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PHOENIX FROM THE ASHES—THE 1999 PACIFIC SALMON AGREEMENT

Sims G. Weymuller[†]

Abstract: The United States and Canada have found a solution to their century long “salmon war” over how many salmon can be taken by each side’s fishing fleets from the once-bountiful Pacific salmon runs. Each country felt entitled to an “equitable” portion of the salmon, but no agreed means existed to calculate the shares. Canada felt that the prodigious U.S. fleet often caught more than its share. Substantial peace first came under the 1985 Pacific Salmon Treaty, but dwindling salmon populations, the expiration of the original management regimes, and flaws in those regimes threatened to doom the 1985 Treaty by the mid-1990s. The lack of harvest agreements left each country scrambling for the fish, putting unsustainable pressure on an already delicate resource. After half a decade of infighting and argument, Canada and the United States signed a new agreement under the treaty in 1999. On the surface, the genius of the new Agreement lies in the new “Abundance Based Management” scheme and the multi-million dollar Endowment Funds earmarked for conservation. The flexible, resource-based management programs considered the yearly strength of the salmon runs before and during the harvest season. These new regimes, and the 1999 Agreement as a whole, were subject to review under the Endangered Species Act, completed by NMFS in 1999. The Endowment Funds provided a financial base to undertake substantial conservation initiatives. With the understanding that an imperfect agreement was better than no agreement, the Canadians effectively set aside their longstanding equity demands to achieve consensus. As part of the overall compromise, the United States agreed to fully finance the Endowment Funds for a total of (U.S.) \$140 million. The sea change in Canadian negotiation posture reflected a renewed emphasis on resource conservation and a willingness to pioneer new avenues for success.

I. INTRODUCTION

Pacific salmon are both an inspiration and a staple to the people across the Northern Pacific Rim. The past bounty of this species was an integral element of ecosystems that supported the indigenous tribes of the Pacific Northwest for over nine thousand years.¹ For local Native Americans, salmon were a source of food, pride, recreation, and even spirituality.² The arrival of Western civilization to this region brought about drastic reductions in salmon populations.³ As salmon populations have dwindled, competition

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¹ JIM LACHATOWICH, SALMON WITHOUT RIVERS 28 (1999).

² *Id.* at 1-13.

³ *Id.* at 52-113.

for the remaining salmon has increased.⁴ In particular, the United States and Canada fish aggressively for Pacific salmon.⁵ Over the last century the two countries have competed and compromised over the harvest and management of these fish.⁶

The essential issue between Canada and the United States stems from the remarkable migratory life cycle of the Pacific salmon. Originating in the interior streams of the coastal regions of Canada and the United States, all five species of Pacific salmon are anadromous.⁷ Anadromous species hatch in freshwater rivers and streams, migrate downstream into estuaries and ultimately into the ocean.⁸ Upon maturation, salmon journey home hundreds of miles to their native stream to spawn and complete their life cycle.⁹ Between birth and death, Pacific salmon pay little heed to political boundaries, migrating through territorial waters of neighboring nations.¹⁰ As a result, commercial and recreational fishers often catch fish that are returning to the waters of neighboring countries. This practice has caused competition and bitter argument between the United States and Canada.¹¹

The first comprehensive agreement between the United States and Canada regarding the commercial salmon harvest was the Pacific Salmon Treaty of 1985 ("1985 Treaty").¹² The 1985 Treaty was successful in the short term, but the Treaty required yearly negotiations¹³ that began to fail in the mid 1990s. The provisions on the number of fish that were hatched in the streams of one nation that could later be harvested by the other nation¹⁴ presented the largest stumbling block for the negotiation process. Several

⁴ Karol de Zwager Brown, *Truce in the Salmon War: Alternatives for the Pacific Salmon Treaty*, 74 WASH. L. REV. 605, 622 (1999).

⁵ TROUT UNLIMITED & TROUT UNLIMITED CANADA, RESOLVING THE PACIFIC SALMON TREATY STALEMATE 1 (1999).

⁶ *Id.* at 2.

⁷ LACHATOWICH, *supra* note 1, at 9.

⁸ Backgrounder, A History of the Pacific Salmon Treaty, Department of Fisheries and Oceans Canada, [http://www.ncr.dfo.ca/COMMUNIC/backgrou/1999/hq29\(113\)_e.htm](http://www.ncr.dfo.ca/COMMUNIC/backgrou/1999/hq29(113)_e.htm).

⁹ LACHATOWICH, *supra* note 1, at 11. Due to this cycle, the condition of the streams in which the salmon spawn is an important determinant of their survival. Blockage, pollution, biological modification, or elimination of streams or rivers can prevent salmon from completing their life cycle, leading to declines in population. *Id.* at 130-36.

¹⁰ Daniel D. Huppert, *Why the Pacific Salmon Treaty Failed to End the Salmon War*, New Directions in Marine Affairs (Univ. of Wash. Sch. of Marine Affairs ed.), Jan. 1996, at 2.

¹¹ *Id.*

¹² Treaty Between the Government of the United States of America and the Government of Canada Concerning Pacific Salmon, Jan. 28, 1985, U.S.-Can., T.I.A.S. No. 11091 (entered into force Mar. 18, 1985), available at 1985 WL 167273 [hereinafter 1985 Treaty].

¹³ *Id.* art. IV.

¹⁴ *Id.*

failed negotiations ensued until Canada and the United States reached an agreement in June 1999.¹⁵

The 1999 Pacific Salmon Agreement ("1999 Agreement") was the harbinger of seemingly mended fences between Canada and the United States. A new harvest management scheme, designed to be sensitive to variations in salmon populations, focused on conservation of the Pacific salmon.¹⁶ Two large funds¹⁷ were created to carry out the goals of the 1999 Agreement.¹⁸ The 1999 Agreement also provided for a renewed commitment to scientific cooperation and a joint commitment by both nations to protect and restore salmon habitat.¹⁹

In addition to the terms of the 1999 Agreement itself, Diplomatic Notes ("Notes") exchanged at the signing required an Endangered Species Act review of the 1999 Agreement,²⁰ a review that was limited in scope. This National Marine Fisheries Service completed the review within the time frame set out in the Notes. The review covered only the northern fisheries, leaving subsequent review of the southern fisheries for a later date.²¹

Nevertheless, the 1999 Agreement reflects a significant change in the relationship between the two nations regarding their mutual salmon harvest policy. In particular, the Canadian government, in an arguably visionary step, apparently set aside its claim to equity in an effort to put the conservation of the resource first. This change of perspective allowed compromise on an historically intractable issue.

This Comment examines the 1999 Agreement between Canada and the United States. Part II outlines the history of agreement and conflict between Canada and the United States over Pacific salmon management. Part III considers the structure, operation, demise, and aftermath of the 1985

¹⁵ Agreement Relating to and Amending Annexes I and IV of the Treaty Concerning Pacific Salmon of January 28, 1985, with attachments, June 30, 1999, U.S.-Can., State Dept. No. 99-97, available at 2000 WL 668151 [hereinafter 1999 Agreement]. The 1999 Agreement was an agreement amending and extending the original 1985 Treaty.

¹⁶ *Id.*

¹⁷ These funds were the Northern Boundary and Transboundary Rivers Restoration and Enhancement Fund ("Northern Fund") and the Southern Boundary Restoration and Enhancement Fund ("Southern Fund") (Collectively, "the Funds"). *Id.* Annex IV, attachment C.

¹⁸ *Id.*

¹⁹ *Id.* Annex IV, attachments D, E.

²⁰ *Id.* Diplomatic Notes. The Diplomatic Notes were exchanged between Canada and the United States at the signing of the 1999 Agreement. For an explanation of their significance and binding nature, see *infra* Part V.C.

²¹ Biological Opinion, National Marine Fisheries Service, Approval of the Pacific Salmon Treaty by the U.S. Department of State and Management of the Southeast Alaska Salmon Fisheries Subject to the Pacific Salmon Treaty (Nov. 18, 1999), at 7 [hereinafter Biological Opinion].

Treaty. Part IV examines the content, structure, and requirements of the 1999 Agreement. Part V analyzes the negotiation process of the 1999 Agreement, its resulting strengths and weaknesses, as well as the U.S. Endangered Species Act review. Part VI concludes that a shift in Canadian negotiation posture broke the seemingly intractable stalemate and provided the basis for a final agreement balancing the needs of the nations, their commercial fleets and the Pacific salmon.

II. THE HISTORY OF AGREEMENT AND DISAGREEMENT OVER PACIFIC SALMON

The migratory habits of the Pacific salmon are the main source of the dispute between Canada and the United States. Salmon migrate from their native rivers to the Ocean commons, where they are “intercepted” by fishers from other nations. The United States and Canada have long maintained that they are entitled to the fish from their waters. But that division has rarely been easy or accurate, causing a century of conflict over the harvest of Pacific salmon.

A. *Biological Factors Contributing to the Dispute*

The management of such a wide-ranging migratory species as the Pacific salmon has proven difficult.²² The primary goal of salmon fisheries management is to maintain a healthy and sustainable population to ensure a sustained harvest for all fisheries.²³ This goal is accomplished by ensuring that an ample amount of salmon are allowed to “escape” the commercial fisheries and return to their streams of origin to spawn.²⁴ Seemingly infinite variables complicate salmon management, including: hatching rates and juvenile survival,²⁵ ocean conditions and events,²⁶ prey populations, spawning rates,²⁷ and freshwater river flows.²⁸ Hydroelectric dams on the

²² Huppert, *supra* note 10, at 2.

²³ *Id.*

²⁴ *Id.*

²⁵ Hatching rates and juvenile survival refer to the number of salmon that are hatched as smolts in the freshwater environment versus the number that are able to negotiate their way through the river system, beyond the estuaries and to the ocean. *Id.*

²⁶ Ocean upwellings and large climactic episodes such as El Niño and La Niña create great disturbances in the meta-level nutrient patterns in the ocean. These variations can leave successfully migrated salmon without an abundant food supply once they reach the ocean. *Id.*

²⁷ Spawning rates measure the amount of salmon that return to their stream of origin to spawn as compared to the amount of salmon that originally migrated to sea. *Id.* Harvesting managers often refer to the quantity of salmon that are not harvested and begin their journey to the stream of origin as an

Columbia River and its tributaries,²⁹ substantial habitat degradation, and industrial and agricultural pollution further pressure the species and management's ability to predict and protect salmon stocks.³⁰ In addition, the competing needs of various stakeholders such as streamside industrial facilities, commercial fishers, farmers, power generators, Native Americans, sport fishers, and environmental groups complicate management.

The migratory habits of the Pacific salmon are the main source of the dispute between Canada and the United States.³¹ As salmon emerge from their rivers of origin into the Pacific Ocean and move up and down the coastline, some portion of the migrating fish are inevitably caught by the fishers of the other country.³² These "interceptions" are at the root of the salmon problem between the United States and Canada, two otherwise non-confrontational nations.³³ As summarized by Ray Suarez of National Public Radio News, "[t]here's no maple leaf on the side of salmon meant to be caught by a Canadian vessel, no stars and stripes on a Sockeye."³⁴ In a recent report to the Prime Minister of Canada and the President of the United States, special appointees David Strangway (Canada) and William Ruckelshaus (United States) concluded, "the crux of the dispute between Canada and the [United States] is the age old practice of fishers catching fish where they find them, regardless of the river where the fish originate."³⁵

"escapement" value. *Id.* However, since escapement addresses the number of fish that begin the journey upstream and spawning rates refer to the number that actually make it upriver to spawn, the two are usually different values. *Id.*

²⁸ De-watered rivers harm salmon in numerous ways. Salmon require full, cold, and fast moving water for their habitat. *Id.* Water withdrawals reduce these factors in a river exposing salmon to a myriad of problems, including: over heating, prey exposure, and perhaps most importantly the process of drying out the salmon "redds" (spawning grounds or gravel where the eggs incubate). *Id.* Reduction in water flows (also termed "in stream flows") can negatively affect hatching rates, juvenile survival, and spawning rates. *Id.*

²⁹ Debate rages over the actual effects of the thirty-eight dams on the Columbia River system on salmon populations. Many critics assert that the migrating fish are lost through mismanaged river flows through dams, gas supersaturation (or "gas bubble disease"), exhaustion, exposure to prey, and more. The effect of hydroelectric dams are beyond the scope of this paper, but for a complete discussion of the roots and evolution of the salmon crisis in the Pacific Northwest, see LACHATOWICH, *supra* note 1.

³⁰ See LACHATOWICH, *supra* note 1.

³¹ de Zwager Brown, *supra* note 4, at 606.

³² Huppert, *supra* note 10, at 5.

³³ de Zwager Brown, *supra* note 4, at 606.

³⁴ Ray Suarez, *Talk of the Nation: Restoring Salmon Fisheries in the Pacific Northwest, Canada and Alaska and the U.S.-Canadian Agreement over Catches in Coastal Waters* (NPR News Radio Broadcast, June 8, 1999).

³⁵ DAVID W. STRANGWAY & WILLIAM D. RUCKELSHAUS, *PACIFIC SALMON REPORT TO THE PRIME MINISTER OF CANADA AND THE PRESIDENT OF THE UNITED STATES I* (1998).

When fishers intercept salmon from other nations, their practice comes into conflict with the "state of origin" principle.³⁶ This principle of environmental law was codified in the United Nations Third Law of the Sea Convention in 1982. While neither Canada nor the United States are parties to this Convention, both generally accept the provisions on anadromous species as international law.³⁷ The "state of origin" principle maintains that the nation where a migratory species originates has the primary interest³⁸ and the authority to manage the fish that spawn in their rivers, both within their 200-mile Exclusive Economic Zone ("EEZ")³⁹ and on the high seas.⁴⁰ This interest extends to fish that migrate beyond their jurisdiction and into or through the jurisdiction of another country.⁴¹ However, determining the national origin of a salmon is difficult, even in a laboratory.⁴² It is especially challenging when harvesting them by the thousands.⁴³ As Pacific salmon stocks declined over the last century, Canadian and U.S. commercial fisheries, and thus the two nations, came into conflict.⁴⁴

B. *Canada-U.S. Fisheries Relations Prior to the 1985 Treaty*

Over the course of the last century, Canada and the United States have at various times cooperated, conflicted, threatened, and agreed about the

³⁶ Ted L. McDorman, *Symposium: A Canadian View of the Canada-United States Pacific Salmon Treaty: The International Legal Context*, 6 WILLAMETTE J. INT'L L. & DISPUTE RES. 79, 81 (1988).

³⁷ McDorman, *supra* note 36, at 80; U.N. Convention on the Law of the Sea, Dec. 10, 1982, 21 I.L.M. 1261.

³⁸ The extent to which the language "primary interest" creates a proprietary right in one nation to harvest, to the exclusion of vessels of another nationality, is unclear. Associate Professor of Law, Ted L. McDorman, (University of Victoria, B.C. Canada), concluded that "the best view of this issue is that while the state of origin may have a proprietary interest in salmon in the waters of the neighboring state, that proprietary interest does not inhibit the jurisdiction of the neighboring state regarding that salmon." *Id.* at 82. Both the United States and Canada have supported language that would create stronger rights in salmon that come from their rivers. *Id.* However, McDorman concluded that in spite of strong language, "it is my view that pursuant to the Law of the Sea Convention, once salmon have left the waters of the state of origin and entered the waters of a neighboring state, that neighboring state can treat that salmon as its own." *Id.* at 85.

³⁹ The Convention established these EEZs, which give coastal states the exclusive right to manage fisheries within the 200-mile mark off of their coasts. 1982 U.N. Convention on the Law of the Sea, *supra* note 37, art. 57.

⁴⁰ The "high seas" are the rest of the ocean waters outside the 200-mile EEZs. de Zwager Brown, *supra* note 4, at 616-17.

⁴¹ *Id.*

⁴² *Id.*

⁴³ The most successful efforts at determining the river of origin in large harvests are usually accomplished by tagging juvenile fish in their river and then counting those tags at harvest. *Id.* The counted tags are used as indicators and the actual percentage is estimated based on those numbers. *Id.*

⁴⁴ TROUT UNLIMITED & TROUT UNLIMITED CANADA, *supra* note 5, at 2.

management of Pacific salmon.⁴⁵ Various agreements, both bilateral and multilateral,⁴⁶ have shaped the relationship between the two nations.⁴⁷

By the 1970s, stocks of Chinook and Coho salmon began to decline to dangerously low levels and each country blamed the other for over-harvesting.⁴⁸ Between 1970 and the signing of the 1985 Treaty, tension and animosity grew between the two nations.⁴⁹ Over-harvesting, by both Canadian and U.S. fishers, placed increasing stress on salmon populations.⁵⁰ Hydroelectric dams, habitat destruction, reduced river flows, and other freshwater environmental problems further contributed to the decline in populations.⁵¹

As the size of salmon returns diminished, tensions increased and the "salmon wars" began in earnest.⁵² Fishing fleets began to directly compete with each other with the intent of catching as many fish as possible and ensuring that other fleet did not.⁵³ The fierce harvesting and this "zero sum"⁵⁴ approach resulted in the rapid deterioration of salmon runs and the relationship between the two nations.⁵⁵ Although there was clearly a need for comprehensive international fisheries management, the method and model for that management were not as clear.

In the 1970s, two key U.S. lawsuits further complicated negotiations by enforcing tribal treaty rights that drastically increased the U.S. Native American stake in the overall salmon harvest and the management of the fishery.⁵⁶ The "Boldt Decision"⁵⁷ reaffirmed the right of U.S. Native

⁴⁵ de Zwager Brown, *supra* note 4, at 612.

⁴⁶ These agreements include the Convention for Protection, Preservation and Extension of the Sockeye Salmon Fisheries of the Fraser River System (United States and Canada, re-negotiated and ratified in 1937); International North Pacific Fishery Convention (United States, Japan and Canada, 1953); "Surf Line Agreement" (United States and Canada, 1957); and U.N. Law of the Sea Convention (U.N., 1982). de Zwager Brown, *supra* note 4, at 613-18.

⁴⁷ See generally McDorman, *supra* note 36.

⁴⁸ de Zwager Brown, *supra* note 4, at 623.

⁴⁹ *Id.*

⁵⁰ Huppert, *supra* note 10, at 4.

⁵¹ Jason Dunn, *The 1999 Pacific Salmon Treaty Agreement*, 1999 COLO. J. INT'L ENVTL. L. & POL'Y 164, 165 (1999).

⁵² The series of disagreements between the United States and Canada over salmon management issues became popularly known as the "salmon wars." de Zwager Brown, *supra* note 4, at 612.

⁵³ *Id.* at 660.

⁵⁴ The term "zero sum" refers to the capture theory with a goal of victory over one's opponent versus a goal of simply sustaining oneself. Here, this term means that each fleet would intentionally attempt to undercut the other fleet, rather than just focusing on catching their limits.

⁵⁵ de Zwager Brown, *supra* note 4, at 625.

⁵⁶ *Id.* at 619.

⁵⁷ *United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974). Another case also involved a number of similarly worded treaties signed in the mid-1880s between the U.S. government and several Native American tribes in Washington State. See *United States v. Washington*, 626 F. Supp. 1405 (W.D. Wash. 1985). The treaties were a result of efforts by Governor Isaac Stevens on behalf of the United States

American Tribes to fish in their "usual and accustomed" places and to "equally share" the overall harvest.⁵⁸ The "Baldrige Stipulation,"⁵⁹ a settlement between twenty-four treaty tribes,⁶⁰ the Federal Government, Alaska, Oregon and Washington, established that Alaskan interceptions of Pacific Northwest salmon must be allocated and included in the non-tribal share of the total harvest.⁶¹ By mandating such an inclusive harvest scheme, the Baldrige stipulation cleared the way for the United States to negotiate an agreement with Canada.⁶²

III. THE 1985 PACIFIC SALMON TREATY AND ITS AFTERMATH

Canada and the United States successfully concluded several years of negotiations and signed the Pacific Salmon Treaty in January of 1985. The 1985 Treaty emphasized conservation of the species, created a scheme of guide sharing between the nations, and established a bilateral commission to oversee its operation. The 1985 Treaty had some success, but ultimately expired in the mid-1990s, leaving the nations without an agreement, the fishers without harvest limits, and the salmon in peril.

A. *The Terms of the 1985 Pacific Salmon Treaty*

On January 28, 1985, Canadian Prime Minister Brian Mulroney and U.S. President Ronald Reagan signed the Fisheries Pacific Salmon Treaty.⁶³ Annex IV of the Treaty contains six distinct chapters addressing management arrangements for the key fisheries within the treaty area: (1) Trans-boundary Rivers;⁶⁴ (2) Northern British Columbia and Southeastern Alaska; (3) Chinook Salmon; (4) Fraser River Sockeye and Pink Salmon;⁶⁵

to persuade the tribes to relinquish their land. *See id.* The language of a number of the treaties extended powerful fishing rights to many of the tribes. *See id.*

⁵⁸ de Zwager Brown, *supra* note 4, at 620. Under the Boldt decision, "equally share" was interpreted to mean that Native Americans were entitled to fifty percent of the overall harvest. *Washington*, 384 F. Supp. at 312.

⁵⁹ *Confederated Tribes & Bands of the Yakima Indian Nation v. Baldrige*, 605 F. Supp. 833 (W.D. Wash. 1985).

⁶⁰ *See Washington*, 384 F. Supp. at 312.

⁶¹ de Zwager Brown, *supra* note 4, at 622.

⁶² Joy A. Yanagida, *The Pacific Salmon Treaty*, 81 AM SOC. INT'L L. 577, 584 (1987).

⁶³ 1985 Treaty, *supra* note 12.

⁶⁴ Trans-boundary rivers originate in Canada and flow through the United States before reaching the Pacific ocean. This largely happens in Southeast Alaska as the "panhandle" juts down the coast in front of mainland Canada.

⁶⁵ The Fraser River is one of the largest Canadian salmon rivers. Its headwaters are hundreds of miles inland and its mouth is near Vancouver, B.C.

(5) Coho Salmon; and (6) Southern British Columbia and Washington Chum Fisheries.⁶⁶

The 1985 Treaty established temporary management regimes with “fixed ceilings” in place for the majority of the fisheries in the six categories.⁶⁷ Each fixed ceiling set a harvest limit in each category for each nation prior to the season.⁶⁸ This pre-set system was insensitive to natural fluctuation in salmon returns.⁶⁹ The 1985 Treaty limited the time frame of the management regimes,⁷⁰ the longest of which was the eight-year Fraser River regime.⁷¹

The 1985 Treaty also established two guiding principles for fisheries management between the nations. First, the “conservation principle”⁷² ensured that fisheries management of each country would “prevent overfishing and provide for optimum production.”⁷³ Second, the “equity principle”⁷⁴ ensured that management would “provide for each party to receive benefits equivalent to the production of salmon originating in its waters.”⁷⁵ These principles were seen as interdependent, the first ensuring an abundance of the resource and the second allocating it.⁷⁶

The “equity principle” was a controversial element of the 1985 Treaty.⁷⁷ According to Professor McDorman,⁷⁸ U.S. officials “consistently opposed” this concept during the negotiations of the 1985 Treaty.⁷⁹ McDorman postulated that the principle did not prohibit the harvest of salmon from neighboring countries.⁸⁰ Rather, it established a mechanism to give the nation of origin the economic benefits it loses through the

⁶⁶ 1985 Treaty, *supra* note 12, Annex IV, chs. 1-5. Some categories, including the Fraser River Sockeye and Pink fisheries, were managed for abundance. *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.* These limits are set by the Pacific Salmon Commission. See *infra* Part IV.

⁶⁹ Shifting from the fixed ceiling regime to “Abundance Based Management Regimes” is a major facet of the 1999 Agreement and is discussed in greater detail *infra* Part IV.

⁷⁰ The 1999 Agreement substituted the short-term regimes with ten- and twelve-year regimes to increase the stability of the agreement. 1999 Agreement, *supra* note 15; see discussion *infra* Part IV.

⁷¹ 1985 Treaty, *supra* note 12, Annex IV, chs. 1-5.

⁷² Huppert, *supra* note 10, at 2.

⁷³ 1985 Treaty, *supra* note 12, art. III, para. 1(a).

⁷⁴ Huppert, *supra* note 10, at 2.

⁷⁵ 1985 Treaty, *supra* note 12, art. III, para. 1(b). Article III also expressly states that “[i]n fulfilling their obligations pursuant to paragraph 1, the Parties shall take into account: (a) the desirability in most cases of reducing interceptions . . .” *Id.* art. III, para. 3(a). The failure to fully observe this rule in the years to come would ultimately be the crux of the general conflict between the two nations. Huppert, *supra* note 10, at 2.

⁷⁶ de Zwager Brown, *supra* note 4, at 627.

⁷⁷ McDorman, *supra* note 36, at 89.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

interceptions.⁸¹ McDorman concluded that the two nations did not agree to the equity principle because of any allegiance to the Convention on the Law of the Sea, but simply because each had long maintained publicly that the nation of origin deserves the fish.⁸²

To carry out its provisions, the 1985 Treaty established the Pacific Salmon Commission ("PSC").⁸³ The PSC has a total of eight Commissioners that are split into two sections, each section containing four Commissioners that were appointed from each nation.⁸⁴ The duty of the PSC is to oversee implementation of the management regimes and principles established in the 1985 Treaty.⁸⁵ However, the terms of the 1985 Treaty mandated that all of the PSC sections representing both nations approve any decision by the PSC.⁸⁶ While this consensus process sought to ensure that each decision was equitable to both nations, it also made the PSC less efficient and effective than it otherwise might have been.⁸⁷

To support the PSC with information and expertise, Annex I of the 1985 Treaty created three panels that report to the PSC.⁸⁸ The panels were divided geographically into the Southern Panel, the Fraser River Panel, and the Northern Panel.⁸⁹ The Fraser River Panel was the only panel vested with management authority.⁹⁰ That authority extended beyond the Fraser River, from the waters around Vancouver Island (south) to the waters of Puget Sound.⁹¹ Several technical committees provided support to the panels and the Commission.⁹²

B. *Operation and Aftermath of the 1985 Pacific Salmon Treaty*

1. *Operation of the 1985 Treaty*

Both Canada and the United States initially considered the 1985 Treaty a success. It succeeded in rebuilding the size of the Fraser River and

⁸¹ *Id.*

⁸² *Id.*

⁸³ 1985 Treaty, *supra* note 12, art. II, para. 1.

⁸⁴ *Id.* art. II, para. 3. Each section is funded by its respective nation. *Id.* art. II, para. 11.

⁸⁵ de Zwager Brown, *supra* note 4, at 631.

⁸⁶ 1985 Treaty, *supra* note 12, art. II, para. 6.

⁸⁷ de Zwager Brown, *supra* note 4, at 631.

⁸⁸ 1985 Treaty, *supra* note 12, Annex I.

⁸⁹ *Id.*

⁹⁰ The Fraser River Panel regulates the fisheries for Fraser River Pink and Sockeye salmon. Trout Unlimited & Trout Unlimited Canada, *supra* note 5, at 3.

⁹¹ The authority also includes the waters surrounding Whidbey and Fidalgo Islands in the Puget Sound. 1985 Treaty, *supra* note 12, Annex II, para. 2.

⁹² Trout Unlimited & Trout Unlimited Canada, *supra* note 5, at 3.

transboundary river stocks.⁹³ The Fraser River management was able to maintain the U.S. harvest of Pink and Sockeye salmon while increasing the Canadian harvest through stock enhancement and other management techniques.⁹⁴ Further, the overall Sockeye runs increased from approximately five million in the early 1980s to over fifteen million in the 1990s.⁹⁵ Trans-boundary rivers (including the Stikine, Taku, and Alsek Rivers) also experienced increases in salmon stocks, made possible through shared conservation responsibilities,⁹⁶ combined research, and stock enhancement by the two countries.⁹⁷

However, the Commission was less successful with Chinook salmon.⁹⁸ The harvest management plan failed to rebuild the Chinook stocks of Washington and Oregon.⁹⁹ The Commission did establish a management plan with specific escapement goals,¹⁰⁰ harvest ceilings in Alaska and British Columbia, and reduced harvests in the Washington and Oregon fisheries. Even so, the Chinook population failed to rebound.¹⁰¹ Pressures separate from harvesting limits, particularly the hydroelectric dams and low instream flows on the Columbia and Snake Rivers, played a large role in the continued decline of the population.¹⁰² This problem was magnified by the failure of the Commission to establish a system for measuring and limiting the stocks and harvest.¹⁰³ Neither nation could determine how many fish were being harvested, what country the fish came from, or which nation was harvesting them.¹⁰⁴

⁹³ *Id.*

⁹⁴ Stock enhancement generally means developing a hatchery program and using it to artificially increase salmon stocks. Huppert, *supra* note 10, at 2.

⁹⁵ de Zwager Brown, *supra* note 4, at 635. This increase was short lived and thus cannot be solely attributed to the Fraser River Panel's management. Interview with Larry Rutter, Alternate Federal Commissioner, Pacific Salmon Commission and Senior Policy Assistant, U.S. National Marine Fisheries Service, in Lacey, Wash. (Jan. 17, 2001).

⁹⁶ These responsibilities included habitat protection and management and were facilitated by both nations. *Id.*

⁹⁷ *Id.* at 636.

⁹⁸ This failure is addressed in the 1999 Agreement with more species-specific management of Chinook salmon. 1999 Agreement, *supra* note 15, Annex IV.

⁹⁹ *Id.*

¹⁰⁰ Escapement goals refer to the number of salmon that "escape" harvest and begin the journey upstream to spawn.

¹⁰¹ de Zwager Brown, *supra* note 4, at 636-37.

¹⁰² Dunn, *supra* note 51, at 165. Many would argue that the greatest cause of the failure to rebuild as expected resulted from a significant downturn in ocean productivity. Rutter, *supra* note 96.

¹⁰³ *Id.*

¹⁰⁴ de Zwager Brown, *supra* note 4, at 637.

2. *Demise of the 1985 Treaty*

In 1993, the management regimes in the 1985 Treaty expired and no new regimes were implemented. This was primarily because of a lack of agreement on how to implement the treaty's equity principle.¹⁰⁵ The key problem was a perception by the Canadians that the United States continued to increase its interception rates.¹⁰⁶ Canadian sources reported that the United States intercepted 5.3 million more fish than Canada in 1996 compared to 2.4 million more fish in 1985.¹⁰⁷ This was an increase of over 100% and resulted in approximately 35 million fish, worth an estimated (Can.) \$500 million.¹⁰⁸ The imbalance of interceptions was further complicated by the large percentage of Canadian interceptions derived from Washington and Oregon stocks. As those stocks decline, so do the amount of Canadian interceptions, thus increasing the imbalance.¹⁰⁹

Both nations agreed that interceptions were a problem, but differed as to the magnitude. For instance, between 1987 and 1991, Canada estimated that the United States intercepted over four million salmon, while the United States claimed it intercepted 785,000 fish.¹¹⁰ These estimates were based largely on tagging programs and statistical sampling of harvests.¹¹¹ Results of the statistical samples were often extrapolated across the U.S. and Canadian fleets to estimate the number of interceptions.¹¹² Such methods allow substantial room for differing interpretations of the results.¹¹³

Differing market values of each salmon species further complicate the notion of "equity." Article III (1)(b) of the 1985 Treaty required that each nation receive the "benefits equivalent"¹¹⁴ to the salmon from its rivers. However, the definition of "equivalent" has been widely disputed.¹¹⁵ Ensuring that equal numbers of fish are caught will not create equity when a twenty-pound Chinook salmon is worth fifty times what a two-pound Pink salmon is worth.¹¹⁶ While not incorporated into the 1985 Treaty, the basic

¹⁰⁵ *Id.* at 636.

¹⁰⁶ *Id.* at 638.

¹⁰⁷ *Id.* at 640.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 641.

¹¹⁰ Huppert, *supra* note 10, at 3.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ 1985 Treaty, *supra* note 12, art. III(1)(b).

¹¹⁵ Some feel that equality rests in equal numbers of fish caught while others focus on the market value of that catch. McDorman, *supra* note 36, at 91.

¹¹⁶ Huppert, *supra* note 10, at 3.

understanding between the nations was that Canadian interceptions of Coho and Chinook would largely balance out U.S. interceptions of Fraser River Sockeye.¹¹⁷ Many Canadians perceived an imbalance at the outset, but believed the Agreement to be a recipe for correcting the imbalance over time.¹¹⁸

As the Pacific salmon populations declined and the U.S. interceptions rose, the tension between the nations increased.¹¹⁹ The 1985 Pacific Salmon Treaty's specific catch quotas¹²⁰ expired in 1994. Prior to the 1994 season, talks between the two nations broke down and no new long-term, comprehensive agreement was reached.¹²¹ Once the agreement expired, each nation was left to manage the resources in what again became a fierce zero-sum game of fisheries brinkmanship.

The Canadian government maintained that U.S. interceptions far outnumbered their own.¹²² Canada exerted pressure on the United States to return to the bargaining table by imposing a "transit fee" on U.S. fishing boats using the Inside Passage,¹²³ threatening to revoke the lease of the joint U.S.-Canadian submarine base in Nanoose Bay,¹²⁴ and by implementing a "Canada First" fisheries management scheme¹²⁵ that was aimed at transferring the U.S. catch to Canadian boats.¹²⁶ Canadian fishers escalated tensions by blockading an Alaskan ferry in Prince Rupert Sound for three days to gain publicity for what they saw as an inequitable arrangement.¹²⁷ Alaskan fishers took advantage of the negotiation breakdown by taking three times the catch allowed under the 1985 Treaty.¹²⁸

¹¹⁷ McDorman, *supra* note 36, at 92.

¹¹⁸ Rutter, *supra* note 95.

¹¹⁹ For a comprehensive review of the salmon related problems that developed between the Canada and the United States in the 1990s, see Jennifer MacDonald, *Tensions Escalate between Canada and the United States over Salmon*, 1998 COLO. J. INT'L ENVTL. L. & POL'Y 246 (1998).

¹²⁰ 1985 Treaty, *supra* note 12, Annex IV, chs. 3-6.

¹²¹ de Zwager Brown, *supra* note 4, at 651.

¹²² McDorman, *supra* note 36, at 95.

¹²³ The Inside Passage is the 750-mile route used by ships from Washington to Alaska that runs between Vancouver Island and the Canadian mainland. de Zwager Brown, *supra* note 4, at 652.

¹²⁴ The threat to evict the United States from the submarine base came from British Columbia Premier Clark who was more outspoken than the federal Canadian government. *Id.* at 662. The Canadian government prevented the closure of the base by asserting that federal officials would expropriate the base under federal jurisdiction. *Id.* Premier Clark never followed through on his threat. *Id.*

¹²⁵ This policy allowed an unlimited catch of several salmon stocks, including Adams River Sockeye, which were nearly fished to extinction in 1994. See MacDonald, *supra* note 119, at 250. A study showed that twelve additional hours more of fishing would have permanently decimated the salmon run. *Id.*

¹²⁶ *Id.*

¹²⁷ *Blockade Ends; Ferry Sails; Fishermen Quit Prince Rupert Protest*, SEATTLE POST-INTELLIGENCER, July 22, 1997, at A1.

¹²⁸ MacDonald, *supra* note 119, at 250.

3. *Events After the 1985 Treaty Breakdown*

a. *Lawsuits*

As a result of the breakdown of the 1985 Treaty, several parties with interests in Northwest salmon filed lawsuits in an attempt to stop other parties from over-harvesting. For example, the Northwest Indian Tribes filed suit against Alaska and in 1995, obtained a preliminary injunction under the Baldrige stipulation to keep the state from harvesting an excessive amount of salmon.¹²⁹ In 1997, Alaska filed a (Can.) \$2.8 million lawsuit for disruption of service against 200 Canadian boat owners who blockaded the Alaskan ferry.¹³⁰ Later that year, British Columbia's Premier Clark filed a (Can.) \$325 million lawsuit against the United States, Washington, Alaska, and others for lost harvest share and revenues.¹³¹

b. *Negotiations*

Intermittent and ultimately unsuccessful negotiations took place between 1993 and 1998. In 1994, each country appointed new negotiators who attempted, but failed to resolve the deadlock on equity.¹³² An attempt at mediation led by New Zealand ambassador Chris Beeby failed in 1997.¹³³ The 1996 and 1997 "stakeholder" discussions that were led by representatives from the major commercial fishing fleets and tribes, and were overseen by government representatives, also failed largely because neither side would agree to significantly reduce its own share of the stocks.¹³⁴ Ambassador Beeby proposed a formula to determine equity that was based on the wholesale value of fish, quantified by price per pound.¹³⁵ The proposal would have likely forced the United States to reduce its harvest levels or to pay compensation to Canada for its disproportionate

¹²⁹ *Confederated Tribes & Bands of the Yakima Indian Nation v. Baldrige*, 898 F. Supp. 1477 (W.D. Wash. 1995).

¹³⁰ *de Zwager Brown*, *supra* note 4, at 664. British Columbia Premier Clark offered to pay the legal fees of the fishermen. *Id.* The Canadian government, along with the City of Prince Rupert, intervened and settled with Alaska for a (Can.) \$3 million marketing campaign designed to increase Alaskan tourism. *Id.*

¹³¹ U.S. District Court Judge John Coughenour dismissed the case in January 1998, stating that a decision would "impose a foreign policy decision on the executive branch." *See de Zwager Brown*, *supra* note 4, at 665-67.

¹³² *Trout Unlimited & Trout Unlimited Canada*, *supra* note 5, at 5.

¹³³ *Id.*

¹³⁴ *de Zwager Brown*, *supra* note 4, at 658.

¹³⁵ *Id.* at 657.

interceptions.¹³⁶ While Canada embraced the method and saw it as vindication, the United States rejected the proposal without comment.¹³⁷ That same year, Canadian Prime Minister Jean Chretien and U.S. President Bill Clinton appointed special representatives Dr. David Strangway and William Ruckelshaus to discuss a solution and reinvigorate the negotiations.¹³⁸

In January 1998, Ruckelshaus and Strangway issued a report to Prime Minister Chretien and President Clinton.¹³⁹ The report made four key recommendations: (1) termination of the stakeholder process;¹⁴⁰ (2) development of interim fishing agreements for up to two years by the federal governments; (3) development of a framework for implementing the equity principle during the suggested period of interim agreement; and (4) comprehensive review of the PSC and its functions by Canada and the United States.¹⁴¹ In the words of Canadian Minister of Fisheries and Oceans David Anderson, the report suggested that in order to achieve agreement, the United States must "move fish to Canada and that Canada must not expect to receive every fish it believes it is owed."¹⁴² This report set the stage for the negotiations that ultimately resulted in the 1999 Pacific Salmon Treaty.¹⁴³

Political and biological pressures brought the two nations closer and resulted in some temporary, but important, agreements. In the spring of 1998, Canadian scientists presented evidence to Minister Anderson that several Canadian Coho salmon stocks¹⁴⁴ were at risk of extinction, regardless of the harvest level.¹⁴⁵ Similar concerns arose about salmon

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ STRANGWAY & RUCKELSHAUS, *supra* note 35.

¹³⁹ *Id.*

¹⁴⁰ This conclusion was not met with open arms in Washington, D.C. as Secretary of State Madeline Albright issued a statement claiming that the State Department continues to view the process as "an important resource" in solving the problems and that "stakeholders have an important continuing role in the implementation of the report's recommendations. We are prepared, with the assistance of the stakeholders, the involved states and tribal representatives, to pursue discussion to develop short-term and long-term arrangements for Pacific salmon." Secretary of State Madeleine K. Albright, Statement on Pacific Salmon (Jan. 12, 1998), at <http://secretary.state.gov/www/statements/1998/980112.html>.

¹⁴¹ *Id.* STRANGWAY & RUCKELSHAUS, *supra* note 35.

¹⁴² David Anderson, Minister of Fisheries and Ocean, Update on the Pacific Salmon Treaty (Apr. 30, 1999), http://www.ncr.dfo.ca/COMMUNIC/Statem/1999/april30_e.htm.

¹⁴³ TROUT UNLIMITED & TROUT UNLIMITED CANADA, *supra* note 5, at 5.

¹⁴⁴ Of particular concern were Coho stocks in the Skeena and upper Thompson Rivers. See David Anderson, Canadian Minister of Fisheries and Ocean, Address to the World Affairs Council: "Bilateral Cooperation and Pacific Salmon" (Apr. 1, 1999), http://www.ncr.dfo.ca/communic/speech/1999/040199_e.htm.

¹⁴⁵ *Id.* In response, Canada adopted unprecedented measures to protect Coho, including: complete closure of threatened stock fisheries and the announcement of a five year program to reduce the Canadian commercial fleet, restore habitat and assist fishers to adjust to the changing industry. See Business Editors,

stocks in Washington and Oregon, when the National Marine Fisheries Service listed more species as threatened and endangered under the Endangered Species Act.¹⁴⁶ These pressures, and the attitudes of reconciliation created by the Ruckelshaus and Strangway report, led to two agreements between Canada and Washington State in June and July of 1998.¹⁴⁷ In the first agreement, Washington agreed to reduce its catch of Thompson River Coho by twenty-two percent.¹⁴⁸ The second agreement restricted when the Washington fleet could fish for Fraser River Sockeye, but granted the fleet twenty-three percent of the total catch, a figure comparable to previous seasons.¹⁴⁹ While these agreements represented Canada's first success at negotiation in nearly five years,¹⁵⁰ Canada failed in its efforts to reach an agreement with Alaska.¹⁵¹

In January 1999, Canada and the United States increased their push for an agreement in time for the next summer season. Negotiations heated up and the doors closed.¹⁵² No minutes were taken and the meetings were confined to diplomats only.¹⁵³ By April, President Clinton appointed special representative Lloyd Cutler, a specialist in dispute resolution, to lead the U.S. negotiating team.¹⁵⁴ His chief role was to coordinate with the multiple parties on the U.S. side (i.e., Washington, Oregon, Alaska, and the Treaty Tribes).¹⁵⁵ This appointment of a high-level White House representative was taken by many as a sign that the United States was more determined than in years past to work through the differences between the two nations.¹⁵⁶ As the two nations entered negotiations, Minister Anderson publicly declared, "the atmosphere has been more constructive than any we

Fisheries and Oceans Canada—Canada And U.S. Reach A Comprehensive Agreement Under The Pacific Salmon Treaty, BUSINESS WIRE, June 3, 1999, available at LEXIS, News Group File. This program cost (Can.) \$400 million. *Id.*

¹⁴⁶ Biological Opinion, *supra* note 21, at 2.

¹⁴⁷ Anderson, *supra* note 144.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ David Anderson, Minister of Fisheries and Oceans, Statement on Interim Arrangements on Southern Fisheries for 1998, July 3, 1998, http://www.ncr.dfo.ca/COMMUNIC/Speech/1998/july3_e.htm.

¹⁵¹ Update on the Pacific Salmon Treaty (Apr. 30, 1999) *supra* note 142.

¹⁵² Rutter, *supra* note 95.

¹⁵³ *Id.*

¹⁵⁴ Update on the Pacific Salmon Treaty (Apr. 30, 1999), *supra* note 142.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* The chief negotiator for Canada was Don McRea and his counterpart on the U.S. side was Jim Pipkin. David Anderson, Minister of Fisheries and Oceans, Statement on the Pacific Salmon Treaty (June 3, 1999), http://www.ncr.dfo.ca/COMMUNIC/Statem/1999/jun3_e.htm.

have seen in a decade.”¹⁵⁷ That atmosphere ultimately led to a new and significantly altered agreement.

IV. OVERVIEW OF THE 1999 PACIFIC SALMON AGREEMENT

“Men keep to agreements when it is to the advantage of neither to break them.” Ascribed to Solon, c.630-c.560 B.C.¹⁵⁸

On June 3, 1999, Canada and the United States signed the 1999 Pacific Salmon Agreement.¹⁵⁹ In a joint statement, Secretary of State Madeleine Albright and Canadian Foreign Minister Lloyd Axworthy claimed “the agreement represents a victory for all those on both sides of the border interested in salmon conservation and the long term viability of our salmon industries.”¹⁶⁰ The Agreement took effect on June 30, 1999.¹⁶¹ The 1999 Agreement has four main elements: (1) Abundance Based Management Regimes; (2) two Pacific Salmon Treaty Endowment Funds; (3) a renewed commitment to scientific cooperation; and (4) a joint commitment by both nations to protect and restore salmon habitat.¹⁶² In addition to these elements of the 1999 Agreement, the Diplomatic Notes exchanged during the signing required the United States to follow a schedule of payment into the Endowment Funds and conduct a review of the Agreement under the Endangered Species Act.¹⁶³

¹⁵⁷ David Anderson, Minister of Fisheries and Oceans, Statement on the Pacific Salmon Treaty (May 28, 1999), http://www.ncr.dfo.ca/COMMUNIC/Statem/1999/may28_e.htm.

¹⁵⁸ ELIZABETH FROST-KNAPPMAN & DAVID S. SHRAGER, *THE QUOTABLE LAWYER* 10 (1998).

¹⁵⁹ 1999 Agreement, *supra* note 15.

¹⁶⁰ Press Statement by Spokesman James P. Rubin, U.S. Department of State (June 3, 1999), <http://secretary.state.gov/www/briefings/statements/1999/ps990603.html>. Canadian Fisheries Minister David Anderson hailed the agreement as the beginning of a “new era of effective conservation and more equitable sharing of the precious salmon resource.” Anderson, *supra* note 156. Vice President Al Gore maintained that the “agreement is absolutely integral to our long-term strategy to bring the salmon back.” Press Release, The White House, Office of the Vice President, Statement by Vice President Gore (June 3, 1999), http://www.nwr.noaa.gov/1press/060399_3.html.

¹⁶¹ 1999 Agreement, *supra* note 15.

¹⁶² *Id.*

¹⁶³ *Id.* Diplomatic Notes (June 30, 1999). For additional analysis of the 1999 Agreement, see Sunny Knight, *International Law Treaties: Salmon Recovery and the Pacific Salmon Treaty*, 27 *ECOLOGY L.Q.* 855 (2000), and Ted McDorman, *The 1999 Canada-United States Pacific Salmon Agreement: Resolved and Unresolved Issues*, 15 *J. ENVTL. L & LITIG.* 1 (2000).

A. *Abundance Based Management Regimes*

The first element, the Abundance Based Management Regimes (“ABMR”), reflects an increased commitment by both nations to the “conservation principle.” Instead of the rigid fixed ceilings in the 1985 Treaty, harvest limits in the 1999 Agreement are allowed to fluctuate according to the strength of the salmon population in any given year.¹⁶⁴ Despite its variability, this new regime has greater permanence than the regimes established by the 1985 Treaty. Harvest amounts will vary each year, but the formulas used to determine those amounts are fixed for a minimum of ten years.¹⁶⁵

The ABMR were intended to fix past problems.¹⁶⁶ The general organizational framework of the 1985 Treaty was to establish fixed catch amounts or “ceilings” on the total amount of fish harvested at a number of key fisheries.¹⁶⁷ This inflexible approach created an environment where fishers saw the limits as guaranteed quotas or entitlements, regardless of the stock abundance.¹⁶⁸ Meanwhile, fisheries managers in each country felt bound by the Treaty to allow harvest up to the ceiling.¹⁶⁹

While fixed ceilings were intended to spread harvest reductions over a thirteen-year rebuilding period, they failed to do so.¹⁷⁰ Fluctuating survival rates complicated the system.¹⁷¹ For example, southern Chinook return rates were higher than expected in the immediate years following the implementation of the 1985 Treaty, but then declined sharply in later years.¹⁷² Reductions in rates of exploitation were not enough to restore the wild populations.¹⁷³ As stated by the Canadian Department of Fisheries and Oceans, the fixed ceiling approach “was insensitive to stock abundance, was based on little knowledge of which stocks were caught and their relative health, and ignored in-season adjustment to fishing effort.”¹⁷⁴ Canadian and

¹⁶⁴ Dunn, *supra* note 51, at 169.

¹⁶⁵ *Id.*

¹⁶⁶ Backgrounder, Abundance Based Management Regimes, Department of Fisheries and Oceans Canada, [http://www.ncr.dfo.ca/COMMUNIC/BACKGROU/1999/hq29\(102\)_e.htm](http://www.ncr.dfo.ca/COMMUNIC/BACKGROU/1999/hq29(102)_e.htm).

¹⁶⁷ 1985 Treaty, *supra* note 12.

¹⁶⁸ Backgrounder, Abundance-Based Management Regimes, *supra* note 166.

¹⁶⁹ Anderson, *supra* note 156.

¹⁷⁰ TROUT UNLIMITED & TROUT UNLIMITED CANADA, *supra* note 5, at 8.

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ Backgrounder, Abundance-Based Management Regimes, *supra* note 166.

U.S. officials realized that the fixed ceiling approach was inferior to a more flexible harvest rate approach.¹⁷⁵

The realization that the fixed ceiling approach was not working resulted in a fundamental shift to the ABMR system in the 1999 Agreement.¹⁷⁶ The intent of the ABMR system is to base the allowable harvest on the amount of fish returning to the fisheries covered under the six Chapters in Annex IV.¹⁷⁷ In most cases, the relevant PSC committee¹⁷⁸ will determine a pre-season forecast of the estimated stock return in a given fishery.¹⁷⁹ Each fishery may have a management plan previously agreed to by the Commission, and the committee may develop the forecast model based on the guidelines of that plan.¹⁸⁰ In many cases, the committee may modify the forecast model at any point before the beginning of the season.¹⁸¹ From the forecast, weekly estimates of the Total Allowable Catch ("TAC") can be made.¹⁸² Both Canadian and U.S. fishing practices may be based on TACs.¹⁸³ In some fisheries, the pre-season estimates will be used until a specified time in the season,¹⁸⁴ after which the TAC is revised using an in-season forecast model.¹⁸⁵ If the committee cannot come to an agreement during a given season, the committee may use the TAC from previous years instead.¹⁸⁶

While the pre-season and in-season TAC levels are flexible, the ABMR procedures are fixed.¹⁸⁷ The mechanisms for determining the harvest levels are more functionally robust than procedures under the 1985

¹⁷⁵ TROUT UNLIMITED & TROUT UNLIMITED CANADA, *supra* note 5, at 8. The framers of the 1985 Treaty probably did not regard fixed ceilings as superior. Rather, they likely seemed adequate to the task and consistent with capabilities at the time. Rutter, *supra* note 95.

¹⁷⁶ Background, Abundance-Based Management Regimes, *supra* note 166.

¹⁷⁷ As outlined in Annex IV of the 1999 Agreement, the six regimes are: (1) Trans-boundary Rivers; (2) Northern British Columbia and Southeastern Alaska; (3) Chinook; (4) Fraser River Sockeye and Pink Salmon; (5) Coho Salmon; and (6) Southern British Columbia and Washington State Chum. 1999 Agreement, *supra* note 15, Annex IV, chs. 1-6.

¹⁷⁸ Usually one of the regime panels or technical committees is assigned to a given area. Background, Abundance-Based Management Regimes, *supra* note 166.

¹⁷⁹ *Id.*

¹⁸⁰ 1999 Agreement, *supra* note 15, Annex IV.

¹⁸¹ *Id.*

¹⁸² Background, Abundance-Based Management Regimes, *supra* note 166.

¹⁸³ *Id.*

¹⁸⁴ The specified time is often halfway through the season, or a point after which enough data has been collected to make an educated analysis of in-season stock returns. *Id.*

¹⁸⁵ Using "in-season" management techniques is not a revolutionary idea, even within the context of the Pacific Salmon Treaty. In an attached Memorandum of Understanding to the 1985 Treaty, the section on data sharing includes an agreement to "explore the feasibility of in-season management." 1985 Treaty, *supra* note 12, Memorandum of Understanding, pt. B(h).

¹⁸⁶ See generally 1999 Agreement, *supra* note 15, Annex IV.

¹⁸⁷ *Id.*

Treaty because they do not require a yearly consensus for their operation. The 1999 Agreement fixes the procedural terms and processes for determining the estimates and TAC levels for five of the six Pacific salmon fisheries for ten years,¹⁸⁸ while the process for the Fraser River Sockeye and Pink fishery is locked in for twelve years.¹⁸⁹ These “long-term” fisheries regimes remove one of the crippling elements of the 1985 Treaty: the need for periodic consensus.¹⁹⁰

Ostensibly, the positive elements of the ABMR system outweigh the possible drawbacks. The nations acknowledge that this scheme requires greater cooperation, greater scientific input and greater quantities of timely information.¹⁹¹ Furthermore, the refusal of the United States to alter its current consensus based decision-making within its section may prove detrimental to the process.¹⁹² Disagreements between the states, tribes and the federal government have caused delay and even stalemates in the past, and may continue to do so under the new agreement.¹⁹³ However, both nations also maintain that the ABMR systems are more responsive to variance in stock returns, reflect modern conservation-based fishing practices, and reduce the bias in previous models to over-fish the resource.¹⁹⁴

B. *Structure of the Restoration and Enhancement Funds*

The 1999 Agreement also created two funds (the “Funds”), the Northern Boundary and Trans-boundary Rivers Restoration and Enhancement Fund (the “Northern Fund”¹⁹⁵) and the Southern Boundary

¹⁸⁸ *Id.* chs. 1-3, 5, 6.

¹⁸⁹ Treaty, *supra* note 15, Annex IV. The U.S. catch of Fraser River Sockeye in Washington Waters will decline from 22.4% of the TAC in 1999, to 20.4% in 2000, to 18.4% in 2001, and to 16.5% from 2002 to 2010. *Id.* This compares with the 1998 agreement’s figure of 24.9% and the historical average of 20.5% between 1985 and 1996. Anderson, *supra* note 156.

¹⁹⁰ Dunn, *supra* note 51, at 169. The 1985 Treaty management regimes were usually multi-year and required consensus when the regimes expired. The lack of agreement for new terms usually resulted in “rolling over” the previous regime. This practice largely continued through 1992, then largely broke down as Canada increased its equity demands. Rutter, *supra* note 96.

¹⁹¹ Background, Abundance-Based Management Regimes, *supra* note 166.

¹⁹² Knight, *supra* note 163.

¹⁹³ *Id.*

¹⁹⁴ Background, Abundance-Based Management Regimes, *supra* note 166.

¹⁹⁵ “The geographic area for the Northern Fund shall be Northern and Central British Columbia, Southeast Alaska, and the drainage of the Alsek, Taku and Stikine Rivers.” 1999 Agreement, *supra* note 15, Annex IV, attachment C, Northern Boundary and Transboundary Rivers Restoration and Enhancement Fund, para. 2.

Restoration and Enhancement Fund (the "Southern Fund"¹⁹⁶), consisting of (U.S.) \$75 and \$65 million, respectively.¹⁹⁷ Three main functions of the Funds are outlined in the Agreement: (1) "development of improved information for resource management;"¹⁹⁸ (2) "rehabilitation and restoration of habitat;"¹⁹⁹ and (3) "enhancement of wild stock population."²⁰⁰

Under the 1999 Agreement, U.S. Congressional appropriations are the exclusive mandatory source of money for the funds.²⁰¹ The Diplomatic Notes of the Agreement mandate that payments to these funds be completed by 2003 or the Agreement may be suspended.²⁰² The willingness to accept the establishment of these bilateral funds as part of an overall settlement represented a significant change in negotiating posture by the Canadian government.²⁰³ Facing a stalemate, the Canadians decided to forego their claims of past interception inequity in exchange for a package that included the new fishery regimes and the creation and financing of the Funds.²⁰⁴ This change was perhaps the most defining move of the negotiation process, and allowed the talks to ultimately proceed to agreement.²⁰⁵

The Northern Fund Committee and Southern Fund Committee, each composed of six members with three representatives from each nation, will distribute the money.²⁰⁶ None of the principal of the Funds will be spent; only the earnings and interest derived from the invested capital of the Funds

¹⁹⁶ "The geographic area for the Southern Fund shall be southern British Columbia, the States of Washington and Oregon, and the Snake River basin in Idaho." *Id.* Annex IV, attachment C, Southern Boundary Restoration and Enhancement Fund, para. 2.

¹⁹⁷ *Id.* attachment C.

¹⁹⁸ Development of improved information includes "better stock assessment, data acquisition, and improved scientific understanding of factors affecting salmon production in the freshwater marine environments." *Id.* Annex IV, attachment C, Northern Boundary and Transboundary Rivers Restoration and Enhancement Fund, para. 3(a); *id.* Annex IV, attachment C, Southern Boundary Restoration and Enhancement Fund, para. 3(a).

¹⁹⁹ This purpose also includes "improvement of natural habitat to enhance productivity and protection of Pacific salmon." *Id.* Annex IV, attachment C, Northern Boundary and Transboundary Rivers Restoration and Enhancement Fund, para. 3(b); *id.* Annex IV, attachment C, Southern Boundary Restoration and Enhancement Fund, para. 3(b).

²⁰⁰ Enhancement of wild stock population will occur "through low technology techniques rather than through large facilities with high operating costs." *Id.* Annex IV, attachment C, Northern Boundary and Transboundary Rivers Restoration and Enhancement Fund, para. 3(c); *id.* Annex IV, attachment C, Southern Boundary Restoration and Enhancement Fund, para. 3(c).

²⁰¹ *Id.* Other parties may contribute of their own accord, but the Fund amounts are explicitly set to be paid by the United States. *Id.* Annex IV, attachment C, Northern Boundary and Transboundary Rivers Restoration and Enhancement Fund, para. 4; *id.* Annex IV, attachment C, Southern Boundary Restoration and Enhancement Fund, para. 4.

²⁰² *Id.* Diplomatic Notes.

²⁰³ Rutter, *supra* note 95.

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.*

may be expended.²⁰⁷ Evaluation and approval of proposals for use of the income of the Funds are subject to procedures developed by the Committees.²⁰⁸ These approval procedures are currently in the early stages of development by the Committees.²⁰⁹ No provisions for public comment have yet been added, although such provisions are under consideration.²¹⁰ According to Annex IV of the 1999 Agreement, no allocations will be distributed from the Funds after 2010 (when four out of the six regimes for determining the estimates and TAC levels are scheduled to expire) unless new regimes are put in place.²¹¹

Similar to the ESA review requirements discussed below in Part V, two critical facets of the Northern Fund and Southern Fund—the payment schedule and the implications of failure to meet that schedule—are not part of the language of the Agreement itself, but rather the Diplomatic Notes that were exchanged as attachments to the Agreement.²¹² Both Notes exchanged require that the Agreement “shall be subject to the obtaining of specific legislative authority from the United States Congress” for the Funds.²¹³ The Notes also outline a strict payment schedule,²¹⁴ which effectively makes the agreement conditional upon the arrival of (U.S.) \$140 million to the PSC within four year’s time.²¹⁵

Despite worrisome implications in the FY 2000 budget cycle, recent indications from the U.S. Congress are that the 2003 deadline for total

²⁰⁷ *Id.* Annex IV, attachment C, Northern Boundary and Transboundary Rivers Restoration and Enhancement Fund, para.6; *id.* Annex IV, attachment C, Southern Boundary Restoration and Enhancement Fund, para. 6.

²⁰⁸ *Id.* Annex IV, attachment C, Northern Boundary and Transboundary Rivers Restoration and Enhancement Fund, para.7; *id.* Annex IV, attachment C, Southern Boundary Restoration and Enhancement Fund, para. 7.

²⁰⁹ Rutter, *supra* note 95.

²¹⁰ *Id.*

²¹¹ 1999 Agreement, *supra* note 15, Annex IV, attachment C, Northern Boundary and Transboundary Rivers Restoration and Enhancement Fund, para.8; *id.* Annex IV, attachment C, Southern Boundary Restoration and Enhancement Fund, para. 8. The Fraser River Sockeye and Pink regime and the Coho regime were excluded from this protection. Funding of approved projects may resume once new agreements are made on these regimes. *Id.* In the event that new agreements are not made, the principle and any remaining interest derived from it will escheat back to the nation that contributed it. *Id.* Annex IV, attachment C, Northern Boundary and Transboundary Rivers Restoration and Enhancement Fund, para.9; *id.* Annex IV, attachment C, Southern Boundary Restoration and Enhancement Fund, para. 9. While the Funds are explicitly funded by the United States, voluntary contributions may be made by either party. *Id.*

²¹² *Id.* Diplomatic Notes.

²¹³ *Id.*

²¹⁴ The Notes read: “(I)n the event that the United States Government does not make initial funds available for the Funds by December 31, 1999, or in the event that additional installment payments to these Funds are not made by the end of U.S. fiscal year 2001 or by the end of U.S. fiscal year 2002, or in the event that total payment for the two Funds is not made available by the end of the U.S. Fiscal year 2003, all of the obligations under this Agreement shall be suspended until such funds are available.” *Id.*

²¹⁵ *Id.*

payment will be met. The first round of appropriations by Congress for FY 2000 added up to approximately (U.S.) \$10 million for each fund. While it did not violate the specific terms of the agreement, this amount was not enough to keep on track to meet the 2003 deadline. In the most recent round of appropriations (for FY 2001) however, Congress allocated approximately (U.S.) \$20 million for each fund. Both sets of allocations have been under the State Department and Commerce Department budgets. Congress also gave general authorization for full payments into the Funds through 2003. While the Departments of State and Commerce will have to seek actual appropriation in the next two budget cycles, the blanket authorization removes a major obstacle for the Funds.²¹⁶

C. *Renewed Commitment to Scientific Cooperation*

The 1999 Agreement introduced a section promoting the “renewed commitment to scientific cooperation.”²¹⁷ Attachment D of the 1999 Agreement recognizes the importance of consultation and cooperation on science and information exchange and management to maintain the stability of the ABMRs and the 1999 Agreement itself.²¹⁸ Attachment D encourages cooperation including staff exchanges, workshops, and data exchange.²¹⁹ It also renamed the “Committee on Research and Statistics” the “Committee on Scientific Cooperation.”²²⁰

The emphasis on cooperation in attachment D is similar to language in the 1985 Treaty.²²¹ A Memorandum of Understanding attached to the 1985 Treaty listed numerous agreements to cooperate between the nations.²²² In addition, the 1985 Treaty explicitly and repeatedly mentioned the importance of cooperation to avoid an imbalance of interceptions.²²³ Moreover, it emphasized the need for precise and comprehensive measurement and data collection regarding interceptions.²²⁴

The section on renewed cooperation in the 1999 Agreement does not emphasize the importance of measuring and reducing interceptions. The word interception does not even appear in the language of the 1999

²¹⁶ Rutter, *supra* note 95.

²¹⁷ 1999 Agreement, *supra* note 15, attachment D.

²¹⁸ *Id.*

²¹⁹ *Id.* para. (b).

²²⁰ *Id.* para. (d).

²²¹ 1985 Treaty, *supra* note 12, Memorandum of Understanding.

²²² *Id.*

²²³ *Id.* Memorandum of Understanding pt. A.

²²⁴ *Id.* Memorandum of Understanding pt. B.

Agreement.²²⁵ Instead, the 1999 Agreement encourages the identification of “emerging issues,” “the development of common assessment models[,]” and the distinguishing of “technical and policy issues[.]”²²⁶ This difference between the two Treaties reflects the agreement between Canada and the United States to exclude the question of equity in interceptions from the negotiations.

D. Joint Commitment to Protect and Restore Salmon Habitat

The 1999 Agreement recognizes the importance of habitat restoration and protection in the larger scheme of abundance based management.²²⁷ The language recognizes the need to restore habitat, water quality, and water quantity in an effort to both increase the levels of natural stocks and to promote safe passage for juvenile and adult salmon.²²⁸ The Agreement requests that the PSC give an annual report on the stocks that harvest controls alone will not protect and on the non-fishing factors affecting safe passage of salmon.²²⁹

The language about the joint commitment by both nations to protect and restore salmon habitat is vague.²³⁰ However, appropriations for habitat restoration by both nations to date suggest that they consider this joint commitment just as important as the exchange of scientific information.²³¹ An initiative begun by Canada prior to the agreement, as well as efforts made by the Clinton Administration after the agreement, indicate that this commitment may prove important in the overall scheme of salmon recovery. The Canadian government launched a five-year, (Can.) \$400 million program to restore salmon habitat, reduce their commercial fleet, and provide employment assistance for displaced fishers.²³² In the United States, Senior White House Representative Lloyd Cutler promised that “the Administration will work closely with Congress to ensure that we can provide the resources needed to undertake these vital recovery efforts.”²³³ Through the end of its term, the Clinton Administration followed through on

²²⁵ 1999 Agreement, *supra* note 15, attachment D.

²²⁶ *Id.* attachment D, (d), (i)-(iii).

²²⁷ *Id.* attachment E.

²²⁸ *Id.*

²²⁹ *Id.* attachment E, (2).

²³⁰ *Id.* attachment E.

²³¹ Canada Department of Fisheries and Oceans, *Conservation Means More Fish for Canada's Future*, at http://www.ncr.dfo.ca/pst-tsp/ads/ad1_e.htm.

²³² *Id.*

²³³ See Rubin, *supra* note 160.

that promise, by securing a (U.S.) \$100 million in salmon funding for 1999 and 2000.²³⁴

V. ANALYSIS OF THE 1999 PACIFIC SALMON AGREEMENT

The 1999 Agreement represents progress and compromise in the Pacific salmon saga. Interest groups have complemented and criticized its provisions. The new management regimes, combined with the U.S. funded Restoration and Enhancement Funds, allowed Canada to give ground on its claim of past inequity. The United States ensured that the ABMR, and the Agreement as a whole, would be subject to review under the Endangered Species Act. This review was conducted within the time allotted by the agreement, but did not include fisheries in Washington and Oregon.

A. Criticisms by Interest Groups

While the 1999 Agreement is indicative of harmony between the governments of Canada and the United States, interest groups within those countries have been vocal, albeit qualified, in their criticism of the new agreement. Commercial fishers from Alaska and Washington claimed that the United States negotiators relinquished too large a share of the harvest to Canada. British Columbia First Nations²³⁵ maintained that Canada signed the agreement without adequate consultation of their members. Environmental groups from both countries have questioned the ability of the 1999 Agreement to bring Pacific salmon back from the brink of extinction.

Commercial fishers from both Alaska and Washington felt that the compromise gave away too large a share of their annual harvest. In testimony before the U.S. House of Representatives Committee on Resources, Subcommittee on Fisheries Conservation, Wildlife and Oceans, Jev Shelton of the United Southeast Alaska Gillnetters stated that “[i]n the pressure to “get a deal,” concessions were made to Canada in virtually every southeast Alaska fishery . . . as well as the non-tribal Sockeye fishery in Washington state.”²³⁶ In the same hearing, Robert Zuanich, Executive

²³⁴ This (U.S.) \$100 million includes the funding sought for the Endowment Funds. In FY 2001, (U.S.) \$90 million was appropriated for salmon recovery to the states and Tribes, not counting the bilateral funds. Similar amounts are proposed in the President's budget for FY 2002. Rutter, *supra* note 95.

²³⁵ The native peoples and tribes of Canada generally chose to be called First Nations.

²³⁶ *Hearing on the 1999 Pacific Salmon Treaty Before the House Comm. on Resources, Subcomm. on Fisheries Conservation, Wildlife, and Oceans*: 105th Cong. 2 (Oct. 28, 1999) (statement of Jev Shelton, United Southeast Alaska Gillnetters). Mr. Shelton also spoke on behalf of the Alaska Trollers Association and the Southeast Alaska Seiners. *Id.*

Director of the Purse Seine Vessel Owners Association, related his disappointment that U.S. negotiators conceded a harvest reduction to 16.5% of Fraser River Sockeye (instead of 18% agreed to by his association) and that the reductions would occur regardless of the establishment and funding of an adequate buyback program.²³⁷ Zuanich underscored the importance of implementing and fully funding a program to buy back commercial fishing licenses and provide economic assistance to those families affected by the harvest reduction.²³⁸

British Columbia First Nations have also raised concerns with elements of the 1999 Agreement, but more specifically, challenge the failure of the Canadian government to consult them before signing the agreement. The British Columbia Aboriginal Fisheries Commission (“BCAFC”) stated that the Canadian Department of Fisheries and Oceans (“DFO”) has “fail[ed] miserably in their duty to consult with First Nations” regarding harvest levels and the 1999 Agreement.²³⁹ BCAFC maintained that the Canadian government should have consulted First Nations under a fiduciary duty set out in *R. v. Sparrow*, a decision of the Supreme Court of Canada.²⁴⁰ Due to frustration with the implementation of the 1999 Agreement by the DFO, BCAFC issued a statement on January 26, 2000 “declaring war regarding their rights and title to the fisheries in BC.”²⁴¹

Environmental groups from both the United States and Canada have made cautionary statements regarding the 1999 Agreement. In testimony before the U.S. House of Representatives Committee on Resources, Subcommittee on Fisheries Conservation, Wildlife and Oceans, Steve Moyer, Trout Unlimited Vice-President for Conservation Programs, stated that the “new agreement wisely moves from ceiling management to abundance based management regimes . . . but there is some danger that the abundance levels chosen may be too high for protection of depleted wild

²³⁷ *Hearing on the 1999 Pacific Salmon Treaty Before the House Comm. on Resources, Subcomm. on Fisheries Conservation, Wildlife, and Oceans*: 105th Cong. (Oct. 28, 1999) (statement of Robert Zuanich, Executive Director, Purse Seine Vessel Owners Association). Mr. Zuanich is also a member of the U.S. Fraser River Panel of the Pacific Salmon Commission. *Id.*

²³⁸ *Id.* The U.S. Congress has delivered on (U.S.) \$25 million of its promised (U.S.) \$35 million for the buyback funding and the remainder is in the FY 2002 budget request. Rutter, *supra* note 96.

²³⁹ Press Release, British Columbia Aboriginal Fisheries Commission, *First Nations in BC Are Declaring War Regarding Their Rights and Title to the Fishery*, (Jan. 26, 2000), at http://www.bcafc.org/pr/war_26jan00.html.

²⁴⁰ Press Release, British Columbia Aboriginal Fisheries Commission, *First Nations Bear Brunt of the Pacific Salmon Treaty*, (Aug. 23, 1999), at http://www.bcafc.org/pr/brunt_23aug99.html.

²⁴¹ Press Release, British Columbia Aboriginal Fisheries Commission, *supra* note 239. The BCAFC mentions other sources of frustration with the DFO in their press release. For an exploration of their perspectives and issues visit <http://www.bcafc.org>.

stocks of salmon.”²⁴² Furthermore, a British Columbia based environmental group questioned the accuracy of the ABMRs and the ability of the “aggregate” model systems to adjust to the variable needs of the fishery.²⁴³

B. *Negotiation Breakthrough: Canada's Sea Change*

The key breakthrough in treaty negotiations came when Canada ostensibly dropped its claim for compensation for historical inequities in salmon interception. In exchange for this concession, the United States agreed to exclusively finance the two Restoration and Enhancement Funds, a major element of the 1999 Agreement.²⁴⁴ While observers agree that this arrangement was the breakthrough in negotiations, the official public from the Department of State gave no explanation of why the United States is funding the entire amount.²⁴⁵ Canadian public statements have similarly ignored fact that the United States is the only nation appropriating money for the Funds.²⁴⁶ Nevertheless, the discrepancy in the funding source was a key element of a larger package that allowed Canada to accept an agreement without compensation for its historical claim of inequity.

As discussed in Part II, *infra*, the single most contentious issue in negotiating the 1999 Agreement was the problem of interceptions and conflict over the “equity principle.”²⁴⁷ For many years prior to the 1999 Agreement, Canada claimed that United States interceptions outnumbered and out-valued the Canadian interceptions by millions of dollars.²⁴⁸ Regardless of whether this inequity was as great as the Canadians perceived it, the issue was a large impediment to an agreement.²⁴⁹ Prior to the negotiations, Canada maintained that the “equity principle” was the critical piece of the 1985 Treaty.²⁵⁰ Conversely, the United States argued that the

²⁴² *Hearing on the 1999 Pacific Salmon Treaty Before the House Comm. on Resources, Subcomm. on Fisheries Conservation, Wildlife, and Oceans: 105th Cong. (Oct. 28, 1999)* (statement of Steve Moyer, Vice President for Conservation Programs, Trout Unlimited).

²⁴³ David Lane, T. Buck Suzuki Environmental Foundation, *Pacific Salmon Treaty Flawed*, available at <http://www.bcen.bc.ca/bcerart/Vol10/pacific.htm>.

²⁴⁴ 1999 Agreement, *supra* 15, Annex IV, attachment C.

²⁴⁵ Press Statement by Spokesman James P. Rubin, U.S. Department of State (June 3, 1999), *supra* note 160.

²⁴⁶ Anderson, *supra* note 160.

²⁴⁷ In an updated article on the 1999 Agreement, Professor McDorman agreed that “the core of the Canada-United States Pacific salmon dispute lies in the differing views of the two countries with respect to the quantity that fishers from each country can and should harvest consistent with both the conservation and the state of origin principle.” McDorman, *supra* note 163.

²⁴⁸ Huppert, *supra* note 10, at 12.

²⁴⁹ Rutter, *supra* note 95. Larry Rutter serves on the Pacific Salmon Commission and was a part of the 1999 Pacific Salmon Treaty U.S. Negotiation Team.

²⁵⁰ *Id.*

“conservation principle” was of greater concern, given the vast salmon population reductions.²⁵¹ As discussed earlier in Part II, the vague language of the Treaty allowed for various interpretations of both principles and left a chasm between the two nations.

Approaching the negotiations, Canada had three major objectives for the new agreement.²⁵² First, Canada wanted a conservation-based arrangement that provided an improved basis for addressing conservation issues.²⁵³ Second, Canada wanted fish allocations transferred to Canada from the U.S.²⁵⁴ Third, Canada wanted to create a solid foundation for the parties to cooperate in the future.²⁵⁵

By setting these objectives, the Canadian negotiating team side stepped the equity issue (if only for the moment) to allow a compromise on the overall package that the 1999 Agreement represents. Canadian negotiation team member Paul Sprout maintained that Canadian acquiescence was based on their “evaluation of the overall set of measures,” not simply because the United States agreed to pay for the Funds.²⁵⁶ Sprout further stated that Canada never set aside its claim to equity but was “creative in constructing a total package that both sides could agree to.”²⁵⁷

This perspective created a win-win situation for both the United States and Canada. While it is likely true that Canada did not permanently set aside its legal claim to equity, at the very least they reprioritized to accommodate an agreement. The United States did not acknowledge the interception imbalance, but they did commit to financing all (U.S.) \$140 million of the Funds.²⁵⁸ Through this mechanism, each nation was able to walk away from the table with an apparent victory.²⁵⁹

The Funds were instrumental in allowing each side to frame the debate in a novel way and to sidestep the equity issue that had frustrated the negotiations for decades.²⁶⁰ By constructing a mechanism through which Canada could avoid the obstacle to success, the Canadian leadership

²⁵¹ *Id.*

²⁵² Telephone interview with Paul Sprout, Canadian Negotiation Team Member and Acting Associate Assistant Deputy Minister of Fisheries Management, Canada Department of Fisheries and Oceans, Jan. 30, 2001.

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ *Id.*

²⁵⁸ Rutter, *supra* note 95.

²⁵⁹ *Id.*

²⁶⁰ *Id.*

fundamentally changed the debate.²⁶¹ This shift in negotiating posture demonstrated that Canada was committed to both the survival of the Treaty and the survival of salmon. The Canadian team viewed U.S. financing of the Funds in light of the other major changes in the 1999 Agreement.²⁶² The Canadian negotiators viewed the ABMRs, the renewed commitment to scientific cooperation, the commitment to habitat restoration, and the Funds as a “whole package” that they found adequate for the needs of Canadian fishers and the salmon.²⁶³ The strongest influence came from Minister Anderson.²⁶⁴ In reflecting on the positive shift in Canadian position, U.S. negotiator and NMFS Senior Policy Assistant Larry Rutter concluded that Minister Anderson “deserves more of the credit for the sea change in Canadian philosophy than anyone.”²⁶⁵ Both Rutter and Sprout agree that the 1999 Agreement was reached by virtue of a large package of concessions, from both sides, that included the AMBR and the Funds.²⁶⁶

Canada may also have realized weaknesses in its legal claim to “equity.”²⁶⁷ While both U.S. and Canadian figures do show an interception imbalance, observers agree that the “equity principle” is not a binding one.²⁶⁸ This is because the terms of the equity principle are largely unclear as a matter of international law. Mechanisms for determining and monitoring equity were never established and there was no binding timeline.²⁶⁹ While the claims had merit in public eye, they may have proven to be more valuable at the negotiating table as a concession rather than an obstacle to agreement.²⁷⁰

C. *Endangered Species Act Review*

The ABMR, and the 1999 Agreement in its entirety, are subject to the requirements of the Endangered Species Act and the requirements discussed in the Diplomatic Notes exchanged at the signing of the Agreement. The 1973 U.S. Endangered Species Act (“ESA”) provides that all major federal

²⁶¹ *Id.*

²⁶² Sprout, *supra* note 252.

²⁶³ *Id.*

²⁶⁴ *Id.*

²⁶⁵ *Id.* Canadian Negotiation Team member Paul Sprout agreed, stating that “Mr. Anderson was crucial in saying the priority has to be the resource; to put the fish first.” Sprout, *supra* note 252.

²⁶⁶ *Id.*; Rutter, *supra* note 95.

²⁶⁷ McDorman, *supra* note 36, at 96–98.

²⁶⁸ *Id.*

²⁶⁹ *Id.* at 97.

²⁷⁰ *Id.*

actions affecting listed species are subject to review by the listing agency.²⁷¹ Furthermore, the Diplomatic Notes explicitly state that “each Government shall take the necessary steps to implement the obligations under this Agreement consistent with its national laws.”²⁷² Thus, in order to remain in force, the 1999 Agreement must comply with the ESA.

1. *Requirements of Endangered Species Act and the Diplomatic Notes*

a. *Endangered Species Act requirements*

The actual language of the 1999 Agreement does not explicitly require an ESA analysis of the Agreement, but the review is required by operation of Federal law. The ESA requires that all major federal actions that affect listed species undergo review by the “listing agency”.²⁷³ This review of one federal agency by another is generally referred to as a “Section 7 consultation,” named after the section of the ESA that requires it.²⁷⁴ Since Pacific salmon are an anadromous species, the listing agency and thus the review agency is the U.S. National Marine Fisheries Service (“NMFS”).²⁷⁵ Under regulations adopted by NMFS, if the proposed agency “action”²⁷⁶ “may affect listed species or critical habitat,” the initiation of consultation with NMFS is mandatory.²⁷⁷ The “may affect” decision is normally based on a “biological assessment” conducted by the acting federal agency or NMFS.²⁷⁸ If a “may affect” decision is reached, NMFS may then begin a formal consultation and the drafting of a “biological opinion.”²⁷⁹ In this process, NMFS evaluates the status of the species, its habitat, direct and indirect effects of the action, and the cumulative effects of private and state action in the larger area.²⁸⁰ Ultimately, the process concludes in a biological opinion with a finding of either “jeopardy” or “no-jeopardy” regarding the

²⁷¹ Section 7(a)(2) of the Endangered Species Act requires consultation by the Secretary with the action agency if the action is likely to affect a listed species.” 16 U.S.C. § 1536(a)(2) (2001).

²⁷² 1999 Agreement, *supra* note 15, Diplomatic Notes (June 30, 1999).

²⁷³ 16 U.S.C. § 1536(a)(2).

²⁷⁴ *Id.*

²⁷⁵ National Marine Fisheries Service (“NMFS”) is an agency of the National Oceanographic and Atmospheric Administration, which is under the Department of Commerce.

²⁷⁶ The term “action” is defined in the regulations adopted by NMFS to mean “all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies.” 50 C.F.R. § 402.02 (2001).

²⁷⁷ *Id.* § 402.14(a).

²⁷⁸ *Id.* § 402.12(b). NMFS regulations contain no mandatory content requirements for a biological assessment, only recommendations. *Id.* § 402.12(f).

²⁷⁹ *Id.* § 402.14(e).

²⁸⁰ *Id.* § 402.14(g).

action's effect on the species.²⁸¹ If the NMFS makes a no-jeopardy finding, it may issue an "incidental take statement," which permits the taking of a listed species consistent with the terms of the statement and limits liability under the prohibition on take in Section 9 of the ESA.²⁸²

b. Diplomatic Notes requirements

The Diplomatic Notes each explicitly state that implementation of the Agreement by the United States "shall be contingent on a determination that the Agreement satisfies the legal requirements under the United States' Endangered Species Act."²⁸³ The Diplomatic Notes also require the United States to "fill those requirements" and "keep the Government of Canada informed regarding this matter."²⁸⁴ The Diplomatic Notes set a schedule for compliance by stating that "in the event that the United States' Government has failed to fulfill the legal requirements of the Endangered Species Act by December 31, 1999, the obligations under this Agreement shall be suspended pending fulfillment of those legal requirements."²⁸⁵

Even though they are not in the actual language of the Agreement, they are binding under the generally accepted methodology for interpreting a treaty as outlined in the Vienna Convention on the Law of Treaties.²⁸⁶ Article 31 of the Vienna Convention provides that a "treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its objective and purpose."²⁸⁷ Subsection 2(a) defines "context" to include "any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty."²⁸⁸ Since the Diplomatic Notes were exchanged at the signing of the 1999 Agreement, they are in connection with the conclusion of the Agreement and would likely be interpreted as "context" and thus a binding element of the Agreement.²⁸⁹

²⁸¹ See *id.*

²⁸² *Id.*

²⁸³ 1999 Agreement, Diplomatic Notes, *supra* 15.

²⁸⁴ *Id.*

²⁸⁵ *Id.*

²⁸⁶ The United States never ratified the Vienna Convention. INTERNATIONAL ENVIRONMENTAL LAW AND POLICY 205 (David Hunter et al. eds., 1998). However, the U.S. Department of State has declared that the principles expressed in the Convention are binding. *Id.*

²⁸⁷ *Id.*

²⁸⁸ *Id.*

²⁸⁹ *Id.* at 222.

2. *NMFS Review of the 1999 Pacific Salmon Agreement*

To comply with these ESA requirements, NMFS conducted a Section 7 inter-agency consultation with the U.S. Department of State.²⁹⁰ Before the December 31 deadline, NMFS issued a Biological Opinion on the 1999 Agreement.²⁹¹ This is the first time NMFS has consulted directly on a proposed fishery management plan involving specific harvest levels applicable to Canadian fisheries.²⁹²

As NMFS embarked on the Section 7 consultation process, it was in a precarious scientific and political position.²⁹³ Congress designed the consultation procedures for agency actions of more corporeal nature than the signing of a treaty.²⁹⁴ Furthermore, by virtue of being "abundance based," the management plans that NMFS was charged with analyzing, would necessarily fluctuate from year to year and even within a given year,²⁹⁵ making them difficult quantity to assess. Additionally, a finding that the 1999 Agreement places listed species in "jeopardy" would likely have upset the delicate balance struck in the negotiations. After years of attempts and stalemates, the United States and Canada had forged an agreement after which both sides claimed victory. Disturbing the balance with a "jeopardy" finding by NMFS would not have been politically expedient. The only clear "reasonable and prudent" alternative for NMFS to suggest would have been the undesirable result of revisiting the terms of the agreement in a subsequent negotiation.²⁹⁶ Furthermore, NMFS felt it had to weigh the 1999

²⁹⁰ Biological Opinion, *supra* note 21, at 1.

²⁹¹ *Id.*

²⁹² *Id.* at 2.

²⁹³ NMFS negotiator Larry Rutter was the ESA standard bearer in the negotiations. Adding another condition to an already contentious negotiation was a difficult task for the delegates. However ensuring compliance was his duty given the great attention to the listings of threatened and endangered salmon had received in the prior decade, along with the natural role of the NMFS delegate as a steward of the ESA. Thus the U.S. negotiators worked to make the terms of the 1999 Agreement consistent with ESA requirements in order to avoid a conflict with its enforcement upon ratification. Rutter, *supra* note 95.

²⁹⁴ Normally the listing agency is confronted with a federal project to build a bridge in a critical habitat area, permit a timber sale, or some similar physical action. The normal tools for scientific assessment were not shaped for an action that, in a sense, amounted to a signature. However, listing agencies do often undertake "programmatic" reviews that take into account broader systems and subjects. *Id.*

²⁹⁵ Background, Abundance-Based Management Regimes, *supra* note 166.

²⁹⁶ Since the United States does not have jurisdiction over Canadian fisheries, the Department of State could not impose restrictions on their harvest levels. Once the United States signed the Treaty, fishing levels in Canada could not be revisited except under the terms of the agreement. Letter from William Stelle, Regional Administrator, National Marine Fisheries Service, to Bill Frank Jr., Chairman, Northwest Indian Fisheries Commission (Sept. 3, 1999) (on file with author).

Agreement and its terms against the alternative of having no agreement.²⁹⁷ This context provided a strong incentive for NMFS to make a “no jeopardy” finding before they even began the process. However, since the negotiators were aware of the impending ESA review during the negotiations, their work to ensure that compliance resulted in an agreement that was more likely to comply.²⁹⁸

Because of the pressing time constraints on the consultation, NMFS skipped the biological assessment phase of the ESA Section 7 process and proceeded directly to the biological opinion phase.²⁹⁹ NMFS considered two “proposed actions” by the United States.³⁰⁰ The first was the formal commitment of the United States to implement its fishery obligations consistent with terms of the 1999 Agreement.³⁰¹ The second action was the decision to delegate federal management authority to Alaska for those fisheries within the EEZ off the coast of Alaska.³⁰² NMFS determined that the “action area”³⁰³ was the “northern fisheries” which included “all marine and freshwater areas in [Southeast Alaska] and [British Columbia] subject to provisions of [the 1999 Agreement].”³⁰⁴

NMFS did not consider the “southern fisheries”³⁰⁵ in Biological Opinion.³⁰⁶ NMFS listed three reasons for this decision. First, the southern fisheries involve relatively few interceptions of Chinook from other

²⁹⁷ *Id.* This is a questionable assumption. While a “jeopardy” finding would have upset the agreement, it is unclear that the balance struck between the nations was so delicate that revisiting the terms would necessarily result in collapse. Given the advances that were made in the negotiations, a reasonable assumption would have been that some agreement would survive and should be judged on its own terms, not the lack thereof.

²⁹⁸ Rutter, *supra* note 95.

²⁹⁹ *Id.*

³⁰⁰ Biological Opinion, *supra* note 21, at 3.

³⁰¹ *Id.*

³⁰² The North Pacific Fisheries Management Council (“NPFMC”) is the federal institution, which has authority to manage fisheries in the United States EEZ. Under the April 1990 Fishery Management Plan For The Salmon Fisheries In The EEZ Off The Coast Of Alaska, NPFMC deferred to the State the regulation and management of Alaska salmon fisheries in the EEZ off the coast of Alaska. In 1996, Alaska first indicated its intention to manage its fisheries patterned after the U.S. Letter of Agreement (“LOA”) between the U.S. Commissioners of the PSC. In 1999, Alaska declared its intention to manage its fisheries pursuant to the terms of the 1999 Agreement (which replaced the LOA), thus the Biological Opinion considers the terms of the Treaty. *Id.*

³⁰³ “Action area” is defined in the NMFS regulations to mean “all areas to be affected directly or indirectly by the Federal action and not merely the immediate area involved in the action.” 50 C.F.R. § 402.02.

³⁰⁴ Biological Opinion, *supra* note 21, at 7.

³⁰⁵ Though not defined in the Biological Opinion, “southern fisheries” presumably includes the fisheries off the coasts of Washington and Oregon.

³⁰⁶ Biological Opinion, *supra* note 21, at 7.

jurisdictions.³⁰⁷ Second, NMFS asserted that these fisheries “are actually a complex of fisheries managed by a number of different entities that involve three states and many tribes,” and they are managed by other processes,³⁰⁸ such as the Pacific Fishery Management Council, the North of Falcon³⁰⁹ process, the state and tribal management decision under the *United States v. Washington*, and the Baldrige stipulation.³¹⁰ Third, the recent ESA listings in the area and the subsequent “4(d)” rulings,³¹¹ have motivated the formation of new comprehensive management plans that were not yet complete.³¹² Because of these uncertainties, NMFS saw the southern fisheries as not yet “ripe” for consultations.³¹³

It is not clear from the language of the Biological Opinion when the southern fisheries will be “ripe” for consultations. The Opinion states that they “will be considered in more detail during consultation on associated future federal actions.”³¹⁴ However, “associated future federal actions” are not defined in the Biological Opinion.³¹⁵ Pre-decisional memoranda are equally unclear. In his letter addressing the concerns of Billy Frank Jr., Chairman of the Northwest Indian Fisheries Commission, NMFS Northwest Regional Administrator William Stelle simply states “[b]ecause of [the above] uncertainties, the southern fisheries are not considered as part of the proposed action covered by this [Biological Opinion], but will be considered in future section 7 consultations.”³¹⁶

³⁰⁷ *Id.* Why this suggests that the fisheries should be excluded is unclear. Presumably it is because the taking of listed species by Washington and Oregon fleets is mainly limited to species from those jurisdictions. Therefore it is more exclusively an issue to be handled by the management plans of those states. However, as discussed above, the Alaskan fisheries was subject to review precisely because of the deferred management authority to that state.

³⁰⁸ *Id.*

³⁰⁹ North of Falcon is a process by which the Washington Department of Fisheries, Oregon Department of Fish and Wildlife, NMFS, and the Treaty Tribes join to formulate the fishing plans to meet all biological and other requirements.

³¹⁰ Stelle, *supra* note 296.

³¹¹ Section 4(d) of the ESA requires that when a species is listed as threatened, the Secretary shall issue regulations to provide for the conservation of the species. 16 U.S.C. § 1533(d).

³¹² *Id.*

³¹³ Stelle, *supra* note 296. Larry Rutter’s explanation for the decision to exclude the southern fisheries is that “the bilateral agreement did not provide much specificity regarding the management of southern U.S. fisheries because those fisheries involve few interceptions, in contrast to the Alaskan fishery. That they were not considered in the BO stems from the fact that those fisheries *would* be reviewed in another context, namely the detailed southern fishery management plans that would be developed and implemented by the states and tribes.” Rutter, *supra* note 95.

³¹⁴ Biological Opinion, *supra* note 21, at 7.

³¹⁵ See generally *id.*

³¹⁶ Stelle, *supra* note 296. The foundation in the Diplomatic Notes for the redaction of the southern fishery from the ESA review is unclear. Section 8 of the note from Acting Secretary of State Thomas Pickering to Canadian Prime Minister Raymond Chretien calls for each government to take the necessary steps to ensure compliance with its national laws. 1999 Agreement, *supra* note 15, Diplomatic Notes. The

In the area the Biological Opinion did cover, the northern fishery, NMFS ultimately concluded that the terms of the Agreement are not likely to jeopardize any endangered salmon species.³¹⁷ It is beyond the scope of this article to analyze the accuracy of this Opinion, except to say that it is consistent with ESA and NMFS regulations. The Opinion established an environmental baseline, determined the effects of the action and took into account cumulative effects, fulfilling the requirements of the ESA.³¹⁸

NMFS included an incidental take statement permitting the take of endangered or threatened salmon that is "incidental to and not intended as part of the agency action."³¹⁹ NMFS concluded that the amount of incidental take of any one of the endangered or threatened evolutionarily significant units ("ESUs")³²⁰ of Pacific salmon would "vary from year to year," be a "rare event" or would not be taken at all.³²¹ One can only estimate that these take levels of salmon, largely originating in the rivers and streams of Washington and Oregon, would increase if the Washington and Oregon fisheries were included in the analysis. In addition, NMFS included some "Reasonable and Prudent Measures" and "Terms and Conditions" of that essentially require the various management agencies involved follow the terms of the agreement.³²² NMFS also included non-binding conservation recommendations to federal agencies,³²³ suggesting the agencies monitor the conditions and that, at some point in the future, in some areas, they adopt more restrictive harvest responses than are specified in the agreement.³²⁴

According to NMFS, the southern fisheries are being accommodated through procedures conducted after the Biological Opinion. Larry Rutter

notes also add "in particular, implementation of this Agreement by the United States Government shall be contingent on a determination that the Agreement satisfies the legal requirements under the United States Endangered Species Act." *Id.* This statement seemingly calls for review of the whole Agreement, not parts of it. Similarly, the language of the NMFS regulations does not clearly support the decision by NMFS to divide and ignore half of the agency action area. *See* 50 C.F.R. § 402.02. As discussed earlier, under regulations adopted by NMFS, the initiation of consultation with NMFS is mandatory if the proposed agency action may affect listed species or critical habitat. *Id.* § 402.14(a). The act provides no provision for setting aside large parts of the agency action because it is complex or difficult to manage. *See generally* 50 C.F.R. § 402.02.

³¹⁷ Biological Opinion, *supra* note 21, at 66.

³¹⁸ *Id.* pts. III-IV.

³¹⁹ *Id.* at 77.

³²⁰ ESU was a term developed by NMFS to describe sub-species of Salmon with distinct genetic characteristics and endemic to certain areas. *See id.* at 1.

³²¹ *Id.* at 78-79.

³²² *Id.* at 80.

³²³ *Id.* at 81. This results in the interesting sentence: "NMFS believes the following conservation recommendations are consistent with these (ESA) obligations, and therefore should be implemented by NMFS." *Id.*

³²⁴ *Id.*

explained that "Section 7 consultations on the southern fisheries occurred as soon as the applicable management plans were formulated, i.e., in advance of the 2000 fishing season, and again in advance of the 2001 season (under 4(d))."³²⁵ These plans should provide the necessary review that was not included under the Biological Opinion.³²⁶

VI. CONCLUSION

Given that the 1999 Agreement is a harvest-focused agreement, it places significant importance on the sustainability of salmon. The flexible, resource based management regimes consider the yearly strength of the salmon runs before and during the harvest season. The (U.S.) \$140 million Endowment Funds provided a financial base to take on substantial conservation initiatives. The renewed commitment to scientific cooperation, combined with the provision to protect and restore salmon habitat, if nothing else, provide strong language for the conservation of the salmon. The ESA review by NMFS was complete for the section of the fishery it covered, and subsequent measures appear to cover the additional areas in the Agreement.

While the Abundance Based Management Regimes and the two Endowment Funds are critical elements of the 1999 Agreement, the success of the negotiations lies in the Canadian compromise. In spite of a legitimate claim to historical inequities of Pacific salmon harvest in favor of the United States, the Canadian government chose to set aside malcontent and instead embrace the agreement. The shift in Canadian negotiation posture reflected a long-term understanding of resource management and a willingness to pioneer new avenues for success. It was this change that broke the seemingly intractable stalemate and provided the basis for a final agreement balancing the needs of the treaty nations, their commercial fleets, and the Pacific salmon.

³²⁵ Rutter, *supra* note 95.

³²⁶ *Id.*