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THE NEGOTIATION OF THE 1999 PACIFIC SALMON AGREEMENT

*Donald McRae**

I want to build on the background provided by David Colson and describe the process by which the Pacific Salmon dispute was resolved and the 1999 Agreement concluded. The process was complicated, involving provincial, state, tribal, industry and environmental interests.

The Issues

The legal dispute surrounding the Pacific Salmon/Treaty (PST) related to Article III. Article III provides that the Parties are to conduct their fisheries so as to: “prevent over fishing and provide for optimum production,” (known as the conservation principle) and “provide for each Party to receive benefits equivalent to the production of salmon originating in its waters” (known as the equity principle).

Article III also provides that in fulfilling their obligations, the Parties are to take into account the desirability in most cases of reducing interceptions and the desirability in most cases of avoiding undue disruptions of existing fisheries.

Canada claimed that the principle of receiving benefits from the production of its rivers was a legal entitlement. This meant, Canada argued, that interceptions could be measured and counted according to stocks, numbers and values, and that these had to be balanced between the two countries. So that if one side intercepted more of the other side’s fish, then it had to pay back by reducing interceptions either in the same fishery or elsewhere.

The U.S., by contrast, did not accept that there was any agreed or automatic way of measuring interception imbalances. Reducing interceptions,

* Paper presented by Professor Donald McRae to the Canada-United States Law Institute Conference on The Impact of Federalism: Border Issues in Canadian and U.S. Relations, April 21, 2001. Although the author was Canada’s Chief Negotiator for the Pacific Salmon Treaty during the negotiation of the 1999 Agreement, the views expressed are personal and do not necessarily represent the views of the Government of Canada.

the U.S. argued was “desirable” under the treaty, not a matter of obligation. Moreover, the U.S. wanted to focus on the provision in Article III that referred to the desirability of avoiding disruptions of existing fisheries. However, the U.S. was never prepared to have the matter of legal interpretation tested by international arbitration.

What did all this mean in practice? In 1985, the interception imbalances were potentially manageable. But, since then, U.S. interceptions increased and Canadian interceptions declined. By the time the allocation annexes expired in 1992, the balance was decidedly in favor of the U.S. This resulted, in part from the fact that stocks were abundant in Alaska and catches were correspondingly high. By contrast, as a result of declines in Washington and Oregon stocks, Canadian interceptions of southern U.S. fish were dropping. At the same time, Fraser River sockeye interceptions by U.S. fishers were also high.

To remedy this interception imbalance would have involved substantial cutbacks by Alaska. And in a mixed stock fishery in which Canadian fish are only a small proportion of total SE Alaska catch; this would require the Alaskans to stop fishing their own stocks in order to reduce interception of Canadian stocks. It would also require the U.S. in the south to reduce their interceptions of Canadian Fraser River stocks. From Alaska’s point of view, stock declines in Washington and Oregon, and hence declines in Canadian interception of U.S. fish, were attributable to the failure of Washington and Oregon to preserve their river and stream habitats. Thus, Alaskans saw themselves as having to pay the price, by reducing their catch, for mismanagement by the southern states. This they were not prepared to do.

As a result, the negotiations for new allocations, with Canada insisting on a strict application of the equity principle and the U.S. resisting this, had been protracted, filled with recriminations, and unsuccessful. The PSC could not resolve the issue. Special negotiations were appointed by each side- on the U.S. side successive special negotiations- mediation was attempted but abandoned, direct negotiations amongst the industry stakeholders was attempted, and in 1997 frustration in Prince Rupert amongst fishers at failure to get an interim agreement with the U.S. led to the blockading of an Alaskan state ferry in Prince Rupert Harbor. By now, the Pacific Salmon issue had become the most difficult issue in Canada- U.S. relations.

Two special envoys, David Strangway and William Ruckelshaus were asked by Prime Minister Chretien and President Clinton to look at the matter.

They reviewed the stakeholder negotiation process and concluded that it could not work and they said that the governments had to resolve the issues themselves. They went on to say that Canada had to reduce its demand and that the U.S. had to move more fish to Canada. New negotiations were appointed in March of 1998. Attempts to negotiate a one-year solution for 1998 were only partially successful, and as 1998 drew to a close it looked as if negotiations for a long-term solution were doomed like all of the previous efforts.

What happened next? Well, to understand the process, I think that we have to look at who was involved- the players- and the interests that were at stake. Then I will talk about how we went about the negotiations.

The Players

In Canada, the federal government has responsibility for the management of fisheries. But, of course, the Province of British Columbia had a direct economic interest in the dispute. But relations between the province and the federal government on this issue were fractious, to say the least. The others who were directly involved in the process were the representatives of the commercial fishery, the aboriginal fishery and the sports fishery. These groups were all represented in the Pacific Salmon Commission and had taken part in the stakeholder negotiations. In fact, negotiating sessions would involve a delegation of thirty to fifty people. This made compromise almost impossible. Moreover, what was missing was a public environmental perspective on the fishery.

On the U.S. side, although the federal government was nominally responsible, voting in the PSC was in the hands of the states (Washington, Oregon and Alaska) and the Tribes. The U.S. government was only one amongst five. Negotiations were conducted with all of these groups at the table, who with their advisers constituted another thirty to fifty people. The U.S. federal government was able to do nothing unless the states and the Tribes agreed and past inexperience showed that the U.S. federal government had difficulty forging an agreement amongst its domestic interests. And, from what I have already said, part of the problem was between Alaska and the southern states over who was responsible for conservation in the south.

And, the situation in the U.S. was even more complicated than this. Negotiating at the table on the complex issues of allocation was one thing. Having the political climate in the U.S. in favor of making the necessary com-

promises was another. This required governors of the states to be on side, as well as the tribal leadership, Congress and the White House. And while the White House and the governors of those states were all Democrats, the key Congressional figures were Republicans- all from Alaska. So there had to be parallel contacts and initiatives at these political levels.

Moreover, political support can be very fickle. It was clear that White House interest, which came from Vice President Gore's off ice could not last much beyond the middle of 1999. After that, the attention of Vice President Gore's staff was going to be on other things. Thus, looking at things at the end of 1998, suggested that there was going to be a relatively narrow window of opportunity in 1999 to get an agreement.

The Interests

One of the complexities of this dispute is that the issues do not divide neatly along national lines. It was a dispute between Canada and the U.S. But, in reality, the nature of the interests depended on the nature of the fishery. And that varied north and south. Geography and the patterns of fish migration dictate that the Alaska-Canada relationship in the north is in part the reverse of the Canada- Washington/Oregon relationship in the south. Remember that in the north, the Alaskans intercept fish bound for Canadian rivers, and in the south Canadian fishers intercept fish bound for the rivers of Washington and Oregon. The interests also varied between different fisheries. Those who fished for Chinook on both sides of the border had different interests from the seiners who fished sockeye or coho, on both sides of the border. And the seiners differed from the gillnetters.

This was recognized in the original treaty that sought to administer each fishery differently. Historically, each side had sought to reconcile the interests on their own side before dealing with the other. This, too, compounded the difficulty of reaching an agreement.

All of these issues had existed in the past. What changed?

The Change in the Environment

By the end of 1998 certain changes had emerged that were to make negotiations in 1999 different from previous years. There were two critical factors, one in Canada and one in the U.S. In Canada, by 1998 two of our domestic coho stocks were at crisis level- Upper Skeena Coho and Upper

Thompson Coho. The Minister of Fisheries had concluded that the only way to save these stocks was to take the extreme measure of declaring zero mortality for endangered coho. Unless a fishery could guarantee zero mortality, it was closed. And since this affected most areas on the west coast, the impact on the commercial fishery was drastic.

In the context of the PST, this meant that we were intercepting even less U.S. fish. It made attempting to resolve the interception problem by having parallel reductions in the U.S. fishery completely unrealistic. Would Alaska really close down its fishery in order to balance interceptions because we had decided to close our fishery for conservation reasons? Particularly with the fact that our stocks comprised little more than one percent of Alaska's catch.

But our domestic conservation problem also highlighted something else. What was the point in having Alaska return fish to Canada if we could not harvest them because we had closed our own fishery? To argue that they should is a rather perverse form of "we don't want them, but you can't have them." Having the U.S. take measures that would help us with our conversation was much more important in some areas than having them return harvestable fish that we could not harvest. In terms of obtaining benefits from the production from our rivers, under Article III, conserved fish were going to be the real benefit for Canada.

The critical factor in the U.S. was also related to conservation. The NMFS was in the process of designating certain Washington and Oregon Chinook stocks as endangered under the ESA. Such a designation has implications for harvest and for habitat and could have enormous impacts on the economy of the region. It can affect industrial development in areas where salmon-spawning streams are found. In Washington those areas of development meant Boeing and Microsoft. Harvest reductions that ensure that ESA requirements are met can reduce the need for habitat expenditures and restrictions. In short, a new political dynamic was developing in some parts of the U.S. for a resolution of the Pacific salmon issue.

The Process

There were two fundamental problems with the negotiating process. First, on the Canadian side, there was the lack of cooperation from the government of the Province of British Columbia. You cannot negotiate if the Premier of British Columbia in the middle of a negotiating session with the U.S. withdraws part of your team. You cannot negotiate if members of your

fifty person advisory group feel free to talk to the press about any details of the negotiation with which they disagree.

The second problem was the historic inability of the U.S. to coordinate a negotiation position, to reconcile the interests, north and south, that it had within its position. The U.S. federal government could not control the states or the Tribes. Their rights under the PST had been enshrined in legislation. And, as I have suggested, the competing interests within the U.S. were intense and their battles often acrimonious.

In response, on the Canadian side we did two things. First, we reduced the Canadian negotiating team down to three individuals with technical advisers, fisheries scientists and managers, who worked very closely with the relevant federal ministers. This meant that many people who traditionally had been involved in the process were excluded both within government and outside, and this caused some resentment both during the process and when the agreement was concluded.

Second, in dealing with the U.S., we were not able to reduce their negotiating team to the same degree but changes did occur. We began to meet with the Alaskans separately from the south, and the south separately from the Alaskans. We gave up on formal, stylized meetings between the two governments where each side presented formal positions- something that had characterized previous negotiations. Instead, we talked informally, sometimes over dinner. In this way we avoided the problem that had existed in the past of the U.S. being unable to put together a position because it could not get internal agreement first. By meeting with the Alaskans and the southern states and Tribes separately we were able to help them forge an agreement that internally they were unable to coordinate. In a peculiar way, the Canadian team played a mediating role within the U.S. negotiating team.

From January to June of 1999 we engaged in negotiations. Officially they were technical discussions, but in the course of those discussions the framework for the final deal emerged. The pattern was to have an initial discussion of the general framework, then have the technical fisheries experts, small groups of fisheries scientists and fisheries managers from both sides, produce a draft and then use that as a basis for discussion.

In some cases that draft became the final version with the relevant allocation numbers negotiated and added in; in other cases the draft was rewritten and renegotiated. What was obvious was that in spite of notorious and diffi-

cult public battles over Pacific salmon, there was the potential for a high degree of cooperation at the technical level on both sides of the border.

At the same time contact was been maintained at the variety of different levels political levels, I referred to earlier. Contact had been maintained with the governors of Washington and Alaska, with key congressmen, with the White House. At one point the White House appointed Washington lawyer, Lloyd Cutler, as its representative to the negotiations. In this regard, critical roles were played by Fisheries Minister David Anderson, the Canadian Embassy in Washington DC, and Foreign Minister Lloyd Axworthy. Indeed, it was this parallel political track, which the British Columbia government had misunderstood in 1998, accusing Minister David Anderson of trying to “hi-jack” the negotiations.

The negotiations were kept private and it was not until about a week before we were ready to announce that an agreement had been reached that the press became aware than an agreement was even a possibility. That agreement was announced on June 3, and it was concluded formally on June 30.

The Outcome

The agreement is technically complex. As I mentioned, often it was drafted by scientists- in fact my counterpart, the U.S. Chief Negotiator, and myself were the only people who were legally trained. As a result some of the drafting is unusual, much to the consternation of Foreign Affairs and State Department lawyers when they came to look at it! But it was written for the people who have to administer it. It is a functional arrangement, not an artifact of the high art of diplomacy.

Let me highlight the key aspects of the agreement.

First, it is an important conservation document. Under the agreement, management and allocation are abundance-based. This means that when abundance is high, catches are high. When abundance is low, catches are low. This may seem so elementary that you would wonder why it has to be mentioned. But under the earlier Treaty annexes, shares were based on catch ceilings. Thus, regardless of whether stocks were abundant a party was entitled to catch up to its ceiling. This meant that when stocks were in decline, the state that had the first opportunity to fish, generally Alaska, would take up to its ceiling. Those lower down on the salmon's pat could only catch up to their ceiling at the risk of over fishing the stock.

Catch ceilings reflected thinking at a time of high abundance. From a Canadian point of view, it made sure that the U.S would not take the benefits of high abundance in Canadian stocks. They could only fish up to their ceilings. But, as I have mentioned, by 1999 we were talking about sharing the burdens of conservation, not the benefits of abundance. Protection against over fishing at low abundances was a much greater priority.

Finally, on conservation, the Agreement recognizes, in precatory language, the importance of habitat to the future of the salmon fishery. This was a matter of particular importance to the Tribes and generally seen as an important additional part of the PST regime.

Second, the 1999 Agreement is an important management agreement. A new conservation-based management regime has been developed for Chinook salmon. This had been a point of bitter contention for many years. Unlike some stocks, which are more area-specific, Chinook range coast wide. It is the King Salmon and central to the myths, the history, and the culture of the Pacific Northwest. It was the one area where we all had to negotiate together. Further, some Chinook stocks are endangered and subject to Endangered Species Act (ESA) listings.

The regimes developed for ocean-based Chinook fisheries and for more coastal and in-river fisheries involved numerical limits varying according to abundance levels, catch reduction obligations, a special arrangement in respect of threatened stocks (a "weak stock gate") and a commitment to work towards managing on the basis of total, and not just catch-based, mortality. In short, this is not just an allocation regime; it is a regime under which stocks can be rebuilt.

The Parties committed also to develop a management and conservation regime for coho in the southern area, something that did not exist before—again, an important new development in cooperative management under the PST.

Third, the Agreement lasts for ten years, and in the case of Fraser River sockeye for twelve years. Critical to this was an acceptance by the U.S. that its share of Fraser River sockeye would be phased down to no more than sixteen point five percent. The U.S. had entered the negotiations in March of 1998 with a proposal for twenty-eight to thirty percent share. It was able to reduce to sixteen point five percent through buying out a substantial portion

of the Washington state non-tribal fleet. In many respects this was an important key to the whole Agreement. Fraser river sockeye has always been at the center of the PST. Before 1985, the U.S. share was as much as fifty percent. We knew that a drastic reduction in the U.S. catch would make the overall agreement saleable in British Columbia. Without that reduction in U.S. catch, the 1999 negotiations would have failed as well.

Fourth, the Agreement establishes a Fund for conservation of the resource, contributed to solely by the U.S. A total sum of one hundred forty million, established fully by the end of 2003, is to be divided between the Northern and Southern boundary areas and used for salmon conservation and enhancement. This is an endowment fund with only the income to be spent, so that the Fund will exist in perpetuity. The Fund is important both for the future of the salmon resource and symbolically. Since it is the U.S. that pays, the issue of compensation for past equity imbalances, which had been a stumbling block in previous negotiations, could be removed from the table. Further, the amount was substantially larger than any amounts contemplated by the U.S. in earlier discussions. In this regard, growing concern over endangered species, plus a budgetary crisis in Alaska were helpful in achieving agreement.

Finally, the 1999 Agreement is a document about cooperation. It recognizes that the parties have to work together on science, as well as on management at the Commission and panel levels and on management on a day-to-day basis across the border. It provides for the creation of a committee on Scientific Cooperation and contemplates cross border information and staff exchanges. These provisions of the Agreement may be seen as stating the obvious, as not imposing specific obligations, but they represent a key step forward from the verbal slinging matches of the past. "Our science is real; Alaskan science is 'political science.'" The Agreement moves on from this. It focuses on dispute avoidance, rather than procedures for dispute settlement, although there is agreement to work on the implementation of the technical dispute settlement provisions of Article XII.

It's Never Over Until It's Over

Although we announced an agreement and embodied it in an exchange of diplomatic notes, it was not all over. The Funds had to be voted by Congress. In fact, the Agreement itself could not actually commit the U.S. to contributing the Funds. That would have been impinging on Congressional authority. This was dealt with in the Agreement with some creative drafting.

Also, the U.S. could not implement its obligations until the Agreement was vetted for compatibility under the ESA in accordance with its domestic law. Thus, in order to protect Canada from U.S. non-compliance, it was provided that if Congress failed to vote funds or if the ESA determination had not been made by December 1999, the Agreement would be suspended.

After the agreement was announced, it was discovered that there was another internal issue in the U.S. that had not been part of the negotiations. There was outstanding litigation in the U.S. between the Tribes and Alaska relating to Chinook, which Alaska wanted stayed during the term of the Agreement. In exchange for compliance with the Agreement, Alaska wanted to be assured that the Agreement would protect them from litigation. Discussions in the U.S. before the Agreement was formally concluded appeared to have resolved this issue and the litigation was to be stayed.

Now, Congress did vote what we expected them to do, that is the first twenty million for the Fund. However, riders were attached to the appropriation. The relevant riders related first to the U.S. voting structure in the PSC. It was provided that on issues affecting the north, Alaska would have the deciding U.S. vote and on issues affecting the south, the southern states and the Tribes would have the deciding vote.

The other rider related to the litigation. It was provided that unless the Tribes filed their requests for the stays by December 31, the moneys appropriated could not be allocated to the Fund. Essentially Congress would have to re-appropriate the Funds. But remember too, if the funds were not made available by December 31, the Treaty would be suspended.

Now these were unilateral riders, attached at the Congressional level. They were not part of the negotiations, nor apparently the result of internal bargaining within the U.S. negotiating team. Needless to say, the Tribes were not pleased to learn of this change in the voting structure on the U.S. side within the PSC. They indicated that they would not file the requests for the stays of the litigation. So that in November we were faced with the possibility that the Treaty would be suspended at the end of the year with no guarantee that Congress would re-appropriate the Funds. This situation was beginning to look like the ill-fated East Coast fisheries Agreement of 1979, which died in Congress after being so carefully and thoroughly negotiated.

This led to intensive negotiations on the U.S. side, with us on the sideline. During the negotiation of the Agreement we were able to work to bring the

different elements of the U.S. together. Now we could only watch and wonder at the way in which an international arrangement was being held hostage to domestic politics— a situation that is now unfamiliar in the U.S. Finally, accommodations were reached and on December 29, at around mid afternoon, the requisite requests for the consent orders to stay the litigation were filed. Since December 30 was a holiday in the U.S. and December 31 was a Saturday, we avoided having the Agreement suspended by about three hours.

But, even then it was not quite over. There was a further rider in Congress's appropriation of the Funds. If the courts did not make the orders staying the litigation by March 1, the money had to revert to the U.S. Treasury. Since these were consent orders, it seemed unlikely that there were any barriers to their being made, and in fact eventually the orders were entered.

Implementation

So the money was voted. Of course, the fish did not cooperate. The first season was disastrous for Fraser River sockeye, so that the impact of the Washington State reduction was hardly noticed.

But, by all accounts, the agreement has been working well. Two seasons have now gone by without the dispute and rancor of the past. The Fund has been set up. Indeed, not only did Congress vote the allocations for year two, it authorized the allocations for the following years as well to bring the Fund up to the full one hundred forty-nine million. Canadians and the U.S. cooperate in the management of the Fund and those who have been involved in the past find the cooperative spirit quite remarkable. The committee on Scientific Cooperation has also been established. So it is quite possible that a new page has been truly turned.

Implications

Although this presentation may give the impression of the orderly implementation of a well-crafted plan, let me assure you that the reality was different. The process was one of improvisation and trial and error. What I have done now is to look back and reconstruct it into a form that it probably did not have at the time.

What it demonstrates is that agreements of this kind are the product of time and circumstances. A whole variety of circumstances came together to make it possible. These included our domestic conservation needs; a Minis-

ter of Fisheries who was prepared to take, at considerable political risk, measures that were necessary to achieve conservation and an agreement; ESA listings in Washington and Oregon which led Governor Locke of Washington to take a realistic view of what was important for the economy of his state; Alaska's budgetary difficulties, which made a fund for conservation look really attractive to the fishing industry.

More fundamentally, it demonstrates the complexity of negotiating issues of this kind with the U.S. when you are dealing with issues that are in fact, at least, within the authority of a state rather than the federal government. The multi-layered political process in the U.S. means that it is simply not possible, if you want to be successful, to negotiate with the U.S. on the basis of federal government to federal government. You have to ensure that you are dealing with those who make the decision or who represent the decision makers. And that is not always the U.S. administration.

After a few years as Canada's ambassador to the U.S. Alan Gotlieb once commented that Canada's influence in Washington was like that of any lobby group. You had to get involved with Congress, with the White House, and with others, and act as any effective lobby group could do. He was suggesting, I believe, that in dealing with the U.S. it is not sufficient to treat issues as sovereign state to sovereign state. In many respects, the negotiation of the 1999 Pacific Salmon agreement bears that comment out.