

COMPARATIVE LAND GOVERNANCE AND USE RIGHTS: A PERSPECTIVE ON ADVANCING ECONOMIC DEVELOPMENT, LAND USE PLANNING, NATURAL RESOURCE MANAGEMENT AND INDONESIAN LAND LAW REFORM. *

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ABSTRACT

Land use policies and laws or *land governance* that define access to and use of land and natural resources assets (i.e. land tenure regimes and use rights, land administration and agrarian reform) are key national issues in many countries, especially in evolving economies. Related aspects include production opportunities and constraints reflected in land resource access, use permits and regulations, exploitation rights, input cost and availability, land management, rural prosperity and social justice. Boundary conditions include the existing legal and informal land use controls and incentives that shape land use dynamics in the Republic of Indonesia, and the policy effects on the distribution of associated benefits for and impacts on its people.

Agricultural development is one of the most vital agendas of the current government. New RI policy priorities identified include food security, regional food self-sufficiency, improving agricultural productivity, strengthening intra-sectoral linkages, improving rural incomes, evaluation of subsidies, and fairness in international trade. With the dominance of land-less and small-scale farming, agrarian reform is a critical element in addressing these policy objectives. This will require a focused and dedicated policy initiative that not only addresses land access and security but also input and pricing policies that are effective in improving the economic viability of small-scale farms. Price scenarios that benefit producers have to be combined with increases in productivity to improve rural incomes, post-harvest processing and marketing. In this process, the role and capacity of agricultural extension in improving farm management by providing effective technical assistance, is also essential.

In addition, the development and expansion of the public infrastructure will greatly reduce transportation cost and create critically-needed production efficiencies. Recent legislation passed in the form of the new land acquisition law (Law No. 2, 2012) will significantly address these needs. The key challenge will be to link this initiative with economically viable and environmentally sustainable land policies at the

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national, provincial and regency level. The development of a long-term, transparent, hierarchical, proactive and enforceable land use planning framework will be instrumental in this process. This will require, foremost a consolidation, harmonization and refocusing of existing laws and regulations to mobilize latent production opportunities and target land use (re)development and restrictions, including the use of effective land use controls, incentives and taxation. Such land use planning is the precondition to the establishment of a viable rural economic development program that seeks to optimize production opportunities, promote rural prosperity and reduces environmental impacts and risk.

Land policy needs in formulation and harmonization will greatly benefit from the implementation of the new land law in a process that must be publicly recognized and accepted as being transparent, impartial, efficient and fair at all stages of implementation and appeal. The primary beneficiaries will be the most urbanized and congested regions where transaction cost have increased significantly in the last decennia.

Key words: Indonesian Land Policy, Property Rights, Eminent Domain, Social Equity, Economic Development and Land Use Planning.

I. INTRODUCTION

The most economically-viable, environmentally-acceptable, and sustainable use of a nation's natural assets – including its land, water, ecosystems and mineral resources - determines its long-term economic growth and the potential to generate natural resources-derived goods and services that help improve the “quality-of-life” of its population. Sustainable use is defined here *as maintaining, restoring and enhancing the long-term productive capacity of the natural resource base and the generation of the associated stream of benefits for its population*. In general, this relates to national policy issues such as food and energy security and, more specifically to the ability of the average citizen to meet their daily needs, such as nutrition, education and health care.

The underlying notions here are the concepts of *economic optimization (within environmental and sustainability constraints and public trade-offs)* that should be viewed in the context of *social justice* – the ability of people to have access to production opportunities (land, labor and capital) and reasonably share in the associated benefits. This includes: a) the fruits of their labor, b) the aggregate national wealth created as a result of utilizing public resources, and c) not be disproportionately burdened by the negative consequences of industrial processes (environmental pollution, related health risk and effects).

Fundamental to this process are economic development opportunities in the context of land resource governance – land tenure and property rights. Conflicts about tenure and property use rights cause: political instability; land disputes and violence; displacement and impoverishment of populations; reduction in land productivity and food security; resource exploitation and environmental destruction; while reducing economic development potential.

Securely-defined access to and control of land and land-based resource assets for all people, public and corporate entities is a critical and strategic component in realizing resource development objectives that include sustained economic growth, food and energy security, improved nutrition and public health, democracy and governance - including the rule of law, conflict prevention and reduction, adaptation to climate change, and natural resource conservation and management. Many argue that the lack of secure

and negotiable property rights, ineffective and transparent land markets and high transaction costs are some of the most limiting factors in achieving economic growth and democratic governance throughout the developing world. Insecure or poorly-defined property rights, limited or inequitable access to resources, and weak legal or institutional structures regulating property rights (including laws, regulations, courts and other dispute resolution mechanisms, and land administration – such as the lack of properly functioning cadastral and equitable taxation systems) are debilitating factors in promoting economic development. For these reasons many countries are moving to a system of long-term, extendable land rights, such as China (in 1998) for periods of 20 and 30-year and Mozambique and Lesotho for periods of 99-year. Evidence strongly suggests that when land rights are more secure, people are more willing to make long-term investments and land productivity increases. These investments are typically not only in the form of capital goods but also as more durable inputs, such as the planting of perennial crops with potentially higher returns, life stock operations and value-added enterprises.

Despite the importance of land and resource governance, many newly independent countries continue to be constrained by the lack of a transparent and effective land tenure, and property right systems. In these countries, statutory systems of law and governance often do not protect the property rights of large segments of the population and institutions tend to be weaker, under-financed and ineffective in serving the needs of the public. At the same time, customary land tenure systems, as in parts of Indonesia, may provide the primary means for land access and use rights to natural resources for large segments of peoples living in the developing world. In many cases, customary systems have persevered through generations of social and political strife, and are often ignored or not recognized by state authorities and current laws. Customary land tenure systems may also present inherent weaknesses, including gender biases – especially against women's hereditary and use rights, frequently cause land conflicts and through lack of title security have limited capacity to attract capital investments.

Statutory land tenure and property rights laws often fail to protect people who claim assets under customary rules and norms (*Adat rights* in Indonesia), although the latter are prevalent in most developing and post-colonial nations. Customary rights and informal rules of land access are often not recognized by formal legal systems. This variance between customary and statutory systems allows for social and political manipulation, the unjust imposition of land rent, corruption, land conflicts, land resource exploitation, and disinvestments. Where formal land titles do not exist or are not recognized by state or local authorities, powerful individuals or special interest groups may make successful land claims. This in turn may form the basis for protracted grievances and land conflicts.

When societies evolve and population densities and demand for land and natural resources increase, so does competition for valuable and scarce resources. This progressively results in tenure challenges where the property rights are unclear or contested. This may be further exacerbated when policies and legal systems are not keeping pace with socio-economic and political transformations. These challenges may become even greater due to cultural differences and inequities such as reflected in property and hereditary rights between men and women, and labor roles and responsibilities with respect to household security, agricultural production and household quality of life. Many times the success of comprehensive, and wide-spread economic growth is based on secure and respected property rights and the owner's ability to make informed decisions regarding labor and capital investments, improved productivity and land transactions.

Over the last decennia, external demand for land and natural resources by foreign nations with rapidly growing economies such as China, India and Middle Eastern nations have added pressure on natural resources in the form of large scale land acquisition, mining and exploitation rights, and long-term land lease arrangements with commodity produced to meet external rather than domestic demand. This is especially the case in parts of Africa. This in turn has increased concerns not only about potential impacts on national food prices and resource security but also about the future impacts on small land-holders and farmer vital to rural economies.

Given these considerations and challenges, it is critically important to clarify property rights and define use rights that are clearly understood, accepted, promote investment and economic growth, and reduce land resource conflicts.

II. PROPERTY RIGHTS

Property rights typically refers to the *bundle of private property rights* for the use (or the right to use) its means to produce goods and services, and related income, control and transfer of property assets associated with a specific piece of real estate, parcel of land or body of water (including its associated natural assets such as forest, water resources, oil, gas or mineral resources, and fisheries). These rights may be held by an individual, or a collective such as family, community, corporate entity or institution.

The specific parcel or real estate is typically defined by means of a *cadastral survey*; a legal description of the real estate boundaries and its ownership or title holder. A *title* is the legal term for the contract that establishes evidence of ownership or the *bundle of rights* associated a piece of real estate in which a party may have a legal or equitable (fair or percentage) interest. In common law systems, this ownership is defined by the term *land tenure*: the legal regime that defines the ownership relationship between the title holder and the government as a public entity. Every country has its own definition and interpretation of this tenure relationship and the rights that can be held by the property owner and that are reserved for the state or public. For instance, such as reserved rights held by national governments.

Besides these country-specific rights limitations (e.g. such as the reservation of oil, gas and mineral rights that are held by governments such as in Indonesia and many other countries), there are typically *overarching public rights* that provide for governments to take away private property rights for the public benefit, such as for the construction of essential public infrastructure, for national defense or public safety. In such cases of *Eminent Domain*, compensation is typically paid to private landowners to off-set the loss of assets and income, based of *fair market value*. In this context, it is therefor important to remember that private *property rights are exclusive and not absolute*. Not only may governments exercise their *taking authority*, use limitations typically also apply if significant negative consequences affect adjacent properties or their use.

Under this title or contract, real estate property may include land, buildings and structures or both. Property rights may range from private with “unrestricted or free and clear title rights” (in that case there or no restriction or “liens”, or questions about ownership claims) to leasehold (long-term leasehold e.g. “erfpacht” in Indonesia) on many other countries, where properties are held by the state and owners are

provided with “use rights” with limited duration, such as China or longer-term such as in many African countries. Besides, hereditary arrangements vary a great deal in how these rights are passed on to the next generation. World-wide, therefore, property rights have both spatial and temporal dimensions as they are affected by nationality, gender, race, ethnicity, class, and political and religious affiliation. The political and administrative system that regulates these interactions, and specifically access to and use of land and natural resources access, is referred to as *Resource Governance*.

In principle, it is considered important for governments institutions to management public lands and key infrastructural assets that serve critical or important public functions such as transportation, national parks and forests, nature reserves or defense establishments. For the remaining territory, registered and secure property rights (private or communal) facilitate capital investment, increase productivity and economic growth, and frequently promote more sustainable use of natural resources. In this context it is very important to regulate the access and exploitation of public natural assets (such as fossil fuels, minerals or forest resources) by private interests. For instance by: a) requiring Environmental Impacts Assessments (EIA) prior to the issuing of mining permits, b) defining mining regulations that seek to protect the environment and public health (including safety standards), and c) articulating site-specific requirements associated with single mining permits, and d) to define mine reclamation/restoration requirements using funds held in escrow from mining proceeds.

Private property rights may be held collectively (e.g. communal) or by individuals or corporations. They can be administered and secured through formal systems, including land titling and registration, or through less formal systems, such as customary, non-statutory systems as seen in many parts of the world. The degree of *regularization or formalization* of property rights may depend on prevailing ethnic condition, political realities and land use changes over time. For instance in Indonesia, large differences in ethnic – geographic conditions relating to Adat land use rights, hereditary and management regimes exists on Sumatra and Papua and will require a degree of customization to reflect cultural and political sensitivities.

This *formalization* may eventually take the form of individual land titling and registration, country-wide, or at the interim, legally recognizing informal land or use rights by statutory authority administered by more formal registration systems. Overall, legally recognizing customary rights and creating opportunities for individuals to transform these rights over time into statutory ones (thereby developing effective land markets, reduced transformation costs and equitable taxation systems) is increasingly seen as a more effective, democratic, and efficient approach to secure property rights rather than forcing immediate adoption of a statutory system, nation-wide. As such, the co-existence of multiple land tenure systems (statuary, customary or religious) should be encouraged, where appropriate, while adapting a more formalized, statutory system may be seen as a long-term goal when cultural and political circumstances evolve.

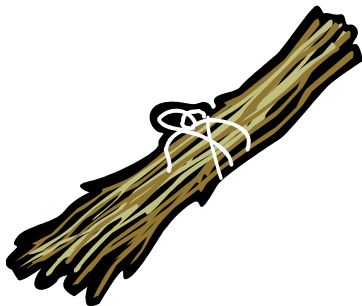
III. LAND PROPERTY RIGHTS IN INDONESIA AND THE U.S.

Indonesian land rights associated with the pluralistic legal system and formally recognized as registered interests are consequently rather diverse, inconsistent and constrain investment and planned development. However, the State controls virtually all land. While supporters of the Basic Agrarian Law (BAL) claim

that such control is less invasive than eminent domain or complete state ownership, it can be argued that it is overly restrictive. Compared to other nations, private land law is undeveloped and private land rights are severely limited. By comparison, in the U.S. a large number of (separable) rights are associated with private land property rights, reflecting the *Bundle of Rights* principle. They reflect:

- **the right of possession** - the property is owned by whomever holds title;
- **the right of control** - within the laws and local regulations, the owner controls property use;
- **the right of exclusion** - others can be excluded from using or entering the property;
- **the right of enjoyment** - the owner can enjoy the use of the property in any legal manner; and
- **the right of disposition** - the title holder can sell, rent or transfer ownership or use of the property at will

Ownership of land is holding "title" to it. The evidence of that title is the deed. The seller executes a deed to transfer title to real property and the "bundle of rights" or portions thereof, with it (Fig. 1)



- **USE (subject to public regulatory restrictions such as "police" powers, health and public welfare, zoning, eminent domain – public taking and just compensation clause, condemnation)**

- **LEASE**

- **MORTGAGE**

- **SUBDIVIDE (zoning regulations)**

- **DEED RESTRICTION (e.g. conservation and other easements, covenant, development rights, term-limited or not, role of tax incentives)**

- **SALE OR BEQUEST**

- **WATER (riparian, prior appropriation or other, more restrictive in water scare regions)**

- **MINERAL (includes oil and gas)**

- **DEVELOPMENT (restrictive covenants and eminent domain or public taking powers: zoning and other ordinances, environmental nuisance, building codes, and development guidelines)**

- **LIENS (taxes and other)**

Figure 1 – The (US) "Bundle of Private Property Rights Principle" - *Exclusive* but not *Absolute*.

Aside from regulatory land use restrictions, primarily contained in local planning and zoning ordinances, the most significant public right here making these *private property rights exclusive rather than absolute* is the *Right of Eminent Domain* or the right to expropriate private property for the public good or benefit, at fair compensation as mandated by the *US constitution*. The constitutional hurdle remains high for property owners. First, owners are not automatically entitled to the most profitable use of their land. Local zoning (regulated use and development density), nuisance or wetlands ordinances restricting the type and nature of development are examples of use limitations. Second, diminutions of value caused by government regulations are uniformly tolerated. Third, virtually all public interests to be served by environmental laws are considered constitutionally acceptable. Last, such laws are usually found to substantially advance the public interest. Interestingly, the notion of “public interest” has received broader recognition by US courts over the last few years. For instance, whereas in the past most “public takings” were primarily reserved for infrastructural projects, now in some jurisdictions urban renewal or development projects are considered meeting this threshold.

In the US, private property rights can be separated at sale or later. The primary example is mineral rights that are often severed from the surface estate. Such severance is accomplished with a conveyance or reservation of these rights. This conveyance or reservation includes minerals or substances considered to be minerals in this broader definition. Mineral rights therefor, do include hydrocarbon resources such as oil and natural gas, which are technically not minerals. Minerals are formally a naturally occurring crystalline "solid" or an *ore* that refers to a concentration of a typical minable substance – such as iron or copper ore, typically occurring at a concentration that is typically 4 times or more the normal natural concentration to make economic exploitation viable. Nonetheless, legal regimes typically lump them together under this one term. Such a conveyance or reservation includes royalties, bonuses and rentals.

The five elements of a *mineral right* are:

1. the right to use as much of the surface as is reasonably necessary to access the minerals (e.g. including access roads, excavation of overburden and storage of mine tailings)
2. the right to further convey rights (to other parties, as necessary)
3. the right to receive bonus consideration (to be stipulated in the mineral lease)
4. the right to receive delay rental fees (when property is reserved and not yet actively used for exploitation)
5. the right to receive royalties (a fixed % of mineral value)

The owner of a mineral interest may separately convey any or all of the above-listed interests. Minerals may be possessed as a life estate, which does not permit a person to sell them, but merely that they own the minerals so long as they live. After this, the rights revert to a pre-designated entity, such as a specific organization or person. It is possible for mineral right owners to sever and sell oil and gas royalties, while keeping the other mineral rights. In such case, if the oil lease expires, the royalty owner has nothing and the mineral owner still owns the minerals.

A listing of RI land rights is included below (Table 1). It should be noted that, in addition, the Basic Agrarian Law also creates rights to use airspace and water, and the cultivation and harvesting of fishery resources. Excluded are oil, gas and mineral rights. As currently formulated, the system of land rights is predominantly time-limited (e.g. *Hak Pakai*: the non-transferable right to use state-owned or other land by

Table 1 – Indonesian Private and Community Land Ownership and Use Rights

<p><u>PERPETUAL RIGHTS</u></p> <ul style="list-style-type: none"> • Hak Milik 	<p>“Ownership” – the right to own the land. Hereditary right for Indonesians through conversion regulations, government grants or Adat (customary) law. Owner can convey building right, use right, right to rent, pledge the land (hak gadai), share cropping or right of lodging – originates from “landerijenbezitrecht”</p>
<p><u>TIME-LIMITED RIGHTS</u></p> <ul style="list-style-type: none"> • Hak Pakai (HP) • Hak Guna Bangunan (HGB) • Hak Guna Usaha (HGU) 	<ul style="list-style-type: none"> • Right to use the land • Right to build on the land or use the building on the land • Right to operated a plantation (exploitation right)
<p><u>OTHER LAND RIGHTS</u></p> <ul style="list-style-type: none"> • Hak Sewa Bangunan • Hak Membuka Tanah • Hak Memungut-hasil-hutan • Hak Pengelolaan (HPL)¹ • Hak Ulayat 	<ul style="list-style-type: none"> • Right of lease • Right to clear and cultivate the land • Right to collect forest products • Land management by state authority • Conceptual community property rights. Under Agrarian Law community titles are subject to state interests and, therefore not considered “land rights”. Consequently, “community land” is for the taking by administrative authority without compensation
<p><u>MODERN RIGHTS</u></p> <ul style="list-style-type: none"> • Hak atas satuan rumah susun • Hak tanggungan 	<ul style="list-style-type: none"> • Ownership of strata (e.g. apartments) • Land as secure collateral for mortgages

¹ This right is not formally recognized or written into the Basic Agrarian Law

private persons, typically for a 10-year period, occasionally indefinite, *Hak Guna Bangunan*: the transferable right to construct a building on land for a period of 20 or 30 years, and renewable for another 20-year term, *Hak Sewa Bangunan*: Non-registerable Right to use land for building purposes and time period based on agreement between lessor-lessee, and cannot be mortgaged, *Hak Guna Usaha* or exploitation right for state-owned land for agriculture, fisheries and husbandry for up to 35 years with extension for 25 years, with certification and mortgage option).

Renewal or extension of rights on expiration of the initial term is handled via an application to the National Land Agency (BPN), one year prior to expiration and with a fee payment. The law does not address the issue of expiration of the extended term but consensus seems to exist that land right can be extended if there is not infraction of use conditions. Transaction of land rights are to be executed via deeds executed before a deed official at the local office of the Pejabat Pembuat Akta Tanah (PPAT) (a private office run by a notary authorized by BPN) and registered at the regional BPN office. The fee to convert an existing *free-hold* land certificate (Hak Milik) to a Hak Pakai (Use Right) or *lease-hold* certificate is about Rp 20,000,000 per 200m² plus 1% of sale price to notary, 5% byer tax and 5% seller tax.²

As such, the complexity of Indonesian property rights structure, its limited time period, its renewal requirements, its fee structure and its variable interpretation by local officials make it incompatible with the modern investment climate and dynamic land markets that require long-term title security to recoup long-term investments in agriculture, commerce and industry. Feared land speculation, associated with unlimited land use rights, can be avoided by simply limiting developing rights through proactive, well-articulated and objectively-enforced land use plans.

Similarly, other restrictions can be enacted by planning and zoning laws and still promote a sound investment climate, while preserving public and community interests. This bundle of (limited) land rights concept – permitting a clear definition of specific use rights and their limitations – is a widely and successfully employed legal principle in many industrialized nations to help regulate urban expansion and direct economic development and land use.

One fundamental challenge is to clearly define and administer land use rights associated with customary or *Adat* rights as defined in the Basic Agrarian Law. Although rights are conveyed to the *Adat* community (“rechtsgemeenschap” in Dutch references), it is unclear how these rights specifically convey to its inhabitants. In practice, individual rights are neglected and many people are marginalized to the benefit of other powerful domestic or foreign investors³.

This results in conflicts between the *Adat* community or some of its people and the investors in cash crop plantations, forest plantations or lumbering operations, and government if it involves clearcutting for transmigration projects. Of special note is Regulation of State Minister for Agrarian Affairs/Chairman of the National Land Agency No 5 / 1999 that provides guidelines for resolving these conflicts by delegating authority to local governments. This is largely an unfunded mandate because local authorities typically do

² <http://www.gili-property.com/contact-us.php>

³ BAPPENAS, 2008. *Adat Land Tenure*, Final Report. Land management and Policy Development Project.

not have the knowledge or the required capital or human resources to conduct the necessary research and to fairly implement such programs.

Criteria for the identification of such *Adat* communities include: a) the *implicit recognition* and implementation of individual use rights by the community; b) the *geographic identification* of a location where the individual or community lives and provides for its daily needs; and c) an *informal understanding* of the guiding land tenure, management, use and principles by the community.⁴ It is argued that overlapping administrative rules pertaining to the recognition of *Adat* communities and their rights should be addressed by means of clarification and harmonizing the vertical and sectoral integration (such as for forestry and mining) of pertinent laws and regulations. It is further recommended that *Adat* communities are spatially identified to permit the certification of land rights, provide title and tenure security as a means of improving prosperity, preserve cultural identity and promote social equity and justice.

It can be argued that the Basic Agrarian Law 5/1960 (BAL), needs fundamental reform. The BAL is "based on *adat* (customary) law", principles that reflect a sedentary, traditional, immobile agrarian society. It does not provide the necessary flexibility to develop a coherent national land law that seeks to promote responsible investment and economic development. Under the BAL, land is controlled by the State to achieve "prosperity of the Indonesian people, Indonesian socialism, and *adat* philosophy". The presumptions are that State control is essential and provides for a better mechanism to control land rights and allocate capital inputs than well-functioning landmarkets, and that total private or corporate ownership (as it may be restricted by the proper land use plans, laws, regulations and enforcement) leads to exploitation and waste. The multi-institutional control of land rights as exercised directly or indirectly by various GOI agencies is currently viewed as discretionary, replete with confusing and contradictory mandates and regulations, with a high transaction cost and low, if any, accountability.

One example is the recent decision (Nov. 13, 2012) by Indonesia's Constitutional Court that part of the 2001 oil and gas laws were unconstitutional and consequently, dissolved BPMigas as the national regulator. Apparently, the fact that RI Constitution states that natural resources "shall be under the powers of the State and shall be used to the greatest benefit of the people" was interpreted that BPMigas does not have the authority to oversee its permitting process and sign production-sharing agreements with foreign firms⁵. The court recommended that all foreign-run operations should be turned over to PT Pertamina, the national oil company, upon contract expiration. In the meantime, regulatory authority was transferred to the Energy Ministry and foreign investors are uncertain about future lease security or investment climate. An example includes recent contract negotiations with oil and gas companies, such as BP. While specific implications are unclear, BP's negotiations about a \$12 billion expansion of its liquid natural gas facility expansion in Papua have been halted.

Some interpret this as an example of a new wave of economic "nationalization", such as the recent requirement (2012) that foreign mine operators sell a majority stake (51% or greater) to the government (previously 20% after 5 years). The international experience is that such requirements have dried up international investment and the use of new technology in exploration. Indonesian crude oil production

⁴ Ibid. 2008

⁵ The Economist, Nov. 24, 2012.

has fallen from 1.4 million barrels (2000) to 918,000 in 2011. Natural gas production is up only slightly (from 63 to 76 billion m³ over the same period)⁶ and the remaining hydrocarbon sources are increasingly difficult to extract. Similar situations in the Americas have resulted in reduced foreign investments, untapped resources and depressed economic growth.

In a world where the supply dynamics of new energy reserves and increasing demand have caused great price fluctuations, the USA is expected to become a net energy exporter within the next 8 years due to the new hydraulic “fracking” technology that rapidly expands natural gas production (Figure 2). This has resulted in a drop in natural gas prices from \$4.50 per thousand cubic feet in 2010 to under \$2.50 (2012)⁷. Similar production expansion is expected in shale formation across the globe. With these changes and the annual discovery of new off-shore deposits, an investment climate and well-defined and transparent property rights that facilitate foreign investments, energy production and self-sufficiency may be essential for Indonesia, that became a net importer of oil in 2003.

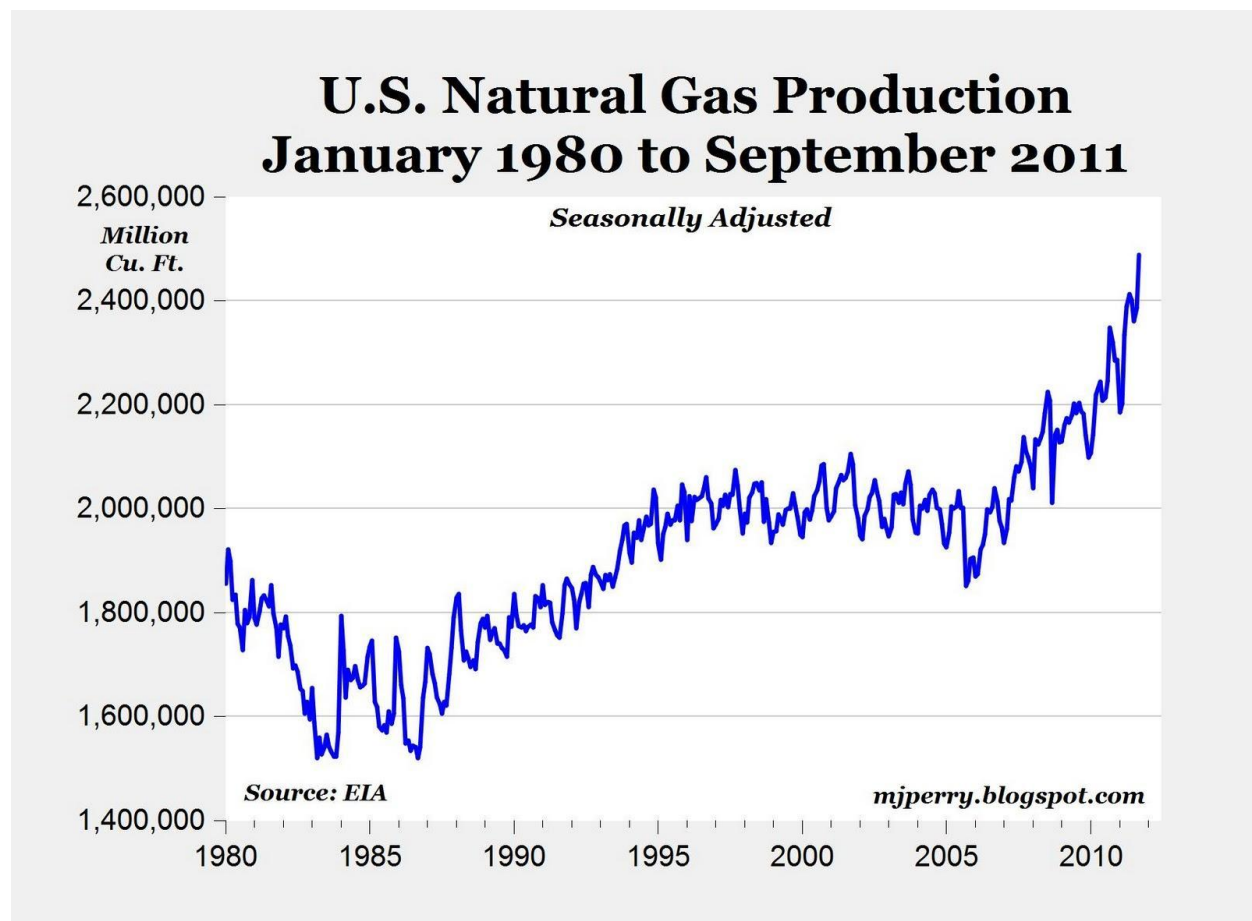


Figure 2 – U.S. Natural Gas Production Expansion – Rapid Capital and Technology Investments Facilitated by Transparent and Legally Enforceable (Private) Mining Right

⁶ Ibid

⁷ Deutch, J, 2012. Wall Street Journal, August 14

IV. REAL ESTATE PROPERTY RIGHTS IN SELECTED EUROPEAN UNION COUNTRIES

Property rights have evolved over time guided by a few transitional principles. They include the notion that even under despotic or colonial regimes both the ruling class and subjects were interested in maximizing earning power and the creation of wealth. Maintaining internal control and security came at a cost of lower outputs and therefore wealth foregone. Only if subjects were giving more control in the form of use rights, lower taxation, democratic principles or ownership, could higher inputs be expected. Another principle is that real estate property rights tend to evolve when land use intensity, competition, resource scarcity and values are increasing. Across the world, these transformations, affected by cultural and other socio-economic factors, have led to a progression from informal, customary systems to formalized tenure system with statutory rights.

GREAT BRITAIN

In Great Britain rights giving A) exclusive “ownership rights” include⁸:

- Freeholds – absolute ownership
- Commonholds – absolute ownership in flats leaseholds – time limited ownership
- Beneficial interests - rights to exclusive possession (or more limited rights e.g. to income) recognized only in equity

Rights giving B) less than exclusive possession (incumbrances or burdens)

- Rights to secure an estate: contracts (called estate contracts when they affect a legal estate in land) including options and pre-emptions (marginally proprietary and subject to conflicting authorities)
- Security interests: mortgages, liens and rent or other charges
- Incorporeal hereditaments – rights in land which are abstract in nature, such as affecting freehold land, including adjacent interests easements (legal and equitable) and restrictive covenants

C) Land easement and covenants (proprietary burdens) recognized by law that follow the neighbor principle that the person benefitting should own land that actually benefits (usually by an increase in use or re-sale value)

They are:

a) Positive or “affirmative” easements

These easements confer the right to use neighboring land to a limited extent. Most common are access rights called “rights of ways”, which may be limited (e.g. non-motorized) or general. They may include rights to run a pipelines and cables under the land (such as utility easements by energy companies in the US which are almost universally accepted).

⁸ See also Schmid, 2005. Real Property Law and Procedure in the European Union, European Private Law Forum, European University Institute, Florence

b) Negative easements

This minor category comprises limited restrictions on adjacent land created by prescription (long enjoyment) as well as expressly implied at land division. Examples include the right to light such as light to a particular window blocked by adjacent development in front or the right of structural support for an adjacent building. Similarly, in the US, case law is dealing increasingly with wider restrictions like the right to a particular view shed that may be blocked by trees growing on downslope properties. Presumably, this could also be argued in a case where underground excavation may cause structural damage to adjacent or overlying properties (e.g. as may be the case in the development of subway infrastructure such as considered in Indonesia for metropolitan Jakarta).

c) Profits à prendre (French for “right of taking” or exploitation rights)

The right to take part of the land or its resources/products, e.g. grazing, timber, fishing or mining rights, by a single or communal entity, as typical in the “commons” of communities in medieval Europe.

d) Restrictive covenants

Such covenants provide broader land use restrictions than easements and can only be created expressly, by a deed of covenant. These overlay covenants are also imposed by subsequent land divisions to the whole development. Such covenants may be enforced among neighbors or the land developer. In the US such covenant is reflected in subdivision regulations that set certain development standards, building or housing codes, use restrictions or maintenance requirements that are enforceable by affected neighbors, resident association or local jurisdiction.

NETHERLANDS

The Dutch law recognizes the following real property rights⁹:

- *Eigendom* (ownership)
- *Erfpacht* (building lease: emphytheusis)
- *Opstal* (building lease: superficies)
- *Vruchtgebruik* (usufruct)
- *Recht van gebruik en bewoning* (usus et habitatio)
- *Appartementsrecht* (apartment ownership)
- *Mandeligheid* (joint ownership)
- *Erfdienstbaarheden* (servitudes, easements)
- *Hypotheek* (mortgage).

The Dutch civil code has limited mandatory regulations resulting in a great variety of rights by contract.

Recht van Vruchtgebruik (Right to use the Proceeds) and *Recht van Gebruik en Bewoning* (Right to Use and Habitation) are varieties of usufruct. This right is term-limited -- tied to the life of the beneficiary,

⁹ Ploeger et al, 2005. Real Property Law and Procedure in the European Union. Technical University Delft.

although *vruchtgebruik* may be transferred.

Mandeligheid means joint ownership of real estate (e.g. parcel of land). *Appartementsrecht* and *mandeligheid* are forms of joint ownership

Erfdienstbaarheden are the easements by which property owners may allow or restrict certain activities.

A *hypotheek* or mortgage is accessory, although it may be established to allow for later debt or increase thereof.

In the limited rights to land a distinction is made between the use rights (genotsrechten): *erfpacht*, *opstalrecht*, *vruchtgebruik*, *gebruik en bewoning* and *erfdienstbaarheden* on one hand and the security right *hypotheek* on the other hand.

The Dutch Civil Code gives a general description of a servitude (erfdienstbaarheid) :

“A servitude is a charge imposed upon an immoveable thing, the servient property, in favor of another immoveable thing, the dominant property”

In Dutch law only easements in appurtenance (or accessory) are known. Such contractual obligation or *kwalitatieve verplichting* may be attached. This is a qualitative obligation or contract between the owner of real estate and another party (to do, not do or tolerate). After registration of the contract in the public registers all the legal successors are bound by the same obligation. This obligation is not a formal public right, but a contract regulated by general principles.

Apartment ownership means that an owner has exclusive use rights to one or more apartment units. When the owner of the building (existing or to be constructed) has registered a *splitting deed* and *apartment right* is transferred, a mandatory apartments association is formed. This owners association (*vereniging van eigenaren*) is not the owner of common parts, but takes care of the daily management of the complex and bound by law, and deed. The deed also specifies the distribution of general maintenance cost and any rent restrictions other than general use. Together with the deed, the *reglement (regulations)*, bylaws or statutes of the association (charter) are established with operational housing rules (*huishoudelijk reglement*). The latter rules can be changed by the members meeting of the association. The charter, however, has to be changed by deed, and be registered. The house rules are not formally registered, but are on file at the association and available for inspection by the public. They are typically established by majority vote. *Apartment rights* are considered a real estate property right (like ownership) and can be mortgaged by the right holder.

Insurance is legally mandated. If major damage by fire or other causes occurs, all right holders have a joint claim insurance claim. In that case the right holders have the option to reconstruct the building or not. The latter is likely resulting in annulment (*opheffing*) of the *splitting deed* but all mortgagees are protected by the rule of law.

If the *splitting deed* must be changed (for instance in case of enlargement of the housing complex or major construction changes affecting an owner's general apartment rights, or holders of limited rights such as conveyed by mortgage) all owners must agree with the change. Acceptance may be enforced by

court action.

The regulatory component of this system is very similar to subdivision regulations of a particular homeowners association found in some private housing subdivisions in the U.S. These are primarily designed to define ground rules and expectations with respect to building codes, safety standards, exterior appearance, lot maintenance requirements, lighting etc. in order to protect public safety and property values.

An indirect form of *Building Lease* exist in the Netherlands. The lease is known in two forms, both rights in rem: the right to use the land of the owner and for the construction of buildings. The first one is the *erfpacht* (hereditary use right), historically this right to hold and use the land for agricultural has evolved in its own urban form. Here *Erfpacht* includes the vertical accession, so the land owner also owns of all buildings as holder of the building lease right. Building leases can be established for a limited time or in perpetuity. Historically, this was intended for the building of houses but also for the construction of public infrastructure such as bridges, dikes, pipelines, powerlines, etc.). In a limited number of cases the right of superficies (opstalrecht) is used. In this case the holder of this limited right in rem is also owner of the building.

GERMANY

The German law of real property distinguishes between three types of interests in land¹⁰:

- Rights to use (Nutzungsrechte)
- Security interests (Verwertungsrechte or *right to profit*) and
- Preemption rights (Vorkaufsrechte or *right to sell*).

There are several types of use rights

- a) The *building lease* (Erbbaurecht) grants the transferable and inheritable right to have a structure above or below the land surface.
- b) The owner of an usufruct has the extensive right to use the property, This also extends to the earning of profits as in the case of rental fees.

The concept of servitudes is that the owner of land has to tolerate or omit certain acts that may affect these rights. The servitudes are linked to the person who is entitled to use the land, the actual parcel or adjacent parcels. There are easements in appurtenance, i.e. to the benefit of the primary owner or possessor of other interests, such as adjacent land, One could interpret this as dominant tenement (herrschendes *Grundstück*) and a subservient tenement (dienendes *Grundstück*). There are easements in gross, i.e. to the personal benefit of another person. A special form is the right to use a building or a special part of building as a residence.

The subservient tenement may be encumbered by servitudes in three different ways: a) The owner may be entitled to a specific land use; b) certain land use right by the owner do not extent to the subservient

¹⁰ Hertel, C, and H. Wicke. 2004. Real Property Law and Procedure in the European Union. National Report, Germany. European University Institute, Florence.

tenement; or c) the exercise of a right, which arises out of the subservient tenement, may be excluded. Examples include various easements such as trespass, utility or a parking.

There is a separate statutory regulation on apartment ownership and found in the Condominium Act (Wohnungseigentumsgesetz). Apartment ownership consists of a co-owner's share in landed property combined with individual property. The Act provides rules to organize interest and settle potential conflicts.

In certain provinces a separate apartment ownership exist known as "Gebäudeeigentum" (building ownership). Co-owners may set up their own rules but some provisions in the Condominium Act are mandatory. The condominium bylaws are created by contract and majority rule and apply to current and future registered owners. Apartment divisional ownership is established by a "partition plan" (Teilungserklärung), formally registered. The partition plan usually determines the general function of the housing complex which may also contain a commercial section, such as a restaurant. The condominium bylaws may also provide for the distribution of the shared costs and set forth other use regulations.

Apartment ownership right can be mortgaged without the consent of the other owners, while the land may also be encumbered with joint owners' approval. This applies in particular to servitudes granting the right to use the land as a whole or in part (e.g. restrictive easement). In case of building destruction, the apartment ownership rights and interests continue to exist. The majority of the co-owners may decide on reconstruction of the building, unless more than half of it has been destroyed and the damage is not covered by insurance. In such case any owner may demand the dissolution of homeowner association.

V. EMINENT DOMAIN FOR INFRASTRUCTURAL PROJECTS

In many rapidly developing economies the pressure is increasing to develop an infrastructure that can keep pace with the urban service demands. This is especially the case for public services such as urban transportation, drinking water and sewage disposal and treatment. At the same time, some of these economies experienced recent political and cultural histories that increased the sensitivities about protecting private property rights. In China, this was primarily the *cultural revolution* and movement towards a market economy in the last 30 years. This movement was accompanied by an expansion in property rights in rural areas by providing peasants with 20 and 30-year use rights (figure 3).

While this law does not bring the full property-rights revolution that development demands, it gives peasants marketable "ownership" use rights to the land they farm. Although, if they could sell their land, millions of underemployed farmers might find productive work and the prevailing and expanding rural poverty would be reduced. The remaining farmers would benefit, could acquire larger land holdings and economies of scale would be created. The new law will also not let peasants use their land as security collateral and borrow money at competitive rates and to purchase competitive inputs or make capital investments and dramatically increase productivity. Besides, they are still under threat of expropriation, and land grabbing by local official and their cohorts.

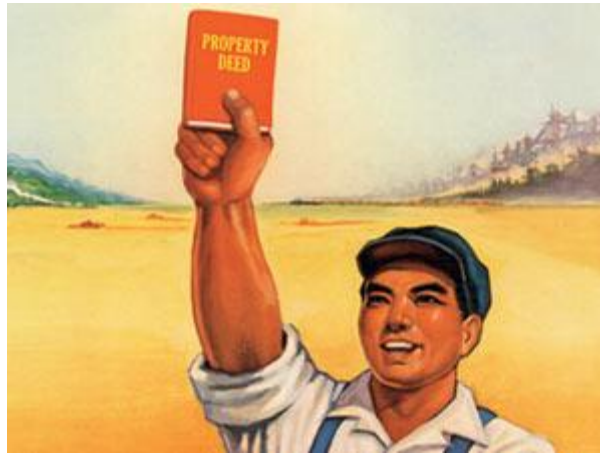


Figure 3 – China’s next Revolution (Source: Economist, March 8, 2007)

This law also does not resolve ownership issues. After the mass collectivization during Mao's *Great Leap Forward* 50 years ago, that left farmland “collectively” owned, peasants have since been granted short (20 and 30-year) term leases. In many cases, even outside rural areas, it is often unclear whether a “private” enterprise is really owned by individuals or by a local government or party unit.

“Conversely, some “collective” or “state” enterprises operate in ways indistinguishable from the private interests of their bosses. Moreover, should an underdog try to use the new law to enforce his rights, the corrupt and pliant judiciary would usually ensure he was wasting his time. Since the Cultural Revolution, when the NPC passed just one law between 1967 and 1976, the legislature has been legislating quite prolifically. But the passage of laws is not the rule of law” (Economist, March 8, 2007)

In urban areas private ownership titles are more secure and expropriation and compensation rules problematic. This results in situation where it seems difficult to distinguish between priorities involving the private or public sector, as illustrated in the pictures below (Fig. 4 and 5).

For similar reasons, Indonesia passed in 2012 land legislation to address land acquisition for infrastructural development. Since the 1960, landowners have received legal protection preventing government land takings for infrastructure projects. The new law expedites expropriation and seeks to guarantee fair compensation to landowners. This initiative comes at a critical stage given the need to deal with increasing traffic congestion and expand the highway and public transportation network.

The legislation established a special committee to determine the land prices on a case-by-case basis. It also allows landowners to seek judicial review in land valuations. This key provision and clarification of the role of the courts is essential because land disputes have the potential to drag on for years given Indonesia’s notoriously inefficient legal system. It is essential to establish a process that is perceived by the public as transparent, impartial and fair rather than a committee role that provides the appearance of

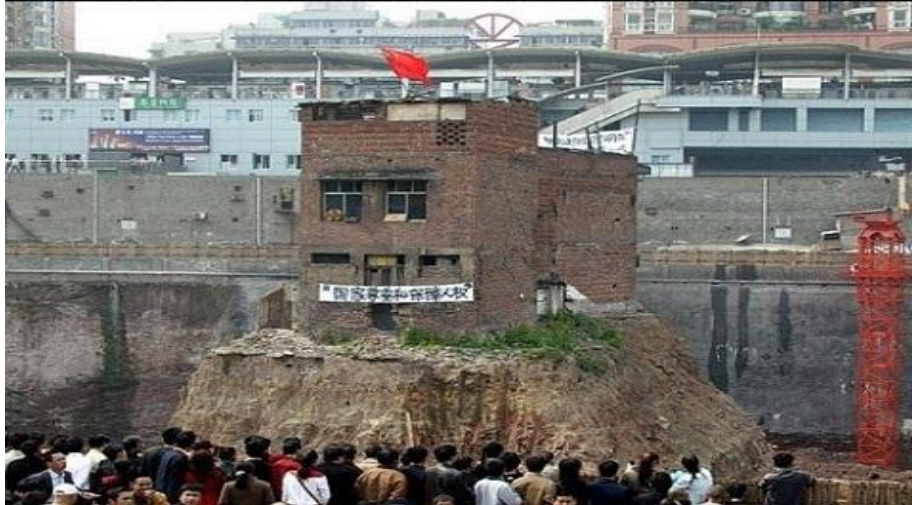


Figure 4 – A private landowner is surrounded by construction excavation, holding out for better compensation but receives no legal protection that affirms fundamental property rights and safety standards



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Figure 5 - In China *Eminent Domain* is exercised selectively and under poorly-defined legal and implementation/compensation rules, even for projects that clearly serve the public good. Here an elderly couple refuses to abandon their apartment despite road construction between and a village. The road runs and the Wenling railway station and has yet to be officially opened (Source for both: Reuters, 2012.

<http://www.dailymail.co.uk/news/article-2236746/Road-built-building-couple-refuse-China.html#ixzz2CyhrFVaI>)

democratic governance with little or no public accountability. This is especially critical giving Indonesia's consistently low rankings in the Transparency International's Corruption Perceptions Index (# 100 in 2011)¹¹

This initiative is also critical in establishing a foreign investment climate that, in the future, is characterized by maturing and well-functioning institutions with a more predictable, precise and timely results and improved accountability. All these factors combined, currently create a high degree of business risk, irrespective of industrial sector. Across the board, the perception by foreign investors is one of limited political stability combined with a high degree of regulatory changes and disparate interpretations by public officials. Formal institutions need to be strengthened, with greater independence and their functions streamlined, and need to be adequately resourced to enhance their technical, administrative and analytical capacities.

The new land acquisition law (Law No. 2, 2012) was formally passed by the Indonesian House of Representatives in January, 2012 but its implementation was pending the issuance of a presidential regulation. Timing is critical as the government plans to spend \$7 billion on upcoming infrastructure projects¹² and its implementation of the law would also reduce land speculation. It would also help set aside land for infrastructure projects and make it available to developers and restrict the sale of needed land to third parties.

It includes the following fundamental principles (translated¹³):

- 1. The Government and the Regional Governments guarantees the availability of land in the Public Interest and funding.*
- 2. Acquisition of Land in the Public Interest shall be performed in accordance with: a. the Regional Spatial Planning; b. the National/Regional Development Plan; c. the Strategic Plan; and d. the Working Plan of each Agency needing land.*
- 3. Acquisition of Land shall be performed through planning with involving all the guardians and stakeholders.*
- 4. Performance of Acquisition of Land shall consider the balance between the interest of development and the interest of the public.*
- 5. Acquisition of Land in the Public Interest shall be performed by giving reasonable and fair Compensation*

The awaited regulation was finally passed on August 7, 2012 (No.71). Its delay received mixed reviews and apparently some criticism from the Indonesian Chamber of Commerce and Industry (Kadin) and the Indonesian Employers Association (Apindo).¹⁴ At that time, contention over the regulation centered on the failure to help ongoing infrastructure projects halted due land acquisition issues. Among the stalled projects were 24 toll roads, including sections of the Jakarta outer ring road project and the trans-Java toll roads. This project, which covers 605 kilometers, is valued around Rp 160 trillion (US\$16.96 billion). The article referenced, quotes a spokesman for the Office of the Coordinating Economic Minister

¹¹ <http://cpi.transparency.org/cpi2011/results/>

¹² Jakarta Globe, July 28, 2012

¹³ Law No. 2 / 2012. Translation Wishnu Basuki

¹⁴ Tampubolon, Jakarta Post, Jakarta, Sat, August 11 2012

(Wuryanto), indicating that the regulation would only cover ongoing projects if the investors failed to find concrete solutions to their land problems by 2014.

Another concern is the 583-day maximum time period permitted to complete land acquisition. Apindo chairman Sofjan Wanandi expressed dismay about the long time period and noted the fact that when infrastructure building is involved it might take five years or more. This issue is a bone of contention and the impression exists that economic development (currently around 6.5% annually) has been affected primarily by the lack of infrastructure, such as roads, seaports, airports, power plants and railways.

Key points in Presidential Regulation No. 71/2012 include:

- *All institutions that want to acquire land for public infrastructure must formulate land-acquisition documents, which consist of planning, spatial suitability, land location, land area, land status and land appraisal estimates. The documents will then be submitted to governors in those respective areas.*
- *The governor must establish a preparation team consisting of the regent or mayor, a provincial apparatus working unit (SKPD) and other relevant institutions.*
- *The preparation team is in charge of conducting a public consultation on the planned land acquisition by inviting all stakeholders, including affected local communities, to determine the location of an infrastructure project.*
- *Compensation can be given in the form of cash, relocation, stock ownership or other forms based on the agreement made by all the stakeholders.*

Apparently, 2 additional regulations are needed from the Ministry of Finance and Ministry of Home Affairs, which should be in place in mid-2013¹⁵. Currently, land acquisition regulations are applicable to new projects. Any projects that have initiated land acquisition prior to the passing of UU 2/2012 must use previous regulations. If this process is not completed prior to Dec 2014 the process must start over, presumably using new laws.

VI. INDONESIA LAND LAW IMPLEMENTATION POTENTIAL AND CHALLENGES

With the passage of PENGADAAN TANAH BAGI PEMBANGUNAN UNTUK KEPENTINGAN UMUM (Land Law for the Acquisition of Land for Development in the Public Interest - Law No. 2 of Jan. 14, 2012) implementation challenges remain. One of the complicating factors is the need to coordinate with various local and regional plans for land acquisition and related national planning, and economic development strategies. This is a direct consequence of the more recent decentralization process that has provided more autonomy to regencies.

Specifically challenging is the need to coordinate land acquisition (Article 7) as:

Acquisition of Land in the Public Interest shall be performed in accordance with:

¹⁵ Personal Communication, Collier W. Nov 19, 2012.

- a. the Regional Spatial Planning;*
- b. the National/Regional Development Plan;*
- c. the Strategic Plan; and*
- d. the Working Plan of each Agency needing land.*

But foremost, the challenge will be to develop a publicly accepted and wide-recognized transparent, impartial, and fair implementation and appeals process that minimizes complexity and procedural duration.

As commented on in a recent article,¹⁶ accelerated land acquisition is urgently needed to stimulate economic growth. As indicated, in a time span of about 1 year, Rp 490 trillion (about 50 billion US\$) investments were recorded for 135 major projects in the real estate and infrastructural development, with remaining funds for 2012 and almost Rp 194 billion in 2013 yet to be allocated.

It is hoped that the development facilitated by this new law will indeed increase productivity and efficiency, while reducing unemployment and bring equitable prosperity to Indonesian citizens.

¹⁶ Firmanzah, 2012. Infrastructure availability is lubricant for equitable development. *Bisnis Indonesia*. August 28, 2012.