Canadian Small-Scale Fisheries: The Necessity of Legal Perspectives

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Abstract

Small-scale fisheries, when governed from a trans-disciplinary approach, can be an important industry for sustainable practices and participating communities. However, 'small-scale fisheries' requires an operative legal definition in Canada to ensure the ability of such fisheries to develop and operate within the context of larger established fisheries with robust governance schemes. Legal perspectives are a necessary participant in transdisciplinary discussions when approaching small-scale fisheries governance. To demonstrate this, this paper was prepared with secondary research into global small-scale fisheries perspectives, Canadian statutes, and Canadian jurisprudence. The author combines this research into support for a statutory definition of 'small-scale fisheries' in Canada through the lens of a legal professional. There are different ways to approach how 'small-scale fisheries' should be defined at a national level, including whether a single pan-Canadian definition should be deployed, or whether regional definitions responsive to each fishery's varying needs would better meet the goals of pursuing small-scale fisheries governance in Canada. Such an operational definition (or definitions) must be approached from a trans-disciplinary perspective and with regard to the legal realities of fisheries participants and stakeholders in order to provide a long-term solution for small-scale fisheries development on regional, national, and

international levels.

Introduction

'Small-scale fisheries' are receiving increased attention. Fisheries are one of the oldest statutorily-regulated industries in Canada, with the first *Fisheries Act* coming into force in 1868, the year after Canada was formed. Since that time, Canada has expanded and diversified, acquiring provinces and territories, and laying claim to the inland and coastal fisheries that come along with them. Canada's changing geography has occurred in the context of shifting fisheries markets and market access, increased efficiency in fishing technologies, and differing public opinions on who should have access to the fisheries and when. Yet, after more than 150 years of developing fisheries governance, Canada's current statutory record is relatively scant on the governance of small-scale fisheries. This chapter demonstrates why an operational legal definition of small-scale fisheries is necessary in the Canadian context and why legal perspectives should be employed in developing future small-scale fisheries opportunities. This chapter explores what small-scale fisheries actually means from legal perspectives – or more appropriately, what it **might** mean. The chapter describes the need for a concrete legal definition of small-scale fisheries in Canada, why developing small-scale fisheries opportunities is a legal issue, and why legal perspectives are necessary for the small-scale fisheries road ahead.

Newfoundland Fishing Boats and Stages (Photo: Newfoundland Quarterly, V001 No 3 - December 1901).

What are small scale fisheries?

Small-scale fisheries have achieved worldwide recognition as a potential model for a sustainable future for the world's fisheries, both for its participants and the resources it harvests. The Food and Agriculture Organization of the United Nations (FAO) released the Voluntary Guidelines for Securing Sustainable Small-Scale Fisheries in the Context of Food Security and Poverty Eradication (the SSF Guidelines) in 2015. The SSF Guidelines find that characteristics which typify small-scale fisheries include:

- carried out by self-employed fishers, providing food for household and communities as well as participating in commercial harvests;
- seasonal migration;
- a fishery anchored in a local community with an adherence to the adjacency principle; and
- participants depending directly on access to fishery resources and land

access (FAO 2015).

These loose boundaries do not apply neatly to all states. Understanding what 'small-scale fishery' means to a state or to its populations is a prerequisite for such fisheries recognition in policy and research.

Some states have established specific, prescriptive legal definitions for small-scale fisheries. Libya has a legal definition for small-scale fisheries which is rooted in the size of a participating boat and in the amount of time it takes to complete a single trip. Some other legal definitions are more referential, such as Malaysia's reference to 'inland fisheries' or 'riverine fishing'(Nakamura et al. 2021). Other states, like Canada, have no definition at all, although it is understood that some small-scale fisheries have operated amongst contemporary Canadian fisheries, like the fixed-gear fishery in the Bay of Fundy (Berkes et al. 2001). Without a definition of small-scale fisheries that operates within the Canadian context, it can be tough to precisely pin down which fisheries may or may not be considered small-scale fisheries.

Defining small-scale fisheries in Canada

The lack of a Canadian definition is a concerning omission because legislation directly affecting fisheries in Canada must be delivered from the federal government. The specifics of this legal structure will be discussed in more detail below, but for now it suffices to say that small-scale fisheries likely cannot effectively operate without federal regulatory approval, at least not in a way that such fisheries can be regularly assessed and developed for sustainable, long-term operation.

A Canadian definition may take cues from the Guidelines. For instance, the Guidelines encourage states to *"recognize the role of small-scale fishing communities and Indigenous peoples to restore, conserve, protect, and co-manage local aquatic and coastal ecosystems"* (FAO 2015). Adopting this as a principle for developing domestic small-scale fisheries could provide valuable guidance on building fisheries models that preserve the health of the fishery from socioeconomic, ecological, biodiversity, and multicultural perspectives.

The drawbacks of a definition

A standardized, statutory definition may decrease flexibility in the ability for regional institutions to meet their own specific needs through what might otherwise be a tailor-made definition of small-scale fisheries. We can consider the Northwest Atlantic Fisheries Organization (NAFO) as an example. Consisting of 12 countries, NAFO governs and regulates how certain stocks can be harvested and by whom within the Northwest Atlantic (NAFO n.d.) The Nunavut Wildlife Management Board (NWMB) may be another example. The NWMB's mandate is to regulate and manage wildlife in the Nunavut Settlement Area, which includes the Canadian coastline and the Arctic Archipelago (NWMB n.d) Its mission statement is "*...to conserve wildlife (and wildlife habitat) for the long-term benefit of all Nunavut residents while fully respecting Inuit harvesting rights and priorities*" (NWMB n.d).

The interests of NAFO and the NWMB in institutionalizing small-scale fisheries as a category or class of fisheries would likely be different, as they both manage fisheries in different regions, and within different operational and political contexts. A single, pan-Canadian statutory definition of small-scale fisheries may not be flexible enough to give varying bodies such as these the tools they need to meet their potential small-scale fisheries mandates.

More than one way to filet a fish: Multiple definitions of small-scale fisheries

While a standard, operational definition of small-scale fisheries could benefit Canadian fisheries, multiple statutory definitions of small-scale fisheries could also produce a benefit. Small-scale fisheries could be defined through different definitions under the Fisheries Act's regulations. For instance, the Atlantic Fishery Regulations, 1985, could be amended to include a definition of small-scale fisheries that was appropriate for the regional circumstances and existing licencing schemes in Atlantic Canada. Other Canadian fisheries may develop their own definitions through the appropriate, pre-existing regional regulations. This could provide for operational flexibility while

maintaining regulatory certainty. However, as will be discussed below in the context of the R. v. Saulnier case, if multiple definitions spread across laws which serve different purposes, that can cause legal contention.

Forming a definition: The requirement of a legal perspective

As sensible and considerate as those concerns may be, an operational legal definition of small-scale fisheries in the Canadian context is one of the most secure vehicles for developing and supporting domestic small-scale fisheries. A legal perspective for small-scale fisheries means the provision of stability for regulators, researchers, fisheries participants, communities, and market interests. It provides a lens of assessment for current and past practices to most efficiently develop contemporary routes to achieving Canadian small-scale fisheries and growing successful fisheries under that banner. A legal perspective is a navigation system for Canadian small-scale fisheries implementation.

There are four legal concepts which are important to understanding how the Canadian legal system affects fisheries. The first is that of Canada as a federation – a collection of independent legal powers governing in tandem with a central authority. The second, related concept, is that of the Division of Powers. Thirdly, the concept of multijuralism is important to gain an understanding of how fisheries legislation may or should operate in the future. Finally, a discussion of international legal obligations will provide some context for Canada's responsibility to manage a fishing industry in a global market.

1. **Federalism.** Canada operates as a federation, whereby there is one Federal Government and 10 provincial governments (the three Canadian Territories wield power delegated by the Federal Government). Canada was formed with the signing of the *British North America Act* in 1867 (the *Constitution*). Comprising only Nova Scotia, New Brunswick, Quebec,

and Ontario, the infant country began governance of its own affairs immediately, delivering legislation which set Canada apart as a distinct legal entity. Canada operationalized its *Fisheries Act* only a year after it became a country; the *Act* is over 150 years old, and has been amended frequently ever since (Beale 2020).

2. **Division of Powers.** The *Constitution* places restrictions on what bodies of government can regulate what aspects of Canadian life. Sections 91 and 92 of the *Constitution* dictate which aspects of Canadian life fall under the legal jurisdiction of the Federal Government, and which ones fall under the legal jurisdiction of the provincial governments. Subsection 91.12 states that the Government of Canada has the jurisdiction to legislate over "Sea Coast and Inland Fisheries" (Constitution Act 1867). With the Federal Government as the ultimate authority over Canadian fisheries, fisheries governance occurs in an inherently 'top-down' manner. Although this does not prevent operations such as participant feedback or joint federal-provincial management systems, such input systems generally need to be given some latitude or approval from the federal government before they, or their operations, can be legally carried out.
3. **Multijuralism.** Canada has been recognized as a bijural country since its formation; that is, a country which has two separate but operational legal systems. Canada is bijural because nine of the provincial governments operate within a common law system, with the exception of the Province of Quebec. Quebec operates within a civil law system. However, with Canada's implementation of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) in 2021 (Government of Canada 2021), and considering the 2020 dispute over the Sipekne'katik First Nation's right to exercise inherent self-governance through establishing an independent lobster fishery, it may be prudent to approach the formation of a Canadian small-scale fisheries definition through a multijural lens.
4. **International obligations**. Canada has taken on obligations under the UN which should directly affect fisheries and how they are governed.

UNDRIP is a prime example. There are other multilateral agreements as well, such as NAFO. A small-scale fisheries definition provides a clear baseline to other states for our view of how domestic small-scale fisheries should operate, and what characteristics Canada values in such systems. A legally entrenched definition of small-scale fisheries will provide a starting point, and consistent reference point, for other states to understand how Canada's obligations to its people, resources and economy may affect multilateral agreements in the fisheries, environmental, and human rights contexts. Lack of a standardized definition can lead to inefficiencies when it comes to determining what 'small-scale fisheries' means in the context of international agreements.

A legal perspective in context

The common law labyrinth

One of the implications of a common law system is that, in general, the written laws must be followed. However, the courts of a common law state can interpret the written laws, restricting or broadening the definitions and other elements therein to ensure the law works as intended. Consider the *Fisheries Act* which has been judicially interpreted for decades, with legislative amendments that have been regular and prolific.

Lawyers are trained to navigate the labyrinth of statutes and court decisions, which operate to blur the application of some laws or to sharpen others. Lawyers can identify, apply, distinguish, and conduct historical review of judicial decisions. Such jurisprudence is rooted in statutory law. It can be these written laws which a lawyer asks a court to interpret in a particular way that would be beneficial to a lawyer's client. Sometimes, interpretations of multiple laws may not always agree with each other.

In the fisheries context, these legal problems (and skills) can be seen playing out in the 2006 Nova Scotia Supreme Court case of *Royal Bank of Canada v Saulnier* (*Saulnier*), which was appealed to the Nova Scotia Court of Appeal, and eventually to the Supreme Court of Canada. In this case, lawyers for both

Benoit J. Saulnier and the Attorney General of Canada (and a number of other parties involved) had to present to the Court interpretations of the *Fisheries Act*, the *Bankruptcy and Insolvency Act*, and Nova Scotia's *Personal Property and Security Act*. Lawyers for both sides argued before the Court whether or not a fishing licence could be considered a form of property owned by the person who held the licence, and if so, what definition of property applied - 'property' under the *Bankruptcy and Insolvency Act* or 'property' under the *Personal Property and Security Act*? (*Royal Bank of Canada* 2006). Both these statutes contain a different definition of 'property' which serves the needs of those statutes. The laws are clear on what those definitions are, but it was unclear as to whether a fishing licence could be considered under either of them.

It is not only legal definitions which can be argued in Court, but the operation of statutes themselves. In another fisheries case, *Kirby Elson v. Canada (Attorney General)*, Elson, a fisher, was considered by the Department of Fisheries and Oceans (DFO) to be fishing under a controlling agreement. A controlling agreement, as defined by the *Preserving the Independence of the Inshore Fleet in Canada's Atlantic Fisheries Policy,* is

"an agreement between a licence holder and a person, corporation or other entity that permits a person, other than the licence holder, to control or influence the licence holder's decision to submit a request to DFO for issuance of a 'replacement" licence to another fish harvester (commonly referred to as a 'licence transfer') (Government of Canada 2010)."

Elson (and his counsel) took the position that DFO was not granted the power by the *Constitution* to decide whether fishers could operate under controlling agreements or not. A deceptively simple fisheries question - whether a fisher should be able to participate in the Canadian fisheries under a controlling agreement - became an in-depth legal analysis of fish as a resource, fish as a product, the operation and history of federalism in our country, and how control over access to the fisheries is exercised by our federal government.

Without a statutorily entrenched definition (or multiple definitions) of small-scale fisheries, it will be hard for fishers, processors, marketers,

lawmakers, communities, and other stakeholders to determine what the role of small-scale fisheries in Canada should be in the context of existing Canadian fisheries. It is likely that small-scale fisheries operations, if recognized as such, will be carried out on a case-by-case basis, without being afforded the legal protection necessary for long-term success.

Legal histories

The *Fisheries Act* allows the Governor in Council and the Minister of Fisheries and Oceans to make regulations under the *Act.* There are currently 41 regulations published under the *Fisheries Act*, (Fisheries Act 1985). There are many more statutes which affect the lives of those in the fishing industry, including the *Oceans Act, 2001*, the *Marine Liability Act*, multiple provincial fish processing statutes, the *Income Tax Act*, and the *Employment Insurance Act*. Most of these also have their own sets of regulations, which further direct how fishers and other users of marine spaces have to regulate their activities.

The immense body of law governing Canada's fishing industry has been amended and rewritten many times, creating an *ad hoc* mosaic of contemporary and historical regulations. Such a body of law is intrinsically complicated, and it requires a legal perspective to unravel the past changes and additions to the law to understand how it currently operates. A legal perspective can also recognize areas in contemporary law that allow or prevent a given activity. For small-scale fisheries, this means that understanding why Canadian fisheries law has developed the way it has is necessary to develop a definition of small-scale fisheries that both works within the strictures of the law, but still has the room to grow its own niche area of operation that can adapt to future changes in fisheries statutes and regulations.

Drying Fish, Witless Bay (Photo: Newfoundland quarterly V87 No 2-Spring 1992).

Legal realities

Small-scale fisheries cannot be adequately developed without consideration of the legal realities of such systems. Legal perspectives can show us that legal realities are often discordant between those who legislate and those who experience legislation. For instance, when the *Saulnier* case was appealed to the Supreme Court of Canada, the Court recognized that treating fishing licences as if they were **not** property ignored the realities of how licences were traded within the industry (*Saulnier* 2008, para 24). This discord between laws and the realities of those who experience them can be leveraged and examined for ways to build statutory schemes for small-scale fisheries management that are cohesive in their purposes and in their effects on fisheries participants.

Likewise, the principles and policies underlying certain regulatory measures do not always reflect the **purpose** of the system which they are used to regulate. One example is the extension of employment insurance (known as unemployment insurance, at the time) ('**EI**') to fishers in 1957. This decision was not made to directly affect the operation of the fishery, but to increase the

likelihood of Liberal Party success in an upcoming federal election (Schrank 1998, p. 7).

Translating from law to language (and vice versa)

Legal perspectives can also assist with developing small-scale fisheries in Canada by drawing out the intended applications of the current legislative regime and making those purposes clear to fishery participants, researchers, stakeholders, and other marine space users.

Likewise, for a statute to have the desired effect, the goals and objectives of marine space users must support the text of a fisheries statute so that it can give effect to what such users want to achieve. In the small-scale fisheries context, this means spinning scientific knowledge, local and traditional ecological knowledge, historical and lived experiences, and respect for other marine space users' rights to access an area or a resource into a legal fabric which can clearly describe what actions small-scale fisheries participants intend to perform and when.

Applying the context to the situation

Legal professionals are trained to assist in the formation of an operational small-scale fisheries legal definition in Canadian law. Communicating with fishery participants, stakeholders, researchers, and other interest groups, the objectives and experiences of those who would participate in small-scale fisheries can be contrasted with the strictures of the current legal regime. Once it is fully understood which aspects of a defined small-scale fishery are currently regulated and which ones are not, a legal perspective can translate those same objectives and experiences into legal concepts for a fisheries governance and management perspective. The goal is not to increase the layers of regulation which apply to Canadian fisheries and their participants, but, where possible, to carve out spaces in the existing legal regime for small-scale fisheries to flourish.

One way to consider the necessity of creating these legislative spaces, and

to communicate another point on multijuralism, is to think of Indigenous ceremonial, sustenance, and moderate livelihood fisheries. Remember that Libya's definition of small-scale fisheries considers a boat of a certain size only fishing for a maximum number of days to be a participant in small-scale fishing. If such a definition were implemented in Canada, it would 'capture' some Indigenous fisheries, as well as other small commercial fisheries. Indigenous peoples and the governance of their fisheries are intrinsic to the conversation about how small-scale fisheries might continue, develop, and operate in Canada. Some questions to consider are:

- Would Indigenous nations want to be included in a small-scale fisheries regime?
- Should certain some fisheries be excluded?
- What rights are available to Indigenous fisheries as comparable to those of small-scale fisheries participants?
- What legal approaches are available to govern non-Indigenous and Indigenous small-scale fisheries simultaneously?

The answers to these questions lie in the intersection of legal perspectives, Indigenous rights, the perspective of other fishery participants, research, and governance.

Many hands make light work: Beyond a legal perspective

The Guidelines stress the need for transdisciplinary approaches throughout their contents. The preface discusses the cultural perspectives of fisheries and interfacing factors such as healthcare availability or environmental conditions. Article 11 clearly states that "*bioecological, social, cultural and economic data is necessary for decision-making in the management of small-scale fisheries*." It further states the necessity of open and transparent communication amongst small-scale fisheries stakeholders and communities, and emphasizes Indigenous peoples and their participation in such fisheries.

Principle 7, listed under Article 3.1, stresses the importance of the Rule of Law in developing small-scale fisheries within regional, national, and international contexts (FAO 2015).

In other words, a legal perspective is a necessary input for the commencement and management of small-scale fisheries, but multiple cooperating perspectives are necessary to form not just the successful and sustainable management of small-scale fisheries, but a definition of what small-scale fisheries are in the first place.

There are two hypothetical frameworks below which demonstrate the importance of varying perspectives in forming a definition for small-scale fisheries. These show how slight differences in an approach to defining small-scale fisheries can vary an operational definition. These frameworks were developed from ideal governance scenarios rooted in the theory of interactive governance. I have provided a very broad, visual definition of small-scale fisheries in these frameworks, which are guided by what small-scale fisheries should exclude as much as what it may become. Considering the emphasis this chapter places on the need for multiple perspectives, I am hesitant to unilaterally develop a legal definition of small-scale fisheries here.

Example 1

In this first framework, the parties involved in developing small-scale fisheries have agreed upon taking an ecosystem-based approach to small-scale fisheries. This hypothetical coalition has agreed that Indigenous fisheries have a *sui generis* status and individual needs for operation and regulation. Indigenous fisheries would continue to employ and develop their own regulatory systems, while small-scale fisheries develop independently and directly interact with pre-established, smaller commercial fisheries. Inshore and nearshore fisheries, depending on their target stocks, quotas, etc., may be considered small-scale fisheries under this framework. This framework defines small-scale fisheries as commercial systems, possibly as subsets of our current commercial fishery regimes.

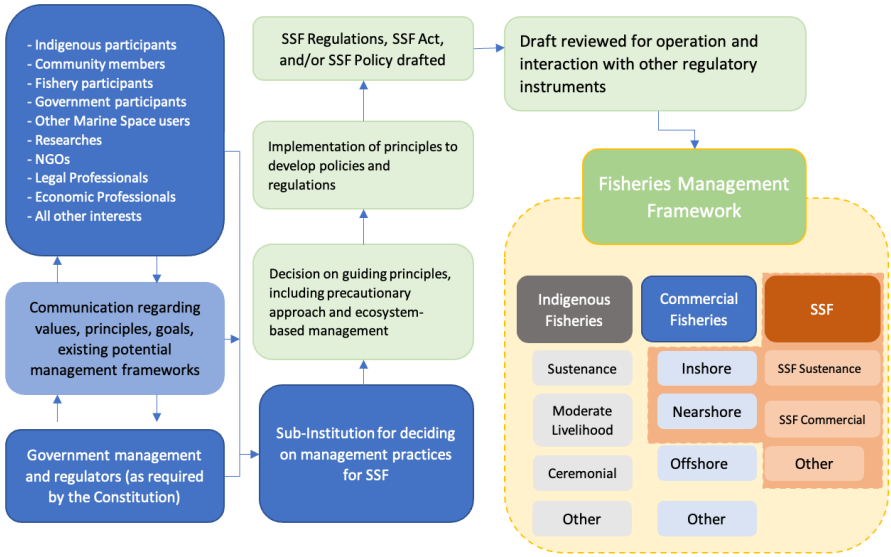

Figure 1. Hypothetical Framework 1.

Example 2

This framework sees our coalition approaching small-scale fisheries with an emphasis on community viability, community-based management, and relies upon principles of adjacency and local or regional markets. Here, the fisheries framework changes. Instead of developing and interacting directly with commercial fisheries, independent small-scale fisheries are defined based on community adjacency and needs. The regulatory framework for this model of small-scale fisheries can be used to support Indigenous fisheries, or take its cues from the operation of pre-existing Indigenous fisheries and principles.

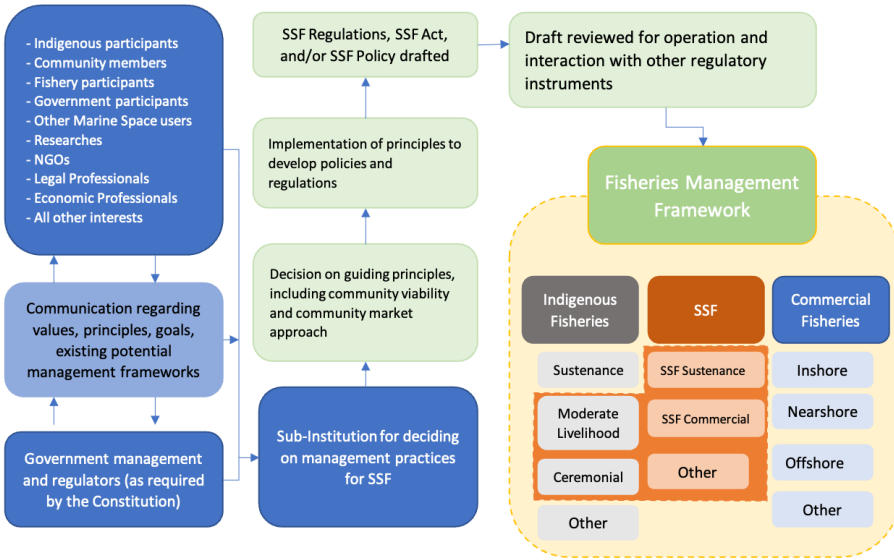

Figure 2. Hypothetical Framework 2.

Continuing contributions: The role of a legal perspective in the face of change

A legal perspective brings stability to small-scale fisheries systems in the face of socio-ecological change, and provides a necessary ability to communicate the strictures and opportunities provided by Canadian fisheries law to participants and stakeholders in Canadian small-scale fisheries. However, a legal perspective, like any other perspective, comes with its pitfalls. If the legal perspective takes too formal an approach to the development of small-scale fisheries, then the relationship between small-scale fisheries governance and the small-scale fisheries system being governed will be designed with built-in friction. Commercial, legal, and lived realities will not be fully treated by the law. On the other hand, too idealistic an approach may result in small-scale fisheries governance regime which must be consistently redrafted to ensure its compliance with pre-existing Canadian laws, long-

term operability, and resistance to challenges from parties opposed to small-scale fisheries operations. This extends the timeline for small-scale fisheries to be implemented, and could reduce capacity for small-scale fisheries governance to operate efficiently within the Canadian legal system.

The balance which must be struck by legal perspectives contributing to the development of Canadian small-scale fisheries is best met by input from other contributing perspectives, such as those from fisheries participants, Indigenous participants, researchers, government, stakeholders, and community members.

In summary

Small-scale fisheries are ideal subjects for a legal fishery regime. Because of Canada's legal system and history of laws, a domestic definition of small-scale fisheries - or multiple definitions of small-scale fisheries - is necessary to allow the practice to flourish without interruption or contention from other laws and regulations which aim to govern other kinds of fisheries. Such a definition, or collection thereof, can also provide staying power in the shifting currents of Canadian law as the law develops over time. Establishing a forward-looking definition, developed to provide stability and success for fishers, fish stocks, and communities, can help anchor small-scale fisheries as a legal concept, and may assist in preventing undue erosion or re-interpretation of small-scale fisheries over time. To avoid a definition of small-scale fisheries becoming a hindrance rather than a boon to small-scale fisheries progress, an operational definition of small-scale fisheries is best considered in a way which makes it respondent to the varying needs of diverse fisheries participants and stakeholders. Defining small-scale fisheries in this context is directly assisted by employing legal perspectives throughout the small-scale fisheries development process.

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