

Pacific Aboriginal Fisheries Framework (PAFF)

Strengths/Weaknesses/Opportunities/Threats Assessment

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Introduction:

Questions are divided into four categories:

1. General direction for treaties
2. BC treaty process
3. Content of the fisheries components of treaties.
4. Options and ideas for change

For categories 2 and 3, you will find background material in appendices to this document.

Questions:

1) General direction for treaties:

- a) What is your level of experience with treaties? In what capacity have you participated in or contributed to the BC treaty process?

Role	Years/Months Experience
Table negotiations (main table or fisheries technical group)	
Development of allocations	
Development of implementation costing estimates	
Providing technical support	
Policy development on treaty-related matters	
Other (please specify)	

- b) What, in your opinion, should DFO be seeking to achieve with treaties in BC.

- c) In your opinion, what are some overall pros and cons of treaties and the BC treaty process?

Pros	Cons

- d) To what extent do the BC treaty process and resultant agreements support DFO's strategic directions for fisheries (e.g. strategic plan, WSP, fisheries reform, eco-system-based approaches to fisheries)?

- e) What broad obstacles does DFO face in the current BC Treaty Commission process?

- f) How might DFO overcome these obstacles?

2) BC treaty process

As background to the following questions, Appendix A contains a summary of the BC Treaty Commission process and how it is applied to fisheries negotiations.

- a) What is your opinion of the current BCTC process? Some specific factors to consider are:
- geographic scale of negotiations (i.e. individual First Nation vs. regional or watershed / coastal area)
 - the level of transparency and general understanding of the process (among parties to the negotiations and to external interests)
 - mechanisms for addressing external / third-party interests (aboriginal and non-aboriginal)
 - mechanisms for dealing with overlap / shared resource issues
 - potential impacts on relationships between the parties and with external parties
 - DFO's internal processes for supporting negotiations
 - Role of INAC
 - Current and future impacts on program delivery in your sector or area
 - Effectiveness of the current process at achieving desired levels of certainty and stability in the fisheries resource.

3) Content of the fisheries component of treaties.

Appendix B represents what Canada, with the advice of DFO, has negotiated with First Nations in the BC treaty process.

- a) Given that, treaties are documents that are constitutionally protected and are intended to last in perpetuity,
 - i) How much detail should be included in the fisheries component of treaties?

Provisions	Level of detail					Comments
	Not included	General	Descriptive	Detailed	All inclusive	
Roles and responsibilities of Joint Fisheries Committee						
Allocations / abundance-based allocation formulas						
Process for establishing allocations post-effective date						
Stewardship/enforcement/enhancement arrangements						
Nature and role of consultation bodies						
Overage / underage provisions						
Details of harvest plans and licensing						
Other: (please specify)						
Other: (please specify)						

- ii) What rights should be spelled out in treaties?

iii) Would some items currently included in treaties be more appropriately placed in side agreements or operational guidelines that are not constitutionally protected?

Provisions	Constitutionally -Protected	Non-constitutionally Protected			Comments
		In long-term side agreement	In short-term side agreement	In operational guidelines	
	In treaty				
Roles and responsibilities of Joint Fisheries Committee					
Allocations / abundance-based allocation formulas					
Process for establishing allocations post-effective date					
Stewardship/enforcement/enhancement arrangements					
Nature and role of consultation bodies					
Overage / underage provisions					
Details of harvest plans and licensing					
Other: (please specify)					
Other: (please specify)					

b) Will treaty agreements, as they have been structured to date, be effective in addressing future changes or uncertainty in:

- Environmental conditions and the distribution and status of stocks?

- The general characteristics of fisheries in BC (e.g. markets, distribution, new species, legislative and regulatory controls)?

4) Options and Ideas for Change

- a) What ideas do you have for changes or improvements either to the BCTC process or the content of agreements that could help address some of the weaknesses highlighted above?
- Need to resolve overlapping claims issues before AIP.
 - If at all possible avoid provisions that speak to “may negotiate” something in a post treaty environment
 - Treaties need to include provisions for changes over time that will accommodate the needs of both parties (in particular when new acts or regulations are enacted)
 - Develop a post treaty fisheries conservation and management vision now with mutually agreeable outcomes so that current government and non government initiatives supporting Aboriginal involvement can be coordinated and focused on where we are going in the longer term (post treaty)
 - Within federal and provincial agencies assign staff to coordinate efforts and resources and to work with NGOs to further coordinate activities and approaches.
 - Move away from negotiating treaties with individual FNs and build incentives in the process for FNs within linguistic groups to work together under the umbrella of one treaty (with linguistic groupings if possible)
 - Negotiate umbrella agreements that:
 - cover broad geographical areas plus species specific stock management agreements (e.g., as was done with the International Halibut agreement)
 - develop better communications and consultations arrangements before during and after treaties are implemented
 - Governance and decision make – who is responsible for what and with what authority – a key issue to try and a broad basis of agreement on
 - It is imperative that fisheries can be effectively managed (including cost effective) in a post treaty environment. Management structures/models/frameworks need to be built now and tested. DFO and FNs need to see that fish can be conserved and managed effectively (this along with resolution of allocation and governance should be the three top priorities to get working on prior to treaties being finalized.
- b) Does DFO have other options for achieving stability of the resource and reconciliation with First Nation other than treaty?
- DFO needs to work through a mutually agreeable process with representatives of Aboriginal organizations (whether in the treaty process or not) to build management structures such as the Northwest Indian Fisheries commission (e.g., a Fraser River Fisheries Commission). Initially this will require an engagement strategy within DFO; followed by Aboriginal organizations and non government organizations that support activities associated with management of fisheries and protection of fish and fish habitat.
 - Options for negotiation long term agreements outside treaties should be explored with the BCTC and Aboriginal organizations. Such long term agreements should include incentives to move to agreement under a treaty.
 - Where appropriate support inter-tribal treaties and look for opportunities for a supporting organization to resolve difficult issues such as overlapping claims and fish allocation issues (e.g., Leadership Council/FN Fisheries Council).

- Resolution of the allocation issue will be the biggest hurdle. This should be an initiative that is pursued with groups both in and out of treaties now. DFO should work with the FN Leadership Council and its Fisheries council to develop and implement a strategy to at least get agreement on a fair way to proceed and make decisions. There will be some FNs that will never willingly agree to an allocation or an allocation formula, but this should not stop the Department from moving forward in this issue.

c) Additional comments?

- Need more experienced fisheries management staff in treaty negotiation positions even if this means accommodating individuals by allowing them to work out of their area office (too many treaty negotiators lacking the needed experience puts too much additional workload on area staff)
- Implementing treaties appears to be a responsibility of area staff. This needs to be looked at carefully to ensure that there are sufficient human and financial resources in the areas to implement provisions in treaties.
- Seek the expertise of DFO staff that have experience with implementing treaties (e.g., those implementing the Nisga'a Treaty)
- Hire new staff in the areas to assist with treaty work and to be mentored by experienced staff before they retire.

- **Appendix A: the BC treaty process**

The BC Treaty Commission (BCTC) and the BC treaty process were established in 1992 by agreement among Canada, BC and the First Nations Summit and in response to the 1992 BC Claims Task Force report and recommendations. The BC treaty process establishes tripartite negotiations between BC, Canada and First Nations' organizations to advance the fair and durable treaty settlements. A summary of key characteristics of this process are:

- BC treaties are intended to be full and final settlements establishing lasting certainty between the parties
- BCTC facilitates and oversees negotiations. BCTC has responsibility for determining what First Nations organizations are eligible to participate in negotiations.
- There are six negotiating stages:
 - Stage 1: statement of intent to negotiate
 - Stage 2: assessment of readiness to negotiate
 - Stage 3: negotiation of a framework agreement
 - Stage 4: negotiation of an agreement in principle
 - Stage 5: negotiation to finalize a treaty
 - Stage 6: implementation of the treaty
- INAC is the lead federal agency through their treaty negotiations unit. Within DFO, the Treaty & Aboriginal Policy Directorate in Vancouver coordinates DFO input into the process
- BCTC allows First Nations to organize as they wish, subject to specific criteria. This has led to a multiple negotiations in BC (59 First Nations negotiating at 49 different negotiating tables).
- Many negotiations are with individual communities with small populations and limited capacity
- First Nations receive funding support to participate in negotiations; 80 % of this is in the form of loans generally repayable when a treaty comes into effect
- Once in effect, the responsibility for treaty implementation passes from the INAC negotiations unit to operational departments.
- INAC is the federal department responsible for securing federal funding for treaty implementation. Funding envelopes are secured on a table-by-table basis. The level of funding available for implementation is generally kept secret until very late in the negotiating process. Funding may be made available both to the First Nation and to operational departments with responsibilities under the treaty.
- **In identifying funds for implementation, INAC adheres strictly to the principle that only firm commitments within the body of the treaty will receive funding. Provisional or permissive clauses (i.e. those that suggest that the Parties "may" do something) are not afforded funding. Nor is there a mechanism to fund activities that could provide support to a number of treaties (e.g. watershed-level stock assessment, enforcement or monitoring programs).**
- More detail on the BC treaty process is available at www.bctreaty.net

Appendix B: Content of the fisheries component of treaties

The following is a summary of the content of the fisheries chapters of Final Agreements or Agreements in Principle that have been reached to date under the BC Treaty Process.

Agreement provisions establish:

- A First Nation's right to fish for all species within a defined harvest area.
- The ongoing authority of the Minister to manage fisheries
- That the First Nation will fish under the authority of the Minister using a Harvest Document or Licence issued by the Minister.
- That the fishing right may be exercised by individuals designated by the First Nation to fish
- Abundance-based allocations for a number of harvested species are included in the Agreement.
- Overage and underage provisions as a mechanism to account for non-compliance with treaty allocations in a given year (they apply to both the First Nation and the Minister)
- For species where allocations have not been included in the Final Agreement, a process to develop allocations post-Effective Date
- A process for the development and review of an annual First Nations Fishing Plan.
- A bilateral (Canada – First Nation [BH: Aboriginal organization]) Joint Fisheries Committee. This is a bi-lateral consultative body for providing recommendations to the Minister on matters such as the content of fishing licences, exercise of harvesting rights, monitoring and enforcement, fisheries management, other matters that the Parties agree to address.
- That FN will have law making authority on: distribution of fish harvested under the fishing right, designation, documentation of individuals designated, preservation of TEK, administration of individuals under the fishing right, resolution of disputes among FN citizens under the fishing right, trade and barter of fish harvested under the right.
- A process for the negotiation of access to surplus fish on an annual basis (no rights established).
- That Fisheries Operational Guidelines (FOG) will be developed to describe procedures and guidelines for operationalizing the treaty). FOGs are not constitutionally protected and may be amended at any time with agreement of the Parties.
- That commercial access to the resource is provided through Harvest Agreements (also outside of treaty and therefore not constitutionally protected, though funding is provided to acquire access).
- That stewardship and enhancement agreements will be negotiated and managed outside of treaty (no incremental funding)
- That habitat-related issues/functions are outside of treaty with no incremental funding.
- That enforcement agreements will be negotiated and managed outside of treaty (no incremental funding). There is funding for incremental enforcement to manage treaty obligations.
- That First Nations may participate in regional and/or watershed processes, but not on a mandatory basis. [Funding for participation if not in treaty >AAROM to fund]