

COMPLEX AND UNCERTAIN LAND ACQUISITION: ONE OF MAJOR OBSTACLES IN TOLL ROAD PUBLIC PRIVATE PARTNERSHIP (PPP) PROJECT IN INDONESIA

Rizal Z. TAMIN, Puti F. MARZUKI, Susy F. ROSTIYANTI
Institut Teknologi Bandung

ABSTRACT: Facing the challenge of limited fund, the Indonesian government has issued a Public Private Partnership (PPP) policy in developing the country's toll roads. Three international infrastructure summits had been held in January 2005, December 2006, and April 2010 to attract national and foreign investors. However, from the 36 road sections (1,152 km) offered, only 9 sections (96 km) have been chosen by the investors. Land acquisition is the main obstacle in the development of Indonesian toll roads. Uncertainties in land acquisition process have implied difficulties for the contractor to assess the risks and have made the projects not bankable. Although a Principal Agrarian Decree has already existed to abolish land ownership for public interest, the implementation regulation involving the President as head of state and the democracy euphoria have made land acquisition problem a complex political issue. This paper describes land acquisition problems in the development of toll roads in Indonesia. The contents comprise an overview of related regulations, a description of social system management complexity in a country newly introduced to the democratization process, and an analysis of efforts made to solve the problems. It also analyzes the steps taken by the government including the development of a new decree on land provision.

KEYWORDS: Toll Road Development, Public Private Partnership (PPP), Land Acquisition

1. INTRODUCTION

Toll roads started to be operated in Indonesia in 1978. In the beginning, toll roads were financed and operated by the government through a state owned company: PT. Jasa Marga. The fund came from the state budget, foreign loans (Notosoegondo, 2005), and PT. Jasa Marga's bonds. In 10 year-period, from 1978 to 1988, toll roads' growth merely reach 26.9 km/year.

The increase of need for toll roads had pushed the government to seek for other funding alternatives. Since 1987, the Indonesian government has started to invite the private sector to participate in toll roads development. This participation is expected to accelerate the fulfillment of transportation infrastructure needs to balance economic growth rate. The Act No. 13/1980 on Roads becomes the legal basis of private sectors' participation in toll roads operation through a partnership called Public Private Partnership (PPP). PT Jasa Marga was assigned to be the operator as well as the regulator (Rostiyanti and Tamin, 2010). In 1989, private sector-managed toll roads started to be operated. Until 2004, ten toll road sub-sections were operated by six private investors. This development was not enough, as since the participation of the private sector in toll roads operation until 2004 (1988-2004 period), the Indonesian toll road growth rate was still low: merely 23.0 km/year. Toll roads development involving PT. Jasa Marga as operator and regulator had weakened business concession agreement and

caused lack of investment transparency. A more conducive investment climate was needed to attract more investors. This condition had pushed the government to change toll roads management system.

In order to improve toll roads management system performance, in 2004 Act No.38/2004 on Roads was issued as a replacement for Act No. 13/1980. This Act stipulates the separation of regulator's role from operator's role (BPJT, 2006). The regulator's role is taken back by government through the establishment of a buffer body named Toll Roads Regulating Board (Badan Pengatur Jalan Tol – BPJT), while PT Jasa Marga becomes a pure state owned company operating in Toll Roads investment and development.

To attract private investors in the Indonesian infrastructure, including toll roads development, the government held the Indonesian Infrastructure Summit in 2005, 2006, and 2010. However, these three infrastructure summits were not very successful: among the offered 36 toll roads sub-sections (1,152 km), only 9 sub-sections (96 km) succeeded in attracting investors. The development performance stayed low and toll roads growth in the 2004-2010 period was only 21.4 km/year. A lot of obstacles had hampered toll roads growth through the 1978-1988, 1988-2004, and 2004-2010 periods (Fig. 1). One of the most significant obstacles is the complex and uncertain land acquisition process.

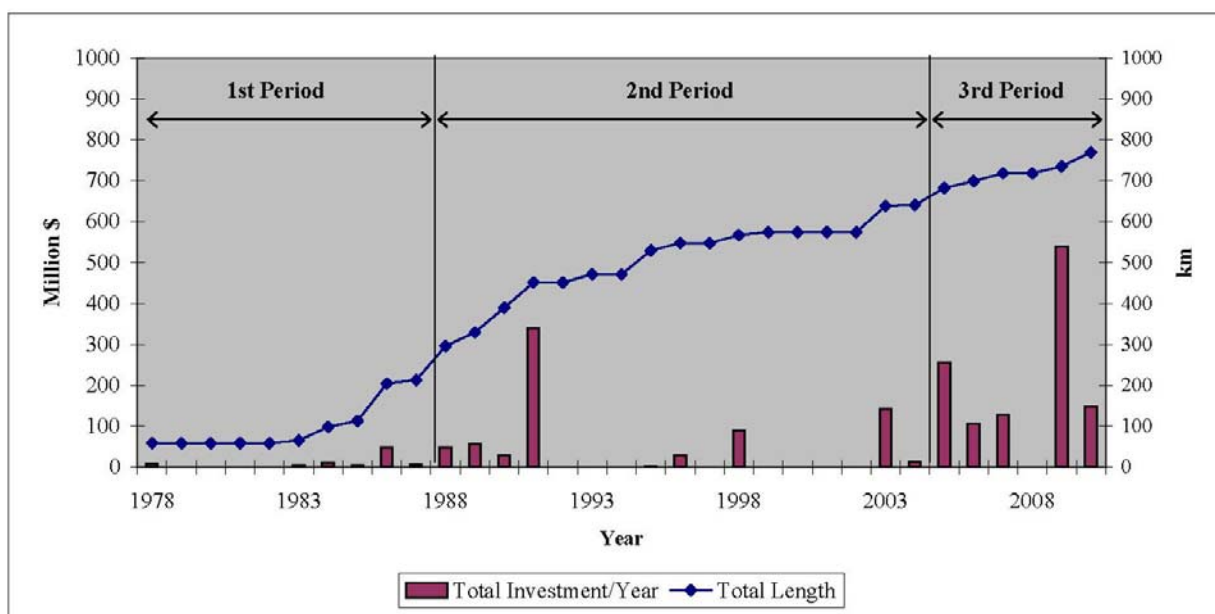


Figure 1. Development of Indonesian Toll Roads Investment and Length in 1978-1988, 1988-2004, and 2004-2010 Periods

2. LAND ACQUISITION REGULATING ACTS

Fifteen years after the country's declaration of independence, the Indonesian government issued Act No. 5/1960 on Agrarian Principles Basic Regulation replacing the colonial agrarian law which didn't give legal guarantee and dualistic in nature due the existence of custom law. This national agrarian law is based on the simple custom law and guarantees a legal certainty for the whole Indonesian people while also considering elements of religion law. With this law the state regulates land ownership and guides land utilization, so that the whole Indonesian land is used for people's benefit and welfare, individually as well as communally.

This Act adopts section 33 clause (3) of the 1945 Constitution stipulating that the earth, water, and space, including the contained natural resources are ultimately under the state's control representing the people's power. The state's right to control includes the authority to:

- regulate and execute the allotment, the utilization, the supply, and the maintenance of the earth, water, and space;
- determine and regulate the legal relationships between people and the earth, water, and space;
- determine and regulate the legal relationships between people and acts concerning the earth, water, and space.

In its implementation, the state's right to control can be delegated to regional governments and custom law community only when needed and not in

contrary to national interests, based on government regulations. Based on the state's right to control, various rights on the earth's surface, called land, are determined. Land can thus be granted to and possessed by the people, individually as well as together with others, and legal entities.

All rights over land have a social function. In order to protect public interest, excessive land ownership and acquisition are not allowed and only Indonesian citizens who can have a total relationship with the country's earth, water, and space. Every Indonesian citizen, men or women, has an equal chance to get a certain right over land and to benefit from its outputs, for him or herself as well as for his or her family. These rights over land include: proprietary right, concession right, building utilization right, utilization right, rent right, land opening right, and forest products collection right.

For public interest, including the nation's and the state's and the people's interests, the rights over land can be withdrawn, by giving adequate compensations according to a specifically regulated method in the Act No. 20/1961 on 'The Withdrawal of the Rights Over Land and Things On It'. The President, as head of government, in compelling situations after hearing the opinions of and information from the Agrarian Minister or the Head of the National Land Board (Kepala Badan Pertanahan Nasional – BPN), the Minister of Justice, and related technical Ministers can withdraw the rights over land and things on it. The appeal of the concerned party is to be filed to the President via the Head of the National Land Board (BPN) accompanied by:

- a. Allotment plan and the reasons why right withdrawal has to be conducted for public interest.
- b. Information on the name of the party who have the right over the land as well its location, and total area, and the type of right over land to be withdrawn and connected things.
- c. Plan to accommodate the people from whom the right over land will be withdrawn, and if any, the people who cultivate the land or who reside in connected houses.

Besides the Agrarian Minister (or Head of the National Land Board – BPN), the Minister of Justice, and concerned Technical Ministers, the right over land withdrawal procedure involves the considerations of regional heads including Governor, Bupati, Mayor, and the Appraisal Committee as a professional party who estimates the compensation for the withdrawn land and connected things over which the right will be withdrawn. The inputs from the regional heads and Appraisal Committee should be received by the Head of the National Land Board in three months at the latest. If the time given is over, the Head of the National Land Board, based on his, the Minister of Justice's, and the Technical Ministers' considerations, can forward the appeal to the President to make a decision to withdraw the right over land.

It is also mentioned that in compelling situations requiring an immediate land acquisition, the Head of the National Land Board can withdraw a right over land without compensation estimation and without Governor's, Bupati's, or Mayor's inputs. If the concerned party is not willing to accept the compensation stipulated by the President's Decree, he or she can file an appeal to the Supreme Court for a decision on the compensation value. The Supreme Court will take the first and last level decision.

The above description shows that Act No. 5/1960 and Act No. 20/1961 have given legal certainty and clearly regulated the procedures of land acquisition for public interest, including for the development of toll roads, by withdrawal of right over land and the things on it. The two Acts are also based on a solid social concept and the strong government's responsibility and authority which take into account the fact that: (1) land has a very important social function for the community so that its right over land has to be guaranteed, (2) the proprietary right as the strongest and fullest right can shift and be shifted to another party, (3) for the interest of the public, nation, state, and community, the government can withdraw a right over land within a short period, and (4) the President as head

of government is the party who is responsible and has to make the decisions.

Since 1960, along with the introduction of western influence mainly on human rights and democracy in 1998, government regulations were issued to implement the above mentioned two Acts. Those connected to land provision in Public-Private Partnership on road development are:

- a. Government Decree No. 39/1973 on Guidelines for Compensation Determination by the Supreme Court in connection with the Withdrawal of Rights Over Land and Things On It, as an implementation of Act No. 20/1961.
- b. Presidential Decree No. 65/2006 on Land Provision for Construction Development for Public Interest, replacing two previous regulations: Presidential Decree No. 36/2005 and Presidential Decree No. 55/1993, as an implementation of Act No. 5/1960.

The Presidential Decree No. 65/2006 is heavily flavored with principles of human rights and democracy. Although not explicitly mentioned in Act No. 5/1960 and Act No. 20/1961, in the Presidential Decree a land provision for public interest through right release or right transfer is introduced. This is based on respect for right over land and carried out through a deliberation to achieve an agreement on construction development for public interest in the location as well as the form and amount of compensation. Thereby individual rights are taken into account in determining the location. Previously, this was simply done through government consideration.

The withdrawal of right over land through a Presidential Decree, although allowed, is considered as a last effort in case the process of release or transfer of right over land for public interest does not successfully ended by an agreement. In the last ten years, land acquisition through withdrawal of right over land has never been carried out although the process of right over land release or transfer has almost always faced never lasting difficulties.

With the new Decrees, land acquisition involves a new element, i.e. a Land Provision Committee (Panitia Pengadaan Tanah – P2T) established by the head of regional government (Governor, Bupati, and Mayor) according to their authority and consisted of regional leaders related to the National Land Board. The land acquisition stages are:

- a. Establishment of a 'Land Acquisition Committee' and a 'Price Appraisal Team' by the Minister of Internal Affairs, Governor, Bupati, or

Mayor according to their authority and the location of land to be acquired.

- b. Research, inventory, socialization, and deliberation process and determination of compensation form and amount by the Land Acquisition Committee.
- c. If deliberation does not produce agreement or dispute happens after compensation determination, the Land Acquisition Committee entrusts the compensation money to the state court.
- d. The holder of right over land who does not agree with the decision of the Land Acquisition Committee can file an objection to the Minister of Internal Affairs, Governor, Bupati, or Mayor according to their authority.
- e. The Minister of Internal Affairs, Governor, Bupati, or Mayor make an effort to find settlement for the compensation problem considering the right over land holder's expectation.
- f. If the settlement proposal is not accepted by the right over land holder, the Minister of Internal Affairs, Governor, Bupati, or Mayor according to their authority proposes a settlement by withdrawing the right over land based on Act No. 20/1961 to the head of the National Land Board who conveys it to the President for a decision.

The amount of land compensation is determined by the Land Acquisition Committee based on the selling value of tax object, selling value of buildings, and selling value of plants by considering inputs from the Price Appraisal Team. From this land acquisition process, the following issues could be noted: (1) the first decision on the form and amount of compensation is determined by the Land Acquisition Committee which is an ad hoc unit and not an executive institution, (2) the state court is involved as an institution which will be entrusted with compensation money and not as a legal decision making one, and (3) the acquisition process is mainly expected to be carried out through deliberation which includes a generally slow and long consultation and negotiation process.

3. LAND ACQUISITION IS THE MAIN OBSTACLE TO THE INDONESIAN TOLL ROAD PPP

Different from best practices in many countries where land acquisitions in PPP Toll Road Project is part of government's task and normally executed before investment tender (ADB, 2000), in Indonesia it becomes part of the responsibility of investors and consequently cause uncertainties and risks for them.

The land acquisition process described in Section 2 generally takes a long time and continues to drag on without reaching an agreement and producing a decision. This causes delays in PPP Project execution and toll roads construction. Deliberation is prioritized and forced while land acquisition through right withdrawal is avoided and has never been adopted in the past ten years. The concept of right over land release or transfer seems ideal but in reality the community generally objects to every land acquisition or asks for inappropriate compensation.

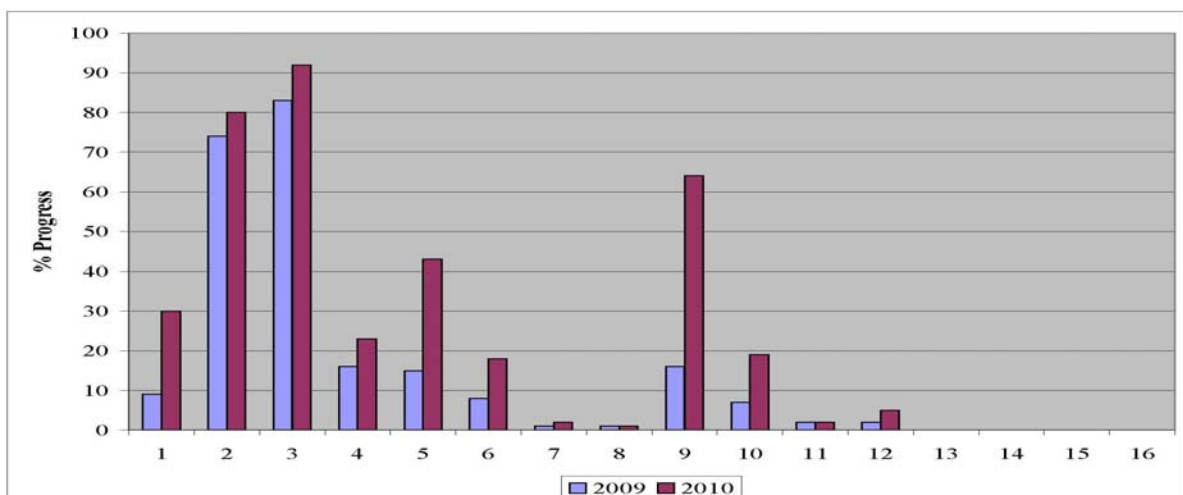
Moreover, the process of reforms and democracy in almost every facet of life (economy, social, and politics) has caused government's hesitation in making decision for public interest. Democracy has been misinterpreted, and every decision is expected to satisfy all parties in order to respect human rights. The President tends to avoid, due to political considerations, making unpopular decisions, mainly in human rights-related situations, even when those decisions are needed for national development.

This condition has made land acquisition the main obstacle to toll roads development and to PPP Project in Indonesian infrastructure development. Uncertainties caused by this situation become risks that are difficult to measure and toll road PPP Project in Indonesia becomes un-bankable. Table 1 shows the slow process of land acquisition in toll road PPP Project in Indonesia. Different also from the practice in many countries, land acquisition cost is included in investment cost. This is stipulated in the Minister of Public Works' Decree No. 27/PRT/M/ 2006 on 'Toll Roads Business Procurement Guidelines', where in various types of investments offered (toll tariff, government support, and general items), land acquisition cost is always included as part of investment cost. This cost is rather high, can reach 30%-40% of investment cost (see Table 1).

Due to the prolonged land acquisition process the cost could be 2-3 times higher than planned in investment agreement. Generally the government compensates the high land acquisition cost with longer concession period (30-40 years instead of the usual 20-30 years). This long investment return period influences investors' interest. Moreover, due to limited experience and toll road length, the construction cost in Indonesia is not yet too competitive i.e. 5-6 Million US\$/km (see Table 1).

Table 1. Land Acquisition Cost and Progress for Toll Road Development in Indonesia 2006 -2010

NO	SECTION	LENGTH (km)	LAND (Mill. US\$)	CONSTRUCTION (Mill. US\$)	LAND ACQUISITION PROGRESS (%)		CONTRACT SIGN
					2009	2010	
1	Surabaya – Mojokerto	34.1	44.4	111.5	9	30	April 6, 2006
2	Gempol – Pandaan	13.6	18.4	48.4	74	80	December 19, 2006
3	Bogor Ring Road	11.0	8.9	77.6	83	92	May 29, 2006
4	Cinere - Cimanggis (Jagorawi)	14.7	93.9	57.3	16	23	May 29, 2006
5	Kertosono – Mojokerto	41.7	21.3	144.4	15	43	June 30, 2006
6	Semarang – Solo	75.7	88.9	268.8	8	18	December 15, 2006
7	Gempol – Pasuruan	33.8	24.4	96.0	1	2	May 29, 2006
8	Depok – Antasari	21.6	77.7	100.7	1	1	May 29, 2006
9	Cikopo (Cikampek) – Palimanan	116.0	55.6	421.5	16	64	July 21, 2006
10	Pejagan – Pematang	57.5	21.0	199.4	7	19	July 21, 2006
11	Pematang – Batang	39.0	14.9	141.8	2	2	July 21, 2006
12	Semarang – Batang	75.0	25.0	250.0	2	5	July 21, 2006
13	Cikarang (Cibitung) - Tanjung Priok	34.5	25.0	125.7	0	0	January 29, 2007
14	Ciawi – Sukabumi	54.0	80.6	255.6	0	0	July 27, 2007
15	Pasuruan – Probolinggo	45.3	16.7	196.2	0	0	June 25, 2007
16	Kunciran – Serpong	11.2	99.9	65.9	0	0	September 22, 2008



4. LAND ACQUISITION SUPPORTING POLICY

Due to the complex and heavy task of land acquisition to be carried out by investors the government is urged to provide support and incentive for its execution as well as for its financing.

In 2006, the Minister of Public Works created the 'Toll Roads Land Acquisition Team' under the Directorate General of Roads (Bina Marga) to help the Land Acquisition Committee established by the Minister of Internal Affairs, Governor, Bupati, or Mayor in executing some activities in land acquisition process such as elucidation, socialization, deliberation, and compensation payment. The function and tasks of the Land Acquisition Team

actually, more or less, overlap those of the Toll Roads Regulating Board (BPJT), a buffer body which was also created by the Minister of Public Works to regulate and manage the Indonesian toll roads. The Land Acquisition Team's operating cost is charged to investors through a 'Land Acquisition Account' which, based on Toll Road Business Agreement (PPJT), has to be opened by investors. There are thus three institutions helping the government in executing land acquisition: the Land Acquisition Committee, the Land Acquisition Team, and the Toll Roads Regulating Board, which, due to lack of coordination, cause bureaucratic problems in the process.

In 2007, through the Regulation No. 04/PRT/M/2007, the Minister of Public Works provides a

revolving fund to temporary cover the land acquisition cost which actually has to be paid by investors. This incentive is actually a kind of risk management mechanism for investors as through this method they don't have to spend their own money for land acquisition until the land acquisition process for a planned toll road section is completed. The utilization process of this revolving fund is as follows:

- a. Eligible investors make a request and an agreement with BPJT. This agreement mentions the revolving fund utilization interest and administrative cost as well as return requirements. The maximum interest payment period is 2 years to anticipate unfinished land acquisition process which basically is part of government's responsibility.
- b. As revolving fund utilization bond, investors are required to fill the 'Land Acquisition Account' with a higher amount of money than the amount of revolving fund requested to be utilized.
- c. Investors have to repay the utilized revolving fund along with interest and administrative cost after the land acquisition process for a part of a section or for the whole toll road section is completed, as agreed.

Further, in 2008, through Regulation No. 12/PRT/MA/2008 the Minister of Public Works issued a policy to support land acquisition funding for toll road investors. This regulation stipulates the limit of land acquisition cost to be paid by investors and the mechanism and amount of government support if the actual land acquisition cost is above the limit. The government's support is stipulated as follows:

- a. Land acquisition cost that should be paid by investors is the highest value between 110% of the agreed land acquisition cost and 100% of land acquisition cost plus 2% investment cost.
- b. The government provides funding support for the required surplus cost.

However, this funding support is not generally and adjusted to budget availability and project's financial feasibility level. Until 2010, as much as 550 Million US\$ have been made available for 28 toll road sections. The project's financial feasibility level corresponds to the smallest value among: (1) the difference between the project's financial feasibility level before and after the increase of land acquisition cost and it is 4% maximum, and (2) project's financial feasibility level after the increase of land acquisition cost should be 12% minimum. If needed, fund addition request can be made to the Minister of Finance. If government fund is not available, investors are given an option to terminate the

partnership or to continue the partnership with tariff adjustment or concession period as compensation.

New toll road sections have to comply to the principle of return from investor for government support. This return corresponds to revenue surplus above the financial internal rate of return during the concession period plus 2%, and valid after investors arrive at the discounted payback period with toll road revenue sharing pattern.

Five years since the implementation of these supporting policies, land acquisition performance has not improved and remained to be an obstacle to toll road construction completion. Moreover, investments for infrastructure development have not been increasing. The third International Infrastructure Summit in 2010 had not succeeded in attracting investors, and had concluded that land acquisition was still one of the main obstacles to the Indonesian infrastructure investment. Further, it is started to be realized that the root of the problem is in the acquisition principle: (1) avoiding right withdrawal process and choosing deliberation instead to respect human rights, and 2) avoiding making presidential decisions for political reasons. In this regard, through government's initiative, a new Act is being prepared which is expected to overcome the above problems.

5. DRAFT OF LAND ACQUISITION FOR CONSTRUCTION AND DEVELOPMENT ACT

This Draft of Land Acquisition for Construction and Development Act is wider in nature, and includes land acquisition for public and private business interests. A very basic subject in this Act is the replacement of right over land withdrawal stipulations in Act No. 5/1960 and Act No. 20/1961 with right release or transfer. Although the right over land withdrawal mechanism stipulated in those previous Acts is not explicitly removed, but in the closing stipulations of this Act's Draft it is stated that by issuing this new Act the stipulations on land acquisition for public interest in previous acts are no longer applicable.

Consequently, the withdrawal of right over people's land which has important social function is no longer based on the reasoning that it is an extraordinary action to be taken by the President for public interest. In other words the new act draft has shifted to become a technical instrument which merely regulates a common and general mechanism of land acquisition when needed by certain parties for construction development to fulfill public needs

(Kesowo, 2011). The importance of including land acquisition regulation for private business needs is also questionable as a direct mechanism which includes a negotiation willingly done by both parties is already regulated.

An addition is made to the process of land acquisition for public interests in the new act's draft, i.e. the determination of planned construction development location for public interest which has to be agreed by the parties interested in land acquisition through public consultation. The main player of land acquisition is the Land Institution (the National Land Board – BPN) which is a governmental non ministerial institution coordinated by the President. The final decision over the objection from the right over land holder is taken by the State Court. Consequently the President is not directly involved.

In general, land acquisition for public interest according to the new act's draft is carried out through the following stages:

- a. Land Acquisition Planning Stage where the institution requiring land makes a land acquisition plan based on National and Regional Spatial and Infrastructure Development Plan. The land acquisition plan contains complete information on construction development plan and land to be acquired.
- b. Land Acquisition Preparation Stage. In this stage announcement, detailed data collecting, and public consultation on the development plan are carried out by the land requiring institution. The objective is to arrive at an agreement on the planned construction development location with the lands' holder and related parties. If there is an objection from a certain party, the public consultation is repeated. The two public consultation processes should last in no longer than 3 months. If there is a still objection from a certain party, the land requiring institution reports them to the Minister of National Development Planning or the Governor according to their authority. These authorized parties have to decide whether to accept or reject the objections within 14 days. Adjustments or changes to the construction development location plan can be done according to requirements. Further, the land requiring institution submits a Land Acquisition Plan to the Land Institution (the National Land Board - BPN) to get a determination of construction development location for public interest.
- c. Land Acquisition Execution Stage. In this stage the Land Institution (the National Land Board - BPN) carried out the land acquisition process with the help of the Appraisal Team. This

process includes appraisal, deliberation, and compensation payment. The parties objecting the form and amount of this compensation should submit their objection to the State Court in no longer than 14 days. The State Court will take the first and final level decisions within 30 days (maximum).

6. CONCLUSION

Land acquisition is the main obstacle in the Indonesian toll roads development. Act No. 5/1960 and Act No. 20/1961 has actually provided legal certainty and clear procedures on land acquisition in short period of time for public interests. These two Acts are based on a solid social concept and a strong government responsibility and authority to protect public interests. Right over land withdrawal is possible as long as it is for public interest and carried out by the President as the state's and government's most responsible party. If there is objection or disputes, the first and final decision is taken by the Supreme Court.

Western influences, notably in subjects related to democracy, since 1998 has caused government's hesitations in taking decisions although it is for public interest. The president tends to be unwilling to get involved in taking unpopular decisions related to human rights. The right over land withdrawal process is avoided and replaced by the development of a right over land release or transfer mechanism through public consultation and deliberation. Land acquisition experiences show that this process has not been smoothly executed.

To provide a solid legal basis for the execution of the above right over land release or transfer process, a Draft Act on Land Acquisition for Construction and Development is being prepared. The scope of this Draft Act is widened to accommodate land acquisition regulation for private sector's interest. The right over land withdrawal concept is indirectly removed and replaced by a technical mechanism of right release or transfer. Land acquisition process is completed by a stage to arrive at an agreement on development location plan with the right holder. The main executor of land acquisition is the land requiring institution and the Land Institution (the National Land Board - BPN). The State Court will take the final decision if there are objections or disputes.

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