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Unpacking water tenure for improved food security and sustainable development



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Foreword

Increasing understanding of the role that secure water resources tenure plays in ensuring sustainable livelihoods, just resource governance, environmental protection, and sustainable economic development has led the Food and Agriculture Organization of the United Nations (FAO) to re-ignite the debate that had begun in 2012, when the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests (VGGT) were adopted by FAO, and that had culminated in 2016 with the publication of the FAO seminal study “Exploring the concept of water tenure”. Picking up from where that FAO publication had left off, an Expert Roundtable on Water Tenure was convened by FAO in Rome, in December 2019, to begin the process of developing a common conceptualization of water tenure and its scope within the broader context of water resources and tenure governance. Strengthening the position of individuals and communities within the political economy of water resources governance, particularly for the rural poor whose livelihoods and food security depend on secure and equitable access to - water and land - was central to the debates.

This report includes the Policy Brief and the Expert Roundtable Summary that explored the bundle of water-related rights approach to un-packing the concept and the practical ramifications of water tenure. This report is based on recent research and analysis that have helped to identify the core elements of water tenure based on data demonstrating how water tenure systems are legally recognized at the national level and how they function across diverse countries.

It is hoped this report will be instrumental to generating a policy-relevant debate that, in the event, would inspire and inform legislative reforms for increased water tenure security for the benefit of all segments of the resource users’ population in general, and of the rural poor and of traditional communities in particular, in context with food security, sustainable development, and climate resilience.



Maria Helena Semedo
Deputy Director-General
Food and Agriculture Organization of the United Nations

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FAO is grateful to the Dicastry for Integral Human Development, The Holy See for recognizing the importance of this undertaking.

An important review of this report was conducted by Stefano Burchi of Associazione internazionale per il diritto delle acque – AIDA, Benjamin Kiersch, Ann-Kristin Roth, and Sasha Koo-Oshima with supporting contributions from FAO experts Javier Molina-Cruz, Blaise Kuemlangan, Benjamin Davis, Michael Clark, Dubravka Bojic, Aurelie Bres, Domitille Vallée, Francesca Romano, Ibrahima Diallo, Jean-Maurice Durand, Jippe Hoogeveen, Sally Bunning, Patricia Mejias-Moreno, Ruhiza Boroto, Maher Salman, Safia Aggarwal, Ines Beernaerts, Julia Magot, Valerie Johnson, Livia Peiser, Chris Hegadorn, Charlotte Alcouffe, and Simon Funge-Smith.

The project was conceived and directed by Sasha Koo-Oshima, the Deputy Director of Land and Water Division and, under the auspices of Eduardo Mansur, Director of Land and Water Division. Administrative, publication, and technical support was provided by Sofia Ramirez-Fionda, Maria Arnal, and James Morgan.

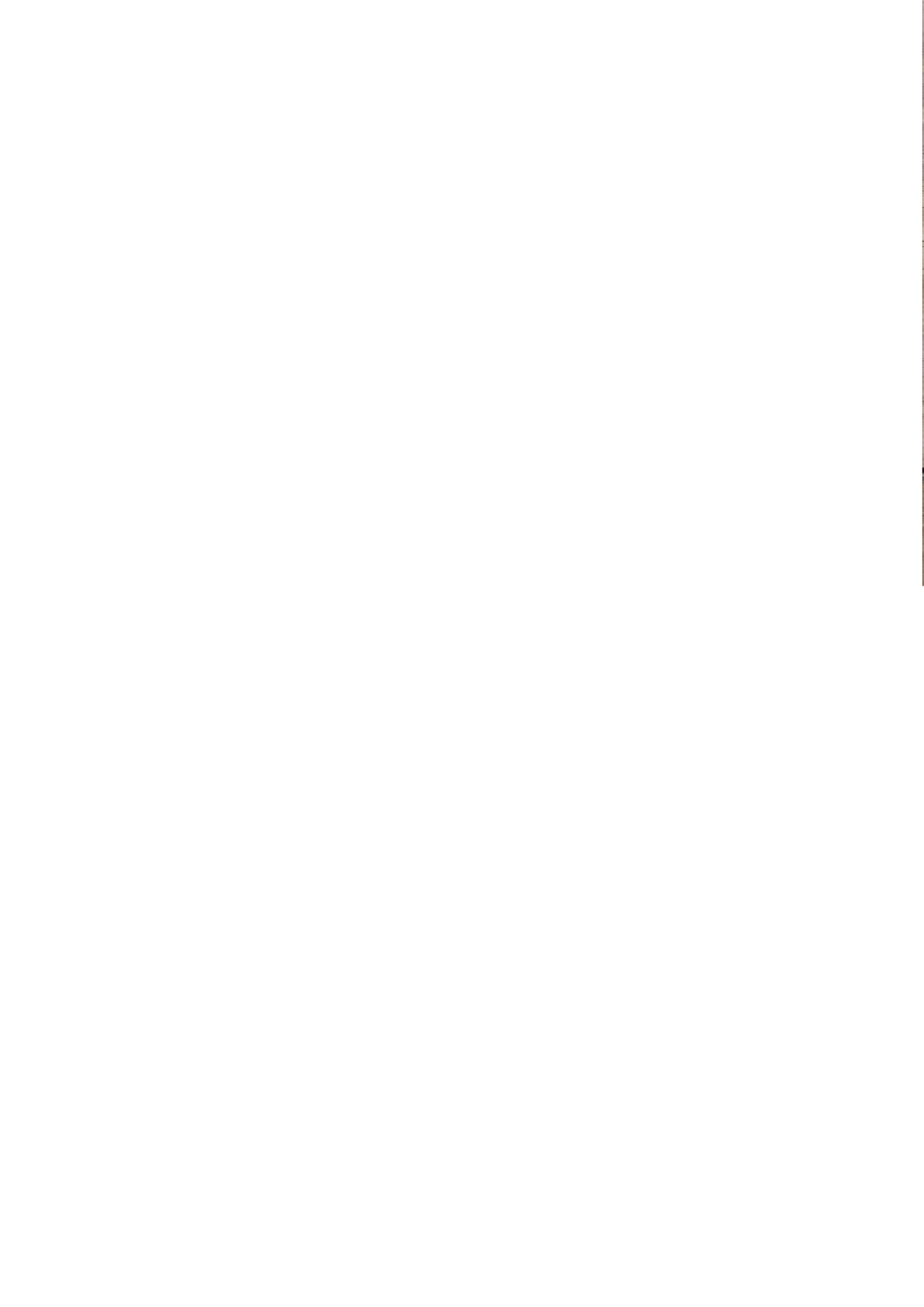


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Section 1

Policy brief on water tenure

JUNE 2020





Why water tenure?

Freshwater – including both surface and groundwater – is essential to public health, food security, livelihoods, and healthy and resilient ecosystems. Yet, approximately 2.2 billion people globally continue to lack access to safely managed drinking water and over 2 billion people live in conditions of high water stress. These challenges are, in large part, attributable to failures in water governance: the rules, practices, and processes through which decisions about water management and allocation are made and implemented and by which decision-makers are held accountable. A key aspect of water governance is water tenure, which can be defined as the relationship, whether legally or customarily defined, between people, as individuals or groups, with respect to water resources.

Secure tenure plays a critical role in ensuring sustainable livelihoods, good governance, environmental protection, and sustainable economic development. Over the past several years, there has been an increasing international recognition of the ways in which secure tenure underpins equitable and sustainable development. This, in turn, has led to tangible progress in many countries toward the legal recognition and protection of land, forest and fisheries rights. The development and implementation of principles and tools to guide policy and legal reforms, notably the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests (VGGT), have also provided an important basis for building policy consensus on what constitutes responsible governance of tenure. A key aspect of this international consensus has been the critical importance of prioritizing the rights of the rural poor, whose livelihoods and food security depend on secure and equitable access to land and natural resources.

Despite progress in improving the security and equity of land, forest, and fisheries tenure, water tenure has received far less attention and its conceptualization remains nascent. Early discussions on defining water tenure foundered on the unique aspects of water as a fugitive, inherently shared, and essentially public resource, which make it difficult to conceptualize water tenure in the same way that tenure is framed for its terrestrial counterparts.

Nevertheless, it is possible to articulate – both conceptually and based on legislative and customary practice – a core set of water-related rights that comprise the diverse water tenure regimes found around the world. Taking this “bundle of rights” approach enables countries to identify areas for harmonization across the water, land, forest, fisheries, and other key resource sector legislation. This, in turn, provides an important basis for improved, integrated, and more equitable land and water governance.

Recent research and analysis have helped to identify the core elements of water tenure based on data demonstrating how water tenure systems are legally recognized at the national level and how they function across diverse countries. This work has highlighted the legal interdependencies across water, land, forest, and other resource tenure systems. It has also unpacked how those interdependencies shape the equitable and sustainable use, management, and development of both terrestrial and freshwater resources and highlighted the gaps between what is formally required under law and what happens in practice. These findings indicate a strong need for water (and other sectoral) policies and legislation that better reflect the practical needs and realities of both governments and water users. Water tenure security is essential in enabling sustainable livelihoods, equitable economic development, and climate resilience—particularly for indigenous peoples, rural communities, and other vulnerable populations. There is thus a critical need to advance the concept of water tenure and clarify the roles it should play in both national water and tenure policy agendas to achieve the Sustainable Development Goals (SDGs).



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Defining water tenure

Water tenure is both a social and a legal construct. It comprises the diverse legislative and customary systems that shape how various stakeholders – whether as individuals or groups – relate to one another in their use of and impacts on water resources. In doing so, water tenure captures how water is actually allocated and used at multiple scales.

Water Tenure is the relationship, whether legally or customarily defined, between people, as individuals or groups, with respect to water resources.

Water tenure is a critical component of water governance, which comprises the political, legal, social, economic, and administrative systems that determine how water is managed. Water governance frameworks control decision-making with respect to water resource development, allocation, and management. Within water governance frameworks, water tenure systems include the rights and rules governing those rights, which determine how individuals and groups are able to use various freshwater resources, for how long, under what circumstances, and how they relate to other users. These rights and rules can emanate from legislation, regulations, decrees, and judicial decisions, as well as from customary and religious laws and practices. De facto water tenure systems may also exist outside of both legislative and customary systems by virtue of the failure of formal water governance agencies to enforce existing legislative requirements, creating a further level of complexity.

At the center of most water tenure systems is a core group, or bundle, of rights that constitute the fundamental elements of peoples' relationship with their water resources and with each other in relation to freshwater resources. Rights to use, manage, and

develop water, among others, are created and protected by legislative and customary frameworks which may or may not be aligned. The ways in which the various rights within the bundle are assigned and enforced shapes both the quality and security of water tenure regimes. While the bundle-of-rights approach to tenure was initially developed to apply to terrestrial resources, it can be tailored to apply in the freshwater context.

There are some nuanced ways that the nature of water shapes specific water tenure rights. For example, water is a common pool, fugitive resource that flows across jurisdictional and property lines and across ecosystems. While some countries continue to enable private rights to water, the vast majority of modern water laws reflect a balance of public and private property rights, recognizing water as a “public trust” to be held by the government or the citizens of a country as a whole and administered for the good of all. These unique characteristics of water as a public and essentially shared resource require that tenure rights be adapted accordingly. For example, legally recognized rights to exclude third parties from water resources often cannot be absolute, as it is often shared among many users. However, there are many ways in which water tenure holders can legally prevent third parties from polluting, over-abstracting or otherwise impacting the resource over which they hold tenure, resulting in a modified exclusion right.

Understanding the various ways in which rights are bundled to create water tenure regimes for various individuals and groups (including communities) can help governments and other stakeholders be more strategic in aligning what is actually happening on the ground with national policies designed to protect both water users and the resource itself.

Distinguishing water tenure rights and the human right to water

The water rights that comprise water tenure should not be confused with the human right to water, which was recognized by the United Nations General Assembly in 2010 as entitling every person to “sufficient, safe, acceptable, physically accessible, and affordable water for personal and domestic uses.” Over time, the definition of the human right to water has been elaborated (notably through General Comment 15 of the UN General Assembly) and included in both international treaties and national constitutions and legislation as a justiciable right.

Where it is legally recognized, the human right to water establishes an important legal basis for improved and more secure water tenure for all users by requiring equitable access to water for basic human (domestic) needs. Moreover, within the context of a human rights-based approach to development, the human right to water must be seen as integral to the realization of all human rights, including the right to life, food, and development. Thus, legal recognition of the human right to water could arguably also form the basis for ensuring water tenure rights for livelihoods and sustainable development. As such, the right human right to water should not be confused with the rights constituting the bundle that form water tenure regimes, but rather a related and clearly distinguished right.

It is also important to note that water tenure is often linked to or even predicated on land or forest rights. While contemporary water laws tend to de-couple water rights from land tenure, the land/water nexus persists in many ways and can have an important impact on the realization and security of the various water rights, particularly those constituting the customary water tenure of traditional and other rural communities. For example, water laws may not recognize or acknowledge provisions in land legislation that create water rights on customary lands. This can undermine the security of those water rights, opening them to legal challenge under the conflicting legislative requirements. An integrated, tenure rights-based approach seeks to unpack this relationship between rights to water, land, and other terrestrial resources, helping identify gaps and synergies across sectoral legislation or practices and enabling a more integrated approach that promotes inter-sectoral harmonization. An important step in further defining water tenure will be to better understand the various ways in which the land-water nexus shapes the recognition and protection of various water tenure regimes, particularly of customary water tenure practiced by traditional communities, as well as the opportunities the nexus poses for more integrated and sustainable approaches to terrestrial and freshwater resource management and development.

THE BUNDLE OF RIGHTS

Defining water tenure using a bundle-of-rights approach begs the question: which rights? Recent work by the Rights and Resources Initiative (RRI) and the Environmental Law Institute (ELI) has focused on this question in the context of community-based water tenure, which comprises those water rights that are essential to communities for food security, livelihoods, climate resilience, and economic advancement. (RRI and ELI, 2020.) This approach is grounded in decades of work on tenure of common pool resources defining resource tenure in terms of various bundles of rights. (Schlager and Ostrom, 1992.) The bundle of rights used in this work is aligned with the rights that have been broadly accepted as relevant to land and forest tenure in order to enable meaningful cross-sectoral comparison and assessment; it is also carefully tailored to the inherently unique aspects of water as a resource. This general approach was validated by a group of experts participating in the first Expert Roundtable on Water Tenure under the auspices of the FAO in December 2019 and would benefit from further consultation with governments and other stakeholders to refine the approach, popularize the approach, and support its application.

A preliminary typology for the categories of rights included in the bundle, reviewed and validated by FAO's water tenure expert group, is briefly described below.

Use rights

The right to abstract and use water is perhaps the most central right in the bundle that constitutes water tenure. Water use rights can be divided further by type of use (e.g., domestic uses, livelihoods uses, agricultural uses, commercial uses, instream or environmental uses, rights to return water to the resource, and religious and cultural uses) to provide a clearer picture of how water tenure regimes enable or restrict various use rights.

Exclusion rights

The right to exclude others ensures that rights holders have the legal authority to protect their water rights and territorial water resources from capture or abuse by third parties. There are limitations on exclusion rights. Because water is a fugitive and shared resource, it is often subject to overlapping claims. Moreover, water rights regimes are

often predicated on balancing the public and private property claims to water to ensure equitable access and sustainable management of the resource. Water is essential to human life. Legal rights to exclude third parties from water resources therefore often do not apply to third parties who seek to use freshwater to fulfill basic human needs, which are generally safeguarded as a domestic and/or human right.

Transferability rights

The right to sell, lease, or otherwise transfer water rights is an element of some water tenure regimes particularly those that relate to transfers within an irrigation scheme. The trade /transfer of other types of water rights, particularly those that involve the abstraction and use of water from rivers, streams and aquifers, is less common and more controversial due to concerns about speculation, high transaction costs and potentially adverse third party, social and environmental impacts.

Governance and management rights

While water tenure forms one component of water governance, which takes place at multiple levels, some specific rights to manage particular water resources can also be important “sticks” in the bundle of water tenure rights. Examples of typical management rights include the rights to plan and make decisions regarding the allocation of water. Management rights at the level of a water tenure regime include the ability to set rules, implement those rules and resolve conflicts related to water. These rights at the level of a tenure regime are frequently applicable where tenure rights are held collectively. For example, when a community, users’ association or other group is granted the right to manage their water resource, that right to make, implement, and even enforce decisions can be considered one of the bundle of sticks in their water tenure regime. In most contexts, management rights must be aligned with the broader water governance frameworks at the basin, catchment and national levels.¹

Procedural rights

When tenure holders’ substantive water rights are threatened by proposed or actual third-party activities, procedural (or due process) rights provide a basis for rights holders to respond effectively and protect their water tenure. These include the right to access to information prior to developments or activities that could threaten or negatively impact water rights, to participate in decisions regarding those developments or activities, to appeal decisions impacting water rights to a court of law, and to receive fair compensation should their water rights be infringed or extinguished. These procedural rights are broadly accepted as critical to the environmental rule of law and increasingly recognized as human rights by statutes, constitutions and international law. As such, procedural rights can provide a critical means for protecting water tenure, particularly for those whose tenure rights are not formally recognized (UN General Assembly. 2013).

¹ Exceptions to this are cases in which all rights to administer and govern water are granted exclusively to certain communities or Indigenous Peoples, either specifically with respect to water or more broadly in relation to the resources within their legally recognized lands or territories. The Bolivian Constitution, for example, recognizes the “uses and customs” of rural native indigenous communities and organizations over the management and administration of sustainable water and a national law further elaborates that the State recognizes the right of indigenous, native and peasant communities to conduct sustainable administration of water resources, respecting their authorities, recognizing their traditions, customs, easements and cultural knowledge about water use. Constitution of Bolivia. 2009. Article 374, paragraph II; Bolivian Supreme Decree 28817, Article 5(f).

Other important considerations in defining water tenure

In addition to the core bundle of rights outlined above, there are five key considerations in defining the bundle of rights constituting water tenure: (1) the specific water rights of women; (2) the fundamental linkages across land and water sector legislation that may form the basis for water tenure rights; (3) the contexts for water tenure; (4) whether the rights are permanent or dynamic; and (5) who holds the rights.

Women's water rights

The critical role of women and girls in water resources management and protection has been increasingly recognized at the highest policy levels². Research has shown that a gender perspective in designing and implementing water and sanitation projects is essential to sustainable outcomes. (UN, 2006) Despite this recognition, the gender gap in water governance persists and rights to water and decision-making on water continue to be male-dominated. (Troell and Yaari, 2019) Recent research highlights that many community-based water governance systems continue to be gender neutral (rather than gender-sensitive or gender responsive) and fail to explicitly protect women's tenure rights to water.³ Women's water tenure must be legally recognized and supported and any discriminatory laws eliminated across sectors in order to achieve gender-equitable water governance.

The land/water nexus

In many countries, water rights are legally dependent on land or forest rights. The recognition of water rights across land, forest, and other laws can provide additional legal avenues for recognition of water tenure, particularly customary forms of water tenure. At the same time, if land and water laws are not consistent in how they address the elements of water tenure, those rights can also be undermined, result in duplicative requirements, or even lead to contradictory provisions governing water rights. A clear understanding of the specific legal mechanisms creating or shaping the land/water nexus is therefore critical in defining and securing water tenure, particularly customary forms of water tenure.

Contexts for water tenure

Water tenure systems govern a wide range of uses, including domestic/household, commercial, and agricultural uses (which can be defined as both livelihoods and commercial uses, depending on the situation). Water tenure systems can also address fisheries, aquaculture, energy, environmental (in-stream flows), and other uses of water. As such, unpacking the linkages – both overlaps and gaps – across sectoral tenure systems becomes paramount to ensuring that these rights are coherent, equitable, and supportive of national water policy goals.

Permanent or dynamic rights

Water rights may be permanent or time-bound (for example, granted via a license for a particular period of time). Moreover, rights may change due to changes in water availability (e.g., due to seasonal drought or during times of emergency). These aspects of water tenure can impact the security of specific water rights and overall water

² The Beijing Platform for Action (2005); Rio Principle 20 (1992); Africa Water Vision 2025; The AMCOW Strategy and Policy for Mainstreaming Gender in the Water Sector in Africa (2011); and the Mekong River Commission Gender Policy and Strategy (2013).

³ RRI and ELI, supra n. 1.

security of water tenure holders. More broadly, there is a need to understand what constitutes secure water tenure within the context of broader water policy objectives.

Rights holders

In water tenure, water rights may be held and exercised individually or collectively. When held collectively, water rights may be held by communities generally, by traditional communities, or by indigenous communities. Moreover, different communities or groups within communities may have different rights (for example, indigenous communities might have rights of prior informed consent or water rights based on broader territorial rights that non-indigenous communities in the same country may not enjoy). It is critical to understand the various ways in which different types of tenure systems are created and how they interact to ensure that water and related development policy goals are effectively achieved.



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Ongoing initiatives and next steps

FAO has a long history developing the concept of water tenure and has been working with its members and global partners and other stakeholders to develop a more comprehensive, global framing of water tenure that draws upon the lessons from a number of ongoing initiatives.

A tool under development is a preliminary typology of water tenure, developed in the FAO Land and Water Discussion Paper on *Exploring the Concept of Water Tenure*. (Hodgson, 2016.) This typology explores the broad set of tools and sources of water tenure arrangements that can be identified, compares various types of water tenure as defined in the paper, and discusses the advantages of water tenure as a concept that can and should influence policy and legislation.

Another emerging tool is being developed under the FAO-funded Knowing Water Better (“KnoWat”) project. KnoWat is in the process of developing a national water governance and tenure assessment methodology, using lessons from both of the tools listed above to apply in three focal countries at different scales: Rwanda, Senegal, and Sri Lanka. The assessment methodology developed and applied through KnoWat is expected to be scaled and tailored for use in other country contexts.

Further work on various aspects of water tenure is being undertaken by the International Water Management Institute (IWMI) and the Water Integrity Network (WIN), including research on how to align customary and legislative water rights for communities and individuals in sub-Saharan Africa. These and other ongoing efforts are essential to (1) refining the conceptual framework for water tenure; and (2)

understanding the specific legal and practical tools necessary for effective water tenure at multiple levels.

RRI and ELI have analyzed 15-country water tenure assessment on whether community-based freshwater tenure rights are legally recognized and how those rights are protected or addressed within national legal frameworks.¹ These findings are helping to close fundamental knowledge gaps on the legal protection of Indigenous Peoples' and local communities' water tenure rights by identifying the ways in which countries are recognizing and supporting these rights. This enables countries to address water tenure in a more coherent, gender-equitable, and effective manner.

The work outlined above is contributing to a broadened understanding of the critical role that water tenure plays not only in improving water sector governance, but also in ensuring rational and equitable cross-sectoral policies that are informed by the intersections across water, land, forest, and other resource tenure laws and management systems. **Further applied research** will be required to ensure that water tenure assessment and analysis approaches are effective and meaningful across country contexts.

This research will help to refine **tailored tools** to guide water tenure assessment and resulting policy and legal reforms. Identifying the scope and range of these tools will require a **broad, consultative process to engage key stakeholders** across diverse country and local contexts. Such a process was launched in December 2019 under the auspices of the FAO during the first Expert Roundtable Discussion on Water Tenure. This Roundtable provided an opportunity to engage key stakeholders to come to an initial understanding of the topic as it is being developed across the fields of water law, agricultural water management, fisheries, water accounting, indigenous and community rights, and other relevant fields. The findings of the Roundtable and their implications for policy reform highlight the importance of ongoing support for a community of practice around water tenure. Such a community of practice could form a platform to spearhead a broad, consultative process that engages national government and non-governmental stakeholders to build consensus around the meaning and relevance of water tenure and help countries to tailor policies and practice and incorporate lessons and guidance as they are further developed.

The efforts related to water tenure will also influence other important work streams. Of note, FAO Governance for Sustainable Development of Food and Agriculture and its programmatic work is the institutional platform for intergovernmental and multi-stakeholder policy dialogue, generating inter-governmentally agreed treaties, declaration, norms and standards, as well as voluntary guidelines. A number of FAO Governing Bodies' processes related to governance include programs under the Committees of Agriculture, World Food Security, Fisheries, Forestry, and Regional Conferences, all represented by Members of the FAO who coordinate and promote for greater policy coherence at the global level. On-going relevant tools, policy briefs, norms, initiatives, Code of Conduct, and voluntary guidelines such as the VGGT's instruments and implementation work at the national and international levels, will be relevant in the context of water tenure concept development and vice versa. A number of issues discussed in the policy Roundtable dialogue, but beyond the scope of this brief, will require further review. An example of this is the connection between water tenure and transboundary considerations for which the Roundtable summary in the following section offers proposals for next steps.

¹ RRI and ELI, supra n. 1.



Section 2

Expert roundtable on water tenure - Final report

11 December 2019 - FAO Headquarters, Rome, Italy



Introduction

On December 11, 2019, the Food and Agriculture Organization of the United Nations (FAO) and the Environmental Law Institute (ELI) convened an Expert Roundtable on Water Tenure to begin the process of developing a common conceptualization of water tenure and its scope within the broader context of water and tenure governance.

The Roundtable brought together a diverse cross-section of professionals and researchers engaged in various aspects of water tenure and the interface between water, land, and other natural resource tenure. The 12 experts were joined by representatives of Knowing Water Better (“KnoWat”), an ongoing FAO project engaging in water tenure assessment in Sri Lanka, Senegal, and Rwanda, as well as by a representative of the Vatican working on water issues. During the final session of the Roundtable, approximately 10 FAO staff members joined the experts to provide input, informing the ongoing conceptualization of water tenure as it applies to the various contexts of FAO’s work streams.

The Roundtable was successful in achieving its desired outcomes, which included:

- A clear articulation of the areas of consensus on the core elements and definition of water tenure, and identification of issues that require further consultation and research.
- A vision for a multi-stakeholder, consultative process to raise awareness and build consensus around the conceptualization and practical applications of water tenure.

- Establishment of a consultative body of experts that can provide ongoing technical advice to FAO on the development of programs and normative products related to water tenure.
- Identification of areas for collaborative research.
- Preliminary identification of existing and needed normative tools to support practical implementation of water tenure approaches.

This report summarizes the discussions and findings from the Roundtable, which clearly indicate a need for continued engagement of experts and a broader set of stakeholders on this critical topic.



Background

Increasing understanding of the role that secure land and resource tenure plays in ensuring sustainable livelihoods, just land and resource governance, environmental protection, and sustainable economic development has led to tangible progress in many countries toward the legal recognition and protection of land and forest rights for marginalized populations who face the highest levels of tenure insecurity. The development and implementation of principles and tools to guide policy and legal reforms, notably the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests (VGGT), have provided an important basis for building policy consensus and strengthening the position of individuals and communities within the political economy of land and forest governance, particularly for the rural poor whose livelihoods and food security depend on secure and equitable access to land and natural resources.

Despite the increased international emphasis on achieving secure land and forest tenure as a critical aspect of sustainable development, water tenure has received far less attention and its conceptualization remains nascent. Yet access to, use, management and control of freshwater is essential to the realization of food security and sustainable livelihoods, as well as the achievement of other essential development objectives, including as the SDGs, increased climate resilience, and the realization of human rights and poverty alleviation. Moreover, despite the unique aspects of water, it is possible to articulate – in the abstract, but also based on legislative practice – a core set of water rights that comprise (in varying formulations) the diverse water tenure regimes found around the world.

Recent research and analysis has started to explore the contours water tenure, understand how water tenure systems function and are being legally recognized at the national

level across various countries, and unpack the ways in which land, water, and forest resource tenure systems are legally interdependent and how those interdependencies impact the equitable and sustainable use, management, and development of freshwater resources. Building on the findings of this preliminary work, this Roundtable sought to answer the following questions:

- What are the core elements of water tenure? Why is water tenure important as a concept? What is its potential to add value to water and tenure governance, policy, and legislative development?
- What is an appropriate definition of water tenure? How is it differentiated from and related to water governance and water rights?
- How does the land/water nexus play out across tenure systems in theory and in practice? How should this nexus be captured in the relevant governance structures and in legislation?
- What tools do we already have to frame, assess, and analyze the legal (including customary) recognition and protection of water tenure?



Participants and agenda

Experts participating in this Roundtable represented a diverse set of backgrounds and knowledge related to water tenure. This initial event was structured to engage key stakeholders to come to an initial understanding of the topic as it is being developed across the fields of water law, agricultural water management, fisheries, water accounting, indigenous and community rights, and other relevant fields.

The following experts participated in the Roundtable:

1. Charles Batchelor: Director, Water Resources Management, Ltd.
2. Carl Bruch: Senior Attorney; Director, International Programs, Environmental Law Institute
3. Stefano Burchi: Chair, International Association for Water Law
4. Chloe Ginsburg: Tenure Analyst, Rights and Resources Initiative
5. Stephen Hodgson: Attorney, Independent Consultant
6. Jippe Hoogeveen: Senior Land and Water Officer, FAO
7. Benjamin Kiersch: Project Coordinator, KnoWat, FAO
8. Sasha Koo-Oshima: Deputy Director, Land and Water Division, FAO
9. Ruth Meinzen-Dick*: Senior Research Fellow, International Food Policy Research Institute
10. Ann-Kristin Rothe: Tenure Governance Expert, FAO

11. Barbara Schreiner: Executive Director, Water Integrity Network
12. Paulo de Tarso de Lara Pires: Associate Professor, Federal University of Parana; Daugherty Water for Food Global Institute
13. Jessica Troell: Senior Attorney; Director, International Water Program, Environmental Law Institute
14. Barbara van Koppen: Principal Researcher on Poverty, Gender, and Water, International Water Management Institute
15. Tebaldo Vinciguerra: Diastry for Integral Human Development, The Holy See
16. Louise Whiting: Senior Water Management Officer, FAO Regional Office for Asia and the Pacific

* Indicates remote participation.

The Roundtable opened with three, short presentations to set the stage for the day's discussions.

Chloe Ginsburg, Tenure Analyst with the Rights and Resources Initiative (RRI), contextualized water tenure in the lessons that have been learned through the development and application of land and forest tenure rights, particularly in the context of vulnerable populations. Ms. Ginsburg highlighted the “bundle of rights” approach taken in these other contexts as the basis for RRI and ELI’s work on water tenure using a similar approach but tailoring the specific rights to a water context. She noted that the conceptualization and advocacy surrounding a tenure approach has had significant and tangible impacts for vulnerable and indigenous communities in securing their rights, and also the nexus that exists in law and in practice between land, forest and water tenure systems.

The second presentation was given by Jessica Troell, Senior Attorney and Director of the International Water Program at ELI. Ms. Troell shared the methodology developed over the past three years by ELI and RRI to identify and track the legal frameworks governing community-based water tenure. This methodology takes a tailored “bundle of rights” approach and has been applied to 15 countries to enable a global, comparative analysis of water tenure rights across Latin America, Africa and Asia. Ms. Troell briefly shared relevant findings of this analysis that could shape discussions around water tenure more broadly, including: the importance of inter-sectoral coordination and legislative harmonization around the “land-water nexus” that is the basis for water tenure rights across the majority of countries’ laws and practices; the gaps in protections for women’s water tenure at a national legal level; the critical role of legislative recognition of customary laws and practices around water tenure; and the need to tailor water administrative requirements to the needs of communities and indigenous peoples.

The final presentation was given by Stephen Hodgson, Attorney and consultant. Mr. Hodgson shared the work he has developed for FAO creating a “preliminary typology” for water tenure and capturing some lessons learned from country studies in Spain, South Africa, and India. He stressed the importance of water tenure in capturing real relationships and the actual implementation of various types of water rights systems and the broad spectrum of instruments that can create water tenure relationships. He proposed utilizing the principles of water security, equity, sustainability, and efficiency to measure the effectiveness of water tenure regimes or specific bundles of rights.

These presentations were followed by a series of discussions focusing on the guiding questions. Participants briefly shared their current work related to water tenure, and then focused on three key aspects: (1) the core elements and definition of water tenure; (2) the utility and policy relevance of taking a water tenure approach; and (3) outlining next steps for further development of assessment methodologies and their application at the local and national levels and consensus building on the conceptualization of water tenure through broader stakeholder engagement.

In the afternoon, the experts were joined by FAO staff members so they could learn the outcomes of the discussions thus far, to have an opportunity to ask questions of the experts, and to share their relevant experiences regarding water tenure.

The full Agenda is attached as Annex 1.

The list of FAO experts who participated in the discussion is attached as Annex 2.



Summary of outcomes and proposed next steps

Below is a summary of the discussions, highlighting areas of consensus and issues that require further exploration to refine the conceptualization of water tenure and its use in practice.

CORE ELEMENTS OF WATER TENURE

The concept of a “bundle of rights” as forming the basis for water tenure was generally accepted as the basis for a definition. While the bundle of rights proposed by ELI and RRI in their work was accepted as forming a solid foundation for defining the core elements of water tenure, it was also apparent that further consultation and applied research is necessary to refine the rights in the bundle and the various ways in which water security is achieved through different types of water tenure arrangements. The existing rights proposed include:

- Use (with further enumeration of use types, including uses for domestic/basic human needs; livelihoods/small-scale productive uses; commercial; and religious/cultural);
- transferability;
- exclusion;
- governance (including rulemaking, planning, management, dispute resolution, and enforcement); and
- due process and compensation rights.

A key question highlighted was what constitute the core rights that will enable security of tenure and what we mean by water tenure security, distinguishing it from water governance (to provide security of rights). A related question raised around the proposed typology was whether the comprehensive framework (covering all types of water tenure sources and arrangements) could be streamlined and connected to a bundle of rights approach in order to strengthen its use in analysis of water tenure arrangements. Further research and consultation is needed to address these questions.

DEFINITION OF WATER TENURE

Steve Hodgson offered a proposed definition of water tenure, drawing upon the work in the FAO Land and Water Policy Paper “Exploring the Concept of Water Tenure”. The proposed definition is:

“The relationship, whether legally or customarily defined, between people, as individuals or groups, with respect to water resources.”

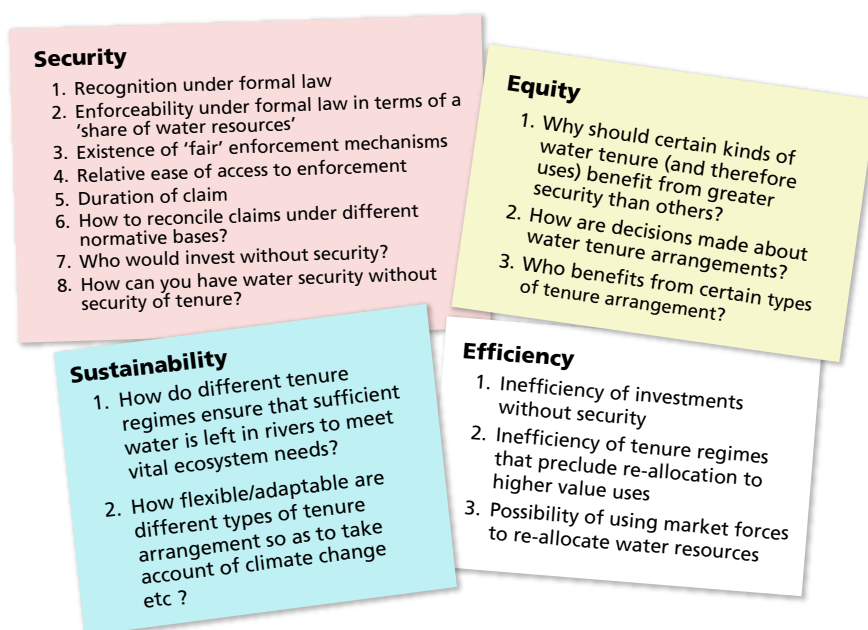
This definition was broadly found acceptable, although experts agreed that further discussion with a broader set of stakeholders will be necessary to refine and build consensus around the definition. Experts did raise some questions regarding the definition, which can be explored in further consultations:

- Concern regarding if the language “whether legally or customarily defined” implies that customary water rights are not legal, which they often are;
- whether we agree that water tenure is a “social construct” defining relationships among users or can also be legally defined as a bundle of rights;
- how we might incorporate transboundary aspects of water tenure within the definition.

In defining water tenure, it was agreed that there is a strong need to clearly distinguish between the three related concepts of water tenure, water rights, and water governance. Throughout the discussions, it was apparent that the specific delineation of these three concepts are not clear-cut, although the experts agreed that water governance provides the framework for water tenure and water rights. For example, concerns were raised related to implementation of existing water rights as a critical aspect of water tenure. However, some experts noted that these concerns were really questions of water governance and the institutional frameworks available to create, strengthen, and protect the rights that form water tenure. Importantly, experts agreed that water governance is the broader framework within which water tenure is defined, recognized, implemented and enforced. Additionally, key aspects of water governance can be seen to be core components of a “bundle of rights” approach to water tenure. For example, the ability to plan, make decisions, and resolve disputes around water resources are critical water governance “rights”, particularly at the community level. Further consultation on the clear definition of “good governance of water tenure” and the delineation between water governance, water tenure and water rights should be a priority.

A related issue for further elaboration and consultation is the security of water tenure and its role in the good governance of water tenure. The discussion of water tenure security also highlighted the need for further exploration of the concept of resilience in the context of water tenure, particularly in light of climate change. A priority for ongoing research and discussion should be to understand how best to balance security of rights and flexibility to respond to changing circumstances (i.e., diminishing flows, new users, extreme events, population growth, pollution).

FIGURE 1
Considerations in defining water tenure



Finally, the need to define the goals of water tenure security was also highlighted, including an emphasis on vulnerable populations and the ways in which water tenure can be leveraged to meet SDGs, improve climate resilience, and support sustainable water management. Related to this was the question of how water tenure should be situated in diverse national contexts to ensure relevance. A key element across countries is the importance of effective water sector legislation as the basis for defining and protecting water tenure, with a caveat that other sectoral laws and policies must be aligned with these provisions.

IMPORTANCE OF WATER TENURE

Participants broadly agreed that water tenure has substantial policy relevance for many reasons:

- It provides a mechanism for analyzing what is actually happening with respect to water users, enabling a better understanding of user relationships and potential conflicts.
- Using water “tenure” provides a common language for coordination and legislative harmonization across land, water, and other related natural resource sectors that currently contain overlapping and sometimes conflicting provisions, which undermines security of tenure, particularly for vulnerable populations.
- Water tenure, as opposed to water rights, can enable a more open discussion of legal and illegal water uses in certain contexts.
- A bundle of rights approach reflects how communities and individuals actually access and use water resources, as well as related terrestrial resources, so this approach reflects reality.
- Mapping water tenure arrangements (both legally and in reality) can highlight potential for and incidents of land and water grabbing as well as facilitate more sustainable and equitable management of the resource.

The issue of situating water tenure in national contexts was also discussed. It was noted that while “water tenure” has substantial value, “tenure” may be a disfavored term in some countries. Further outreach and consultation on both the substance and terminology of “water tenure” is warranted to understand reservations, as well as how those reservations might be accommodated or addressed.

Finally, experts emphasized the need to ensure that approaches to analyzing and providing guidance on water tenure must be politically sensitive, guided by stakeholders, and contextualized to ensure meaningful policy and decision-making support.

LAND/WATER NEXUS

In many countries, water tenure is clearly linked to or even predicated on existing land (or forest) rights. Water law reforms sometimes fail to clarify the ways in which intrinsic linkages between land, water and other land-based resources should translate into clear water tenure rights. In many countries where the legal status of water tenure is addressed (either explicitly or implicitly) in legislation pertaining to land, water, and other natural resources, legislative ambiguity and a lack of harmony across legal provisions has muddied the legal status of water rights. In some instances, this has created distinct legal avenues for asserting those rights under various laws while simultaneously undermining the legal security of those rights. Overlaps and even conflicts across sectoral legislation also creates confusion as to sectoral mandates and inefficiencies in implementation. By contrast, having a clear understanding of existing water tenure systems and their legal status can enable a more integrated approach that promotes inter-sectoral harmonization and aligns with the ways in which most communities manage their land and water resources for basic human needs, livelihoods and economic development.

A key aspect of the further definition of water tenure therefore requires careful assessment and understanding of the various ways in which the Land/Water Nexus shapes the recognition and protection of water tenure, as well as the opportunities the nexus poses for more integrated and sustainable approaches to terrestrial and aquatic resource management and development.

TOOLS

Existing tools for identifying water tenure regimes, assessing the legal recognition of water tenure and contextualizing water tenure in the larger context of landscape and catchment governance, sustainable livelihoods (particularly in the case of vulnerable populations), food security, climate resilience, and achieving the SDGs were shared and discussed.

The first tool is the Water Tenure Methodology developed by ELI and RRI to assess whether community-based freshwater rights, including rights to surface and groundwater, are legally recognized, and how those rights are protected or addressed within national legal frameworks regulating and impacting freshwater resources. This Water Tenure Methodology was applied across 15 countries in Africa, Asia and Latin America and results of this comparative assessment are being used to expand and refine the methodology to apply in various country contexts, as well as to inform the further development of a Water Tenure Assessment methodology at the national level that would include both community-based and individual rights. The initial assessment seeks to narrow fundamental knowledge gaps on the legal protection of

Indigenous Peoples' and local communities' water rights by identifying the ways in which countries are recognizing and supporting these rights. These gaps, in turn, can be leveraged to inform clear legal and policy recommendations for countries to address land, forest and water tenure in a more integrated and effective manner and with an eye towards achieving the SDGs, poverty alleviation and increased climate resilience. (Rights and Resources Initiative and Environmental Law Institute. 2020)

The second tool is a preliminary typology of water tenure, developed by Stephen Hodgson in the FAO Land and Water Discussion Paper "Exploring the Concept of Water Tenure." (Hodgson, 2016) This comprehensive typology explores the broad set of tools and sources of water tenure arrangements that can be identified, compares various types of water tenure as defined in the paper, and discusses the advantages of water tenure as a concept generally. Much of the thinking in this paper was reflected in discussions at the Roundtable, but it is important to note the paper and its analysis of key issues as an important resource for further discussions.

An emerging third tool is being developed under the FAO-funded Knowing Water Better ("KnoWat") project. KnoWat is in the process of developing a national water governance and tenure assessment methodology, using lessons from both of the tools listed above, to apply in its three focal countries at different scales: Rwanda, Senegal and Sri Lanka. An important aspect of KnoWat is a mandate to raise awareness on the concept and application of water tenure, which will provide forums for expanding consultations with stakeholders in the project's target countries and beyond. It seeks to inform normative discussions with results from country-driven analysis of water governance and tenure, given their priorities and views on the concept.

In addition to these tools, a number of the experts shared related research findings and publications that should be used to contribute to our evolving understanding of water tenure.

WAY FORWARD

A number of proposals for next steps emerged from the Roundtable discussions. In general, these activities can be grouped into four categories:

1. Building on the work of this group to constitute a consultative body of experts to provide ongoing technical advice to FAO on the development of concepts, programs, assessment tools and normative instruments related to water tenure.
2. Identifying fora for expanded engagement with key stakeholders to build consensus on the definition and core components of water tenure, identify necessary assessment and normative tools, and better understand the diverse practical applications of a water tenure approach.
3. Joint development and implementation of water tenure assessment methodologies to expand knowledge on the existing status of water tenure in countries and to identify practical measures for improving integrated tenure governance approaches to support country development goals, enhance equitable access to water, increase water security, and improve climate resilience.
4. Utilizing lessons learned and data collected from the work and consultations described above to develop normative materials for the reference of countries and other stakeholders around water tenure assessment, implementation and governance.

Key, **outstanding areas for further consultations** and discussion include:

- Refining the definition of water tenure.
- Establishing consensus around the core elements of water tenure, including the rights that should constitute the “bundle of rights” approach.
- Clarifying the distinctions between water governance, water tenure and water rights.
- Defining what constitutes water tenure security.
- Integrating the proposed water tenure typology and existing and developing water tenure assessment methodologies.
- Further elaboration of the land/water nexus and its implications for water tenure governance.
- How best to link water tenure to the achievement of the SDGs and other national development priorities.
- How water tenure should relate to the VGGTs and learn from their development and implementation process.
- How can water tenure be defined and governed to be resilient to climate and non-climate stressors but also provide legal certainty.

Key fora for further consultations should focus on key stakeholders, including Member States and include:

- IWRA Congress 2020 (FAO, AIDA and ELI will convene a Special Session on Water Tenure).
- The G-20 planning sessions and Summit.
- UN Water – exploring potential to establish a Working Group.
- Stockholm World Water Week.
- World Water Forum 2021 and planning sessions.

Formal communications around these and other fora were highlighted as a priority need to ensure continuity and broad participation in the events.

Specific proposed interventions included:

- Ongoing development of water tenure assessment methodologies, particularly in the context of KnoWat.
- Joint project development and implementation to broaden the knowledge base of how water tenure is functioning at the local and national levels.
- Co-convening events to enable strategic consultations and further elaboration of key issues related to water tenure at fora listed above.
- Using data obtained from projects and consultations to determine appropriate normative tools for the reference of countries and stakeholders, including on the good governance of water tenure.

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Annex. 1

**FAO EXPERT CONSULTATION ROUNDTABLE ON WATER TENURE
DRAFT AGENDA
DECEMBER 11, 2019
FAO, ROME (9:00 AM-5:00 PM)
KING FAISAL ROOM BUILDING D, ROOM 263**

| | |
|-------------|---|
| 9:00-9:05 | Welcome by FAO Land and Water Division Sasha Koo-Oshima , Deputy Director, Food and Agriculture Organization of the United Nations |
| 9:05-9:20 | Introductions and Overview of Agenda Carl Bruch , Senior Attorney and Director, International Programs, Environmental Law Institute |
| 9:20-9:30 | Contextualizing Water Tenure: Lessons from Land and Forest Tenure Chloe Ginsburg , Tenure Analyst, Rights and Resources Initiative |
| 9:30-9:40 | A Bundle-of-Rights Approach to Water Tenure Jessica Troell , Senior Attorney and Director, International Water Program, Environmental Law Institute |
| 9:40-9:50 | A Typology for Inclusive Water Tenure Stephen Hodgson , Attorney and Independent Consultant |
| 9:50-10:30 | Brief sharing of relevant work and additional frameworks All Experts Facilitated by Carl Bruch , ELI |
| 10:30-10:45 | Coffee/Tea Break |
| 10:45-12:00 | Facilitated discussion All Experts - Facilitated by Stefano Burchi , Chair, International Association for Water Law |

Guiding discussion questions:

- What are the core elements of water tenure? Why is water tenure important as a concept? What is its potential to add value to water and tenure governance, policy, and legislative development?
- What is an appropriate definition of water tenure? How is it differentiated from and related to water governance and water rights?

- How does the land/water nexus play out across tenure systems in theory and in practice? How should this nexus be captured in the relevant governance structures and in legislation?
-

12:00-13:00 Working Lunch – continued discussions
[FAO Buffet Restaurant]

13:00-14:30 Continued facilitated discussion
All Experts - Facilitated by **Jessica Troell**, ELI

Guiding Discussion Questions:

- What tools do we already have to frame, assess, and analyze the legal (including customary) recognition and protection of water tenure?
 - What tools should be developed (assessment methodologies, guidance for countries or other stakeholders, capacity building initiatives, advocacy across sectors, etc.)?
 - How should these tools relate to the VGGT? OECD Principles on Water Governance? Other key frameworks?
 - Next steps:
 - What are the outstanding areas for further discussion?
 - Who else (individuals and institutions) needs to be engaged?
 - What should the process be for further engagement, multi-stakeholder consultation at the national and international levels, and further research/development of tools (especially over the time leading to the next World Water Forum)?
 - What are the envisioned final product(s) of this process?
-

14:30-15:30 Findings from Roundtable presented to FAO staff

15:30-15:45 Tea/Coffee break

15:45-17:00 Discussion and Q&A with FAO Staff and International Experts
Facilitated by **Stephen Hodgson**

19:30-21:00 Group Dinner, venue tbd

Annex. 2

LIST OF FAO EXPERTS IN ROUNDTABLE DISCUSSION

Safia Aggarwal, Forestry Department

Charlotte Alcouffe, Land and Water Division

Maria Arnal, Land and Water Division

Ines Beernaerts, Subregional Office for Mesoamerica

Dubravka Bojic, Economic and Social Development stream

Ruhiza Boroto, Land and Water Division

Aurelie Bres, Land and Water Division

Sally Bunning, Regional Office for Latin America and the Caribbean

Michael Clark, Economic and Social Development stream

Benjamin Davis, Strategic Programme 3: Reduce rural poverty

Ibrahima Diallo, FAO Senegal

Bojic Dubravka, Economic and Social Development stream

JeanMaurice Durand, Partnerships and Outreach stream

Simon Funge Smith, Fisheries Division

Christopher Hegadorn, Agrifood Economics Division

Jippe Hoogeveen, Land and Water Division

Valerie Johnston, FAO Legal Office

Benjamin Kiersch, Land and Water Division

Sasha Koo-Oshima, Land and Water Division

Blaise Kuemlangan, FAO Legal Office

Julia Magot, FAO Legal Office

Eduardo Mansur, Land and Water Division

Patricia MejiasMoreno, Land and Water Division

Javier MolinaCruz, Partnerships and Outreach stream

Livia Peiser, Land and Water Division

Sofia RamirezFionda, Land and Water Division

Francesca Romano, Partnerships and Outreach stream

AnnKristin Rothe, Partnerships and Outreach stream

Maher Salman, Land and Water Division

Domitille Vallee, Regional Office for the Near East

Louise Whiting, Regional Office for Asia and the Pacific

LIST OF EXTERNAL EXPERTS IN ROUNDTABLE DISCUSSION

Charles Batchelor: Director, Water Resources Management, Ltd.

Carl Bruch: Senior Attorney; Director, International Programs, Environmental Law Institute

Stefano Burchi: Chair, International Association for Water Law

Chloe Ginsburg: Tenure Analyst, Rights and Resources Initiative

Stephen Hodgson: Attorney, Independent Consultant

Ruth Meinzen-Dick*: Senior Research Fellow, International Food Policy Research Institute

Barbara Schreiner: Executive Director, Water Integrity Network

Paulo de Tarso de Lara Pires: Associate Professor, Federal University of Parana; Daugherty Water for Food Global Institute

Jessica Troell: Senior Attorney; Director, International Water Program, Environmental Law Institute

Barbara van Koppen: Principal Researcher on Poverty, Gender, and Water, International Water Management Institute

Tebaldo Vinciguerra: Dicastry for Integral Human Development, The Holy See

Unpacking water tenure for improved food security and sustainable development

Increasing understanding of the role that secure water resources tenure plays in ensuring sustainable livelihoods, just resource governance, environmental protection, and sustainable economic development has led FAO to re-ignite the debate that had begun in 2012, when the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests (VGGT) were adopted by FAO, and that had culminated in 2016 with the publication of the FAO seminal study "Exploring the concept of water tenure". Picking up from where that FAO publication had left off, an Expert Roundtable on Water Tenure was convened by FAO in Rome, in December 2019, to begin the process of developing a common conceptualization of water tenure and its scope within the broader context of water resources and tenure governance. Strengthening the position of individuals and communities within the political economy of water resources governance, particularly for the rural poor whose livelihoods and food security depend on secure and equitable access to - water and land - was central to the debates.

This report includes the Policy Brief and the Expert Roundtable Summary that explored the bundle of water-related rights approach to un-packing the concept and the practical ramifications of water tenure. This report is based on recent research and analysis that have helped to identify the core elements of water tenure based on data demonstrating how water tenure systems are legally recognized at the national level and how they function across diverse countries.

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