The Future of the Columbia River Treaty

By Nigel Bankes and Barbara Cosens

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Executive Summary

This paper examines the future of the Columbia River Treaty (CRT). In particular it assesses the degree of flexibility available under international law and the domestic laws of the United States and Canada for the relevant parties to negotiate and implement possible future legal arrangements for the Columbia River Basin. We do not argue for the adoption of any particular vision of those future arrangements, but take as a starting point the possibility that the future may hold something different from the two options that are allowed in the current text of the Columbia River Treaty. The two default options that the Treaty provides for are continuation and unilateral termination. We leave it to the relevant parties, including basin stakeholders, to consider the additional specific scenarios they would like to explore. Our focus is to assess the degree of flexibility available under international and domestic law to adopt and implement any such alternative arrangements.

The CRT between Canada and the United States, concluded in 1961 and entering into force in 1964, addresses the cooperative management of the Columbia River but only for flood control and power purposes. The parties share the resulting benefits. The Treaty has no fixed term but either Party may unilaterally terminate the Treaty in 2024 or later provided that it gives at least ten years notice. Unilateral termination will principally affect the sharing of power benefits. This is because the flood control provisions change automatically in 2024. Those changed flood control provisions survive treaty termination as does the right of the U.S. to operate Libby Dam. In addition to these rules the governing regime will revert to the Boundary Waters Treaty of 1909 and any relevant norms of customary international law. In addition to unilateral termination, the two States may terminate the entire Treaty at any time by mutual agreement.

The 1964 CRT was ratified by the President of the United States on the advice and consent of a two thirds majority of the Senate, and ratified by the federal Crown for Canada following parliamentary approval and agreement with the province of British Columbia. Implementation has proceeded at the federal level in the U.S. through the appointment of the Administrator of the Bonneville Power Administration and Division Engineer of the Northwestern Division U.S. Army Corps of Engineers as the U.S. Entity, and in Canada through the appointment of British Columbia Hydro as the Canadian Entity.

The Treaty addressed flood control and power values but it did not directly accommodate other values including fish and related ecological values. The Treaty focused on power and flood control because the Parties believed that these were the issues where the greatest benefits could be secured through cooperative action. States in the U.S. portion of the basin were involved in negotiations through their representatives in the Senate. The province of

British Columbia was also heavily involved in the negotiation of the Treaty on the Canadian side. Indigenous peoples were not involved in the development of the CRT on either side of the international boundary; neither in any significant way were other basin residents.

The Entities have reached mutually acceptable annual supplementary agreements to meet some of the non-power and non-flood concerns but many believe that these arrangements do not go nearly far enough in accommodating ecosystem values and function. The supplementary agreements do not provide an avenue for re-consideration of the formula for sharing the costs and the benefits of providing enhanced power and flood control. The dynamic created by possible treaty termination in 2024 (by notice given in 2014 or earlier) as well as the automatic changes to the flood control operations that will occur in 2024 will create both the opportunity, and perhaps the need, to take a broader look at the treaty.

The Entities have begun their own assessments of alternatives futures for the CRT and have undertaken joint studies to inform some options. The Phase I report of the entities considered three alternatives:

> **(1) Option A - Treaty Continues:** The Treaty continues post-2024 with its current provisions including expiration of certain flood control provision.
>
> **(2) Option B - Treaty Terminated:** The Treaty terminates in 2024, leaving only continuation of certain flood control provisions as in Option A.
>
> **(3) Option C - Continuation of Pre-2024 Conditions:** The Treaty continues post-2024 with the existing pre-2024 flood control and other provisions. Option C would require new arrangements for implementation.

This paper starts with the premise that the two alternatives that the treaty text offers, *unilateral termination* (albeit with continuing but changed flood control provisions), and *continuation* (power provisions continue, flood control provisions change just as in unilateral termination) cannot be exhaustive of the possible futures. Changes in values since the early 1960s have led to important legislative developments in both countries including environmental assessment laws and endangered species legislation that requires that much greater attention be accorded to environmental and ecological concerns. Many basin interests would like to see ecosystem function (variously defined as keeping reservoir levels higher or re-introducing salmon to the upper basin, and operating in a manner consistent with the natural hydrograph in the lower basin) elevated to a third purpose of international management. In addition, there is a much higher expectation of public participation in government decision making and resource management now than there was in 1964 and the legal status of indigenous peoples has been considerably enhanced since then. Finally, changing approaches to flood control and changes in energy

markets since 1964 may lead some to seek to alter the arrangements for sharing the costs and the benefits of providing enhanced power and flood control.

As noted above, this paper leaves to others the actual development of additional alternative scenarios. But to the extent that the relevant parties seek an alternative that is not articulated as a default position in the CRT, it will be necessary for them to consider that alternative in the context of the flexibility provided by international law and the domestic law and practice of the two countries in relation to treaties.

In the U.S., the Constitution provides for Presidential ratification of international agreements following the advice and consent of a two thirds majority of the Senate. However, actual practice indicates greater flexibility and some room for unilateral Executive action. Just how flexible and what process is to be followed in the alternative is left to the Executive and Congress to determine as a political matter. No bright line can be drawn. In general, the Executive in entering into international agreements will seek to rely on an existing treaty, or a general indication of acceptance or delegation of authority from Congress before taking unilateral action. Consultation by the Executive with Congressional representatives from the states in the basin and members of the Senate Committee on Foreign Relations throughout will reduce the risks of not pursuing the advice and consent route to ratification.

In Canada, the path forward is clearer since the conclusion of international agreements is the responsibility of the executive. However, since the subject matter of the CRT engages the rights and interests of the province, British Columbia will take a leadership role in concluding any arrangements. Both governments will need to consult with First Nations if their interests may be affected by the negotiations.

It is useful to break the analysis leading to the conclusions above into three steps: (1) the negotiation of any new arrangement; (2) the ratification of any new arrangement, and (3) implementation, because the degree of flexibility varies with each step. Consideration of these three steps within the context of international law and the domestic laws of the two parties is the subject of chapters 3, 4 and 5 of the paper and is briefly summarized here then related to the overarching question of flexibility to alter international management of the Columbia River.

Negotiation: The legal answer to the question of who can participate in the negotiation of any new international agreement is straightforward but warrants addressing due to the interest of basin stakeholders in this issue. International law imposes no constraints on the inclusion of different regional interests within the negotiating team of a state. Under U.S. law the Executive has the sole authority to negotiate an agreement, but may appoint a

negotiating team that includes representatives of various departments, and may include as advisors members of Congress and other interested parties. Although nothing requires the inclusion of representatives of states, Native American tribes, and other interested parties in the Basin, nothing prevents the Executive from appointing a team of representatives from the Basin to act in an advisory capacity during negotiations, provided the Executive either maintains final authority to accept the agreement or expressly delegates that authority to the negotiation team. It is also important to note that while the Executive may compose a negotiating team in any manner it sees fit, should the CRT be terminated in its entirety and management proceed under operating agreements among agencies, the U.S. agencies are substantially more constrained in their authority to include basin interests with public comment being the primary avenue for input.

The position is similar under Canadian law: the conclusion (or amendment) of a treaty is an executive act of the federal government. As a practical matter the federal government will work collaboratively with a province to the extent that the subject matter of a treaty engages the property, resource and legislative interests of the province. The Columbia River Treaty is such a treaty. The Province was heavily involved in the negotiation of the Treaty and will be similarly involved in any discussions as to its future. This is confirmed by the terms of the 1963 Agreement between Canada and British Columbia. Developments in constitutional and aboriginal law in Canada require both governments to consult an aboriginal people if the outcome of a proposed negotiation may affect (prospectively) the aboriginal or treaty rights of that particular people. Other residents of the Basin have no similar constitutional entitlement to be engaged in any such negotiations but the provincial government has made a political and ethical commitment to engage all residents of the Basin.

Ratification: International law leaves all decisions as to the appropriate process for ratification of a treaty to the domestic law of the States concerned. Under U.S. domestic law, international agreements that have the force of a treaty in international law may be ratified by the Executive (1) with the advice and consent of the Senate; (2) with prior or post-authorization of Congress or both; or (3) by the Executive alone. In the period since 1964 it has become increasingly common to use options (2) and (3) rather than seeking the advice and consent of the Senate prior to ratification. A 1984 Study indicated that 94% of international agreements reached between 1946 and 1972 were ratified without the advice and consent of the Senate. However, it is important to note that no clear line exists for when the advice and consent of the Senate is required. If implementation of an agreement requires additional action by Congress, such as the appropriation of funds, then unilateral Executive action is insufficient and at the very least post-Congressional action is required. In areas specifically under the purview of Congress such as commerce (and through commerce, water), the Executive may be on stronger ground when acting under an existing

treaty or Congressional action addressing the matter. Nevertheless, practice is not entirely consistent with this statement. The U.S. Supreme Court has been unwilling to weigh in on the balance between the Executive and Congress in entering into international agreements. Consultation by the Executive branch with key members of Congress (those from the Basin states and those on the Senate Committee on Foreign Relations) is an important step in determining the appropriate process and we strongly recommend that it begin early in the consideration of alternatives.

If the question were the degree of flexibility available under U.S. law to enter into an international agreement with Canada on the Columbia River without formalizing the treaty through the advice and consent of Congress and with participation by basin residents, the response would be that there is some flexibility as noted above, providing that key members of Congress concur. That is not, however, the question. A treaty on the subject of the Columbia River already exists. With the backdrop of U.S. domestic law in general, the actual practice between the United States and Canada for similar purposes and under the CRT is informative. In fact, the Department of State articulates a series of factors for determining when an international agreement requires the advice and consent of the Senate. Of particular importance in the context of the CRT are the preference of Congress and past U.S. practice, particularly in its relations with Canada. In the area of water and other natural resources, the U.S. has increasingly entered into agreements through unilateral Executive action with and without the umbrella of an existing treaty. The discussion of implementation further informs this analysis.

The written constitution of Canada does not prescribe a particular form for the ratification (or termination) of an international treaty or a treaty amendment. In recent years the federal government of Canada has adopted a policy of tabling new arrangements in Parliament. It is less clear that such a policy will be applied to amendments to existing treaties or their termination. Recent practice suggests that the federal government does not consider that the policy applies to termination but the policy should extend to significant amendments to a treaty.

Implementation: Although the flexibility to implement a new arrangement is related to the flexibility to negotiate a new arrangement, it also raises a question as to the degree of flexibility offered by the CRT as it stands. Thus, we treat implementation as a separate issue. International law has nothing to say about the manner in which States implement treaties in domestic law other than that they must do so in good faith and that a State cannot rely upon its own constitution or laws as an excuse for failing to implement the terms of a treaty.

Testimony by the Executive in the 1961 advice and consent proceedings in the Senate focused narrowly on the treaty purposes of flood control and hydropower and the limitation of discretionary decisions by implementing entities to technical decisions on reservoir operation based on water supply. This seemingly narrow view of flexibility under the CRT is tempered by the fact that actual implementation of the CRT has been quite flexible, including the 1964 Exchange of Notes that filled gaps in the implementation of the flood control provisions and in doing so made more specific agreements than were spelled out in the CRT. Similarly, the operating entities have used supplemental agreements to achieve benefits to both parties including those related to fisheries. This flexibility parallels the increasing use of unilateral Executive action in general and suggests a relatively high degree of flexibility in dealings between the U.S. and Canada to alter implementation under the existing treaty A cautionary note is warranted – the further the basin stakeholders seek to deviate from the CRT and its subsequent implementation, the more likely it is that a new agreement is needed and the more likely that it will require the advice and consent of the Senate prior to ratification.

Efforts to reconcile implementation under the CRT with a later-enacted domestic law (i.e. the *Endangered Species Act*), provides an additional avenue for flexibility for the U.S. to alter implementation under the existing CRT. U.S. courts will uphold a later-enacted domestic law over a treaty in the event of conflict. Because the result of this interpretation would place the U.S. in breach of the international agreement, courts will go to great lengths to interpret the domestic law in a manner that avoids a finding of conflict. Arguably the Executive is well advised to implement the domestic law in a manner that also avoids conflict. Thus, the basis for modifications to implementation to reconcile the CRT with the *Endangered Species Act* (e.g., through the Libby Coordination Agreement) lies in the need to avoid conflict and need not rest solely on the authority for unilateral Executive action.

The issue of the scope of authority and degree of flexibility afforded the U.S. Executive branch under a treaty is further informed by the question of who has the authority to interpret a treaty and who has standing to challenge that interpretation? The U.S. Supreme Court considers interpretation of an international agreement to be a matter for the political branches and has been unwilling to consider challenges to interpretation by either private parties or members of Congress. Thus, the ultimate decision on interpretation is left to a political battle of wills between the Executive and Congress. While this suggests the possibility of considerable flexibility, based on the analysis below, consultation between the two branches is strongly advised before the Executive embarks on a new interpretation of a treaty, and the greater the deviation from past practices, the more likely that consultation will lead to a push for seeking the advice and consent of the Senate.

The conclusion and ratification of a treaty does not change the division of legislative authority in Canada for the subject matter of that treaty. Accordingly, where the subject matter of a treaty like the Columbia River Treaty or any amendment of that treaty deals largely with provincial property and provincial legislative powers, it is the provincial government that obtains the benefits of the treaty and which has the authority to implement the treaty. The federal government remains responsible in international law for the fulfillment of the terms of the treaty. The federal and provincial governments dealt with this mismatch between authority and responsibility when the treaty was negotiated by entering into the 1963 Canada-British Columbia Agreement. This Agreement confirms the allocation of benefits to British Columbia and requires the province to fulfill the terms of the Treaty. The agreement further requires the province to indemnify Canada against any losses that Canada may suffer in the event that British Columbia fails to implement the obligations arising under the terms of the Treaty.

Given the executive status of a treaty in Canadian law, the most important preliminary task of the responsible level of government is to assess whether or not the treaty needs to be implemented by legislation or whether it can be implemented simply by executive action. In the case of the CRT, the two governments (and principally the provincial government) concluded that executive action alone would suffice. Thus, there is no federal or provincial "Columbia River Treaty Implementation Act". Instead, the CRT has been implemented by executive act and principally by executive acts of the provincial government and its agent British Columbia Hydro (BC Hydro), the designated Entity for Canada under the Treaty. This has proven to be efficient although the executive character of the implementation makes it difficult to provide appropriate avenues for public participation.

The responsible government(s) will need to scrutinize any future arrangements for the Columbia River in light of the same question. If the Treaty expands to cover a broader range of values than just power generation and flood control it may be necessary to amend provincial or federal laws to accommodate any new responsibilities. It is not possible to make that judgment in the abstract; the assessment can only be made on a case by case basis. To the extent that any treaty amendment or future implementation may affect existing aboriginal or treaty rights it will be necessary for the responsible government(s) to consult and accommodate the affected First Nations.

Treaty practice in the international relations of Canada and the United States examined in Chapters 6 and 7 informs the degree of flexibility that has been accepted in treaty implementation in dealings between the two countries. In Chapter 6 of the paper, we examine practice in relation to treaties other than the CRT. Most of the treaties examined are boundary or transboundary water agreements but we also look at the Migratory Birds Convention and the Pacific Salmon Treaty. Two questions inform the inclusion of this part

of the paper: First, what do these practices tell us about the circumstances under which the amendment of such a treaty might require the advice and consent of the Senate, and second, what do these practices tell us about how the two states have involved regional interests in the negotiation and implementation of such arrangements?

As to the first question, the analysis shows that the practice is very mixed. Some amendments to treaties have received the advice and consent of Senate (e.g., a recent important amendment to the Migratory Birds Convention) while in other cases the U.S. has found it possible to accommodate significant changes and additions to existing instruments without needing the approval of the Senate. Furthermore, recent (post-1950) bilateral water agreements have been ratified without securing Senate consent (although with the important caveat that the implementation of any obligations is subject to domestic approval of any necessary financial appropriations).

As to the second question, practice in relation to the Migratory Birds Convention (MBC) and Pacific Salmon Treaty (PST) shows how indigenous and regional interests may be taken into account in international negotiations. Aboriginal interests were a very significant driver of the 1985 Protocol to the MBC. In particular, it was important to ensure that the arrangement reflected Canada's constitutional obligations. Indigenous people were consulted closely on the language of those amendments. The amendments also recognize the importance of indigenous knowledge. The PST is more guarded, although the Yukon River amendments to the Annex to the PST do, for example, expressly recognize the priority attaching to aboriginal and subsistence harvesters. The PST also provides useful examples of how regional interests may be taken into account in implementing a treaty. However, such regional representation is not without its problems and may make it very difficult to achieve consensus. Indeed, the particular history of the PST suggests that U.S. interests may be much more enthusiastic about using the PST as a model for accommodating regional interests than their Canadian counterparts.

Chapter 7 of the paper examines the practice under the CRT. In this section we examine the extent to which the parties (the U.S. and Canada) and the Entities have felt able to add to, elaborate upon, change or finesse the treaty in response to new developments, unexpected circumstances and changing values. The practice includes early agreements in relation to the Treaty (including the Protocol), as well as later agreements dealing with the return of the Canadian entitlement, the annual supplementary operating agreements, and the agreement in relation to the changed operation of the Libby dam. So far as we are aware, in only one case has the Executive in the U.S. felt it necessary to return to the Senate for its advice and consent. That instance related to what seems, in retrospect, to be a fairly trivial matter – an additional flood control payment to Canada as a result of the advanced in-service date for the Duncan and Arrow storage facilities. In all other cases, the

Entities have proceeded on their own (as in the case of the annual supplementary operating agreements and the Non-Treaty Storage Agreements) with the approbation of the Permanent Engineering Board and often accompanied by declarations that the arrangements have no adverse effect on treaty obligations, or if the two States are involved, then by way of an Exchange of Notes.

In sum, our analysis of the three steps involved in developing a new arrangement that goes beyond the options articulated under the CRT suggests the following. First, international law will not constrain the parties in adopting a new arrangement. Second, the different ways in which the U.S. may ratify an international agreement means that it will be important for there to be clear communication between the Executive and key members of Congress in the U.S. if it seems desirable to avoid the advice and consent procedure in Congress. Third, in Canada the Province will assume a leading role in any articulation and negotiation of a new arrangement for the Columbia Basin. In taking that role the Province has assumed a moral responsibility to consult with the residents of the Basin. In addition, both the Province and the federal government have a legal responsibility to consult and accommodate First Nations whose rights and interests may be affected by any such new arrangement.

1.0 Introduction

For 48 years, the United States and Canada have cooperatively shared the management of the Columbia River under the Columbia River Treaty (CRT). The Treaty has provided both parties with significant direct benefits from flood control and power generation and indirect benefits of economic growth in the Pacific Northwest. While not without flaws, the CRT has been hailed as "one of the most successful transboundary water treaties based on equitable sharing of downstream benefits".[1] It is now time to think about the future of the Columbia River Treaty.

Under international law, the U.S. and Canada may agree to modify or terminate the Treaty at any time. The CRT contains no automatic expiration date but either party may unilaterally terminate portions of the Treaty beginning in 2024 by providing notice at least ten years in advance (i.e. by 2014). The parties and other stakeholders in the Columbia River Basin have already begun to think about what a future treaty might look like.

This paper deals with the future of the Columbia River Treaty and the degree of flexibility available under international law and the domestic laws of the United States and Canada to negotiate and implement possible future legal arrangements for the Columbia River Basin (the Basin). We take as a starting point the possibility that the future may hold something different from that elaborated in the current text of the Treaty. This may be because those who are affected most by current Treaty operations − the states of the Basin, the province of British Columbia, the tribes and the First Nations of the Basin, and all the other residents of the Basin (collectively, the Basin interests) − desire a different future than either of the two options available under the CRT. Those two options are continuation of the Treaty (but with changed flood control rules) or termination of the Treaty which would end the sharing of downstream power benefits but provide for the continuation of flood control, albeit on an altered basis.

Let us assume that the Basin interests agree that neither of these two options is optimal. Some, for example, may think that downstream interests require additional flood control protection. Others may argue that the Treaty needs to be changed to allow the river to return to a more natural flow pattern or that more consideration should be given to fisheries and other ecological values. Still others may argue that the Treaty should continue but with a different allocation of benefits between upstream and downstream states. This paper does not argue for the adoption of any particular vision of those future arrangements, nor does it seek to develop or elaborate additional scenarios. The starting point for the paper is simply the premise that Basin interests may agree on some preferred

[1] John. M. Hyde. Columbia River Treaty Past and Future, HydroPower, July 2010.

future other than those allowed for in the present Treaty. If the premise holds true, it becomes important to examine whether relevant rules of international law or the constitutional and legal arrangements of the United States and Canada will make it difficult to implement the arrangements that the Basin interests are able to agree upon. The paper focuses on two questions: How much flexibility do Basin interests have to craft a future which differs from either of the futures offered by the terms of the Treaty without encountering a significant risk of legal or constitutional challenge? And second, do the rules and practices of treaty-making constrain the involvement of Basin interests in the negotiation and implementation of any such different future?

The short answers to these questions are:

- Other than the need for formal endorsement by the parties to effect a valid Treaty amendment, international law imposes no constraints on the process to amend the CRT.
- Under U.S. constitutional law the Executive has a degree of flexibility in developing a new arrangement without obtaining the advice and consent of the Senate for the ratification of that arrangement. This flexibility arises from both the changing practices in the U.S. in the area of foreign agreements and the need to reconcile treaty compliance with post-1964 domestic legislation (including the *Endangered Species Act*). Key to achieving this is to involve congressional delegations from the Columbia River Basin and members of the Senate Committee on Foreign Relations in any negotiations, as well as tribal interests.
- U.S. constitutional law places the authority to negotiate with the Executive, however nothing limits the power of the President to appoint a negotiating team that includes local representation.
- Canadian constitutional law will be able to accommodate any of the visions of a different future for the CRT. Although the conclusion or amendment of a treaty is an executive act of the federal government, because the core subject matters of the CRT fall within provincial heads of power and property rights, the province of British Columbia will play a central role in the negotiation of any amendments.
- The governments of Canada and British Columbia have a constitutional duty to consult and accommodate First Nations whose interests may be affected by a Treaty amendment.
- International law calls for greater participation by indigenous people whose interests are affected by decision making than was the case in 1964.
- Analysis of the practice under the 1964 CRT demonstrates that a number of mechanisms have been effectively used to respond to changed circumstances, achieve mutual non-Treaty benefits, resolve disputes and avoid or resolve conflicts.

The balance of the paper provides the necessary discussion of law (international and domestic – U.S. and Canada) and practice to support these summary conclusions. The paper proceeds as follows.

Chapter 2 provides background on the Columbia Basin and the key provisions of the CRT, emphasizing two points that may influence the need for a new arrangement. First, the Treaty has no formal expiration date but may be terminated as of 2024 if either party gives at least ten years notice of termination. And second, regardless of termination or continuation, the flood control provisions of the Treaty change in important ways automatically in 2024.

Chapter 3 provides an account of the general international law pertaining to the conclusion and amendment of treaties. This part sets the CRT within the context of the Vienna Convention on the Law of Treaties and discusses the different forms of treaty making. This chapter also examines what international law has to say about the involvement of indigenous peoples and sub-national interests in the negotiation of a treaty or an amendment to a treaty.

In Chapters 4 and 5, we turn to the domestic law of treaties and provide an account of how treaties are viewed in the domestic law of the United States and Canada respectively, paying particular attention to how each country's domestic law deals with the three phases of negotiation, ratification, and implementation of an international agreement.

Chapter 6 examines US/Canada treaty practice in relation to treaties other than the Columbia River Treaty. This section of the paper principally examines other Canada/US treaties that deal with boundary waters or transboundary waters but it also discusses practice in relation to the Migratory Birds Convention (MBC) and the Pacific Salmon Treaty (PST). The purpose of this section is to show the different arrangements that the U.S. and Canada have adopted when dealing with treaty amendments covering similar subjects. Chapter 6 also examines how the processes for negotiation and implementation of the PST and MBC accommodated regional and indigenous interests.

Chapter 7 examines actual practice under the terms of the Columbia River Treaty, paying particular attention to the way in which the parties and the Entities have implemented the Treaty including any changes or variations in the Treaty. This section also examines the ways in which the parties (or the implementing Entities) have been able to accommodate interests, values, and new legal obligations that were not directly mentioned in the Treaty.

Chapter 8 summarizes the key conclusions of the paper.

2.0 Background

The Columbia River arises in the Rocky Mountains of British Columbia and flows 2,000 kilometres (1,243miles) through alpine meadows, grasslands, wetlands, forests, rolling uplands, deep gorges and cities before it empties into the Pacific Ocean. It is the largest river in the Pacific Northwest and the fourth largest in the U.S. The water shed − the Columbia River Basin − covers 671,000 square kilometres (259,500 square miles) roughly the size of France. About 15% of the Basin lies in Canada (all within the province of British Columbia) and the remainder is in the United States.[2] The Basin encompasses portions of seven states, Washington, Oregon, Idaho, Montana, Nevada, Utah and Wyoming. The U.S. portion of the basin includes the lands of fifteen tribal nations and the Canadian portion of the basin includes the lands of eleven First Nations residing within the basin and an additional six First Nation with interests in the Basin (see Figure 1 in Appendix A). Although only 15% of the Basin lies within Canada, 38% of the average annual flow and 50% of the peak flow measured at The Dalles (located on the mainstem between Oregon and Washington) originates in Canada.[3] In addition, due to the later runoff from snowpack, flow originating in Canada can account for half of the flow in late summer.[4] The Columbia River produces more hydroelectric power than any other river on the continent. The average annual runoff for the Columbia River Basin is 200 million acre-feet, but there is significant year-to-year variability.[5] This variability led to a demand for large upstream storage facilities to provide flood control and to even out the natural hydrograph.[6]

When the first European explorers encountered the Columbia Basin there were no dams. Salmon fisheries sustained the native population. Falls slowed upriver migration of salmon and provided excellent fishing locations. Each year thousands of Native Americans from numerous tribes gathered at locations such as Celilo Falls (now inundated by water behind The Dalles Dam) to fish and trade. Competition from

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[2] James Barton & Kelvin Ketchum, *Columbia River Treaty: Managing for Uncertainty, in* THE COLUMBIA RIVER TREATY REVISITED: TRANSBOUNDARY RIVER GOVERNANCE IN THE FACE OF UNCERTAINTY, edited by Barbara Cosens, A Project of the Universities Consortium on Columbia River Governance (Oregon State University Press, publication pending 2012) (hereinafter THE COLUMBIA RIVER TREATY REVISITED) (draft article at 1, on file with author).

[3] John Shurts, *Rethinking the Columbia River Treaty, in* THE COLUMBIA RIVER TREATY REVISITED, *supra* note 2 (draft article at 7, on file with co-author Cosens).

[4] Alan Hamlet, *The Role of Transboundary Agreements in the Columbia River Basin: An Integrated Assessment in the Context of Historic Development, Climate, and Evolving Water Policy*, *in* CLIMATE AND WATER: TRANSBOUNDARY CHALLENGES IN THE AMERICAS 23 (H. Diaz & B. Morehouse eds., 2003).

[5] *Id*. The year to year variability of unregulated peak flow on the Columbia is 1:34, compared to a mere 1:2 on the Saint Lawrence River or 1:25 on the Mississippi River.

[6] *See generally* Paul W. Hirt & Adam M. Sowards, *The Past and Future of the Columbia River*, *in* THE COLUMBIA RIVER TREATY REVISITED, *supra* note 2 (draft article at 6, on file with co-author Cosens).

commercial fishing and an influx of canneries began in 1866.[7] On the Canadian side of the boundary, salmon made their way up to the headwaters of the Columbia River to spawn in the Columbia and Windermere lakes, providing food and a cultural foundation for First Nations throughout the watercourse as well as an important source of nutrients for the ecosystem of the upper basin.[8] As early as 1896, the U.S. Army Corps of Engineers began transforming the Columbia River for navigation with locks and numerous dams to follow.[9] Initially, most dams on the U.S. portion of the mainstem served to generate hydropower and aid navigation but did not store substantial water.[10] Later developments changed this. The Grand Coulee Dam was completed on the mainstem in 1942 for irrigation, flood control and power purposes, and permanently blocked salmon from reaching the upper Columbia in Canada. Other storage facilities built include the Hungry Horse Dam on the South Fork of the Flathead, which was completed in 1953 and the Dworshak Dam on the North Fork of the Clearwater, which was completed in 1972.[11]

2.1 The evolution of the Columbia River Treaty

A critical impetus for the creation of the Columbia River Treaty was the flooding experienced on both sides of the border in 1948. In that year, total flow on the Columbia was close to average but runoff occurred rapidly and peaked with a flood in May that killed 50 people and destroyed the town of Vanport, Oregon (the second largest city in the state) and caused substantial damage in Trail, British Columbia. The estimated flow at Vanport was over 1 million cubic feet per second ("cfs"), about twice the average peak flows.[12] At the time of the 1948 flood, total storage capacity on the Columbia was about 6% of the average annual flow.[13]

Even before the 1948 flood, the governments of Canada and the United States had directed the International Joint Commission (which was created by the 1909 Boundary

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[7] Dan Landeen & Allen Pinkham, SALMON AND HIS PEOPLE, A NEZ PERCE NATURE GUIDE 1 (1999). *See also* Paul Hirt, *Developing a Plentiful Resource: Transboundary Rivers in the Pacific Northwest*, *in* WATER, PLACE, & EQUITY 147, 155 (John M. Whiteley et al. eds., 2008) (noting that pre-European settlement salmon runs were estimated at 12-15 million salmon).

[8] Nigel Bankes, *The Columbia Basin and the Columbia River Treaty: Canadian Perspectives in the 1990s*, working paper published by Northwest Water Law and Policy Project, Northwestern School of Law of Lewis and Clark College, 1996, http://www.law.ucalgary.ca/system/files/Columbia+River+Treaty+Lewis+%2526+Clark+paper+Bankes9504-1.pdf at pp. 4 – 7 referring inter alia to Andrew Thompson et al, No Way Up: First Nations' Legal Options for the Loss of the Columbia River Fishery, prepared for the CCRIFC, October 1993.

[9] Richard White, THE ORGANIC MACHINE: THE REMAKING OF THE COLUMBIA RIVER 37 (1995).

[10] Shurts, *supra* note 3, at 7.

[11] *Id.*

[12] Barton & Ketchum, *supra* note 2, at 4.

[13] Anthony White, *The Columbia River, Its Treaties and Operation*, *in*, THE COLUMBIA RIVER TREATY REVISITED, *supra* note 2 (draft article at 1, on file with co-author Cosens).

Waters Treaty)[14] to study the possibility of storage within Canada to provide flood control or power benefits to both countries.[15] The flooding of 1948 provided additional momentum to those studies. The IJC's work ultimately led to the adoption of the Columbia River Treaty.[16] The original text agreed to in 1961 was modified by the terms of a Protocol which the new federal government in Ottawa insisted upon both to clarify some of the provisions of the Treaty but also to provide for the immediate sale into the United States of the power benefits that British Columbia would obtain under the terms of the Treaty. The 1964 Columbia River Treaty was ratified by the President of the United States on the advice and consent of a two thirds majority of the Senate, and ratified in Canada by the federal Crown following agreement with the province of British Columbia.

Main provisions of the Treaty

The main provisions of the CRT are as follows. Canada is to provide 15.5 million acre feet (MAF) of storage "usable for improving the flow of the Columbia River" at three facilities Mica, Duncan, and Keenleyside[17] with 8.45 MAF of that storage also dedicated to assured flood control.[18] In return, the U.S. is to pay Canada $64.4 million for assured flood control for the first sixty years of the Treaty and provide a 50/50 division of the benefit of the additional hydropower generated in the United States due to releases from the three new dams. The Canadian share is referred to as the "Canadian Entitlement"[19] or the Canadian downstream power benefits. In order to realize these benefits the Treaty provides that Canada must operate the Treaty dams in accordance with agreed upon flood control plans and hydroelectric operating plans. In addition, the Treaty allowed the United States to build Libby Dam on the Kootenai (Kootenay) River. Lake Koocanusa − the reservoir behind Libby − backs up into Canada.[20] The location of these dams is shown on the following map.

[14] Text available at http://www.ijc.org/en/background/treat_trait.htm

[15] Jeremy Mouat, *The Columbia Exchange: A Canadian Perspective on the Negotiation of the Columbia River Treaty*, *in* THE COLUMBIA RIVER TREATY REVISITED, *supra* note 1 (draft article at 1, on file with co-author Cosens); Shurts, *supra* note 3, at 6-7.

[16] Treaty Between Canada and the United States of America Relating To Cooperative Development of the Water Resources of The Columbia River Basin ("Columbia River Treaty" or CRT), U.S.-Can., Jan. 17, 1961 *available at* http://www.ccrh.org/comm/river/docs/cotreaty.htm [hereinafter Columbia River Treaty].

[17] Article II.

[18] Article IV(2).

[19] Columbia River Treaty, *supra* note 16, Art. V.

[20] *Id.* Art. XII.

The Columbia River Basin

The Treaty also provided for the appointment of operating Entities by the United States and Canada. As its operating Entity, the U.S. selected the Administrator of the Bonneville Power Administration and Division Engineer of the Northwestern Division U.S. Army Corps of Engineers (USACE);[21] Canada selected BC Hydro.[22] The Treaty established one new institution, the Permanent Engineering Board (PEB) to report on performance under

[21] Exec. Order No. 11,177, 29 Fed. Reg. 13097 (Sept. 16, 1964).
[22] Barton & Ketchum, *supra* note 2, at 2.

the Treaty with a view to ensuring that the objectives of the Treaty are being met.[23] It is important to note that BC Hydro and other private parties have other facilities on the Columbia and its tributaries in Canada and that not all of the storage in the Treaty facilities is dedicated to the Treaty. For example, Mica contains considerable non-Treaty storage and BC Hydro took advantage of the control offered by Mica to build the Revelstoke facility immediately downstream of Mica.

Under international law, the U.S. and Canada may agree to modify or terminate the Treaty at any time. The CRT contains no automatic expiration date but either party may unilaterally terminate it beginning in 2024 by providing at least ten years notice (i.e. providing notice by 2014).[24] However, some provisions of the Treaty continue indefinitely even if one party gives notice to terminate. The provisions that survive termination include Canada's obligation to provide "called upon" flood control on certain terms and conditions and the right of the United States to continue to operate Libby and maintain the Koocanusa reservoir that backs up into Canadian territory. Termination is therefore something of a misnomer.

The flood control provisions of the Treaty change automatically in 2024 whether the Treaty "terminates" or continues.[25] The flood control changes are as follows. Until 2024 the United States receives two types of flood control, an assured operation and an additional on-call operation.[26] The assured operation is Canada's obligation to operate 8.45 MAF storage space, or an equivalent amount in terms of flood control in accordance with the Flood Control Operating Plan (FCOP).[27] The on call operation allows the US, on certain terms and conditions, to require Canada to operate any additional storage in the Basin in order to meet its flood control needs[28] but no such calls have been made to date.[29] In 2024 the United States loses the assured flood control operation but is still entitled to a "called upon" operation which requires Canada to operate any storage within the Basin within the limits of those facilities to meet flood control needs in the US.[30] The United States is required to pay Canada the operating costs incurred in proving the flood control and compensation for any economic losses incurred. As a result of clarifications made through the Protocol, the United States can only exercise called upon flood control in the event of potential floods "that could not be adequately controlled by all the related

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[23] Article XV.
[24] Columbia River Treaty, *supra* note 16, Art. XIX
[25] *Id*. Art. XIX(4).
[26] *Id*. Art. IV(2).
[27] Id., Art. IV(2)(a). There have been two main versions of the FCOP one adopted in 1972 and the current version (dated May 2003) which is available at http://www.crt2014-2024review.gov/Files/FCOP2003.pdf .
[28] Id. Art. IV(2)(b).
[29] Id., Art. VI(3).
[30] Id. Art. IV(3) as qualified by para. 1 of the Protocol.

storage facilities" in the US.[31] There is some debate as to the full implication of this last clause and as to the level of flood control to which the United States is entitled post-2024. In particular, there is a debate as to whether the U.S. can trigger a called-upon operation when it anticipates a peak discharge of 450 Kcfs (thousand cubic feet per second) at The Dalles or only if the peak discharge is anticipated to exceed 600 Kcfs at The Dalles.[32] The current Flood Control Operating Plan is designed to provide flood control protection down to 450 Kcfs. In addition, it is not clear what is meant by "all related storage facilities" in the U.S. It is not necessary to resolve these issues here but the existence of these uncertainties in relation to the important issue of flood control will compel the parties to seek either clarification or amendment of these provisions well before 2024 when the flood provisions automatically change.

In sum, the 1964 Treaty deals with the co-operative management of the Columbia and Kootenay rivers for flood control purposes and for power purposes. The parties share the resulting benefits. The power benefits will continue to be shared after 2024 unless one or other party takes steps to terminate the Treaty. The flood control provisions change automatically in 2024. Those changed flood control provisions survive Treaty termination as does the right of the U.S. to operate the Libby Dam.

The Columbia River Treaty did not directly accommodate other values associated with the River[33] including fisheries and related ecological values. Indigenous peoples on either side of the international boundary were not involved in the development of the Treaty; neither was there significant involvement of people and communities in the Basin. However, since ratification of the Treaty in 1964, there have been important legislative developments in both countries including environmental assessment laws and endangered species legislation that require that much greater attention be accorded to environmental and ecological concerns. In addition, public participation has become a much more important component in project review and implementation. And finally, the legal and political status of indigenous peoples has been significantly enhanced over the last thirty years.

[31] Protocol, para. 1(1).

[32] For further discussion see Bankes, "The flood control regime of the Columbia River Treaty: before and after 2024" (2012), 2 Washington Journal of Environmental Law and Policy 1.

[33] Note however that Article XIII which prohibits out of channel diversions from waters that would otherwise cross the international boundary does not apply to diversions for consumptive uses (defined as the use of water for domestic, municipal, stock water, irrigation, mining or industrial uses, except hydro) – in that sense all of these other uses rank higher in priority than generation for power purposes. This priority was confirmed by Article VI(1) of the Protocol.

Indigenous peoples in the Basin

Globally the recognition of indigenous rights is reflected in the adoption of the United Nations Declaration on the Rights of Indigenous Peoples[34] but the legal and political status of indigenous peoples has also been enhanced in the United States and Canada. This is perhaps most apparent in Canada with the constitutional entrenchment of aboriginal and treaty rights and the constitutional recognition of the government's obligation to consult and accommodate First Nations who may be affected by proposed government decisions if the proposed conduct or decision might adversely affect an aboriginal or treaty right of that First Nation.[35] In the U.S. portion of the Columbia River Basin, successful litigation relating to fishing rights has elevated the tribes to become co-managers of the fishery[36] and entitled them to substantial funding for restoration activities.[37]

The spiritual, cultural and subsistence reliance of the northwest tribes on Columbia Basin fisheries led to the inclusion of what has been interpreted to be highly significant language in a series of treaties negotiated by Isaac I. Stevens, then territorial Governor of Washington Territory, with various northwest tribes south of the 49th parallel at the council of Walla Walla in 1855[38] This language can be found, for example, in Article 3 of the Nez Perce Treaty: "[t]he exclusive right of taking fish in all the streams where running through or bordering said reservation is further secured to said Indians; as also the right of taking fish at all usual and accustomed places in common with citizens of the Territory".[39] The language stating that the right is "in common with citizens of the Territory," was interpreted by Judge Boldt of the U.S. District Court, Washington in 1974, to entitle treaty tribes to up to 50% of the harvestable fish that pass (or would pass absent harvest en route) the usual and accustomed fishing places.[40] At the time of the 1855 treaty, non-Indian fishing in the area was minor; however, once canneries made large scale commercial fishing possible, non-Indian harvest began to present major

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[34] Adopted by the General Assembly of the United Nations, 13 September 2007, UNGA 61/295 by a vote of 143 in favour, four opposed and 11 abstentions. Both Canada and the United States cast negative votes but since then both have adopted statements offering at least a measure of support for the Declaration. For Canada's statement of support November 12, 2010, see http://www.aadnc-aandc.gc.ca/eng/1292354321165. For the statement of the United States, December 16, 2010 see http://usun.state.gov/documents/organization/153239.pdf .

[35] *Haida Nation v British Columbia (Ministry of Forests)*, [2004] 3 SCR 511.

[36] United States v. Washington (*Boldt Decision),* 384 F. Supp. 312, 330 (W. D. Wash. 1974) *aff;d* 525 F.2d. 676 (9th Cir. 1975), *cert. denied,* 423 U.S. 1086 (1975); Washington v. Washington State Commercial Passenger Fishing Vessel Ass. 443 U.S. 658, 685 (1979)

[37] See, Columbia River Intertribal Fish Commission, URL: http://www.critfc.org/text/work.html

[38] Josephy, Alvin M. *The Nez Perce Indians and the Opening of the Northwest.* (Mariner Books 1965).]

[39] "Treaty between the United States of America and the Nez Perce Indians." 12 Stat. 957 (June 11, 1855).]

[40] United States v. Washington (*Boldt Decision),* 384 F. Supp. 312, 330 (W. D. Wash. 1974) *aff;d* 525 F.2d. 676 (9th Cir. 1975), *cert. denied,* 423 U.S. 1086 (1975); Washington v. Washington State Commercial Passenger Fishing Vessel Ass. 443 U.S. 658, 685 (1979)]

competition for the fish. Yet the ruling recognizing the legal right of Native American's equal access to fish would not come until years later and over a decade after the Columbia River Treaty was finalized. In affirming Boldt's decision, the Ninth Circuit Court of Appeals interpreted the right of treaty tribes "in common with citizens of the Territory," as analogous to a co-tenancy, stating:

> "[C]otenants stand in a fiduciary relationship one to the other. Each has the right to full enjoyment of the property, but must use it as a reasonable property owner. A cotenant is liable for waste if he destroys the property or abuses it so as to permanently impair its value . . . By analogy, neither the treaty Indians nor the state on behalf of its citizens may permit the subject matter of these treaties to be destroyed"

In 1977, in the wake of these decisions and after conclusion of the Columbia River Treaty, the four tribal governments who were involved − the Nez Perce, Confederated Bands of the Yakama Nation, Confederated Tribes of the Umatilla Indian Reservation, and Confederated Tribes of the Warm Springs Reservation − formed the Columbia River Intertribal Fish Commission (CRITFC) to unite the efforts of the four tribal governments to renew their sovereign authority in fisheries management.[41] This legal recognition of rights combined with the capacity building reflected in the scientific and policy work of CRITFC, has elevated the status of the four tribes to co-managers of salmon in the U.S. portion of the Columbia River basin.

In addition to the tribes participating in CRITFC, the five upper Columbia tribes in the United States have joined together on various resource issues of common concern forming the Upper Columbia United Tribes.[42] The primary common issue among the Coeur d'Alene Tribe, the Kalispel Tribe of Indians, the Spokane Tribe of Indians, the Kootenai Tribe of Idaho, and the Confederated Tribe of the Colville Reservation is the blockage of their lands from anadromous fish migration by Grand Coulee Dam.[43] In 2005, UCUT and its member tribes entered a memorandum of understanding with Bonneville Power Administration recognizing the sovereign role of the tribes in management of, among other things, fish and water resources (UCUT).

The recognition of the tribal role as co-managers in the U.S. portion of the Basin can be seen in the inclusion of representatives of the fifteen tribes in the Basin along with the four main states in the sovereign review team established to provide input to the U.S.

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[41] CRITFC. *Columbia River Inter-Tribal Fish Commission* (2010). http://www.critfc.org/text/work.html]
[42] UCUT. *Upper Columbia United Tribes.* http://www.ucut.org/index.ydev (accessed December 15, 2010).]
[43] UCUT. *Upper Columbia United Tribes.* http://www.ucut.org/index.ydev (accessed December 15, 2010).]

Army Corps of Engineers and Bonneville Power Administration on the review of the Columbia River Treaty.[44]

There is no similar history of treaty relations with First Nations within the Columbia Basin on the Canadian side of the boundary. Thus the different First Nations (Okanagan Nation, Ktunaxa Nation and Swecwepemc Nation) all maintain self-government, aboriginal rights and aboriginal title claims within some parts of the Basin. Some of these Nations are currently engaged in land claim and self government negotiations with the Crown.[45] Given the loss of salmon as a result of the construction of the Grand Coulee Dam on the mainstem there is similarly no long standing history of co-management of the salmon resource in most of the basin. However, the three Nations did form the Canadian Columbia River Inter-Tribal Fisheries Commission in 1993 (CCRIFC). CCRIFC has been actively engaged in restoring sockeye salmon runs in the Okanagan River. There were record returns of sockeye to the Okanagan in the summer of 2012. As described by Bill Green, Operational Director of CCRIFC, CCRIFC works to conserve and restore fish and aquatic ecosystems. Key founding principles include:[46]

- To protect, conserve, manage, harvest and enhance the water, fisheries and aquatic resources of the Canadian Columbia River Basin according to traditional law and custom, and the laws of Canada as they evolve from aboriginal rights court decisions; and

- To cooperate in the development of a long-term and comprehensive water, fisheries and aquatic resource restoration strategy for the Columbia River Basin through the CCRIFC and in cooperation with partner organizations in Canada and the United States.

It has not been easy to accommodate changing values in the way in which Canada and the United States (and in particular the two Entities) manage the river and the facilities on the river, but some accommodations have been made. For example, while the Permanent

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[44] Columbia River Treaty: 2014/2024 Review. URL: http://www.crt2014-2024review.gov/.

[45] For example, the Ktunaxa Kinbasket Treaty Council entered the treaty process in December 1993, and is now in stage 4 of the six-stage process: http://www.gov.bc.ca/arr/firstnation/ktunaxa_kinbasket/default.html. The parties finalized a Strategic Engagement Agreement in October 2010. An assessment of the relevant case law dealing with aboriginal rights and title is beyond the scope of this report. The most important cases dealing with aboriginal title include *Delgamuukw v British Columbia*, [1997] 3 SCR 1010, *R v Marshall and R v Bernard*, [2005] 2 SCR 220, and *William v British Columbia (the Tsilhqut'in case)*, [2012] 3 CNLR 333, 2012 BCCA 285. The most important cases dealing aboriginal rights include *R v Van der Peet*, [1996] 2 SCR 507 and *R v Sappier; R v Gray*, [2006] 2 SCR 686.

[46] Ktunaxa Nation, *Annual Report*, 2012 at 43, available at http://www.ktunaxa.org/2012-AGA-Report-Download.pdf

Engineering Board (PEB) takes the view that the Assured Operating Plans that the Entities prepare should not take account of the need for fish flows, the PEB has accepted that the Entities may reach annual mutually acceptable supplementary agreements that provide flows to meet fisheries concerns on both sides of the boundary. Similarly, by taking into account the interaction between storage at Libby and storage at Arrow/Keenleyside, the Entities were able to resolve a conflict which emerged as a result of changes to the operation of Libby following the listing of Kootenay sturgeon as endangered under the terms of the *Endangered Species Act*.[47]

But while some accommodations have been possible, some believe that the resulting changes in management to accommodate ecosystem values do not go nearly far enough.[48] Thus, it seems reasonable to think that the dynamic created by possible Treaty termination in 2024 (by notice given in 2014 or earlier) as well as the automatic changes to the flood control operations that will occur in 2024 will create both the opportunity, and perhaps the necessity, to take a broader look at the Treaty.

2.2 Future scenarios for the Columbia River Treaty

The Entities (Bonneville Power, USACE and BC Hydro) have begun their own assessments of alternatives and have undertaken joint studies to inform some options.[49] The Phase I Report of the Entities considered three alternatives (referred to in the Report as Studies).[50] These options are as follows:

> **Option A – Treaty Continues:** The Treaty continues post-2024 with its current provisions. Canadian flood control obligations change from the current prescribed annual operation of a dedicated amount of storage to a Called Upon operation. Assured operating plans for power benefits and the Canadian Entitlement provisions continue with modifications to current procedures to reflect revised Canadian flood control obligations.
>
> **Option B – Treaty Terminated:** The Treaty terminates in 2024 with no replacement agreement. The Canadian Entitlement terminates as does Canada's obligation to regulate flows for U.S. power interests. The

[47] This example of practice under the treaty is explored in more detail in Chapter 7, section 8 of the paper.
[48] See the variety of views expressed in University of Idaho and Oregon State University. 2010. Combined Report on Scenario Development for the Columbia River Treaty Review (copy available from co-author Cosens). Others, however, express concerns as the costs of losing a renewable and low carbon form of generation. Id. and Columbia River Treaty Power Group, URL: http://www.ppcpdx.org/documents/Col_Treaty_Power_Group_info_sheet_Mar_2012_Final.pdf
[49] U.S. Army Corps of Engineers and Bonneville Power Admin., COLUMBIA RIVER TREATY: 2012/2024 REVIEW: PHASE 1 TECHNICAL STUDIES (Apr. 2009), *available at* http://www.crt2014-2024review.gov/TechnicalStudies.aspx .
[50] Id., at 8.

Canadian flood control obligations change as in Option A. Subject to this obligation Canada is free to operate its projects for Canadian power, flood control, and other benefits.

Option C – Continuation of Pre-2024 Conditions: The Treaty continues post-2024 with the existing pre-2024 Flood Control Operating Plan, Assured Operating Plan, and Canadian Entitlement procedures. This option is not consistent with the existing Treaty commitments since it contemplates the continuation of some form of assured flood control operation post-2024. Therefore, new arrangements (e.g., an extension or replacement of the current flood control purchase) would be required to implement this option.

Others have also entered the debate to imagine and examine different possible futures for the Basin and alternatives for the CRT. Additional drivers that may have to be taken into account include changes in the legal and constitutional status of indigenous people (discussed above), climate change and the changing energy mix in the Pacific Northwest with greater reliance on intermittent sources of energy. Some, for example, and in particular First Nations in Canada, look to a future in which anadromous fish (fish that migrate upriver from the sea to spawn) will once again spawn in the headwater lakes of the Columbia River.[51] The fifteen tribal nations in the U.S. portion of the basin have developed a set of common views[52] that include respect for tribal sovereignty through participation in negotiation of a new Treaty, participation in basin governance, and inclusion of protection of tribal cultural and ecological resources and reserved rights in water management. An organization of electric utilities in the U.S. seeks recognition of the value of continuing a low carbon form of power generation and revisiting of the means of calculating shared benefits.[53]

Students in classes held by members of the Universities Consortium on Columbia River Governance[54] at the Universities of Montana, Idaho, and Oregon State, interviewed

[51] This is one of the long term goals of the Canadian Columbia River Inter-tribal Fisheries Commission (CCRIFC).

[52] Attachment to resolution 11-63 at the website: http://www.atnitribes.org/PDF%20Docs/resolutions/2011/annual/11-63.pdf

[53] Columbia River Treaty Power Group URL: http://www.ppcpdx.org/documents/Col_Treaty_Power_Group_info_sheet_Mar_2012_Final.pdf

[54] The Universities Consortium on Columbia River Governance (UCCRG) is composed of representatives of: the Universities of British Columbia, Calgary, Idaho, and Washington, and Oregon and Washington State Universities. The UCCRG formed in 2009, after an initial symposium with participants from the basin and academia to develop an understanding of the 1964 Columbia River Treaty and relevant changes that have occurred in the basin since 1964. Two subsequent symposia, and a third to be held in 2012, have provided a facilitated forum for an informal cross-border dialogue on the future of the Columbia River.

stakeholders in the Basin in both Canada and the United States to identify interests in the outcome of the CRT review, the process for any resulting negotiation, and any implementation.[55] The interview processes were not exhaustive or quantitative, but they do serve to identify some of the other possible issues people would like to see explored. In general, interviewees expressed a desire to continue receiving benefits from hydropower production and flood control, but would like to see ecosystem function (variously defined as keeping reservoir levels higher or re-introducing salmon to the upper Basin, and operating in a manner consistent with the natural hydrograph in the lower Basin) elevated to a third purpose of international management.[56] Many interviewees would like broader participation and a more public process for both the negotiation of any new agreement and its implementation.[57]

Based on this feedback, the Universities Consortium on Columbia River Governance has elaborated two additional scenarios: a "keep Arrow high scenario" predicated on Treaty termination and a scenario which incorporates ecosystem conditions into the operation of the CRT.[58] In the first of these two scenarios, BC Hydro operates its facilities to keep the Arrow (Hugh Keenleyside) Dam as high as possible thereby delivering recreational benefits on the Arrow reservoir while operating the Mica and Revelstoke dams to maximize power benefits. One implication of this might be that the U.S. would need to operate its own facilities differently so as to assure itself of continuing flood control.[59] The second of these two scenarios builds upon Option C developed by the Entities. This scenario assumes that the Treaty and current FCOP operation continues but with some variations. The variations include managing flood control operations on the basis of a 600 Kcfs target for flows at The Dalles, operating projects in a way that is more consistent with the natural hydrograph, and managing storage to keep reservoir levels as high as possible coming into spring and early summer so as to have the flexibility to release water for fish flows later in the summer and into the early fall.

Clearly the scenarios listed above are not exhaustive of the possible futures the basin stakeholders may seek to explore. This paper will not attempt to develop additional

[55] McKinney, M., Baker, L., Buvel, A.M., Fischer, A., Foster, D., and Paulu, C. "Managing Transboundary Natural Resources: An Assessment of the Need to Revise and Update the Columbia River Treaty." *West Northwest Journal of Environmental Law and Policy* 16 (2010): 307; University of Idaho and Oregon State University. 2010. Combined Report on Scenario Development for the Columbia River Treaty Review (copy available from co-author Cosens).

[56] Ibid.

[57] Ibid.

[58] Presented and discussed at the Third Annual Symposium on Transboundary River Governance in the Face of Uncertainty, Kimberley, British Columbia, October 3 -5, 2011.

[59] For example, this may require the U.S. to draw Libby down more than is customary under the so-called VARQ operation at Libby and Hungry Horse. Such an operation illustrates the trade offs which may occur between the east and west Kootenays in Canada since a drawdown at Libby may impair recreational values in Canada on Lake Koocanusa.

scenarios, but will explore the legal options open to the basin on the premise that the two alternatives that the Treaty text offers − *termination* (albeit with continuing but changed flood control provisions), and *continuation* (power provisions continue and flood control provisions change) − cannot be exhaustive of the possible futures for the Columbia River. Other possibilities and options will emerge such as those briefly referenced above. But if the parties fasten on an alternative that is not articulated as a default position in the current text of the Treaty it will be necessary for them to think about how that arrangement will be captured in a legal form. Will it take the form of a new treaty? Will it take the form of an amendment to the existing Treaty either by a document that is styled as an amendment or something that is simply recorded as an exchange of notes? Can and should any such new arrangement provide a mechanism that allows a participatory role for stakeholders in addition to the two federal governments and the Entities? Should the arrangement, for example, create a special role for the tribes and First Nations of the Basin and for states on the U.S. side of the Basin? What is the role for residents of the Basin and institutions like the Columbia Basin Trust in Canada?

One of the legal questions that arises in this context is the role that will be played by different governments and different branches of government. The original Columbia River Treaty was ratified by the President of the United States on the advice and consent of a two thirds majority of the Senate as contemplated by Article II, s.2 of the U.S. Constitution. Interviews suggest that stakeholders on both sides of the border favour a solution that involves residents of the Basin in both the negotiating process and implementation of the Treaty. Many would like to avoid a process in which it is necessary to seek the advice and consent of the Senate in the United States prior to the ratification of any amendment to the CRT. In Canada, many assume that any review of the Treaty should be driven by the Province in conjunction with residents of the Basin and should not require significant involvement of the federal government. Concerns relating to the need to obtain Senate advice and consent are informed by an appreciation that a significant number of US/Canada bilateral agreements have failed to secure the necessary support when the negotiated text has reached the Senate.[60] Concerns relating to

[60] Examples include: (1) a 1979 version of the Protocol to amend the Migratory Bird Convention of 1916, (2) a 1979 Agreement on East Coast Fishery Resources, (3) the 1983 version of the Pacific Salmon Treaty (never submitted for advice and consent because of opposition that emerged in Alaska). On the fisheries agreements see MP Shepard and AW Argue, *The 1985 Pacific Salmon Treaty: sharing conservation burdens and benefits*, Vancouver, UBC Press, 2005, esp. at 71 – 74. Shepherd and Argue also discuss earlier examples of the Senate refusing to endorse negotiated agreements with respect to salmon at 18 (1919 and 1921 and noting as well that the Senate delayed approving the 1930 agreement on Fraser sockeye until 1936). For additional earlier examples see the discussion in Kurkpatrick Dorsey, *The Dawn of Conservation Diplomacy: US-Canadian Wildlife Protection Treaties in the Progressive Era*, University of Washington Press, Seattle, 1998 and, more briefly David A. Colson, "Fisheries, Fishers, Natives, Sportsmen, States and Provinces" (2004), 30 Can-US LJ 181 at 182 recalling "that during the 19th Century, there were at least three major international conventions … on fisheries issues. Each time the treaties

the involvement of Basin residents stem from the absence of that involvement when the Treaty was first negotiated. Accordingly, one of the key goals of this paper is to analyse alternatives to Senate advice and consent and the opportunities that exist for involving Basin residents in negotiation and implementation.

The next chapter of the paper puts the CRT within its context as a public international law treaty.

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were submitted to the Senate, and they were rejected by the Senate of the United States." For a more general discussion see Jeffrey Lantis, *The Life and Death of International Treaties: Double-Edged Diplomacy and the Politics of Ratification in Comparative Perspective*, Oxford University Press, Oxford, 2009. Lantis offers a useful chapter on NAFTA (ch. 3) but also notes more generally (at 10) that "In the United States alone, there have been more than 500 instances of presidential endorsement that did not lead to Congressional ratification."

3.0 The International Law Context

This chapter of the paper does five things. First, it provides a grammar of treaty law; second, it distinguishes between treaties and other legally binding agreements; and third it examines the state of the law in relation to the involvement of indigenous peoples in the negotiation and conclusion of international treaties. Fourth, it examines the role of sub-national units (such as states and provinces) in the negotiation and conclusion of international treaties, and fifth, it briefly canvasses sources of international law other than treaties.

The analysis shows that states use many different terms to describe the agreements that they enter into, but nothing turns on this choice of terminology so long as the parties intend to enter into a legal relationship governed by international law. States that are party to a bilateral treaty can agree to amend that treaty in any way they wish and, as matter of international law, need not follow the same procedures for ratification and entry into force for the amendment as were used when the treaty was originally adopted. Similarly, international law leaves it to the States concerned to determine how they will structure their negotiating teams to provide (or not) for regional and/or indigenous representation as long as such teams are accorded the authority to represent the state. Treaties should always be understood and interpreted in the context of all the relevant rules of international law including relevant norms of customary international law.

3.1 A grammar of international treaty law

The Columbia River Treaty is an agreement between states that is governed by international law and not by the domestic laws of either Canada or the United States. The same is true of the 1964 Protocol to the CRT and the subsequent "exchanges of notes" dealing with various implementation matters including the initial sale of the Canadian entitlement, adjustment issues during start up, and the return of the Canadian entitlement.[61]

Much of the international law pertaining to treaties has been codified in the Vienna Convention on the Law of Treaties (VCLT) which entered into force January 27, 1980.[62] Canada is party to the VCLT, the United States is not, but numerous decisions of the International Court of Justice and other tribunals confirm that much of the content of the VCLT is a codification of customary international law which is therefore binding on all

[61] All of these arrangements are discussed in Chapter 7 of the paper.
[62] Vienna, 23 May 1969, http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf . And generally on the Law of Treaties see Anthony Aust, *Modern Treaty Law and Practice*, 2nd ed, Cambridge, Cambridge University Press, 2007.

states as custom even if they have not become a party to the treaty.[63] It also follows from this that the content of the VCLT as custom can be applied to treaties, such as the CRT, that entered into force before the VCLT.[64]

Article 2(1)(a) of the VCLT defines a treaty as:

> … an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation

The crucial points of the definition are these. First, there must be a written agreement. Second, the agreement must be between States. And third, the parties must intend that the agreement is to be governed by international law (i.e. the agreement is to be governed by law and that the relevant law is principally international law and not domestic law). The title that the parties use to describe the agreement is not important – "whatever its particular designation". States use different terms to describe instruments that for the purposes of law are all treaties. Thus, some such documents are titled "agreements"[65] others are termed "conventions".[66] "Protocol" is another common term used to connote an agreement between States that is to be governed by international law. Current and historic practice suggests that the title "protocol" may be preferred in a number of different contexts, the common feature of which is that the agreement captured by the protocol is related to another existing international agreement.

[63] Aust *id*., at 12 – 13. *Gabčíkovo-Nagymaros Project (Hungary/Slovakia),* Judgment, I.C.J. Reports 1997 at para. 46; *Arbitration Regarding the Iron Rhine Railway (Belgium v Netherlands)*, The Hague, 24 May 2005 at paras. 44 – 61; *Dispute Concerning Article 9 of the OSPAR Convention (Ireland v UK)*, 2 July 2003 at paras 81 – 82. In addition, the United States has expressly accepted that the basic interpretive rules of the VCLT represent customary law in a number of trade and investment law disputes. See for example, *Ethyl Corporation v Canada*, Award on Jurisdiction, 24 June 1998 esp. at para. 52 and note 18, available at http://www.italaw.com/sites/default/files/case-documents/ita0300_0.pdf and *Pope and Talbot v Canada*, Interim Award, June 26, 2000 at para. 66 available at http://www.italaw.com/sites/default/files/case-documents/ita0674.pdf.

[64] See VCLT Article 4.

[65] For example, the Agreement on the Conservation of Polar Bears, Oslo, 1973. Both Canada and the United States are parties to this agreement. Bilateral examples include the Porcupine Caribou Herd Agreement, 17 July 1987, 1987 CTS No. 31, and the Agreement Concerning the Transboundary Movement of Hazardous Waste and Other Waste, 8 November 1986, CTS 1986 No. 9, as amended by Exchange of Notes November 4 and 25, 1992, CTS, 1992 No. 23.

[66] See for example, the United Nations Framework Convention on Climate Change, 1992 available here http://unfccc.int/2860.php or the United Nations Convention on the Non-Navigational Uses of International Watercourses, 1997 available on line at http://untreaty.un.org/ilc/texts/instruments/english/conventions/8_3_1997.pdf It is unusual to use the term Convention in a bilateral context. It is more commonly used in a multilateral context.

The term "protocol" is perhaps most commonly used in current international legal practice in the context of so called "framework agreements" especially in environmental law. In this context, a protocol represents a more specific elaboration of a matter that might be dealt with in the parent agreement. Examples include the Kyoto Protocol (1997) to the United Nations Framework Convention on Climate Change (UNFCCC) (1992),[67] the Cartagena (2000) and Nagoya Protocols to Convention on Biological Diversity (1992),[68] and the various protocols to the Convention on Long Range Transboundary Air Pollution (LRTAP).[69] Used in this sense, a protocol is a self-contained treaty in its own right. While the protocol or the parent treaty may provide that a State cannot adhere to the protocol unless it is a party to the parent treaty,[70] a State may be party to the parent treaty without needing to adhere to the protocol. Such a protocol does not amend the parent treaty – rather it elaborates that treaty. The parent treaty may specifically contemplate elaboration by protocols but this is not always the case.[71]

The term "protocol" is also used to describe an agreement which amends or supplements an earlier treaty. An example in US/Canada treaty practice is the 1995 Protocol amending the 1916 Migratory Birds Convention between the United Kingdom on behalf of Canada and the United States.[72] A multilateral example is the Protocol (1996) to the London Dumping Convention (1972).[73] The Protocol to the CRT is somewhat unusual in that it reflects either amendments to the text of the treaty or at least agreed understandings as to its interpretation and implementation that served as a condition precedent to the exchange of the instruments ratification – which in turn was a condition precedent to the entry into force of the CRT.[74] The CRT Protocol amended the treaty after the advice and consent of the Senate had been given, but before it had entered into force. There are other examples

[67] UNFCCC, *id*.
[68] For the texts of the Convention and Protocols see the CBD website at http://www.cbd.int/
[69] The text of the Convention and the various Protocols are available here: http://www.unece.org/env/lrtap/lrtap_h1.html
[70] For example, article 17(4) of the UNFCCC stipulates that "Only Parties to the Convention may be parties to a protocol".
[71] For example the LRTAP Convention makes no reference to elaboration by way of protocol.
[72] Both texts are included in the schedules to the Canadian implementing legislation the *Migratory Birds Convention Act*, SC 1994, c.22. Another example is the 1987 Protocol (November 18, 1987, 1987 CTS No. 32) which amends the Agreement between Canada and the United States of America on Great Lakes Water Quality, 1987, Ottawa, November 22, 1978, 1978 CTS No. 20.
[73] The Protocol, adopted in 1996, completely replaces the Convention for those states that become a party to the Protocol http://www.imo.org/OurWork/Environment/SpecialProgrammesAndInitiatives/Pages/London-Convention-and-Protocol.aspx
[74] The Protocol is attached to an exchange of notes between Secretary of State, Dean Rusk and Paul Martin, Secretary of State for External Affairs, 22 January 1964. The Notes indicate that the exchange "shall constitute an agreement between our two Governments, relating to the carrying out of the provisions of the Treaty with effect from the date of exchange of instruments of ratification of the Treaty."

of protocols being added to a treaty contemporaneously with its ratification. For example, a Protocol of Exchange was added to the Boundary Waters Treaty at the time of ratification (May 5, 1910) to confirm that the treaty did not affect existing rights in the area of St. Marys River at Sault Ste. Marie and more generally that the treaty should not be construed as interfering with the drainage of wetlands that might be connected to boundary waters.[75] The parties (Canada and the US) also added a protocol to the 1925 Lake of the Woods Treaty, contemporaneously with its execution.[76]

Other terms in common usage for international agreements include "accord" and "exchange of notes". An exchange of notes is just that, an exchange of statements between authorized representatives of States (e.g., an ambassador and a minister of foreign affairs[77]) in which one party, by correspondence, proposes a particular agreement or understanding and the other responds by accepting the proposal. The exchange of correspondence constitutes an agreement (an offer and an acceptance) and if the content of the agreement reveals that it is to be governed by international law then it is a treaty for the purposes of the VCLT and other related purposes. It is quite common for a parent treaty or agreement to expressly contemplate that elements of the treaty will be further elaborated by exchange of notes. The CRT contains several such examples:

1. Article IV requires that the first hydroelectric operating plans or any subsequent plan which departs substantially from the preceding plan shall be approved by exchange of notes "in order to be effective".[78]
2. Article VIII contemplated that the parties, by exchange of notes could authorize disposal of Canada's downstream power benefits within the United States. The article contemplated that the general terms could be established by exchange of notes as soon as possible after ratification. Paragraph 3 of the Protocol varies this provision to stipulate that this exchange should occur "contemporaneously" with the exchange of the instruments of ratification.
3. Article IX deals with a proposal by the U.S. to modify the determination of downstream power benefits with respect to possible future new dams. Any such agreement must be evidenced by an exchange of notes.
4. Article X contemplated that an exchange of notes would confirm a "mutually satisfactory electrical coordination arrangement" between the Entities.

[75] The Protocol of Exchange is appended to the text of the treaty as reproduced on the IJC's website at http://www.ijc.org/rel/agree/water.html#text The Protocol concludes that this "declaration shall be deemed to have equal force and effect as the treaty itself and to form an integral part thereto."
[76] Washington, 24 February 1925, 6 Bevans 14.
[77] On the power to enter into a treaty see Article 7 of the VCLT which contemplates either express "full powers" (i.e. a document expressly authorizing that person to negotiate or adopt that particular agreement) or the inference of full powers through the practice of the states concerned.
[78] The first five Assured Operating Plans (AOPs) (1970 – 1975) were covered by an Exchange of Notes but none of the subsequent AOPs have been.

5. Article XIV(4) contemplates that the parties may, by exchange of notes, "empower or charge the Entities with any other matter coming within the scope of the Treaty" in addition to those powers and duties already conferred on the Entities by Article XIV(2) of the Treaty or by any other article of the Treaty.
6. Article XV prescribes that the Permanent Engineering Board must comply with any "directions, relating to its administration and procedures" agreed by the parties and evidenced by an exchange of notes.
7. Article XVI(5) & (6) contemplate that the parties may agree on arrangements and alternative arrangements for dispute resolution by means of an exchange of notes.

Other less formal terms may also be used by States for international agreements including memorandum of agreement (MOA) or memorandum of understanding (MOU). These terms are frequently ambiguous as to the legal status of the resulting arrangement. The parties may use these terms when they do not intend to enter into a relationship that is to be governed by international law. Alternatively the parties may intend that there is an agreement (not just an agreement to agree) and that it is to be governed by international law.[79] In all such cases it is therefore important to examine the actual terms of the MOA or MOU to determine what the parties might have intended with respect to that particular question. This ambiguity is recognized in Canadian policy documents dealing with the negotiation of international agreements.[80]

In some cases it will be crystal clear that the parties did not intend to create legal obligations. For example, a recent MOU on polar bear conservation between Canada and the United States executed by the Secretary of the Interior and Canada's Minister of the Environment simply states that "This Memorandum of Understanding is not legally binding and creates no legally binding obligations on the Participants."[81]

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[79] A particularly prominent example of an "understanding" which is a fully-fledged treaty is the Dispute Settlement Understanding of the WTO.

[80] See Annex C of Policy on Tabling of Treaties in Parliament and entitled "International Instruments that are not binding under Public International Law (Memoranda of Understanding)". This Annex notes that Canada uses these instruments "to express political and moral commitments as opposed to undertakings governed by public international law." However the document continues with the following cautions:

> It is important to note that while Canadian recent practice dictates that Memoranda of Understanding or Arrangements are not legally-binding, not all States view these instruments as such. Simply labelling a document as a "Memorandum of Understanding" or "Arrangement" is not enough to ensure that it will not be considered as an agreement governed by public international law by some of the participants to the instrument. Departments and agencies should take care to ascertain before negotiating a non-binding arrangement that the other participants agree that the arrangement is not binding at public international law.

[81] May 2008, Memorandum of Understanding between Environment Canada and the United States Department of the Interior for the Conservation and Management of Shared Polar Bear Populations. http://graphics8.nytimes.com/packages/pdf/national/20080515polar_memo.pdf More ambiguous is the Trilateral Agreement between Canadian Wildlife Service, the Secretaria de Medio Ambiente, Recursos Naturales y Pesca de los Estados Unidos Mexicanos (SEMARNAP), through the Unidad Coordinadora de

A treaty or an amendment to a treaty enters into force in accordance with its terms[82] which may be by signature[83] or by some other arrangement such as the exchange of instruments of ratification.[84] This latter option was the mode chosen by Article XX of the CRT. An Exchange of Notes is more likely to be made effective (expressly or by implication) as of the date of the exchange. If a treaty provides for entry into force by ratification the domestic laws and practices of the states concerned control how ratification is to be effected and the circumstances in which somebody can be authorized to ratify on the State's behalf[85] but in international law ratification is an act that is a formal confirmation of a State's intention to be bound. Where a treaty provides for both signature and ratification, signature at a minimum connotes agreement with the content of the treaty[86] with formal consent to follow. In addition, a state that signs a treaty is obliged, pending ratification, "to refrain from acts which would defeat the object and purpose of a treaty".[87]

3.1.1 Amendment and Modification of Treaties

Part IV of the VCLT deals with the amendment and modification of treaties and simply contemplates that a bilateral treaty may be amended "by agreement between the parties" applying the same rules as for the conclusion of the original treaty "except in so far as the treaty may otherwise provide."[88] The CRT contains no rules with respect to its amendment (i.e. it is silent unlike some later bilateral treaties such as the Agreement between Canada and the U.S. for Water Supply and Flood Control in the Souris River Basin, 1989)[89]. Importantly, there is nothing in general international law that prescribes that a treaty can only be amended and enter into force in the same manner as the original treaty.[90] Aust comments as follows:[91]

Asuntos Internacionales, and the U.S. Fish and Wildlife Service dealing with wildlife and ecosystem conservation and management, April 9, 1996.
http://www.fws.gov/filedownloads/ftp_DJCase/endangered/pdfs/International/TRILATER.PDF

[82] VCLT, Article 24(1).

[83] See for example, Great Lakes Water Quality Agreement (GLWQA), 1978, Article XIV.

[84] VCLT, Articles 11 – 16.

[85] See Chapters 4 & 5 of this paper.

[86] VCLT, Article 10.

[87] VCLT, Article 18.

[88] VCLT, Article 39. Aust, *supra* note 62 emphasises (at 263 – 4) that the choice of the word "agreement' is deliberate since this recognizes that "it is perfectly possible to amend a treaty by an agreement which does not itself constitute a treaty … a treaty can also be effectively amended by a subsequent agreement between the parties regarding the interpretation or application of the treaty [here referring to Article 31(3)(a) of the VCLT]."

[89] Washington DC, October 26, 1989, CTS 1986 No. 36, Article XIII(2); see also GLWQA, 1978, Article XIII.

[90] Aust *supra* note 62, at 14 makes this point more generally noting that in some rare circumstances a customary norm may supercede a treaty: "International law does not contain any principal of *acte contraire*, by which a rule can be altered only be a rule of the same legal nature."

> There may be reasons why an amendment clause is not wanted or is not desirable. It may not be wise politically to contemplate amendments to a treaty which establishes a border. But if both parties want to amend such a treaty, they can of course do so. The advantage of an amendment clause is that the means by which the amendment is to be done is agreed from the outset. But, should the means not be suitable, the parties can simply ignore it and amend the treaty in any way they can agree on.

An example from the treaty practice of the U.S. and Canada is the Great Lakes Water Quality Agreement of 1987 which is expressed simply to supersede the earlier agreement of 1972.[92]

3.1.2 Termination of Treaties

Part V, section 3 of the VCLT deals with the termination and suspension of operation of treaties. Article 54 provides that a treaty may be terminated in accordance with its terms or any time with the consent of all the parties. A treaty may also be terminated in the event of breach.[93] That is, if state A commits a *material* breach of a bilateral treaty, state B "may invoke the breach as a ground for terminating the treaty or suspending its operation in whole in part." It is important to emphasise that breach per se does not terminate the treaty; at most it gives the other party the option to treat the treaty as terminated. A *material* breach of a treaty is an act of repudiation of the treaty or the violation of a provision "that is essential to the accomplishment of the object or purpose of the treaty". Other grounds for terminating a treaty include supervening impossibility of performance (Article 61), fundamental change of circumstances (Article 62) and the emergence of a new peremptory of general international law (Article 64) (*ius cogens*). The VCLT also establishes a number of procedural safeguards that are to be followed when a state proposes to invoke one of these grounds for terminating or suspending a treaty. The case law on the VCLT and most notably the decision of the International Court of Justice in *Gabčíkovo-Nagymaros*[94] makes it clear that it is exceedingly difficult

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[91] Aust, id., at 265. For some this may go too far especially if the treaty in question implicates the interests of third parties such as investors. See, for example, the debate in the context of NAFTA as to the use of the agreed interpretive procedure (Article 1131) to limit the scope of the fair and equitable treatment standard under Article 1105 of NAFTA. See NAFTA Free Trade Commission, "Notes of Interpretation of Certain Chapter 11 Provisions", July 31, 2001. NAFTA tribunals have however concluded that they are bound by this agreed interpretation. See, for example, *Grand River Enterprises Six Nations Ltd et al v United States of America*, ICSID, January 12, 2011 esp at paras 176 and 219; *Chemtura Corporation v Government of Canada*, Ad Hoc NAFTA Arbitration under UNCITRAL Rules, esp. at para. 120,

[92] GLWQA, 1978, Article XV.

[93] VCLT, Article 60.

[94] *Supra* note 63.

for a state to successfully plead termination on the grounds of breach or any of the other grounds listed here. The dominant rule in the Convention as noted in Article 26 is very much, *pacta sunt servanda*, "Each treaty in force is binding upon the parties to it and must be performed in good faith."

3.2 The distinction between treaties and other legally binding agreements that are not treaties

One of the features that distinguishes a treaty from other forms of legally binding arrangements is that a treaty is governed by the terms of public international law. This does not mean that all such arrangements between Canada and the U.S. must be governed by international law. The parties might choose to make a commercial agreement subject to the domestic law of one or other of the parties, or "general principles of law" or some other "proper law". The non-treaty storage agreements between BC Hydro and the Bonneville Power Administration are worth examining in this context. These agreements are concluded between BC Hydro as owner of the facilities and by the Agency (and not by the two States themselves nor even by BPA and BC Hydro as the designated Entities under the terms of the Treaty).[95] Thus the analogy is not precise since a treaty is an agreement between States, but the overall point is the same: these agreements are manifestly not treaties and are not governed by international law – rather, they are ordinary commercial agreements. This is clear from the terms of at least some of those agreements. For example, the first significant Non-Treaty Storage Agreement (NTSA) in 1984 contains a recital to the effect that:[96]

> WHEREAS BPA and BCH intend this Agreement to be a commercial arrangement to be governed by the relevant domestic law and not an international agreement governed by international law.

This statement is particularly significant in the context of the 1984 Agreement since that agreement was also intended to resolve a dispute between the Parties as to the filling of

[95] This was a point made with some force at workshop discussing the paper in June 2012. That said, the NTSA must respect the terms of the Treaty; see CRT Article IV(5).

[96] Agreement executed by the United States Department of Energy acting by and through the Bonneville Power Administration and British Columbia Hydro Authority Relating to: (1) Initial Filling of Non-Treaty Reservoirs; (2) Use of Columbia River Non-Treaty Storage; and (3) Mica and Arrow Reservoir Refill Enhancement, January 1984. Copies of all prior NTSAs and related agreements are available on BPA's website at http://www.bpa.gov/corporate/ntsa/previous.cfm The 1990 NTSA contains a similar recital but it also contains a clause (cl. 13) entitled "mediation" which provides that:

> If a dispute arises out of or relates to this Agreement, or the breach thereof, and if said dispute cannot be settled by the Operating Committee or through other negotiation, the Parties agree first to try in good faith to settle the dispute by mediation under the Commercial Mediation Rules of the American Arbitration Association, before resorting to litigation or some other dispute resolution procedure.

two non-Treaty reservoirs (Revelstoke and Seven Mile).[97] This was a dispute as to the interpretation of the CRT. BC Hydro (BCH) argued that it could fill this storage space without needing to compensate Bonneville Power Administration (BPA) or mainstem dam owners for power losses at downstream facilities whereas BPA contended that compensation was due.[98] The 1984 NTSA provided a mechanism by which BC Hydro would become entitled to a release of any claims that might be made by Bonneville Power Administration or downstream utilities.[99]

The most recent NTSA continues the practice of taking steps to ensure that the agreement is to be treated as a commercial rather than a public international law arrangement. In this case operative Article 22 provides that:[100]

> This agreement shall not be construed to amend or modify the Treaty or the obligations of Canada or the United States under such. The Parties intend that this Agreement shall be an operational agreement governed by applicable domestic law and not international law.

3.3 The role of indigenous people in the negotiation and conclusion of international agreements

The role of indigenous people in the negotiation and conclusion of international agreements can be examined as both a question of international law and domestic law. Parts 4 and 5 of the paper discuss the role of indigenous people in negotiating and concluding international agreements within the domestic laws of the United States and Canada. Here we consider what international law might have to say on the subject. Notwithstanding the definition of "treaty" in the VCLT which, as noted above, refers to a written agreement between States, the VCLT is deliberately silent as to the treaty-making capacity of others.[101] Thus, Article 3 provides as follows:

> The fact that the present Convention does not apply to international agreements concluded between States and other subjects of international

[97] The agreement also refers to Murphy Creek but Murphy Creek has never been built.

[98] The basic elements of the dispute are recited in cl. 3 of the agreement.

[99] The interaction between entity claims and treaty claims is well illustrated by the following paragraph of the agreement (s.3(a), para. 4):

> It is further understood and agreed between the Parties that except insofar as BPA grants to BCH and BCH accepts from BPA release and discharge satisfactory to BCH in respect of any initial filling, BPA and BCH are at liberty to seek to have their rights under the Treaty declared or damages assessed by a tribunal or court of competent jurisdiction in respect of that initial filling; provided, however, that each Party agrees that in such event it shall not directly or indirectly introduce this Agreement or any of its provisions into the proceedings before the tribunal or any court or in any way refer to such proceedings to the Agreement or any of its provisions.

[100] http://projects.compassrm.com/ntsa/Data/REPORT/Draft_NTSA_CleanFinalDraft_1Mar2012.pdf

[101] Annika Tahvanainen, "The Treaty-Making Capacity of Indigenous People" (2005), 12 International Journal on Minority and Group Rights 387 at 398.

> law or between such other subjects of international law, or to international agreements not in written form, shall not affect:
> (*a*) the legal force of such agreements;
> (*b*) the application to them of any of the rules set forth in the present Convention to which they would be subject under international law independently of the Convention;
> (*c*) the application of the Convention to the relations of States as between themselves under international agreements to which other subjects of international law are also parties.

The capacity to be a party to an agreement that is subject to international law is closely tied to the question of the status of that party as a subject of international law. A State is clearly a subject of international law and States can endow others (such as international organizations) with that capacity. Furthermore, it seems clear that at least at one time indigenous people (tribes) were regarded as having the capacity to conclude treaties (e.g., peace and friendship treaties during the 18th Century) governed by international law.[102] However, positivist conceptions of the state and the European rhetoric of civilized nations served to marginalize indigenous peoples in both international law[103] and domestic law such that their treaty making capacity came to be questioned.[104] Arguably, the last two decades have seen the beginnings of a process of decolonizing international law and the adoption of the UN Declaration on the Rights of Indigenous Peoples[105] is some evidence of that. A number of the Articles of the UN Declaration may be relevant when considering the impact of the CRT including Article 18 dealing with the right of indigenous peoples "to participate in decision-making which may affect their rights" and Article 11(2) dealing with the obligation of States to provide redress where cultural or other property has been taken without consent or in violation of the "laws, traditions and customs" of indigenous peoples.

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[102] Tahvaneinen, *id*.

[103] Tahvaneinen, *id*; and see also Anthony Anghie, *Imperialism, Sovereignty and the Making of International Law*, (Cambridge, Cambridge University Press, 2005).

[104] In the United States, Congress ended the practice of making treaties with tribes in 1871 due to concerns raised in the House that agreements requiring appropriations should not be limited to the advice and consent of the Senate. The Supreme Court considers Native American tribes to be subject to the plenary power of Congress, and thus "quasi-sovereign." This concept comes from three cases referred to as the Marshall trilogy: Johnson v. M'Intosh, 21 U.S. 543 (1823); Cherokee Nation v. Georgia, 30 U.S. 1 (1831); Worcester v. Georgia, 31 U.S. 515 (1832). For Canada, the low point was represented by *R v. Syliboy* (1928), 50 CCC 389 subsequently overruled in *Simon v R*, [1985] 2 SCR 387 and see also *Sioui v AG Quebec*, [1990] 1 SCR 1025 preferring the view that "an Indian treaty is an agreement sui generis which is neither created not terminated according to the rules of international law."

[105] UNGA Resolution 61/295, 13 September 2007 and see *supra* note 34. The Declaration is not a treaty although some of the articles of the Declaration undoubtedly represent customary international law.

Article 37 of the UN Declaration on the Rights of Indigenous Peoples specifically addresses the question of indigenous treaties concluding that indigenous peoples have "the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States …"[106] But it is also possible to imagine different ways of involving indigenous peoples in international arrangements that affect them.[107] The proposed draft Nordic Saami Convention offers an interesting example.[108] This draft was prepared by an expert group comprised of state representatives from Norway, Sweden and Finland and representatives of each of the three Saami parliaments in those jurisdictions to address the rights of the Saami indigenous people in the three states. The draft deals with a number of issues of concern to an indigenous people divided by international boundaries, including land and resource rights. The states are currently engaged in negotiations to reach a final agreement on the final text of the Convention. At this point the State have resolved that the Saami will not be a party to the ultimate agreement apparently because of concerns that this may preclude the instrument's standing as a treaty under international law but the parties have also resolved that the agreement will not enter into force unless and until it has also been ratified by the three Saami Parliaments.[109]

Equally innovative (although not a treaty) are the arrangements that British Columbia and Montana have put in place for the Flathead basin (a sub-basin of the Columbia) through the negotiation of a memorandum of understanding. This MOU brought to an end decades of disagreement over British Columbia's proposals to develop coal and coal bed methane resources of a portion of the Flathead basin in Canada. The MOU contains important acknowledgements of the indigenous interests of the Ktunaxa people in British Columbia and of the Flathead reservation and Salish, Kootenai and Pend d'Oreille peoples in the United States.[110]

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[106] We are starting to see references to this article of the Declaration in the practice of one international organization that deals with indigenous harvesting rights. See the Chair's Report of the International Whaling Commission, 63rd Meeting, 2011 at 24, referring to comments made by both Sweden and Switzerland.

[107] See also the discussion of U.S. and Canadian practice in parts 4 and 5 of the paper.

[108] An unofficial translation of the text is reprinted in (2007) 3 Journal of Indigenous Peoples Rights 98 http://www.galdu.org/govat/doc/samekoneng_nett.pdf There is already a significant literature on the draft including Gudmundur Alfredsson, "Minimum Requirements for a New Nordic Sami Convention" (1999), 68 Nordic Journal of International Law 397 – 411; Mattias Åhrén, "The Saami Convention" (2007), 3 Journal of Indigenous Peoples Rights 8,http://www.galdu.org/govat/doc/samekoneng_nett.pdf; Timo Koivurova, "The Draft for a Nordic Saami Convention (2006/ 7), 6 European Yearbook of Minority Law 103 – 136; and Timo Koivurova, "The Draft Nordic Saami Convention: Nations Working Together" (2008), International Community Law Review 279 – 293

[109] Draft Nordic Sami Convention, Articles 48 and 49.

[110] Memorandum of Understanding and Cooperation on Environmental Protection, Climate Change and Energy, 18 February 2010. The agreement was signed by the Premier and the Governor and witnessed by the Chief of the Ktunaxa Nation Council (Teneese) and by a Council Member of the Confederated Salish and Kootenai Tribes (Kenmille) (hereafter Flathead MoU).

3.4 The role of sub-national units or regions in the negotiation and conclusion of international agreements

International law has nothing to say about the inclusion of sub-national units or regions in the negotiation and conclusion of international agreements. It is a matter for each State to determine the composition of its negotiating delegation and up to each State to determine whether to make ratification conditional upon obtaining the support of a sub-unit of the federation. This is an issue that federal States encounter on a continuing basis and is explored in greater detail in the context of the CRT in Chapter 5 of the paper (dealing with the role of British Columbia in the original Treaty and Protocol negotiations). International law does, however, insist that a state cannot rely upon provisions of its domestic law or constitution as an excuse for failing to perform an international treaty,[111] or other obligations under international law.

3.5 Other sources of international law

A treaty is only one source of international law. Other sources include customary international law (i.e. the actual practice of States which they regard as binding[112]) and general principles of law.[113] We mention this for two reasons. First, there will not be a vacuum if the Parties elect to terminate the CRT.[114] Second, the CRT, as with any other treaty, must be interpreted in light of these other sources of law.[115] While treaty law will

[111] VCLT, Article 27.

[112] Ascertaining custom can be difficult but a good starting point in ascertaining relevant custom in this area would be the UN Convention on the Non-Navigational Uses of International Watercourses, New York, May 21, 1997, New York, May 21, 1997, http://untreaty.un.org/ilc/texts/instruments/english/conventions/8_3_1997.pdf and the wok of the UN's International Law Commission which led to that text. For the ILC's work see http://www.un.org/law/ilc/ . For an endorsement of the text as representing custom see *Gabčíkovo-Nagymaros Project (Hungary/Slovakia) supra* note 63.

[113] Article 38 of the Statute of the International Court of Justice provides an authoritative statement of the sources of international law.

[114] As we have noted treaty termination is something of a misnomer; and in addition Article VXII provides for the restoration of the pre-treaty legal status of the waters of the Columbia Basin including the re-application of the Boundary Waters Treaty.

[115] VCLT, Article 31(3)(c) and for further discussion see Duncan French, "Treaty Interpretation and the Incorporation of Extraneous Legal Rules" (2006), 55 ICLQ 281, Campbell McLachlan, "The Principles of Systemic Integration and Article 31(3)(c) of the Vienna Convention" (2005), 54 ICLQ 279, Richard K. Gardiner, *Treaty Interpretation*, Oxford, Oxford University Press, 2008, ch.7, Philippe Sands, "Treaty, Custom and the Cross-fertilization of International Law" (1998), 1 Yale Human Rights and Development Law Journal 85. See also *Gabčíkovo-Nagymaros Project (Hungary/Slovakia) supra* note 63, and the Chemtura Award, *supra* note 91 at paras 121 – 122,

usually serve as the *lex specialis* in relation to any matter covered by the treaty, in exceptional circumstances custom may supersede a treaty.[116]

3.6 Conclusions to Chapter 3

It is clear that international law is very flexible when it comes to amending an existing treaty. All that is required is that the parties clearly articulate that this is what they are doing and that they intend the arrangement to be governed by international law. As a matter of international law the parties (i.e. the United States and Canada) may effect a treaty amendment by whatever instrument they choose, whether denominated a treaty, an agreement, a protocol or an exchange of notes or even by their subsequent practice including authoritative interpretations. International law does not require that the parties to a treaty adopt the same method for ratification and entry into force for an amendment as they applied to the original treaty. The parties may also choose to incorporate elements of a subsequent agreement between them in a commercial contract rather than a treaty. States may elect to involve indigenous people in treaty making in a number of different ways by, for example, by affording them a role in determining whether a treaty is ready for ratification. Similarly, international law is not prescriptive about the way in which a state puts together a negotiating team or how the state provides for (or does not provide for) regional representation.

[116] Nancy Kontou, *The Termination and Revision of Treaties in the Light of New Customary International Law* (Oxford: Clarendon Press; New York: Oxford University Press, 1994).

4.0 Treaties in United States Domestic Law

This chapter discusses the negotiation, ratification and implementation of international agreements in U.S. domestic law in general, focusing on the degree of flexibility within the U.S. legal framework. The analysis shows that the President has considerable flexibility in the appointment of a negotiating team and may include representatives from the basin as well as Congressional observers. Despite the provision in the U.S. Constitution requiring the advice and consent of the Senate before the President ratifies a treaty, the U.S. increasingly ratifies international agreements by unilateral Executive action. The decision of when an international matter requires the advice and consent of the Senate is currently interpreted by the Supreme Court as a political matter between Congress and the Executive. Given this we strongly recommend consultation between the two branches as part of determining how the Executive should ratify any agreement that may depart from the two options contained in the CRT. In general, before taking unilateral action to ratify an instrument the Executive will seek support for its actions either through areas of constitutional authority accorded to the Executive, or through an existing treaty, or by relying on a general indication of acceptance or delegation of authority from Congress.

4.1 Negotiation of treaties in United States domestic law

In U.S. domestic law, the power to negotiate a treaty is clearly vested in the Executive branch. The U.S. Constitution provides that "[the President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur . . ."[117] The U.S. Supreme Court has recognized this exclusive power to negotiate.[118] The Senate may appoint observers to negotiations and has done so for negotiations concerning environmental topics and arms control.[119] The authority to negotiate on behalf of the President is generally delegated to the Department of State, originally titled the Department of Foreign Affairs when it was the first department

[117] U.S. Constitution Article II, Section 2. See also, Congressional Research Service for the Library of Congress. *Treaties and Other International Agreements: The Role of the United States Senate*. A Study Prepared for the Committee on Foreign Relations, United States Senate, 106th Congress, 2d Sess, S. Prt. 106-71 at 16. January 2001

[118] United States v. Curtiss-Wright Export Corp. (1936) 299 U.S. 304, 319 ("In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation. He makes treaties with the advice and consent of the Senate; but he alone negotiates. Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it. As Marshall said in his great argument of March 7, 1800, in the House of Representatives, 'The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations.' Annals, 6th Cong., col. 613."); see also Congressional Research Service *supra* note 116 (noting that the initial intent of the framers of the Constitution that the Senate play an advisory role throughout negotiations was quickly abandoned.)

[119] Congressional Research Service, *supra* note 1176 at 14.

established by Congress in 1789.[120] However, the President is not limited in choice of negotiators. Testimony during CRT hearings before the Senate Committee on Foreign Relations in 1961 indicates that the lead negotiating team was composed of Secretary of State Ivan White, General Itschner of the U.S. Army Corps of Engineers, and Interior Department Under Secretary Bennett, with Secretary of the Interior Udall leading the presentation of the CRT to the Senate.[121] (It should be noted that in 1961 the Bonneville Power Administration was under the Department of Interior,[122] while today BPA is under the Department of Energy.)[123] In addition, members of the Senate Committee on Foreign Relations from the Basin (Senator Mansfield of Montana, Senator Church of Idaho and Senator Morse of Oregon) participated in an advisory capacity.[124]

Under the U.S. Constitution, states or their subdivisions do not have the authority to enter into a treaty,[125] and there is no requirement of state participation in negotiations. Nevertheless, through the authority of the Executive to appoint the negotiators, it is possible to include state, community or tribal representatives on the negotiating team.[126] Although appointment to a negotiating team allows the appointee to voice the views of their constituency during internal discussions of positions, appointees serve as representatives of the United States during official negotiations. As will be discussed in the next section, consultation between the Executive branch and Congress is an important step in determining the appropriate process for ratification of a treaty. By including Congressional representatives from the Basin on the negotiation team or in an advisory role, the Executive can smooth this process. State participation in treaty ratification is generally through their Congressional delegation. For a treaty requiring the advice and consent of the Senate, the 2/3 majority requirement means that no more than 33 Senators may oppose. In addition, Senate informal customary practices allow one senator to place a hold on a bill, blocking it from reaching the Senate floor for a vote.[127] Voting can also be blocked by a filibuster on the Senate floor. Although recently subjected to greater

[120] U.S. Department of State, Founding: The Department of State, 1783. URL: http://future.state.gov/when/timeline/1784_timeline/founding_dos.html
[121] 87th Congress, 1st Session, Hearing before the Committee on Foreign Relations, United States Senate. March 8, 1961, Subject: Columbia River Treaty at 21.
[122] U.S. Public Law 75-329 (1937).
[123] 16 USC §832a(a).
[124] Hearing, *supra* note 121 at 32.
[125] United States Constitution, Article I, Section 10. "No State shall enter into any Treaty . . ." It should be noted that states do have authority to enter compacts with each other with the approval of Congress. United States Constitution, Article I, Section 10. In addition states may enter informal arrangements such as the MOU between Montana and British Columbia referred to in an earlier section.
[126] United States Department of State, Circular 175: Procedures on Treaties, Revised Feb. 25, 1985, at 11 FAM 730.3; Congressional Research Service *supra* note 117 at 98.
[127] Walter J. Olezek. *"Holds" in the Senate*, Congressional Research Service Report www.crs.gov 98-712. May 19, 2008.

transparency,[128] these practices remain a strong tool for any Basin state opposing a new or modified treaty that comes before Congress. To avoid opposition, the Congressional Research Service recommends "legislative-executive consultation prior to or during negotiations".[129] In addition, the authors recommend that while official consultation with the Senate Committee on Foreign Affairs is important, early inclusion of both Senate and House representatives from the Basin, regardless of their committee membership, is crucial.

As the third sovereign, Native American tribes also represent a special group for consideration when discussing the participants in a treaty negotiation. As a matter of law the United States, as trustee for tribes, holds tribal resources (including land and water) in trust for them as beneficiary.[130] This does not obligate the United States to bring tribes to the table in negotiations, but does obligate them as trustee to protect their interests.[131] As noted in section 2.2, the fifteen tribal nations in the United States seek recognition of tribal sovereignty through participation in both negotiation and subsequent governance.

In practice, there is a long history of the federal government ignoring tribal interests in treaty negotiations. Tribal interests were not taken into account in the negotiation of Article VI of the Boundary Waters Treaty of 1909,[132] which addressed the Milk River that runs through or borders three Indian Reservations,[133] or in the negotiations of the 1964 Columbia River Treaty. The failure to consult tribes in the past has been addressed as a matter of domestic law (e.g., litigation by tribes against the U.S. for failure to fulfill trust responsibility), rather than at the international level or as a challenge to entering into or implementing a treaty.

4.2 Ratification of treaties in United States domestic law

Ratification of a treaty in U.S. domestic law is accomplished by the signature of the President. However, the steps necessary to allow the President to ratify an agreement that has the force of a treaty in international law, although clearly set forth in the Constitution, is in practice a gray area in U.S. domestic law. Under U.S. domestic law, international

[128] Ibid. Walter J. Olezek. *Senate Policy on "Holds": Action in the 110th Congress.* Congressional Research Service Report, www.crs.gov, RL34255. March 14, 2008.
[129] Congressional Research Service, *supra* note 117 at 16.
[130] Cherokee Nation v. Georgia (1831) 30 U.S. 1, 13; Seminole Nation v. United States (1942) 316 U.S. 286, 296-297; United States v. Jicarilla Apache Nation (2011) 131 S.Ct. 2313, 2321.
[131] Ibid.
[132] Article VI, Treaty between the United States and Great Britain Relating to Boundary Waters, and Questions Arising between the United States and Canada, Accessed at http://www.ijc.org/rel/agree/water.html#text
[133] The Milk River runs through the Blackfeet Reservation and borders the Fort Belknap and Fort Peck Reservations, all in Montana. See, Federal Lands and Indian Reservations – Montana Map Accessed at http://www.docstoc.com/docs/14162827/Federal-Lands-and-Indian-Reservations---Montana-Map

agreements that have the force of a treaty in international law may be ratified by the Executive (1) with the advice and consent of the Senate; (2) with prior or post-authorization of Congress; or (3) unilaterally. [134] The uncertainty in the law relates to the choice of the mode of ratification. While in domestic law, the term "treaty" is reserved for those agreements ratified with the advice and consent of the Senate,[135] in international law all three forms of agreement would be referred to as a "treaty."[136] The U.S. Senate website includes information on the growing use of means other than ratification on the advice and consent of the Senate to enter into international agreements, stating that "[a]ccording to a 1984 study by the Senate Committee on Foreign Relations, '88.3 percent of international agreements reached between 1946 and 1972 were based at least partly on statutory authority; 6.2 percent were treaties [with the advice and consent of the Senate], and 5.5 percent were based solely on executive authority.'"[137] In 1952 alone, "the United States signed 14 treaties and 291 executive agreements."[138]

Advice and Consent of a two-third majority of the Senate is required by the U.S. Constitution prior to Presidential ratification.[139] Although scholars debate whether the framers of the constitution intended this as the sole means for entering international agreements, the increase in international relations since World War II has led to increasing reliance on the more expedient approaches discussed below. This should not be read as a statement that Article II(2) is dead or that the Executive branch thinks it can be ignored. The President continues to submit many treaties to Congress as will be evident in Chapters 6 and 7.

Congressional-Executive agreements are international agreements negotiated by the Executive with either prior Congressional authorization or subsequent Congressional approval or both.[140] This approach differs from the advice and consent of the Senate by (1) reducing the requirement of a two thirds Senate majority to a simple majority; and (2) allows the House of Representatives, where revenue and appropriations bills start, to

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[134] United States Department of State, *supra* note 120 at 11FAM 721.2(b).
[135] United States Constitution, Article II, Section 2.
[136] Vienna Convention on the Law of Treaties, Article 2, Section 1(a) defining "treaty" as "an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation." See also, Congressional Research Service, *supra* note 117 at 1 and 4.
[137] United States Senate, Art & History: Origins & Development: Powers and Procedures: Treaties: Executive Agreements, URL: http://www.senate.gov/artandhistory/history/common/briefing/Treaties.htm; see also, Congressional Research Service, *supra* note 117 at 1 and 22.
[138] Ibid. Note that the seeming discrepancy in counting the number of Executive Agreements is caused by the fact that most studies label both Executive Agreements and Congressional-Executive Agreements as Executive Agreements.
[139] U.S. Constitution Article II, Section 2.
[140] John M. Rogers. *International Law and United States Law.* Dartmouth Publishing, 1999 at 99.

weigh in by a simple majority vote. [141] Trade agreements are often Congressional-Executive agreements.[142] Use of this approach may provide an advantage if treaty implementation requires an appropriation, because the same bill can be used to either authorize or approve the treaty and to authorize an appropriation. With the exception of some scholarly writing that takes the position that the requirement for the advice and consent of a two thirds majority of the Senate in the U.S. Constitution is absolute,[143] there seems to be little domestic controversy regarding the use of this method to enter into a binding international agreement.

If any new arrangement or modification under the existing CRT requires an appropriation (e.g. to extend flood control benefits), at a minimum, post Congressional action will be necessary. However, this action may simply accomplish the appropriation and need not authorize Executive ratification of the agreement. This would be viewed by the Court as "Congressional acquiescence" and is discussed below.

Sole Executive agreements are international agreements entered into by the Executive without the concurrence of either Congress or the Senate. The U.S. Senate website indicates that the difficulty in obtaining a two thirds majority required for Senate consent and the growing scope of foreign interaction has led to a proliferation of Executive agreements since World War II.[144] Executive agreements have the same legal standing as a treaty in international law and when addressed by U.S. courts. However, there is considerable debate about the scope of the Presidential power to act unilaterally[145] among both scholars[146] and members of Congress.[147] Even those scholars who do not go so far as

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[141] U.S. Constitution, Article I, Section 7. See also, Congressional Research Service *supra* note 117 at 20 (noting that the increasing use of Congressional-Executive Agreements reflects the need to have House buy-in to anything with appropriations. In addition, the study notes that "[i]n 1945 the House adopted a resolution to amend the Constitution to require the advice and consent of both Houses for treaties, but the Senate did not act on the measure.").

[142] Frederic L. Kirgis, *International Agreements and U.S. Law*. American Society of International Law. May 1997. Accessed at http://www.asil.org/insigh10.cfm; Congressional Research Service *supra* note 116 at 5 ("Some areas in which Congress has authorized the conclusion of international agreements are postal conventions, foreign trade, foreign military assistance, foreign economic assistance, atomic energy cooperation, and international fishery rights.")

[143] See e.g., David Gray Adler and Larry N. George eds. *The Constitution and the Conduct of American Foreign Policy.* University Press of Kansas, Lawrence, Kansas. 1996.

[144] United States Senate, Art & History: Origins & Development: Powers and Procedures: Treaties: Executive Agreements, URL: http://www.senate.gov/artandhistory/history/common/briefing/Treaties.htm (As an example, the website indicates that in 1952 the President signed 291 executive agreements and 14 treaties.)

[145] Kirgis *supra* note 141; see also Congressional Research Service, *supra* note 116 at 25 ("The extent to which executive agreements can be utilized instead of treaties is perhaps the fundamental question in studying the Senate role in treaties, and is by no means wholly resolved.")

[146] Adler and George, *supra* note 143 at 1.

[147] Kirgis, *supra* note 141; Mike Masnick, Senator Wyden Asks President Obama: Isn't Congress Required to Approve ACTA? *Techdirt*. Oct. 12, 2011 10:48 a.m. URL:

to assert that all international agreements require the "advice and consent" of the Senate, suggest that the scope of Presidential authority is limited.[148] Although some scholars base the scope of Presidential power to unilaterally enter into an international agreement on those powers enumerated in the Constitution[149] and draw the line at those powers specifically assigned to Congress,[150] as a practical matter the line is drawn politically in a battle of wills between the President and Congress.[151] This leads to considerable uncertainty regarding the scope of Presidential power to enter into an Executive Agreement.

The Department of State has developed criteria for determining when the advice and consent of the Senate is required.[152] These factors (in italics) along with their potential application to the Columbia Basin are:

(1) *The degree of commitment or risk for the entire Nation*: The primary factor that appears to drive the desire for in-Basin control of the Columbia River international agreement is that it addresses matters of regional rather than national concern. Arguably the continued supply of non-carbon based energy from the largest producer of hydropower in North America is not purely a local matter. In addition, substantial power from the Columbia River system is marketed to the southwestern U.S. Nevertheless, unless discussions deviate from the current expressed desire to maintain hydropower production, this is a non-issue.

(2) *Whether the agreement is intended to affect state laws*: Allocation of water is done at the state level in the United States. The 1964 CRT retains domestic control over allocation of water and no desire to alter that has been raised. Importantly, both hydropower licensing and listing of endangered species are matters of federal law. Thus any attempt to reconcile the two does not affect state law.

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http://www.techdirt.com/articles/20111012/10072216326/senator-wyden-asks-president-obama-isnt-congress-required-to-approve-acta.shtml

[148] Kirgis, *supra* note 142; Rogers *supra* note 140 at 100, 101, 102; Robert J. Spitzer, 1996. "The President, Congress, and the Fulcrum of Foreign Policy," in Adler and George *supra* note 143 at 99 (indicating that as a practical matter "an international understanding is likely to be handled as an executive agreement unless it deals with a politically important subject and Congress expresses sufficient objection to avoidance of treatymaking.")

[149] Kirgis, *supra* note 142 (indicating that the President's authority to act unilaterally is limited to some areas in which he acts as commander in chief, and actions as chief diplomat.)

[150] Rogers, *supra* note 140 at 100, 101, 102 (indicating that the President's authority to act unilaterally would not extend to areas delegated to Congress such as actions related to the Commerce Clause).

[151] Spitzer, *supra* note 148 at 99 (indicating that as a practical matter "an international understanding is likely to be handled as an executive agreement unless it deals with a politically important subject and Congress expresses sufficient objection to avoidance of treatymaking.")

[152] United States Department of State. *supra* note 120 at 721.2(b); Congressional Research Service, *supra* note 117 at 26.

(3) *Whether the agreement requires enabling legislation*: This will depend on the agreement.

(4) *Past U.S. practice*: This will be discussed in Chapters 6 and 7 of the paper. However, it should be noted in relation to the CRT that the Treaty itself was ratified following the advice and consent of the Senate. Subsequent implementing arrangements were, with one exception discussed in Chapter 7, all taken by the Executive.

(5) *The preference of Congress*: State Department rules call for consultation with the Senate when questions exist concerning the appropriate procedure to be followed when entering into an international agreement,[153] and we strongly advise that this be followed by interests in the Columbia Basin.

(6) *The degree of formality desired*: One factor raised by stakeholders expressing a desire to make changes within the existing agreement is the need for flexibility in the face of uncertainties introduced by in particular, climate change, and changing energy markets. Stakeholders have expressed concerns that Senate advice and consent precludes the flexibility needed to experiment in the face of uncertainty. This factor suggests that the State Department also believes that the advice and consent of the Senate imposes a more formal approach with less likelihood of change. However, it should be noted that the content of a treaty itself may provide that flexibility by establishing a procedure for modification regardless of the method of its approval.[154]

(7) *The proposed duration and the need for prompt conclusion*: The fact that nothing changes under the existing treaty until 2024 suggests that there is no need for a prompt conclusion. The duration of any new agreement has not been determined, but presumably is not likely to be of short duration.

(8) *General international practice on similar agreements*: Chapters 6 and 7 of the paper will address the practice between the United States and Canada.

Although these criteria provide useful guidelines, they are not necessarily those followed by Congress. Factor 5 – the preference of Congress − is possibly the most important consideration. <u>We strongly recommend consultation between the Executive branch and the Congressional delegation from the Basin and Congressional members of the Senate</u>

[153] United States Department of State, *supra* note 120 at 721.4(b).

[154] An example of this is provided by the 1944 Treaty for the Utilization of the Waters of the Colorado and Tijuana Rivers and of the Rio Grande, between the U.S. and Mexico. The treaty establishes a Boundary Waters Commission and a procedure for reporting on decisions in a document referred to as a "Minute."

Committee on Foreign Relations in the process of formulating any future agreement for the Columbia River.

Arguably agreements entered into by the Executive in implementing a treaty may fit the category of "sole Executive agreements." But because some Congressional action has preceded them, this type of agreement is best addressed below in the context of Congressional acquiescence and in Chapter 7 concerning agreements entered under the CRT.

Historically, debates between Congress and the Executive concerning the power of the President to enter into an Executive agreement have played out in both the political arena and the courts. U.S. Supreme Court rulings on the matter are discussed below. The political debate has generally involved cases dealing with the unilateral exercise of war powers by the President. In 1973, Congress passed the *War Powers Act*[155] over presidential veto,[156] attempting to limit the ability of the President to commit troops to battle.[157] Kirgis notes "[t]he War Powers Resolution in practice has had the effect of inducing Presidents to consult with and report to Congress when U.S. armed forces are used in combat situations, but it has not significantly limited the President's practical power to commit the United States to use military force."[158] The year before, in 1972, Congress also passed an act requiring transmittal of any Executive agreement to Congress within sixty (60) days of its finalization.[159] According to the Congressional Research Service, one of the reasons the Vienna Convention on the Law of Treaties remains pending on the Senate Foreign Relations Committee calendar is that the Executive branch objected to an interpretation the Senate would impose on approval – i.e. the position that a "treaty" for purposes of the convention (and thus international law) is limited to an

[155] Joint Resolution Concerning the War Powers of Congress and the President, Public Law 93-148, 87 Stat. 148, Nov. 7, 1973, codified at 50 USC §§ 33-1541-1548.
[156] U.S. Constitution Article 1, Section 7(2) provides that a bill vetoed by the President nevertheless becomes law by a vote of 2/3 of each house.
[157] Kirgis, *supra* note 142.
[158] Kirgis, *supra* note 142.
[159] The *Case-Zablocki Act* of August 12, 1972 ("Case Act"), 1 USC §112b; see also, 22 CFR 181.7(a) (Department of State Regulations requiring transmittal of international agreements other than "treaties" to be transmitted to Congress within 60 days); see also, Congressional Research Service, *supra* note 117 at 2 ("The main threat of erosion of the Senate treaty power comes not from the international agreements that are submitted as treaties, however, but from the many international agreements that are not submitted for its consent. In addition to concluding hundreds of executive agreements, Presidents have made important commitments that they considered politically binding but not legally binding. Maintaining the Senate role in treaties requires overseeing all international agreements to assure that agreements that should be treaties are submitted to the Senate."). See also Congressional Research Service, *supra* note 117 at 14, 22, and 209.

international agreement entered into by the President with the advice and consent of the Senate.[160]

The President's role as commander-in-chief of the armed forces arguably introduces some ambiguity in the area of war powers. It is more difficult, however, to assert that the power of the President to act unilaterally extends to areas of commerce such as water and hydropower.[161] Nevertheless, Executive agreements on the topic of fishing rights have been entered into without objection, while others have been entered into with the advice and consent of the Senate.[162] Bilateral agreements relating to water that have been entered in this matter will be discussed in Chapters 6 and 7 of this paper. It appears, however, that there is no clear answer in U.S. domestic law in general to the question of whether the President could simply direct the U.S. Entity to conclude a new or modified Columbia River agreement or to extend the flood control provisions of the existing agreement. Importantly, however, there also seems to be greater latitude for the President to enter into an Executive Agreement under an existing treaty despite the absence of specific treaty language authorizing the Executive to act than there would be for a new treaty.[163] This will be discussed below in the context of treaty implementation under U.S. domestic law because it is a question of interpretation of the specific treaty.

The controversy surrounding Executive agreements has led both members of Congress and private entities affected by an action taken to implement an agreement to challenge the power of the President in court. The uncertainty surrounding the U.S. process for treaty finalization underscores the need to consider the potential for a challenge. Understanding the Court's approach to challenges in this context is therefore important, should the Parties consider use of an Executive agreement to amend or modify the CRT or to develop a new agreement.

The U.S. Supreme Court has avoided reaching a final conclusion on this question by finding in challenges raised by private parties, that there was either Congressional authority or acquiescence in each case.[164] In a rare challenge raised by a Senator, a plurality of the Court found the case to be a nonjusticiable political question (i.e., not

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[160]Congressional Research Service, *supra* note 117 at 20-21.

[161] Rogers, *supra* note 140 at 100, 101, 102 (indicating that the President's authority to act unilaterally would not extend to areas delegated to Congress such as actions related to the Commerce Clause).

[162] Spitzer, *supra* note 148 at 95.

[163] Congressional Research Service, *supra* note 117 at 5 ("Some executive agreements are expressly authorized by treaty or an authorization for them may be reasonably inferred from the provisions of a prior treaty. . . The President's authority to conclude agreements pursuant to treaties seems well established . . ."). Ibid. at 26 ("Executive agreements pursuant to treaties are supposed to be within the purview of the treaty, that is, carry out the purposes of the treaty.")

[164] United States v. Curtiss-Wright Export Corp. (1936) 299 U.S. 304; United States v. Belmont (1937) 301 U.S. 324; United States v. Pink (1942) 315 U.S. 203; Dames and Moore v. Reagan (1981) 453 U.S. 654.

appropriate for judicial review because the issue lies within the discretion of the politically elected branches – the President and Congress).[165] With the proliferation of Executive agreements, members of the Court and lower courts have begun to leave open the possibility that the Supreme Court will decide the issue in a case raised by a Senator that it considers "ripe."[166] Some of the leading cases in these categories are discussed in the following paragraphs.

Congressional authority or acquiescence

Although not rising to the level of a Congressional-Executive agreement, the U.S. Supreme Court has nevertheless upheld unilateral Presidential action in cases brought by private litigants where it finds that Congress has provided broad authority in the area or acquiesced in the particular action. In 1936, the U.S. Supreme Court upheld Presidential action blocking sales of arms to Bolivia and Paraguay claiming authority under a vague joint resolution of Congress that would be insufficient to delegate authority for a domestic issue.[167] The Court found that the President as the sole negotiating authority has broader power to act in the face of a vague delegation in foreign affairs.[168] The Court also found that Congress had often accepted Presidential action in foreign affairs under a vague delegation indicating acquiescence,[169] and the Court made it clear that it was not holding that the President would have plenary power without indications of acquiescence.[170] It is important to note that these cases involve an area in which the President has express Constitutional authority as Commander-in-Chief of the armed forces under Article II, Section 2. Although this is thought by scholars to bolster Presidential power in this area,[171] and is mentioned in a concurring opinion of Justice Rehnquist in *Goldwater v. Carter* (discussed below), it was not the focus of Supreme Court opinions in the following case.

In the most recent case, *Dames and Moore v. Reagan*,[172] President Reagan implemented an Executive Agreement with Iran freeing the U.S. hostages by nullifying attachments and liens on Iranian assets and suspending claims filed against Iran.[173] The Court held

[165] Goldwater v. Carter (1979) 444 U.S. 996 (plurality decision). See also, Lowry v. Reagan (1987) 376 F. Supp. 333 (challenge to use of armed forces in the Persian Gulf without a Congressional declaration of war held nonjusticiable as a political question.)
[166] Ibid. concurring opinion of Powell; Dellums v. Bush (1990) 752 F.Supp. 1141 (Finding that a challenge by a member of Congress to deployment of troops in Iraq without a declaration of war from Congress is not ripe in the absence of conflicting action by Congress.)
[167] United States v. Curtiss-Wright Export Corp. (1936) 299 U.S. 304, 319-322.
[168] Ibid.
[169] Ibid. at 327-328.
[170] Ibid. at 687
[171] Kirgis, *supra* note 141 (indicating that the President's authority to act unilaterally is limited to some areas in which he acts as commander in chief, and actions as chief diplomat.)
[172] Dames and Moore v. Reagan (1981) 453 U.S. 654.
[173] Ibid. at 660.

that Presidential authority in foreign affairs combined with the fact that several acts addressing emergency authority (the *International Emergency Economic Powers Act* and the *Hostage Act*), while not expressly delegating the authority exercised, indicated Congressional acceptance of Presidential action in this area.[174] In doing so, the Court adopted an approach formerly expressed in a concurring Supreme Court opinion:[175]

> When the President acts pursuant to an express or implied authorization from Congress, he exercises not only his powers but also those delegated by Congress. In such a case the executive action "would be supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it." When the President acts in the absence of congressional authorization he may enter "a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain." In such a case the analysis becomes more complicated, and the validity of the President's action, at least so far as separation-of-powers principles are concerned, hinges on a consideration of all the circumstances which might shed light on the views of the Legislative Branch toward such action, including "congressional inertia, indifference or quiescence." Finally, when the President acts in contravention of the will of Congress, "his power is at its lowest ebb," and the Court can sustain his actions "only by disabling the Congress from acting upon the subject." [176]

This concept that Congress must express its opposition as a body rather than expressly delegate authority (with silence interpreted as lack of authority) is beginning to find a place in challenges brought by members of Congress in cases discussed below in which lower courts and Justices in concurring opinions found the dispute "not ripe" for consideration. This has not been adopted by a majority of the U.S. Supreme Court and should be considered a possible theory for future adoption, but not one that should be relied upon in deciding a course of action.

Political Question/Not Ripe

In 1979, the Court upheld Presidential termination of a treaty that had been entered with the advice and consent of Congress (the 1954 Mutual Defense Treaty with Taiwan) without Congressional approval.[177] Unlike the cases filed by private parties discussed above, *Goldwater v. Carter* was filed by a Senator. In this dispute between a member of Congress and the President, the Court in a plurality opinion, found the matter to be a

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[174] Ibid. at 677.

[175] Concurring opinion of Justice Jackson in Youngstown Sheet & Tube Co. v. Sawyer (1952) 343 U.S. 579, 635-638.

[176] Ibid. at 668-669. citations omitted

[177] Goldwater v. Carter (1979) 444 U.S. 996.

political question and dismissed without deciding the merits.[178] As a plurality opinion, the basis for the dismissal – that it was a political question – does not provide precedent. In 1987, a lower court followed the reasoning of the plurality opinion in Goldwater, finding a challenge to the deployment of troops by the President to be a political question.[179] Taking a different approach in a concurring opinion in *Goldwater v. Carter*, Justice Powell asserts that in the absence of action by Congress, as opposed to disagreement by a single Senator, the dispute is not ripe for consideration. Although this case is clearly relevant in considering the power of the President to unilaterally terminate a treaty, it has general relevance for purposes of this section on the question of whether the Court will hear a challenge to unilateral Presidential action. In 1990, a lower court adopted the approach of Justice Powell in challenges to unilateral exercise of war powers by the President.[180] This leaves open the possibility that the Court will resolve a dispute that rises to the level of impasse in which Congress votes against a unilateral action by the President.

4.3 Implementation of treaties in United States domestic law

Questions concerning the degree of flexibility to implement a treaty relate to both the general treatment of the topic in U.S. domestic law and the specifics under the 1964 CRT. This section addresses the general treatment under U.S. law and potential interpretations under the CRT. Discussion of flexibility reflected in the practice under the 1964 CRT will be addressed in Chapter 7. The degree of flexibility for implementation of a treaty under U.S. domestic law requires an understanding of how a treaty is interpreted in relation to domestic laws and who has final authority to interpret a treaty.

The United States Constitution provides that "Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby."[181] Although all treaties are the "law of the land," in a dispute concerning a conflict between a treaty and a prior existing law, domestic courts will only give legal effect to a treaty if it is either self-executing or Congress has passed implementing legislation.[182] Whether a treaty is self-executing turns on intent.[183] Thus, provisions that are highly specific, such as the provisions on power

[178] Ibid.
[179] Lowry v. Reagan (1987) 376 F. Supp. 333 (challenge to use of armed forces in the Persian Gulf without a Congressional declaration of war held nonjusticiable as a political question.)
[180] Dellums v. Bush (1990) 752 F.Supp. 1141(Finding that a challenge by a member of Congress to deployment of troops in Iraq without a declaration of war from Congress is not ripe in the absence of conflicting action by Congress.)
[181] United States Constitution, Article V; see also Congressional Research Service, *supra* note 117 at 4.
[182] Kirgis, *supra* note 142.
[183] Ibid.

and flood control in the Columbia River Treaty, are more likely to be considered self-executing, and therefore implementation may occur without an act of Congress.

The U.S. Supreme Court views a later enacted federal statute that conflicts with a treaty to control,[184] despite the fact that under international law actions by the U.S. to comply with the federal statute may place it in breach of the treaty. [185]The Court, however, will go to considerable lengths to avoid finding a conflict, unless Congress expressly indicates its intent to override the treaty.[186] In fact, canons of construction articulated by the U.S. Supreme Court indicate that U.S. law will be interpreted to be consistent with international law, but if inconsistent, U.S. law will prevail.[187] Chapter 7 will discuss the measures the U.S. entities have taken to reconcile later-enacted domestic law with the CRT.

There are also examples in which the United States Executive branch has found a later-in-time customary international law to prevail over a treaty,[188] although the U.S. Supreme Court has not addressed this issue.[189] This may be relevant in considering whether customary law may be relied on as gap-filling to allow implementation of the Columbia River Treaty for the additional purposes on which the 1964 CRT is silent. For example, customary international law prohibits use of a country's territory to harm that of another country. Arguably the requirement that countries with shared watercourses cooperate to protect the corresponding ecosystems, articulated in Part IV, Article 20 of the U.N. Convention on the Law of the Non-navigational Uses of International Watercourses, although not in effect, is also customary international law.

One of the key factors in determining the degree of authority the Executive branch has to alter implementation is the interpretation of the breadth of the 1964 CRT itself. Although this will be addressed specifically in Chapter 7, a preliminary matter critical to that discussion is the question of <u>who has the authority to interpret a treaty</u>. The U.S. Supreme Court has the final say on the interpretation of the U.S. Constitution and federal domestic law.[190] However, the Court considers that the interpretation of international law is a political matter that should be left to the political branches – Congress and the

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[184] Rogers, *supra* note 140 at 87; Congressional Research Service, *supra* note 117 at 4 and 174.
[185] VCLT, Article 27: "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."
[186] Kirgis, *supra* note 128; Congressional Research Service, *supra* note 117 at 4.
[187] Rogers, *supra* note 140 at 30, 37, 40, 45.
[188] For example, although the U.S. is not a party to the Law of the Sea Treaty, it considers the 200 mile territorial limit articulated in that treaty to be customary international law and has followed that despite treaties expressing a lesser limit. Rogers, *supra* note 140 at 154-55.
[189] Ibid.
[190] Marbury v. Madison (1803), 5 U.S. 137.

Executive.[191] But what happens if Congress and the Executive disagree? Is the Court an avenue to resolve the dispute? As discussed below in the case of treaty-making power, the Court has been reluctant to intervene. The resolution of a dispute during the Reagan Administration concerning interpretation of the Anti-Ballistic Missile Treaty (ABM Treaty) is illustrative of the tension that can exist between Congress and the Executive.

In 1985, the Reagan Administration took the position that testing for the Strategic Defense Initiative (also known as "Star Wars"), did not violate the 1972 ABM Treaty ban on testing because it would involve testing of "new technology."[192] This interpretation conflicted with Executive branch testimony before the Senate during proceedings to obtain the Senate's advice and consent to the ABM Treaty.[193] In response, the Senate Foreign Relations and Judiciary Committees held hearings on the question of "[c]an the President unilaterally and fundamentally change a treaty by 'reinterpreting' it in disregard of executive representations originally tendered to the Senate?"[194] The Senate Foreign Relations Committee drafted Senate Resolution 167, taking the position that it would be unconstitutional for the President to interpret a treaty ratified with the advice and consent of the Senate in a manner that directly conflicts with the representations made by the Executive on the record during hearings on the treaty.[195] Although the Resolution was never taken up by the full Senate, the Senate consented to the Intermediate-Range Nuclear Forces Treaty with the Soviet Union in 1988 with the qualification that treaty interpretation must reflect a shared understanding between the Executive and Congress as reflected in testimony before the Senate by the Executive in hearings for the advice and consent of the Senate. This was referred to as the "Biden Condition," and was included as a condition on its consent to ratification.[196] Although the President questioned the ability of Congress to modify a treaty when the Constitution grants sole authority to negotiate a treaty to the Executive branch, the Senate responded that, rather than a modification of a treaty, their action was a condition on consent to ratification as a matter of domestic law.[197]

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[191] Rogers, *supra* note 140 at 33. Primary sources for interpretation of the treaty powers by the political branches: for the Executive: Title 22 on Foreign Relations, Chapter 1: Department of State, Subchapter S: International agreements; found at 22 CFR 181.4. (this subchapter of the CFR is the codification of State Department Circular 175, 11 Foreign Affairs Manual 700, governing procedures for international agreements) For the Senate: Congressional Research Service, *supra* note 117.

[192] Joseph R. Biden, Jr. and John B. Ritch III. The Treaty Power: Upholding a Constitutional Partnership, 137 *University of Pennsylvania Law Review*, 1529 at 1531 (1989).

[193] Ibid. at 1532-1533.

[194] Ibid. at 1534.

[195] Ibid. See also, Congressional Research Service, *supra* note 117 at 13.

[196] Ibid. at 1551.

[197] Ibid. at 1552; see also, Congressional Research Service, *supra* note 117 at 1 ("The Senate may refuse to give its approval to a treaty or do so only with specified conditions, reservations, or understandings."); Ibid. at 6-11.

No challenge was raised in court during this dispute between Congress and the President but the dispute does illustrate the power of Congress to challenge unilateral action by the President. Possibly of equal importance for the Columbia River Basin, the author of the Condition is currently Vice President. Should he remain so as the Basin considers alternative approaches to implementation, it may be difficult for the Executive to interpret the CRT in a manner that conflicts with the Congressional Record from the time when the Senate provided its advice and consent in 1961. Thus, it is important to consider relevant aspects of the original Senate hearings on the CRT.

In 1961, testimony before the Senate Committee on Foreign Relations opened with a statement by presiding Senator Sparkman that "[t]he purpose of the treaty is to insure the development of the water resources of the Columbia River Basin so that both countries obtain the maximum advantage in the production of hydroelectric power, flood control, and other benefits."[198] Testimony throughout the hearing focused heavily on hydropower[199] and flood control,[200] with only minor reference to the value of increased summer flow for irrigation and recreation.[201] However, correspondence on the coordinating agreement among federal and non-federal hydropower generating utilities contemplated by the Treaty was submitted for the record by Secretary of the Interior Udall. Correspondence from the U.S. Army Corps of Engineers stated that the "governmental agencies have the responsibility for multipurpose uses of the Columbia River for the public interest. Such uses include not only power, but also flood control, navigation, irrigation, pollution abatement, recreation, and fish and wildlife conservation. Any coordination agreement must recognize these responsibilities."[202] It was clearly understood at the time that the treaty would be implemented in consideration of other domestic laws. Testimony specific to the fishery by Secretary of State White focused on the fact that location of the treaty dams above Grand Coulee Dam would prevent "interference with the salmon and other anadromous fish which constitute such an important economic and recreational asset for the people of the Pacific Northwest."[203]

The committee expressed concern over delegation of authority to operating Entities and specifically the Treaty language, providing: "[t]he United States of America and Canada

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[198] 87th Congress, 1st Session, Hearing before the Committee on Foreign Relations, United States Senate. March 8, 1961, Subject: Columbia River Treaty at 1.

[199] Ibid. at 9, Testimony of Secretary of the Interior Stewart L. Udall. Note that there is substantial additional testimony by Senators from the basin concerning power benefits. For the purposes of this article references are limited to statements by representatives of the Executive Branch.

[200] Ibid. at 9, Testimony of Secretary of the Interior Stewart L. Udall, at 48-59 Testimony of General Emerson C. Itschner, Chief of the U.S. Army Corps of Engineers. For the purposes of this article references are limited to statements by representatives of the Executive Branch.

[201] Ibid. at 9, Testimony of Secretary of the Interior Stewart L. Udall.

[202] Ibid. at 19.

[203] Ibid. at 33.

may by an exchange of notes empower or charge the entities with any other matter coming within the scope of the treaty."[204] The committee asked about the extent of the authority delegated to the Executive under the provision. Secretary of State White responded: "Well, that . . . is a delegation that empowers each of the Governments . . . to delegate to [the appointed] entity any matter that comes within the scope of the treaty."[205] In response to additional questioning, Secretary White said: "[i]t does not constitute an authorization to make any change in the treaty. It deals, as I understand it, with the administration of the provisions of the treaty."[206] A memorandum on the "Delegation of Authority to Operating Entities Under Article XIV(4) of the Columbia River Treaty" was jointly prepared by the Departments of State and Interior and the U.S. Army Corps of Engineers and was included in the record. It provides that "neither government could, by a delegation to the operating Entities under this provision, change or modify any substantive provision of the treaty," and referring to the length of the treaty, "XIV(4) was necessary because all operating and technical matter which it might appear desirable to authorize the entities to perform could not be foreseeable."[207]

Termination

Finally, the matter of termination must be considered under U.S. domestic law. The U.S. Constitution is silent on termination of an existing treaty. Scholars disagree on whether termination of a treaty requires the advice and consent of the Senate,[208] although a study by the Congressional Research Service for the Senate Foreign Affairs Committee takes the position that modification, extension, or termination must follow the same method as the original agreement while noting that this has not been adhered to in the case of termination.[209] Reasoning to the contrary, the Constitutional silence on termination reflects the reality that reducing U.S. obligations is not as serious as entering into new obligations, and may need to be done speedily.[210] Practice reflects this line of reasoning.[211] One study indicates that from 1789 to 1985, 10 treaties were terminated by unilateral Presidential action, 7 with the concurrence of Congress, and 2 with the advice and consent of the Senate.[212] As detailed above, the U.S. Supreme Court in *Goldwater v. Carter* refused to hear a challenge to unilateral termination of a treaty, finding the issue to be a political question that should be left to Congress and the Executive.

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[204] Article XIV(4)
[205] 87th Congress, 1st Session, Hearing before the Committee on Foreign Relations, United States Senate. March 8, 1961, Subject: Columbia River Treaty at 40-41.
[206] Ibid. at 41.
[207] Ibid. at 42.
[208] Spitzer, *supra* note 148 at 88.
[209] Congressional Research Service, *supra* note 117 at 13 and 18.
[210] Congressional Research Service, *supra* note 117 at 172. Ibid at 199 noting that ("The Restatement (Third) subscribes to the view that the power to terminate treaties is lodged in the President.")
[211] Ibid. at 173.
[212] Spitzer, *supra* note 148 at 89 citing a study by David Gray Adler

The 1964 CRT expressly addresses the possibility of unilateral termination of certain provisions (in particular those relating to shared power benefits) and authorizes either the U.S. or Canada to terminate by giving ten years notice with the earliest date of unilateral termination being sixty years after treaty ratification.[213] This provision may be interpreted to authorize the Executive to make the determination.

Termination (unilateral or mutual) followed by international cooperation pursuant to agency operating agreements has also been raised as an avenue to flexibility by stakeholders in the basin. In the U.S., this approach requires Congressional authorization for any additional authority required by the relevant agencies and to appropriate any necessary funds. It should also be noted that the Federal Advisory Committee Act[214] controls any effort by agencies to include an advisory committee from the basin in its actions. In the alternative, public involvement is limited to the public comment available under standard administrative procedures that require open meetings for decision making and open public records.

4.4 Conclusions to Chapter 4

In sum, U.S. domestic law provides considerable flexibility for developing a new arrangement for international management of the Columbia River including a more inclusive process for either negotiation or implementation of the arrangement. Practice suggests that it is common to include Senators from the Basin and from the Senate Committee on Foreign Relations in an advisory capacity during negotiations. Nothing prevents the President from including representatives of Native American tribes in an advisory capacity as well. Similarly, unless specified otherwise by the treaty, the President is not constrained in choosing the entity for implementation of an international agreement or in designating representatives of various interests to serve in an advisory capacity.

Changes to implementation of the existing CRT or development of a new international agreement do not necessarily require the advice and consent of the Senate provided that key Congressional members from the basin and the Senate Committee on Foreign Relations are involved and concur. Congressional action by a simple majority of both houses of Congress is necessary should any arrangement require an appropriation, however this action may follow Executive negotiation and ratification of an agreement.

[213] Columbia River Treaty, Article XIX, Section 2. Note that under international law, the U.S. and Canada could mutually agree to terminate the treaty at any time. The provision simply addresses unilateral action.
[214] P.L. 92-463

In addition, it is unlikely that a court will entertain a challenge to Executive interpretation or reinterpretation of the scope and details of the CRT unless Congress actually passes a measure disagreeing with that interpretation. Again, consultation with members of Congress to avoid this impasse is highly recommended.

5.0 Treaties in Canadian domestic law

This chapter discusses the negotiation, ratification and implementation of international agreements in Canadian domestic law.[215] The analysis shows that it is possible to provide for considerable regional involvement in both the negotiation and implementation of a treaty or the amendment of an existing treaty. Indeed, to the extent that the subject matter of the treaty engages provincial property and legislative interests, provincial involvement is a practical and legal necessity. As a matter of law, ratification of a treaty is an executive act in Canada which does not require the involvement of Parliament although practice has recently changed so as to require (as a matter of policy) that proposed treaties be tabled in the House of Commons before ratification.

5.1 Negotiation of treaties in Canadian domestic law

The formal legal position in Canada is that it is the federal Crown (executive) that has the constitutional authority to engage in treaty making (including the conclusion, amendment or lawful termination of a treaty) with a foreign government. There is no written constitutional provision to this effect.[216] A province has the power to enter into an agreement with another government (e.g. a state government[217]) but such an agreement is not a treaty and is not subject to international law.[218]

The procedures for the negotiation of a treaty, or an amendment to an existing treaty, are based upon policy rather than law. Prior to entering into treaty negotiations the initiating department of the federal government must ensure that it has a policy mandate to

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[215] For general sources see Allan Gotlieb, *Canadian Treaty-making* (Toronto: Butterworths, 1968) and Daniel Dupras, International Treaties: Canadian Practice, PRB 00-04E, 3 April 2000, http://publications.gc.ca/Collection-R/LoPBdP/BP/prb0004-e.htm

[216] Dupras, *id*.

[217] See, for example, the environment cooperation agreement between British Columbia and Washington state and the various sub-agreements between the parties or agencies of the parties. For copies of the agreements see http://www.env.gov.bc.ca/spd/ecc/mou.html See also the BC/Montana MoU with respect to the Flathead, *supra*, note 110.

[218] Such an agreement might be subject to the domestic law of one or other legal system but much would depend on the intentions of the parties i.e. did they intend to enter into a legally binding arrangement (i.e. a contract). In many such cases that will not be the intention (e.g. it will be a political accord) and this will be evident on the face of the document. See, for example, the 1996 agreement (Ibid) between the B.C. Minister of the Environment and the Washington Department of Ecology with respect to prior consultation and information sharing for water rights application particularly in relation to the Abbotsford/ Sumas Aquifer. The agreement states that “it is not intended to constitute a contractually binding relationship between the parties”.

commence negotiations.[219] In the case of any proposed amendments to the Columbia River Treaty, the initiating Department will likely be either the Department of Foreign Affairs or the Department of Energy and Natural Resources Canada. The policy mandate will likely be secured by means of a Memorandum to Cabinet (MC). The MC will address the following matters:[220]

i. the expected purpose of the agreement, and its relation to existing agreements;
ii. its potential foreign policy implications;
iii. its possible domestic impact;
iv. a preliminary outline of any financial obligation that may be incurred; and
v. legislative changes that may be necessary if the negotiations prove successful.

The sponsoring Department will also be expected to show that it has consulted other government departments, provinces and territories, aboriginal groups, non-governmental organizations and industry stakeholders as appropriate.[221] The sponsoring Department will need to involve the Department of Foreign Affairs in the negotiations[222] and the treaty text will have to be prepared in both official languages before it can be signed. Authorization for signature will be secured by means of an Order in Council which must be supported by a second MC which should seek:[223]

i. approval of the text of the treaty in both official languages;
ii. policy approval to sign the treaty, as well as to ratify it should the Government so decide after the tabling period;
iii. policy approval for all resources required to implement the treaty; and
iv. policy approval to draft any legislation necessary to implement the treaty.

Although treaty making is formally a responsibility of the federal executive, the federal executive will prepare for and participate in negotiations with an acute understanding of the limited executive and legislative authority that the federal government has to implement the terms of any arrangements that may be agreed to. Unlike the position in many federal states (including the United States and Australia), the conclusion of a treaty by Canada has no effect on the distribution of legislative powers or property rights

[219] "The Treaty Making Process", Annex A to Policy on Tabling of Treaties in Parliament, http://www.treaty-accord.gc.ca/procedures.aspx
[220] Annex A, s.3.
[221] Id.
[222] See Laura Barnett, "Canada's Approach to the Treaty Making Process", Library of Parliament, 24 November 2008 at 3 referring to s.10(2)(c) of the *Department of Foreign Affairs and International Trade Act*, RSC 1985, c.E-22. which provides it is the Minister of Foreign Affairs that shall "conduct and manage international negotiations as they relate to Canada" but acknowledging that the Department "does not have a monopoly on negotiations with foreign states …. but rather plays a supervisory role …".
[223] Id., s.4 "negotiating a treaty".

between the federal and provincial governments.[224] Hence, depending upon the subject matter of the treaty, the treaty might fall to be implemented by the federal government, the provincial government, or some combination of the two.

We can illustrate some of these points by reference to the Columbia River Treaty. The basic subject matter of the Treaty relates to the construction and operation of dams on major rivers located (in Canada) entirely within the province of British Columbia. Canada's constitution allocates the property in public lands including water powers and the beds of navigable waters to the provincial government where the property is located.[225] The *Constitution Act, 1867*, s.92, also grants the provincial legislatures the exclusive right to make laws for the following matters:[226]

> 5. The Management and Sale of the Public Lands belonging to the Province and of the Timber and Wood thereon.
> 13. Property and Civil Rights in the Province.
> 16. Generally all Matters of a merely local or private Nature in the Province.

The Constitution of Canada was amended in 1982 to add a new section − section 92A − which makes it even clearer that rights in relation to hydroelectric facilities located within a province accrue to that province and that that province has the exclusive power to make laws in relation to such matters. The text, so far as relevant reads as follows:

> 92A. (1) In each province, the legislature may exclusively make laws in relation to
> ….
> (*c*) development, conservation and management of sites and facilities in the province for the generation and production of electrical energy.
> …….
> (4) In each province, the legislature may make laws in relation to the raising of money by any mode or system of taxation in respect of
> ….
> (*b*) sites and facilities in the province for the generation of electrical energy and the production therefrom, whether or not such production is exported in whole or in part from the province, but such laws may not authorize or provide for taxation that differentiates between production

[224] *AG Canada v AG Ontario* (*Labour Conventions Case),* [1937] A.C. 326. Put another way, the Canadian constitution does not contain a foreign affairs power. There is a minor exception to this in the case of the so-called Empire treaties (treaties negotiated by the UK for Canada); one such treaty is the Boundary Waters Treaty *supra* note 12. The federal government does have the authority to implement such treaties in domestic law notwithstanding the ordinary division of powers.
[225] Constitution Act, 1867, s.109 and the B.C. Terms of Union.
[226] Constitution Act, 1867, s.92.

exported to another part of Canada and production not exported from the province.

In sum, the core subject matters of the CRT all fall within provincial, not federal jurisdiction.

5.1.1 The role of the provinces in the negotiation of an international treaty

Given the constitutional division of powers, the federal government will, as a matter of practice, be reluctant to proceed with negotiations for any treaty without the active support and participation of affected provinces. The federal government will also want to assure itself that such a province will deliver on its commitments. Both issues were addressed in the context of the CRT.

Swainson's account of the Treaty negotiations shows that the province of British Columbia was intimately involved in the negotiations and "called the shots" on all of the key issues and decisions that had to be made in the course of negotiations.[227] Furthermore, while it was the new federal Liberal administration that demanded the clarification changes that were secured through the negotiation of the Protocol, it was the Province that insisted upon the pre-sale of the Canadian entitlement for the first 30 years of each of the three Treaty dams so as to permit it to develop the Peace River as well as the Columbia.

While the involvement of the Province in the negotiations for the CRT addressed some of the provincial government's concerns, it did not address federal concerns as to the future implementation of the Treaty by the provincial government. The federal government dealt with these concerns by negotiating two intergovernmental agreements with British Columbia, the agreements of July 8, 1963 and January 13, 1964.[228] The 1963 Agreement is the more important of the two agreements; the 1964 Agreement was added in response to the pre-sale of the Canadian entitlement. The content of these agreements is addressed in section 5.3, "implementation of treaties in Canadian domestic law".

5.1.2 The role of indigenous people in the negotiation and conclusion of international agreements

As noted in Chapter 2 of the paper, the role of indigenous people in the negotiation and conclusion of international agreements is properly the subject of both domestic law and international law. The question in this part of the paper is as follows: what does Canadian

[227] Neil Swainson, *Conflict over the Columbia: the Canadian Background to an Historic Treaty*, McGill-Queen's University Press, Montreal, 1979

[228] The agreements are both reproduced in *Columbia River Treaty Protocol and Related Documents*, http://www.empr.gov.bc.ca/EAED/EPB/Documents/1964_treaty_and_protocol.pdf

law and practice say about the role of indigenous people in the negotiation and conclusion of international agreements? The historical practice is certainly not encouraging. Indeed it seems safe to say that indigenous peoples in Canada were not consulted or involved in any way in relation to the negotiation or conclusion of the CRT or indeed other international matters such as the construction of the Grand Coulee dam which made it impossible for salmonids to return to spawning grounds in the upper Columbia River.[229]

The current legal situation is different since the Supreme Court of Canada now recognizes that the Crown (i.e. both the federal and provincial governments) have a duty to consult First Nations if a proposed government decision or conduct might adversely affect an aboriginal or treaty right or title.[230] The Crown has never negotiated and concluded treaties with the First Nations affected by the CRT or pre-CRT dams within the Basin and accordingly such First Nations, including the Ktunaxa and Sinixt peoples, will likely be able to establish both an unextinguished aboriginal title and aboriginal rights to some or all of the Basin. The duty to consult and accommodate relates to future events and proposed decisions.[231] There is no present duty to consult and accommodate in relation to past harms created by the CRT, pre-CRT or post-CRT dams that are already operating. However, government conduct or decisions that may change current operations in ways which may adversely affect the aboriginal rights and title of First Nations in the Basin will trigger such a duty. Given the automatic change in the nature of the flood control operation post-2024 and the options associated with termination or amendment it seems reasonable to conclude that the Crown does have a duty to consult First Nations with respect to these options. Such consultation should extend to considering which options, including treaty amendment, may offer benefits and improvements to the indigenous people of the Basin.[232]

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[229] The Grand Coulee dam on the mainstem affects water levels at the international boundary and accordingly required the approval of the IJC under Article IV of the BWT. For an account of the IJC's inquiry into this matter see Bankes, *The Columbia Basin and the Columbia River Treaty: Canadian Perspectives in the 1990s*, working paper published by Northwest Water Law and Policy Project, Northwestern School of Law of Lewis and Clark College, 1996, *supra* note 8 at 30 - 36; and for the efforts of CCRIFIC to re-open the Grand Coulee Order of Approval see the page devoted to this issue on the IJC's website at http://www.ijc.org/rel/boards/ccrifc/request_ccrifc-e.htm

[230] *Haida Nation*, *supra* note 35 at para. 35.

[231] *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, [2010] 4 CNLR 250 at para. 45.

[232] The Supreme Court of Canada has emphasised that the duty to consult "is not confined to decisions or conduct which have an immediate impact on lands and resources": *id*, *Rio Tinto* at para. 44. The Court went on to provide some examples from the case law (citations omitted):

> Thus, the duty to consult extends to "strategic, higher level decisions" that may have an impact on Aboriginal claims and rights …. Examples include the transfer of tree licences which would have permitted the cutting of old-growth forest (*Haida Nation*); the approval of a multi-year forest management plan for a large geographic area (*Klahoose First Nation v. Sunshine Coast Forest District (District Manager)*,; the establishment of a review process for a major gas pipeline (*Dene Tha' First Nation v. Canada (Minister of Environment)*; and the conduct of a comprehensive

Support for the view that the duty to consult with First Nations extends to consultation with respect to positions to be taken in international negotiations can be found in the terms of land claim agreements.[233] Modern land claim agreements typically require the Government of Canada to consult with the aboriginal party to the agreement in relation to certain classes of international agreements and negotiations.

For example the Nisga'a agreement[234] contains the following provisions in relation to fisheries and migratory birds:

> 8.115. Canada will consult with the Nisga'a Nation with respect to the formulation of Canada's positions in relation to international discussions or negotiations that may significantly affect fisheries resources referred to in this Agreement.
>
> 9.96 Canada will consult with the Nisga'a Nation in respect of the formulation of Canada's positions relating to international agreements that may significantly affect migratory birds or their habitat within the Nass Area.

There are similar provisions in other modern land claim agreements in both British Columbia and elsewhere.[235] The more recent Tsawwassen Final Agreement contains a particularly broad provision to the effect that "After the Effective Date, before consenting to be bound by a new International Treaty that would give rise to a new International Legal Obligation that may adversely affect a right of Tsawwassen First Nation under this Agreement, Canada will Consult with Tsawwassen First Nation in respect of the International Treaty, either separately or through a forum that Canada determines is appropriate"[236]

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inquiry to determine a province's infrastructure and capacity needs for electricity transmission (*An Inquiry into British Columbia's ElectricityTransmission Infrastructure & Capacity Needs for the Next 30 Years, Re*, (B.C.U.C.)).

[233] The term 'land claim agreements' refers to modern treaties: see Constitution Act, 1982, s.35.

[234] http://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ/STAGING/texte-text/nis_1100100031253_eng.pdf See also McRae, "Fisheries: Fishers, Natives, Sportsmen, States and Provinces" (2004), 30 Can-US LJ 189 at 197 noting that this provision affords the Nisga'a "a greater right than the Province of British Columbia has. The Province has no formal right to be consulted. Therefore, if all the treaties with First Nations provide for such consultation, it will change the way the Federal Government organizes itself in dealing with fisheries negotiations."

[235] See, for example, the Nunavut Final Agreement, Article 5.9.

[236] Tsawwassen Final Agreement, s.2.26, http://www.gov.bc.ca/arr/firstnation/tsawwassen/down/final/tfn_fa.pdf

5.1.3 The role of the Basin

The Canada-B.C. Agreements privilege the province of British Columbia in any negotiations or discussions concerning the future of the CRT, and the Constitution of Canada similarly creates a special role for First Nations within the Basin. In contrast, there is no legal rule that requires the Province or Canada to provide a special role in these matters for the people living in the Basin. That said, the Province has made a political and ethical commitment to involve Basin residents through the creation of the Columbia Basin Trust. Indeed the Preamble to the *Columbia Basin Trust Act*[237] provides as follows:

> WHEREAS the desires of the people of the Columbia Basin were not adequately considered in the original negotiations of the Columbia River Treaty;
>
> AND WHEREAS the government desires to include the people of the Columbia Basin in decisions that affect their lives and determine their future;
>
> AND WHEREAS the government intends to work with the people of the Columbia Basin to ensure that benefits derived from the Columbia River Treaty help to create a prosperous economy with a healthy, renewed natural environment…

5.1.4 Wrap Up

The formal legal constitutional position in Canada is that it is the federal government that concludes international treaties and amendments to those treaties. As a practical matter the federal government will work collaboratively with a province where the subject matter of the treaty engages the property, resource and legislative interests of the province. Developments in constitutional and aboriginal law in Canada require both levels of government (to the extent that the authority of each is engaged) to consult an aboriginal people if the outcome of a proposed negotiation may affect (prospectively) the aboriginal or treaty rights of that particular people. Other residents of the Basin have no similar constitutional entitlement to be engaged in any such negotiations but the provincial government has made a political and ethical commitment to engage all residents of the Basin.

5.2 Ratification of treaties in Canadian domestic law

The ratification of a treaty in Canadian law is also a federal executive act. There is no legal or constitutional requirement to involve parliament in this procedure. However, there is now a broad policy commitment “to ensure that all instruments governed by

[237] RSBC 1996, c.53.

international law …. are tabled in the House of Commons following their signature or adoption by other procedure and prior to Canada formally notifying that it is bound by the Instrument."[238] Where a treaty does not require implementing legislation the Government will not take steps to bring the treaty into force for at least 21 days during which time debate on the treaty may be initiated in Parliament.[239] This requirement may be waived in exceptional circumstances but Parliament must still be informed "at the earliest opportunity following the ratification."[240] The government must provide an Explanatory Memorandum to accompany the treaty as tabled. The Memorandum should address the following issues:[241]

- Subject Matter: a description of the treaty;
- Main Obligations: a description of the main obligations that will be imposed upon Canada by the treaty, should it be brought into force;
- National Interest Summary: a description of the reasons why Canada should become a party;
- Ministerial Responsibility: a listing of Ministers whose spheres of responsibility are implicated by the contents of the treaty;
- Policy Considerations: an analysis as how the obligations contained in the treaty, as well as how the treaty's implementation by Government departments are or will be consistent with the Government's policies;
- Federal-Provincial-Territorial implications: a determination of whether the obligations in the treaty relate in whole or in part to matters under provincial constitutional jurisdiction;
- Time Considerations: details of any upcoming dates or events that make the ratification a matter of priority;
- Implementation: a brief description of how the treaty will be implemented in Canadian law, including a description of the legislative or other authority under which it will fall (which will have already been determined by the Department of Justice);

[238] Policy on Tabling of Treaties in Parliament, s. 2, http://www.treaty-accord.gc.ca/procedures.aspx, first introduced June 25, 2008. Prior to this Dupras, *supra* note 215 refers to two distinct practices, first the "sporadic" tabling in Parliament of copies of treaties that had come into force in Canada and a second practice whereby so-called "important" treaties are approved by parliamentary resolution. Dupras draws in part on Gotlieb, *supra* note 215. Gotlieb (at 16 – 17) suggests that four categories of treaties were generally presented to parliament for approval prior to ratification: (1) treaties dealing with sanctions, (2) treaties involving large expenditures or with important economic implications, (3) treaties with "political implications of a far-reaching character", and (4) treaties the performance of which might affect private rights. Gotlieb at 17, note 44, lists the Columbia River Treaty in category 3 noting that it was approved by resolution of the House of Commons on June 5, 1964 and by the Senate on June 10, 1964, ratification followed in September.

[239] Policy on Tabling, id., s. 6.2.

[240] Id., s.6.3

[241] Id., s.6.4.

- Associated Instruments: information on any international instruments of any kind that are related to this treaty;
- Reservations and Declarations: a description of any reservations or declarations;
- Withdrawal or denunciation: a description of how the treaty could be terminated; and
- Consultations: a description of the consultations undertaken with the House of Commons, self-governing Aboriginal Governments, other government departments and non-governmental organisations prior to the conclusion of the treaty, as appropriate.

The policy commits the Government to consider any concerns raised by Opposition Parties during the tabling process but the policy also contains the reminder that the process continues to be essentially an executive process and not a parliamentary process:[242]

> The Executive under the constitutional treaty-making power exercised by the Federal Crown under the Royal Prerogative remains responsible for undertaking any international obligations of Canada.

None of the policy documents deal expressly with the procedure to be followed as part of a decision to terminate or withdraw from a treaty to which Canada is a party. Recent but isolated practice suggests that the Government of Canada does not think that the procedure should apply to a decision to withdraw from a treaty. In December 2011 the Government of Canada announced that it was withdrawing from the Kyoto Protocol.[243] The decision to do so was not tabled in the House for debate before the decision was acted upon. A former MP, Daniel Turp, has commenced an action in Federal Court to question the legality of that process.[244] A key issue is likely to be the justiciability of that issue in the domestic courts.[245]

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[242] Id., s.6.6. See also Barnett, *supra* note 222 at 5 noting that the policy is "a courtesy on the part of the executive" and at 11 describing it as "a policy, not law" which "can be easily revoked or bypassed when necessary".

[243] Article 27 of the Kyoto Protocol allows a state party to withdraw from the Protocol after three years; withdrawal takes effect one year after receipt of notification of withdrawal.

[244] Montreal Gazette, January 14, 2012 http://www.montrealgazette.com/technology/Kyoto+withdrawal+challenged+court/5995316/story.html

[245] See in this context *Friends of the Earth v Governor in Council and the Minister of the Environment*, 2008 FC 1183, aff'd 2009 FCA 297. In this case the Federal Court took the view that the language of the *Kyoto Protocol Implementation Act*, SC 2007, c.30, was non-justiciable. Although clearly not precisely on point the judgement of Justice Barnes at first instance (at para. 25) emphasises the importance of the courts being sensitive to "the separation of function within Canada's constitutional matrix so as not to inappropriately intrude into spheres reserved to the other branches …".

The topic of termination is dealt with expressly in the context of the CRT by the federal provincial-agreement of 1963 and the next section returns to examine that agreement under the heading of implementation.

5.3 Implementation of treaties in Canadian domestic law

As noted in section 5.1 of this paper, there is no general federal power to implement the terms of a treaty. Both the authority and the responsibility to implement the terms of a treaty are governed by the general rules of the constitution. Furthermore, since a treaty is an executive act and not a legislative act, a treaty will not change the law of the land and the rights and duties of subjects unless it is transformed into domestic law by statute (federal or provincial as appropriate).[246] A treaty has no special constitutional status in Canadian law and in the event of a conflict between a treaty and a statute, the statute will prevail although the courts will endeavour to interpret statutes in a manner consistent with Canada's international obligations.[247]

Given the executive status of a treaty, the responsible level of government must assess whether or not the treaty can be implemented simply by executive action or whether it will be necessary to amend or add to existing laws. In the case of the CRT, the two governments (and principally the provincial government for the reasons given in section 5.1) reached the conclusion that executive action alone would suffice. Thus there is no federal or provincial "Columbia River Treaty Implementation Act". Instead, the CRT has been implemented by executive act; principally by executive acts of the provincial government and its agent, BC Hydro, the designated entity under the Treaty.[248]

As noted in section 5.1, the governments of Canada and British Columbia negotiated two agreements to address their mutual concerns relating to the allocation of responsibilities and benefits arising under the CRT and its implementation. Under the 1963 agreement the province undertakes to fulfill all of the key obligations that the Treaty imposed on Canada (s.3). Canada also had the province of British Columbia indemnify it as to any liability arising under the Treaty for which B.C. was responsible (s.8). The 1964

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[246] This does not mean that a treaty that has not been implemented in domestic law has no effect in domestic law. See *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817.

[247] See *Baker*, *id* and for commentary Gibran Van Ert, "Using Treaties in Canadian Courts" (2000) 38 Can. Y.B. Int'l L. 3 (a thorough survey in which Van Ert attempts to explain the Canadian case law on the basis of the tension between two competing principles: the principle of self-government and the principle of respect for international law) and Jutta Brunée & Stephen Toope, "A Hesitant Embrace: The Application of International Law by Canadian Courts" (2002) 40 Can. Y.B. Int'l L. 3.

[248] It is possible to point to other acts of domestic implementation including the terms of licences issued to BCH for treaty facilities including licences issued under the terms of the federal *International River Improvements Act,* RSC 1985, c. I – 20; see also the *Libby Dam Reservoir Act*, RSBC 1996, c. 262 although the latter is concerned with the implementation of the Canada/ BC Agreement rather than the treaty itself.

agreement extended that indemnity to cover obligations arising under the terms of the sale of the downstream power benefits.

The 1963 agreement also addressed some of British Columbia's concerns. Thus, s. 1 of the Agreement confirms that all of the benefits arising under the terms of the Treaty accrue to the province. Section.6 of the Agreement provided that Canada would designate BC Hydro as the Canadian entity and allowed the province to nominate one of the two Canadian members of the PEB. Section 4 of the Agreement is of central importance in the present context. It provides that Canada, in exercising particular listed rights and powers under the Treaty, shall not do so without first obtaining the concurrence of British Columbia, and, in particular, shall obtain that concurrence before (s.4(2)(f)) "terminating the Treaty". The duty to obtain the Province's concurrence also extends to some of the matters on which the Treaty contemplates subsequent exchanges of notes. Canada does not require the concurrence of British Columbia for any decision to *continue* the Treaty which is, after all, the default position under the CRT.

Section 5 of the CRT deals with Canada's responsibilities to act upon requests made by British Columbia in relation to the Treaty. It suggests that Canada shall, if requested by the Province, "endeavour to obtain the agreement of the United States" with respect to certain matters. Two of the five clauses deal with Libby. Two of the clauses deal with proposals to give any additional power, duty, or direction, on, or to, the Entities or the PEB. One clause deals with diversions of water not provided for under the Treaty. The final clause deals with "any proposal relating to the treaty which Canada and British Columbia agree is in the public interest." It seems likely that this last clause includes modifications or amendments to the Treaty. It is less clear this section requires Canada to adopt a proposal from the province to *terminate* the Treaty.

The agreement is expressed to be subject to the jurisdiction of the Exchequer Court (now the Federal Court) of Canada and it is clearly intended to be legally binding.[249]

This section has focused on the position of the Province in relation to treaty implementation. In carrying out its authority to implement the Treaty or any new arrangements, the Province will be subject to its constitutional obligations to consult and accommodate First Nations as noted in section 5.1. It will also have continuing political and ethical commitments to Basin residents arising from the terms of the Columbia Basin Trust legislation.

[249] The jurisdiction of the Federal Court is confirmed by the *Federal Courts Act*, RSA 1985, c.F-7, s.19 and the equivalent provision in British Columbia's *Federal Courts Jurisdiction Act*, RSBC, 1996, c.135.

5.4 Conclusions to Chapter 5

Treaty negotiations, including negotiations leading to treaty amendments as well as decisions to terminate a treaty, are all federal responsibilities, but actual practice, the constitutional division of powers and the terms of the B.C. Canada Agreements will accord the province of British Columbia a significant role in relation to the future of the Columbia River Treaty. Specifically the 1963 agreement requires that Canada obtain the concurrence of the Province before terminating the Treaty. More broadly, it seems highly unlikely that Canada will generate amendment initiatives of its own motion or agree to any amendments to the Treaty without B.C.'s agreement. It is likely that B.C. will have significant influence on such practical matters as the selection of a negotiating team and the extent to which such a team might represent particular interests. Recent land claim agreements require Canada to consult First Nations in relation to international negotiations that may affect their rights and interests. There are no modern land claim agreements within the Canadian portion of the Columbia Basin but arguably the general constitutional duty to consult and accommodate should lead to the same conclusion. The Province also has a political and ethical commitment to involve residents of the Basin in discussions of treaty futures but no legal obligation to do so.

The constitution of Canada does not prescribe a particular form for the conclusion and ratification or termination of an international treaty or an amendment to such an agreement. In recent years the federal government Canada has adopted a policy of tabling new arrangements in parliament. It is less clear whether that policy will be applied to amendments to existing treaties or their termination. Indeed, recent practice suggests that the federal government does not consider that the policy applies to termination but the policy should extend to significant amendments to the Treaty.

Since treaty implementation is an executive act, the responsible government(s) will need to scrutinize any future arrangements for the Columbia River to determine if the new arrangements can be implemented by the executive or if new legislation will be required. If the coverage of the Treaty expands to cover a range of issues that is broader than just power and flood control it may be necessary to amend provincial or federal laws to accommodate any new responsibilities. It is not possible to make that judgment in the abstract; the assessment can only be made on a case by case basis. To the extent that Treaty implementation may affect existing aboriginal or treaty rights, it will be necessary for the government concerned to consult and accommodate the affected First Nations.

6.0 The Bilateral Treaty Practice of Canada and United States

The bilateral treaty practice of the United States and Canada is a critical factor in determining the appropriate procedure to be followed in the entry into force and ratification of a new treaty or the amendment of an existing treaty under U.S. domestic law. This chapter of the paper examines the bilateral treaty practice of the United States and Canada especially in relation to treaties dealing with international watercourses.[250] The paper also discusses the Migratory Birds Convention (1916) and Protocol (1995) as well as the Pacific Salmon Treaty (1985).

The chapter has two key objectives. The first objective is to learn what we can of current and historic treaty practice between the United States and Canada in order to provide additional context with which to assess whether a significant amendment to the CRT will likely only be ratified by the U.S. Executive on the advice and consent of Senate or whether the practice indicates greater flexibility. The analysis shows that the practice is very mixed. Some amendments have required the advice and consent of Senate (we will see that in relation to an amendment to the Migratory Birds Convention) while in other cases the parties have found it possible to accommodate significant changes and additions to existing instruments without needing the approval of the Senate. Furthermore, recent bilateral water agreements have in many cases been concluded (i.e. not amendments, but original agreements) without securing Senate approval although frequently the obligations of the parties are expressed to be conditional upon the necessary appropriations being made in accordance with domestic law.

A second reason for examining these agreements (particularly the non-water agreements) is to identify evidence in these arrangements of the involvement of states and provinces, indigenous peoples, communities and other interests on either side of the boundary. This is intended as a very selective and indicative analysis of a limited number of treaties; it is clearly not exhaustive.

The contents of the chapter are presented in summary form in Tables 1 and 2 in Appendix A.

[250] We do not claim to be comprehensive. There is, for example, no discussion here of the extensive bilateral treaty practice in relation to the St. Lawrence River and Seaway.

6.1 The Boundary Waters Treaty, 1909[251]

This treaty which, *inter alia* established the International Joint Commission (IJC), was ratified by President Taft upon the advice and consent of the Senate.[252] Indeed Article XIV of the Treaty itself prescribed this mode of ratification. That same article provides that the Treaty will remain in force for five years and continue thereafter unless terminated by 12 months' notice from either party. The Treaty does not contain an express clause dealing with amendments but it does contemplate that the provisions of the Treaty might be varied in relation to specific waterbodies by means of "special agreements"[253] which agreements include not only "direct agreements between the High Contracting Parties" but also any mutual arrangement between the U.S. and Canada "expressed by concurrent or reciprocal legislation" of Congress and Parliament.[254] There has been only one express amendment to the BWT and that was in 1950 when the Niagara River Treaty[255] terminated paragraphs 3, 4 and 5 of Article V of the BWT. However it is clear that subsequent agreements between Canada and the U.S. have varied the application of the BWT by means of "special agreements", by explicit provisions such as Article XVII of the Columbia River Treaty, or by conferring additional responsibilities on the IJC (e.g., the Great Lakes Water Quality Agreements) or by the actual practice of the two States.[256]

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[251] January 11, 1909, 6 Stat. 2448.

[252] Article X of the BWT which establishes the binding arbitral jurisdiction of the IJC also contemplated a role for the Senate insofar as it provides that the U.S. would only consent to refer a matter to arbitration with the advice and consent of the Senate. While many matters have been referred to the IJC under Article IX (the reference jurisdiction) no matter has ever been referred to the IJC for arbitration. It is far more likely that the two states would reach an ad hoc agreement to refer the matter to arbitration as they did in the case of the Gut Dam Arbitration: CTS 1966/22. That treaty was expressed to be subject to ratification.

[253] See for example the references to "special agreements" in Article III(1) and Article IV(1). There are references to the "special agreement" provision of the BWT in the subsequent treaty practice of Canada and the US. See for example, Exchange of Notes between the government of Canada and the government of the United States of America concerning the construction of a temporary cofferdam on the Niagara River between Goat Island and the United States mainland, March 1 and March 21, 1969; Exchange of Notes between Canada and the United States of America concerning certain dredging works in the St. Mary's River and the St. Clair River sections of the Great Lakes connecting channels, CTS 1957, no. 4, November 30, 1956, April 8, 1957 and April 9, 1957, http://www.treaty-accord.gc.ca/text-texte.aspx?id=103598; Exchange of Notes between Canada and the United States of America constituting an agreement providing for the temporary raising of the level of Lake St. Francis during low water periods, CTS, 1941, no. 19, http://www.treaty-accord.gc.ca/text-texte.aspx?id=100450

[254] Article XIII. This procedure was not without difficulty (what constitutes concurrent or reciprocal legislation – must the statutes be explict, identical and contemporaneous?) and for that reason has hardly ever been relied upon and then only in the first few decades of practice under this treaty.

[255] CTS 1950, No. 3, http://www.treaty-accord.gc.ca/text-texte.aspx?id=100418; 1 UST 694.

[256] For example Article IX of the treaty establishes the so-called reference jurisdiction of the IJC. The text suggests that either party may make a reference to the Commission. However, by practice or convention it is understood that both parties must agree to the terms of a reference.

6.2 Agreement between the United States and Canada with Respect to the Regulation of the Lake of the Woods, 1925[257]

The 1925 Lake of the Woods Agreement regulates the level of the Lake of the Woods. It was negotiated based upon recommendations made by the IJC in response to a Reference from the two governments. The Lake of the Woods Agreement required Canada to enlarge the outflow capacity of the Lake while the U.S. assumed responsibility for acquiring a flowage easement as well as additional protective works, although at least some of the expenses of such works were to be covered by Canada.[258] Article 12 provided that "The present Convention shall be ratified in accordance with the constitutional methods of the High Contracting Parties …" The Agreement was ratified by the President on the advice and consent of the Senate. It contains no specific provisions dealing with either duration or amendment.[259] The Agreement does not expressly amend the BWT although Article 11 does provide that no diversion should be made from the Lake of the Woods watershed to any other watershed without the approval of the IJC.

Two agreements are attached to the Lake of the Woods Agreement, the first styled a Protocol and the second styled an agreement. The Protocol varies the Agreement in some respects (e.g. it established a different upper limit for water levels until Canada enlarges the outlets from the Lake) and elaborates upon the Agreement in other respects (e.g. it discusses a procedure for resolving disputes as to the level of contribution that Canada might be required to make to the U.S. under Article 10). The attached agreement provided the IJC with an additional Reference in relation to the levels of Rainy Lake and Namakan Lake and other related questions.

6.3 Convention Providing for the Emergency Regulation of Rainy Lake and other Boundary Waters in the Rainy Lake watershed, 1938[260]

This short Convention was the response of the two governments to part of the Reference sent to the IJC by way of the annexed agreement to the Lake of the Woods Agreement. The Convention empowers the IJC to determine the existence of emergency conditions in the watershed and further empowers it to "adopt such measures of control as it may seem proper with respect to existing dams at Kettle Falls and International Falls" as well as in relation to future works. Article II of the Convention adopted a ratification and entry into

[257] Washington, 24 February 1925. http://www.treaty-accord.gc.ca/text-texte.aspx?id=100416; 6 Bevans 14.
[258] Id., articles 7 – 10.
[259] The treaty was amended by Exchange of Notes in 1979, 30 UST 5998; the amendment entered into force upon the exchange. The amendment involved the substitution of a new survey benchmark to replace one that no longer existed.
[260] Ottawa, September 15, 1938; 6 Bevans 115.

force clause essentially identical to that of the Lake of the Woods Agreement. The Convention was ratified by the President on the advice and consent of the Senate. The Convention does not contain an amendment clause and neither is there a provision dealing with duration.

6.4 Exchange of Notes re Albany River and the Long Lac-Ogoki Diversions, 1940[261]

This important Exchange of Notes provides U.S. "approval" for a basin transfer of Hudson Bay water (Albany River) into the Great Lakes and allows Canada (the province of Ontario) to make additional diversions from Niagara in recognition of the increased flow at that site. The Exchange of Notes refers to Canada's need for power as a result of the "war effort" and the U.S. need as a result of its "major national defence effort". The Exchange is set in the context of the overall development of the Great Lake/St. Lawrence Basin and provides inter alia that "the Government of the United States will interpose no objection pending the conclusion of a final Great Lakes-St Lawrence Basin agreement … to the immediate utilization for power at Niagara Falls by the Province of Ontario of additional waters equivalent in quantity to the diversions into the Great Lakes Basin above referred to." The Agreement would appear to have entered into force immediately upon the Exchange without the need for further ratification.

6.5 Treaty Concerning the Diversion of the Niagara River, 1950[262]

This Treaty regulates the amount of water that may be diverted at Niagara to be used for power purposes and allocates that water equally between Canada and the United States. As noted, above Article I of the Treaty amended (terminated) three paragraphs of the BWT. The treaty was expressed to be subject to ratification and the treaty was submitted to the Senate for its advice and consent which was provided but subject to a contentious reservation, the validity of which has been questioned.[263] The treaty did not contain an express clause dealing with amendments but the operation of Article IV of the treaty has been subject to temporary variation which variation has been approved by an Exchange of Notes.[264]

[261] CTS 1940 No. 11, Exchange of Notes October 14 and 31 and November 7, 1940; 6 Bevans 199.
[262] CTS 1950, No. 3, http://www.treaty-accord.gc.ca/text-texte.aspx?id=100418; 1 UST 694.
[263] Louis Henkin, "The Treaty Makers and the Law Makers: The Niagara Reservation" (1956), 56 Columbia Law Review 1151.
[264] Exchange of Notes Between Canada and the U.S. Concerning the Temporary Additional Diversion Of Niagara River Water For Power Purposes, March 1, 1969 and varying Article IV of the Treaty; and see also Exchange of Notes Constituting an Agreed Interpretation of Article IV, April 17, 1973, 24 UST 895.

6.6 Great Lakes Water Quality Agreement, 1978[265]

This Agreement superseded the earlier 1972 Agreement of the same name.[266] The Agreement entered into force upon signature for five years terminable thereafter on one year's notice. The Agreement was not referred to the Senate for its advice and consent. In common with the 1972 Agreement, the obligations assumed by both parties are expressed to be subject to the appropriation of funds in accordance with domestic procedures. The Agreement contains an express clause dealing with amendments which contemplated entry into force by Exchange of Notes[267] "subject to the requirement that such amendments shall be within the scope of this Agreement." The Agreement has been amended on at least two occasions: (1) by way of a Supplementary Agreement of 1983 which entered into force on signature and which added a Phosphorous Load Supplement to the existing Annex 3,[268] and (2) a Protocol of 1987 which entered into force upon signature and which contained extensive amendments to the body of the treaty and added annexes dealing with pollution from non-point sources, contaminated sediment, airborne toxic substances and pollution from contaminated groundwater (and which may or may not have gone beyond the "scope of the agreement").

6.7 Treaty between Canada and the U.S. Relating to the Skagit River Treaty and Ross Lake and the Seven Mile Reservoir on the Pend d'Oreille River, 1984[269]

This agreement dealt with two matters, the Ross Dam (and the level of Ross Lake behind the dam) and the Seven Mile Dam on the Pend d'Oreille River (and the level of the reservoir behind that dam). The Treaty provided a public international law framework for an underlying agreement between the province of British Columbia and the City of Seattle. In each case that underlying agreement provided that British Columbia would compensate Seattle: (1) in return for Seattle for not raising the level of Ross Lake as high as had been authorized by the IJC in a wartime order of approval, and (2) in return for B.C. being allowed to raise the level of the Seven Mile Dam so as to cause tailwater encroachment on to Seattle Boundary Dam upstream on the Pend d'Oreille. The treaty provides a series of default remedies in the event that either party to the agreement, and in particular British Columbia, breaches its obligations under that agreement. The treaty has a minimum life of about 80 years since it cannot be terminated prior to 2065. Of particular note is Article VI which contemplates that the Boundary Waters Treaty shall

[265] Ottawa, November 2, 1978, CTS 1978 No. 20.
[266] Id., Article XV.
[267] Id., Article XIII.
[268] Halifax, October 16, 1983, CTS 1983, No. 22.
[269] CTS 1984, No. 16.

continue to apply except with respect to the IJC's functions under Article IV(1) and Article 8 with respect to these particular waters.

The treaty entered into force on December 14, 1984 on exchange of instruments of ratification; it was ratified by the U.S. without being presented to the Senate for its advice and consent.

6.8 Exchange of Notes between Canada and the U.S. relating to the Construction of a Joint Ring Levee, 1988[270]

The purpose of this agreement was to authorize the construction of a joint levee to provide flood protection for Emerson, Manitoba and Noyes, Minnesota from the flows of the Red River of the North. Under the terms of the agreement the Province of Manitoba (not a party to the Exchange of Notes) agreed to pay for the construction of part of the levee to be built in Minnesota and also agreed to provide a lump sum to be invested to pay for the maintenance of that levee.

The agreement, constituted by the Exchange of Notes, entered into force immediately; it was not subject to ratification.

6.9 Agreement between Canada and the U.S. for Water Supply and Flood Control in the Souris River Basin, 1989[271]

There are important parallels between this treaty and the CRT. The agreement requires Canada to complete the construction of the Rafferty and Alameda Dams in order to provide 337,000 AF of flood storage[272] in return for which the United States pays $26.7 million.[273] Canada agrees to operate certain facilities in accordance with the Operating Plan attached to the Agreement.[274] The Agreement also provides for a water quality monitoring program.[275] The Agreement entered into force upon signature and will remain in force for 100 years or until the parties agree that the useful life of the two dams has ended "whichever is first to occur". It may also be terminated if either party fails to receive approval for the appropriations required to implement the treaty.[276] This extraordinary provision stipulates as follows:[277]

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[270] August 19 & 30, 1988, CTS 1988 No. 43.
[271] Washington DC, October 26, 1989, CTS 1986 No. 36.
[272] Id., Article II.
[273] Id., Article IV.
[274] Id., Article III.
[275] Id., Article VI.
[276] Id., Article XIII.
[277] Id., Article XIII(4). It is interesting to consider this provision in the context of a Columbia scenario in which the U.S. seeks the continuation of some form of assured flood control operations but for which the payments are made conditional on appropriations in accordance with domestic law. Would the form of

> 4. If either Party fails to receive appropriations or other revenues in amounts sufficient to meet anticipated obligations under this Agreement, that Party shall so notify the other Party. Ninety calendar days after providing such notice, either Party may elect to terminate this Agreement or to defer future performance under this Agreement. Termination or deferral of future performance shall not affect existing obligations of the Parties under this Agreement or relieve the Parties of liability for any obligation previously incurred. In the event that either Party terminates or suspends future performance under this Agreement pursuant to this provision, the Government of the United States of America and the Government of Canada shall make appropriate adjustments in the Operating Plan to maximize the flood control and water supply benefits that can be obtained in the United States of America and Canada from the construction accomplished at the time of termination or suspension.

The Agreement contains a specific provision allowing the parties to amend it by mutual consent. It has been amended twice since its entry into force. The first such amendment (effected by an Exchange of Notes) amended Annex B of the Agreement which establishes the apportionment rules for non-flood control operations.[278] The second amendment (also effected by an Exchange of Notes) dissolved the water quality monitoring program established by Article VI of the Agreement and replaced it with a Reference to the International Joint Commission[279]

Attached to the Agreement is a very short additional agreement between Canada and the province of Saskatchewan which: (1) designates the Government of Saskatchewan as Canada's responsible entity under the agreement, and (2) provides that Saskatchewan "shall indemnify and save harmless Canada from and in respect to any liability of Canada to the United States of America arising under the Agreement."

As noted above, the agreement entered into force upon signature and did not require the advice and consent of the Senate.

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conditional arrangement embedded in this Article provide sufficient certainty for either government or basin interests?

[278] Exchange of Notes of December 20, 2000 and December 22, 2000.

[279] Exchange of Notes of January 14, 2005 and June 9, 2005.

6.10 Migratory Birds Convention, 1916

The Migratory Birds Convention (MBC) was concluded in 1916.[280] Like the BWT the MBC is an empire treaty within the meaning of s.132 of the *Constitution Act, 1867* of Canada. Accordingly, the federal government has the right to make the necessary laws to implement the Convention notwithstanding that such an implementing law would ordinarily fall under the head of "property and civil rights", a provincial head of power.[281] There has long been pressure to amend the Convention in Canada, notably because the closed seasons that the Convention establishes are inconsistent with aboriginal and treaty rights to hunt migratory game birds. The Supreme Court of Canada recognized this conflict in its decision in *Sikyea*[282] holding at that time that the federal implementing legislation prevailed over the right to hunt embedded in Treaty 8 but that position became untenable following Canada's constitutional recognition and protection of aboriginal and treaty rights with the adoption of s.35 of the *Constitution Act, 1982*.[283]

Following prolonged negotiations between the two states, as well as consultations with indigenous peoples on both sides of the border, the parties ultimately adopted an amendment (styled as a Protocol) to the Convention in 1995.[284] The 1995 Protocol replaced an earlier text which was sent to the Senate for its advice and consent which was never forthcoming.[285]

Article IX of the original Convention expressly contemplated ratification by the President on the advice and consent of the Senate. The same article provided that the Convention was to have a 15-year initial term to be continued thereafter from year to year unless either party provided 12 months notice to terminate. The Convention did not contain an express amending provision.

The Protocol amends the original Convention in significant ways. For example the Protocol deletes and replaces Articles II, III, IV and V of the original Convention. It contains important provisions acknowledging the rights of indigenous people to harvest migratory game birds. In addition, the amendments to Article II provides for the inclusion of a set of "conservation principles", one of which provides for the "use of aboriginal and

[280] For the text of the Convention and the Protocol see the *Migratory Birds Convention Act*, SC 1994, c.22.
[281] One concern with the proposals to amend the Convention was that "any substantial amendment of the Convention with respect to the close season or migratory bird habitat might impair its 'Empire Treaty' status": see Thompson and Morgan, "Migratory Birds" in Canadian Bar Association, *Sustainable Development in Canada: Options for Law Reform*, 1990, pp. 242 – 250 at 245.
[282] *R v Sikyea*, [1964] SCR 642.
[283] See *R v Flett*, [1989] 6 WWR 166 (Man. QB), leave to appeal refused, 1990 MJ 427.
[284] CTS 1999, No. 34, http://www.treaty-accord.gc.ca/text-texte.aspx?id=101589
[285] See letter of transmittal, August 2, 1996, http://www.fws.gov/le/pdffiles/Canada_Mig_Bird_Treaty.pdf

indigenous knowledge, institutions and practices." Article VI of the Protocol deals with entry into force and provides as follows:

> This Protocol is subject to ratification. This Protocol shall enter into force on the date the Parties exchange instruments of ratification, shall continue to remain in force for the duration of the Convention and shall be considered an integral part of the Convention particularly for the purpose of its interpretation.

The Protocol was submitted to the Senate for its advice and consent before being ratified by President Clinton.

6.11 Pacific Salmon Treaty, 1985[286]

There is a long history of bilateral salmon treaties between the United States and Canada on the west coast going back to 1908.[287] While treaty relations were initially confined to Fraser River sockeye the two states ultimately resolved that it was necessary to have a treaty that addressed all of the different salmon fisheries on the west coast. The ultimate result was the Pacific Salmon Treaty (PST). A key goal of the agreement was to address the problem of interception fisheries (i.e. the catch by fishers of state A of fish bound for home streams in state B or transboundary streams in state B) while at the same time recognizing historic fisheries.[288] Important interception fisheries included interceptions of U.S.-bound fish (coho, chinook) by Canadian fishers off Vancouver Island, interception by Alaskan fishers of fish bound for Canadian streams and transboundary panhandle rivers, and a historic interception fishery by Washington fishers targeting Fraser River sockeye. Alaskan fishers also intercepted fish bound for Oregon and Washington rivers raising concerns that such interceptions were interfering with the Stevens and Palmer treaty fishing rights of the tribes.[289] Given salmon migration patterns there was very little interception of Alaskan bound fish and therefore Alaska was the least interested in reaching an agreement that was based on reducing (or at least equalizing) the interception

[286] January 28, 1985.
[287] See Shepard and Argue, *supra* note 60, esp. c.2 covering the period from the 1890s to the 1960s. For other sources on the PST and its subsequent implementation see Jensen, "The United States-Canada Pacific salmon interception treaty: An historical and legal overview" (1986), 16 Environmental Law 362; Yanagida, "The Pacific Salmon Treaty" (1987), 81 AJIL 577; Ted L. McDorman, "The West Coast Salmon Dispute: A Canadian View of the Breakdown of the 1985 Treaty and the Transit License Measure" (1995).17 Loy. L.A. Int'l & Comp. L. Rev. 477
[288] PST, Article III(3).
[289] Confederated Tribes and Bands of the Yakima Indian Nation v Baldridge, 605 F.Supp. 833 (1985).

fishery.[290] For these and other reasons, the negotiations of the original treaty and the Annexes were difficult and long drawn out.[291]

The PST established the Pacific Salmon Commission and comprises 15 Articles (covering such matters as principles, conduct of fisheries and specific articles dealing the Fraser River, transboundary rivers and the Yukon River) and four Annexes. The treaty acknowledges the important indigenous interest in the salmon fishery with a provision in Article XI to the effect that "This treaty shall not be interpreted or applied so as to affect or modify existing aboriginal rights or rights established in existing Indian treaties and other existing federal laws." In addition, Article VI of the Treaty dealing with the Fraser River contains a specific provision enjoining the Fraser River Panel and the Commission to "take into account and seek consistency with existing aboriginal rights, rights established in existing Indian treaties and domestic allocation objectives."

The structure of the Commission and the various panels established for particular rivers was important to both sides but especially so within the United States since it wished to use its appointments on these bodies as a way of ensuring regional and tribal representation.[292] The treaty itself leaves the matter of representation to the parties but provides that the Commission shall be composed of two national sections each comprised of four commissioners. Each section shall have one vote. This is an important provision because it means that each commissioner has a veto.[293] The U.S. implementing legislation[294] contemplates that the four U.S. Commissioners shall be appointed as follows: one official of the U.S. government who shall be a non-voting member, one member from a list nominated by the Governor of Alaska, one from a list nominated by the Governors of Oregon and Washington and one from a list nominated by the treaty Indian tribes of Washington, Oregon and Idaho. The federal commissioner is expected to "serve in a conciliatory and advisory role".[295] The representative approach carries over to the appointment of panel members.

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[290] Id., generally. For discussion of Alaska's concerns and its objections to the earlier 1982 agreement see Ted Stevens, "United States – Canada Salmon Treaty Negotiations: The Alaskan Perspective" (1985-1986) 16 Environmental Law 423.

[291] In addition to the sources in note 286 see also the accounts of the two persons who served (at different times) as, respectively, the Canadian and American chief negotiators, Donald McRae, "The Negotiation of the 199 Pacific Salmon Agreement" (2001) 27 Can-US LJ 267 and "Fisheries: Fishers, Natives, Sportsmen, States and Provinces" (2004), 30 Can-US LJ 189; and David A. Colson, "The Impact of Federalism and Border Issue on Canada-U.S. Relations: Pacific Salmon Treaty" (2001), 27 Can-US LJ 259 and "Fisheries: Fishers, Natives, Sportsmen, States and Provinces" (2004), 30 Can-US LJ 181.

[292] *Id*., esp. at 90 – 93 "contrasting approaches to representation".

[293] See Stevens, *supra* note 290 at 429.

[294] Pacific Salmon Fishing Act, 16 USC Title 16, chapter 56A, s.3632.

[295] Jensen, *supra* note 287 at 412.

On the Canadian side it is important to emphasise that there is a further important distinction between the PST and the CRT. The subject matter of the CRT as we have already noticed is largely concerned with provincial property and legislative powers. By contrast, the federal government has exclusive jurisdiction over fisheries matters and thus did not need to follow a provincial lead in the negotiations. In his account of the negotiations in 1998 and 1999, McRae notes that this allowed the federal government to simplify things on the Canadian side of the negotiating table, ultimately reducing the negotiating team to a group of three.[296] This team responded to the complexities on the U.S. side of the table by meeting separately with Alaska, Washington, Oregon and the Tribes and then with the full delegation – a truly extraordinary process.

The 1995 treaty was expressed to be subject to ratification.[297] The treaty was ratified only following the advice and consent of the Senate.[298] The initial term of the treaty is three years subject to termination thereafter on 12 months notice. The Treaty does not make express provision for its amendment but Article XIII does provide for the amendment of Annexes. It contemplates that the Commission shall keep the Annexes under review and make recommendations to the Parties for their amendment. Annexes may be amended through an Exchange of Notes. Although the Treaty does not authorize the addition of new Annexes this has not proven to be an impediment since the parties have simply added new chapters to an existing annex. In many respects the PST serves as a framework convention. The terms of the treaty establish the principles and some of the framework leaving the detail to be fleshed out in the Annexes.

The entry into force of the PST terminated the Convention for the Protection, Preservation and Extension of the Sockeye Salmon Fishery in the Fraser River System (as amended, of 1930) except insofar as the Commission established by that Agreement has continuing responsibilities under the PST.[299]

The Annexes to the PST have been amended in 1991, 1999 and 2002. The 2002 amendments included a new chapter to deal with the Yukon River.[300] The Yukon River chapter of Annex IV is particularly significant in the present context for a number of reasons. First, this chapter creates a new treaty in all but name. There are several indications of this. For example, the chapter provides that several articles of the PST shall not apply to this new chapter. Most importantly, the parties clearly contemplate that the Yukon River chapter should survive termination of the PST:

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[296] McRae (2004), *supra* note 291 at 190.
[297] PST, Article XV
[298] March 7, 1985, Shepard and Argue *supra* note 60 at 76.
[299] PST, Article XV(3).
[300] Exchange of Notes of December 4, 2002

> 8. If the Treaty is terminated in accordance with Article XV(2) thereof:
> (a) this Agreement shall be suspended and enter into force under the name "Yukon River Salmon Treaty" upon an exchange of diplomatic notes indicating that the necessary internal procedures of the Parties for the entry into force of the Yukon River Salmon Treaty have been completed;
> (b) the functions of the Yukon River Panel shall be assumed by a new commission, the "Yukon River Salmon Commission", and the Yukon River Panel shall thereupon cease to exist;
> (c) other provisions of the Treaty, to the extent they apply to the Yukon River, shall remain in effect as part of the Yukon River Salmon Treaty, *mutatis mutandis*; and
> (d) our two Governments shall seek to agree on other measures necessary for the continuation and application of the Yukon River Salmon Treaty.

Second, the new chapter contains an additional and specific acknowledgement of an indigenous interest in the fishery insofar as it contains an express recognition of priority as follows:[301]

> (b) that subsistence fisheries in Alaska have priority over other fisheries in Alaska;
> (c) that aboriginal fisheries in Yukon have priority over other fisheries in Yukon;

Third, the new chapter adds some remarkably strong provisions dealing with habitat protection that have no real precursor in the original treaty.

In sum, the parties to the PST have clearly not felt constrained by content of the treaty or by the form of its ratification in the United States in elaborating the Annexes to the treaty. There is however some acknowledgment that the form of adoption of amendments to the Annexes may constrain implementation at least insofar as funds may need to be appropriated in order to fulfill treaty obligations. For example, the new Yukon River chapter contemplates the creation of a Yukon River Salmon Restoration and Enhancement Fund. The Exchange of Notes acknowledges this in the following ways:

> 5. The obligations under this Agreement shall be subject to the obtaining of specific legislative authority from the United States Congress for the Fund. Such Congressional action (i.e., authorization and appropriation) lies within the discretion of the U.S. Congress.
>
> 6. If in any year the United States does not make an annual contribution as required in Attachment C, until the United States makes such

[301] PST, Annex IV, chapter 8, s.1.

> contribution for that year the Parties' obligations under this Agreement shall be suspended.

In this regard the Annex follows the example of the Souris Agreement already discussed.

6.12 Conclusions to Chapter 6

There are five main conclusions to this chapter. First, the record clearly shows that up to 1950, the United States chose to ratify agreements dealing with boundary waters and transboundary waters by following the advice and consent procedure in the Senate. This procedure was followed for the Boundary Waters Treaty of 1909, the Lake of the Woods Convention of 1925, the Rainy Lake Convention of 1930 and the Niagara River Treaty of 1950. Both the Rainy Lake Convention and the Niagara River Treaty were later amended by an Exchange of Notes, although the amendment in each case can be characterized as minor or temporary.

Second, more recent treaties dealing with the same types of subject matter have not been subject to the advice and consent procedure. This includes the two Great Lakes Water Quality Agreements, the Skagit/Seven Mile Treaty, and the Souris River Agreement. These have been executed as executive agreements and generally enter into force upon signature (not so in the case of the Skagit/Seven Mile) but obligations assumed under the treaty are typically expressed to be subject to appropriations in accordance with domestic constitutional practice (or some similar language).

Third, in one recent case − an amendment to the 1916 Migratory Birds Convention by a Protocol which effected significant changes to the original treaty which had been ratified subject to the advice and consent procedure − the U.S. elected to ratify the amendment using the same procedure (i.e. advice and consent of the Senate).

Fourth, the treaty texts examined here are mostly silent with respect to the participation of indigenous peoples on either side of the border. This is certainly the case with respect to the international watercourse treaties examined, but indigenous concerns are reflected to some degree in the two other treaties. In the case of the 1985 Protocol to the Migratory Birds Convention it is clear that aboriginal interests were a significant driver of the amendments, in particular the need to ensure that the Convention conformed with Canada's constitutional obligations. Indigenous people were consulted closely on the language of those amendments. The amendments also recognize the importance of indigenous knowledge. The Pacific Salmon Treaty is more guarded. The main text contains a saving clause to provide that neither state may rely upon the treaty to limit existing aboriginal and treaty rights to fish. The provision on the Fraser River goes further recognizing that any allocations must take account of aboriginal and treaty rights,

while the Yukon River amendments to the Annex to the PST go further still, expressly recognize the priority attaching to aboriginal and subsistence harvesters.

Finally, the domestic practice with respect to implementation in the United States makes it clear that appointments to various treaty bodies can be used to ensure regional representation. However, it is also clear that such regional representation is not without its problems and may make it very difficult to achieve consensus on implementation decisions. Indeed, given the particular history of the PST, it is possible that interests in the United States may be more enthusiastic about using the PST as a model for accommodating regional interests than their Canadian counterparts.[302]

[302] See the accounts by McRae and Colson, *supra* note 291.

7.0 Canada and United States Practice Under the 1964 Columbia River Treaty

Our analysis of international agreements in United States domestic law indicates that Congressional silence in the face of Executive action on the scope of its implementation authority is an important factor in determining the validity of Executive action. In addition, there is an implied expectation that the Executive branch will take measures to reconcile implementation of later-enacted domestic law with an existing treaty to avoid conflict. This chapter outlines the practice of the U.S. and Canada under the CRT, and efforts by the U.S. Executive branch to reconcile implementation of the CRT with the 1973 Endangered Species Act. The contents of the chapter are presented in summary form in Table 3 in Appendix A.

The main goal of this chapter is to examine the extent to which the Parties (the U.S. and Canada) and the Entities have felt able to add to, elaborate upon, change, or finesse the Columbia River Treaty in response to new developments, unexpected circumstances and changing values. The practice that we examine here includes early agreements in relation to the Treaty (including the Protocol), as well as later agreements dealing with the return of the Canadian entitlement, the annual supplementary operating agreements, and the agreement in relation to the changed operation of the Libby dam. So far as we are aware, there is only one instance in which the Executive in the U.S. felt it necessary to return to the Senate for its advice and consent and that instance related to what seems, in retrospect, to be a fairly trivial matter, but one in which it is almost impossible for the Executive to act alone – an appropriation of an additional flood control payment to Canada as a result of the advanced in-service date for the Duncan and Arrow storage facilities.[303] In all other cases, the Entities have proceeded on their own (as in the case of

[303] See section 7.6 below. While the general proposition is correct, where a liability arises as a direct result of an existing treaty obligation, that liability may be "covered" by the approval of the existing obligation. In this context, John Hyde (BPA) drew our attention to a passage in the PEB's Annual Report for 1967 – 1968 (at 31) in which the PEB notes that the U.S. paid Canada US$198,000 as compensation for the late payment of $11.1 million for Duncan flood control benefits (CRT, Article VI(c)). The Treaty requires that payment be made "upon commencement of operation of the storage", but while the dam was placed in operation on 31 July 1967 payment was not forthcoming until 22 November 1967. The PEB report notes that the payment of the additional $198,000 was pursuant to Article XVIII of the Treaty, "Liability for Damage", i.e. for breach of the treaty obligation. Mr. Hyde suggests that that sum was probably arrived at by reference to the prevailing interest rate. Whatever the basis of the calculation, the key point is that Mr. Hyde (pers. comm. 26 September 2012) is not aware of any specific authorization for this payment other than the Treaty itself. This suggests that there must have been some thought that the Treaty itself, the ratification of which was authorized by the advice and consent of Senate, already provided adequate Congressional authorization for any duty to pay contained in the original Treaty. Another practical example of such a duty is the duty of the U.S. to pay $1.875 million for each of the first four on-call operations during the first sixty years of the Treaty (Article VI(3)). However, some may take the view that

the annual supplemental operating agreements and the Non-Treaty Storage Agreements) with the acquiescence of the Permanent Engineering Board and often accompanied by declarations that the arrangements do not modify or conflict with the Treaty obligations, or, if the two state Parties are involved, then sanctioned by way of an Exchange of Notes.

7.1 Annex to Exchange of Notes (also referred to as "The Protocol"), 1964

The newly-elected Liberal government in Ottawa (which had been opposed to the Treaty while it was in opposition) insisted upon the negotiation of the 1964 Protocol as a condition precedent to ratification by Canada. The new federal administration sought clarification of and improvements to a number of provisions in the Treaty. In addition, British Columbia wanted to ensure the pre-sale of its downstream power entitlement into the U.S. for the first thirty years of operations. Some of the language of the Protocol simply serves to clarify the intent of the Parties or to fill gaps where the Treaty is silent on details of implementation. For example, the Protocol provides specific details on when the United States may call upon Canada to meet flood control needs in the United States (Protocol para. 1) and it requires the Entities to coordinate the operation of Libby with downstream dams on the Kootenay River in Canada and elsewhere in Canada.[304]

However there are a number of ways in which the Protocol modifies the Treaty.[305] One example is Section I.(3) which designates the Permanent Engineering Board (PEB) as the forum for resolution of disputes between the United States and Canada on a call for flood control. Whereas the Treaty authorizes the PEB to "assist in reconciling differences concerning technical or operational matters that may arise between the Entities,"[306] the 1964 Annex requires the Entities to "be guided by any instructions issued by the Permanent Engineering Board,"[307] thus giving the PEB a specific role in the event of a dispute. A second example is Section 8 which varies paragraph 6 of Annex B of the Treaty. Whereas Annex B provided that the determination of downstream power benefits was to be based upon a twenty

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in these circumstances the decision to exercise on-call may itself trigger the need for Congressional approval - however unrealistic that seems as a practical matter.

[304] Annex to Exchange of Notes (hereafter Protocol), Section 5. Other examples are section 6(1) which acknowledges that the Treaty allows each Party to divert water for consumptive use (thereby privileging consumptive uses including irrigation over power uses) and section 7 which clarified that the US could only require Canada to operate treaty storage in a prescribed way for power purposes to the extent that it was producing shared power benefits and thus to the extent downstream power benefits were expected to decline over time so too was the amount of storage that needed to be dedicated to power purposes under the Treaty.

[305] This is a matter on which Canada and the United States have likely long agreed to disagree. While Canada has no difficulty in reasoning that the Protocol amends the Treaty the U.S. State Department has long preferred to see the Protocol as something which simply implemented the Treaty and did not change or conflict with the Treaty

[306] Columbia River Treaty, Article XV, Section 2.(c).

[307] Protocol, Section I.(3).

year record of stream flows "[u]nless otherwise agreed upon by the entities" Section 8 amended that to provide that downstream power benefits should be calculated on the basis of a thirty year stream record. A contemporary official publication of the Government of Canada advised that: "Use of the longer period of record has the effect of increasing the average flows … thereby increasing the need for control by Canadian storage and resulting in an average increase in Canada's downstream energy benefits of … about 18% of the total energy benefit."[308] A third example is Section 3 of the Protocol which provided that the exchange of notes contemplated by Article VIII(1) of the Treaty and allowing for the sale of the Canadian entitlement in the United States was to be effected contemporaneously with exchange of the instruments of ratification rather than in the future as might be agreed.

The 1964 Annex provides an example of the Executive making more specific commitments for implementation of the 1964 Treaty than those placed before the Senate for advice and consent. Based on the criteria the U.S. Supreme Court has set forth for Congressional acquiescence to the assertion of Executive power pursuant to a general authorization in statute or treaty, Congressional silence suggests acquiescence. The Annex does not, however, go beyond the hydropower and flood control purposes of the 1964 Treaty.

The Protocol was attached as an Annex to an Exchange of Notes which came into effect "on the date of the exchange of instruments of ratification of the Treaty".

7.2 Exchange of Notes of January 22 1964 and September 16, 1964 Authorizing the Canadian Entitlement Purchase Agreement

The CRT contemplated that Canada would take delivery of its downstream entitlement of power benefits either for return to Canada or for re-sale within the United States (subject to the terms of an Exchange of Notes as further contemplated by Article VIII). However, British Columbia determined that its interests could best be met by the pre-sale of that entitlement for the first thirty years. The result of this decision was ultimately an agreement outside of the Treaty between BC Hydro and the Columbia Storage Power Exchange, the Canadian Entitlement Purchase Agreement (CEPA).[309] Before CEPA could be finalized the two governments effected another exchange of notes to which was appended a document entitled "Attachment Relating to Terms of Sale." This attachment laid out the basic elements that would be included in the sale but also effectively varied (or at least specified in greater detail) the construction/operation schedule contemplated by the Treaty. Article IV(6) of the CRT contemplated that the Canadian Treaty dams should commence operation in accordance with the Treaty as soon as the facilities became operable and in no case later than five years after ratification in the case of the Duncan and Arrow dams and nine years in the case of the Mica dam. The Attachment

[308] *The Columbia River Treaty and Protocol: A Presentation*, April 1964 at 164.
[309] August 13, 1964.

was more specific and varied these terms since it contemplated that Duncan would be operational for power purposes by April 1, 1968, Arrow by April 1, 1969 and Mica by April 1, 1973. These dates were also reflected in the CEPA.

Canada's acceptance of the Exchange, September 16, 1964 went on to add that:

> Any dispute arising under the Canadian Entitlement Purchase Agreement, including but without limitation, a dispute whether any event requiring compensation has occurred, the amount of compensation due or the amount of any over delivery of power is agreed to be a difference under the Treaty to be settled in accordance with the provisions of Article XVI of the Treaty, and the parties to the Canadian Entitlement Purchase Agreement may avail themselves of the jurisdiction hereby conferred.

This was an important extension to the dispute settlement provision of the CRT.

7.3 Exchange of Notes with Respect to the Permanent Engineering Board, 1965[310]

Article XV of the Treaty provides for the creation of the Permanent Engineering Board (PEB) and requires it to report to the Parties to ensure that the objectives of the Treaty are being met.[311] Article XV(4) provides that the PEB shall comply with directions as to its procedures as prescribed by the two governments by way of Exchange of Notes. This is that Exchange of Notes and it took effect as of the date of the Exchange. The attached Annex on "Administration and Procedure" deals with routine matters. It confirms the membership of the PEB including the requirement established by the B.C.-Canada Agreement that one of the two Canadian members shall be nominated by the Province. While this particular agreement as to procedures was relatively straightforward, the Treaty-based authority to prescribe additional procedures for the PEB may be a useful hook in the event that the Parties wish to expand or change the role of the PEB in any future scenarios. One of the roles of the PEB under the Treaty is to report on whether the objectives of the Treaty are being met (Article XV(2)(d). Such reports are prima facie of the facts therein contained and shall be accepted as such unless rebutted. A finding by the

[310] October 1965; TIAS 5877.

[311] There are occasions when the PEB has reached the conclusion that the requirements of the Treaty were not being met because the Entities have been unable to agree upon the interpretation or application of key Treaty provisions. See for example PEB Annual Report, 30 September 1994, at 38 and PEB Annual Report 1997 at 39. These declaration have asserted pressure on the Entities to negotiate agreements to resolve these differences. The resolution of these differences is frequently recorded in the Principles and Procedures documents (see section 7.9.2 *infra*.)

PEB may be relevant to determining what sort of approval from the Parties (i.e. the U.S. and Canada) might be required for any new arrangements.

7.4 Exchange of Notes with respect to the early operation of the Duncan Dam, 1967[312]

As noted above, Article IV(6) of the CRT as varied by CEPA and the related Exchange of Notes, contemplated that the Duncan dam would be operative for power purposes by April 1, 1968. However, by the Spring of 1967 it became clear that it would be possible to have Duncan operative, at least on a test basis, by April 30, 1967. This Exchange of Notes recognizes that the early completion of the dam would allow Duncan to confer power benefits beyond what was bargained for under the terms of the CEPA. Accordingly it provided for the delivery of an agreed amount of power to BC Hydro based on the amount of water that was stored in Duncan by July 31, 1967. The agreement was a one year agreement which was expressed to be "subject to the terms of the treaty."

7.5 Exchange of Notes concerning a special operating programme for Duncan and Arrow, 1968[313]

As noted above, Article IV(6) of the CRT as varied by CEPA and the related Exchange of Notes, contemplated that the Arrow dam would be operative for power purposes by April 1, 1969. However, by early 1968 it became clear that Arrow could be at least partly operative for storage purposes by February 1, 1968 and as a result the Entities agreed upon a special operating programme which this Exchange of Notes confirmed and made effective. The Notes "empowered and charged" the two Entities to proceed to implement the Special Operating Programme pursuant to Article XIV(4) of the Treaty.[314]

7.6 Exchange of Notes concerning adjustments in flood control payments with respect to Duncan and Arrow, 1970[315]

Article VI of the Treaty provided a schedule of payments to be made to Canada with the commencement of operation of storage at the three Treaty dams. The Protocol, however varied that arrangement insofar as it contemplated that if construction proceeded ahead of schedule the United States might obtain a longer period of assured protection than assumed in the calculation of those payments. Accordingly, paragraph 11 of the Protocol provides that:

[312] May 8 & 18, 1967, CTS 1967, No. 15.
[313] December 30 1968 and February 26, 1969, effective April 1, 1968.
[314] The paragraph provides that "Canada and the United States of America may by an exchange of notes empower or charge the entities with any other matter coming within the scope of the Treaty."
[315] CTS 1970 No. 33,

> In the event operation of any of the Canadian storages is commenced at a time which would result in the United States of America receiving flood protection for periods longer than those on which the amounts of flood control payments to Canada set forth in Article VI(1) of the Treaty are based, the United States of America and Canada shall consult as to the adjustments, if any, in the flood control payments that may be equitable in the light of all relevant factors. Any adjustment would be calculated over the longer period or periods on the same basis and in the same manner as the calculation of the amounts set forth in Article VI(1) of the Treaty. The consultations shall begin promptly upon the determination of definite dates for the commencement of operation of the Canadian storages.

As noted earlier, both the Duncan and Arrow dams were completed earlier than anticipated. This led to Exchanges of Notes with respect to power issues as discussed above. The Parties also carried out consultations on the flood control benefits when it became clear that Duncan would provide two additional years of flood control protection and Arrow would provide one additional year of protection. As a result, the United States agreed, by way of an Exchange of Notes, to pay an additional amount of $82,000 for the flood protection offered by Duncan and $196,000 for Arrow.[316] The Exchange provided that the monies should be payable within a "reasonable period" taking into account U.S. domestic procedures and that the agreement would only enter into force once the U.S. had notified Canada "that it has completed all internal measures necessary to give effect to this agreement." The Exchange was put before the Senate on November 10, 1969 and the President ratified the Exchange with that advice and consent on December 2, 1969 and so informing Canada on January 7, 1970.[317] So far as we are aware this is the only example of any supplementary arrangements under the Treaty being referred to the Senate for its advice and consent prior to ratification and entry into force.

7.7 Exchange of Notes of March 31, 1999 permitting the disposal of the Canadian Entitlement within the United States[318]

With the expiry of the pre-sale of the Canadian entitlement beginning March 31, 1998,[319] it became necessary for the governments and the Entities to agree on the terms for the delivery of the Canadian power entitlement for the next thirty years of the Treaty and/or for the sale of the entitlement within the United States of America. The Treaty addresses the delivery of the entitlement in Article V(2) and with disposal of the entitlement within the United States in Article VIII(1). The Parties reached agreement on terms one year

[316] Exchange of Notes of August 18 and August 20, 1969, 1970 CTS, No. 33.
[317] TIAS 6819.
[318] CTS 1999 No. 18, March 31, 1999.
[319] The sale expired in stages based upon the in-service dates of the three treaty facilities.

after the return of the entitlement began. The agreement is in two parts: (1) an Exchange of Notes between the two states, and (2) the Disposal Agreement between the Bonneville Power Administration acting on behalf of the U.S. Entity, and the Province of British Columbia (the Canadian entity for this specific purpose).

The Exchange of Notes does three things. First, it authorizes "disposals from time to time of all or portions of the downstream power benefits to which Canada is entitled under the Treaty … within the United States, with delivery and other arrangements for such disposals made in accordance with the attached Disposal …". Second, it provides that the dispute resolution provisions of the Disposal Agreement constitute "an alternative procedure" for the purposes of Article XVI(6) of the Treaty for settling differences arising under the Treaty. And third, the Exchange acknowledges that the Province is deemed to be the Canadian Entity for the purposes of paragraph XIV(2)(i) of the Treaty.[320] The Exchange of Notes entered into force on the date of the exchange.

The Disposal Agreement contemplates that British Columbia (or its assignee such as Powerex, BC Hydro's marketing arm) may dispose of its entitlement by reaching agreement with a party (e.g., a Public Utilities District) which would otherwise have an obligation to deliver power to Bonneville; such an agreement serves to reduce that obligation.[321] The balance of the entitlement (i.e. not subject to reduction) shall be delivered, at B.C.'s option, at one or more "Points of Entitlement Delivery" denominated by Bonneville.[322] A "Point of Entitlement Delivery" is a point "of integration at which hydroelectric power shall be made available to the transmission system in the Pacific Northwest for delivery over such system to the Canada-United States border pursuant to the Treaty." BC Hydro is responsible for arranging transmission downstream of the point of entitlement delivery but may dispose of that delivery in the United States.[323] Alternatively, B.C. may enter into other mutually agreeable commercial arrangements with Bonneville Power Administration for delivery of the entitlement or to reduce the entitlement provided that such arrangements "are not inconsistent with the Treaty".[324]

The Disposal Agreement also contains a complex and innovative Dispute Resolution procedure. The procedure contemplates that the parties (i.e. Bonneville and B.C.) will endeavour to settle any differences using a facilitator or mediator, failing which either

[320] This paragraph provides that the powers and duties of the entities include the "preparation of proposals to implement Article VIII and carrying out any disposal authorized or exchange provided for therein". In addition the Note recognizes that any power received by B.C. "has entered commerce in the United States" and that the Exchange is without prejudice to the rights and obligations of either party under NAFTA or the FTA.
[321] Disposal Agreement, s.3.
[322] Id., s.4.
[323] Id., s.4.
[324] Disposal Agreement, s.5, "Mutually Agreeable United States Delivery".

Party may deliver a notice of dispute to the other Party and to the two governments. Such delivery triggers a 45-day period within which the two governments may hold consultations with a view to either settling the dispute or referring it at the option of either government to the dispute settlement procedure contemplated in Article XVI of the Treaty. Should neither government pursue this form of state to state arbitration, the matter will then proceed to arbitration as between the parties (i.e. Bonneville and B.C.) under the UNCITRAL (United Nations Commission on International Trade Law) Rules. The dispute resolution clause does not contain its own statement of applicable law but s.9.2 under the heading "Miscellaneous Provisions" stipulates that "This Agreement shall be governed by and construed in a manner consistent with the Treaty." The dominant position of the Treaty is affirmed by s.9.3 which allows the parties to amend the Agreement, but not s.9.2. Equally, the Exchange of Notes provides that "nothing in this exchange of notes or the Disposal Agreement amends the Treaty or modifies the rights and obligations of either the Government of Canada or the Government of the United States under the Treaty except as authorized pursuant to Article VIII and Article XVI(6) of the Treaty."

The Exchange of Notes and the Disposal Agreement illustrate the extent to which the power provisions of the Treaty have both a commercial law flavour and a public international law flavour. Since the rights to the entitlement are derived from the Treaty, the Disposal Agreement is careful to preserve a distinct role for the two governments in the event of a dispute as to the terms of the Disposal Agreement. The default position will be commercial arbitration between the parties. While the Disposal Agreement provides the main elements of the bargain between the parties (and indeed the governments) the Treaty does require an exchange of notes to approve of both disposal of the entitlement in the United States and (Article VIII) and alternative dispute resolution measures (Article XVI(6)). This Exchange of Notes obliges on both fronts.

7.8 Libby Coordination Agreement, 2000

The possibility that Libby Dam would be built on the Kootenai (Kootenay in Canada) and would flood land in Canada was contemplated in the 1964 Treaty.[325] While the 1964 Treaty primarily provides for consultation on construction, limits on lake levels, and agrees to the flooding of land in Canada, Article XII(5) of the Treaty and paragraph 5 of the Protocol together require that operation of Libby Dam be coordinated for the purposes of downstream benefits in Canada.[326] The Treaty specifies that power benefits resulting from Libby Dam will accrue to the country in which they are generated.[327]

[325] Columbia River Treaty, Article XII.
[326] Annex to Exchange of Notes, Section V.
[327] Columbia River Treaty, Article XII, Section 2.

Libby was completed in 1973, with a generating capacity of 525 MW from five generating units.[328]

The listing of white sturgeon found in the Kootenai River downstream from Libby Dam as endangered under the U.S. *Endangered Species Act* led to changes in the operation of Libby Dam that had "the general effect of decreasing flows in the fall and winter and increasing flows in the spring and summer."[329] These changes in flows could result in decreased power generation at Canadian dams in fall and winter and increased spill in fall, spring and summer[330] and gave rise to a dispute between the United States and Canada over whether those changes were consistent with operations under the 1964 Treaty and the Annex to Exchange of Notes (the Protocol).[331] Canada estimated loss of power generation valued at $12 million for the period 1994 through 1999, but the United States rejected Canada's claim to compensation.[332] The dispute led to a failure to agree on an Assured Operating Plan for 2000-01, and concerns arose that the impasse could ultimately lead to default on Treaty responsibilities.[333] The Libby Coordination Agreement is the resolution of that dispute.[334] It was negotiated by the Columbia River Treaty Operating Committee (i.e. the Entities).[335]

The Libby Coordination Agreement, although expressly an "Entity Agreement" was only signed by representatives of the Entities following receipt of a Diplomatic Note from the Canadian Ambassador to the United States and the U.S. Secretary of State.[336] The Diplomatic Note recognizes that the agreement is an Entity Agreement, states that Canada will not claim losses during the operation of the Agreement, and states that "the Entity Agreement does not . . . modify, amend, interpret or imply changes to the terms of

[328] Corps of Engineers, Libby Dam and Lake Koocanusa, http://www.nwd-wc.usace.army.mil/report/lib.htm The U.S. Entity for the Columbia River Treaty, Record of Decision: Libby Coordination Agreement, February 15, 2000, at 1 (RoD) available at http://www.bpa.gov/corporate/pubs/rods/2000/Libby_Coordination_Agreement.pdf.
[329] Ibid. at 2.
[330] Ibid.
[331] Ibid. ("Canada requested in 1995 that the U.S. cease what it characterized as unilateral operation of Libby Dam for sturgeon flows and compensate the Canadians for alleged power losses at their downstream Kootenay River projects during the 1994-95 operating year. Based on their interpretation of Paragraph 5 of the Protocol of the Treaty, the Canadian Entity claimed that the Treaty gave Canada a right to downstream power and flood control benefits in Canada that are a result of an operation of Libby *only* for power and flood control benefits in the U.S.") (emphasis in original)
[332] Ibid. at 3.
[333] Ibid.
[334] Columbia River Treaty Entity Agreement Coordinating the Operation of the Libby Project with the Operation of Hydroelectric Plants on the Kootenay River and Elsewhere in Canada. February 16, 2000.
[335] RoD, *supra* note 328 at 1.
[336] Letter from Ambassador Raymond Chrétien to Secretary of State Madeleine Albright, February 15, 2000.

the Treaty."[337] For purposes of U.S. domestic law, the Agreement was finalized as a Record of Decision in compliance with the *National Environmental Policy Act*.[338] Thus, the Libby Coordination Agreement is an example of a unilateral Executive branch action under the umbrella of the CRT but going beyond the expected four corners of that treaty. It can be terminated by either party with 30 days notice and terminates automatically on September 15, 2024.[339]

The Libby Coordination Agreement demonstrates the flexibility that is available to the Entities (and therefore available to the governments). It provides BC Hydro with the option for drafting at Arrow and related exchanges of power with BPA that mitigate BC Hydro's power losses due to Libby's operation for non-power purposes, and allows exchanges of storage draft between Libby and Canadian reservoirs for mutual benefit.[340] The Agreement states that authority for this arises from the fact that "[t]he Entities may . . . prepare and implement detailed operating plans . . . that may produce results more advantageous to both countries than those that would arise from operations under the AOPs."[341]

7.9 Entity practices that do not require sanction by means of an Exchange of Notes

As noted in section 3.1 of this paper, the CRT expressly requires approval of implementing activities by way of an Exchange of Notes in at least seven situations. However, the CRT also contemplates, expressly or impliedly, that the Entities will be able to reach agreements for better implementation of the Treaty. In particular, the Parties understood that implementation of the flood control and power provisions of the Treaty would require a lot of elaboration. The two Annexes to the Treaty as supplemented by the Protocol contemplated that the US entity would prepare the flood control operating plans (FCOP)[342] while the power operating plans were to be developed jointly.[343] Article XIV of the Treaty, headed "Arrangements for Implementation" is of central importance here. Article XIV provides for the designation of the Entities and contemplates (Article XIV(1)) that they will be "charged with the duty to formulate and carry out the operating arrangements necessary to implement the Treaty". Paragraph 2 further specifies the duties of the Entities including:

[337] Ibid.
[338] RoD, *supra* note 328 at 1.
[339] Ibid. at 4.
[340] Libby Coordination Agreement at Sections 10 and 11. and Attachment D.
[341] Ibid. at 1. This is a reference to CRT, Article XIV(2)(k).
[342] CRT, Annex A, Principles of Operation, para. 5.
[343] Ibid. Paras 7 – 8.

(h) preparation of the hydroelectric operating plans and the flood control operating plans for the Canadian storage together with determination of the downstream power benefits to which Canada is entitled; and

(k) preparation and implementation of detailed operating plans that may produce results more advantageous to both countries than those that would arise from operation under the plans referred to in Annexes A and B.

In this section we examine Entity agreements and practice under seven headings: (1) Entity agreements and practice in relation to flood control, (2) Entity agreements and practice in relation to principles and procedures for the preparation and use of hydroelectric operating plans, (3) the Agreement on the establishment of the hydrometeorological system (4) Miscellaneous Agreements, (5) Assured and Detailed Operating Plans, (6) Supplemental Operating Agreements, and (7) Agreements in relation to non-treaty storage.

7.9.1 Flood control agreements and practice

The Treaty (Annex A, para 5) contemplates that flood control operations will be based on a flood control operating plan (FCOP) submitted by the US Entity. The first draft of the FCOP for treaty storage was developed by a joint Entity task force established in 1965.[344] The FCOP was prepared in draft form by 1968 and the task force was then dissolved. The Corps of Engineers revised the draft in 1971 and the revised version was reviewed by the Columbia River Treaty Operating Committee in 1972. Revisions to the 1972 Plan were made in 1999 and the current version of the FCOP was adopted in May 2003. One of the crucial things that the FCOP does is to establish the flood control objectives for the first sixty years of treaty operations.[345]

While the Treaty allocated (Annex A para. 5) flood control storage space responsibilities to particular facilities, paragraph 5(d) of Annex A allows the Canadian Entity to exchange the flood control storage that is subject to the assured operation between different facilities (e.g., to move assured storage from Arrow upstream to Mica) if the Entities agree that the exchange provides the same effectiveness for control of floods at The Dalles.[346] The Entities agreed to allow BC Hydro to move 2 MAF of flood control from Arrow to Mica shortly after ratification of the Treaty. In 1995 the U.S. Entity further authorized transfer of an addition 1.5 MAF as long as Canada agreed to augment the Mica storage dedicated to assured flood control by a further 0.5 MAF.[347] While this

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[344] This history is recounted in FCOPs, 1972 and 2003, *supra,* note 27.

[345] The Treaty itself is silent on this although the intentions of the parties can be inferred from contemporaneous documents. Fir further detail see Bankes, "Before and After" *supra,* note 32.

[346] Another example is Article V(2) which provides that the Canadian entitlement is to be delivered near Oliver, "or at such other place as the entities may agree upon".

[347] FCOP 2003, *supra* note 27 at 14.

agreement merely gives BC Hydro an additional option, it is another illustration of the flexibility that has been available to the Entities in furthering the objectives of the Treaty.

7.9.2 Entity agreements and practice in relation to principles and procedures for the preparation and use of hydroelectric operating plans

As noted above, Annexes A and B of the Treaty, as well as Article XIV, contemplate that the Entities will develop assured operating plans (AOPs) for the sixth succeeding year of operation which may be modified or supplemented by annual detailed operating agreements (DOPs). However, the Entities also needed to be able to agree on how to go about preparing these operating plans and the contents of the plans. To that end, the Entities, within the context of the CRT Operating Committee, negotiated and agreed upon a document known as the Columbia River Treaty Principles and Procedures for Preparation and Use of Hydroelectric Operating Plans (the POPs document). The first version of the POPs document was agreed upon in 1967. It has been amended on at least five occasions since: in 1979, 1983, 1988, 1991 and most recently in 2003.

The POPs document is very complex and the details need not detain us here but it is important to appreciate that the document represents an agreement, at least at the level of the Entities, as to how certain key provisions of the Treaty should be interpreted and implemented.[348] For example, the POPs document specifies the content of the Assured Operating Plan and the Detailed Operating Plan.[349] Other examples are more complex. For example, the Treaty requires that the downstream power benefits should be

[348] The legal and practical significance of the POPs document is particularly well described in the 1988 Annual Report of the Entities (for the period 1 October 1987 – 30 September 1988. That report, referring to the adoption of the 1998 version of the POPs document notes that: "As a result of extensive study of the technical implications of various alternative interpretations of the Treaty and related documents, and examination of the legal support for such alternatives, the Entities agreed on an interpretation of future Assured Operating Plans and the Determination of Downstream Benefits. This is embodied in the agreed to principles … and the corresponding procedures …. The documents clarify the definition of the loads of the Pacific Northwest area, thermal resources which may be displaced and how these resources are assumed to operate in calculating useable energy.
The Agreements also describe the streamflows to be used in the studies, and the way in which the effects of irrigation should be included over the course of time. There are also a number of interpretations on how individual plants should be operated when they are included in the studies leading up to the development of Assured Operating Plans and the Determination of Downstream Benefits.
Included in the Agreement is a way in which energy may be shifted between years of the Critical Period, and the way in which any resulting benefits shall be determined…..
These Agreements represent another milestone in the cooperative effort to solve long-standing problems associated with development of an operating plan to the mutual benefit of both countries."
The PEB evidently agreed with this assessment noting in its 1998 Annual Report (at 24) the general contents of the agreements and acknowledging that "the changes provided for in the two Entity agreements resolve the concerns which the Board has expressed in recent annual reports.".
[349] POPs Document, 2003, at 36 for the AOP and at 53 for the DOP.

calculated by reference to the operation of the Base System[350] and mainstem projects which makes the most effective use of the improvement in stream flow resulting from the Canadian storage.[351] This necessarily involves some agreement between the Entities as to "the established operating procedures of the projects involved".[352] This has become more contentious over the years especially in the United States as the need to operate facilities for non-power purposes has grown. While the general principle is that non-power purposes are *not* taken into account in calculating the downstream benefits or in the related process of reaching agreement upon the assured operating plan,[353] the Entities *have* reached agreement on certain minimum operating procedures for Canadian Treaty projects and for many of the facilities in the Base System. These procedures include minimum flow requirements and in a small number of cases, draft rate limitations. These agreed operating procedures represent an important elaboration of Treaty rules. The agreement of the Entities on these matters (initially reached in 1996) is currently recorded in Appendix 2 of the 2003 POP.

Similarly, with the return of the Canadian entitlement, it became necessary for the Entities to agree on a number of matters especially relating to scheduling and point of deliveries. Agreement on these matters was initially reached in November 1996 but the final agreement was concluded in March 1999. The key elements of that agreement are also included in section 6 of the 2003 POPs document.

7.9.3 Agreement on the establishment of the hydrometeorological system

Paragraph 2 of Annex A of the CRT contemplates that the Entities, in consultation with the PEB, will reach agreement on the establishment of a hydrometeorological system including precipitation stations and stream flow gauges.[354] That work which was clearly crucial to operationalizing the Treaty was originally undertaken by a joint task force in 1965 ultimately resulting in an agreement between the Entities in 1967 describing both the base system as well as supporting facilities and providing for the creation of the Columbia River Treaty Hydrometoerological Committee to work in association with Columbia River Treaty Operating Committee.[355]

[350] The 'base system' is a defined term in the treaty and refers to the named facilities listed in the table that forms part of Annex B.
[351] CRT Article VII(2)(b) and Annex B.
[352] CRT, Annex B , para. 7, Step I.
[353] *PEB Annual Report*, 1983, at 23, *PEB Annual Report*, 1985 at 24, and *PEB Annual Report*, 1986 at 24-25.
[354] See also CRT Article XIV(2)(e).
[355] The background and terms of reference for the committee can be found in the Supplemental Reports of the Columbia River Treaty Hydrometeorological Committee which are available on line at http://www.nwd-wc.usace.army.mil/PB/PEB_08/documents.htm

7.9.4 Miscellaneous Agreements

In addition to the POPs, the annual AOPs and DOPs and other agreements contemplated by the CRT, the Entities have also reached agreements on some contentious issues relating to the Treaty.[356] Some of the more important of these agreements have ended up being incorporated into the POPs document. Thus the current POPs document lists the following important agreements in addition to the Libby Coordination Agreement and the Entitlement Disposal Agreement discussed above:

(a) Columbia River Treaty Entity Agreement on Principles for the Preparation of the Assured Operating Plan and Determination of Downstream Power Benefit Studies, dated 20th July (U.S. Entity) and 28th July (Canadian Entity), 1988;

(b) Columbia River Treaty Entity Agreement on Changes to Procedures for Preparation of the Assured Operating Plan and Determination of Downstream Power Benefit Studies, dated 28th July (Canadian Entity) and 12th August (U.S. Entity), 1988;

(c) Columbia River Treaty Entity Agreement on Resolving the Dispute on Critical Period Determination, the Capacity Entitlement for the 1998/99, 1999/00, and 2000/01 AOP/DDPB's, and Operating Procedures for the 2001/02 and Future AOP's, dated 29 August 1996;

(d) Columbia River Treaty Entity Agreement on Aspects of the Delivery of the Canadian Entitlement for April 1, 1998 through September 15, 2024 between the Canadian Entity and the United States Entity, dated 29 March 1999;

The text of these agreements makes it crystal clear that these agreements are designed to resolve difficult interpretive questions without necessarily conceding the preferred interpretation of the other Entity. They represent pragmatic responses to problem solving that allows the Entities to proceed with their operations. The language is clearly very carefully chosen. Thus agreement (c) above contains the following lengthy recital:

> "A. The … Treaty … requires that the Entities agree annually on an … AOP and a determination of the resulting downstream power benefits (DDPB) for the sixth succeeding year of operation.
> B. Differences in interpretation of the definition of "critical stream flow period" in Article I, paragraph 1(d) of the Treaty prevented the Entities from agreeing to the Capacity Entitlement for the 1998/99, 1999/00, and 2000/01 AOP/DDPB's.
> C. Differences in interpretation arose during the preparation of recent AOP/DDPB studies with respect to how the operating procedures referred to in Annex B, paragraph 7 of the Treaty are established.

[356] Note that Annual Report of the Entities contains a list of Entity Agreements concluded in that year.

D. The Entities entered into an agreement on April 5, 1995, entitled the Columbia River Treaty Entity Agreement on the 1998/99, 1999/2000, and 2000/2001 Assured Operating Plan and Determination of Downstream Benefit Studies which provided, among other things, that the Entities would take steps under the Treaty to resolve the difference between them over the interpretation of the definition of "critical stream flow period.

E. The Permanent Engineering Board (PEB) examined the interpretation of the definitions of "critical stream flow period" proposed by each Entity and concluded that the "Draft for Power" interpretation should be used. The PEB also made a recommendation relating to the use of "established operating procedures" in the future.

F. The Canadian Entity accepted the findings and conclusions of the PEB. The U.S. Entity did not.

G. The Entities desire to reach a mutually beneficial agreement which is intended to give the Canadian Entity equivalent benefits to those anticipated by using the "Draft for Power" interpretation, while preserving the U.S. Entity's position that it does not accept the PEB's conclusion.

H. The Entities desire to reach an agreement relating to the use of nonpower "established operating procedures" in future AOP/DDPB studies:

(i) which essentially incorporates the nonpower requirements included in the 1979/80 and prior AOP/DDPB studies;

(ii) which the Entities believe to be consistent with the PEB's findings; and

(iii) which the Entities anticipate will avoid differences in the determination of the critical stream flow period in the future because the result will be the same under either interpretation of the definition of "critical stream flow period".

Therefore, the Entities now agree as follows:

1. Capacity Entitlement for 1998/99 and 1999/00 AOP/DDPB's

The Capacity Entitlement for the 1998/99 and 1999/00 AOP/DDPB's shall be computed using the results from the "Draft for Power" interpretation of the definition of "critical stream flow period". Therefore, the Capacity Entitlement for the 1998/99 DDPB shall be 1514.7 MW, and the Capacity Entitlement for the 1999/00 DDPB shall be 1461.9 MW. By agreeing to these results, the U.S. Entity does not agree with the "Draft for Power" interpretation of the definition of "critical stream flow period".

2. Completion of 2000/01 AOP/DDPB

The Capacity Entitlement for the 2000-01 AOP/DDPB shall be computed using the "Draft for Power" interpretation of the definition of "critical stream flow period". By agreeing to this result, the U.S. Entity does not agree with the "Draft for Power" interpretation of the definition of "critical stream flow period. . .".

7.9.5 Assured Operating Plans and Detailed Operating Plans

The Assured Operating Plans (AOPs) and Detailed Operating Plans (DOPs) are part of the formal Treaty apparatus (see Annex A, para 9 and Article XIV(2)(k)).[357] According to the POPs document the AOP which is to be prepared and agreed to each year for the sixth succeeding year of operation "is intended to provide the Entities with essential information on the operation of Canadian Treaty Storage required for effective operational planning of their respective power systems" and forms the basis for computing the downstream power benefits.[358] The AOP establishes, *inter alia*, critical rules curves (graphical representations of the storage contents of reservoirs), assured and variable refill curves and upper rules curves for each of the Canadian Treaty projects.[359] The DOP is also prepared annually for the next ensuing operating year. The aim of the DOP is "to identify and evaluate proposed changes to the Assured Operating Plan that would be mutually advantageous to the Entities." The default principle is that the rule curves and procedures specified in the AOP will govern unless the Entities agree to a (mutually beneficial) change (CRT Article XIV(2)(k)).

7.9.6 Supplemental operating agreements

In addition to the DOPs the Entities may agree during the operating year to mutually beneficial arrangements known as supplemental operating agreements (SOAs) above or below the specified rule curves to meet both power and non-power benefits. The POPs document offers the following clarification of the relationship between DOPs and SOAs:[360]

> Each Supplemental Operating Agreement can be considered a "detailed operating plan" in accordance with Article XIV(2)(k) of the Treaty. However, for greater clarity, the term Detailed Operating Plan is generally used to refer to the plan put in place at the start of the operating year and "Supplemental Operating Agreements" generally refers to those agreements implemented during the operating year.

The SOAs serve to fine tune the operation of Treaty storage to address power and non-power objectives in light of actual stream flows and operating conditions. The POPs (2003) document provides the following examples of actions included in SOAs:[361]

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[357] The AOPs and DOPs are available on line here http://www.nwd-wc.usace.army.mil/PB/PEB_08/documents.htm.
[358] POPs 2003 at 31.
[359] Ibid at 36 – 37.
[360] Ibid at 61, note 13.
[361] Ibid at 61.

Arrow Lakes Local Method: changes the method for determining the Variable Refill Curve for Arrow (see Appendix 5 for additional information on the Arrow Lakes Local Method). Improves the power operation of Arrow, consistent with the refill objectives at that project, whenever Mica's project operating criteria cause it to draft below its Variable Refill Curve;

Libby – Canadian Storage Exchange: provides for exchange of storage between Libby and Canadian Treaty Storage to enhance power and environmental objectives;

Non-power Uses Agreement: provides for smoothing of project operations to meet several objectives including trout spawning downstream of Arrow, salmon spawning at Vernita Bar, Arrow reservoir level enhancement for dust control and improved recreation, and flow augmentation for downstream migration of salmon;

Whitefish agreement: provides January flow reductions to reduce impact of subsequent flow reductions on Whitefish spawning downstream of Arrow; and

Summer Treaty Storage Agreement: provides for storage above the Treaty Storage Regulation to enhance U.S. system reliability and to provide various non-power benefits to Canadian Treaty Storage (implemented once in recent low flow (2001) conditions).

SOAs can be used to assist in meeting the requirements of Biological Opinions related to the needs of listed fish species in the US as well as minimum flows for resident fish in Canada.

7.9.7 Entity practice outside the Treaty

As noted in several other places in this paper, the Entities have many dealings and arrangements between them that are not required by the Treaty although they are declared to be consistent with the Treaty, such as the SOAs just discussed. The Entities also have dealings and arrangements that fall outside the Treaty, such as the Non-Treaty Storage Agreements (NTSAs).[362] What is perhaps most significant about these arrangements in the present context is that the parties to these agreements (the Entities whether acting as the Entities or simply as electric utilities, facility owners or an agency) recognize that there is a distinction to be made between (1) arrangements that are required by the Treaty; (2) arrangements in relation to storage that are not required but are permitted by the Treaty; and (3) arrangements that relate to storage in Canada that is not subject to direct control under the Treaty other than through the general obligation imposed on Canada by the terms of Article IV(5) of the Treaty. This Article is Canada's obligation not to operate any storage constructed post-ratification in a manner that reduces the flood

[362] See section 3.2, supra.

control and hydroelectric power benefits which would be produced by applicable operating plans.

Sometimes, however, it is difficult to make the distinction. We have already observed that the first significant NTSA also served to resolve a dispute that had arisen with respect to filling non-Treaty storage; the foundation of that dispute was the U.S. claim that Canada's action was a possible breach of the terms of the Treaty.

In a Treaty termination scenario, it is easy to see that the Entities (whether continuing to act as the Entity as defined by the surviving of the Treaty or acting simply as utilities or dam owners) and perhaps others who own and operate hydro facilities in the Basin will still see some mutual advantage in coordinating their power operations by means of agreements. Such agreements will not be Treaty instruments (unless Canada and the U.S. agree on new treaty terms) but will take the form of commercial contracts between the parties, much like the current NTSAs. These agreements may have an enhanced scope in a non-Treaty world and may cover larger amounts of storage. The ability of parties to make these agreements will likely only be constrained by laws of general application on both sides of the boundary including Canada's *Fisheries Act*, and the United States *Endangered Species Act* and any other applicable international agreements including the Boundary Waters Treaty, 1909.[363]

7.10 Conclusions to Chapter 7

The main conclusions with respect to this chapter are as follows. First, some of the subsequent practice under the Treaty falls squarely within what the Treaty itself contemplated. This is true of the AOPs and DOPs and arrangements made in relation to the practice of the PEB. But it is also true of the arrangements the Entities made for the return of the downstream entitlement. This latter set of arrangements seems to have provided more flexibility to the Parties and Entities than originally contemplated by the terms of the Treaty. These arrangements were covered by an Exchange of Notes as were the first five AOPs from 1970 to 1975 (as per Article IV(1) of the Treaty).

Second, a good part of the subsequent practice was occasioned by British Columbia's demands to have its interests in a pre-sale of the Canadian entitlement accommodated. These demands as well others led directly to the Exchanges of Notes covering the protocol as well as the terms of sale.

[363] Article XVII(2) revives the application of the BWT within the part of the Columbia Basin covered by the CRT.

Third, other arrangements were triggered by the early completion of some of the facilities which produced additional benefits downstream in the U.S. Most of these arrangements were accommodated by Entity agreements sanctioned by Exchanges of Notes but in one case − the additional flood control benefits triggered by early completion of Duncan and Arrow − the arrangement was subject to ratification which in the U.S. involved obtaining the advice and consent of the Senate.

Fourth, the Entities have considerable flexibility in optimizing operations for power and other values not specifically addressed by the Treaty by means of supplementary operating agreements and agreements relating to non-Treaty storage. These operations have included operations relating to fisheries, recreation and dust-storm avoidance.

Fifth, the practice shows that the Parties to the Treaty can accommodate different operating Entities. The U.S. Entity has always been comprised of two bodies. Canada for the most part has had a single Entity for all Treaty purposes but it is worth noting that at the time of the return of the entitlement, the Province itself was designated as the Entity for a certain specific purpose. The practice also shows that the PEB can be subject to different composition (one of the Canadian members is nominated by the Province in accordance with the 1963 Agreement between B.C. and the Government of Canada) and the terms of reference for the PEB can also be changed by way of Exchange of Notes.

Sixth, the practice shows that the two governments may use Entity agreements to resolve a broad range of disputes and to avoid elevating those disputes to a claim of breach of Treaty. Another way to put this is that the Entities will seek to resolve disputes themselves and will only elevate a matter to the governments if they cannot resolve the matter or if they feel that they need the "sanction" or cover of an Exchange of Notes. We can see this in the Principles and Procedures documents but also in the NTSA and in the Libby Coordination Agreement. The Principles and Procedures document includes important interpretations and applications of the requirements of the Treaty. We can also read the Libby Coordination Agreement as continuing the process of accommodating non-Treaty values (fish or endangered species) within the Treaty framework, provided that this can be achieved in a way that offers benefits to both Parties. Within the framework of U.S. law, the Libby Coordination Agreement can be seen as an effort by the Executive branch to resolve an inconsistency between the CRT and a subsequent domestic law (the *Endangered Species Act*). Its authority to do so is found not only in Congressional acquiescence, but in Congressional enactment of the ESA. The Record of Decision implies this very interpretation when it notes that one of the benefits of the Libby Coordination Agreement is that "[t]he fundamental confrontation between Treaty issues over Libby operations and obligations under ESA is avoided and it does not

compromise either government's legal positions with respect to Treaty requirements."[364] It might be possible to pursue this goal more systematically through the negotiation of an additional Annex or Protocol to the Treaty providing mutual benefits to ecosystem function for the U.S. and Canada.

Seventh, the CRT provides a number of open-ended provisions for expanding the responsibilities of key actors under the treaty which have not been much utilized by the Parties. We refer here to Articles XIV(4) and XV(5). The former allows the governments to charge the Entities with additional responsibilities while the latter allows the governments to accord the PEB additional responsibilities. Both directions are to be evidenced by an exchange of notes. The Parties referred to the former provision in providing for special operating agreements for Duncan and Arrow when those facilities first became operational, but both provisions might provide some cover and authority for different arrangements under the terms of the Treaty. The scope of these provisions might usefully be explored further in any analysis of future scenarios that go beyond the options of treaty termination or continuation.

Finally, and focusing specifically on the authority of the U.S. Executive branch to alter implementation under the 1964 CRT, a major factor is Congressional acquiescence in the existing practice of implementing a broad interpretation of the Treaty. Advice and consent of the Senate was obtained in 1961 for the 1964 Columbia River Treaty, but not for the Annex with Exchange of Notes signed in 1964, or the Libby Coordinating Agreement entered in 2000. These subsequent agreements provide some guidance on the degree of flexibility under the Treaty. Congressional acquiescence to the Annex and the Libby Coordinating Agreement suggests, under the reasoning of the cases discussed in Chapter 4, that Congress intended a broad delegation of authority to implement the 1964 Treaty.

[364] RoD, *supra* note 328 at 5. (In addition, the ROD lists as one of the benefits of the Agreement "the U.S. government's desire to resolve the dispute with little cost or adverse impact to the U.S., and no precedent or adverse impact on legal interpretations of Treaty rights and obligations . . .") Ibid. at 7.

8.0 Overall Conclusions

So where does it all leave us? In the preceding chapters we examined whether relevant rules of international law or the constitutional and legal arrangements of the United States and Canada will make it difficult to implement any arrangement for the Columbia River that the Basin interests are able to agree upon which goes beyond the two options (continuation or termination) outlined in the CRT. The key questions we addressed are: How much flexibility do Basin interests have to craft a future which differs from either of the futures offered by the terms of the Treaty without encountering a significant risk of legal or constitutional challenge? And do the requirements and practices of treaty-making constrain the involvement of Basin interests in the negotiation and implementation of any such different future?

The short answers to these questions are as follows. First, international law has nothing to say about the manner in which each State organizes its own negotiating team beyond ensuring that the team has the authority to negotiate. The team can be highly centralized or can be entirely driven by Basin interests. Any amendment to the Treaty will need to be formally endorsed by the responsible authority of each federal government as discussed in Chapters 4 and 5 and summarized below in order to effect a valid Treaty amendment. Short of this, international law imposes no constraints on the process followed in each part of the Basin and on each side of the boundary.

Turning to domestic law, our basic conclusion is that Canadian constitutional law will be able to accommodate any of the visions of a different future for the Treaty outlined above. However, ratification of the initial Treaty did become highly politicized and major changes may become equally political. The degree of flexibility within the United States is a political matter and is most likely determined by the degree to which the President and members of Congress from the states in the Basin and on the Senate Committee on Foreign Relations can agree on the procedure to be followed for entry into force.

The Executive in the U.S. has entered into many international agreements without gaining the advice and consent of the Senate, often with some indication of Congressional consent either due to an existing treaty on the subject, a general delegation of authority, or acquiescence to a continuing practice. In addition, while the original Columbia River Treaty was only ratified by the U.S. after obtaining the advice and consent of the Senate, our analysis of subsequent practice under the CRT and other similar international agreements suggests that the Executive in the U.S. will have some flexibility in the process it follows in amending the original Treaty.

Our analysis also shows that the principal risk of proceeding without the advice and consent of Senate is that the Senate may pass a resolution against the action taken by the Executive. Disagreement between the Executive and Congress is most likely to play out in the political arena and strategies to manage this risk include involving congressional delegations and members of the Senate Committee on Foreign Relations in any negotiations as well as tribal interests. We strongly recommend consultation between the Executive branch and the Congressional delegation from the states in the Basin and Congressional members of the Senate Committee on Foreign Relations in the process of formulating any future agreement for the Columbia River.

In Canada, the constitution does not prescribe a particular form for the conclusion and ratification or termination of an international treaty or an amendment to such an agreement. In recent years the federal government Canada has adopted a policy of tabling new international arrangements in the House of Commons, but it is less clear whether that policy will be applied to amendments to existing treaties or their termination. Although the conclusion or amendment of a treaty is an executive act of the federal government, because the core subject matters of the CRT all fall within provincial heads of power the province of British Columbia will play a central role in the negotiation of any amendments. This conclusion is confirmed by the terms of the 1963 Agreement between Canada and the Province. The implication of this is that it will be the Province and not the federal government that will, as a matter of practice, determine whether or not any proposed new arrangements that go beyond the terms of the treaty are acceptable.

In developing its position the Province will need to consider the interests of First Nations at least to the extent that any proposed amendment affects their interests. Recent land claim agreements require Canada to consult with First Nations in relation to international negotiations that may affect their rights and interests. There are no modern land claim agreements within the Canadian portion of the Columbia Basin but arguably the general constitutional duty to consult and accommodate should deliver the same conclusion extending the duty in this case to the Province. The Province also has a political and ethical commitment to involve other residents of the Basin in discussions of Treaty futures, but no legal obligation to do so.

Practice under the 1964 Columbia River Treaty informs how each State may view its options in choosing how to proceed. We note that although much of the practice since 1964 falls four square within the original text of the CRT, there has been a degree of flexibility in responding to changed circumstances such as the early completion of facilities, or the desire for pre-sale of the Canadian entitlement. The Entities have been able to resolve important interpretative issues relating to the treaty and have incorporated those agreements in the terms of the Principles and Procedures of Preparation and Use of

Hydroelectric Operating Plans. Even greater flexibility is secured by the use of supplemental agreements to achieve mutual non-Treaty benefits and in the choice of operating Entities and PEB membership. The greatest degree of flexibility is found in agreements between Entities (Non-Treaty Storage Agreements and Supplemental Operating Agreements) that have been used to resolve possible disputes relating to the CRT and in particular, to avoid or resolve conflicts created by the need of the U.S. to accommodate changing requirements under its own domestic laws.

APPENDIX A

Table 1: Practice under Selected Bilateral Treaties ─ Agreements relating to Boundary or Transboundary Waters

Agreement	Entry into force	Amending procedure	Examples of Amendments and how effected
Boundary Waters Treaty, 1909	On ratification; A & C (1)	No specific procedure	a. Niagara Diversion Treaty, in the U.S. by A & C b. Special agreements c. Other treaties indirectly amend
Lake of the Woods, 1925	On ratification; A & C	No specific procedure.	A Protocol attached to the agreement clarifies or varies some of its terms.
Rainy Lake Convention, 1938	On ratification, A & C	No specific procedure.	
Albany River and Long Lac-Ogoki Diversions, 1940	Exchange of Notes	Contemplated inclusion in a final Great Lakes-St. Lawrence agreement, pending which the U.S. will "interpose no objection".	Not aware of any amendments
Diversion of Niagara River, 1950	On ratification; A & C	No specific procedure	Temporary variation of treaty arrangements approved by an exchange of notes; and same for an agreed interpretation of Article IV (EDST) (1973).
Great Lakes Water Quality, 1972	Upon signature; obligations subject to appropriation of funds in accordance with domestic procedures	Yes; provided "such amendments shall be within the scope of this Agreement"	Superseded by the 1978 GLWQA
Great Lakes Water Quality, 1978	Upon signature; obligations subject to appropriation of funds in accordance with domestic procedures.	Yes; provided "such amendments shall be within the scope of this Agreement"	a. Supplementary Agreement adding phosphorous, 1983, EIF on signature b. Protocol of 1987 *inter alia* adding annexes dealing with pollution from non-point sources, contaminated sediment, airborne toxic substances & pollution from contaminated groundwater
Skagit River, Ross Lake and Seven Mile Treaty, 1984	Upon ratification.	Discusses amendment of the attached agreement (between BC and Seattle) but not the treaty itself.	Not aware of any amendments.
Joint Ring Levee Agreement, 1998	Upon EoN	No explicit procedure.	None
Souris Agreement, 1989	Upon signature; obligations subject to appropriation of funds.	Amendment by mutual agreement	Two amendments effected by Exchange of Notes in 2000 and 2005.

(1) A & C refers to ratification by the United States on the advice and consent of 2/3 majority of the Senate.

Table 2: Practice under Selected Bilateral Treaties ─ Other Agreements

Agreement	Entry into force	Amending procedure	Examples of amendments and how effected
Migratory Birds Convention, 1916	On ratification; A & C.	No explicit procedure	Protocol of 1995; ratified in the U.S. upon A & C
Pacific Salmon Treaty, 1985	Subject to ratification; A &C	Explicit procedure for amending annexes; no explicit provisions re the treaty.	The annexes have been amended on a number of occasions including by the addition of an important new provisions dealing with the Yukon River.

APPENDIX A

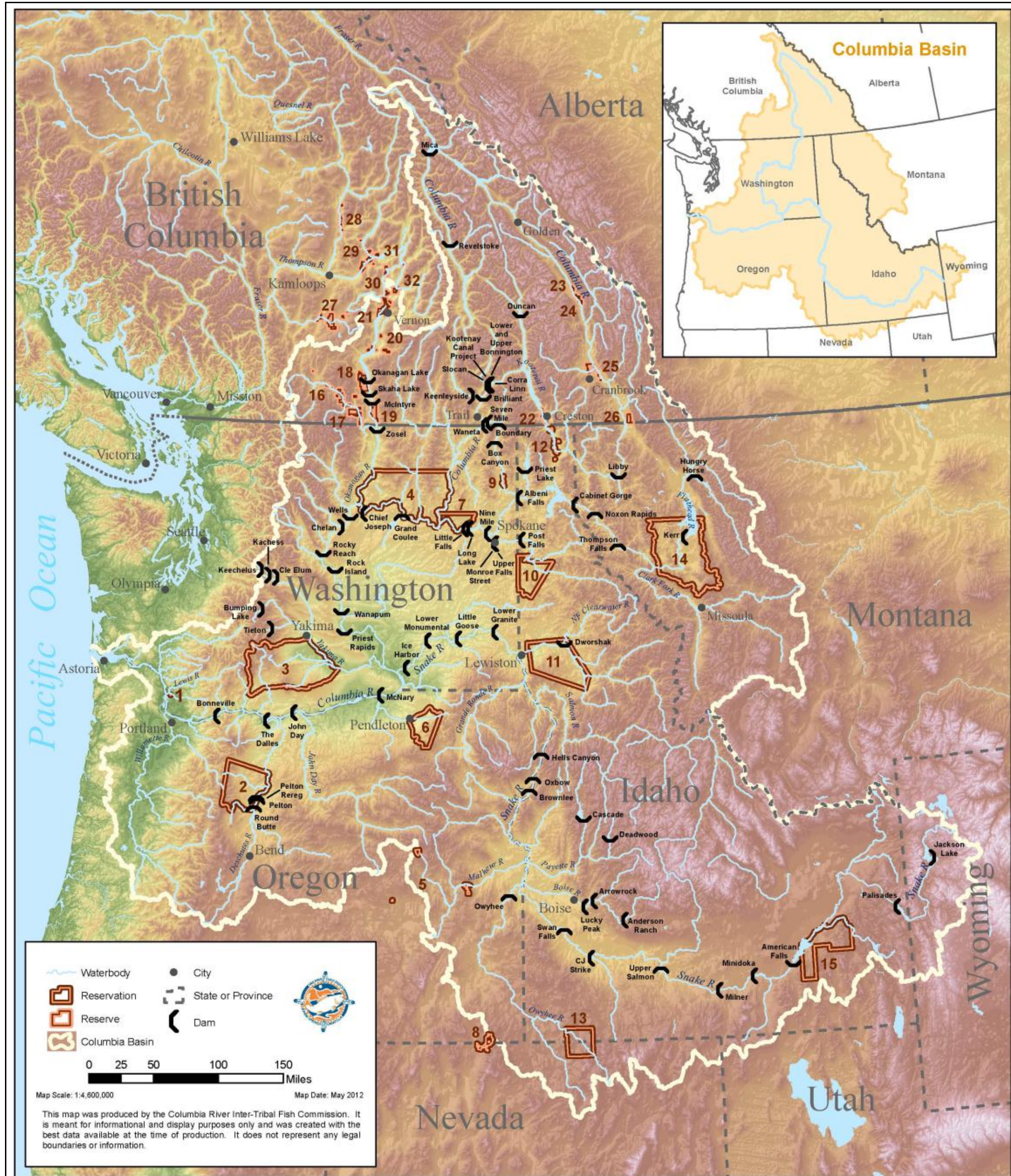
Table 3: Practice under the Columbia River Treaty

Agreement	Subject matter & CRT authority (if any)	Entry into force
The Protocol (1964)	Clarification of the terms of the Treaty and providing for immediate approval of the sale of the downstream entitlement in the US	The Protocol is an agreement relating to the carrying out of the provisions of the treaty attached to an EoN which entered into force on the date of exchange of the instruments of ratification.
Exchange of Notes [EoN] re Canadian Entitlement (1964)	Authorized the Canadian Entitlement Purchase Agreement; Article VIII(1) CRT and para. III of the Protocol. Purported to extend the benefit of Article XVI of the CRT (dispute resolution) to the parties to CEPA.	By way of an Exchange of Notes which shall enter into force on the date of exchange of the instruments of ratification.
EoN re PEB (1965)	Establishes procedures for the PEB; Article XV(4).	Immediately upon the exchange of notes.
EoN re early operation of Duncan (1967)	Provided for the delivery of power to Canada in recognition of the early in-service date of the dam, Article XVI(4).	Effective April 1, 1967; Exchange of Notes of May 8 and 18, 1967.
EoN re early operation of Duncan and Arrow (1968)	Provided for a special operating agreement given early in service date for Duncan and Arrow: Articles IV(6), V(3) and XVI(4).	Effective April 1, 1968; Exchange of Notes December 30 1968 and 26 February 1969.
EoN re adjustments in flood control payments re Arrow and Duncan (1970)	Provided for additional flood control payment to Canada as contemplated by para 11 of the Protocol.	EiF subject to completion of domestic procedures which, in the US involved advice and consent of the Senate.
EoN re return of and disposal of the Canadian entitlement (1999)	Authorizes disposal of the CE in the US; establishes and alternative dispute resolution procedure; acknowledges that the Province is the Canadian entity for this purpose: CRT Article VII and XVI(6)	Immediately upon the exchange of notes.
Libby Coordination Agreement (LCA) (2000)	Settled dispute over the operation of Libby to meet fish flow requirements. Effected by an Entity Agreement conditional upon a diplomatic note in which Canada agreed not to pursue certain claims for so long as the LCA remained in effect.	The LCA was only signed upon receipt of Canada's Diplomatic Note by the Department of State. There was no mutual Exchange of Notes.
Flood control agreements (FCOP) (1972 and 2003)	Inter alia establishes the level of flood control protection contemplated by the treaty CRT Annex A, para. 5.	Approval of US Entity; no Exchange of Notes.
Entity Agreements on Principles and Procedures (1867, 1979, 1983, 1991, 2003)	Resolved disputes about the interpretation of key issues and provided a framework for the preparation of assured and detailed operating plans. CRT Article XIV, and Annexes A & B	Approval of both Entities; no Exchange of Notes.
Agreement on the establishment of the hydrometeorological system (1967)	CRT Annex A, para. 2	Approval of both Entities in consultation with the PEB; no Exchange of Notes.

Miscellaneous Entity Agreements (various dates)	Agreements deal with a number of important matters of interpretation and resolve disputes as between the Entities.	No specific authority.
Assured and detailed operating plans (annual)	Prescribe rule curves for treaty facilities and allow the calculation of downstream power benefits: CRT Article XIV and Annex A & B. AOP applies except to the extent that the Entities can agree to mutually beneficial alternative arrangements.	Approval of both Entities; no Exchange of Notes.
Supplemental agreements for non-power purpose (annual)	Agreements to vary detailed operating plans so as to provide mutual benefits typically including flexibility to provide fish flows for anadromous (US) and resident (Canada) fish: CRT Article XIV(k)	Agreement between the Entities; no Exchange of Notes; agreements reported to PEB
NTSA (various)	Various agreements relating to the operation of non-treaty storage in Canada (Mica) but also settling a dispute as to the filling of Mica, Seven Mile and Revelstoke.	Upon execution as a commercial contract by BPA and BCH as utilities or facility owners (and not as the Entities); no Exchange of Notes.

APPENDIX A

Figure 1: Tribal Nations and First Nations in the Columbia River Basin



Columbia River Treaty

Tribal Nations in the United States *

1 - Cowlitz Indian Tribe
2 - Confederated Tribes of the Warm Springs Reservation of Oregon
3 - Confederated Tribes and Bands of the Yakama Nation
4 - Confederated Tribes of the Colville Reservation
5 - Burns Paiute Tribe
6 - Confederated Tribes of the Umatilla Indian Reservation
7 - Spokane Tribe of Indians
8 - Fort McDermitt Paiute Shoshone Tribes
9 - Kalispel Tribe of Indians
10 - Coeur d' Alene Tribe
11 - Nez Perce Tribe
12 - Kootenai Tribe of Idaho
13 - Shoshone Paiute Tribe of the Duck Valley Indian Reservation
14 - Confederated Salish and Kootenai Tribes of the Flathead Nation
15 - Shoshone-Bannock Tribes of the Fort Hall Reservation

First Nations in Canada

Inside the Columbia Basin

16 - Upper Similkameen Indian Band (Okanagan Nation)
17 - Lower Similkameen Indian Band (Okanagan Nation)
18 - Penticton Indian Band (Okanagan Nation)
19 - Osoyoos Indian Band (Okanagan Nation)
20 - Westbank First Nation (Okanagan Nation)
21 - Suknaqinx/Okanagan Indian Band (Okanagan Nation)
22 - Lower Kootenay Indian Band (Ktunaxa Nation)
23 - Shuswap Band (Secwepemc Nation)
24 - ?a'kisqnuk First Nation (Ktunaxa Nation)
25 - ?aq'am (Ktunaxa Nation)
26 - Tobacco Plains Indian Band (Ktunaxa Nation)

Outside the Columbia Basin with Asserted Interests

27 - Upper Nicola Indian Band (Okanagan Nation)
28 - Simpcw First Nation (Secwepemc Nation)
29 - Adams Lake Indian Band (Secwepemc Nation)
30 - Neskonlith Indian Band (Secwepemc Nation)
31 - Little Shuswap Indian Band (Secwepemc Nation)
32 - Splatsin First Nation (Secwepemc Nation)

* Management authorities and responsibilities affected by the Columbia River Treaty