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**OCEAN PASTURAGE IN THE PACIFIC SALMON TREATY
FACT OR FICTION?**

by

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ABSTRACT

Shepard, M.P. and A.W. Argue. 1998. Ocean pasturage in the Pacific Salmon Treaty - fact or fiction? *Can. Ind. Rep. Fish. Aquat. Sci.* 242: 44 p.

The contentions of a paper by Alaskan authors Jev Shelton and Jeffery Koenings regarding the extent to which the marine life of salmon should be taken into account in implementing sharing arrangements within the 1985 Pacific Salmon Treaty (PST) and regarding positions of the United States and Canada regarding State of origin harvesting rights for salmon were reviewed. Study of the negotiating history of the Treaty leads to the conclusion that it was never the intent of the PST to include consideration of marine factors in determinations of benefits accruing to the Parties. It was also concluded that, in shared international initiatives over the past 40 years and in negotiation of the PST, both the United States and Canada consistently pressed for acceptance of the concept that States in whose fresh water and estuarial waters salmon originate have a proprietary right to the harvest of such resources.

RÉSUMÉ

Shepard, M.P. and A.W. Argue. 1998. Ocean pasturage in the Pacific Salmon Treaty - fact or fiction? *Can. Ind. Rep. Fish. Aquat. Sci.* 242: 44 p.

Nous avons examiné les arguments de deux auteurs de l'Alaska, Jev Shelton et Jeffery Koenings, concernant la place _ donner aux aspects de la vie marine des saumons dans la mise en oeuvre des ententes de partage prévues par le Traité de 1985 sur le saumon du Pacifique, et les positions respectives du Canada et des États-Unis quant aux droits d'exploitation du pays d'origine des saumons. L'examen de l'histoire des négociations entourant le Traité permet de conclure _ l'absence dans le texte de l'intention d'inclure la considération de facteurs touchant _ la phase marine des saumons dans la détermination des profits revenant _ chaque Partie. Nous concluons aussi que, dans les initiatives internationales prises en commun depuis 40 ans et dans la négociation du Traité, les États-Unis et le Canada ont toujours insisté pour faire accepter l'idée qu'un État dont les eaux douces et estuariennes produisent des saumons a un droit de propriété sur l'exploitation de cette ressource.

OCEAN PASTURAGE IN THE PACIFIC SALMON TREATY - TRUTH OR FICTION?

Introduction

In March, 1985, Canada and the United States concluded the Pacific Salmon Treaty (PST)² which provides for cooperative management of salmon stocks that migrate between the waters of the two countries and are subject to competitive fishing by citizens of both countries. For the past five years, provisions of the Treaty dealing with the sharing of benefits accruing from its implementation have been in dispute. The present paper examines one aspect of this dispute, namely opposing views held by Alaskans and Canadians regarding factors to be taken into account in determining entitlements of harvests of stocks of salmon subject to competitive fishing.

The Pacific Salmon Treaty and the "Interception Problem"

Before examining these differing views, a brief sketch of the life history of salmon would seem appropriate. Salmon, both Pacific and Atlantic, carry out long migrations at sea beyond the limits of national jurisdiction of the State in whose rivers they originate. Though they may wander broadly, the salmon almost unerringly return to the rivers, streams, lakes and estuaries in which they originated. This creates opportunities for fishers of countries other than the State of origin to harvest ("intercept") salmon originating in other States' waters. Thus, salmon bound for the rivers of North America are vulnerable to harvest by foreign fleets operating offshore beyond the limits of Canadian and United States jurisdiction. Closer to home, in the coastal waters of the eastern North Pacific Ocean, Canadian and United States fishers intercept each other's salmon bound for spawning grounds in Washington state, British Columbia and southeast Alaska and, in the Arctic, United States fishers intercept salmon bound for Canadian sections of the Yukon River. In the Atlantic, salmon of both North American and European origins are taken in waters off the coast of Greenland and Canadian fishers intercept salmon bound for United States rivers to the south.

Concentrating in dense schools on their homeward journey, salmon are susceptible to overfishing. In order to ensure that sufficient mature fish reach the spawning grounds, the fisheries have to be tightly restricted. Modern fishing gear is so efficient that, in many areas, fishing must be limited to only a day or two a week. Were such limitations not in place, the runs would quickly be fished to commercial extinction. Interceptions, often unpredictable and sometimes substantial, can greatly complicate management and deprive fishers of the State of origin of harvests of fish originating in their own rivers.

2 Treaty between the Government of Canada and the Government of the United States concerning Pacific Salmon. Entered into force March 18, 1985. TIAS No. 11091.

The Canada/United States interception problem arises because Alaskan fishers harvest Canada-bound salmon and vice versa, Canadian fishers harvest salmon bound for the rivers of Washington, Oregon and Idaho, and Washington State fishers harvest salmon bound for southern British Columbia. At the time the PST was concluded in 1985, in terms of commercial value, over a quarter of the total harvest of sockeye, chinook and coho salmon in the waters of southeast Alaska, British Columbia and Washington State comprised intercepted fish.³ Such interceptions were not only a political irritant but also a real impediment to management and development. It became extremely difficult to justify efforts to increase salmon production on both sides when the benefits of such efforts to increase stocks were subject to variable and often uncontrollable harvests by fishers of the other country.

Adequate management of fisheries for intercepted stocks clearly demands cooperation between management agencies of both countries, and, with each country facing vigorous internal demands for access to resources, requires rules for sharing the resources that can only be provided through international agreement.

The Principles of the Treaty: Conservation and Equity

In order to meet these concerns, the Pacific Salmon Treaty was concluded in 1985 to put to rest over 75 years of controversy regarding the conduct of intercepting fisheries on both sides. To accomplish its purpose, the Treaty has two central elements. The first, known as the conservation principle, creates an obligation for the two Parties to cooperate to **conserve** the stocks by requiring the Parties to conduct their fisheries and enhancement programs so as to *prevent overfishing and provide for optimum production* (Article III.1.a). The second, known as the equity principle, was aimed at providing certainty and equity in the **sharing of benefits** of treaty implementation by stipulating that the fisheries and enhancement programs of the two Parties would: *provide for each Party to receive benefits equivalent to the production of salmon originating in its waters* (Article III.1.b). The latter principle reflected the need to ensure that the country making sacrifices and expenditures to conserve its salmon resources would reap the benefits of its own efforts.

The treaty principles are implemented through a series of annexes to the Treaty which specify actions to be taken by each Party to control its intercepting fisheries. When the Treaty was signed in 1985, most Annexes covered the first 4-8 years of its operation. The Parties have since attempted to negotiate new arrangements in advance of the expiration of the initial Annex

3 Based on data from Pacific Salmon Commission. 1993. Third Report on the Parties' Estimates of Salmon Interceptions - 1980-1991. Joint Interceptions Committee. Report JIC (93)-1. 25 pp. plus appendices. Revised on the basis of subsequent data exchanges through the Joint Interceptions Committee.

arrangements. Little progress has been made in such renegotiations, however, mainly because the two Parties cannot agree on how the equity principle should be implemented in terms of practical fishing regimes.

The Difference of Opinion

The difference between the Parties focuses mainly on the question of the strength of the sharing obligation specified in the equity principle. Peripheral to the formal dispute, Alaskan representatives have recently cast doubt on whether the term *waters* in the equity principle (see above) referred only to waters in which the salmon were spawned or whether the term included marine waters where the salmon may be found (often off the coast of the second country) at a later stage in their life history. The Alaskans argue that arrangements for sharing of harvests of salmon in the Canada/United States Pacific Salmon Treaty go beyond consideration of the place of origin and should take into account the contribution made by *host nations*, i.e., nations in whose marine waters salmon spend a portion of their lives.⁴ The Alaskan paper extends this postulate by questioning the extent to which the place of origin of salmon confers proprietary rights on the State of origin for the salmon's harvest.

In respect of the Alaskan contentions, Canadians, and until recently, United States representatives, have always understood that the term *waters* in Article III.1.b referred exclusively to the rivers, streams, lakes, estuaries and enhancement facilities where the salmon originated, i.e., the waters in which the eggs were laid and embryonic development took place prior to the young salmon beginning the free-swimming stage of their lives.

The purpose of the present manuscript is to examine the text and negotiating history of the PST and of related negotiations in order to determine the intent of the Parties regarding the extent to which marine factors should be taken into account in implementing the Treaty's harvest sharing ("equity") provisions and the extent to which the Parties considered that the origin of salmon conferred proprietary rights for their harvest on the State of origin.

The Contentions of the Alaskan Paper

Relevance of Marine Factors in Equity Implementation

In a nutshell, the Alaskan paper contends that the position, attributed to Canada, that *production of and propriety rights to salmon are defined solely by spawning location*, is in error. In the Alaskan view, the equity principle should take into account *Pacific salmon migratory behaviour in the ocean and the critical role of marine residence in salmon production*.⁵

4 Jev Shelton and Jeffery P. Koenings. 1995. Marine factors in the production of salmon: Their significance to the Pacific Salmon Treaty. Alaska Fishery Research Bulletin. 2(2): 156-163.

5 Ibid. at 156, para 1.

Without explaining why, the authors state that:

*Taking into account marine elements of complex salmon life cycles seems intuitively essential in determining legitimate national claims to salmon that cross jurisdictions.*⁶

Proprietary Rights to Benefits from Salmon Production

The paper presses strongly for control of fisheries using an "abundance-based approach" i.e., with regulatory limits being related to the strength of runs harvested, whether the fisheries were harvesting domestically-produced or foreign stocks. This is in contrast to a number of provisions of the annexes agreed to in 1985 which, for specified periods, placed caps or limits on the number of fish harvested.

Noting that the PST calls for equity in the extent to which each country harvests ("intercepts") salmon bound for rivers of the other country, the Alaskan authors contend that:

6 Ibid. at para 4.

Canada has consistently asserted that a nation has the right to harvest salmon spawned in its rivers and other nations do not. In the Canadian view, equity status should be determined by the relative gross values of intercepted salmon, meaning salmon caught in one nation's fishery that spawned in the other nation's waters. That is, the gross value of salmon intercepted by the nation's fisheries should be compared, equity being achieved only when the value of the respective interceptions is equal.⁷

Regarding Canada's purported position, the paper concludes that:

... international legal considerations and international conventions do not support the concept that a nation has exclusive rights to the value of salmon spawned in its waters that migrate into another nation's waters.⁸

Extent of Canada/United States Agreement on Principles

The paper further contends that the United States and Canada had always disagreed on the question of proprietary harvest rights for States of origin:

While Canada's focus on balancing interceptions and promoting exclusive rights to Canadian-spawned salmon has been maintained consistently for 25 years, the United States has never agreed with that view.⁹

7 Ibid. at para 5.

8 Ibid. at 157, para 3.

9 Ibid. at 160, para 8.

Focal Issues in the Alaskan Paper

Summarizing these views, in respect of the implementation of the PST, Alaska's contentions focus on three issues:

- The relevance of the marine life history stage *vis à vis* sharing arrangements in the PST.
- The nature and extent of harvesting rights accruing to a State in whose waters salmon originate.¹⁰
- The extent to which Canada and the United States disagreed regarding the PST's equity principle and the proprietary rights of States of origin.

The remainder of the present paper will show that, for all three issues, the Alaskan contentions are clearly at odds with the wording of the PST, with the history of its negotiation and with positions taken by both Canada and the United States in numerous international negotiations over the past 40 years.

The Plain Language Meaning of the Treaty

A simple reading of the treaty text is sufficient to set aside Alaska's contentions that the Treaty should take into account marine residence. Article III 1.b clearly indicates that the Treaty does not take such factors into consideration, stating that implementation of the Treaty should *provide for each Party to receive benefits equivalent to the production of salmon originating in its waters*. (Emphasis added). The waters referred to are obviously the waters where the eggs were deposited and embryonic development carried out. There is no way the word *originating* could ever be interpreted to include waters of another country scores or hundreds of miles away from the waters where the salmon were spawned.

Clearly, the drafters of the PST were relating the sharing arrangements of the Treaty to the true waters of origin - the streams, rivers, lakes, estuaries and enhancement facilities where spawning

10 The Alaskan authors have never defined their view regarding exactly what "proprietary" or "ownership" rights are. In the present paper, it is assumed that the Alaskans consider that the Canadian position that States of origin should have the right to receive benefits commensurate with (equivalent to) the production of salmon in its own waters is an expression of the State of origin's "proprietary" or "ownership" right to the resource.

occurs and not to marine areas of other nations where the salmon may spend some time later in their life cycle.

The Alaskan authors attempted to obscure the issue by making a play on words. Their paper states:

One of the contentious debates during negotiation of the PST centred on salmon production. Canada argued for wording in Article III that would credit each nation for "production of salmon originating in its rivers." However, the accepted wording, "in its waters," reflected that salmon are the product of much more than freshwater birthplace.¹¹

These comments imply that there was an important debate during the PST negotiations regarding whether the term "rivers" or "waters" should be used in phrasing the equity principle. Such a debate never occurred. A search of the records of Treaty negotiating sessions of the PST and a canvass of Canadian officials participating in Treaty negotiations from 1971 through 1985 failed to reveal any mention of marine factors entering into the formulation of the equity principle. In keeping with the consistent positions of both countries over many years and in many forums, the term "waters" was never intended to indicate anything else but the location of the spawning grounds in which the salmon originated.¹²

11 Shelton and Koenings, n. 3 above, at 156, para. 4.

12 Debate did occur, however, regarding how the equity provision should apply to salmon produced in rivers shared by the two countries, i.e., transboundary rivers rising in Canada and draining to the sea through the United States (e.g. the Stikine and Taku Rivers in the Alaska Panhandle area). The question arose because, within the transboundary rivers, salmon spawned on both sides of the border. The Parties considered the rivers to be truly international - transboundary salmon could not survive without both countries preserving the rivers for salmon production.

Canada originally contended that, in implementing the equity principle, salmon spawning in Canadian sections of transboundary rivers should be considered the same way as any other Canadian fish. The United States argued that such a monopolistic position was unfair, considering its important interest in the system and its salmon resource. Canada eventually accepted that Canadian transboundary fish would be treated differently from Canadian salmon originating in coastal Canadian rivers; i.e., United States interceptions of salmon bound for Canadian section of the transboundary rivers should not be counted in equity balances in the same way as United States interceptions of salmon bound for coastal rivers in British Columbia. Instead such interceptions should be "discounted" with a proportion of the interceptions being subtracted from the total equity balance as if they were of United States origin.

During the negotiations, the Parties attempted to reach a compromise based on the concept of discounting. Discussion, however could not be brought to finality in the time available. As outlined in para D of the 1985 Memorandum of Understanding the Parties therefore decided that, in respect of salmon originating in transboundary rivers: *...whereas the Parties have encountered difficulties in determining the percentage of the total allowable catch of salmon that shall be deemed to be of United States origin for the purpose of implementing Article III, paragraph 1(b) of the Treaty, ... The Parties therefore agree that the Commission shall determine this percentage during the first year following entry into force of the Treaty.* Despite the instruction to reach a decision within one year, agreement still has not yet been reached on this question..

The "deeming" issue, with its focus on how and not whether fish should be included in equity equations, is again evidence that, contrary to the Alaskan view, the drafters of the Treaty intended that implementation of the equity principle would involve counting and balancing of interceptions by fishers of the two Parties.

In developing the 1982 draft agreement, there also was debate on how sockeye salmon bound for Canada's Fraser River would be treated in implementing the equity principle. Considering that, since 1937, through the bilateral International Pacific Salmon Fisheries Commission, both Canada and the United States had shared in the management and enhancement of the Fraser sockeye stocks, the United States claimed that it should receive credit for its contribution. Canada acknowledged that consideration should be given to past United States contributions. In response to this concern, Canada agreed to allocate the United States a larger Fraser sockeye share for the first four years of the Treaty than would have been appropriate otherwise. On this basis the issue was settled in the Treaty negotiation and reflecting this, unlike the case of the Transboundary salmon, there was no need to include a "deeming" provision for Fraser sockeye in the MOU.

The simple facts are that, from the early 1970s to early 1982, the term "rivers" was consistently used in expressing the equity principle in successive agreed treaty drafts. It was during the final fine-tuning of the draft in early 1982¹³ that Canada proposed the term "waters" be used in expression of the equity principle to reflect the fact that salmon spawned not only in rivers but in streams, lakes, estuaries and enhancement facilities as well.

From the foregoing, it is quite evident that the substantive debate that the Alaskan authors imply occurred during negotiation of the treaty text simply did not take place.

Confirmation Provided by the Treaty's MOU

The clear meaning of *waters* in the Treaty is made even clearer in the Memorandum of Understanding (MOU), which is an integral part of the Treaty. The first part of the MOU provides guidance to the Parties on how the equity principle is to be implemented. In respect of long-term fishery and enhancement activities, the MOU specifies that:

13 Although the Treaty was not finally signed until January, 1985, the text of the Treaty had been developed (with the exception of a single word dealing with the Yukon River) and initialed by negotiators in December 1982. The negotiations between 1983 and 1985 were concerned with the development of annexes dealing with fishing plans to implement the Treaty during its start-up phase. The word *waters* first appeared in a Canadian draft dated March 30, 1982 which, according to correspondence records, was discussed with United States officials in early April, 1982.

... if it is determined that one country or the other is deriving substantially greater benefits than those provided from its rivers, it would be expected that the Parties would develop a phased program to eliminate the inequity within a specified time period, taking into account the provisions of Article III, paragraph 3.¹⁴ Since correction of imbalances is a national responsibility and may involve differential fishery adjustments or enhancement projects on a regional basis within either country, the Party with the advantage shall submit appropriate proposals to the Commission for consideration. Such proposals shall be discussed within the Commission and be reflected in the agreed fishery regimes and coordinated enhancement planning in ensuing years.¹⁵ (Emphasis added).

The use of the word rivers clearly establishes the birth place of the salmon as providing the basis for entitlement for sharing of benefits within the Treaty. The MOU also clearly indicates that, contrary to the implications of the Alaskan paper, implementation of the equity principle would involve measuring and comparing benefits each side would gain or lose as the result of interceptions, with interceptions being based on determinations of where the fish originated.

Understandings of United States Officials and Politicians

The Alaskan contention that the United States never agreed with Canada's position on equity is belied by statements made by United States officials at the time the Treaty was being considered by the federal administration. Thus, in his letter to the President of the United States explaining the PST, Secretary of State George Shultz stated that:

... the so-called equity principle is intended to provide for each Party to receive compensation benefits of unspecified form or quantity of fish harvested by one Party but originating in the waters of the other. To implement the equity obligations, the Commission is to ascertain the value of each Party's production of stock[s] which are intercepted by the other Party.

...

The United States section of the Commission has the responsibility for developing proposals to correct [the] equity imbalance in favour of the United States.¹⁶

In a 1985 hearing of the United States House Sub-Committee on Fisheries and Wildlife Conservation and the Environment, Ted Kronmiller, the Chief United States negotiator of the PST stated that:

14 Paragraph 3 provided that implementation of the principles of the Treaty would take into account the desirability of reducing interceptions, the desirability of avoiding undue disruption of fisheries and annual variations in abundances of the stocks.

15 PST. Memorandum of Understanding. Part A, at para. 3

16 Letter. U.S. Secretary of State George Shultz to the President. February 4, 1985, at 4 and 9.

*It might be found that the United States is in a deficit position in relation to its production of fish resources. In that case, we will have to make it up to Canada.*¹⁷

¹⁷ House of Representatives Subcommittee on Fisheries and Wildlife Conservation and the Environment. February 25, 1985, at 99.

*In the longer term, if there is an equity deficit on the U.S. side, enhancement should be the primary and first means used to address the deficit, so there is a short to medium term conservation impact to be addressed and a long-term equity impact that needs to be addressed.*¹⁸

At the same Sub-Committee hearing, PSC Commissioner for the United States and Director of Washington Department of Fisheries, Bill Wilkerson submitted a written statement which included the following:

*Like Canada on the Fraser River, the United States can now make significant investments in salmon with assurance that such investments will benefit our own fishermen. The principle of equity established in the Treaty provides that each nation receive the benefits equivalent to its own production. The adoption of management by ceilings or quotas in the treaty annexes is clear evidence that both nations intend to live by this provision.*¹⁹

The workings of the equity principle were well understood not only by United States Government officials involved in the negotiations and the initial implementation of the Treaty, but also by political leaders. Thus, in the House debate which passed the Pacific Salmon Treaty Act (H.R. 1093), the Hon. John Breaux, Representative from Louisiana and Chairman of the Merchant Marine and Fisheries Committee, stated that:

The principal purpose for "getting a handle" [on] interceptions ... is to ensure that each nation receives the full economic benefit for "its own" resources.

The equity Principle is intended to provide each Party with compensation benefits of unspecified form or quantity for the "intercepted" harvest of fish resources originating in the waters of the other ... To the extent the Commission is able to ascertain that the

18 Ibid. at 100.

19 Ibid. at 114.

*levels of interception by each Party are not equivalent, it is expected that within the Commission the parties will develop a phased program to adjust and compensate for the inequity.*²⁰

20 U.S. Congressional Record. March 5, 1985, at H988

There also did not appear to be any confusion on the part of Alaskan politicians. As outlined earlier,²¹ the text of the 1985 Treaty had been agreed at the level of negotiators in 1982. The negotiators proposed that the Parties conclude the Treaty on the basis of their draft. However, the newly elected Governor of Alaska, Bill Sheffield, was strongly lobbied by a number of Alaskan fisheries interests who were concerned about possible effects of the Treaty on their fisheries. In response, the Governor appointed an Advisory Committee to review its contents. On the basis of the Committee's recommendations, the Governor announced that he would not endorse the draft and urged further negotiations.²² His objections focused not on the terms of the Treaty but on provisions of fishing plan annexes and other administrative arrangements. The letter did not address the equity principle.²³ Thus, whereas Alaska did have objections to some aspects of the 1982 treaty annexes, and forced United States rejection of the Treaty at that time, such objections had nothing to do with the expression of the equity principle in the Treaty nor in the implementation of the principle as spelled out in the Treaty's MOU.²⁴

Negotiating History - The Origin of the Equity Principle

The foregoing should be sufficient to lay to rest any Alaskan contentions regarding obligations by the Parties to take marine factors into account in determining equity status. If greater certainty is required, one has only to refer to the records of negotiations leading to the conclusion of the PST. Negotiation of a comprehensive salmon treaty began in 1971. In June of that year, negotiators reached an *ad referendum* agreement on a series of principles to guide the substantive negotiations that were to follow.

21 See n. 12 above.

22 See Jensen, Thomas C. 1986. United States-Canada Treaty. The United States-Canada Pacific salmon interception treaty: An historical and legal overview. Environmental Law. Northwestern School of Law of Lewis and Clark College, at 395, footnote 88.

23 Letter from Alaska Governor Bill Sheffield to Secretary of State George Shultz, March 28, 1983. Governor Sheffield's letter listed seven areas of concern comprising : chinook harvest limits generally; lack of specific limits on some Canadian chinook fisheries; lack of comparability of Canadian and Alaskan chinook fishing regulations; level of Canadian fisheries on transboundary rivers; need for assurances that Alaska would be able to harvest its own salmon production under proposed treaty limits; need for clarification of provisions regarding Yukon River salmon; and, procedures for ratification of the treaty.

24 However, Joy Yanagida reported that, almost two years after the conclusion of the 1982 draft, in November 1984 (a few weeks before the final 1985 treaty was initialled by negotiators), Alaskan Commissioner of Fish and Game Don Collingsworth wrote to Deputy Secretary of State Edward E. Wolfe expressing the view that the equity principle was contrary to the interests of the nation, and international law and had to be renegotiated. (Yanagida, Joy A. 1987. The Pacific Salmon Treaty. American Journal of International Law. 81(3) at 588). This expression came very late in game and did not receive a positive response from the United States Government. No attempt was made to renegotiate the equity clause. As evidenced by a 96-0 United States Senate vote to give its advice and consent, Mr. Collingsworth's initiative also failed to gain political support.

These principles were never rejected by the negotiators nor by their Governments and, throughout the negotiations, the principles provided the framework for the final agreement drafted in 1982 and finally signed in 1985.

Inter alia, the principles provided that:

Each country should reap the benefits of its efforts to maintain or increase its stocks of salmon.

Each country should fish the salmon bound for its own rivers and should seek to avoid interception of salmon bound for their rivers of origin in the other country.

There shall be an equitable balance between the interception by the two countries. By equitable balance is meant that the total value of salmon intercepted by the United States bound for Canadian rivers shall, as nearly as possible, equal the total value of salmon bound for the United States rivers caught by Canada.

This equitable balance should be achieved where possible by reducing, rather than increasing interceptions.

Each country should seek to make adjustments in the techniques and economics of its fisheries which will make reduction of interceptions possible.

These adjustments must take into consideration the overriding requirements of conservation.²⁵ (Emphasis added)

These agreed principles expressly related harvest "entitlements" to rivers of origin, clearly called for counting and balancing the value of interceptions, further indicating that United States and Canada had no disagreement regarding the "proprietary" harvest rights that flowed from their respective positions as States of origin.

The unequivocal evidence provided by the 1971 statement of principles regarding the intent of the Parties makes ludicrous the Alaskan contention cited earlier that:

25 Minutes of Proceedings and Evidence of the Canadian Parliamentary Standing Committee on Fisheries and Forestry. May 1, 1974, at 9.8.

*While Canada's focus on balancing interceptions and promoting exclusive rights to Canadian-spawned salmon has been maintained consistently for 25 years, the United States has never agreed with that view.*²⁶

The Record in the Global Arena

It has been established above that the text of the Treaty and its negotiating record do not support the Alaskan contentions. If still more proof is needed, one has only to refer to records of the participation of the Parties in the broader international arena. A review of these records reveals that the opinions expressed in the Alaskan paper regarding Canadian and United States attitudes on the rights of States of origin are incongruously out of touch with the history of Alaska's positions *vis à vis* foreign fishing activities and with positions of the Governments of the United States and Canada in international initiatives beyond the PST. In the latter initiatives, shoulder to shoulder, and with Alaskan advisors to the forefront, both Governments fought to protect their respective salmon resources from interceptions by other parties. In part, they did so by attempting to establish, in international law, the proprietary rights of States of origin to harvests of fisheries resources originating in their territories.

26 N. 8 above.

Succeeding sections of this paper trace the history of United States involvement in multilateral negotiations regarding the management of international fisheries for anadromous species such as salmon. As background for such an historical analysis, it would seem useful to review the conclusions of a recent study by United States academic William T. Burke on the status of the emerging international law regarding such fisheries.²⁷

In a general vein, Burke observed that:

*Because salmon species are intimately related to land areas, beginning and ending life in fresh water, they are sometimes closely associated with the aspirations and beliefs of the people who surround them. This makes salmon enormously important in the social and cultural life of their home territory ...*²⁸

*The basic claim pertaining to salmon is that by the state of origin to extend its authority over these species wherever they go in the ocean. The main object of the claim is to maximize the return of the salmon from their high seas sojourn into fishing and spawning areas. This claim opposes any harvest of salmon [in] regions beyond national territory, whether the take is by direct harvest or a bycatch.*²⁹

*Because salmon originate within a state and are fished most efficiently and with greater accountability as they return to these waters to reproduce, this state has not only the most substantial interest in their harvest, but also is the only state with significant capacity to assure their continued productivity and existence.*³⁰ (Emphasis added)

After establishing the substantial interests of States of origin, without whose efforts in conservation and environmental protection salmon resources could not continue to exist, Burke went on to speculate on the interests of nations other than the State of origin in salmon harvests on the high seas. In respect of such third States, Burke noted that:

27 Burke, William T. 1994. *The New International Law of Fisheries*. Clarendon Press. Oxford.

28 *Ibid.* at 151.

29 *Ibid.* at 152.

30 *Ibid.* at 153.

... it is certainly a cost to high seas fishing states if they refrain from direct or indirect harvesting of salmon in this region. Refraining from takings incidental to fishing for other species seems to merit at least some weight in deciding upon allocation of the benefits of salmon harvesting by the state of origin.

In this regard he observed that:

*To date, these questions have not been considered in decisions about salmon ... and the allocation of benefits between high seas fishing states and states of origin.*³¹

Burke's observations confirm that marine factors have not played a role in international decision-making regarding the sharing of Pacific salmon harvest benefits between States of origin and high seas fishing States.

Burke moved on to consider relations between States of origin fishing salmon within their respective limits of national fisheries jurisdiction:

*Conservation and allocation of salmon stocks between states who share a number of these species in their jurisdictional waters pose other policy problems. It is an extremely tangled and complex matter which can really only be resolved by good faith negotiations between the states concerned, which seek to allow each state to benefit from the fish which originate within its borders.*³² (Emphasis added)

From the foregoing, it is clear that Burke considers that the relationship between States of origin turns on where the salmon were spawned and not on where they spend their life at sea.

Moving on now to particulars.

31 Ibid. at 154. However, based mainly on a paper by Jill Bubier, Burke also discussed NASCO's treatment of the marine "pasturage" question. This subject and Bubier's paper are discussed later in the section dealing with Atlantic salmon. See n. 66 below.

32 See Burke, n. 26 at 154 and 155.

Ancient History - Protecting Alaska's Marine Resources Prior to World War II

Fur Seals

When the United States purchased Alaska from Russia in 1867, it inherited the world's most abundant salmon-producing waters and a wealth of other marine resources. Foreign threats to those resources in the 1870s and 1880s generated intense diplomatic activity by the United States over the next three decades. Initially the problem arose from offshore fisheries for fur seals that threatened the United States sealing operation, which was limited to a land hunt on the Pribilof Islands. In 1886, United States custom patrols seized three Canadian sealing vessels 60 miles from the nearest land off the Alaskan coast. A further seventeen vessels were either seized or warned to leave the Bering sea between 1887 and 1890. Great Britain, on behalf of the Canadian fishers, protested the seizures and claimed compensation, contesting United States jurisdiction beyond the then accepted international limit of 3 miles from shore. The two parties attempted to negotiate a solution to the problem, finally agreeing to submit the question to a formal arbitration commencing in 1892.³³

At the time, the United States was an expanding maritime power, desirous of maintaining freedom of navigation for its trade and naval activity and for its expeditionary fisheries activity off the coasts of other countries (e.g. whaling world-wide and fishing for cod off Canada's east coast). For this reason the United States defense in the arbitration stopped short of claiming sovereignty over waters beyond three miles from shore.³⁴ It focused instead on the dependence of its coastal industry on the resource and the presumed right of the coastal state to take action to protect the resource from overexploitation and to reserve its use for its domestic industry. Rather than an assertion of sovereign jurisdiction, it was ... *a right of self protection and self defense*.³⁵

As stated by Mr. Phelps of the United States Legation in the United Kingdom prior to the arbitration:

*Here is a valuable fishery, and a large and, if properly managed, permanent industry, the property of nations on whose shores it is carried on.*³⁶

33 Moore, J.B. 1898. History and Digest of the International Arbitrations to which the United States has been a Party. Vol. I at 763-917.

34 Indeed, until the late 1970s, the United States was one of the leading advocates for limitation of national maritime jurisdiction to 3 miles from shore. E.g., see Johnston, Douglas M. 1965. The international law of fisheries. Yale University Press. 554 p.

35 Cited in Leonard, L.L. 1944. International Regulation of Fisheries. Carnegie Endowment for International Peace, at 69.

36 Report by Mr. Phelps of the United States Legation to the United Kingdom, quoted in Moore, n. 32 above, Vol I, at 783.

In the arbitration, the United States extended the arguments, likening seals to domestic animals and claiming that *the action taken by the U. S. Government to exclude pelagic sealers from the Bering Sea was based upon a property right in the fur seals.*

In its arguments, the United States contended that fur seals must be considered *as subjects of property so long as they possess the animus revertendi, evidenced by their usual habit of returning to a particular place.*³⁷ This position, emphasizing the place of origin as a determinant of ownership, presents an interesting analogy to the case put forward by Canada and the United States regarding State of origin "ownership" of salmon in the 1970s.³⁸

The theme developed in connection with the fur seal dispute, namely the reservation of coastal State resources for coastal State fishers as long as the coastal State could demonstrate full utilization and the capability and commitment to adequately conserve the resource,³⁹ was at the centre of United States fisheries diplomacy for the next three quarters of a century, eventually emerging as the "abstention principle" in the 1953 North Pacific Fisheries Convention. The position had the advantage to the United States of being based on criteria which did not require declarations of full sovereignty beyond the 3-mile limit.⁴⁰

37 See Johnston, n. 33 above, at 208. The arbitral tribunal ultimately rejected the United States argument. See Moore, n. 32 above, at 917.

38 E.g., see n . 55 below.

39 Explaining the United States position, Mr. Carter of the United States, *referring to the property of the United States in the Alaskan seal herd and their right to protect their sealing interests and industry*, contended that the United States had a *property interest in the industry long established on the Pribilof Islands of maintaining and propagating the seal herd, and appropriating the increase for purposes commerce and profit.* Further elaborating on United States interests, Mr. Carter claimed that the United States had, by reason of the nature and habits of the seals and their ownership of the breeding grounds to which the herds resort, *... a property interest in the herds as well while they are in the high seas as upon the land.* See Moore n. 32 above, at 831-832.

40 The United States, however, did take steps to give to itself limited jurisdiction in offshore waters. In 1889, during negotiation of the fur seal dispute, the Senate passed legislation called the *Bill ... to provide for the better protection of the fur seals and salmon fisheries of Alaska ...* (S3993) to make existing legislation apply to all waters of the Bering Sea covered by the Alaska purchase agreement (the area lying eastward of the approximate mid-point of the Bering Strait between Attu and Komandorski Island). Congress also passed an amendment to the Revised Statutes of the United States extending the prohibition the killing of fur-bearing mammals *to include and apply to all the Dominion of the United States in the Behring Sea.* See Moore, n. 32 above, at 763-765. The salmon portion of the Bill dealt with prohibition of construction of obstructions in streams and for the initiation of scientific studies on the life history of salmon and did not address the harvest of salmon at sea.

Pre-World War II Japanese Expeditionary Salmon Fisheries

The next major threat to Alaskan fisheries occurred in 1936 when the Japanese Government sent an exploratory fishing expedition to waters off Alaska's most productive salmon fishing grounds in Bristol Bay in the Bering Sea. This was followed in 1937 by the arrival of a fleet of Japanese commercial fishing vessels ostensibly harvesting crab. Based on sightings and aerial photographs, the United States alleged that the vessels were harvesting salmon. The Japanese incursion caused a major uproar within the Alaskan fishing community and triggered much deliberation by the United States authorities.⁴¹

As reported by Harry Scheiber:

41 Leonard, n. 34 above, at 121-136.

... in November 1937, the United States issued a stern diplomatic warning to Japan reaffirming American adherence to the three-mile offshore limit of jurisdiction - but making an exception of the Alaskan salmon on the equitable grounds that the American industry had maintained the fishery by accepting regulation. The fact that salmon, an anadromous species, spawned in Alaska's inland streams was also advanced as a justification in favour of an exception from the three-mile rule.⁴² (Emphasis added)

There were calls for declaration of United States ownership of the Alaskan salmon resource. In February 1938, Washington State Senator Lewis B. Schwellenbach stated:

I contend that because of these facts [the conservation program of the United States] these salmon belong to us. It is true that they go out into the open sea. It is true that they go beyond the imaginary three miles to which international law has limited our area of control. It is true that they don't carry the American flag on their backs to command our protection. But they were born in our waters. Our taxpayers spend their money conserving them. Our fishermen each year have sacrificed immediate profits to conserve them. We should no more be willing to submit to their destruction than to foreign destruction of any other of our property.⁴³ (Emphasis added)

The United States Congress was assailed by proposals for legislation to limit the Japanese fishery. Among them was one introduced in the House by Alaskan delegate Anthony J. Dimond which provided that the salmon *which are spawned and hatched in the waters of Alaska are hereby declared to be the property of the United States....*⁴⁴ In a radio broadcast, Mr. Dimond supported his proposal by stating that:

The Alaska salmon are American property, an American resource, protected and preserved and kept in being through our labour and the expenditure of our public money, as well as of private contributions. The remedy is a legislative one. Congress should

42 Scheiber, Harry N. 1989. Origins of the Abstention Doctrine in Ocean Law: Japanese:U.S. Relations and the Pacific Fisheries, 1937-1958. Ecology Law Quarterly. Vol. 16:23, at 30 and 31.

43 For the history of the Japanese salmon fishing episode see Leonard, n. 34 above, at 121-136.

44 H.R. 8344 Bill to protect and preserve the salmon fishery of Alaska, and for other purposes. November 15, 1937.

*immediately, by law, declare that the salmon so spawned and hatched in the waters of Alaska are the property of the United States, that they must not be taken, either in Alaska inland waters or in the waters adjacent to the coast of Alaska, except under such laws, rules and regulations as Congress may provide or authorize.*⁴⁵ (Emphasis added)

As described by Leonard:

45 See Leonard, n. 34 above, at 134.

*After declaring the salmon to be the property of the United States, the bill defined the jurisdiction of the United States as extending to all waters east of the international boundary line of 1867 whose depths are 100 fathoms or less and "which the President has found and declared to be salmon fishery law enforcement areas."*⁴⁶

Clearly, in order to defend its resources, Alaskan fisheries interests were espousing the concept of ownership of salmon resources originating in Alaska being harvested by Alaskan fishers. However, diplomacy prevailed and the Japanese agreed voluntarily to suspend their salmon survey operations *pro tem*. The advent of World War II soon after laid the problem to rest for some years.

INPFC and the Abstention Principle

With the conclusion of World War II in 1945, the United States, while anxious to see the speedy restoration of the domestic economy of war-ravaged Japan, was also determined that recovery should not include the resumption of Japanese expeditionary fishing off the North American coast. In advance of conclusion of a general peace treaty, the United States entered into negotiations with Japanese representatives regarding the future of Japanese fisheries.

Initially the United States proposed that Japan and the United States both voluntarily refrain from fishing off each other's coasts. This proposal, which was transparently unbalanced since the United States did not fish, and had no intentions of fishing, off the Japanese coast, was rejected by Japan.

In late 1951, the United States and Japan, joined by Canada, embarked on the negotiation of the tripartite North Pacific Convention which was concluded and came into force in 1953.⁴⁷ Canada and the United States had a common goal, which, as characterised in the authoritative history of the International North Pacific Fisheries Commission (INPFC) by Jackson and Royce, was based on the fact that *the northern Americans did not want to share salmon runs that spawned in their rivers, and that they felt they had conserved.*⁴⁸ (Emphasis added).

46 Ibid. at 134 and 135.

47 International Convention for the High Seas Fisheries of the North Pacific Ocean. Entered into force June 12, 1953. TIAS No. 2786.

48 Jackson, Roy I and William F. Royce. 1986. Ocean Forum : An interpretive history of the International North

In the negotiations, the United States returned to the position it began to espouse in the course of the Bering Sea fur seal dispute, namely that full usage of resources and application of conservation programs by coastal States justified exclusion of others from harvest of the resource.⁴⁹ In short, the approach represented a grant of proprietary rights to harvest resources off a nation's coast conditional on the harvesting State fully utilizing the resource and managing it on a sound conservation basis based on scientific studies.

The result was agreement on the "abstention principle", which, as articulated in Article IV of the INPFC Treaty, provided that, in specified areas, Parties would abstain from fishing stocks harvested by one or both of the other Parties where, inter alia, (1) evidence indicated that more extensive exploitation would not provide a substantial increase in yield; (2) the exploitation of the stock was under limitation aimed at maintaining or increasing maximum sustained productivity, and; (3) the stock was under extensive scientific study.

The Annex to the Convention provided for Japanese abstention from fishing salmon in waters eastward of a provisional line (at approximately 175⁰W) ... *in which commercial fishing for salmon originating in the rivers of Canada and the United States of America is being or can be prosecuted.* (Emphasis added)

Anticipating the spirit that eventually led to the negotiation of the PST, the United States and Canada exempted each other from the abstention provision in the Gulf of Alaska,⁵⁰ but Canada agreed to abstain from fishing salmon in the Bering Sea.

49 The abstention principle was not limited to salmon, but included halibut and herring as well. For an extensive description of the development of the abstention principle see Scheiber, n. 41 above.

50 As specified in para. 1 of Article IV, such exemptions were justified, where there was an ... *historic intermingling of fishing operations of the Parties concerned, intermingling of the stocks of fish exploited by these operations, and a long established history of joint conservation and regulation among the Parties concerned so that there is*

consequent impracticability of segregating the operations and administering control.

When the INPFC Treaty was signed, many thought that limitation of Japanese fishing to the area westward of the abstention line would give adequate protection to North American salmon resources. However, in the late 1950s, high seas research studies indicated that fisheries by Japan in areas adjacent to the abstention line were taking substantial numbers of sockeye salmon bound for Bristol Bay. To counter this, from the late 1950s until the INPFC Treaty was amended in 1979 (following extensions of jurisdictions by the United States and Canada to 200 miles in 1977), the United States held separate bilateral discussions with Japan regarding the conduct of Japanese fisheries that intercepted Alaskan salmon.⁵¹ Such discussions led to Japan placing some restraints on its eastern Pacific fisheries beyond those prescribed in the INPFC treaty.⁵² The 1977 extension of jurisdiction by the United States, accompanied by renegotiation of the Convention in 1979, further limited Japanese fishing activities. As will be discussed later, in 1992 the INPFC Convention was replaced by a four power treaty, including Russia, that provided for further limitations of offshore intercepting fisheries.

The 1958 Law of the Sea Conference

In the mid-1950s, the United States, supported by Canada, began to seek global agreement on the abstention principle as a basis for the management and allocation of fisheries for coastal and anadromous resources. However, a joint United States-Canada proposal for adoption of the principle was defeated at a plenary vote at the 1958 United Nations Law of the Sea Conference.⁵³

As assessed by Harry Scheiber, failure to achieve agreement was the result of opposition from many sources, including:

- Distant-water fishing nations eager to avoid exclusionist claims by coastal States.
- Coastal States (such as Iceland and Peru) who were seeking wider fisheries jurisdictional limits and viewed the abstention principle as not going far enough.
- Domestic United States distant water fishing interests (mainly involved in tuna fishing) who feared that global adoption of the principle would result in exclusion of United States fleets from lucrative tuna waters, particularly of the coast of South and Central America.⁵⁴

51 E.g., see Jackson and Royce, n. 47 above, at 69.

52 See Scheiber, n. 41 above, at 93.

53 Johnston, Barbara. 1977. Canadian foreign policy and fisheries in Johnston, Barbara and Mark. W. Zacker (Eds.). Canadian Foreign Policy and the Law of the Sea. University of British Columbia Press, at 52-99.

54 See Scheiber n. 41 above, at 94. In the late 1950s, the United States was developing a very active distant-water tuna fishery whose well organized operators strongly lobbied the United States Government to maintain an open sea policy everywhere. In 1958, the tuna industry advised the State Department that it would no longer support the principle.

The usefulness of the abstention principle as a tool for limiting Japanese high sea fishing was also losing support in the United States. As outlined above, because the INPFC Treaty did not deal with all areas where substantial numbers of salmon of United States origin were intercepted, the Treaty had failed to limit Japan's high seas fishery as many members of the United States fishing community desired.

These circumstances spelled the end of the abstention principle as an important element in the elaboration of a new Law of the Sea.

Responses to New High Seas Threats - the "Special Interest" Doctrine

The 1960s and early 1970s represented a period of increasing third party interest in high seas fishing for North American salmon on both the Pacific and Atlantic coasts. During the early 1970s, ground was being laid for a new United Nations Conference on the Law of the Sea. As was outlined earlier, 1971 also marked the initiation of the negotiation of the Pacific Salmon Treaty.

With abstention a dead issue, and faced with these increasing challenges, the United States and Canada sought new approaches for protection of their fisheries resources. For salmon, they developed the "special interest" concept.

The concept received first expression in negotiations between Canada and the United States on salmon problems beginning in the mid-1960s.⁵⁵ It was based on the recognition that regulation of salmon fisheries is most effective if runs are fished separately and that, for reasons of equity and to justify the large expenditures involved, each country should reap the benefits of its efforts to maintain or increase the stocks and should therefore seek to avoid interceptions of salmon bound for their rivers of origin in other countries.

This became the centrepiece of joint United States-Canada efforts to halt the spread of third party intercepting salmon fisheries.

Atlantic Salmon

The 1971 Joint Declaration

The special interest concept was first introduced in a multilateral forum in relation to fisheries for Atlantic salmon in the early 1970s. In the late 1960s, Canada and the United States became concerned with the development of high seas fisheries by European countries in the North Atlantic and also the development of the near-shore fishery off the coast of Greenland. Tagging studies showed that both these fisheries depended on salmon originating in the rivers of North America or continental Europe.

55 E.g., see n. 20 above.

The two North American States began a campaign to ban high seas fishing for Atlantic salmon and to bring the Greenland intercepting fishery under control. In November 1971, as background for negotiations, the United States and Canada issued a joint declaration based on the special interest concept:

The Governments of the United States and Canada consider the Atlantic salmon to be a particularly valuable natural resource, and note the unique dependence of the species on the rivers of origin for survival - a dependence found among very few species of the world, and even fewer in the North Atlantic. The Governments ... also note the heavy burden borne by those nations where these rivers are found in maintaining the rivers in a suitable condition to maintain the salmon runs, and otherwise in taking action to preserve the species.

The ban on high seas salmon fishing must be considered a unique conservation tool, not generally applicable to most other species of fish found in the ocean, because of the unique dependence of anadromous species on positive action by the state of origin to maintain them.

... the Governments ... affirm their belief that the rational method of managing the Atlantic salmon resource is by limiting the harvesting to the extent practicable to the country of origin of the salmon.⁵⁶ (Emphasis added)

At no time and in no way did the United States suggest that the rivers expressed in this Declaration did not apply to Pacific salmon.

The 1972 ICNAF Agreement

Consistent with the 1971 joint statement, in 1972, the International Commission for the Northwest Atlantic Fisheries (ICNAF) recommended a phase-out of high seas fishing for Atlantic salmon and the imposition of limits on the inshore Greenland fishery.⁵⁷

The United States was the chief architect of the ICNAF salmon agreement. Danish concurrence with limitation of its own high seas fishery and of fishing in the inshore waters of its Greenland dependency was a prerequisite to reaching agreement. With strong pressures from recreational fishing interests at home, the United States conducted a vigorous diplomatic campaign, including the threat of economic sanctions, to gain Danish acquiescence. The result was a bilateral

56 United States Department of State. December 24 1971. U.S.-Canadian Joint Statement on Atlantic Salmon. Press Release No. 304. 3 pp.

57 ICNAF. 1972. Proceedings of the 22nd Annual Meeting. Proceedings No. 13. Appendix III. See also Buck, Richard. 1993. Silver Swimmer. Lyons and Burford Publishers, at 135.

agreement between the United States and Denmark which provided for a four year phase-out of Danish high seas fishing and a stabilization of the inshore catch in Greenland waters. Canada had originally joined with the United States in the diplomatic offensive but withdrew because, in Canada's view, the compromise being reached did not go far enough or fast enough.⁵⁸

Consistent with Canada's concerns that the United States-Denmark agreement did not go far enough, Canada voted against the ICNAF agreement, co-sponsored by the United States, Denmark, the United Kingdom and Norway. As a footnote to history, the influential United States recreational fishery lobbyist, Richard Buck noted that:

After their walkout just before the negotiations began on the U.S.-Danish agreement, the Canadians were not held in very high regard by the nations involved. They lost even more stature at this ICNAF meeting.

58 See Buck, n. 56 above at 124 and 125.

*Throughout, Don McKernan [the United States negotiator] had stressed the fact that we were very lucky to get what we did, and that it would be a breach of faith to press for more.*⁵⁹

From the foregoing, it is evident that the United States, through its willingness to compromise with States which intercepted salmon but which produced no salmon themselves, considered itself the catalyst for bringing overseas interceptions of North American Atlantic salmon under control. As will be demonstrated, however, willingness to compromise in ICNAF did not signify that the United States would abandon its efforts to obtain greater protection for anadromous species on a global basis.

Negotiation of the NASCO Convention

After the ICNAF agreement, the United States continued to spearhead international efforts to control intercepting fisheries for Atlantic salmon. The effort concentrated on a United States proposal to form a trans-Atlantic salmon organization. This reached fruition in 1982 with the signature of the Convention for the Conservation of Salmon in the North Atlantic Ocean.⁶⁰

Canada initially resisted the United States initiative, being concerned that the international regulatory system being proposed *would intrude in Canada's domestic salmon management and give non-producing states an unwarranted voice in what was essentially Canadian business.*⁶¹

59 Ibid. at 137.

60 Convention for the Conservation of Salmon in the North Atlantic Ocean. In force for Canada, October 1, 1983. TIAS No. 10789. For an account of the United States campaign to develop the Treaty see Buck, n. 56 above, at 181-244.

61 Buck, n. 56 above, at 195.

In the end, Canada concurred when it was agreed that there would be a separate commission dealing with the North American area, essentially limited to consideration of bilateral concerns of the United States and Canada. In addition to the North American Commission (NAC), the Convention established a West Greenland Commission, involving the "host State" interest of Greenland (represented in 1984 by the EEC)⁶² as well as States of origin and a North-East Atlantic Commission covering maritime waters east of the West Greenland Commission area.⁶³

As expressed in the Preamble to the Convention, the objectives of the North Atlantic Salmon Conservation Organization (NASCO) established by the Treaty are to promote:

... the acquisition, analysis and dissemination of scientific information pertaining to salmon stocks in the North Atlantic Ocean.

*... the conservation, restoration, enhancement and rational management of salmon stocks in the North Atlantic Ocean through international co-operation.*⁶⁴

A focal element of the Convention was the banning of fishing for Atlantic salmon on the high seas and in national waters seaward of 12 miles from territorial sea baselines (except in West Greenland waters up to 40 miles from baselines and throughout the areas of fisheries jurisdiction of the Faroe Islands). In the West Greenland area, the United States and Canada were anxious to see more stringent limitation of the near-shore fishery. Diplomatically, however, the two North American States were sensitive to the special circumstances of the Greenland fishery, which provided one of the few economic opportunities for the indigenous people of Greenland. This consideration tempered the approach the North Americans took and made them stop short of demanding that interceptions in the Greenland area should be minimized. Reflecting this approach, the NASCO Convention and the way it has been implemented represents a compromise between interests of the States of origin and the host States. As a compromise, the Convention contains elements which are discordant with the State of origin positions taken by the North American States of origin. In general, however, the Convention strongly favours the States of origin position which, as will be outlined below, has led the United States to set a goal of the

62 In NASCO parlance, the term "host State" refers to *member parties who harvest salmon from their own waters and which are not produced there*. See Peterson, Allen E. Jr. 1988. Future of Atlantic Salmon Management: Law of the Sea/Fair sharing. Proceedings of the Symposium on Present and Future Atlantic Salmon Management. Portland, Maine, October 27-29, 1987, at 177.

63 NASCO Convention (n. 59 above). Article 3 para 3(b) and 4.

64 These goals are prefaced by a statement recognizing *that salmon originating in the rivers of different States intermingle in certain parts of the North Atlantic Ocean* (Emphasis added) and the notation that international law, anadromous fish provisions of UNCLOS, and other developments in international fora were to be taken into account.

complete elimination of all fisheries intercepting Atlantic salmon bound for United States rivers.⁶⁵

Unlike the PST, the NASCO convention does not contain an "equity" clause or any other provision to address the question of sharing of harvests of stocks subject to interception. As will be discussed later, reflecting differences in membership, the three commissions have different goals and terms of reference. All, however, are empowered to propose regulatory measures for intercepting fisheries. In making such proposals, Article 9 of the Convention requires the Commissions to take into account seven considerations, including, *inter alia*:

(c) the efforts of States of origin to implement and enforce measures for the conservation, restoration, enhancement and rational management of salmon stocks in their rivers and areas of fisheries jurisdiction ...

(d) the extent to which the salmon stocks concerned feed in the areas of fisheries jurisdiction of the respective Parties.

⁶⁵ See quotation cited in n. 88.

(g) *the interests of communities which are particularly dependent on salmon fisheries.*⁶⁶

The Article, reflecting the division of interests among the Parties, was clearly a pragmatic compromise, with its elements being somewhat equivocal.⁶⁷ Host States with few or no State of origin credentials favoured factors (such as paragraph d above dealing with "grazing") that could justify continuance of intercepting fisheries. On the other hand, States of origin clearly would have preferred a treaty based on the 1971 United States/Canada joint declaration promoting State of origin predominance in management and sharing. Indeed, the "grazing" paragraph (9.d),

66 NASCO Convention (n. 59 above) Paras. c, d and g of Article 9.

67 NASCO Article 9 has similarities to PST Article III.3 which requires the Parties to take into account the somewhat equivocal objectives of *reducing interceptions* and *avoiding undue disruptions of existing fisheries*.

introduced by the EEC (on behalf of Greenland and the Faroes) in January 1981, was initially opposed by the United States and Canada and only reluctantly accepted by them later in the year in the interest of reaching an overall agreement.⁶⁸

Why compromise was needed to reach agreement was amply demonstrated by the vociferous advocacy of host State interests, who pushed strongly for marine factors ("grazing") to be preeminent in NASCO considerations of sharing formulae. The host States also vigorously attacked United States/Canadian positions regarding the rights of States of origin. Illustrative of the vigorously argued host State positions in the NASCO negotiations, Faroese spokesman Atli

68 Although, as discussed later, there was no evidence that the "grazing" paragraph of Article 9 was ever taken into account quantitatively in establishing NASCO proposals for regulation, according to Bubier (Bubier, Jill L. 1988. *International Management of Atlantic Salmon*. Ocean Development and International Law. Vol. 19, at 45 and 46), once more in the role of mediator, the United States was at least prepared to give lip service to the grazing concept. As reported by Bubier, in 1986, when the EEC contended that Greenland had no right to share in the stocks, the United States responded that *although neither Article 66 nor NASCO mentions the concept of sharing, a mechanism for sharing the burdens and benefits must be developed since all parties to NASCO had agreed that the West Greenland fishery had a right to exist. The United States also mentioned that host states have a role in conservation as well as harvesting. Salmon stocks "graze" in Greenland's waters. Since this feeding stage of their life cycle is important to the health of the species, Greenland's waters are important for conservation.*

Dam indicated his belief that, when considering how Article 9 was to be implemented, the NASCO commissions would have to *attach weights to the following factors*:

1. *The best available scientific information on the state of the salmon stocks and the effect of the fisheries.*
2. *Grazing fee to the host State, contribution of host States to conservation and dependence of the host States on salmon fisheries.*
3. *Contributions of the States of origin to conservation, restoration and enhancement.*⁶⁹

He believed that NASCO could work *as long as the parties do not slide back into the use of obsolete concepts like "ownership" of the salmon stocks or to the nostalgia of the days before the fishermen and scientists found the oceanic grazing grounds of salmon.*⁷⁰

These views were reiterated in the NASCO context over the years. Thus, at the thirteenth annual meeting of the West Greenland Commission, the representative of Denmark (in respect of Greenland) expressed the view that:

*... Greenland and the Faroe Islands were the salmon-producing nations, homewater countries were smolt producers.*⁷¹

Such were the attitudes of non-State of origin host States, whose views, including the need for consideration of "grazing" ("pasturage") in making recommendations regarding regulatory action, had to be accommodated in concluding the NASCO agreement.

69 Dam, Atli. 1987. Interception fisheries - the Faroese point of view. Proceedings of the Symposium on Present and Future Atlantic Salmon Management. Portland, Maine, October 27-29, 1987, at 173.

70 Ibid. at 174.

71 NASCO. 1996. Report of the thirteenth Annual Meeting of the West Greenland Commission., at 128. A smolt is a young salmon leaving its stream of origin to begin its marine life.

However, when it came time to implementing the Convention, as will be outlined below, the "grazing" provision in the NASCO Convention was at most given lip service and then only in relation to host State fishery in West Greenland. It was never considered in the bilateral relation between the United States and Canada in NASCO's North American Commission.

Thus, in NASCO, neither of the North American States of origin abandoned their basic positions regarding the supremacy of the interests of States of origin regarding management and sharing of salmon harvests, interests which did not take into account sojourns of salmon at sea distant from the place of origin.

The accuracy of the foregoing observations is borne out by an examination of the participation of the United States in the proceedings of the West Greenland and North American Commissions. As discussed earlier, the NASCO convention does not specify how the Parties should *share in the benefits and burdens of conservation*.⁷² It was left to the individual Commissions to work out such sharing arrangements. Approaches taken in the West Greenland Commission reflected the juxtaposition of interests of States of origin and host States representing the interests of Greenland (the EEC in 1984 and Denmark thereafter). On the other hand, the deliberations of North American Commission focused on the principle, clearly shared by both the United States and Canada, that, to the extent possible, interception of salmon bound for another country should be minimized.

The West Greenland Commission

As specified in Article 8 of the Convention, the functions of the West Greenland Commission were very general, but included making proposals for regulatory measures for fishing in the area of fisheries jurisdiction of a member for salmon originating in the rivers of other Parties.⁷³ The area covered was limited to that off the southwest coast of Greenland where the inshore Greenland fishery operated (between 42° and 44°W, north of 59°N).

In NASCO's early years, in the West Greenland Commission, discussion of regulatory measures focused on attempts by the States of origin⁷⁴ to reduce the take of salmon in the Greenland fishery below the level that had been established under ICNAF (1,190 tonnes per annum). In 1984 agreement was reached to reduce the quota to 870 tonnes. The deal was a pragmatic one without

72 See Peterson, n. 61 above, at 171. Peterson noted that: *All of these considerations [the elements of Article 9] relate to the interdependence of States who produce salmon and States who harvest salmon produced by others. The considerations imply that the salmon resource is a shared one but nowhere in the Treaty can any language be found that says how the resource will be shared.*

73 NASCO Convention, n. 59 above, para b of Article 8.

74 Initially the United States and Canada, but joined in 1985 by the EEC. In 1984, Greenland was part of the EEC and the EEC's representations at the 1984 Annual Meeting supported Greenland's cause. Greenland subsequently withdrew from the EEC and from 1985 onward the EEC, representing European salmon producing States, took very strong State of origin positions. See Bubier, n. 66 above, at 42 and 43. See also Peterson, n. 61 above, at 178.

reference to the "take into account" provisions of Article 9, except that, consistent with para 9.g which required Parties to take into account *the interests of communities which are particularly dependent on salmon fisheries*, the United States and Canada:

*... assured Greenland that they did not want to eliminate the West Greenland fishery and recognized that the socioeconomic conditions of Greenland made the commercial salmon fishery an essential form of livelihood for its residents.*⁷⁵

75 See Bubier, n. 66 above, at 43.

As described by Jill Bubier, *the United States ... acted as an intermediary lobbying for both sides to reach an acceptable compromise*. The final number bridged the gap between a final Canadian proposal for a limit of 687 tonnes and an EEC (which then represented the interests of Greenland) position calling for a quota that would be "slightly less" than the 1,190 tonne limit that had applied before.⁷⁶

Over the next few years the Commission continued debate on the West Greenland quota, with States of origin continuing to press for reductions in the West Greenland harvest. The discussions frequently became deadlocked because the Treaty lacked any provisions for sharing of harvests. Denmark (on behalf of Greenland and the Faroes) pressed for the Commission to develop a set of principles for Greenland's future quotas, which would have considered and recommended *a definition of the concept of fair sharing of the burdens and benefits of salmon conservation measures in the West Greenland Commission*. Development of such principles would have involved examining and weighting the various qualifying factors listed in Article 9. Mainly due to opposition from the EEC, the Commission failed to agree on the formation of a working group to develop the proposed list of principles.⁷⁷

Despite lack of formal agreement, however, during 1986-87, member countries of the Commission, without the participation of the EEC, conducted informal explorations of possible formulae for establishing an equitable and consistent approach to setting appropriate quota levels for the West Greenland fishery.⁷⁸

NASCO records do not indicate that the results of such deliberations were ever formally reviewed by the Commission, nor that such considerations were ever cited as a basis for subsequent agreements on the level of the West Greenland quota. Certainly, there was no indication that the extent of "grazing" in waters off Greenland was considered. Instead, discussion of quotas for the fishery continued to be based on pragmatic negotiations all related to changes from the most recent levels of harvests in the West Greenland area. In 1988, the Commission put in place a

76 Bubier, n. 66 above at 42.

77 NASCO. 1985. Second Annual Report of the West Greenland Commission, at 3 and 4 and Annex 8. See also Bubier, n. 66 above, at 43.

78 See Peterson, n. 61 above, at 177 and 178.

three-year arrangement aimed at stabilizing the annual average harvest in the West Greenland area to 840 tonnes.⁷⁹ Of all the qualifying elements of Article 9, the only one that seemed to have been given serious consideration was para g dealing with the *interests of communities which are particularly dependent on salmon fisheries*. In this case, NASCO participating countries, including the United States and Canada, were prepared to acknowledge that the West Greenland fishery, dependent entirely on salmon originating in the waters of other countries, still had a "right to exist".

On the basis of the foregoing, it is evident that, although it was the chief architect of compromise in the West Greenland Commission and therefore prepared to take a less firm stand than either Canada or the EEC, the United States maintained a strong State of origin position in all the Commission's deliberations, consistently pressing for reductions in the Greenland fishery to increase returns of salmon to United States waters.

As will now be outlined, in its participation in the essentially bilateral North American Commission (where host State interests were not involved), the United States was able to give full expression to its position as a State of origin with proprietary rights to salmon produced in its waters. Canada was the target of this undivided attention and the United States was unconstrained in its efforts to eliminate Canadian intercepting fisheries.

The North American Commission

As specified in Article 7 of the Convention, the functions of the North American Commission (NAC) were considerably more detailed than those of the Commission for West Greenland. Freed of the need to compromise with non-State of origin "host" States, NAC's terms of reference were based on the clear positions of the United States and Canada outlined in their 1971 joint statement, namely, the primacy of State of origin interests in conservation and sharing of benefits and the consequent need to eliminate interceptions. As expressed by Jill Bubier:

79 NASCO. 1988 Fifth Annual Report of the West Greenland Commission., at 3 and Annex 8.

The North American Commission has special functions under the treaty due to the fact that Canada and the United States have agreed to additional responsibilities. For example, the NAC makes explicit the responsibility of the two members to take " necessary measures to minimize by-catches⁸⁰ of salmon originating in rivers of the other members"⁸¹

Article 7 specified, inter alia, that:

1. *The functions of the North American Commission with regard to its area shall be:*
 - (a) *to provide a forum for consultation and co-operation between the members:*
 - (i) *on matters related to minimizing catches in the area of fisheries jurisdiction of one member of salmon originating in the rivers of another Party, and*
 - (ii) *in cases where activities undertaken or proposed by one member affect salmon originating in the rivers of the other member, for example, of biological interactions;*
 - (b) *to propose regulatory measures for salmon fisheries under the jurisdiction of a member which harvest amounts of salmon significant to the other member in whose rivers that salmon originates, in order to minimize such harvests;*
 - (c) *to propose regulatory measures for salmon fisheries under the jurisdiction of a member which harvest amounts of salmon significant to another Party in whose rivers that salmon originates.*

80 Incidental catches of species or stocks in fisheries directed toward the harvest of other species or stocks.

81 Bubier, n. 66 above, at 39.

2. *Each member shall, with respect to its vessels and the area under its fisheries jurisdiction, take measures necessary to minimize by-catches of salmon originating in the rivers of the other member.*
3. *Fishing patterns in salmon fisheries in the North American Commission area shall not be altered in a manner which results in the initiation of fishing or increase in catches of salmon originating in the rivers of another Party, except with the consent of the latter. (Emphasis added)*

The intent was quite clear: interceptions should be eliminated or at least minimized. The requirement for elimination or minimization of interceptions, even applying to by-catches, could be quite independent of whether or not such reductions were required for conservation. Whereas the NASCO Convention does not have any provisions dealing specifically with sharing or allocation of harvest benefits, the provisions of Article 7 have clear-cut sharing implications: full implementation would result in the States of origin harvesting virtually all the salmon originating in their own rivers, essentially reflecting their ownership of the resource. There is absolutely no consideration of qualifying State of origin rights to the resource owing to the sojourn of the salmon in the marine waters of other countries.

The United States keenness for measures to reduce Atlantic salmon interceptions in North American waters is easily understood. Because of the north-south migration route of maturing salmon and because there are essentially no marine fisheries in the United States, United States fishers take no Canada-bound salmon. On the other hand, Canadian fisheries have many opportunities to intercept United States-bound salmon, particularly off the coasts of Newfoundland and Labrador.⁸²

For this reason, throughout NASCO's history, the United States pressed Canada to reduce its fisheries intercepting United States bound salmon. For example:

- At the 1984 annual meeting, the United States was concerned that Canada's 1984 management plan did not take into account the interception of U.S. origin salmon and proposed quotas for Canadian fisheries. In concluding his intervention at the meeting, the United States delegate stated that:

82 As expressed by Jill Bubier (n. 66 above, at 38), *...there are no known stocks found off the United States coast except for U.S. origin fish.*

*The United States strongly urges Canada to fulfil its obligation under the Convention by undertaking in 1985 management measures designed specifically to minimize harvests of salmon of U.S. origin.*⁸³

- At the 1985 annual meeting, the United States spokesman:

*... maintained that the problem of Canada's interception of US fish must be addressed.*⁸⁴

The United States proposal for regulatory action included the following observations:

*... the United States draws the attention of the North American Commission to Article 7, paragraph 1(b), of the Convention which provides for regulatory action by the Commission in order to minimize interceptions. We note that with this article, the Convention imposes a duty not merely to regulate but to minimize interceptions.*⁸⁵

Detailed consideration of NASCO in the present paper is limited to the period contemporaneous with the conclusion and early implementation of its companion treaty on the Pacific coast, the PST (1984-1987). In later years, however, the United States determination to reserve harvests of its salmon to its own fishers has been even more forceful. United States recreational interests had long promoted the concept, emphasized in the 1971 United States/Canada joint declaration, that, harvests of salmon should be limited to rivers or mouths of rivers.⁸⁶

83 NASCO. Report of the First Meeting of the North American Commission. 3-4 May 1984, at. 7. As noted by Bubier (n. 66 above): *The United States was referring to a provision of the Convention [Article 7(2)] which requires the United States and Canada to minimize interceptions.*

84 NASCO. Report of the Second Meeting of the North American Commission. 21-22 February and 3-7 June 1985, at 5.

85 Ibid. at Annex 12.

86 Buck, n. 56 above at 172-177.

United States policy has moved consistently in this direction. Thus, as Richard Buck reported, in a 1992, the Department of State of the United States wrote to United States Commissioners indicating that:

*...as NASCO Commissioners, you should state clearly that our target is to phase out commercial interceptory fisheries for Atlantic salmon in the next few years.*⁸⁷

The objective was simple - the reservation of the entire harvest of United States-spawned Atlantic salmon for United States fishers. Such an approach is totally at odds with statements in the Alaskan paper that the United States never agreed with the view that States of origin had exclusive rights to salmon bred in their rivers.⁸⁸

Within NASCO, in the context of a major restructuring of its salmon fisheries to meet both domestic and NASCO treaty needs, Canada was responsive to United States concerns. Thus, at the third annual meeting of the North American Commission in 1986, the Canadian spokesman stated that:

*... Canada recognizes its international obligation to reduce the interception of US origin salmon and noted that, as part of its domestic regulations, the Newfoundland fishery will be closed from October 15 ...*⁸⁹

The United States, while disappointed that the Canadian action did not go far enough:

... recognized that the action that will be taken by Canada ... would total approximately a 30% reduction in interception of US salmon.

87 Ibid. at 327.

88 See n. 6-8 above.

89 NASCO. Report of the Third Meeting of the North American Commission. 5-6 February and 23-27 June 1985, at 5.

The US representative did state that the Canadian counter proposal is the first substantive regulatory action that has been considered in the Commission and marks a forward step in NASCO. The US representative also recognised that this action expresses the Canadian recognition of its international obligation to reduce its interception of US salmon.⁹⁰

In respect of the "taking into account" provisions of Article 9, Canada called upon the United States to:

90 Ibid. at 6.

*... recognize Article 9(g) which addresses NASCO's obligation to take into account those communities which are particularly dependent on salmon fisheries, and stated that any further action taken by Canada with respect to Labrador salmon fisheries would have a severe impact on those communities.*⁹¹

In the North American Commission records, there never was a mention of NASCO Article 9.d dealing with "pasturage".⁹² Quite clearly, NASCO's consideration of marine factors, if any, focused on Greenland and Faroese "host" State interests and had nothing to do with the relationship between Canada and the United States in development of their cooperative arrangements for management of the North American Atlantic salmon fisheries.

Conclusions Regarding NASCO

In reference to the contentions of Shelton and Koenings paper promoting consideration of marine factors, a review of the NASCO Convention and its implementation during its formative years lead to the following conclusions:

- In making recommendations for regulatory action, the NASCO convention requires the Parties to take into account a number of factors, one of which is the extent to which Atlantic salmon may "graze" in the waters of a member country. Such a provision, which was originally opposed by the United States, was included as a necessary compromise by States of origin to meet concerns of the dependent communities of host territories such as Greenland and the Faroes.
- There is no evidence that "grazing" was ever taken into account in NASCO deliberations leading to proposals for regulatory action. In contrast, such deliberations did take into account the interests of communities which are particularly dependent on salmon fisheries.

91 Ibid. at 4.

92 As noted above, however, Canada did refer to Article 9.g pointing out the particular dependence of some Canadian communities on the salmon fisheries.

- Canada-United States bilateral relationships were dealt with within NASCO's North American Commission. Whereas consideration of the interests of "host" States might have been appropriate when dealing with concerns of the Greenlanders, the terms of reference and the deliberations of the North American Commission clearly did not consider marine factors at all. Flowing from their 1971 joint declaration of their special interest in Atlantic salmon, United States and Canadian participation in the North American Commission has been tightly focused on the United States objective of eliminating or at least minimizing interceptions to facilitate conservation and to maximize benefits accruing to States of origin from their own production. In this key respect, the United States never mentioned the question of grazing and took a strong State of origin "ownership" position in respect of the management and harvest of salmon.

The Strange Contrast of U.S. Implementation Approaches in NASCO and in the PSC

From the conclusions drawn to this point, it is clear that the United States has always based its approach to management and sharing of salmon resources, both bilaterally in respect of Canada and globally, on the concept of State of origin ownership of the resource. There is, however, a distinct difference in the United States approaches on the Atlantic and Pacific coasts in respect of expression of the principle in treaty terms and in treaty implementation.

As has just been outlined, on the Atlantic coast, the United States has insisted on a dogmatic application of the concept in articulation of the terms of reference for NASCO's North American Commission, and in their implementation, clearly aimed at driving intercepting Canadian salmon fisheries off the seas. In contrast, on the Pacific coast, while aggressively advocating the ownership concept against all comers to protect its Pacific salmon resources against interception by foreigners, in respect of its own intercepting fisheries, the United States has consistently pressed for a *laissez faire* approach to permit continuation and even expansion of United States interceptions of Canadian salmon.

To illustrate the contrast, in negotiation of the PST, Canada sought the same kind of terms that the two Parties agreed to in NASCO, namely a joint commitment to reduce and, if possible, eliminate interceptions by the two countries of the other country's salmon. However, the United States insisted on maintaining its traditional intercepting fisheries. To accommodate the United States desire, the two Parties agreed on a compromise, the so-called equity principle, the results

of which would be, in the words of Tom Jensen, that the *countries may not get all their own fish back ... but both countries will receive benefits commensurate with their production.*⁹³

93 See Jensen at n. 21 above.

When the Treaty was concluded in 1985, both sides considered this formulation of the ownership concept as a satisfactory compromise. As outlined in earlier sections of this paper, however, Canada has found the United States to be unwilling to implement the PST equity principle on the basis of understandings the two Parties had at the Treaty's outset. Thus, whereas on the Atlantic coast, the United States has unequivocally sought to eliminate all Canadian fisheries intercepting United States stocks,⁹⁴ on the Pacific coast, even though United States interceptions in Alaska have mushroomed in recent years and Canadian interceptions have declined, the United States has consistently opposed Canadian initiatives aimed at limiting the growth of interceptions in Alaskan fisheries for Pacific salmon either to share conservation burdens or to contribute to meeting the conditions of the equity principle. Canadians have found this double standard difficult to accept.⁹⁵

Preparations for the Third United Nations Conference on the Law of the Sea

The 1971-72 season, pivotal for the development of international arrangements for Atlantic salmon, also saw the launching of Canada-United States cooperation to sell the ownership concept to the broader audience of the United Nations.

At the 1971-73 meetings of the United Nations Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor Beyond the Limits of National Jurisdiction ("Seabed Committee"), which laid the groundwork for the 1974-1982 United Nations Conference on the Law of the Sea (UNCLOS), the United States submitted successive proposals for draft articles dealing with fisheries in the Law of the Sea convention. The first version provided for allowable catches to be established for each stock. For anadromous species such as salmon, the proposal provided that:

The percentage of the allowable catch of an anadromous stock that can be harvested by the State in whose fresh waters it spawns shall be allocated annually to that State.

The implementing regulations of the coastal State may apply in any area of the high seas adjacent to its coast or, with respect to an anadromous stock that spawns in its fresh waters, throughout its migratory range.⁹⁶ (Emphasis added)

94 The United States situation in respect of Atlantic salmon is closely analogous to Canada's position *vis à vis* interceptions of Pacific salmon in the northern British Columbia - southeast Alaska boundary area. In the latter area, as is the case for the United States on the Atlantic coast, because of a predominant north-south migration pattern, Canadian fishers have much less opportunity to intercept United States salmon than United States fishers do of Canadian salmon.

95 For a recent review of the PST controversy see Huppert, Donald D. 1995. Why the Pacific Salmon Treaty failed to end the salmon wars. School of Marine Affairs. University of Washington. SMA 97-1. 27 pp. Also see the Eighth Annual Report of the PSC (1992-93) at 5-17.

96 Draft Articles on the Breadth of the Territorial Sea, Straits and Fisheries. Submitted by the United States. 1971. Report of the Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor Beyond the limits of National Jurisdiction. General Assembly Official Records Supplement 21 (A/8721) Document A/AC.138/SC.II/L4. Article III.

There could not be a clearer statement of proprietary interest of a State in a resource, with that right flowing from the fact that the salmon spawned in that State's rivers.

The United States maintained the same theme, providing States of origin with proprietary rights, in a revision to its draft articles at the 1972 session of the Seabed Committee:

The coastal State in whose fresh or estuarine waters anadromous resources (e.g. salmon) spawn shall have authority to regulate and have preferential rights to such resources beyond the territorial sea throughout their migratory range on the high seas (without regard to whether or not they are off the coast of said State)

The coastal State may annually reserve to its flag vessels, in accordance with this article, that portion of such ... anadromous resources as they can harvest.

Such ... anadromous resources which are located in or migrate through waters adjacent to more than one coastal State shall be regulated by agreement among such States.⁹⁷
(Emphasis added).

From the foregoing, it is evident that, during the preparatory sessions for the Law of the Sea Conference, the United States was a strong proponent of the special treatment for anadromous species, a concept designed to accord States of origin proprietary harvest rights.

UNCLOS, 1974-1982

The same approach was followed at the opening session of UNCLOS in 1974 where the United States called for a ban on fishing for anadromous species seaward of the territorial sea except as authorized by the State of origin. States through whose internal waters or territorial sea anadromous fish migrate would be required to cooperate with the State of origin in management. In its economic zone, the coastal State could allocate all of the allowable catch to its nationals.⁹⁸

Canada also took a strong position regarding the special case of anadromous fish⁹⁹ and, together, the United States and Canada launched a vigorous campaign to achieve a strong anadromous fish article in the final UNCLOS text. Consensus was reached by the mid-1970s on Article 66 which, in part, provided that:

97 United States of America: Revised draft fisheries articles Document A/AC.138/SC.II/L.9. Article II.

98 United States of America; Draft Articles for a Chapter on the Economic Zone and the Continental Shelf. Third United Nations Conference on the Law of the Sea. 1974. Official Records. Vol III Document No. A/Conf.62/C.2/L.47. Article 18.

99 Canada.; working Paper on the special case of salmon - the most important anadromous species. 1974. Official Records. Vol III Document No. A/Conf.62/C.2/L.81.

1. *States in whose rivers anadromous stock originate shall have the primary interest in and responsibility for such stocks.*
 2. *The State of origin of anadromous stocks shall ensure their conservation by the establishment of appropriate regulatory measures for fishing in all waters landward of the outer limits of its exclusive economic zone and for fishing provided in paragraph 3(b). The State of origin may, after consultations with the other States referred to in paragraphs 3 and 4 fishing these stocks, establish total allowable catches for stocks originating in its rivers.*
3(a) Fisheries for anadromous stocks shall be conducted only in waters landward of the outer limits of exclusive economic zones except in cases where this provision would result in economic dislocation for a State other than the State of origin.
-
4. *In cases where anadromous stocks migrate into or through the waters landward of the outer limits of the exclusive economic zone of a State other than the State of origin, such State shall cooperate with the State of origin with regard to conservation and management of such stocks.*¹⁰⁰ (Emphasis added)

Although neither Canada nor the United States have ratified the UNCLOS Convention, most of its provisions appear to have become customary international law. There has been no dispute concerning the applicability of Article 66 between Canada and the United States or between either of them and any third party.

Representing a compromise required to achieve consensus, Article 66 gave the two States of origin much of what they wanted but fell short of their ideal. It clearly reflected the State of origin's proprietary interest in stocks originating in its waters. It did not recognize, explicitly or implicitly, any notion of pasturage or grazing fees, either on behalf of "host" States or of the international community in respect of waters beyond limits of national jurisdiction (as had been proposed by some distant water fishing States during the Conference).

At the same time, it did not go as far in recognizing proprietary rights as proposals made by the United States and Canada in the Seabed Committee preparations for the main UNCLOS meeting (see above).

The fact that the PST, with its expression of proprietary rights in the equity principle, accorded with the international consensus and the positions taken in international arenas by the two Parties in the international negotiations, is reflected well in a paper prepared by Thomas Jensen, a senior United States policy adviser during negotiation of the 1985 PST:

¹⁰⁰ United Nations Convention on the Law of the Sea. Signed at Montego Bay, Jamaica. December 10, 1982.

Equity is basically a pragmatic reformulation of the countries' state-of-origin principle for harvest of anadromous fish. In international forums, both countries argued that salmon should only be harvested by the country producing the fish. Since Canadian and United States fisheries could not, without massive economic disruption, be restructured to eliminate interceptions, the countries devised a principle that theoretically achieves the same effect as the state-of-origin principle. The countries may not get all their own fish back under the equity principle, but both countries will receive benefits commensurate with their production.¹⁰¹ (Emphasis added)

United States politicians, too, recognized the linkage between the PST and emerging international law. Thus, during congressional hearings regarding the PST, Representative (later Governor) Mike Lowry of Washington State, correctly traced the antecedents of the equity principle by observing that:

101 See Jensen, n.21 above, at 400.

*The Treaty will formalize in international law the so-called area-of-origin concept as it applies to anadromous fish stocks. That is, the Treaty formally recognizes the principle that the benefits of enhancement should accrue principally to the nation that makes the enhancement investment. The Treaty, therefore creates an incentive for each country to conserve and enhance these valuable salmon stocks by establishing fishery regimes which will substantially reduce the interception of each nation's stocks by the other nation.*¹⁰²

From the foregoing, it is clear that, throughout the negotiation of the United Nations Law of the Sea Convention, the United States and Canada maintained strong positions linking ownership of salmon resources with their origins within the territories where they were spawned.

PST out of Sync with Development of International Law?

The Alaskan authors attempt to cast doubt on the validity of views expressed by both Canada and United States supporting the proprietary interests of States of origin and the irrelevance of marine factors, on the basis that such views were not in tune with jurisdictional change (e.g., when 200 mile limits were declared in the late 1970s), nor with recent knowledge of migrations of salmon stocks.¹⁰³

In fact, the PST was concluded in 1985, over a decade after consensus had been reached on UNCLOS Article 66 and eight years after both Parties had extended their maritime jurisdictions to 200 miles. Thus, the PST and the equity principle were developed with full knowledge of the status of contemporary international law and the extent of maritime jurisdiction of both Parties.

102 U.S. Congressional Record. March 5, 1985. At p. H990

103 Shelton and Koenings, n. 3 above, at 160.

In respect of scientific knowledge, the principal features of salmon migrations related to the interception question were well known when the PST was concluded. For example, detailed knowledge of the movements of chinook salmon between the waters of Alaska, British Columbia and Washington/Oregon permitted development of the comprehensive cooperative chinook rebuilding program which was a key element in reaching final agreement in 1985. Another indication of the lack of mystery regarding salmon movements is the fact that there is virtually complete agreement between scientists of the two countries regarding the estimation of the numbers of salmon of all 5 species intercepted by fisheries of the two Parties.¹⁰⁴ If there have been any surprises in the development of new knowledge since the Treaty was signed in 1985, it has been that the extent of interception of Canadian salmon in Alaskan fisheries was higher than many thought (see discussion below).

Recent Events in the North Pacific

Since conclusion of UNCLOS and the initial years of PST and NASCO implementation, the United States has not rested in its efforts to protect its salmon resources from interception by others.

Despite the fact that extensions of fisheries jurisdictions in the late 1970s reduced fishing opportunities for overseas expeditionary fleets that could intercept Pacific salmon bound for North American spawning grounds, activities of Japanese, Korean and Taiwanese vessels in offshore waters remained a concern to the United States. With strong pressure from Alaskan fisheries interests, in the late 1980s and early 1990s, the United States launched a major campaign to bring such foreign fishing under control.

In 1992, the INPFC Convention was replaced by a new treaty which added Russia to the original INPFC signatories, Japan, Canada and the United States.¹⁰⁵ The Convention covers the waters of the North Pacific beyond 200 mile limits. The key article of the Convention is a prohibition of directed fishing for anadromous fish in the convention area and of retention of fish taken incidentally in fishing for other stocks.

In the late 1980s, driftnet fisheries by Asian nations targeting species other than salmon but suspected of taking salmon as well, became the principal focus for United States initiatives. Congress passed legislation calling for a series of bilateral negotiations aimed at improving data collection and enforcement and providing for the imposition of economic sanctions on States conducting the fisheries if the negotiations failed to produce agreements within a specified period. Agreements were subsequently concluded with the States concerned.¹⁰⁶

104 N. 2 above.

105 Convention for the Conservation of Anadromous Stocks in the North Pacific Ocean. Signed in February, 1992.

106 Burke, n. 26 above, at 179.

Driftnetting had become a concern in other parts of the Pacific as well. As a consequence, the United States joined South Pacific nations (particularly New Zealand) in raising the driftnet issue in the United Nations General Assembly, in June 1992, which resulted in adoption by the General Assembly of a Resolution that called for a moratorium on all large-scale pelagic driftnet fishing.¹⁰⁷

107 Ibid. at 179-180.

The foregoing initiatives were all concerned with fishing activities taking place on the high seas. Alaskan concerns, however, have extended to activities within the jurisdiction of another country. In 1997 sockeye salmon catches in northern Alaskan waters fell far below levels that had been predicted before the season. Alaskan fishermen expressed concern that the decline could have been associated with the development of a Japanese fishery operating, by agreement with Russia, in the latter's 200-mile zone off the coast of Kamchatka. As recently reported, after visiting Bristol Bay, where he characterized the situation as an "economic disaster", Alaska Governor Tony Knowles asked the State Department to help investigate whether illegal fishing inside the Russian zone was affecting catches in Alaska. He was quoted as saying that: *There may be fisheries operating inside the Russian exclusive economic zone which could be intercepting large numbers of Bristol Bay salmon.*¹⁰⁸

Thus, Alaska has been ever assiduous in seeking and putting a stop to all possible instances of foreign fishing of Alaskan salmon. To Canadians, the rigour of the Alaskan quest vis à vis Russia and its effectiveness in spurring the United States government to take action stands in stark contrast to Alaska's lack of concern and unwillingness to take action about its own expanding interceptions of Canadian salmon.

Why Does Alaska Make Such Claims?

In light of the foregoing, it would seem that the positions espoused by the Alaskan authors regarding the importance of marine factors and the unimportance of the State of origin "ownership" concept as elements in the implementation of the Pacific Salmon Treaty are very inconsistent with positions taken by the United States government for many years and in many different international forums.

At first blush, attempting to diminish the importance of the State of origin in dictating harvest shares would seem to be a very odd position for Alaska to take, since it is the world's most prolific producer of salmon and, has been a strong proponent in multi-national forums of the principle of State of origin "ownership". One would have thought that Alaska would continue to

108 Buckley, Mark. 1997. Who stole the missing reds. *Pacific Fishing*, October 1997, at 21-22. In 1992, through an exchange of notes, the United States and Russia reached agreement that directed fishing for salmon within their respective zones should be limited to waters within 25 miles from baselines from which the breadth of the territorial sea is measured. The agreement further provided for joint research which, *inter alia*, would be to assess possible interceptions of North American and Russian origin salmon.

embrace such principles in order to protect its resources from outsiders. Why has Alaska now taken the anti-ownership stance in its relations with Canada?

The previous section of this paper identifies the reason - namely that, contrary to the concept of State of origin ownership, Alaskan harvests of Canadian salmon have increased markedly in recent years and Alaska is therefore very reluctant to take actions, as required by the principles of the PST to cut back on such excesses.

To illustrate this point, one has only to look at the extent of interception by Canada and the United States in the northern British Columbia-southeast Alaska boundary area. Alaska harvests large quantities of Canadian salmon and produces relatively few salmon subject to harvest by Canadians. This fact is illustrated in Figure 1 which shows the difference in the numbers of each of the five species of salmon intercepted by Alaskan and Canadian fishers over the most recent 12 years for which agreed Canada/United States data on interceptions are available.¹⁰⁹

The figure shows that with the exception of pink salmon in the 1983-86 period, there has been a consistent difference, in favour of the United States, in the absolute numbers of salmon of each species for all five species of salmon. What's more, the differences have been increasing. For sockeye, the most important species in the northern boundary area interception picture, the difference has more than doubled since 1983-1986.¹¹⁰

Having an advantageous position as far as interceptions are concerned, it is understandable why Alaska now finds the concept of relating harvesting to production from one's own waters unappealing and why, therefore, it strongly resists full implementation of the equity principle.

Faced with this problem, the two-fold intent of the Alaskan paper is very transparent:

- To negate the obligation to relate harvests by each country to the numbers of salmon its rivers produce.

109 During the 12 year period, Alaskan interceptions (including interceptions of salmon bound for Canadian sections of transboundary rivers) of Canadian sockeye salmon averaged about 1,037 million annually compared to Canadian interceptions of Alaskan sockeye of .036 million. Comparable figures for other species are: chinook .161 vs zero; coho .813 vs .079; chum .263 vs .221; and pink 2.741 vs 2.415. Source, see n. 2 above. Data in Figure 1 include interceptions by the United States of salmon bound for Canadian sections of transboundary rivers.

110 During 1983-1990, on a coast-wide basis (i.e., including interceptions in the southern British Columbia - Washington/Oregon area), Canadian fishers took substantially more United States-bound chinook and coho than vice versa whereas United fishers had the advantage for sockeye and pink salmon. Interceptions of chum salmon were about equal. During the most recent period for which agreed data are available (1991-94), United States fishers intercepted more of every species than did Canadian fishers. Considering such evidence, Canada considers it incontrovertible that, in light of the equity principle, there is an imbalance in interceptions in the United States favour and that, as prescribed in the MOU, the United States is required to propose *a phased program to eliminate the inequity*.

- To devise a regulatory system that will permit Alaska to take increasing numbers of Canadian salmon when runs are abundant.

The paper meets these two objectives by:

- Inventing the "host nation" pasturage concept which would offset Treaty-mandated credits accruing to States of origin by non-Treaty credits based on the sojourn of salmon in the

FIGURE 1 ON THIS PAGE

waters of the second, non-producing country.¹¹¹ This provides the excuse for ignoring the Treaty.

- Having dispensed, to their own satisfaction, with obligations to meet the equity provision of the Treaty, the authors of the paper, through their proposal of an Alaska-style "abundance based" approach, would provide Alaska with a proportional share of increasing Canadian production regardless of how much such increased production was due to Canadian conservation sacrifices or enhancement. This provides the mechanism for achievement of Alaska's objective of catching more Canadian salmon.¹¹²

The Alaskan paper serves Alaskan purposes well, but it ignores the fact that its approach is totally inconsistent with the obligations the United States, as a federal entity, assumed in the hard-fought 14-year long negotiation of the Pacific Salmon Treaty. It clearly violates the plain language meaning, the intent and the spirit of the text. As demonstrated in the last half of this paper, the Alaskan position is also totally at odds with positions taken by the United States in other international forums over the past half century.

The PST represented a compromise that obviously could not please all parts of the fishing communities in the two countries. In concluding the Treaty in 1985, the United States gained significant benefits (mainly Canadian cooperation in limiting its fisheries for salmon bound for Washington and Oregon), an objective that the Northwest States had pursued since the 1940s. Alaska also benefits by measures such as the limitation of Canadian fisheries and cooperative enhancement on transboundary rivers. Obligations assumed by the United States as its part of the bargain, included concurrence with the equity principle embodied in Article III.1.b. Alaskan dislike for the principle should not prevent its timely and full implementation.

111 An indication of how much the offset might be is indicated in para. 6 on page 156 of the Alaskan paper which, referring to an earlier paper by Joy Yanagida (See n.23 above, at 590), notes that *...host country contributions may be greater than those of the nation with jurisdiction over the spawning grounds.*

112 In recent years, Canada has been prepared to consider "abundance-based" approaches for management of intercepting fisheries, but structured in such a way as to be consistent with the equity principle.

The Technical Nightmare that the "Pasturage" Concept Would Create

From the foregoing, it is evident that the Alaskan approaches to implementation of the PST, as it stands, are certainly not supportable. Even if they had some credence, one has only to think about how they would be implemented to realize not only their irrelevance but also their impracticability.

The United States has frequently labelled Canada's approach to measuring "equity" as bean counting and too complex to be practical.¹¹³ By way of contrast, let us examine the technical challenge of defining "equity" status if the Alaskan concept of giving credit for pasturage as well as credit for being the State of origin were accepted. For a chinook spawned in the Columbia River, the United States might get one point for being the State of origin and .1 points for pasturage in Washington waters, Canada would get .5 points for pasturing the fish off the west coast of Vancouver Island and Alaska would get .5 points for pasturage in Alaskan waters. But, of course, there is a difference in the length of pasturage for 3-year-olds and 4-or 5-year olds. For young fish Canada should therefore get .75 points. And what about United States spawned chinooks that spend all their sea life in Georgia Strait and outer Puget Sound? How would one measure "pasturage points" for periods when the salmon were grazing on the high seas beyond limits of national jurisdiction?

From the foregoing, it is evident that if one had to take host State interests into account beside the easily measurable criterion of waters of origin title to ownership, development of sharing formulae as prescribed by the PST would truly become impracticable. Moreover, it would open the door to claims that pasturage should apply to waters beyond the limits of national jurisdiction.

One also has to speculate on what the opinion of Washington and Oregon fisheries interests would be to the "pasturage" concept. Very few of the salmon harvested in Washington/Oregon waters spend much of the marine portion of their life history off the coasts of Washington and Oregon. The majority of the salmon harvested in Washington/Oregon spent most of their sea life in the waters within national jurisdictions off the coasts of British Columbia and/or Alaska, or on the high seas. And, as pointed out earlier, how would United States Atlantic interests respond to inclusion of pasturage considerations within NASCO's North Atlantic Commission, considerations which would sharply blunt the United States drive to eliminate intercepting commercial fisheries by Canada.

113 With no significant dispute between the Parties regarding the numbers of salmon intercepted by each country, Canada considers that "equity", the balance of benefits associated with interceptions, is finite and measurable and that it is not impractical for the Parties to adjust their fisheries and/or enhancement programs to correct persistent imbalances. See exchanges between the Parties on the equity issues in: Pacific Salmon Commission Seventh and Eighth Annual Reports for 1991/92 and 1992/93.

Conclusion

In respect of the implementation of the Pacific Salmon Treaty, the Shelton-Koenings paper presents three contentions all of which are not supported by the facts.

- **Contention 1** *[P]roduction of and proprietary rights are [not] defined solely by spawning location.* As has been shown, this contention is completely unfounded. There is not one shred of evidence to indicate that, in the negotiation of the PST or associated negotiations in other forums (e.g., the United Nations Conference on the Law of the Sea), marine factors were ever taken into consideration in defining the interests of States harvesting salmon resources. On the other hand, as indicated by underlining in the numerous quotations contained in this paper, virtually every piece of treaty text, expositions by negotiators, politicians and academic observers dealing with the question of harvest entitlements referred to "rivers", "freshwaters" "estuaries" or "spawning grounds".

Clearly the only factor considered in international negotiations and the only factor advanced by the United States and Canada related to designation of management responsibility and harvest rights was the place where the salmon were spawned, the freshwater or estuarial spawning grounds.
- **Contention 2** *[I]nternational legal considerations and international conventions do not support the concept that a nation has exclusive rights to the value of salmon spawned in its waters that migrate into another nation's waters.* This contention is totally incorrect. The present paper shows that Canada's views regarding the rights of States of origin to salmon harvests were whole-heartedly shared by the United States and fully supported by emerging international law. The equity principle of the PST, fully understood by the United States at the time the PST was signed, was designed precisely to provide each country with the value of salmon produced from its spawning grounds, whether these were harvested by the State of origin or by fishers of the other Party. Throughout various negotiations from the 1930s through conclusion of UNCLOS in 1985, the United States joined Canada in pressing for the concept of State of origin "ownership" of salmon. Naturally, in negotiation of multilateral arrangements where the interests of States other than States of origin had to be accommodated, the two Parties did not achieve complete success in having the ownership principle articulated in treaty language. Nevertheless, it found a close reflection in the principle that the State of origin has primary interest in the resource, which has received prominent recognition in all multilateral agreements dealing with salmon.
- **Contention 3** *While Canada's focus on balancing interceptions and promoting exclusive rights to Canadian-spawned salmon has been maintained consistently for 25 years, the United States has never agreed with this view.* This statement represents an astounding deviation from the facts. The extensive records of United States intervention in international forums cited above clearly indicate that the United States federal Government was strongly onside with Canada regarding the promotion of exclusive

harvest rights for States of origin. In these global deliberations there was no disagreement between the Parties nor was there in their bilateral relationships until the recent dispute on interpretation of the principles of the PST.

From the foregoing it is evident that adoption of the equity principle in 1985 did not involve, in any way, consideration of marine factors such as the notion of pasturage. The principle clearly involved establishing a balance in benefits accrued or lost from opportunities to harvest salmon spawned in the waters of each country. These facts are incontrovertible.