

## Why legal and policy analysis?

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# Why legal and policy analysis?

Since the adoption of the Voluntary Guidelines for Securing Sustainable Small-Scale Fisheries in the Context of Food Security and Poverty Eradication (SSF Guidelines) [1] at the 31st session of the Committee on Fisheries (COFI) of the United Nations Food and Agriculture Organization (FAO) in June 2014, a big question remains about whether the SSF Guidelines are being implemented, how and to what outcomes. The earlier study to gauge where countries were, with respect to the readiness to implement this instrument [2], revealed that, among the 32 case study countries, a few countries had necessary conditions to take action, while the majority still needed to build the required capacity and the public awareness to support the implementation.

The governance of small-scale fisheries is a 'wicked problem', due to the diversity, complexity, and dynamics of the fisheries systems [3]. It often has to deal with inconsistent ways of interpreting, understanding, recognizing, attempting to solve and tackling fisheries issues and irreconcilable conflicts within and across fisheries. Within the range of social actors performing in these coastal and fisheries governance structures, legal practitioners and policy-makers have played and continue to assume a crucial role through the development of legislation and policies for fisheries [4]. Legal and policy aspects of small-scale fisheries governance, in accordance

with the orientation set forth in the SSF Guidelines, remain largely under-examined. From the process of creating effective governing institutions and appropriate mechanisms, grounded on an agreed-upon set of principles and rules, to ensuring their monitoring and compliance, a much better understanding is required, in order to make the SSF Guidelines work at all levels of governance.

The SSF Guidelines are rich in context, with detailed action-guiding texts that might be seen as a burden and an added responsibility for governments that are already under-resourced. Further, the social, economic, political and geographic space where small-scale fisheries operate is often contested, with tension and conflict between various fisheries stakeholder groups, common in many jurisdictions, and lack of support from governments. Such conditions make up for an unacceptable, yet apparently 'natural' attitude of countries, which do not do much about the SSF Guidelines on the basis that they are voluntary and not mandatory. This is in fact a misguided assumption because the SSF Guidelines are part of the set of international fisheries instruments, the implementation of which elevates countries' reputation and brings inherent benefits to their peoples, especially in developing countries where small-scale fisheries mostly operate. This recognition in the international fora can attract the interest of foreign stakeholders

[1] FAO, Report of the Thirty-first Session of the FAO Committee on Fisheries (9-13 June 2014 FIPI/R1101/2015, 2014); Voluntary Guidelines for Securing Sustainable Small-scale fisheries in the context of food security and poverty eradication (adopted at the 31st Session of the Committee on Fisheries, 9-13 June 2014) 18p.

[2] Jentoft S., Chuenpagdee, R., Barragán-Paladines, M.J., Franz, N. (editors) (2017). The Small-Scale Fisheries Guidelines: Global Implementation. MARE Publication Series 14, Springer, Switzerland.

[3] S. Jentoft and R. Chuenpagdee, 'Fisheries and coastal governance as a wicked problem' (2009) 33 Marine Policy 553.

[4] B. Kuemlangan, 'Legal Aspects' in K. L. Cochrane and S. M. Garcia (eds), A Fishery Manager's Guidebook (FAO and Blackwell Publishing 2009).

to support these countries through financial resources, technology-transfer and capacity-building whilst contributing to improving the implementation of international standards in other countries through cooperation [5].

Indifference towards the SSF Guidelines risks jeopardizing the longstanding and collective action preceding its adoption. They represent the outcomes of an effort concurrently pushed forward by several countries, governmental and non-governmental agencies, researchers and small-scale fishers organizations, who bond together to recognize the important contribution of small-scale fisheries and the need to provide them with protection, in terms of rights, access to resources, gender equality, and work safety, among other themes. The SSF Guidelines should not be left aside for no apparent reason, and doing so is not only a missed opportunity, but a step backwards in respect of the advancements already made.

This book is another wake-up call to countries around the world and especially to the developing countries whose millions of livelihoods depend on small-scale fisheries, to react to the need of implementing the SSF Guidelines in their own jurisdictions. Its purpose is to encourage countries to take the required steps in appraising the extent to which the current fisheries legislation and policies are applicable for small-scale fisheries governance, and in expanding this analysis to other instruments that are not fisheries-specific, but which also provide fundamental rights and duties of small-scale fishers, including the countries' Constitutions [6]. Such steps can begin with an evaluation of relevant legal and policy instruments against the principles and recommendations of the SSF Guidelines, on the basis of which it is possible to determine what needs to be done to facilitate and ensure the SSF Guidelines implementation for sustainable small-scale fisheries.

[5] E. Morgera and M. Ntona, 'Linking small-scale fisheries to international obligations on marine technology transfer' (2018) 93 Marine Policy 295; D. Diz, E. Morgera and M. Wilson, Sharing the Benefits of Sustainable Fisheries: From Global to Local Legal Approaches to Marine Ecosystem Services for Poverty Alleviation (Science - Policy Analysis) (Science Policy Working Paper No 7, 2017).

[6] As preliminarily done for Brazil in J. Nakamura and F. Hazin, 'Assessing the Brazilian Federal Fisheries Law and Policy in light of the Voluntary Guidelines for Securing Sustainable Small-scale Fisheries' (2020) 113 Marine Policy 1.

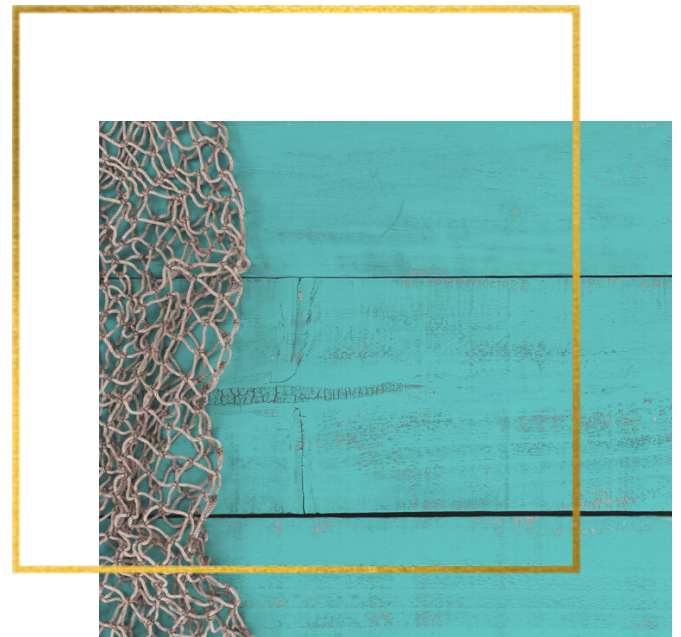
[4] B. Kuemlangan, 'Legal Aspects' in K. L. Cochrane and S. M. Garcia (eds), A Fishery Manager's Guidebook (FAO and Blackwell Publishing 2009).



# A rapid appraisal template

Before embarking on the appraisal, there are a couple of points to keep in mind. First, it is important to recognize that there are different legal systems within the countries studied, ranging from civil law, common law, to mixed types of legal systems. There are also many types of legal and policy instruments that countries employed. Some are legally binding, which include the fundamental law of a country, usually the Constitution, as well as primary legislations (e.g. acts, laws, statutes, etc.) and secondary legislation (e.g. regulations, decrees, orders, etc.). Others are non-formally binding which include policies, strategies and other plans. In addition to these formal instruments, there are other customary rules and practices, which fall under informal legal systems. Next, many of the legal and policy instruments are related to fisheries in general, some are specific to small-scale fisheries, while others are non-fisheries specific, meaning that they relate to other subjects like human rights, climate and gender. It is best to be as inclusive as possible when looking into legal and policy frameworks for small-scale fisheries, given that small-scale fisheries are closely connected to communities, and thus many of the societal laws, rules and customary practices are highly relevant to the protection and wellbeing of small-scale fishers and their families. Finally, the specific context about small-scale fisheries in each country is important to capture as it helps to enhance the understanding of their situation and conditions. Note also that the appraisal should apply not only the harvest part of the fish chain, but also the post-harvest.

The appraisal framework is organized into five main sections. In addition to the 'rapid' appraisal part, which is mostly a check-list, countries are encouraged to provide details about the legal and policy instruments, including the name of the legislation and year, and other relevant information, including web-based sources when available, to enrich the knowledge about the governance system.



# A rapid appraisal template

## (1) What are small-scale fisheries?

Small-scale fisheries are referred to by many terms, such as artisanal, subsistence, semi-industrial, customary, coastal, traditional, indigenous, aboriginal, and tribal. Many countries have official definitions for small-scale fisheries in order to regulate and manage them. Here we are looking at whether definition (formal or informal) exists, under what legal instrument or only in policy document, and how it is applied.

## (2) How are they governed and by who?

The aim is to sketch what the fisheries governing system looks like, starting from indicating the type(s) of the legal system (e.g. common law, civil law, customary law), specifying the actual legislation and policies, to providing details about government entities responsible for fisheries management and their mandates.

## (3) What principles govern small-scale fisheries?

Here we look at the following key principles in the SSF Guidelines and specify whether there are legislations and/or policies that align well with them.

- Human rights & dignity
- Respect of cultures
- Non-discrimination
- Gender equality & equity
- Equity & equality
- Consultation & participation
- Rule of law
- Transparency
- Accountability
- Economic, social & environmental sustainability
- Ecosystem approach to fisheries
- Social responsibility
- Other SSF relevant principles

# A rapid appraisal template

## (4) What legal and policy instruments are specific to small-scale fisheries?

Some of the legal and policy instruments are specific to small-scale fisheries, while others are not so. The SSF Guidelines include many of the key areas where attentions to small-scale fisheries are required (see below) and specific provisions may be necessary. This information helps identify strengths and gaps in the current governance framework.

<ul style="list-style-type: none"><li>• Tenure and related rights for SSF</li><li>• Exclusive fishing area or priority access to fishery resources for SSF</li><li>• Registration requirements for SSF</li><li>• MCS measures and others aimed to deter, prevent and eliminate IUU applying to SSF</li><li>• Social development, employment and decent work for SSF along the value chain</li><li>• Labour rights or social benefits for SSF along the value chain</li><li>• Capacity building program for SSF</li></ul>	<ul style="list-style-type: none"><li>• Recognition of SSF as professional workers, along the value chain</li><li>• Responsible trade in fish and certification of fishery products from SSF, including sanitary and safety standards for domestic vs. export markets</li><li>• Legal protection of women in SSF, along the value chain</li><li>• Special treatment to women in SSF</li><li>• Protection of SSF from disaster risks/ climate change, and/or recognition of SSF vulnerability in disaster risk/climate change policies and strategies</li></ul>
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## (5) What are opportunities for interaction and participation?

The SSF Guidelines encourage participation of fisheries stakeholders in policy and decision-making, especially when co-management is implemented. Mechanisms and opportunities need to be provided, however, to encourage meaningful engagement. Often, they depend on the type of interaction between stakeholders, including among different government entities. Strengthening interactions might be the first necessary step.

# Baseline and comparison

The rapid appraisal of the legal and policy frameworks is part of the 'step zero', serving many purposes. It provides the baseline for characterizing the governing system. Since it can be regularly updated, it can enable monitoring of advancement towards the implementation of the SSF Guidelines, for instance, when a better alignment of key principles emerges. It can also be seen as a tool to communicate and improve interaction among fisheries stakeholders, enhancing understanding about the premise for certain rules and regulations and fostering shared vision for sustainable small-scale fisheries. Sharing of lessons and exchanging of knowledge between countries is also possible when the templates are compared.

