III. Assessment of Philippine Laws of Land and Resource Governance vis-à-vis the VGGT

Working notes on the VGGT

The *Voluntary Guidelines on the Governance of Tenure* or the VGGT is the product of inter-governmental negotiations under the Committee on World Food Security (CFS). This document was officially endorsed by the CFS in May 2012. As an international legal instrument, the VGGT could be considered as an *International Declaration* – meaning, it does not have the legal binding effect of an International Convention or UN Treaty. The VGGT document focuses on "governance of tenure of land, fisheries and forests in the context of national food security".

Nature and focus. The VGGT may be characterized as follows:

- **It is voluntary** (Sec 2.1)
- **It takes on a 'rights-based' approach** (Sec 2.2). It does not seek to introduce new "rights" or "obligations"; rather, it elaborates on existing commitments of States. (Sec 1.1 & 2.2) It is framed in the form of a "legal code" or a "systematic and comprehensive compilation of laws on a subject matter".
- **It identifies "standards" for tenure governance** (Sec 2.3). It does not just stipulate "minimum obligations" for States, but includes "aspired standards" based on good/ best practice. Thus, the document is also seen as a useful "assessment tool" for policy review & implementation (State) and for claim-making (by non-State actors).
- **It takes into account the diversity of tenure systems** (Sec 2.4). It takes on a broader framework that recognizes multiple tenure systems – including communal & collective, indigenous & customary tenure.
- **While global in scope, it is to be interpreted based on national legal systems & institutions** (Sec 2.4 & 2.5). While this increases the general acceptability of the document among UN member-states, this also somewhat decreases the value of the document as a universal standard for compliance and monitoring.

Scope. The VGGT document has seven chapters, but only chapters 2, 3, 4, 5 and 6 deal with the more substantive topics. These 5 chapters are further broken down into 23 sections and 169 provisions. The focus of Part III of this paper is on the 5 substantive chapters and their 23 sections/ general guidelines.[14]

14 Note: this Paper follows the numbering of the VGGT Principles, in order to facilitate cross-referencing with the VGGT official document. Hence, this Study refers to Chapters 2- 6, and the Sections are numbered from 3-25.

Content. The VGGT contains a *large volume* of 169 provisions. As a document finalized through international and multi-sectoral negotiations, certain provisions may not appear coherent or well-organized, with provisions that are packed with several key ideas. Several phrases and ideas are also *repeated* in many parts – i.e., on the “rights of women”, “indigenous peoples’ rights”, on policies that should be “consistent with international agreements and obligations”, on “rights and guarantees against arbitrary evictions”, on “recognition of informal tenure”, etc. Thus, it may be easier to understand the organizing framework of the VGGT through its broad outline:

Nature and focus. The VGGT may be characterized as follows:

- ***Chapter 2:* General matters**: refers to the State’s overall state policies and principles in ensuring tenure rights for citizens. This includes the overall policy, legal and organizational frameworks. In the Philippines the 1987 Constitution is the main policy document that defines these state policies and principles that are further expounded through legislation.

    - Guiding principles
    - Rights and responsibilities
    - Policy legal and organizational frameworks
    - Delivery of (tenure) services

- ***Chapter 3:* Legal recognition and allocation of tenure rights and duties**: focuses on the systems by which the tenure rights of different populations are legally recognized, and how these rights and duties are initially allocated. There is a strong focus on public lands and on recognition of multiple tenure systems, with equal importance given to both customary and informal tenure rights and not just legal rights.

    - Safeguards
    - Public lands, fisheries and forests
    - Customary tenure
    - Informal tenure

- ***Chapter 4:* Transfers and changes to tenure and duties**: addresses issues that may arise when existing tenure rights are transferred through private or public transactions. Tenure rights and duties are transferred through different forms:[15]
    - Markets
    - Investments
    - Land consolidation
    - Restitution
    - Redistributive reforms
    - Expropriation and compensation (state)
- ***Chapter 5:* Administration of tenure**: refers to administrative systems in the management of tenure, as well as for the resolution of disputes.
    - Records of tenure rights
    - Valuation
    - Taxation
    - Regulated spatial planning
    - Resolution of disputes
    - Transboundary issues
- ***Topic 6:* Responses to climate change and disasters**: focuses on addressing tenure issues that arise due to climate change, natural disasters and wide scale conflict.
    - Climate change
    - Natural disasters
    - Conflicts that involve tenure over land, fisheries & forests

15 It is noted that some forms of transfers of tenure rights and duties are not discussed under Topic 4. These include intra-family transfers (such as systems of inheritance and gifts), intra-community transfers (such as the assignment of tenure rights based on cultural, religious and customary practices), and tenurial transactions in the informal economy (including informal land use and occupation, rentals and sub-leases, informal pawning of lands, and informal credit systems that involve land tenure and rights to future harvests, etc).

Topic 2: General Matters (3-6)

- Addresses rights and responsibilities; policy, legal and organizational frameworks; and delivery of (tenure) services
- Focuses on State obligations under international human rights instruments

3 Guiding principles for responsible governance

- General principles: (3A)
    - Recognize legitimate tenure rights holders; identify, record & respect their rights whether formally recorded or not (3.1-1)
    - Safeguard legitimate tenure rights against threats & infringement, including forced evictions (3.1)
    - Facilitate the full enjoyment of tenure rights (3.1)
    - Provide access to justice to resolve disputes; provide just compensation where tenure rights are taken for public purposes (3.1)
    - Prevent disputes, violent conflict, corruption (3.1)

- Role of business enterprises in respecting human rights and tenure rights. States should ensure that businesses are not involved in abuse of tenure rights (3.2)

- Role of business enterprises in respecting human rights and tenure rights. States should ensure that businesses are not involved in abuse of tenure rights (3.2)
    - Human dignity
    - Non-discrimination
    - Equity & justice
    - Gender equality
    - Holistic & sustainable approach
    - Consultation & participation
    - Rule of law
    - Transparency
    - Accountability

- *Overall assessment:* The 1987 Philippine Constitution provides the overall *policy framework for responsible governance of tenure* in a manner that is consistent with the VGGT principles under Section 3. However, specific Philippine legislations that govern land and natural resources remain highly *sectoral* (10 such legislations are covered by this study). These multiple laws often create conflicting policies and overlapping agency mandates, as well as policy gaps, resulting in the fragmentation of both tenure policy and land administration.

- The Constitution declares as state policy "the protection of life, liberty and property, and the promotion of general welfare" (Art II, Sec 5). These rights are recognized and protected in the Bill of Rights (Art III) which upholds the full enjoyment of tenure rights and property.

- The Constitution upholds rights against arbitrary evictions, in accordance with VGGT Sec 3.1. The Bill of Rights states that "private property shall not be taken for public use without just compensation. Art 13, Sec 10 of the Constitution further declares that "Urban or rural poor dwellers shall not be evicted nor their dwelling demolished, except in accordance with law and in a just and humane manner." Furthermore, "no resettlement of urban or rural dwellers shall be undertaken without adequate consultation with them and the communities where they are to be relocated."

- All the VGGT principles of implementation (Sec 3B) are well enshrined in the 1987 Philippine Constitution, especially under *State Policies* (Art 2) and *Bill of Rights* (Art 3):

  - **Human dignity**:"The State values the dignity of every human person and guarantees full respect for human rights" (Art 2.11)
  - **Non-discrimination**: No person shall be denied "equal protection of the laws" (Art 2.1)
  - **Equity & justice**: State shall promote social justice in all phases of national development (Art 2.10); Provisions on social justice and human rights (Art 13.1)
  - **Gender equality**: State recognizes the role of women in nation-building, and shall ensure the fundamental equality before the law of women and men (Art 2.14)
  - **Holistic & sustainable approach**: Covered under section on *National Economy and Patrimony* which covers lands of the public domain, and systems of land classification (Art 12.3).

- **Consultation & participation**: Covered under Art 13 on Social Justice and Human Rights
- **Rule of law**: Covered by the Bill of Rights (esp Art 3.1 and Art 3.14)
- **Transparency**: Right to information and access to official records (Art 3.7)
- **Accountability**: "Public office is a public trust"; public officers and employees "must lead modest lives" (Art 11.1) The Constitution further stipulates "honesty and integrity in the public service and (to) take positive and effective measures against graft and corruption". (Art 2.7)
- **Continuous improvement**

• All the above VGGT general principles are also reflected in the different legislations under this review.

• Moreover, the 1987 Philippine Constitution is also a "reform" Constitution. It not just recognizes tenure rights, but also institutes "social reforms" involving tenure rights. *The Declaration of Principles* declares that the State shall "promote social justice" (Art 2, Sec 10), "promote comprehensive rural development and agrarian reform" (Art 2, Sec 21), and "recognize and promote the rights of indigenous communities" (Art 2, Sec 22). Article 13 of the Constitution, on *Social Justice and Human Rights*, further identifies and establishes tenure rights for three particular rural sectors where tenure is weak and often goes unrecorded:

- "*Farmers and farmworkers* shall be the focus of an agrarian reform program founded on the rights of landless to own directly or collectively the lands they till, or in the case of farmworkers, to receive a just share of the fruits of the land" (Art 13, Sec 4-5)
- *Subsistence fishermen* especially of local communities "shall be given rights to preferential use of communal marine and fishing resources, both inland and offshore" (Art 13, Sec 7)
- *Settlers in public domains* shall "enjoy prior rights in the disposition or utilization of natural resources and lands of the public domain suitable for agriculture, whether the lands are placed under agrarian reform or stewardship agreements. These include homestead rights of *small settlers* and rights of *indigenous peoples* to their ancestral lands." (emphasis added)

- These Constitutional mandates have led to subsequent legislations – i.e., the *Indigenous Peoples Rights Act (IPRA)*, the *Fisheries Code* and the *Comprehensive Agrarian Reform Law (CARL/CARPER)* – that establish tenure rights for the three rural sectors, and also establish the tenure instruments by which their rights are recorded and protected. These three "sectoral reforms" seek to expand the ranks of tenure rights holders among vulnerable sectors, as well as to formalize & strengthen their tenure through different *tenure instruments* – from titling to usufruct rights.[16]

- ***IPRA,*** (Sec 11) recognizes the ancestral domain rights of ICCs/IPs and grants formal recognition of their rights through *Certificates of Ancestral Domain Titles (CADTs) and Ancestral Domain Claims (CADCs)*.

- ***Fisheries Code*** (Sec 17-18) gives priority in fishing privileges/ rights in municipal waters to duly registered fisherfolk and their organizations. These rights are granted and protected through *municipal permits* which grant user rights.

- ***CARL/CARPER*** seeks to address the tenure rights of landless farmers & farmworkers in both private lands and public domain lands. In private and A&D lands, beneficiaries are awarded *Emancipation Patents* (EPs) and *Certificates of Land Ownership Awards* (CLOAs) which operate under the Torrens Title system (CARPER, Sec 24) and become full titles upon completion of amortization. Under Sec 22 of RA 6657, agrarian reform beneficiaries have usufruct rights over the awarded land as soon as the DAR takes possession of such land, even while their EPs and CLOAs are still pending. There is an award ceiling of 3 hectares per beneficiary. (RA 6657, Sec 25) Lands under an EP or CLOA cannot be transferred for a period of 10 years, unless through inheritance. (CARPER, Sec 12).

- ***On access to justic***e (VGGT 3.1-4): Several laws provide for grievance mechanisms and quasi-judicial systems for resolving tenure-related disputes. To cite an example, CARPER, Sec 18, gives quasi-judicial powers to DAR to resolve agrarian reform cases, with parties having the right to appeal decisions and to resort to judicial courts. However, what happens when the different land laws overlap and conflict with each other? What should happen when there are overlapping policies and agency mandates? These matters are further discussed in this Paper under VGGT Sec 21 *(Resolution of Disputes)*.

16 Refer to Annex B for a discussion of tenure instruments and their "bundle of rights".

4 Rights and responsibilities related to tenure

- Ensure responsible governance of tenure towards the realization of human rights, food security, poverty eradication, sustainable livelihoods, etc. (4.1)
- Ensure that all State actions on tenure & governance are consistent w/ existing international obligations (4.2)
- Recognize that no tenure right is absolute, including private ownership. Tenure rights are balanced by duties, the rights of others & public purposes (general welfare, environment & human rights) (4.3)
- Protect tenure rights; protect peoples against arbitrary eviction & infringement of rights (4.5)
- Remove all discrimination related to tenure rights – related to change in marital status, lack of legal capacity, lack of access to economic resources, right to inheritance. (4.6)
- Provide non-discriminatory & gender-sensitive assistance (4.7)
- Provide timely, adequate & affordable means for resolving disputes through access to judicial & administrative bodies (4.9)

- The *Philippine Constitution* states that "the use of property bears a social function" (Art 10, Sec 6). It further states that "all economic agents shall contribute to the common good. Individuals and private groups, including corporations, cooperatives, and similar collective organizations, shall have the right to own, establish, and operate economic enterprises, subject to the duty of the State to promote distributive justice and to intervene when the common good so demands."

- The *Constitution* further implies that the *governance of tenure* should be directed towards ensuring human dignity, reducing inequalities, and equitably distributing wealth and political power for the common good. As Article 13, Sec 1 states: "The Congress shall give highest priority to the enactment of measures that protect and enhance the right of all the people to human dignity, reduce social, economic, and political inequalities, and remove cultural inequities by equitably diffusing wealth and political power for the common good. *To this end, the State shall regulate the acquisition, ownership, use, and disposition of property and its increments.*" (emphasis supplied)

- These overriding principles of rights and responsibilities related to tenure are reflected in the different sectoral land laws and tenure instruments, to cite a few examples:

  - *IPRA*, Sec 9 stipulates the responsibilities of indigenous peoples/ cultural communities IPs/ICCs to protect and manage their ancestral domains;

  - *Fisheries Code,* Sec 2 declares fisherfolk not just as privileged beneficiaries, but as partners in fisheries conservation & management;

  - *CARPER*, Sec 1 mentions the obligation of farmers to cultivate or administer labor on their awarded lands;

  - Finally, other laws provide for a variety of tenure instruments to private individuals and families, communities and the private sector for the conservation, use and management of forests, mangroves and resources in the public domain.[18]

17 Ancestral Domain Sustainable Development and Protection Plans, or ADSDPPs.
18 See Annex B.

- As mentioned in the previous section, the Constitution ensures rights against arbitrary evictions. Specific provisions include the *Bill of Rights* (Art 3.9 on private property), and policy against arbitrary eviction and demolition of homes. (Art13, Sec 10) These rights are reflected in the different laws reviewed, i.e:

    - *IPRA* has a provision against unauthorized and unlawful intrusion (Sec10)

    - *CARPER* imposes prohibitions or restrictions on acts by which landowners try to circumvent agrarian reform, and/or evict farmers from their land. These include the "conversion of agricultural lands" (Section 22) and "*Prohibited Acts and Omissions*" (Section 24).

    - Also, *UDHA* (the *Urban Development and Housing Act*, which is not part of this review) has strong safeguard provisions against arbitrary eviction and housing demolition. Although the title mentions "urban", this safeguard provision applies to rural areas as well. UDHA de-criminalizes squatting, and therefore gives a level of recognition and protection to informal tenure.

- Regarding non-discrimination, Art 2.14 of the *Constitution* states that "the State recognizes the role of women in nation-building, and shall ensure the fundamental equality before the law of women and men." This principle is reflected in the *Civil Code* or *RA 386* (not included in this Review) which upholds equal property rights for women regardless of changes in marital status (marriage), as well as equal rights to property inheritance.

- This policy of equal rights for women and non-discrimination is reflected & strengthened in other tenure laws as well. *IPRA*, Sec 21 on the *Equal Protection and Non-discrimination of ICCs/lPs* stipulates that the State shall "accord to the members of the ICCs/IPs the rights, protections and privileges enjoyed by the rest of the citizenry" and "extend to them the same employment rights, opportunities, basic services, educational and other rights and privileges available to every member of the society". Furthermore, it declares that "fundamental human rights and freedoms as enshrined in the Constitution and relevant international instruments are guaranteed also to indigenous women."

- The issue of discrimination against women on tenure rights, however, is not just a matter of law or policy, but also of culture and institutional practice. Women's tenure rights, and equal access to tenure security should be reviewed, for example, by examining whether official titles, licenses, permits and tenure instruments actually reflect equal rights of women. Such as review should also "consider the particular obstacles faced by women and girls with regard to tenure and associated tenure rights, and take measures to ensure that legal and policy frameworks provide them adequate protection and these are implemented and enforced" (in line also with VGGT 5.4).

5 Policy, legal & organizational frameworks related to tenure

- Ensure that policy, legal & organizational frameworks are consistent w/ international obligations (5.2)
- Recognize & respect legitimate customary rights. Institute frameworks that are non-discriminatory. Promote social equity & gender equality (5.3)
- Frameworks should reflect the interconnected relationships between land, fisheries and forests and their uses, and establish an integrated approach to their administration (5.3)
- Strengthen women's tenure rights (legal contracts, legal services) (5.4)
- Place responsibilities at levels of gov't that can most effectively deliver services; ensure coordination among agencies, as well as with local gov'ts, and indigenous peoples & communities with customary tenure systems) (5.6)

- Some general observations regarding VGGT 5.3 on the "interconnected relationships between land, fisheries and forests and their uses", as well as on "the need for an integrated approach to their administration":

    - *First*, unlike some Asian countries that have a comprehensive and consolidated *Land Law*[19] or a *Land Code*, tenure governance in the Philippines today is founded on numerous legislations that define the policy, legal and organizational frameworks related to tenure and governance of land, forests and fisheries.

    - *Secondly*, while new laws or amendments are continually being passed by Congress, the old laws are often not *repealed*. Sections of old laws are merely superceded, replaced or amended by the new laws, and this system allows the old laws to retain their *residual* validity in whole or in part.[20] The overall result is a complex system of legal jurisprudence that often only lawyers can navigate.

    - *Thirdly*, the country has taken on a highly *sectoral approach* to land/ natural resource policy, tenure reforms, and administration. There is CARP/ER for agrarian reform covering *public* alienable and disposable (A&D) lands and *private* agricultural lands, the *Fisheries Code* covering municipal waters, and IPRA for ancestral domains. In addition, there are the *Mining Act*, *NIPAS*, *Forestry Code*, *AFMA* and others. Each law has its own set of working assumptions, objectives, implementing guidelines and implementing structure; hence, while some laws emphasize tenure rights of sectors and communities, some focus on the *conservation and management* of the resource, while others emphasize *efficient use and productive utilization* of the resources.

19 Examples are: the Cambodian Land Law of 2001; the Thailand Land Code of 1954 as amended in 2008; the Malaysia Land Code of 1965. Indonesia also has a Basic Agrarian Law of 1960 (which is similar to the Philipines' Public Lands Act/ CA 141) that defines the different categories of land and forms of land title.

20 One key example of a law that retains its residual validity is Commonwealth Act 141, or the Public Lands Act of 1936, as amended by subsequent legislations.

Each law may have its own system – for issuing tenure instruments, undertaking land valuations, and even for undertaking extra-judicial settlement of disputes. Each part of the landscape appears to be managed as a separate focus or ecosystem – agricultural lands, mangroves, municipal waters, forests, mines, concessions, etc. As such case, the Philippines appears to take on a "landscape approach" to tenure governance. Some of the land and waters are managed through the local government; others through a line agency or a specialized institution.

In reality, however, tenure systems overlap. Ancestral domains lands do not just cover upland forests, but also lowlands and foreshores, including coastal waters. Mining concessions have been awarded within ancestral domains, without the consent or knowledge of local communities. The management of foreshore lands, mangroves and coastal areas fall under different agencies and the LGUs; these agencies and units also issue different types of tenure instruments such as contracts, licences, concessions and permits. The result is a complex and fragmented landscape of laws and governance of tenure.

- A <u>major finding</u> especially on VGGT 5.3 and on VGGT 5.6 is that sectoral approaches to land policy may lead to fragmented laws, overlapping boundaries, and functional overlaps among agencies. To cite a few key examples:

  - For indigenous peoples under *IPRA*, a major contention has been on jurisdiction over forest lands, as the revised *Forestry Code of 1975* stipulates that "all lands above 18 degrees slope automatically belong to the state and classified as forest lands". Hence, many ancestral domains have overlapping boundaries with national parks and protected areas. Ancestral domain titles and claims also overlap with mining and land concessions, and with agrarian reform areas covered by titles and stewardship agreements.

  - Currently, there are some 77,000 hectares of untitled private agricultural lands (UPAL) that should be covered under the agrarian reform program, but cannot be transferred to farmer-beneficiaries, as the land ownership needs to be resolved first under the DENR.

- How are these and other conflicting policy and jurisdictional issues resolved, when the different sectors are involved? There are both administrative and judicial responses:

  - **Joint administrative orders**. A case in point is the *Joint DAR-DENR-LRA-NCIP Administrative Order No 1, Series of 2012* which seeks to resolve jurisdiction and operational issues among the agencies in relation to the implementation of CARL, IPRA and the Public Lands Act/ CA 141, particularly with regards to the issuance of titles covered by conflicting jurisdictions and claims.[21]

  - **Technical Working Groups** (TWGs)

  - **National Convergence Initiative.** Programmatic approach aimed at improving overall inter-agency coordination and efficiency in the delivery of rural development services among four "rural development" agencies of government – DA, DAR, DENR and DILG.

  - **Judicial courts as a last resort**.

  - However, while the above measures seek to address disputes, they do not necessarily lead to the synchronization of policy.

6 Delivery of services

- Ensure prompt, accessible & non-discriminatory services to protect tenure rights. Eliminate unnecessary legal & procedural requirements (6.1)
- Develop policies and national standards for sharing of information, including spatial info for use by state, implementing agencies, communities, private sector, academia (6.5)
- Consider additional measures to support vulnerable & marginalized groups, including legal support & mobile support to reach remote communities (6.6)
- Adopt and enforce anti-corruption measures including checks & balances, limiting the arbitrary use of power, addressing conflicts of interest, and adopting clear rules & regulations. (6.9)

- *Note: VGGT 6 refers to policies regarding the overall delivery of services in relation to tenure – including administrative & legal services, as well as access to information. The more specific discussions on this theme are found under the "Administration of Tenure" – covering Sections 17 to 22 of this Paper.*
- Article 2, Section 28 of the *Constitution* stipulates "a policy of full public disclosure of all its transactions involving public interest."
- *NIPAS*, Sec 5 also stipulates that all DENR records on protected areas (maps, natural boundaries, rules and regulations, public notices, legal documents and reports) shall be made available to the public in the respective DENR regional, provincial and community offices where *NIPAS* areas are located.

- However, apart from *NIPAS*, the policy of *full public disclosure* does not appear strongly in most of the Land Laws reviewed for this Paper. This is an important gap in the protection of tenure rights.

- As discussed during the Consultations for this Paper, it was clarified that the issue is not just whether information is being disclosed or being made accessible, but also whether certain types of tenure-related information actually exists. And even if information is available and disclosed, there are still questions raised as to their accuracy and reliability.

- A case in point is the availability and sharing of *spatial information* (VGGT 6.5) Are maps being made available? Are they being updated? Are spatial data being consolidated?

- As discussed during the Consultations, there is an overall lack of reliable and accurate spatial information and tenure data. Much of the data collected by government agencies are specific to their own agency purposes, and there is no central database as repository for such information. The DAR has its own database on CLOAs issued; the DENR maintains several and distinct databases on protected areas, on forest areas, on mining applications and permits, etc; and there are other databases maintained by the other agencies. The Land Registration Authority (LRA) under the Department of Justice (DoJ) has started to computerize land records with some level of success, yet even so, its database is limited to deeds and land titles, and therefore excludes all lands under the public domain, or lands under different tenure arrangements.

- ***For further review:*** Examine how the pending *Freedom of Information Act/ FOI* is likely to impact on the delivery of tenure services and improve the overall governance of tenure. Also examine the types of tenure-related information that need to be publicized in order to improve governance (properties, licenses, public concessions, fees, valuations, contracts, payments, maps, spatial information, public investments & property procurement, etc)

- VGGT 6 also largely concerns the issues of land administration, and thus there may be need to review the proposed *Land Administration Reform Act (LARA Bill)* regarding its role in ensuring prompt, accessible & non-discriminatory services to protect tenure rights, eliminating unnecessary legal & procedural requirements; reaching remote communities to support vulnerable tenure groups.

Topic 3. Legal recognition & allocation of tenure rights & duties (7-10)

- Addresses the legal recognition of tenure rights of indigenous peoples and other communities with customary tenure systems, as well as of informal tenure rights; and the initial allocation of tenure rights to land, fisheries and forests that are owned or controlled by the public sector.

7 Safeguards

- When states allocate tenure rights, they should establish safeguards especially to protect women & the vulnerable who hold subsidiary tenure rights (7.1)
- When States (re)allocate tenure rights, they should identify first all existing rights holders whether legal or customary and anyone else who could be affected; they should beincluded in the consultation process (7.3)
- Where it is not possible to provide legal recognition of rights, state should prevent forced evictions (7.6)

- The Diagram (**page 57**) shows the overall land tenure system in the Philippines – and how the different tenure laws define the major land classifications. This is taken and adapted (slightly edited) from a 2001 DENR Study *"Land Laws and Regulations Policy Study: Final Report, Volume 1"* under Land Administration and Management Project (LAMP).
- The Diagram shows the legal basis by which rights holders gain legal recognition of tenure rights, as well as the range and types of different tenure instruments:
  - The *Constitution* defines the national territory and patrimony
  - The national territory covers terrestrial, fluvial and aerial domains. (Note: *subterranean* resources are assumed here to be part of the terrestrial domain, even though subterranean rights might be treated as distinct from surface rights in terms of tenure)

- The terrestial domain is divided into three "tenure" domains covered by respective domain laws – *Ancestral Domain (IPRA), Public Domain (CA141) and Private Ownership (Civil Code)*

- The Public Domain is further divided into "non-disposable" (remains with the state) and "alienable and disposable/ A&D"

- The Public domain is further divided according to their landscapes and designated uses

- There is a range of tenure instruments that cover all three types of domains -- Ancestral Domain, Public Domain and Private Ownership.

- It should be further noted that the tenure instruments listed here refer only to the *initial* holders of tenure. Tenure rights are also further *extended* to others, through different tenure instruments which include rentals, leases, permits, contracts and others. Some tenure instruments are issued by national agencies; others are issued by local government units.

- Holders of legal tenure instruments tend to have secure tenure, while those with *informal* tenure tend to have insecurity of tenure. However, tenure rights are secure only if such rights are *enforceable.*

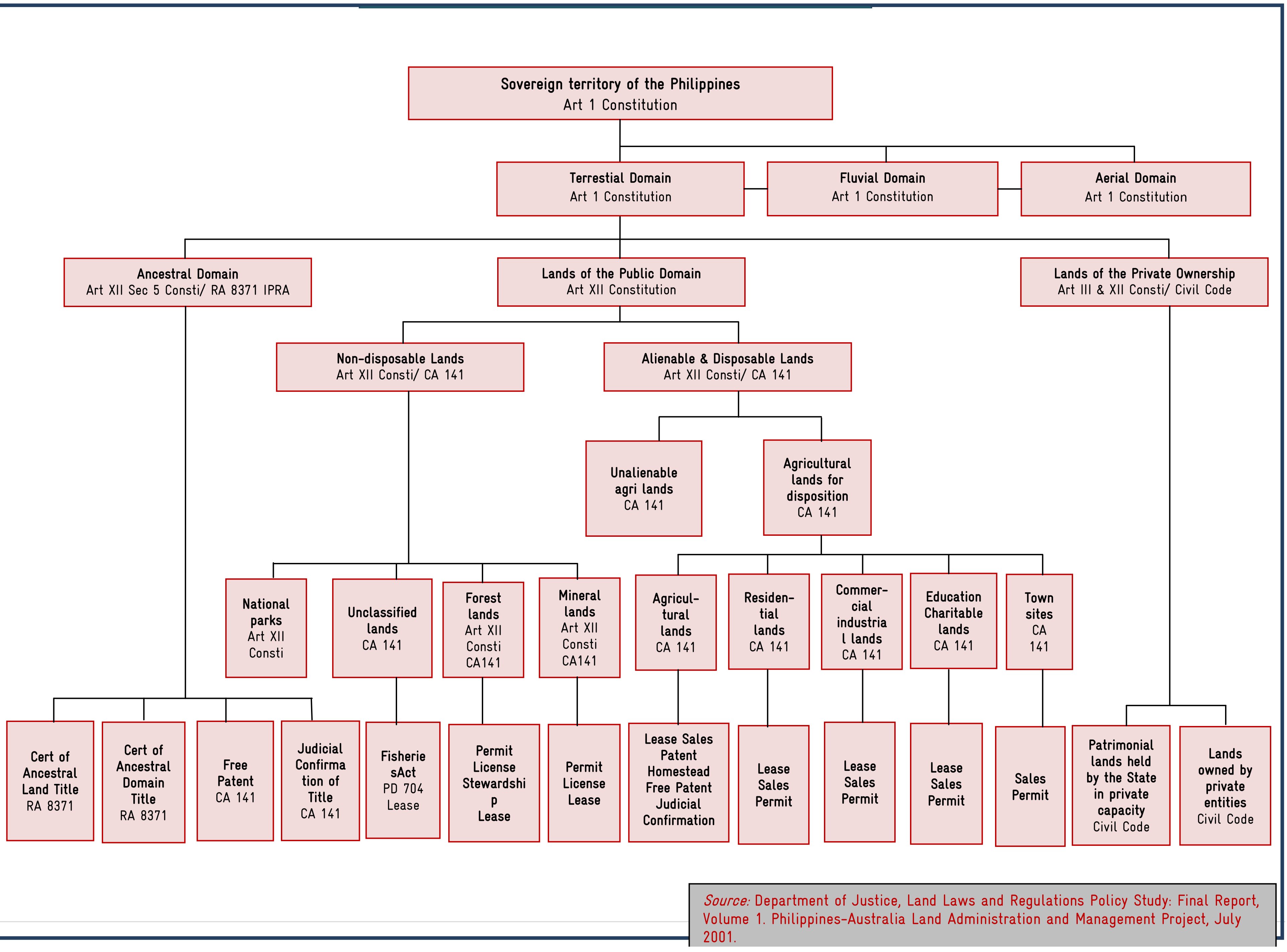

Figure 3. :and Tenure System in the Philippines

8 Public land, fisheries and forests

- Recognize tenure rights, including customary rights of individuals & communities (8.2)
- Recognize *collective* rights and *collective* management systems (8.3)
- Ensure updated public land & resource inventories, including those with customary tenure & the private sector (8.4)
- Develop policies covering the use of public lands & resources. Develop policies that promote equitable distribution of state-owned land, fisheries & forests. Ensure public participation, transparency & accountability in the fulfillment of these policies. (8.6)
- Monitor impacts; gender-differentiated (8.11)

- Article 12, Sec 2 of the *Philippine Constitution* on *National Economy & Patrimony* establishes the public domain and declares state ownership over waters, minerals, coal, petroleum, and other mineral oils, all forces of potential energy, fisheries, forests or timber, wildlife, flora and fauna, and other natural resources. The laws that govern the public domain is illustrated in the previous diagram on the "Land Tenure System in the Philippines".
- The public domain covers an estimated 16 million out of the total 30 million hectares of land in the Philippines.
- Article 12, Sec 3 of the Constitution then classifies lands of the public domain "… into agricultural, forest or timber, mineral lands and national parks. Agricultural lands of the public domain may be further classified by law according to the uses to which they may be devoted. Alienable lands of the public domain shall be limited to agricultural lands…."

- The *Public Lands Act* of 1936 (CA 141), which pre-dates the *Constitution*, remains as the framework law that defines the coverage of the public domain, as well as its management, use and disposition. The *Revised Forestry Code* (Sec 13) then establishes the *System of Land Classification* over forest lands. ("Forest lands" here is used as a designation of state ownership, not as a land use classification or as description of an ecosystem.) It provides for the proper and accurate classification and survey of all lands of the public domain into agricultural, industrial or commercial, residential, resettlement, mineral, timber or forest, and grazing lands, and other classes.

- Certain characteristics may be worth noting in the management of the public domain, in relation to VGGT Section 8:

  - Provisions for smallholder utilization and management – whether through integrated social forestry, small-scale mining, and others. Tenure access and rights are given either to individuals (households) or to collectives (cooperatives)

  - The exploitation and use of natural resources is reserved for Filipinos, but foreigners may participate as minority partners through joint ventures or through financial/technical arrangements

  - The use and enjoyment of the country's marine wealth in its archipelagic waters, territorial sea, and exclusive economic zone, reserved exclusively to Filipino citizens.

  - Limits on the scope (1,000 ha for corporations; 500 ha for individuals) and duration (25 years, renewable) of lease agreements given over public domain lands

  - Legal recognition of customary tenure rights of indigenous peoples as provided under IPRA, and as recognized by other laws, including *CARP/ER and the Mining Act*

- The different laws provide for the further classification and allocation of lands in the public domain, e.g.:

- *NIPAS* law describes "outstandingly remarkable areas and biologically important public lands" as protected areas.

- *CARP/ER* considers "lands of the public domain suitable for agriculture" be included for redistribution under the agrarian reform program.

- However, the given reality is that of overlapping boundaries and tenure rights, and land conflicts in public domain lands, as illustrated by discussions during the consultations, e.g.,:

  - *NIPAS* currently covers some 3.7 million out of the country's 30 million hectares as protected areas. However, there are communities that live within protected areas. Some people hold rights to titled property; others have no legal title, but they have lived long in the area and claim "prior rights". Local politicians constantly pressure officials to excise portions of the land for private titling. Moreover, there are 6.3 million ha of biodiversity-rich areas that lie outside of protected areas.

  - The *Revised Forestry Code* (Sec 38) gives tenure holders (timber licensees & forest concessionaires) the exclusive control over forest concession areas. Because holders of license agreements are also required to adopt forest conservation and protection, they are given both the right of harvest and the right of exclusion (preventing entry by others). But what about *existing forest dwellers and user*s without formal rights who then lose access to such resources? This is one common area of resource conflict.

  - The *Mining Act* prohibits mining companies from operating in ancestral lands without prior consent of the indigenous cultural community concerned. Mining is also prohibited in "old growth or virgin forests, proclaimed watershed, forest reserves, wilderness area, mangrove forests, mossy forests, national parks, provincial/ municipal forests, parks, greenbelts, game refuge and bird sanctuaries as defined by law and in areas expressly prohibited under the *NIPAS*. However, the reality is that mining operations do have overlaps with ancestral domains and protected areas.

- The demarcation of the public domain and the different land classifications have yet to be completed. Policies need to be harmonized. Is there need for a single mapping system?

9 Indigenous peoples & other communities with customary tenure

- Acknowledge that land, fisheries & forests have social , cultural, economic, environmental and political value to indigenous peoples and communities (9.1)
- Indigenous peoples and communities with customary tenure and self-governance should provide equitable, secure & sustainable rights to resources, and ensure participation of all members in decisions including in cases of collective tenure systems (9.2)
- States should meet their international obligations, including ILO Convention 169, Biodiversity Convention & the UN Declaration on Rights of Indigenous Peoples (UNDRIP) (9.3, 9.4)
- No forcible eviction from ancestral lands (9.5)
- Recognize women's rights in customary tenure systems (9.6)
- Ensure participation of affected peoples in developing & drafting tenure policies (9.7)
- Protect customary lands; if possible, formal documentation of customary lands to prevent competing claims. (9.8)

- Art 12, Sec 5 of the *Constitution* states that "the State ... shall protect the rights of indigenous cultural communities to their ancestral lands to ensure their economic, social, and cultural wellbeing. The Congress may provide for the applicability of customary laws governing property rights or relations in determining the ownership and extent of ancestral domain.

- The tenure rights of indigenous peoples over their ancestral domains is legally recognized and protected under the Indig Art 12, Sec 5 of the *Constitution* states that "the State … shall protect the rights of indigenous cultural communities to their ancestral lands to ensure their economic, social, and cultural wellbeing. The Congress may provide for the applicability of customary laws governing property rights or relations in determining the ownership and extent of ancestral domain.

- *Indigenous Peoples Rights Act (IPRA)*. It states that "ancestral lands/ domains shall include such concepts of territories which cover not only the physical environment but the total environment including the spiritual and cultural bonds."

- *IPRA* is a leading example of a law that recognizes the rights of indigenous peoples. It has been cited as a policy model for other Asian countries. *IPRA* addresses four substantive rights: (i) the right to ancestral domains and lands, (ii) the right to self-governance and empowerment; (iii) the right to cultural integrity; and (iv) the right to social justice and human rights. The definition of ancestral domain covers forests, pastures, residential and agricultural lands, hunting grounds, worship and burial areas, and include lands no longer occupied exclusively by indigenous cultural communities but to which they had traditional access, particularly the home ranges of indigenous cultural communities who are still nomadic or shifting cultivators. It is estimated that ICCs/IPs comprise an estimated 13% of the population (about 12-13 million people). As of December 2012, the National Commission on Indigenous Peoples (NCIP) reported that 158 certificates of ancestral domain titles (CADTS) had been issued, covering about 4.2 million hectares and benefiting 918,000 rights claim-holders.[21] It is projected that two million hectares more need to be processed; hence, a total of 6-7 million hectares is expected to be eventually covered under ancestral domain titles or claims.

- Under the principle of self-determination, *IPRA* provides for IP communities to document and delineate their own ancestral domain claims, and to formulate their own sustainable development and management plans (ADSDPs). The law further states that contracts, licenses, concessions, leases and permits within the ancestral ancestral domains shall not be

21 The 4.2 million hectares currently covered under ancestral domain titles constitutes 14% of the country's total land area of 30 million hectares.

renewed or allowed without the free and prior informed consent (FPIC) of the IP community. This is defined as the "consensus of all members of the IPs/ICCs to be determined in accordance with their respective customary laws and practices, free from any external manipulation, interference or coercion." (Chap 2, Sec.3)

- However, the implementation of *IPRA* has been hindered by contradictory legislations, conflicting boundaries and overlapping agency mandates. These have had eroding effects on the application of *IPRA*.

- A major contention has been on jurisdiction over claimed forest lands, as the revised *Forestry Code of 1975* stipulates that "all lands above 18 degrees slope automatically belong to the state and classified as forest lands". Yet large areas of ancestral domain lands have slopes of 18 degrees and above. Moreover, many ancestral domains have overlapping boundaries with national parks and protected areas, land concessions, and agrarian reform areas covered by titles and stewardship agreements. An inter-agency agreement sought to address this problem by issuing a Joint Administrative Order,[22] but the net effect has been to freeze the issuance of new titles for ancestral domains due to conflicting claims.

- There are also operational issues that impact on the rights of IPs/ICCs to self-determination, as well as their exercise of tenure rights: Two are cited here:

  - *One*: The extent to which the Ancestral Domain Sustainable Development and Protection Plans (ADSDPPs) of IPs/ICCs are officially recognized and integrated/ adopted into the programs of national agencies and local government units.

  - *Two*: The proper conduct of FPIC in accordance with customary laws and practices, free from coercion, and based on the intent of seeking genuine "consent" rather than just undertaking a "consultation" with the community.

- Today, mining is the main large-scale intrusion into ancestral domain lands. Studies claim that most IP domains are affected by mining concessions or threatened by mining applications.

22 Joint DAR-DENR-LRA-NCIP Administrative Order No 1, Series of 2012 which seeks to resolve jurisdiction and operational issues among the agencies in relation to the implementation of CARL, IPRA and the Public Lands Act/ CA 141

10 Informal tenure

- Promote policies and laws to provide recognition to informal tenure (10.1)
- Legal recognition to informal tenure should be done through participatory, gender-sensitive processes… with special attention to tenants, farmers & small scale producers (10.3)
- Take all appropriate measures to avoid informal tenure that results from overly complex legal and administrative requirements … (10.4)
- Where legal recognition is not possible, prevent forced evictions of those under informal tenure (10.6)

- ***Explanatory note:*** *"Informal tenure" refers to those who lack official recognition and protection. In some cases, informal tenure is deemed illegal, i.e., held in direct violation of the law. A common example is "squatting", also known as "informal settlers". (Other examples may include the non-registered selling of "rights" to land, or the sub-leasing of lands awarded under agrarian reform which may be prohibited by law.) Yet in many countries, illegal property holdings arise because of inappropriate laws. Property rights may also be deemed illegal because of their use, e.g., the illegal conversion of agricultural land for urban purposes… In other cases, property may be "extra-legal", i.e., not against the law, but not recognised by the law, and customary property held in rural indigenous communities falls into this category. Hence a distinction is also often made is between statutory rights or "formally recognized rights" on the one hand and customary rights or "traditional rights" on the other hand.*[23]

23 Edited from FAO. "What is Land Tenure?" http://www.fao.org/docrep/005/y4307e/y4307e05.htm (accessed 7 March 2014). The VGGT discusses "informal tenure" separately from "customary tenure of indigenous peoples".

- In the Philippines, perhaps the most direct recognition of informal tenure rights is expressed through *RA 8368* which de-criminalizes squatting.[24] Related to this is the *Urban Development and Housing Act (UDHA, or RA 7279)* which discourages the practice of forced evictions and demolitions, and requires that adequate relocation be provided in cases involving eviction and demolition of poor settlers. (UDHA, Sec 28) Although these laws are intended for the urban poor, they apply to rural settlers as well. The two laws – *RA 8368* and *RA 7279* – are not covered by this Study.

- In the Philippines, it is said that a large portion of urban and rural households are *informal settlers*, defined by the National Census Office as those "occupying a lot rent-free without the consent of the owner". Informal settlers may occupy private lands, easements, roadsides, public areas, dumpsites, forest lands and protected areas. It is estimated that 37% of the Metro Manila population, or 4 million people, live in slums in 2010.[25] In the *rural areas*, however, the numbers of informal settlers remains largely unknown.

- In the Philippines, the governance of tenure is focused mainly on the management of landscapes where people and communities are seen merely as part of the landscape. The land laws provide for land classification and for resource inventories, but little data is generated about the landless and about the number of households with informal/ insecure tenure.

- Several laws emphasize *tenure reforms* – or an attempt to move families and communities away from unrecognized/ informal tenure into more *formal*, legal and secure tenure arrangements. This is achieved through different *tenure and policy instruments*, especially involving public lands, waters and forests. A partial list of tenure instruments may be found in *Annex B*, and include:

  - Different forms of stewardship contracts for forest and upland dwellers
  - Fishing/ harvest rights for municipal and artisanal fisherfolk
  - Ancestral domain titling for indigenous peoples and communities (IPs/ICCs)

- ***Recommendation:*** There is need for a separate, thorough review of the different tenure instruments, especially for public lands, waters and forests. Also, a key question is: how to deal with widespread "informal tenure" that still exists, where people still have no tenure security?

24 Title of RA 8368 is the "Act repealing Presidential Decree 772, entitled 'Penalizing Squatting and Other Similar Acts'"
25 Ballesteros, Marife (2010). "Linking Poverty and the Environment: Evidence from Slums in Philippine Cities". PIDS. http://dirp4.pids.gov.ph/ris/dps/pidsdps1033.pdf (accessed 10 July 2014).

Topic 4. Transfers and changes to tenure rights and duties (11-16)

- Addresses governance of tenure when existing rights and duties are transferred or reallocated through markets, investments, land consolidation, restitution, redistributive reforms or state expropriation

11 Markets

- Facilitate efficient & transparent markets (on land). (11.2)
- Prevent impacts from land speculation, land concentration and abuse of customary tenure
- States and parties should ensure that information on market transactions and market values are transparent and widely-publicized (11.4)
- Establish appropriate & reliable recording systems (eg, land registries) that provide accessible information on tenure rights (11.5)
- Establish safeguards to protect tenure rights of spouses, family members who are not listed holders of tenure rights (11.6)
- State and no-State actors should adhere to ethical standards in the operation of markets, & the monitoring of these standards (11.7)
- Protect tenure rights of small-scale producers (food production) when facilitating market operations of tenure transactions(11.8)

- Markets, to be efficient, need common and uniform tenure systems and instruments, as well as transparency in information, and reliable land registries. However, the (land) market in the Philippines is still fraught with many problems. Among the issues discussed at the consultations:
    - Many agencies are involved in land administration, with overlapping responsibilities, weak coordination and poor integration of information

- Complex land policies and regulations; overlapping claims
- Land speculation, due to the absence of an idle land tax and the low cost of holding on to properties
- Inadequate management of land records, lack of efficient land registries and spatial information
- Lack of transparency/limited access to information, including on market transactions, market values, systems of land valuation, etc. Different systems of land valuation are undertaken for different purposes.
- Cadastral information is generally inadequate, with no complete delineation of the boundaries of land classifications.
- Lack of reliable, accurate and complete information on the status of land (under different types of tenure); informal settlers

- There is need to review the proposed *Land Administration Reform Act* (LARA bill) that is has been pending in Congress.
- Meanwhile, to balance markets with the government's social reform agenda, sectoral land policies provide certain safeguards for small-scale producers and smallholders, e.g.
    - Limitations on the transferability of *agrarian reform lands*: "Lands … shall not be sold, transferred or conveyed except through hereditary succession, or to the government, or to the LBP, or to other qualified beneficiaries through the DAR for a period of ten (10) years (CARP, Sec 27)
    - Designation of *protected areas* for agriculture, under SAFDZs (AFMA, Sec 6)
    - Regulations and procedures imposed on the conversion of agricultural lands for other non-agricultural purposes.

- In relation to VGGT 11.6, however, there are *no clear safeguards* to protect tenure rights of spouses, family members who are not listed holders of tenure rights. The equal rights of women to land and property are mentioned in many of the laws. For instance, *CARPER* states that "The State shall recognize and enforce … the rights of rural women to own and control land, taking into consideration the substantive equality between men and women as qualified beneficiaries… These rights shall be independent of their male relatives and of their civil status. (CARPER, Sec 1) However, unless these rights are documented in titles, deeds or registries, then there are no clear safeguards to protect their rights in market transactions.

9 Investments

- Support responsible investments – to support broad economic, social, environmental objectives (12.1)
- Support investments by smallholders, & investments that favor and are sensitive to smallholders (12.2)
- Ensure transparency in all transactions in tenure rights as a result of land investments (12.3)
- Responsible investments should not cause dispossession of legitimate tenure rights holders, environmental damage & should respect human rights. Instead, investments should support poverty reduction, food security, sustainable land/ resource use, diversify livelihoods, etc (12.4)
- Provide transparent rules on the scale, scope & nature of allowable transactions in tenure rights (12.5)
- Provide safeguards to protect tenure, livelihoods, environment from large-scale transactions. (12.6)
- Consider other options (partnership models, contract farming etc)
- Ensure protection of indigenous peoples consistent with international obligations (12.7)
- Institute provisions for investments involving all forms of transactions on tenure rights including acquisitions & partnership agreements ... based on consultation and participation that include those who may be affected. Provide families and communities with information on tenure rights, capacity for participating in consultations, professional assistance (12.9)
- In large-scale transactions, conduct prior impact assessments (social, environmental & affected rights of people) (12.10)
- Contracting parties should provide comprehensive prior information disclosure among those involved in negotiations as well as by those affected by the investment (12.11)
- Require due diligence on the part of professionals & service providers (12.13)
- States and affected parties should contribute to effective impact monitoring of the implementation and impacts. Undertake corrective actions, enforce agreements, provide grievance mechanisms (12.14)
- When States invest or promote investments abroad, they should ensure that their conduct is consistent with national & international law, and international commitments (12.5)

- *Note: The need for responsible agricultural investments has grabbed global attention in light of recent trends, i.e.: (i) The overall decline in public investments in agriculture as a proportion of public spending; and (ii) the growing global phenomena of large-scale land acquisitions in poor and food insecure countries. Thus, while there is a need to promote investments in agriculture, this must be balanced by the interests of smallholders, and the protection of their tenure rights.*

- As state policy, the *Philippine Constitution* (Art 2, Sec 20) "recognizes the indispensable role of the private sector, encourages private enterprise, and provides incentives to needed investments".

- Support for responsible investments is mentioned in several laws on tenure:

  - The *Fisheries Code* establishes a "Code of Conduct for Aquaculture" (Sec 47). In support of municipal fisheries, it also creates: (i) a *Municipal Fisheries Grant Fund* to support fisheries projects of LGUs; and (ii) a *Fishery Loan and Guarantee Fund* administered through the Land Bank of the Philippines.

  - AFMA provides for the identification of Strategic Agriculture and Fisheries Development Zones (SAFDZs) "within the network of protected areas for agricultural and agro-industrial development to ensure that lands are efficiently and sustainability utilized for food and non-food production and agro industrialization". (AFMA, Sec 6) The law also provides for a Rural Industrialization Industry Dispersal Program (AFMA, Chap 3).

  - *CARPER*, Sec 16 cites that incentives should be given to landowners who invest in rural industries.

  - The *Revised Forestry Code* provides incentives to, as well as regulation of, the wood industry, based on the concept of "sustained yield".[26] It provides support for the establishment of industrial tree plantations and tree farms through land-lease agreements for a period of 25 years, renewable for another 25 years. It sets a *minimum* area of 1,000 hectares for industrial tree plantations and 100 hectares for tree farms. The wood industry is given the status of a *pioneer investment area*, with entitlement to tax breaks and other incentives. (Revised Forestry Code, Sec 29-34).

26 Sustained yield" is described as achieving "an approximate balance between growth and harvest or use of forest products in forest lands" (Revised Forestry Code, Sec 21)

  - The Fisheries Code meanwhile encourages *investments by smallholders* (in line with VGGT 12.2). It provides incentives for municipal and small scale commercial fisherfolk, in the form of credit and guarantee funds for post-harvest and marketing support.

- In the Philippines, there are *no specific safeguard policies* in place to protect tenure and livelihoods of smallholders from large-scale land transactions. Instead, the *overall policies on land ownership and tenure* provide certain restrictions on large-scale, foreign land acquisitions:

  - *First,* the *Constitution* requires *Filipino control* over land ownership and utilization of natural resources. It states that "the exploration, development, and utilization of natural resources shall be under the full control and supervision of the State. The State may directly undertake such activities, or it may enter into co-production, joint venture, or production-sharing agreements with Filipino citizens, or corporations or associations at least sixty *per centum* of whose capital is owned by such citizens. Such agreements may be for a period not exceeding twenty-five years, renewable for not more than twenty-five years … (Art 12, Sec 2)

  - *Second*, the agrarian reform law (CARP/ER) establishes a *retention limit* or land ceiling of five hectares for private agricultural lands. Moreover, lands awarded to farmers under the program cannot be sold for 10 years from the time of the award.

  - *Hence*, in the given context, large-scale foreign land acquisitions are likely to come from one of the following arrangements: (i) lease arrangements over land of the *public domain* under a joint foreign venture with a Filipino company; (ii) lease arrangements over *ancestral domain* lands; (iv) long-term lease arrangements over *private agricultural lands* with a group of farmers or with a cooperative; or (v) lease of large government-owned lands.

- A key issue especially in large-scale land transactions is the overall lack of a policy on information disclosure and access to information by the public, especially by communities whose tenure and livelihoods are likely to be affected. There are many cases where local communities are unaware, or else misinformed, about an investment or project that is likely to affect their tenure.

- However, there are safeguard provisions for indigenous cultural communities/ indigenous peoples. Under the principle of self-determination, *IPRA* provides for indigenous communities to formulate their own sustainable development and management plans (ADSDPPs). The law further states that contracts, licenses, concessions, leases and permits within the ancestral domains shall not be renewed or allowed without the free, prior and informed consent (FPIC) of the indigenous community. This is defined as the "consensus of all members of the IPs/ICCs [indigenous peoples] to be determined in accordance with their respective customary laws and practices, free from any external manipulation, interference or coercion".[27]

- Also, the *Mining Act* states that "no ancestral land shall be opened for mining operations without the prior consent of the indigenous cultural community concerned". (Sec 16)

- Yet, while FPIC is required for indigenous peoples and communities, FPIC is not required as a policy for other non-IP sectors.

- It should also be noted here that VGGT Section 12.9 itself also seems weak, as it refers only to the conduct of "consultation" & "participation" – rather than to seek "consent" of the people and communities whose tenure and livelihoods are likely to be affected by the large-scale investment.

- Some of the laws provide safeguard provisions for the environment, e.g.:

    - *Revised Forestry Code*, Sec 21 calls for a balance between growth and harvest for use of forest products in forest lands.

    - *NIPAS* requires environmental impact assessment (EIAs) for activities in protected areas

    - *Mining Act* provides for royalty payments for IPs/ICCs

    - *IPRA*, Sec 9 upholds the right of IPs/ICCs to develop their own lands & natural resources, under the principle of self-determination.

27 IPRA, Chapter 2, Sec.3g,

- However, in reality, many EIAs are often undertaken in behalf of investors rather than by independent parties.
- Finally, the systems are unclear for resolving disputes in the case of investments that impact on tenure, except through the judicial courts. Poorer sectors likely to lose out in court settlements.

13 Land consolidation

- Where fragmentation of smallholder farms & forests exists, States may consider land consolidation & land banks (13.2, 13.3, 13.4)
- Land consolidation should be accompanied by support programs for farmers (e.g., roads, irrigation). It should not be done where fragmentation provides benefits, such as risk reduction or crop diversification. (13.4)
- Provide safeguards for people & communities likely to be affected by land consolidation. Technical & legal support. Environmental safeguards. (13.6)

- *Explanatory notes: In certain countries like Nepal, the fragmentation of agricultural landholdings is a serious issue. Each family tills an average of four plots that are small and non-contiguous. Increasing land fragmentation affects the productivity of the land, contributing to livelihood insecurity and fueling social tensions.*[28]

28 Upreti, Bishnu Raj (2008). "Land as Source of Marginalization and Conflict in Nepal". Chapter 1 in Land Politics and Conflict in Nepal, eds Upreti, Sharma, and Basnet. Published by CSRC, HNRSC and Kathmandu University.

- *Land consolidation refers to the "planned readjustment and rearrangement of land parcels and their ownership"*[29] *The objective of land consolidation is to provide a more rational distribution of land to improve the efficiency of farming, and it involves a process of renegotiating tenure arrangements. The earlier land consolidation programs were undertaken to address the fragmentation of properties by consolidating these into contiguous parcels in order to improve agricultural production. However, today's land consolidation projects (such as those in Eastern and Central Europe) now take on much broader concepts of rural development to include environmental objectives as well as more balanced landscapes – for transportation, recreation, conservation and village renewal.*[30]

- From an overall policy perspective it appears that there is no pro-active government program or law on large-scale land consolidation in the Philippines. Instead, from the set of laws reviewed, the current policy is land redistribution, tenure reforms and the registration of tenure rights. Under *CARP/ER*, there is a land ceiling of 5 hectares for private agricultural lands, although the law also provides for the distribution of collective land titles (CARPER, Sec 10).

- *CARP*, Section 39 on *Land Consolidation* states: "The DAR shall carry out land consolidation projects to promote equal distribution of landholdings i,nfrastructure in agriculture, and to conserve soil fertility and prevent erosion." In this context, DAR undertakes "land consolidation" by developing a land use plan and redistributing land in equal parcels, while engaged in the process of breaking-up large estates or plantations. The objective of the law in this case is to *avoid the further fragmentation of farms*, rather than to reconsolidate fragmented plots into single, contiguous farms.

- Part of the rationale for land consolidation also appears under AFMA (see Chap 1, Secs 6-12), which establishes the concept of SAFDZs (Sustainable Agricultural and Fisheries Development Zones). However, the concept of the SAFDZ focuses on land use planning and zoning, but it does not involve the renegotiation of land tenure rights as in *land consolidation.*

29 http://en.wikipedia.org/wiki/Land_consolidation
30 FAO (2003). The design of land consolidation pilot projects in Central and Eastern Europe. FAO Land Tenure Studies 6. ftp://ftp.fao.org/docrep/fao/006/Y4954E/Y4954E00.pdf

- In the Philippines, land consolidation is likely to emerge as a next generation issue after the institution of land reforms. If not managed and directed by the State with a development vision, then land consolidation is likely to be undertaken by the *private sector* under market arrangements where lands are simply bought up, reconsolidated and converted for commercial and profit purposes.

14 Restitution

- States may consider restitution for loss of legitimate tenure rights. Ensure that all actions are consistent with existing obligations under national and international law (14.1)
- Original parcels should be returned where possible; otherwise, just compensation in money or alternative landholdings (14.2)
- Restitution for indigenous peoples should be addressed at the national context (Note: rather than on case-by-case) (14.3)
- Ensure gender-sensitive policies & processes that provide clear transparent processes; adequate legal assistance for claimants; support services for successful claimants

- *Explanatory note: Restitution means "the act of giving back something that has been lost or stolen" or "the act of restoring to the rightful owner something that has been taken away, lost, or surrendered".[31] Restitution means "recovering gains", while compensation means "recovering losses"; however, both are legal responses to restore benefits to an aggrieved party. In South Africa, for example, the Restitution of Land Rights Act of 1994 seeks to restore the land rights of those who were dispossessed by apartheid and by discriminatory practices under the 1913 Land Act.*

31 http://www.thefreedictionary.com

- Scholars often refer to restitution as one of the "*5 Rs*" in approaches to tenure reform, i.e. – *Recognition of tenure, Registration of rights, Redistribution, Restitution, and Resettlement.*

- In the Philippines, *IPRA* is the main measure of restitution, or the return of tenure rights. In a reversal of the Regalian doctrine,[32] *IPRA* recognizes the *prior rights*, including the *pre-conquest rights* of indigenous peoples, thus superseding the land and resource claims of the State and other entities.[33]

- *IPRA* is discussed under VGGT Section 9 of this paper – Indigenous Peoples and other Communities with Customary Tenure.

32 All Philippine land laws trace their roots to the Regalian Doctrine, where the ownership of all lands, territories and possessions in the Philippines fell under the Spanish Crown, due to the Spanish conquest of the Philippines. The Regalian Doctrine states that all lands of the public domain belong to the State, and that the State is the source of any right of ownership of land. This Doctrine was adopted by the 1935, 1973, and 1987 Constitutions. Until today, all lands without clear private ownership are presumed to be owned by the State.

33 The Regalian Doctrine was challenged by IPRA, whose constitutionality was affirmed in by a 7-7 vote by the Philippine Supreme Court in 1997. Among the arguments cited in support of IPRA was the case of Ibaloi clan leader Mateo Cariño whose right to "native title" was upheld by the US Supreme Court in 1909. The ruling on this case is often referred to as the "Cariño Doctrine".

15 Redistributive reforms

- States may consider allocation of public land, voluntary & market based mechanisms as well as expropriation of private land (15.1)
- States may consider land ceilings as a policy option.
- Redistributive reforms may be considered for social, economic & environmental reasons ie, where a high ownership concentration is combined with a high level of rural poverty (15.3)
- Ensure that reforms are consistent with international obligations & law. Develop partnerships with civil society, private sector, communities, farmers & small-scale producers, fishers, forest users. (15.4)
- Beneficiary contributions should be reasonable and not leave them with unmanageable debt loads. Those who give up their tenure rights should receive equivalent payments without undue delay (15.4)
- Clearly define the program objectives and intended beneficiaries – i.e., families, women, informal settlement residents, pastoralists, historically disadvantaged, marginalized groups, youth, indigenous peoples, gatherers & small-scale producers (15.5)
- Develop policies and laws through participatory processes (15.6)
- Conduct assessments of positive & negative impacts of reforms on tenure rights, food security, livelihoods & environment (15.7)
- Provide the full support required by beneficiaries (access to credit, crop insurance, inputs, markets, technical assistance in rural extension, farm development & housing). (15.8)
- Implement through transparent, participatory and accountable approaches and procedures. All affected parties should be accorded with due process and just compensation (15.9)

- *Note: VGGT, Sec 15 provides a set of "good practice" guidelines for tenure reforms that involve land redistribution.*

- The *1987 Constitution* devotes a whole section to *Agrarian and Natural Resources Reform*. It states: "The State shall apply the principles of agrarian reform or stewardship in the disposition or utilization of other natural resources, including lands of the public domain under lease or concession suitable to agriculture, subject to prior rights, homestead rights of small settlers, and the rights of indigenous communities to their ancestral lands. (Art 13, Sec 6)

- The *Comprehensive Agrarian Reform Program (CARP)* is the Philippines' main redistributive reform. At the level of policy, there appears to be a general convergence & agreement between *CARP/ER* and Section 15 of the Voluntary Guidelines. The *CARP/ER* law:

  - covers both *private* lands and *public* lands suitable for agriculture

  - considers *voluntary mechanisms* and *state expropriation* of private lands (*but not market mechanisms*) in the implementation of the program;

  - establishes *land ceilings* (retention limit) of 5 hectares for private agricultural lands, and *award ceilings* of 3 hectares for beneficiary households

  - identifies *landless farmers* and farmworkers as *target beneficiaries* of land reform

  - redistributes lands "to provide farmers and farmworkers with the opportunity to enhance their dignity and improve the quality of their lives through greater productivity of agricultural lands" (CARPER, Sec 2.4)

  - sets the level of amortization by beneficiaries, based on computations of their *annual gross production* from the land (rather than on the land's market value) thus giving due consideration of beneficiaries to amortize their awarded lands

  - provides for *just compensation* and *retention rights* (5 hectares) for landowners

- establishes an integrated policy of *support services delivery* to agrarian reform beneficiaries, such as: land surveys and titling, socialized agricultural credit, agricultural research and extension services, infrastructure and facilities, and assistance in the organizing and education of agrarian reform beneficiaries

- establishes *equal access of women beneficiaries* to support services, economic opportunities, and participation in all community activities

- however, it *does not provide other support services* mentioned under VGGT Sec 15.8, such as access to crop insurance, technical assistance in farm development, and rural housing

- promotes the creation of Agrarian Reform Communities (ARCs) "in each legislative district with a predominant agricultural population"[34] as the primary mode for the delivery of support services (CARPER, Sec 36)

- creates the Presidential Agrarian Reform Council (PARC), chaired by the President, to provide policy directions, program monitoring and oversight functions

• There are some emerging second-generation policy issues with CARP, in relation to VGGT Sec 15 on Redistributive Reforms:

  - CARPER had set a deadline of June 2014 for the completion of all land transfer activities under the program; hence, what will happen with the unfinished tenure reforms? Will land transfer activities continue after 2014?

  - How to ensure tenure security for those left out of the CARP program? CARP had identified landless farmers and farmworkers as its main beneficiaries, but others have been inadvertently left out, such as migrant and seasonal agricultural laborers.

  - Over time, the effects of land redistribution are likely to be eroded by market forces, as land is re-concentrated among the wealthy. Is there need for a continuing land redistribution program?

34 This appears to be a political move by members of Congress to revise Sec 36 of RA 6657, and to propose under Sec 36 of CARPER that at least two (2) ARCs be created within each legislative district. Note that "legislative districts" are not political units or administrative entities.

16

Expropriation and compensation

- Expropriate only where rights to land, fisheries or forests are required for a public purpose. Clearly define the concept of public purpose in law, in order to allow for judicial review (16.1)
- Respect all legitimate tenure right holders, especially vulnerable and marginalized groups, by acquiring the minimum resources necessary and promptly providing just compensation. (16.1)
- Ensure that the planning & process for expropriation are transparent and participatory. Anyone likely to be affected should be identified, properly informed & consulted at all stages. (16.2)
- Ensure a fair valuation and prompt compensation (16.3)
- Where the acquired land/resource is no longer needed, States should give the original right holders the first opportunity to re-acquire these resources. (16.5)
- Prevent corruption particularly through use of objectively assessed values, transparent and decentralized processes and services, and a right to appeal. (16.6)
- Where evictions are considered to be justified for a public purpose, treat all affected parties in a manner consistent with relevant obligations to respect, protect, and fulfil human rights. (16.7)
- Explore feasible alternatives in consultation with the affected parties, with a view to avoid, or at least minimize, the need to resort to evictions. (16.8)
- Evictions and relocations should not result in individuals rendered homeless or vulnerable. (16.9)

- The *Constitution* states: "Private property shall not be taken for public use without just compensation" (Art 3, Sec 9)

- Among the laws reviewed, *State-led expropriation* involving private lands is included in the agrarian reform laws *(CARP/ER, RA 6657 and RA 9700)*. Relevant provisions in relation to VGGT Section 16 are:

  - Public purpose and coverage: "more equitable distribution and ownership of land, with due regard to the rights of landowners to just compensation…" (CARP, Sec 2). Coverage of private agricultural lands above the 5-hectare retention limit (CARP, Sec 6 and CARPER, Sec 4)

  - Fair value and prompt compensation (CARP, Sec 17-21); support services to landowners (CARPER Sec 16)

  - Transparent valuation: Valuation to include several factors: "cost of land acquisition by the owner, current value of like properties, value of standing crop, nature, use and income, sworn valuation by the owner, tax declarations, appraisal by government assessors, 70% of the zonal value of BIR"… and "social and economic benefits contributed by farmers & by the Government to the property, and non-payment of taxes or loans on the land." (CARPER, Sec 6-7)

  - Processes of acquisition, prior notice and right to appeal (CARP, Sec 16). Eviction (or "compulsory acquisition") is considered as a last option.

- The overall laws that cover the legal provisions on state-led expropriations and compensation are *included* in other Laws not reviewed for this paper.

- It should be noted there appears to be no national standard and method for valuating real property. Different agencies apply several systems and methods in the valuation of properties, depending on the purpose for which land is being assessed. *(see separate discussion on valuation under VGGT 18)*

- ***Further study:*** As this topic is also covered under other laws, it needs a separate review.

Topic 5. Administration of tenure (17-22)

- Related to records of tenure rights, valuation, taxation, regulated spatial planning, resolution of disputes over tenure, and trans-boundary matters.

17 Records of tenure rights

- Provide systems (registration, cadastre and licensing systems) to record individual and collective tenure rights… including those held by the State and public sector, private sector, indigenous peoples & communities w/ customary tenure. (17.1)

- Develop and use socio-culturally appropriate ways of recording rights of indigenous peoples and communities with customary tenure systems. (17.2)

- Develop integrated recording system & spatial systems of tenure rights of the State and public sector, private sector, and indigenous peoples and other communities with customary tenure systems (17.2)

- Ensure that everyone is able to record their tenure rights and obtain information without discrimination on any basis (17.3)

- Adopt simplified procedures and locally suitable technology to reduce the costs and time required for delivering services. Records should be indexed by spatial units as well as by holders to allow competing or overlapping rights to be identified. Broad public info sharing (17.4)

- Ensure that information on tenure rights is easily available to all, subject to privacy restrictions. Such restrictions should not prevent public scrutiny to identify corrupt and illegal transactions (17.5)

- Note: the discussion below is also based on the Consultations for this Paper.

- The land information system in the Philippines remains generally poor and inadequate, although in recent years there have been efforts within several agencies to systematize and upgrade their land information systems. There is a general lack of systematic, reliable and

accurate information about landownership, tenure, boundaries, location, actual land uses and land valuation – including at the local government levels.

- Cadastral information is generally inadequate. There is no complete delineation of the boundaries of public, private and forest land parcels. Full cadastral maps for all *NIPAS* areas are still to be completed. There is no set of cadastral maps that show titled and untitled properties, and land parcels that are under different types of tenure instruments. Records are not regularly updated. Each agency maintains separate land records with different systems of recording and mapping.

- The existing management of land records remains generally poor. Many records are missing due to flooding, war, theft, and damage from fire. Some were also misplaced during frequent transfers of records. Many of the remaining records are in fragile condition and some may have been illegally altered.

- The Land Management Bureau under the DENR, is the keeper of the original cadastral surveys and record maps, while the Land Registration Authority (LRA) under the Department of Justice keeps copies of subsequent surveys on titled property. The LRA continues its computerization of records, although these records are limited to titled property.

- Information is not easily accessible. Moreover, there are instances of fraudulent land titling, altering of records and illegal activities that causes land conflicts, and this may take years to resolve. LGUs continue to issue tax declarations even for lands under the public domain that are deemed inalienable.

- ***Recommendation:*** Review the pending bill on the *Land Administration and Reform Act (LARA bill)* in the context of VGGT Sec 17.

18 Valuation

- Ensure fair and timely valuation of tenure rights for specific purposes, i.e., operation of markets, security for loans, investments, expropriation and taxation (18.1)

- Ensure that valuation systems consider non-market values, i.e., social, cultural, religious, spiritual and environmental values where applicable. (18.2)

- Transparency in valuing tenure rights. Sale prices and other relevant information should be recorded, analysed and made accessible to provide a basis for accurate and reliable assessments of values. (18.3)

- Develop and publicize national standards for valuation for governmental, commercial and other purposes. (18.4)

- Make valuation information and analyses available to the public in accordance with national standards. Prevent corruption in valuation through transparency of information and methodologies, in public resource administration and compensation, and in company accounts and lending. (18.5)

- Overall, there appears to be no national standard and common method for valuating real property. Different agencies apply several systems and methods in the valuation of properties, depending on the purpose for which land is being assessed.

  - There is valuation of land for real property taxation, which is based on the *Tax Code* and is undertaken by provincial, municipal and city assessors.

  - There is valuation for compensation of land acquired or expropriated for public investment.

- There is valuation under *CARP*, which is undertaken by the Land Bank of the Philippines. And even within *CARP*, the land valuation methods may vary. There is a system for valuating lands covered under the earlier *PD 27* or *Land Reform Program of 1972*, for lands offered under the "voluntary offer to sell" arrangement under CARP, and for land acquired through "compulsory acquisition". The valuation system under CARP has undergone several revisions over the years.

- *Finally, the private sector also undertakes its own valuation for the purposes of bank lending, insurance, purchase and sale of real property by investors.*

- Outside of the agrarian reform program *(CARP/ER)*, land valuations are covered by other laws, including the *Tax Code* and other implementing guidelines, and not covered by this assessment.

- Land valuation systems and actual sale prices are not made accessible to the public. The laws do not set standards for transparency of information and methodologies. Where land administration is poor, and where record-keeping is weak, the system is prone to corruption and manipulation.

19 Taxation

- Taxation may contribute to broader social, economic and environmental objectives (e.g., encourage investments, prevent speculation or concentration of ownership) (19.1)

- Develop policies, laws and organizational frameworks for regulating all aspects pertaining to taxation of tenure rights (19.2))

- Administer taxes effectively & transparently. Taxes should be based on appropriate values. Assessments of valuations and taxable amounts should be made public. States should provide taxpayers with a right to appeal against valuations. Prevent corruption in tax administration, through increased transparency in the use of objectively assessed values (19.3)

- *Note of interest: In the Philippines, collection of the private land tax (realty tax) falls largely under the local government, while other agencies collect different fees (permits, licenses) for user rights and extraction in lands under the public domain. In other countries (South Asia), however, land taxes are managed by Land Ministries. This practice was introduced by colonial administrations, where the land tax had provided the main source of revenue to support the costs of colonization and empire-building.*

- In the Philippines, land taxation is covered by other laws, including the *Tax Code* and the *Local Government Code*, and therefore is not directly covered by this assessment.

- ***Recommendation***: There is need for a separate assessment and discussion on taxation policy as an administrative measure for land tenure governance, in line with VGGT Section 19. In particular, there is need to assess:

  - The goals of land-related taxation; how it contributes to broader development goals (aside from just revenue-creation), and in particular to improving the governance of tenure.

  - The effectiveness & transparency of land/resource-related tax administration (including objective systems of valuation, the prevention of corruption).

20 Regulated spatial planning

- Conduct regulated spatial planning, monitor and enforce compliance with those plans spatial planning should reconcile and harmonize different objectives of the use of land, fisheries & forests. (20.1)
- Develop gender-sensitive policies on regulated spatial planning … also consider methods of planning and territorial development used by indigenous peoples & communities with customary tenure systems
- Reconcile & prioritize public, community and private interests and accommodate various uses such as rural, agricultural, nomadic, urban and environmental … Consider all tenure rights, including overlapping & periodic rights. (20.3)
- Ensure wide public participation in planning & in the review of draft spatial plans (20.4)
- Spatial planning should meet the challenges of climate change and food security (20.5)

- A number the legislations reviewed by this Study call for *spatial planning* for different *purposes* (i.e., productivity, protection, risk reduction). They cover land under different *land use* classifications (agricultural lands, forestlands, waters), ownership (public, private) and *tenurial status*. Also, spatial planning is carried out under different *implementation arrangements* (by national agency, special body, LGUs). These include, among others:

a) **Land Use Plans and Zoning Ordinances** that incorporate the SAFDZ[35]– required for all cities and municipalities – and updated every four (4) years or as may be deemed necessary upon the recommendation of the Housing and Land Use Regulatory Board. SAFDZs shall serve as "protected areas" for the development of agriculture, fisheries and agro-industries, identified on the basis of their: (i) favorable agro-climactic conditions; (ii) strategic location; (iii) market access; and (iv) dominant presence of small farmers and producers. (AFMA, Chap 1, Secs 6-12).

b) **System of Forest Land Classification and Survey** – by the DENR to "study, devise, determine and prescribe the criteria, guidelines and methods for the proper and accurate *classification and survey of all lands of the public domain* into agricultural, industrial or commercial, residential, resettlement, mineral, timber or forest, and grazing lands, and others provided by law (Revised Forestry Code, Sec 13, emphasis supplied).

c) **Risk assessment and vulnerability mapping** (national and local) – as provided for under the *Disaster Risk Reduction and Management Act of 2010* (Secs 6, 9, 12-13).

d) **Ancestral Domain Sustainable Development and Protection Plans** – to be developed by indigenous cultural communities/ indigenous peoples (ICCs/IPs) for the management and protection of their ancestral domains, based on indigenous knowledge systems and governance systems. (Based on IPRA, Chap IV, Right to Self-Governance and Empowerment, and Chap VI, Cultural Integrity).

- It is observed, however, that there is need to harmonize systems of spatial planning that incorporate and reconcile different objectives on the use of land, fisheries and forests. Different agencies carry out their own spatial planning and mapping systems, and yet their plans and maps are not consolidated or harmonised.

- Moreover, some of the laws do not prescribe *processes* needed for spatial planning (i.e., consultations) in ways that seek to reconcile different public, community and private interests, accommodate various spatial uses and priorities, and consider all tenure rights that may be overlapping or in conflict with each other.

35 SAFDZ stands for "Strategic Agriculture and Fisheries Development Zones" which are also considered as protected areas for agriculture and agro-industrial development.

- Note: Regulated spatial planning is the major focus of a legislation that has been pending for many years – the proposed *National Land Use Act*, or *NLUA*. It is recommended that discussions on the NLUA bill also take into account the principles of VGGT Section 20 – i.e, the need to reconcile and harmonize the different existing laws, and to negotiate among overlapping and competing interests.

21 Resolution of disputes over tenure rights

- Provide access through impartial and competent judicial and administrative bodies to timely, affordable & effective means of resolving disputes over tenure rights, including alternative means of resolving such disputes. Provide right to appeal. (21.1)
- Consider introducing specialized tribunals or bodies (21.2)
- Strengthen and develop alternative forms of dispute resolution, especially at the local level (21.3)
- Consider using implementing agencies to resolve disputes within their technical expertise (21.4)
- Prevent corruption in dispute resolution processes (21.5)
- Provide legal assistance to vulnerable and marginalized persons, to ensure access to justice without discrimination (21.6)

- Some of the laws reviewed provide for special grievance mechanisms and alternative systems for resolving disputes over tenure. They also provide parties with the right of appeal, and the right to elevate cases to judicial courts. Some laws (i.e., *Mining Act*) recognize the need for a speedy disposition of cases, and therefore stipulate the period by which decisions should be made. To cite some key examples:

  - *CARP/ER*: provides extra-judicial powers to DAR, providing the agency with exclusive jurisdiction over agrarian cases under the program. Farmers are also permitted to lawyer for themselves in extra-judicial proceedings. Parties may appeal their cases with judicial courts.

  - *IPRA*, Sec 7(h): provides for the resolution of conflicts through customary laws. The NCIP (through its regional offices) is also provided with quasi-judicial powers to resolve local disputes, after exhausting all other means. Parties may appeal their cases with the Court of Appeals.

  - *Mining Act of 1995*, Sec 77-79: provides for a Panel of Arbitrators at the DENR regional level, with possible appeal to the Mines Adjudication Board at the national level. The Panel of Arbitrators is given exclusive and original jurisdiction over the following cases:

    a) Disputes involving rights to mining areas;
    b) Disputes involving mineral agreements or permit;
    c) Disputes involving surface owners, occupants and claimholders/ concessionaires; and
    d) Disputes pending before the Bureau and the DENR at the time of the Act.

- These extra-judicial dispute mechanisms help provide timely, affordable & effective means of resolving disputes over tenure rights, in accordance with VGGT Sec 21. However questions arise when different sectors have conflicting claims over the same resource, and their tenure rights are invoked under different laws. Several examples were cited during the Consultations:

- Mining permits given within ancestral domains
- CLOAs issued under agrarian reform, covering land parcels within ancestral domains, or within *NIPAS* areas
- Integrated protected areas that overlap with ancestral domain claims; protected areas that cover entire villages and towns where most residents have no formal tenure, yet have lived in the area even prior to the promulgation of the *NIPAS* law
- The illegal private titling of lands within designated forest lands and protected areas
- Conflicting rights and claims over foreshore lands and other lands of the public domain, due to overlapping permits, leases and tenure instruments issued by different agencies and by the local governments

- As mentioned, the Philippines has a sectoral/landscape approach to land and tenure governance. However, the multiplicity of laws, and the lack of harmonization among different tenure policies has led to conflicting claims among sectors, and functional overlaps among implementing agencies. assessment.

22 Trans-boundary matters

- Where trans-boundary matters related to tenure rights arise, parties should work together to protect such tenure rights, livelihoods and food security of the migrating populations (22.1)
- Learn more about trans-boundary issues (seasonal migration of pastoralists, fishing grounds of small-scale fishers) (22.2)
- Coordinate with relevant regional bodies and with affected parties; strengthen international measures to administer tenure rights that cross international boundaries (22.3)

- ***Note:*** *Section 22 of the VGGT on trans-boundary issues may seem more relevant to countries with adjacent land-based territories. The tenure rights of communities living along national boundaries are often subjected to different tenure and legal systems, access rights and prohibitions, and well as resource conflicts on both sides of the border. Most affected are usually pastoralists, nomadic tribes, indigenous peoples, traditional fishers and minority ethnic communities whose livelihoods are often dependent on farming, fishing, herding, forest gathering or trading. In many cases, these communities suffer from discrimination and lack of tenure rights. In countries with open borders, people and groups with no land certificates may even be denied their citizenship, along with the rights and entitlements that citizenship brings.*
- The 1987 *Constitution* establishes the Philippine patrimony and territory. The national territory includes the Philippine archipelago, with all the islands and waters embraced therein, consisting of its terrestrial, fluvial and aerial domains. The waters around, between, and connecting the islands of the archipelago form part of the internal waters of the Philippines. (Art 1)

- As an archipelagic country, trans-boundary issues in the Philippines consist mainly of territorial disputes with foreign countries over the open sea (as well as islets & reefs). There is the intrusion by foreign fishermen into Philippine waters and conflicts that arise over traditional fishing grounds especially in the North, South and Western Philippine Sea. In the South, there is also a strong historical and ethnic link between the peoples of Sulu and Tawi-Tawi with the peoples of Sabah, Malaysia. Cross-boundary trade and migration have resurfaced as major issues in recent years, due to national security concerns in both countries.

- None of the laws covered by this Study, however, discusses trans-boundary issues as they relate to tenure rights.

Topic 6. Responses to climate change and emergencies

- Focuses on the governance of tenure of land, fisheries and forests in the context of climate change, natural disasters and conflicts.

23 Climate change

- Ensure legitimate tenure rights of people likely to be affected by climate change, especially the poor & vulnerable (23.1)
- Prepare and implement strategies/actions with participation of people likely to be affected by climate change (23.2)
- The provision of alternative land, fisheries, forests and livelihoods for displaced persons should not jeopardize the livelihoods of others (23.2)
- Mobilize participation of people, especially the poor & vulnerable in the negotiation and implementation of mitigation and adaptation programmes (23.3)

- The *Climate Change Act of 2009* or *RA9729* articulates the country's general policy on climate change, and establishes a Climate Change Commission for this purpose. The focus of the law is on creating the *institution* – defining its composition, office bearers, roles and tasks, relation with other agencies and LGUs, and funding. A major task of the Commission is the formulation of a "Framework Strategy and Program on Climate Change" and "National Climate Change Action Plan".
- In relation to VGGT, Sec 23, the *Climate Change Act* states in its Declaration of Policy (Sec 2):

    a) The State's objective of "ensuring that food production is not threatened"; and

    b) A State policy to pursue a "gender-sensitive, pro-children and pro-poor perspective in all climate change and renewable energy efforts, plans and programs".

- However, the *Climate Change Act* does not provide a *clear link* between climate change and the need to *secure the tenure rights* of affected peoples over land, fisheries and forests.

  a) The *Declaration of Policy* (Sec 2) of the Act mentions the *general* objectives of addressing climate change – mitigation and adaptation, including the integration of risk reduction into all programs and initiatives.

  b) The Law draws up a list of concerns that should be the focus of the "National Climate Change Action Plan" (Sec 13), but this list does not include *tenure issues*.

- Meanwhile, *none* of the other laws address the potential impacts of climate change on people's tenure rights to land and resources. Perhaps this is because all the other laws on land and resource rights (under this Study) were legislated *before* climate change came to be recognized as a national concern. Only *IPRA* mentions the tenure rights of IPs in case of displacement due to natural catastrophes – i.e., the right to temporary resettlement, the right to return, and security of tenure in cases where permanent resettlement is necessary.

- As an archipelago, the Philippines is highly vulnerable to the potentially dangerous consequences of climate change – rising seas, changing landscapes, increasing frequency/ severity of storms and floods, droughts, fires, climate related illnesses and diseases, damage to the ecosystem (e.g. erosion, inundation) and biodiversity loss. An estimated 60% of the Philippine population lives in the coastal zone.[36] Climate change will affect overall land availability, land use & tenure.

- While *mitigation* is driven nationally or globally, *adaptation* is largely local. And in climate change adaptation, poorer sectors without secure tenure rights are most vulnerable.

- ***Recommendations:*** Ensure the security and protection of peoples' tenure rights affected by climate change. There is need to further explore and discuss the actual issues and the relevance of policies as they apply to *climate change and tenure rights*, especially in the light of recent events – i.e., Typhoon Yolanda. These include risk reduction and prevention measures, disaster response, recovery and rebuilding efforts for affected communities.

36 http://siteresources.worldbank.org/INTPHILIPPINES/Resources/PEM05-ch1.pdf (accessed 6 March 2014)

- As noted during the consultations, many of the areas severely affected by Typhoon Yolanda were coastal communities where residents have no legal tenure. Several proposals were raised – including:

    a) *Undertaking pre-emptive measures*, i.e. – explore "no-build zones"; widen the coastal easements; review and regulate tenure arrangements to make them consistent with geo-hazard mapping, etc;

    b) *Recognizing the informal rights of settlers* – ensure access and usufruct rights to coastal areas for livelihoods (fishing); ensure tenure security for homelots with provisions for housing;

    c) *Addressing tenure issues during reconstruction and resettlement* – assist families to return to and rebuild their homes; find alternative land for housing and homelots in cases where resettlement is necessary.

- There is also need to review the existing "National Framework Strategy and Program on Climate Change" and the "National Climate Change Action Plan" to determine if tenure issues are discussed, and how tenure-related issues are to be addressed.

  Policies should be holistic and pre-emptive, and should address the whole range of actions in relation to ensuring security of tenure for people and communities – i.e., building resiliency to climate change, reducing risks, responding when disaster events occur, and ensuring recovery and rebuilding efforts. Policies should address the tenure rights of people likely to be affected by climate change, as well as of host communities when cases of resettlement are involved.

24 Natural disasters

- Address tenure in disaster prevention and preparedness. Design regulatory frameworks for tenure, including spatial planning. (24.1)

- Ensure that all actions are consistent w/ int'l obligations (i.e., UN Principles on Housing & Property Restitution for Refugees and Displaced Persons, & Humanitarian Charter and Minimum Standards in Disaster Response). (24.2)

- Systems for recording rights should be resilient to disasters, including off-site storage of records. Identify areas for temporary resettlement, with rules for tenure security in such areas (24.3)

- During emergency response phase: protect tenure rights of displaced persons, as well as of others (24.5)

- During reconstruction phase: provide systems to resolve disputes when people return to their place of origin. Negotiate with host communities where resettlement is involved. (24.5)

- *The Philippine Disaster Risk Reduction and Management Act of 2010 (DRRM)* was instituted to strengthen the country's response and management system to address the risks posed by natural disasters. Its main focus is the creation of an institutional framework – starting with the creation of the National Disaster Risk Reduction and Management Council (NDRRMC) as well as Regional and Local DRRM Councils. It defines the composition of such Councils at different levels, as well as their roles, powers, responsibilities and prohibitions.

- In a *limited* way, the DRRM addresses certain features of VGGT Sec 24:

    1) It provides a stronger focus on "disaster prevention" and "risk reduction" in addition to the past emphasis on "disaster response".

    2) It includes *spatial planning* in preventive/risk reduction measures, i.e.:

        a) Developing information systems and assessment tools to assess vulnerable areas and ecosystems (Sec 6 – J). This includes government initiatives on risk assessment and vulnerability mapping thru the preparation of geo-hazard maps.

        b) Ensuring that local DRRM plans are incorporated into the local Comprehensive Development Plan (CDP) and Comprehensive Land Use Plan (CLUP) (Sec 9-e); and

        c) Developing local disaster risk information and "local risk maps" (Sec 12-3)

    3) It emphasizes coordinative approaches needed for effective risk reduction – i.e., preparedness and pre-planning, multi-agency & multi-sector involvement, consultative & participatory processes with different sectors and localities, decentralized responses, etc.

- However the DRRM law itself remains *silent* about the *link* between "disaster prevention/ risk reduction" and *tenure rights*. For example, while the law provides measures for spatial planning (preparation of risk and hazard maps), it does not articulate how such spatial plans/maps are to be used, for example, as regulatory frameworks for tenure. Neither does it give the NDRRMC the regulatory powers on spatial planning.

- DRRM is also *silent* on policies regarding the need to address tenure issues during emergency response or at the reconstruction phase. This includes resolving disputes over tenure rights and boundaries, provision of temporary shelters, returning people to their places of origin and rebuilding, and providing permanent resettlement as may be necessary. Resettlement areas should be negotiated with host communities to ensure that "people who are displaced are provided with secure access to alternative land … and livelihoods in ways that do not jeopardize the rights and livelihoods of others" (VGGT, Sec 24.5)

- Further, it provides that one role of the Office of Civil Defense is to "Ensure that all disaster risk reduction programs, projects and activities requiring regional and international support shall be in accordance with duly established national policies and aligned with international agreements" (Sec 9, emphasis supplied). While this policy establishes the standards for risk reduction programs in accordance with VGGT 24.2, it *limits* the application of standards only to those projects and activities "requiring regional and international support".

- ***Recommendation***: The need to address *tenure rights and issues* in "disaster prevention/ risk reduction/ response/ rehabilitation" – is an area that requires further policy review and study. There is also need to ensure that all actions on natural disaster risk reduction and response are consistent with obligations under national and international law, and meet the minimum standards for disaster response and in consideration of relevant international principles. (in accordance with VGGT, Sec 24)

- ***Recommendation:*** The regulatory framework (including spatial planning) for disaster preparedness & prevention should be addressed in the pending bill on the *National Land Use Act (NLUA).*

- Among the other laws, it is worth noting that only *IPRA* mentions the tenure rights of indigenous peoples/communities in cases of displacement due to natural catastrophes – i.e., the right to temporary resettlement, the right to return, & security of tenure in the case of permanent resettlement.

25 Conflicts in respect to tenure of land, fisheries and forests

- Take all steps to prevent conflict over tenure rights, but if conflict happens, address tenure issues during & after the conflict, including situations of occupation (25.1)
- Ensure that actions taken are consistent with international obligations & int'l law (25.2)
- Use peaceful means to resolve conflicts. Consider using customary and local mechanisms, as appropriate (25.3)
- When conflicts arise, protect people's tenure; states should not recognize tenure acquired through force or violence. Respect tenure rights of refugees & displaced persons. Protect official records of tenure rights. (25.4)
- Procedures for restitution, rehabilitation and reparation should be non- discriminatory, gender sensitive and widely publicized (25.5)
- Where restitution is not possible, provide secure access to alternative land for refugees and displaced persons; negotiate with host communities in cases of resettlement to avoid displacement and loss of livelihoods. (25.6)
- Ensure special protection for the vulnerable, especially widows & orphans (25.6)
- Institute policies to address discrimination (25.7)

- This section of the VGGT refers to large-scale conflicts rather than disputes (VGGT 21). These conflicts may focus on land and territorial issues, or on other issues. The concern here is about the tenure of people who may be affected or displaced, whether or not they are a direct party to the conflict. These conflicts include tribal wars, insurgencies, and rebellions. A recent event cited as a case-in-point is the Zamboanga City Crisis of September 2003 where thousands lost their homes. Until today, many remain homeless as "internally-displaced people". Most are intent on returning to their homes yet they are prevent from doing so, or else are deemed to be non-qualified for housing assistance because of their lack of formal tenure rights over the land.

- None of the laws studied deals with tenure rights and issues in cases of conflict. Only *IPRA* clearly states the right IPs/ICCs to return and to be reinstated on their lands in cases of post-conflict.

- Meanwhile, the prevention of conflict is related more to programs, rather than to land laws.

- ***Recommendation***: This needs a separate review, and the policies on conflict and tenure should be studied in light of recent experiences, especially the recent Zamboanga conflict.