled the Pacific Salmon fishery for decades.\textsuperscript{111}

In contrast, the state of Alaska had no incentive to participate in a compromise. Unlike the other parties, Alaska's salmon runs are not subject to extensive interception.\textsuperscript{112} Thus, the state had little incentive to participate in a compromise that reduced its annual catch by limiting such interceptions. Alaska argued that the problem lay in the destruction of the habitat of the southern runs and that the Draft Treaty "did not reflect the conservation efforts already being carried out by Alaska."\textsuperscript{113} State officials were unsatisfied both with the limitations placed on southbound chinook harvests and with the allocation of transboundary stocks. They argued that the solution lay in increasing Canadian access to interceptions of southern salmon through better management in Washington and Oregon rather than limiting Alaskan interceptions.\textsuperscript{114} The other parties to the negotiation countered that Alaskan cooperation in limiting interceptions represented a vital part of the agreement and could not be foregone.

\textsuperscript{109} See McDorman, supra note 37, at 348 (discussing the stranglehold that substate stakeholders within the United States maintain on Pacific salmon fisheries negotiations).

\textsuperscript{110} See supra text p. 888 regarding migration patterns.

\textsuperscript{111} A prisoner's dilemma refers to a situation where the parties would benefit if all chose to cooperate, but each has an incentive to defect because there is no assurance of cooperation from the other parties.

\textsuperscript{112} See supra text p. 888 regarding migration patterns.

\textsuperscript{113} Stevens, supra note 44, at 425 (claiming that the 1982 Draft placed the burden of most of the concessions on Alaskan fishermen and neglected to appreciate Alaska's prior conservation efforts, including reduced catch ceilings for southbound chinook).

\textsuperscript{114} See Yanagida, supra note 17, at 577.
Thus, reaching an agreement regarding the Pacific Salmon fisheries in the first place depended on the use of consensus-based decisionmaking. The divisiveness of the issue, both internationally and between the stakeholders within the United States, necessitated that each party retain veto power. However, not only did this undermine cooperation internationally, it virtually paralyzed the United States delegation with respect to controversial issues. Consequently, the consensus requirement blocked effective management under the Treaty. The same divergent, competitive interests that made the veto power necessary serve to make achieving consensus, and therefore cooperation under the Treaty, extremely difficult.

Under the 1999 agreement, Washington and Oregon, who share a representative to the U.S. Section of the Commission, are likely to remain cooperative in the negotiation process. The listings of Snake and Columbia River salmon under the Endangered Species Act have forced these states to address salmon recovery in a concrete way. These listings mean that salmon population numbers must increase, and a reasonable recovery plan must be adopted, or the federal government will step in and take control. Given the intensely controversial and political nature of the decisions involved, the states want to retain control and avoid a federally imposed salmon recovery plan at all costs. Fisheries represent a strong lobby in these states, especially Washington, but the industry has become increasingly weak as runs have failed, thus losing influence to the hydropower and timber industries—other areas where conservation can also improve. Additionally, fisheries represent one of the easiest places to achieve quick increases in the

115. See de Zwager Brown, supra note 29, at 633.
118. See de Zwager Brown, supra note 29, at 624 (stating that “these groups jealously guard their authority and compete fiercely to retain their jurisdiction over fishery decisions”).
number of salmon returning to rivers to spawn. Consequently, both Washington and Oregon are willing to cooperate in the reduction of interceptions for any agreement that addresses conservation of these listed species.

The Northwest Treaty Tribes also hold power within the U.S. Section of the Commission and remain a bit of a "wildcard" in any prediction of domestic cooperation regarding salmon issues because their political motivations are less clear. Nevertheless, the Tribes have historically been very concerned with the health of the Washington and Oregon stocks that make up most of their traditional fishery and have been willing to cooperate to achieve improved conservation. Thus, it is likely that they will remain aligned with Washington and Oregon as they have in the past and continue to push for conservation.

Alaska, on the other hand, has already, albeit unsuccessfully, attempted to undermine the 1999 agreement within Congress and will likely prove uncooperative within the U.S. Section of the Commission. Long critical of the Treaty, Alaskan representatives were initially cautiously optimistic about the new agreement. Their reasons for supporting the agreement are complex, but they hinge on the fact that Alaska can retain control by vetoing any proposed limitations on their fisheries, while at the same time retaining the protection from tribal lawsuits stipulated in the Treaty. The budget situation in Congress during the fall of 1999, however, reveals the state's lack of real commitment to cooperation. It is in Alaska's interest to have an agreement, but to keep it reasonably ineffective. As one commentator put it, "when you add these pieces . . . together, you get a state that now has more power than the United States itself in matters dealing with fish."

Changing the voting structure of the U.S. Section of the Commission would seem to be a partial solution to limiting negative international impact from the lack of domestic consensus regarding Pacific salmon fisheries. However, this

119. See COMMITTEE, supra note 2, at 12.
120. Schmidt, supra note 1, at 130.
121. See id. at 131.
122. See Alaska Senator Frank Murkowski, Government Press Release, Treaty Agreement Should Provide Peace for Fishermen, FEDERAL DOCUMENT CLEARING HOUSE, June 3, 1999 (stating that there is relief to have finally reached an agreement).
123. See Schmidt, supra note 1, at 131.
124. Alaska First, supra note 84.
125. See Schmidt, supra note 1 (arguing for changing the voting structure of the U.S. Section of the Commission as a means of dealing with the problem of the lack of domestic consensus).
suggestion fails to address the deeper lack of state level commitment to interregional conservation that has always undermined the Treaty. Veto power within the U.S. Section of the Commission is just one form of control the stakeholders exert over Pacific salmon fisheries, as evidenced by the recent difficulty in securing appropriations. Furthermore, "maintaining regional control of the fisheries management programs through the current...Section decision process...continues to be essential to gaining regional support for the treaty."126 This regional cooperation and commitment is vital to management under the Treaty given the power vested in the states by the Magnuson Fishery Conservation and Management Act.127

Despite these domestic conflicts, the new compromise may engender enough cooperation to allow salmon recovery to occur.128 To the extent that the complex framework of the new Annex IV addresses the contentious issues that arise between the parties, the requirement of consensus may not be as problematic. The practical flexibility of the new agreement, however, will only be revealed through its application to fishery management. If the long-term allocation agreement is successful in coordinating the interests of the parties and providing for both

126. Id. at 129 (quoting Hearing Before the Subcomm. on Envr't and Natural Resources Jointly with the Subcomm. on Fisheries Management of the House Comm. on Merchant Marine & Fisheries, 103d Cong. 55 (1994) (statement of Charles Meacham, Alaska's Commissioner for the Pacific Salmon Commission and Deputy Commissioner for Fisheries for the Alaska Dept. of Fish and Game).

127. See Yanagida, supra note 17, at 577.

128. The positive changes the agreement makes to the Treaty are complemented by several positive changes within the United States. First, the listing of Washington salmon under the ESA has prompted some action at the state level in an attempt to stave off federal involvement. These changes may represent some improvement in domestic salmon recovery. For example, the state of Washington has created a Salmon Recovery Funding Board in an attempt to create a more effective mechanism to allocate funds to salmon recovery projects and to make the process more transparent and responsive to the public. Second, at the federal level, several court opinions in the past several years have sharply criticized NFMS and have taken a hard line in forcing the agency to comply (at least in terms of goal setting) with the ESA. See Northwest Resource Info. Ctr., Inc. v. Northwest Power Planning Council, 35 F.3d 1371 (9th Cir. 1994) (holding that incremental pace of recovery was unacceptable); see also Idaho Dept' of Fish & Game v. National Marine Fisheries Serv., 850 F. Supp. 886 (D. Or. 1994) (stating that a "major overhaul" of salmon recovery plans was necessary). Nevertheless, the lack of coordination of efforts at the state level under the Federal Power Act (which created the interstate agency, NPPC) with those at the federal level by the NMFS under the ESA remains a major stumbling block, as does the lack of a comprehensive plan to manage salmon domestically. The ESA focuses only on certain runs, while FPA focuses only on hydropower related issues. Finally, there are entrenched interests involved in these issues and creating support for changing the unworkable status continues to be a challenge.
equity and conservation, the consensus requirement will be less important.

The new conservation-minded, equitable allocations are not foolproof, however, and are subject to manipulation by uncooperative stakeholder representatives. Interceptions are a reality of the migration patterns of Pacific salmon populations and only so much adjustment can be done if Washington runs continue to fail and Canadian and Alaskan runs continue to be maintained. With no change to the U.S. decisionmaking framework, such frustration could again lead to a total breakdown of relations. If recovery is not made a reality, it may be only a matter of time before the new provisions fail to address inequitable interceptions. If so, the new emphasis on conservation will inevitably lead to the resurgence of Canadian frustration with subsidizing U.S. habitat destruction at the expense of their own fisheries. At least in the short term, however, with funding now secure, the new agreement seems to have struck a workable balance. Yet it remains to be seen how the agreement will stand up when conflict arises, since the decisionmaking framework has not been changed.

CONCLUSION

It is hard to say how long the spirit of cooperation will hold up between the parties, particularly given the history of controversy. The previous agreement under the Pacific Salmon Treaty broke down so severely that it took four years of negotiations to devise another agreement. However, for the first time since 1985, there is a long-term plan in place between the United States and Canada rather than the yearly disputes that constituted the status quo. After more than five years of bitter conflict, the new agreement under the Treaty creates a framework in which decisions can now be made. The focus on abundance-based quotas and conservation in allocation is essential to effective salmon recovery. In terms of stability and conservation, the new agreement represents a major step forward for Pacific salmon and for relations between Canada and the United States. The failure to address the decisionmaking framework, however, is a potential weakness for the new agreement and points to a continued failure to give up real control to the cooperative enterprise on the part of all the actors concerned.