Canada-United States Law Institute

2000 Niagara Moot Court Tournament

Problem

(Sent to Participants)

"The Pacific Salmon Contraversy"

Year 2000 Niagara Moot Court Tournament
Problem

This problem raises issues that could arise between Canada and the United States under the *Pacific Salmon Treaty* and the 1999 Agreement under the Pacific Salmon Treaty. In order to simplify research and to narrow the scope of the problem, it has been set between hypothetical states on the basis of specific treaty extracts.

The countries of Nordet and Marin are abutting sovereign states located on the west coast of North America. Nordet is further north along the coast than Marin. They have similar geography with many alluvial streams descending from the Continental Divide into the Pacific Ocean. Both countries have ports on the Pacific Ocean. Both countries are stable constitutional democracies. Marin has a greater population but Nordet has a larger landmass. Neither country could be considered a developing nation..

Both Marin and Nordet are parties to the 1982 *United Nations Convention on the Law of the Sea* and the 1995 *Convention on Biological Diversity,* and are signatories to the 1995 *United Nations Agreement on Straddling and Highly Migratory Fish Stocks.* No declarations or reservations have been made by either country to any of these agreements.

The Delavenir River is a river shared by the Parties. It begins in glacier-fed streams in the mountains of Marin and empties into the Pacific Ocean in Nordet. The Delavenir River has been a salmon-producing river for as long as humans have been in the area. While there are six species of Pacific salmon, the only species found in the Delavenir River is sockeye.

Sockeye salmon are anadromous fish - they begin their lives in freshwater, migrate to the sea where they attain most of their size and migrate back to freshwater to spawn. In late summer, females deposit eggs in stream gravel beds. The eggs develop into fry after several months and migrate to the sea shortly after emergence. Sockeye salmon migrate north along the continental shelf and then migrate south into the open Pacific Ocean. They will spend 4-5 years in the ocean until they return to the coastal waters.

Sockeye that survive their time at sea return to spawn in the same stream where they began their lives. Spawning takes place in that portion of the Delavenir River that is in Marin territory. It is during the return migration that salmon fishing occurs. In the Delavenir River, sockeye fishing occurs in August. The salmon industry is currently worth $50-70 Million each year to Nordet and Marin. Environmental downturns, the availability of foreign farmed salmon and market fluctuations have taken a serious toll on the industry: at the peak of salmon fishing in the 1980s, the industry was worth 100-150 Million each year.

In 1980, the Parties signed the *Salmon Treaty*. (Relevant sections of the 1980 Treaty are attached.) The *Salmon Treaty* contained a provision of guiding principles (Article III), a provision for creating fisheries regimes (Article IV), a provision for a technical dispute mechanism (Article XII) and a prohibition against new fisheries and against ocean fisheries.

(Article XIII) The *Salmon Treaty* created a regional organization, the "Salmon Commission", to administer the agreement between the Parties and to conduct non-partisan salmon research. The Commission is jointly funded and staffed by scientists and fisheries managers. Each Party names 4 Commissioners for a period of 5 years.

The Treaty set out, in Fishing Annexes, percentages of total allowable catch for each Party's rivers. The term "total allowable catch" is defined as the number of returning fish minus the number needed to ensure survival of the species. The total allowable catch varies each year according to the number of returning fish. In the Annexes, the Parties divided the possible total allowable catch into percentages. Accordingly, the exact number of fish available to be caught (the "fishing quota") varies each year based on the number of spawning fish. The fishing quota is decided by consensus by the 8 Salmon Commissioners based on the scientific advice and recommendations of the Commission staff and scientists. The Parties then authorize their respective industries to catch the Annex percentage of that year's quota.

The Fishing Annexes to the 1980 Treaty expired in 1991 but the remainder of the Treaty remained in force (and continues to be in force.) It took 4 years of continuous negotiations before the Parties agreed to another set of percentages. The declining value of the industry and the need to balance upstream and downstream catches were two of the reasons for the difficulty of the negotiations. In 1995, the Parties signed the *Salmon Agreement*. This *Agreement* contained new Fishing Annexes as well as agreements on:

1- an institutional structure to increase cooperative enhancement and restoration of salmon habitat and survival through joint projects;
2- dispute settlement improvements including the creation of a committee of non-governmental and governmental authorities to assist in preventing disputes.

(Relevant sections of the 1995 Agreement are attached.)

One of the first cooperative projects was the "seeding" of the glacial streams of Delavenir River in the summer of 1998. Seeding is a process where eggs are bred in laboratories from natural stock and then planted in gravel beds in streams. Seeding is one means of ensuring the continued existence of a salmon stock but it cannot replace the natural genetic diversity that would have occurred in wild salmon streams. This project was duly approved and sanctioned by the Commissioners according to the 1995 *Agreement*. The purpose of the project was to improve sockeye stocks in Delavenir River. These particular stocks are in a precarious state and are considered endangered by some scientists in Nordet and Marin, although a designation of "endangered status" has not been made under the domestic legislation of either country.

An error by the seeding company resulted in the seeding of Atlantic coho in the glacial streams of Marin. This variety of salmon is characterized, in part, by its aggressive breeding habits. Atlantic coho spawn each year of their three-year life cycle. The fry emerge earlier than sockeye fry and, in fact, feed on sockeye eggs during their first few weeks of life. A single Atlantic coho can consume 100 000 sockeye eggs prior to leaving its natal stream. However, Atlantic coho stocks are more susceptible to predation from marine birds and mammals during their ocean residency as they swim closer to the surface than other salmon stocks.

The seeding error was realized at the end of 1998 fishing season. Throughout the following winter, the Parties convened many high-level meetings to attempt to agree on an appropriate strategy. No strategies were agreed-upon, in part because the Parties disagreed about the urgency of the situation. Nordet maintained that leaving the coho unchecked would destroy the wild sockeye population: Marin asserted that Atlantic coho have higher ocean mortality rates and their population would decline naturally to acceptable levels. In June of 1999, the Nordet Minister of Fisheries announced:

> "No alternative to saving the natural sockeye population has been found during negotiations with Marin. This generation has a responsibility to the next to ensure a balanced and healthy ecology. Nordet has no alternative but to authorize its fishers to eliminate the Atlantic coho through fishing during the peak period for coho returns."

The coho taken in this way were to be available for sale in the way that other fish and fish products were sold. In order to capture the coho, the Nordet fleet used mesh nets with mesh sizes between 20 and 25 cm which they stretched across the mouth of the river. The by-catch of non-salmon species by this fishing method was considerable. This strategy resulted in the capture of a high percentage of Atlantic coho. Some scientists of Nordet believe that they have captured enough of the coho to eliminate the threat that they pose but other scientists disagree. Given this scientific uncertainty, the Government of Nordet announced its intention to continue the fishing campaign for the lifespan of the seeded Atlantic coho.

However, the fishing strategy also resulted in the capture of a large number of the endangered sockeye. Scientists from Marin were outraged at the magnitude of the fishing campaign and maintained that it would push the Delavenir sockeye into extinction. Marin requested that a Technical Panel be appointed under Article XII of the 1980 Treaty to decide the best method to protect the sockeye stocks. Nordet refused to agree to an arbitrator, maintaining that this is not a technical issue but a policy issue.

In July 1999, the Marin Government announced that it was closing all fishing for 1999 in the Marin section of the Delavenir River in order to let any remaining sockeye journey to their spawning streams. The fishing industry of Marin suffered enormous losses. Other costs to Marin included lost processing revenues, related small businesses losses (boat repair and supply shops, restaurants, stores, etc.) as well as the costs of water purification, stream diversion and the creation of riverbed protection areas to provide ideal conditions for the sockeye.

Marin and Nordet have now agreed to submit their dispute to the International Tribunal for the Law of the Sea.

Marin requests the Tribunal to declare that:

1. Nordet's fishing activities in respect of Delavenir stocks were contrary to international law;
2. Nordet failure to agree to establish a Technical Panel under Article XII of the Salmon Treaty was a breach of its obligations under the Treaty; and

3. Marin is entitled to all revenues from stocks taken from the Delavenir River by Nordet.

Nordet requests the Tribunal to declare that:

1. Nordet's fishing activities in respect of Delavenir stocks were justified under international law;
2. Nordet was not in breach of any obligation by refusing to agree to establish a Technical Panel under Article XII of the Salmon Treaty; and
3. Nordet is entitled to all revenues from stocks taken from the Delavenir River by Nordet.

Excepts from the 1995 Salmon Agreement between Marin and Nordet

Preamble

"...The Agreement consists of the following elements:.....

(c) provisions for a Salmon Rivers Restoration and Enhancement Fund;

(d) provisions for Renewed Cooperation on Scientific and Institutional Matters; and

(e) provisions relating to Habitat and Restoration.

It is proposed that compliance with this Agreement shall constitute compliance by the Parties with their obligations under Article III of the Treaty.

...

Salmon Rivers Restoration and Enhancement Fund

The Government of Nordet and the Government of Marin agree that:

1. There shall be established a Salmon Rivers Restoration and Enhancement Fund, hereinafter referred to as "the Salmon Fund."

2. The Salmon Fund shall be used to support the following activities:

(a) development of improved information for resource management and improved scientific understanding of limiting factors affecting salmon production in the freshwater and marine environments;
(b) rehabilitation and restoration of marine and freshwater habitat, and improvement of habitat to enhance productivity and protection of Pacific Salmon; and
(c) enhancement of wild stock production through low technology techniques, such as seeding, rather than through the construction of hatchery facilities.

....

7. The Salmon Commission shall develop procedures for the acceptance, review, evaluation and approval of proposals for the use of the income of the Salmon Fund.

...

Agreement on Renewed Cooperation on Scientific and Institutional Matters

Recognizing the advantages of enhanced cooperation in the management and stewardship of Pacific salmon,

Recognizing the benefits of increased stability in the management and stewardship of Pacific salmon under the Salmon Treaty,

Recognizing the benefits of continued bilateral agreement,

Recognizing the advantages of consultation and cooperation on science and information exchange,

Recognizing the need to develop clearer distinctions between technical and policy issues,

Recognizing that improved institutional arrangements and greater cooperation on science will facilitate improved resource management,

The Government of Marin and the Government of Nordet agree to:

...

(d) request the Commission to create the Committee on Scientific Cooperation which shall be comprised of no more than eight members, drawn from both governmental and non-governmental scientific communities, to be nominated four each by the respective Parties with the mandate to:

(i) assist in consultation with the scientific and technical staff of the Commission in setting the scientific agenda for the Commission, including identifying emerging issues and subjects for research and monitoring progress;

(ii) monitor the progress of the Parties in enhancing cooperation and consultation on science including such matters as timely data exchange, the development of common assessment models, and scientific and technical exchanges;

(iii) provide support to the scientific and technical staff of the Commission including advising the Commission at its request on the distinction between technical and policy issues, and assisting in arranging peer review evaluation of scientific reports;

(iv) undertake the tasks assigned to it in the Agreement on Habitat and Restoration; and

(v) make recommendations to the Parties on enhancing scientific consultation and cooperation ;

(e) encourage the resolution of scientific issues at the technical level through the Commission; and

(f) request the Commission to elaborate rules and procedures, as necessary, for the implementation of the process set out in Article XII of the Salmon Treaty.

Agreement on Habitat and Restoration

Considering agreements reached between the Government of Nordet and the Government of Marin (the "Parties") to implement abundance-based management regimes designed to prevent overfishing;

Taking into account the decline in abundance and productivity of important naturally spawning stocks of Pacific salmon;

Recognizing that protection and restoration of salmon habitat and maintenance of adequate water quality and quantity are vital to achieving improved spawning success, safe passage of adult and juvenile salmon and, therefore, optimum production of important naturally spawning stocks;

Recognizing that the principles and objectives of the Salmon Treaty can only be achieved if the Parties maintain and increase the production of natural stocks;

Recognizing that a carefully designed enhancement program would contribute significantly to the restoration of depressed natural stocks and assist the Parties in achieving optimum production;

Desiring to cooperate so as to achieve optimum production, the Parties agree:

1) To use their best efforts, consistent with applicable law, to:
    a) protect and restore habitat so as to promote safe passage of adult and juvenile salmon and achieve high levels of natural production,
    b) maintain and, as needed, improve safe passage of salmon to and from their natal streams, and
    c) maintain adequate water quality and quantity.

2) To promote these objectives by requesting the Commission to report annually to the Parties on:
    a) naturally spawning stocks subject to the Treaty for which agreed harvest controls alone cannot restore optimum production,
    b) non-fishing factors affecting the safe passage of salmon as well as the survival of juvenile salmon which limit production of salmon identified in sub-paragraph 2(a) above,

c) options for addressing non-fishing constraints and restoring optimum production, and
d) progress of the Parties' efforts to achieve the objectives of this agreement for the stocks identified in sub-paragraph 2(a) above.

3) The Committee on Scientific Cooperation, when constituted, shall, in consultation with the scientific and technical staff of the Salmon Commission (the "Commission"), provide advice to the Commission for referral to the Parties regarding non-fishing factors affecting the safe passage and optimum production of salmon.

Excerpts from the 1980 Salmon Treaty

"Considering the interests of both Parties in the conservation and rational management of salmon stocks and in the promotion of optimum production of such stocks;

Recognizing that States in whose waters salmon stocks originate have the primary interest in and responsibility for such stocks;

Recognizing that the management of salmon is a matter of common concern;

Desiring to cooperate in the management, research and enhancement of salmon stocks;

The Government of Marin and the Government of Nordet have agreed as follows: .....

Article III
Principles

1. With respect to stocks subject to this Treaty, each Party shall conduct its fisheries and its salmon enhancement programs so as to:
   (a) prevent overfishing and provide for optimum production; and
   (b) provide for each party to receive benefits equivalent to the production of salmon originating in its waters.

2. In fulfilling their obligations pursuant to paragraph 1, the Parties shall cooperate in management, research and enhancement.

3. In fulfilling their obligations pursuant to paragraph 1, the Parties shall take into account:
   (a) the desirability in most cases of reducing interceptions;
   (b) the desirability in most cases of avoiding undue disruptions of existing fisheries; and
   (c) annual variations in abundances of the stocks.

Article IV
Conduct of Fisheries

1. Each year the State of origin shall submit preliminary information for the ensuing year to the Commission including
   (a) the estimated size of the run;
   (b) the spawning escapement required;
   (c) the estimated total allowable catch; and
   (d) its intentions regarding management of fisheries in its waters.

2. The Commission shall review the information submitted by the Parties and report to the Commissioners with respect to fishery regimes for the ensuing year.

3. Based on the reports of the Commission, the Commissioners shall decide, by consensus, fishery regimes for the ensuing year and recommend these regimes to the Parties.

4. Each Party shall establish and enforce regulations to implement the fisheries regimes recommended by the Commission and shall notify the Commission of these regulations.

Article XII
Technical Dispute Settlement

1. Either Party may submit to the Chairman of the Commission, for referral to a Technical Dispute Settlement Board, any dispute concerning estimates of the extent of salmon interceptions and data related to questions of overfishing. The Commission may submit other technical matters to the Chairman for referral to a Board. The Board shall be established and shall function in accordance with the provisions of this Article.

2. The findings of the Board shall be final and without appeal, except as provided in paragraph 3, and shall be accepted by the Commission as the best scientific information available.

.....

4. Each Technical Dispute Settlement Board shall be composed of three members. Within 10 days of receiving a request under Article XII to refer a matter to a Board, the Chairman of the Commission shall notify the Parties. Within 20 days of this notification each Party shall designate one member and the Parties shall jointly designate a third member, who shall be the Chairman of the Board.

5. The Board shall determine its rules of procedure, but the Commission or the Parties may specify the date by which the Board shall report its findings. The Board shall provide an opportunity for each party to present evidence and arguments, both in writing and, if requested by either Party, in oral hearing. The Board report its findings to the Commission, along with a statement of its reasons.

6. Decisions of a Board, including procedural rulings and findings of fact, shall be made by majority vote and shall be final and without appeal except as provided in Article XII, paragraph 3.

Article XIII
General Obligation

1. Unless otherwise agreed, neither Party shall initiate new intercepting fisheries, nor conduct or redirect fisheries in a manner that intentionally increase interceptions.

2. Unless otherwise agreed, neither Party shall initiate ocean fisheries for salmon, nor conduct or redirect ocean fisheries for salmon. ...."