

Workshop on the Pacific Salmon Treaty

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The purpose of this presentation is to set out several emerging practices in bilateral and multilateral treaties dealing with migratory fish stocks. The presentation focuses on treaties negotiated since the Pacific Salmon Treaty of 1985. At one level, the emerging practices can be seen as the international community's "best practices." It is important, however, to recognize that institutions and processes that work well in one setting are not necessarily well designed to address other settings or issues. Treaty design should always begin with the purposes and context of the treaty and not automatically adopt provisions from other treaties with similar topics.

I. Background

Most recent treaties dealing with migratory fish have been heavily influenced by the *Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks* ("Straddling Fish Stocks Agreement"). Both Canada and the United States have signed and ratified this agreement.

The principal treaties on which this summary is based are:

- *Agreement for the Establishment of the Regional Commission for Fisheries* (Nov. 11, 1999) (in force) (Regional Commission Agreement)
- *Framework Agreement for the Conservation of Living Marine Resources of the High Seas of the South Pacific* (Aug. 14, 2000) (South Pacific Framework Agreement)
- *Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean* (Sept. 5, 2000) (in force) (Western and Central Pacific Convention). Both Canada and the United States have signed, but not yet ratified this convention.
- *Convention on the Conservation and Management of Fishery Resources in the South-East Atlantic Ocean* (April 20, 2001) (in force) (South-East Atlantic Ocean Convention). The United States has signed, but not yet ratified this convention.
- *South African Development Community Protocol on Fisheries* (in force) (South African Protocol).

- *Agreement Establishing the Caribbean Regional Fisheries Mechanism* (Feb. 2, 2002) (Caribbean Regional Agreement).
- *Convention for the Strengthening of the Inter-American Tropical Tuna Commission* (Nov. 14, 2003) (Inter-American Tropical Tuna Convention). Both Canada and the United States have signed, but not yet ratified this convention.

II. Decision Principles

The Straddling Fish Stocks Agreement added two decision principles for governmental decision making not generally seen in earlier bilateral and multilateral fishery treaties. First, and consistent with a number of a number of domestic U.S. resource laws, the Agreement requires that decisions be “based on the best scientific evidence available.” Second, the Agreement requires that member states “apply the precautionary approach.” According to Article 6 of the Agreement, states “shall apply the precautionary approach widely to conservation, management, and exploitation of straddling fish stocks and highly migratory fish stocks in order to protect the living marine resources and preserve the marine environment.” It also requires states to “be more cautious when information is uncertain, unreliable or inadequate.”

Virtually all bilateral and multilateral migratory-fish treaties since the Straddling Fish Stocks Agreement have incorporated similar principles into the decision-making provisions. Some of the treaties add additional or special versions of these principles.

- For example, the South Pacific Framework Agreement provides that the ‘effects of environmental changes and other phenomena which might affect the marine ecosystem, along with the direct or indirect effects of capture, shall be taken into account, in order to reduce or prevent the risk of potentially irreversible alterations.’
- The South-East Atlantic Convention adds that its commission “shall take cognizance of best international practices regarding the application of the precautionary approach,” including the FAO 1995 Code of Conduct for Responsible Fisheries.

III. Emergency Measures

The Straddling Fish Stocks Agreement also provides for the adoption of “emergency” conservation and management measures where a “natural phenomenon has a significant adverse impact on the status of straddling fish stocks or highly migratory fish stocks.” Many of the treaties signed since the Straddling Fish Stocks Agreement contain a similar provision.

IV. Habitats

The Straddling Fish Stocks Agreement does not expressly address habitat protection, nor do most of the treaties negotiated since then. The Caribbean Regional Agreement, however, explicitly requires the Forum created under the agreement to

“promote the protection and rehabilitation of fisheries habitats and the environment generally.”

V. Transparency

Article 12 of the Straddling Fish Stocks Agreement places great emphasis on the importance of transparency in management measures. The article starts out by providing that states “shall provide for transparency in the decision-making process and other activities of subregional and regional fisheries management organizations and arrangements.” It next provides that NGO representatives “shall be afforded the opportunity to take part in meetings ... as observers or otherwise, as appropriate, in accordance with the procedures of the organization or arrangement concerned.” The latter procedures must “not be unduly restrictive in this respect.” Article 12 also gives NGOs “timely access to the record and reports of such organizations and arrangements, subject to the procedural rules on access to them.”

Most of the treaties negotiated since the Straddling Fish Stocks Agreement contain similar transparency provisions. A few of the treaties provide for more affirmative transparency mandates. The South African Protocol, for example, requires the parties to “endeavour to ensure that all stakeholders participate, at the appropriate level, in decision-making processes.” The Inter-American Tropical Tuna Convention requires its commission to “promote transparency ... through ..., as appropriate, facilitating consultations with, and the effective participation of,” NGOs and other interested parties.

The most recently negotiated treaty, the Inter-American Tropical Tuna Convention, includes an annex (Annex 2) explicitly dealing with “Principles and Criteria for the Participation of Observers at Meetings of the Commission.” Relevant provisions include:

1. The Director shall invite to meetings of the Commission ... non-Parties interested in conservation and sustainable use of the fish stocks covered by this Convention that so request.
2. Non-governmental organizations (NGOs) ... shall be eligible to participate as observers in all meetings of the Commission and its subsidiary bodies ..., except meetings held in executive session
7. An NGO desiring to participate as an observer may do so unless at least one-third of the members of the Commission object for cause in writing to such participation.
8. All observers admitted to a meeting of the Commission shall be sent or otherwise provided the same documentation generally available to the members of the Commission, except documentation containing business-confidential data.

9. Any observer admitted to a meeting of the Commission may:
- (a) attend meetings ...;
 - (b) make oral statements during the meetings upon the invitation of the Chairman;
 - (c) distribute documents at the meeting, with the approval of the Chairman; and
 - (d) engage in other activities, as appropriate and as approved by the Chairman.

Some of the treaties also deal with transparency in the work of the treaty's scientific committee. The Western and Central Pacific Convention, for example, provides that its scientific committee may "invite other organizations or individuals with scientific expertise in matters related to the work of the Commission to participate in its meetings." It also provides that NGOs shall "be afforded the opportunity to participate in the meetings" of all subsidiary bodies, including the scientific committee. As noted above, the Inter-American Tropical Tuna Commission similarly provides for NGO participation in all subsidiary bodies, including the scientific committee.

VI. Scientific Assessments and Input

Article 14 of the Straddling Fish Stocks Agreement provides for cooperation among states "to strengthen scientific research capacity in the field of fisheries and promote scientific research related to the conservation and management of straddling fish stocks and highly migratory fish stocks for the benefit of all."

The South African Protocol similarly provides for cooperation in scientific research. But the protocol then goes on to require all parties to "work towards the generation and application of best scientific advice," through the use of (1) peer reviews, (2) national research seminars, (3) publications, and (4) scientific networks. The Inter-American Tropical Tuna Convention also mandates the publication or other dissemination of scientific reports, as well as of "scientific, statistical and other data."

Some international environmental treaties outside the fisheries field have moved toward the use of broad independent scientific bodies designed especially for credibility and impartiality. Perhaps the best example of such a body is the International Panel on Climate Change (IPCC). Most multilateral and bilateral treaties dealing with migratory fish stocks, by contrast, still rely on subsidiary scientific committees, such as the Pacific Salmon Commission's Committee on Scientific Cooperation, consisting of scientists appointed by the governments who are party to the treaties. An exception to this general rule is the Russian/Norwegian cooperate framework in the Barents Sea, which relies on the International Council for the Exploration of the Sea (ICES) for stock assessments and recommendations regarding harvest levels and practices.