

Exploring water tenure & the benefits of a water tenure approach

Stephen Hodgson,
Environmental Lawyer

Introduction

- Tenure arrangements determine how people, communities and organizations gain access to the use of natural resources. Inadequate and insecure tenure arrangements increase vulnerability, hunger and poverty and the risk of conflict while also constraining economic growth: people are usually reluctant to invest without security of tenure - Food & Agriculture Organization of the United Nations-FAO
- So why is it that in a world with increasing pressure on water resources is there is so little discussion of water tenure?

We don't do tenure... we have water rights !

Background

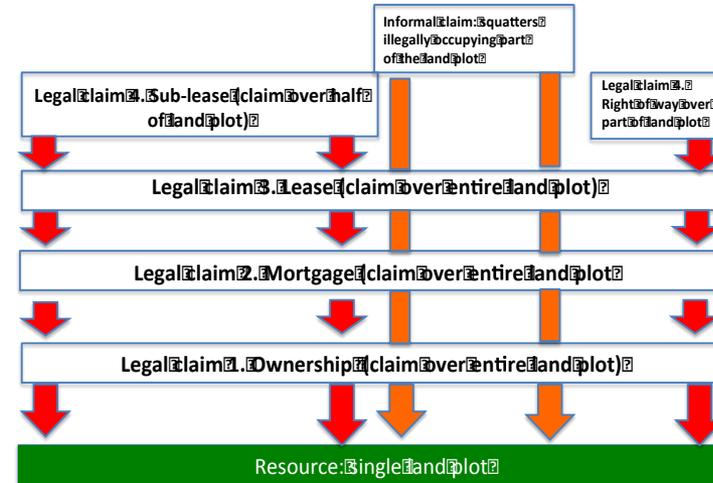
- This presentation is based on work undertaken for FAO
- It was initiated by the development of the 2012 Voluntary Guidelines on the Governance of Land, Forests & Fisheries (VGGT)
- The VGGT seek to set out principles and internationally accepted standards for responsible practices in order to provide a framework that actors can use when developing their own strategies, policies, legislation and programs
- Supported with a series of subject-specific technical guidelines this soft law approach has been widely pioneered by FAO
- Original intention was to include water in the VGGT and some preliminary steps
- Eventually water was omitted for a number of reasons...
- .. but subsequent follow up by FAO in the a series of consultations the preparation of three case studies and a forthcoming paper called *Thinking about water tenure*

What is tenure?

- Most commonly used in connection with land
- Many definitions - a succinct definition promoted by FAO is:
 - ..the relationship, whether legally or customarily defined between people, as individuals or groups, with respect to land.
- Key points to note:
 - Not just the relationship between people and the resource but between people and people and the resource. In other words tenure is a social construct
 - Concerns the rights of individuals and groups
 - Applies to relationships under formal law and customary or local law

Elements of land tenure

- Formal law
 - Ownership rights
 - Leasehold rights
 - Mortgages
 - Rights of way/servitudes
 - Licences
 - Squatters/informal settlement
 - Relationship to local law
 - How rights are created, transferred, recorded etc.
- Customary or local law
 - Not always ancient
 - Complex interaction with formal law
- Scope of land tenure: beyond law & anthropology
 - Economics, sociology, surveying, political science..



Conceptualizing water tenure

- Proposed working definition (based on FAO's definition of land tenure):
The relationship, whether legally or customarily defined between people, as individuals or groups, with respect to water resources
- NB water resources and not water to avoid confusion with emerging human right to water and water supply controversies
- Same broad scope

We don't do tenure... we have water rights !

But what do we actually mean by 'water rights' (never mind the emerging human right to water..)

- **Traditional formal water rights** based around **land tenure** (riparian rights, capture, private waters)?
- **Traditional formal water rights** that are based on **use** not land tenure (prior appropriation)?
- **Modern permit-based formal** water rights (that create property rights albeit use rights)?
- **Short-term regulatory licences** (that do not)?
- Water rights created on the basis of **bulk water supply contracts**?
- Commonhld water rights that arise from **membership of a water user organisation** or other community based mechanism?
- Water rights created on the basis of **investment contracts** with foreign investment protection?
- **De minimis** or **small scale use rights**?
- Water rights created on the basis of **customary** or **local law**?

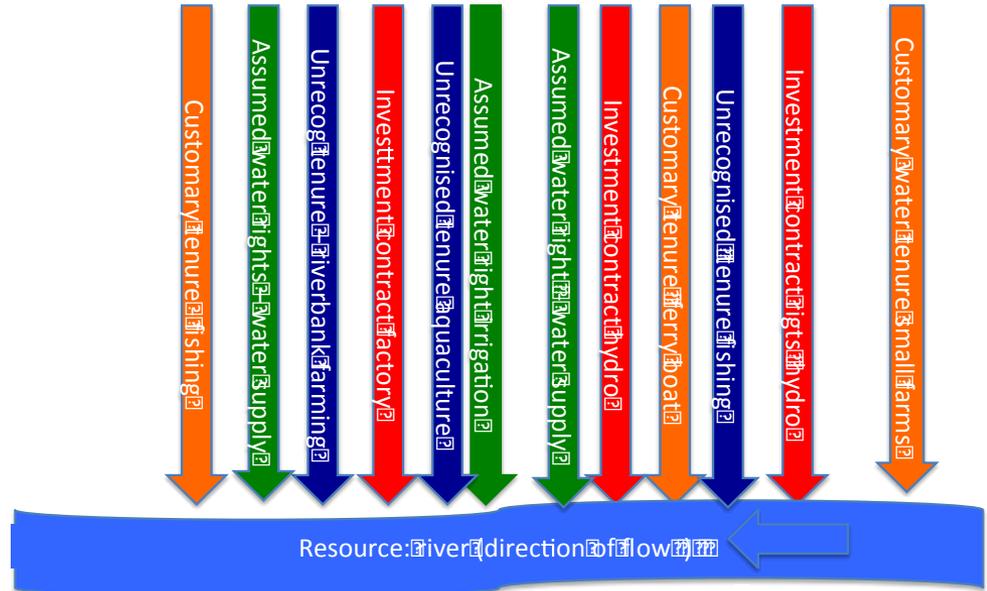
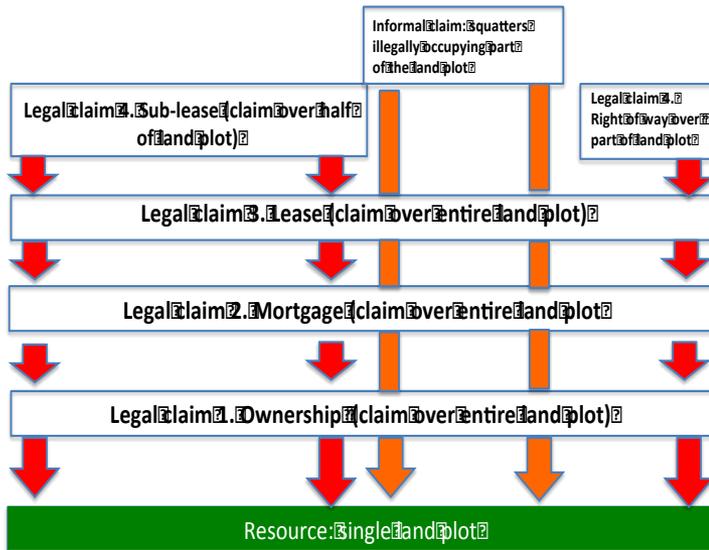
...and other kinds of relationship with water resources
not (so obviously) defined in terms of rights

- Agency control
- ‘Informal’ water tenure – illegal
- ‘Informal’ water tenure – tolerated
- Religious law
- Assumed water rights
- Impossible water rights
- Unrecognized tenure

So is it really tenure?

Differences include

- The nature of the resources (solid/fluid, variability of water resources over time)
- Measurement and demarcation
- Cannot occupy water
- Different nature of overlapping claims... but maybe this suggests that tenure is more important for water than for land?



Water tenure and water use

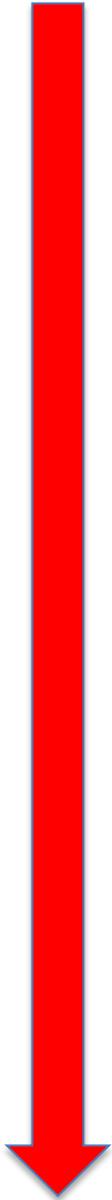
- Water tenure is indifferent to water use (or rather the purpose for which water is used)
- Nevertheless different types of water user will tend to depend on specific types of tenure
- Possibility of mapping use types to tenure type in a given context
- This list of use types is by no means definitive (e.g. untreated drinking water from natural sources is not included)
- Possibility of comparing tenure & use by objective criteria: security, equity, sustainability, efficiency

	Water supply (network)	Agriculture	Industry	Hydropower	Environment	Navigation	Inland fisheries/ livelihoods	Recreation/ landscape
Tenure relationships defined by formal law								
Traditional formal water rights	✗	✓	Unlikely	✗	✓	✗	Unlikely	✗
Modern formal water rights	✓	✓	✓	✓	✗	✗	✗	✗
Regulatory licensing	Unlikely	✓	Unlikely	✗	✓	✓	✗	✓
Agency control	✓	✓	✓	✓	✗	✗	✗	✗
Water supply contract	✓	✓	✓	✗	✗	✗	✗	✗
Commonhold tenure	✗	✓	✗	✗	✗	✗	✗	✗
Investment contract	✓	✓	✓	✓	✗	✗	✗	✗
<i>De minimis</i> use	✗	✗	✗	✗	✗	✗	✗	✗
Regulated free use	✗	✓	✗	✗	✗	✓	✗	✗
Reserve/ minimum flow	✗	✗	✗	✗	✓	✓	✓	✓
Tenure relationships not defined by formal law								
Customary water tenure	✗	✓	✗	✗	✓	✓	✓	✓
Religious law	✗	✓	✗	✗	✓	✗	✗	✓
Informal tenure	✗	✓	✓	✗	✗	✗	✓	✗
Assumed or impossible tenure	✓	✓	✗	✗	✗	✗	✗	✗
Unrecognised tenure	✗	✗	✗	✗	✗	✓	✓	✓

Security of (water) tenure

- For water users: investment & protection
- For water managers: constraint to allocation & re-allocation
- Resource security
- Legal security
 - Duration
 - Ease of enforcement
 - Quantification/measurement
 - Implementation of legislation
 - Access to effective formal enforcement mechanisms
- Water security is not the same as water tenure security..

Security



Type	Legal security	Comment
Investment contract	Maximum security under international law	Confidentiality issues
Modern formal water right	Most secure/sophisticated type of tenure	Depends on implementation
Agency control	Very strong for agency..	
Water supply contract	Depends on duration	
Traditional formal water right	Legally very strong	Difficult to enforce viz resource
Commonhold tenure	Can be very strong	Depends on functionality of WUO etc
Regulated free use	Questionable	Depends on implementation by others
Reserve/minimum flow	Questionable	Depends on implementation by others
<i>De minimis use</i>	Questionable	How to enforce?
Customary tenure	Internally – high. Externally depends on water law	
Informal tenure	In theory none.	In practice may be tolerated
Assumed/impossible tenure	None	
Unrecognized tenure	None	Not recognised in water laws

Scenario ‘Tenuristan’

- No system of modern formal water rights
- Largely unimplemented regulatory licensing regime.
- Irrigation infrastructure is operated and maintained by an irrigation agency that relies on its rights of agency control to build irrigation systems and abstract water resources.
- Agency in turn supplies water on the basis of annual contracts to WUOs that exist mainly on paper.
- Agency also supplies water to industry and large farms but in these cases on the basis of long-term contracts.
- No provision for the setting of minimum flow requirements
- Extensive use of long term investment contracts with foreign investors

	Water supply (traditional)	Water supply (network)	Agriculture (small/medium scale)	Agriculture (Large scale)	Industry	Hydropower	Environment	Navigation	Inland fisheries/ livelihoods	Recreation/ landscape
Tenure relationships defined by formal law										
Traditional formal water rights			Weak		Weak					
Regulatory licensing			Weak	Weak	Weak			Weak		Weak
Agency control			Weak	Strong	Strong	Strong				
Water supply contract			Weak	Strong	Strong					
Commonhold tenure			Weak							
Investment contract		Strong		Strong	Strong	Strong				
<i>De minimis</i> use	Weak			Weak						
Regulated free use			Weak	Weak						
Tenure relationships not defined by formal law										
Customary water tenure	Weak		Weak	Weak			None	None	None	None
Religious law	Weak			Weak			None			None
Informal tenure			None	Weak	Weak				None	
Assumed or impossible tenure	None	None	None	None						
Unrecognised tenure	None							None	None	None

Water tenure and governance

- Water tenure as just an element of water governance...
- ..Or water tenure as central to water governance

Peace, bread and water!

The political economy angle

- Discussions on water governance usually lead to broader governance questions in the state concerned
- There is a clear historic link between land tenure and political reform/activity
- Water has tended to play a lesser role (although watch the movie Chinatown)
- But in terms of water governance/water reform, water tenure and its political economy implications should not be ignored
- Water tenure informs and explains the power dynamics in the sector
- All reforms result in winners and losers
- Put another way sector reforms that do not take account of water tenure will fail

Water... flows uphill to money sucked uphill to politics...

What is (or what could be) a 'water tenure approach'?

- Look at the full picture holistically from all relevant angles (hydrology, law, anthropology, economics, political science, sociology etc.)
- Non-prescriptive nature allows for better understanding of claims and power dynamics
- More sensitive vocabulary
- Bottom up - focus on users and their needs

Conclusions

- Water tenure exists, has always existed and will always exist even if we choose not to recognize it
- For water users it is the only thing that matters
- Sector reforms that fail to take account of water tenure will continue to underperform
- The real question is not ‘should we take water tenure seriously’ but rather, at a time when business as usual is not an option, ‘can we afford not to pay attention to water tenure?’

The end