



Land Procurement for Upstream Oil and Gas Business Activities in Indonesia

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Submitted : 2020-10-30 | Accepted : 2021-04-26

Abstract: *This paper aims to provide an understanding and insight regarding land procurement for oil and gas exploration activities and the development of regulations or legal and policy breakthroughs that have so far not been or very little exposed. Land procurement has always been a serious obstacle or obstacle to oil and gas exploration activities in Indonesia. Land procurement for oil and gas exploration using a business to business (B to B) mechanism makes it very difficult for SKK Migas and the contractor. In recent years, the government has made legal breakthroughs to simplify and accelerate the land procurement mechanism for exploration activities. This study uses a normative juridical method supported by in-depth interviews with legal experts, land acquisition committees, and landowners and has produced conclusions: First, the business to business (B to B) mechanism often faces obstacles and obstacles, such as; 1) refusal from the landowner; 2) inconsistency with the spatial layout; 3) there is a land dispute with other parties; 4) it is difficult for oil and gas contractors to process land certification. Second, discretion is considered as a legal breakthrough or new policy that is ideal in helping to smooth and accelerate the process of oil and gas production in Indonesia.*

Keywords: *land procurement; upstream business; oil and gas; Indonesia.*

I. INTRODUCTION

The oil and gas crisis in Indonesia continues to be a national problem that cannot be easily resolved. Since the middle 1990s, oil production has continued to decline,¹ it also happened on gas production too, making it difficult to achieve the target of simply meeting domestic needs. This forces Indonesia to make a very difficult choice to continue importing oil and gas.

Indonesia was forced to quit the OPEC membership, which had long raised the name of the Indonesian nation as a respected country in the forum of oil and gas producing countries.

Sixty percent of oil and gas resource business activities are carried out on land and, of course, require land. So far, land acquisition for upstream² oil and gas business activities has been obtained through the

¹ Mirza Karim, Karen Mills and Intan Ajrina Qadrya, 'Indonesia and OPEC', (2016) 9, *Journal of World Energy Law and Business*, p.171-172

² Article 1, Number 7 of Law Number 22 Year 2001 on Oil and Gas, Upstream Business Activities are

business to business (B to B) mechanism, which makes it difficult for the Special Task Force for Upstream Oil and Gas Business Activities (SKK Migas) and the Oil and Gas Cooperation Contract Contractor (KKKS) to manage land certification. As a result, the oil and gas business seems to run in place.

Land procurement should be carried out by means of an easy, fast, effective and efficient mechanism, but in reality it is much more difficult³, convoluted and requires a long time. Therefore, it has a negative impact on disrupting the target production time which has a direct impact on the course of oil and gas production. Land procurement has always been a serious obstacle, and is often the scapegoat⁴, delaying oil and gas production from the agreed agreement or contract and has an impact on cost recovery. For example, what happened in the Cepu Block, Bojonegoro, the production target was set in May 2014 with an average of 20,000-30,000 barrels per day, but it turned out that until October 2014, it had not been able to produce. This is because the land acquisition process has encountered problems in the field. The land has been controlled by speculators, while landowners are difficult to find.⁵

The issuance of Law Number 2 of 2012 concerning Land Acquisition for Development for Public Interest (Law No. 2 of 2012), apparently does not include upstream oil and gas business activities as the public interest, even though oil and gas is very important, except Article 10 letter e,

namely: oil, gas and geothermal infrastructure.⁶ Meanwhile, small-scale land acquisition mechanisms cannot solve problems on a large scale. Land acquisition cannot be carried out easily, quickly, effectively, or efficiently.

In 2018, SKK Migas made major changes, namely the elimination of 12 Governance Guidelines (PTK) regulations which are expected to have an impact on shortening the bureaucratic process of land acquisition, monitoring health management, work safety, and environmental protection (K3LL), monitoring and evaluating the reliability of facilities. Upstream oil and gas operations. The question remains whether this write-off will have a significant impact on the land acquisition mechanism for upstream oil and gas activities.

Based on the background description, the problems that will be answered in this study are as follows: 1) How is the development of land acquisition arrangements for upstream oil and gas business activities? 2) What is the possibility of using discretion in land acquisition for upstream oil and gas business activities?

II. LEGAL METHODS AND MATERIALS

This research has a starting point from normative legal research, namely the rule of law (statutory regulations, jurisproduction, customary law or other unwritten law), and legal principles⁷ related to land acquisition

business activities that are based on Exploration and Exploitation business activities.

³ Heri, Sumanto, 'Pengelolaan Migas di Blok Cepu Kabupaten Bojonegoro, Jawa Timur Pasca Putusan Mahkamah Konstitusi (Oil and Gas Management in the Cepu Block, Bojonegoro Regency, East Java after the Constitutional Court Ruling) Nomor 002/PUU-1/2003', (2011) I(1 Edisi Juni) *Jurnal Kontitusi* FKK. FH. Unmer Madiun – MK RI. ISSN. 1829-7729, p. 16.

⁴ Yuni Purwati and Sigit Sapto Nugroho, 2016,

Pengadaan Tanah Untuk Kegiatan Hulu Minyak dan Gas Bumi di Indonesia (Land Acquisition for Upstream Oil and Gas Activities in Indonesia), Competitive Grants Research Report (Unpublished), LPPM Unmer, Madiun, p. 54.

⁵ Ibid

⁶ Article 10 letter e of Law Number 22 Year 2001 on Oil and Gas.

⁷ Bagir Manan, 'Penelitian Hukum' (Legal Research), (1999) *Jurnal Hukum* (Legal Journal),

issues for upstream oil and gas activities. Besides the literature study, this research was also conducted with in-depth-interviews with legal experts and parties who live the issue of land acquisition for upstream oil and gas activities in the Cepu Block, Bojonegoro, Blora, Gresik, Tuban, and surrounding areas, such as the land acquisition committee, landowner, practitioners, and investors.

The data results from library research. Data or information obtained from in-depth interviews, then analyzed qualitatively so that qualitative juridical research results are obtained.

III. RESULT AND DISCUSSION

Development of Land Procurement Arrangements for Upstream Oil and Gas Activities

Land procurement has always been a severe obstacle in the upstream oil and gas business activities in Indonesia, which has been going on for a long time. Land procurement for upstream businesses has never been regulated in Presidential Regulation No. 55 of 1993, Presidential Regulation No. 36 of 2005, Presidential Regulation No. 65 of 2006.

After the promulgation of Law Number 2 of 2001 concerning Oil and Natural Gas (Law No.2 of 2001), Article 34 explains:

- (1) In the event that a Business Entity or Permanent Establishment is going to use parcels of private land or State land in its Operational Area, the Business Entity or Permanent Establishment concerned must first make a settlement with the right holder or land user on State land, in

accordance with the provisions of the applicable laws and regulations.

- (2) The settlement as referred to in paragraph (1) shall be carried out by deliberation and consensus by means of sale and purchase, exchange, appropriate compensation, recognition or other forms of compensation to the right holder or user of land on state land.⁸

Furthermore, Article 35 (2) explains that, Holders of land rights are obliged to permit Business Entities or Permanent Establishments to carry out Exploration and Exploitation on the land concerned, if settlement or settlement guarantees are made previously approved by the land rights holder or land user on state land as referred to in the Article 34.⁹

Based on the provisions of the Article, it can be concluded that land procurement for upstream businesses has been regulated, as follows:

- 1) Plots of land that are used directly for oil and gas business activities, as well as areas for security are granted "Use Rights".
- 2) If the Cooperation Contract Contractor (KKKS) is a Business Entity that is established under Indonesian law, the land has the status;
 - a. Right of ownership, the acquisition of rights must be done by giving compensation;
 - b. Cultivation rights, a release of rights must be carried out by providing compensation;
 - c. Building rights, sale and purchase can be made to then convert it into Right to Use;

Puslitbangkum Unpad, Bandung, Perdana; January, p. 4;

⁸ Article 34 of Law Number 2 Year 2001 on Oil and Natural Gas.

⁹ Article 35 of Law Number 2 of 2001 on Oil and Natural Gas.

d. Land that has not been certified / customary land, the PSC contractor can waive the rights by giving compensation, and then apply for Use Rights over land that has been relinquished.

The development in the field of this provision turns out to be very difficult to implement and this is what is known as the business to business (B to B) mechanism. This system is very convoluted, consumes time and effort, is ineffective and inefficient and results in high production costs (high cost). Therefore, it makes difficulty for SKK Migas and Kontrators.

SKK Migas and Kontrator, often experience obstacles, namely:

- 1) Refusal from land owners because the compensation was deemed too low.
- 2) Inconsistencies with spatial layout.
- 3) There is a land dispute with another party.
- 4) Oil and gas contractors have difficulty processing land certificates, owners are difficult to find.

Apart from these obstacles, SKK Migas and Kontrator also often encounter other obstacles in the field, including;

1. Landowners do not want to release or refuse land acquisition for several reasons, such as a) The land is their only possession both as a place to live and a livelihood; b) Land is a matter of dignity and cannot be replaced by any gang; c) Inadequate compensation.
2. The owner asks a very high price negotiating, and haggling takes time;
3. The land has been controlled by land speculators, and it is not uncommon for people to be involved in SKK Migas or Pertamina.

Subsequent developments when the drafting of Law Number 2 of 2012 concerning Land Procurement for Development in the Public Interest (Law

No.2 of 2012), many parties hoped that land acquisition for upstream oil and gas businesses, which included exploration, exploitation, transmission activities, and/or distribution falls within the criteria of public interest. However, after being passed Law no. 2 of 2012, which is expected to provide a solution to the difficulties experienced by SKK Migas and Contractors in land procurement for upstream activities in order to accelerate and smoothen oil and gas production, it turns out that there is not a single article regulating the problem of land procurement for upstream oil and gas businesses included in the criteria of public interest.

Law No. 2 of 2012 states that all state institutions requiring land are included in the party that can carry out land procurement. However, it turns out that upstream activities, exploration carried out by SKK Migas, have not / are not listed as categories of procurement for the public interest. The law does not regulate upstream and downstream oil and gas activities as public interest criteria, whereas oil and gas are essential commodities.

According to the law, what is meant by the public interest is the interest of the nation, state, and society, which must be realized by the government and used as much as possible for the prosperity of the people. Furthermore, development for the public interest carried out by the Government and / or Regional Government, and there must be a limit to be used as much as possible for the prosperity of the people.

Land for public interest includes 18 (eighteen) activities. In other words, the scope of land has been expanded compared to the provisions in the previous Presidential Regulation (Perpres). Land for Public Interest, as referred to in Article 4 paragraph

(1), is used for the development¹⁰: (a) national defense and security; (b) public roads, toll roads, tunnels, railway lines, train stations, and railway operating facilities; (c) reservoirs, dams, weirs, irrigation, drinking water channels, sewerage and sanitation, and other irrigation structures; (d) ports, airports and terminals; (e) *oil, gas and geothermal infrastructure* (author's italics); (f) electricity generation, transmission, substation, network and distribution; (g) Government telecommunications and informatics networks; (h) waste disposal and processing sites; (i) Government/Regional Government hospitals; (j) public safety facilities; (k) Government/Regional Government public burial places; (l) social facilities, public facilities, and public green open spaces; (m) nature reserves and cultural reserves; (n) government/regional/village government offices; (o) arrangement of urban slum settlements and/or land consolidation, as well as housing for low-income people with rental status; (p) government / regional government educational infrastructure or schools; (q) Government / Regional Government sports infrastructure; and (r) public markets and public parking lots.

Based on Article 10 letter e, Law no. 2 of 2012, it is clear that what belongs to the public interest in upstream activities or oil and gas projects is limited to "oil, gas and geothermal infrastructure"¹¹, whereas in the General Elucidation of Article 10 letter e of the law, it is stated "it is clear ". In other words, land acquisition other than "oil and gas infrastructure" cannot be categorized as

land for public interest and cannot use the land acquisition mechanism for development for the public interest.

Land acquisition for upstream activities still uses the business to business (B to B) mechanism or scheme or other possible mechanisms by providing fair compensation, prioritizing the welfare and dignity of land owners.

Especially for land acquisition for small scale¹² for upstream oil and gas activities, it can refer to the provisions of Presidential Regulation Number 148 of 2015 in conjunction with Work Procedure Regulation Number 027 / PTK / XII / 2007 and Decree of SKK Migas Number KEP-0244 / SKKO000 / 2014 / SO. Of the 2 (two) major methods of land acquisition within the Upstream Oil and Gas KKS Contractor, the small-scale land acquisition method is one of the mechanisms often used by PSC Contractors in carrying out land acquisition. This is because in its use, the small-scale land acquisition method has several advantages compared to other land acquisition methods.

The time efficiency factor and the cost of land procurement are essential reasons why the small-scale land procurement method is the method of choice for PSC Contractors today. So that in terms of the effectiveness of the provisions of land regulations in upstream oil and gas business activities, the provisions of the small-scale land procurement mechanism are deemed more effective to be implemented by the KKS Contractor.¹³

¹⁰ Article 10, Law Number 2 of 2012 on Land Acquisition for Development for Public Interest.

¹¹ Oil, gas and geothermal infrastructure is defined as infrastructure related to upstream oil and gas and natural gas business activities which include exploration, exploitation, transmission and / or distribution activities.

¹² What is meant by small scale is land acquisition of less than 5 hectares.

¹³ Hasry Perdana Putra dan Nurhasan Ismail, *Proses Pengadaan Tanah pada Kegiatan Pertambangan Hulu Minyak dan Gas Bumi di Indonesia (The Process of Land Acquisition in Upstream Oil and Gas Mining Activities in Indonesia)*, Tesis, (2017) (Universitas Gajah Mada, Jakarta).

The issuance of Decree Number 0076 of 2014 concerning Small Scale Land Acquisition Mechanisms for Upstream Oil and Gas Business Activities is an implementation of Law Number 2 of 2012 and Presidential Regulation Number 71 of 2012 in conjunction with Presidential Regulation Number 40 of 2014.

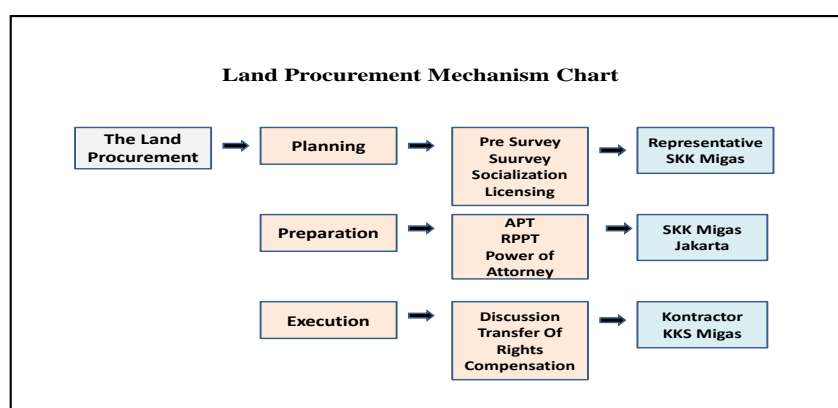
SKK Migas has made significant changes to the Work Procedure Guidelines Number: PTK-005/SKKMA0000/2018/S0 and Number: PTK-032/ KKMA0000 018/S0 (Revision-01), but it does not concern significant scale land acquisition but only for small scale procurement. In the Guidelines, it is explained that; Provisions for Small Scale Land Acquisition for Oil and Gas Exploration and Exploitation needs by the KKKS refer to the SKK Migas Head Decree Number 0244 of 2014 concerning Small Scale Land Acquisition and its amendments.¹⁴

Land procurement governance for upstream oil and gas business activities following the issuance of the Decree of the Head of SKK Migas Number 76 of 2014, land procurement can be accounted for, both

from pragmatic needs in operations and legal administration, so that the security of state assets can be carried out. After carrying out land procurement, the KKS contractor is obliged to safeguard the land assets that have been controlled through registration and issuance of Business Use Rights (HGU) certificates. This is necessary because the land that has been acquired is recorded as state property which must be registered in the form of a Business Use Rights (HGU). Security is carried out not only for the physical land, but also for documents related to land procurement.¹⁵

The Decree regulates the small-scale land procurement process which also regulates the duties of representatives of SKK Migas, SKK Migas Pusat Jakarta, and cooperation contract contractors (KKS contractors), as well as permit applications. Based on the decree, the licensing process, which seemed to be separate from the land procurement process, has now become an integral part of the land procurement process.

The land procurement mechanism on a small scale for upstream business activities is described in the chart as follows:¹⁶



<http://etd.repository.ugm.ac.id/penelitian/detail/110502>, Diakses, tanggal 28 Oktober 2020.

¹⁴ Work Procedure Guidelines Number: PTK-032/SKKMA0000/2018/S0 (Revision-01) Concerning Representative Operations, number 7. 1. Small Scale Land Acquisition.

¹⁵ Didi Setiadi, *Sosialisasi Pengadaan Tanah Skala Kecil* (Socialization of Small Scale Land Acquisition), SKK Migas, (2014), <https://humasskkmigas.wordpress.com/2014/07/07/sosialisasi-pengadaan-tanah-skala-kecil/> accessed 27 November 2020.

¹⁶ Ibid.

The chart shows that the stages of small-scale land acquisition activities are regulated in the decree, it looks quite simple and can be explained, as follows¹⁷:

a. Planning Stage

(1) Pre Survey

Pre-survey activities are the initial activities that must be carried out in the land procurement process. This process is carried out by SKK Migas representatives and KKS contractors to see the condition of the land, such as growing crops, buildings, and others, and to get information about land prices, such as NJOP land prices from the sub-district / village head/village head.

Since the issuance of this decree, SKK Migas representatives, especially representatives of North Sumatra (Sumbagut), have coordinated directly with KKS contractors and carried out socialization, both to KKS contractors in the North Sumatra region as well as to KKS contractors who have plans or need land for drilling and development facilities and others.

(2) After the pre-survey was carried out, the KKS contractor submitted an APT to the Legal and Formality Consideration Division. This APT estimate of the price of land to be acquired, of course, based on information obtained during the pre-survey, such as NJOP, land prices from the sub-district / village head/village head Survey.

If the APT has been approved, SKK Migas representatives and the KKS contractor will carry out a re-survey involving government agencies such as the sub-district head, village head and village head, and landowners. So, the difference with the pre-survey is only the parties that carry it out.

(3) Socialization

Socialization is carried out by SKK Migas representatives together with KKS contractors to entitled parties by involving government agencies.

(4) Application for Permission

As previously explained, the permit and land procurement processes were separate activities, even though they were for the same needs. With the existence of this decree, the permit application is one of a series of activities in the process of land procurement.

b. Preparation phase

Land procurement implementation plan after the (APT) is approved. The highest leader of the KKS contractor submits a Land Acquisition Plan (RPPT) to the deputy in charge of land affairs. Power of Attorney SKK Migas issues power of attorney to the KKS contractor so that the KKS contractor acts for and on behalf of SKK Migas in carrying out the settlement of land procurement.

c. Implementation Stage

Settlement of land procurement after the KKS contractor obtains a power of attorney in which the KKS contractor acts

¹⁷ Muhammad Rochaddy Lubis, 2020, *Transformation of the Licensing Process at Representatives (2)*, Public Relations Staff, Representatives of SKK Migas for the North Sumatra Region, accessed on 19 December 2020.

<https://humasskkmigas.wordpress.com/2015/01/06/transformasi-proses-perizinan-di-perwakilan-2/#more-1041>

for, and on behalf of SKK Migas in completing land procurement, the KKS contractor can carry out deliberations, transfer of rights, and provide compensation to owners or parties entitled to coordinate with SKK Migas Representatives.

Based on this mechanism, it illustrates that in the future, the role of SKK Migas Representatives is getting bigger in supporting and securing the exploration and exploitation activities of KKS contractors according to schedule, so that targets such as production can be achieved. SKK Migas representatives are also enthusiastically carrying out the mandate given by SKK Migas Jakarta as explained above that since Decree No. 0076 Tahun 2014, published in April 2014.

Use of Discretion for Land Procurement for Upstream Oil and Gas Business Activities

The long experience experienced by SKK Migas in land procurement through a business-to-business (B to B) mechanism or scheme is challenging and faces many obstacles and problems. Based on such a framework of thinking, the use of discretion becomes a necessity and a legal breakthrough that makes sense and is ideal for overcoming difficulties and obstacles in land procurement for upstream oil and gas business activities. Land procurement for upstream oil and gas business activities is a fundamental and vital need. It should be able to run with a simple, easy, effective, and efficient mechanism but must still prioritize the principles of justice, the welfare of landowners, and uphold dignity.

The Ministry of Agrarian Affairs and Spatial Planning / National Land Agency (ATR / BPN) has initiated and made legal breakthroughs, namely using the authority or

discretion given by Law Number 2 of 2012 concerning Land Acquisition for Development for Public Interest (Law No.2 In 2012). Minister of ATR / Head of BPN Sofyan Djalil has been involved in the Special Task Force for Upstream Oil and Gas Business Activities (SKK. Migas) inland procurement for upstream oil and gas sector activities. All land acquisition for upstream oil and gas activities is included in the public interest and involves SKK Migas.

The future question is, is it possible to use discretion in the upstream oil and gas business activities? To answer this question, it must be studied theoretically and juridically.

The simple concept of discretion is the freedom to act by the government in response to the development of demands in social life related to the function of the government as the organizer of the public interest in a country. With a reasonably simple concept, it must be able to guarantee that it is able to minimize human rights violations in land acquisition as has happened in the past.

This freedom of action in the government was born because of the limited situation of legal arrangements as a basis for action for the government in certain situations, among others; unclear rules or regulations, regulatory emptiness, or contradiction in regulation. On the other hand, government activities in the context of running the state are continuous or continuous or may not stop.

Observing this simple concept, discretion is the power that contains a particular meaning; namely, the exception is the usual situation where demands regarding the actions that the government has to take are already covered by the legal arrangement. In everyday situations, the power that applies to the government is bound to power or authority, meaning that in this situation, the

legality principle of the rule of law will always be the commander.¹⁸

Some legal experts put forward theoretical views or concepts about discretion, including:

- a. S. Prajudi Atmosudirjoy defines discretion (English), discretionair (France), freies ermesen (Germany) as follows; freedom of action or taking decisions from the competent and authorized state administration officials according to their own opinion. Furthermore, it is explained that discretion is needed as a complement to the legality principle, which is the legal principle which states that "every legal action which states that every act or act of state administration must be based on statutory provisions". However, it is not possible for the law to regulate all kinds of positional cases in the practice of everyday life.¹⁹
- b. Indroharto mentions discretionary authority as facultative authority, which is an authority that does not oblige state administrative bodies or officials to exercise their authority, but provides options even in certain matters as stipulated in its basic regulations.²⁰
- c. Sjachran Basah explained that freies ermesen is the freedom to act on one's own initiative, however, in its implementation, state administrative actions must be in accordance with the law, as stipulated in a constitutional state based on Pancasila.²¹
- d. Diana Halim Koentjo defines freies ermesen as the freedom to act in the state administration or the government (executive) to solve problems that arise in a compelling emergency, where there are no resolution regulations for the problem.²²
- e. Esmi Warassih said that in the context of implementing public policy, bureaucrats can determine their own policies to suit the situation in which they are in, especially in implementing a public policy.²³ The existence of discretion, it is hoped that the existing conditions can achieve a maximum result or goal.

Starting from these concepts, theoretical thoughts and/or legal doctrines, it can be concluded that in essence discretion is freedom of action or freedom to make decisions from government administrative bodies or officials in their own opinion as a complement to the legality principle when the applicable law is unable to resolve.²⁴

¹⁸ Subadi dan Tiara Oliviarizky Toersina, *Perkembangan Konsep atau Pemikiran Teoritik tentang Diskresi Berbasis Percepatan Investasi di Daerah* (The Development of Concept or Theoretical Thought on Discretion Based on Accelerated Investment in Regions), (2018) 30 (1) *Mimbar Hukum*, p. 20.

¹⁹ *Ibid.* See also S. Prajudi Atmosudirjo, 1994, *Hukum Administrasi Negara* (State Administrative Law), Ghalia Indonesia, Jakarta, p. 82.

²⁰ *Ibid.* See also Indroharto, 1993, *Usaha Memahami Undang-Undang Tentang Peradilan Tata Usaha Negara* (Efforts to Understand the Law on State Administrative Courts), (Pustaka Sinar Harapan, Jakarta), p. 99-101.

²¹ *Ibid.* See also Sjachran Basah, 1997, *Eksistensi dan Tolok Ukur Badan Peradilan Administrasi di Indonesia* (Existence and Benchmarks of

Administrative Courts in Indonesia), Alumni, Bandung, p. 3.

²² *Ibid.*; Diana Halim Koentjoro, 2004, *Hukum Administrasi Negara* (State Administrative Law), Ghalia Indonesia, Bogor, p. 41.

²³ *Ibid.* Esmi Warassih Puji Rahayu, 2005, *Pranata Hukum Sebuah Telaah Sosiologis* (Legal Institution of a Sociological Study), Suryandaru Utama, Semarang, p. 138-139.

²⁴ Subadi, *Diskresi Berbasis Percepatan Investasi Daerah* (The Role of Legislation in the Development of National Law), (Dialektika, Yogyakarta, 2018), p. 120. The use of discretion can be carried out with the following limits / benchmarks: 1) Discretion in the form of policy regulations must not conflict or deviate or conflict with the rules on it. In the sense that it must be in accordance with the hierarchy of statutory

certain problems that arise suddenly, which are caused because the regulations do not exist or because the existing regulations governing something that is not clear or unclear.²⁵

Still within the framework of such a concept or viewpoint, it can also be concluded that what is needed is freedom or discretion in state administration consisting of free discretion and bound discretion. In free discretion, the law only determines boundaries and state administration is free to make any decisions as long as it does not exceed / violate these boundaries, whereas in bound discretion, the law stipulates several alternative decisions and state administration is free to choose an alternative decision regulated by law.

Especially in relation to the principle of legality (*legaliteitsbeginsel*) it is known in criminal law and Islamic law, but the legality principle referred to in this paper is the context of administrative law, namely *het beginsel van wetmatigheid van bestuur* or the principle of legality in government. The principle of legality is considered the most important basis of the rule of law (*al seen van belangrijkste fundamenten van de rechtsstaat*) and implies that the government can only take action based on the authority given and limited by law, "*het bestuur kan allen op basis van door de wet toegekende en afgebakende bevoegdheden handelen*". Although the legality principle is considered the most important principle of a rule of law, basing every governmental action in the

public sector on the principle of legality or written law is not without problems. This is because, according to Bagir Manan, there are natural defects and artificial defects from statutory regulations as a form of written law.²⁶

The government has equipped itself with both attributive and delegative powers within the framework of carrying out government tasks. With the development of society, there are often certain circumstances that are urgent in nature that make government administrative officials / bodies unable to use their authority, especially binding authority (*gebonden bevoegheid*) in carrying out legal and factual actions normally.²⁷

Marcus Lukman explained that important urgent issues, at least contain the following elements:

- a. The problems that arise must be related to the public interest, namely the interests of the nation and the state, the interests of the wider community, the interests of the common people, as well as development activities.
- b. The emergence of these problems suddenly, is outside the predetermined plan.
- c. To solve this problem, the laws and regulations have not regulated or only regulated in general, so that the state administration has the freedom to resolve it on its own initiative.
- d. The procedure cannot be completed according to normal administration or if

regulations; 2) The discretion used must not violate the human rights and obligations of citizens in the sense that it is not used arbitrarily; 3) The discretion used is still within the scope of its basic rules; 4) Discretion is used in a compelling or urgent situation for the sake of public welfare / interest; 5) The discretion used must be based on general principles good governance.

²⁵ Subadi dan Tiara Oliviarizky Toersina, above n 17., p. 21.

²⁶ Ibid. Bagir Manan dan Kuntana Magnar, 1987, *Peranan Peraturan Perundang-undangan dalam Pembinaan Hukum Nasional* (The Role of Legislation in National Law Development), Armico, Bandung., Armico, Bandung, p. 45.

²⁷ Julista Mustama, *Diskresi dan Tanggungjawab Administrasi Pemerintahan* (Discretion and Responsibility for Government Administration), <https://ejournal.unpatti.ac.id>, diakses pada 11 Mei 2020.

it is completed according to normal administrative procedure it is less efficient and effective.²⁸

Starting from this discretionary authority means that some of the power held by the legislature is transferred to the government or state administration as an executive body. So, the rule of law of the legislature is replaced by the supremacy of the executive, because the state administration resolves problems without having to wait for changes to laws from the legislative field. This is because in principle, government administrative bodies / officials should not refuse to provide services to the community on the grounds that the law does not exist or the law exists but is unclear, as long as it is within their authority.

Laws and regulations have a limited reach, just taking the moment of hospitalization from the political, economic, social, cultural and defense elements that were most influential at the time of formation. Therefore, laws and regulations will lag behind when compared to changes in society that are getting faster or accelerated.²⁹ In addition, another thing that often creates problems in the application of the legality principle is the structure of public legal norms that will be used as the basis for government action. In contrast to the structure of criminal or civil law norms, the structure of public law norms, especially administrative law, is chain and tiered. This

means that norms for a government affair are not only contained in a regional law or regulation but scattered in various statutory regulations. Thus, an official who will take certain legal actions is required to review all relevant laws and regulations. This is a limitation in itself.

The existence of discretion is functioned to overcome the limitations of officials in understanding all related laws and regulations in the field of administrative law. In this case, *freies ermesen* or discretion, namely the independence of the government to be able to act on its own initiative in solving social problems is needed.³⁰ In other words, *ermessen freies* is a means of providing mobile space for state administrative officials or agencies to take action without being fully bound by the law.³¹

It should be noted that this *freies ermesen* or discretion, if set forth in written form, will turn into policy regulations, namely general regulations issued by government agencies regarding the implementation of governmental authority over citizens or other government agencies that are made without strict legal bases in the Law. The foundation and formal laws both directly and indirectly.

According to Anna Erliyana, the use of *freies ermesen* by State administrative bodies / officials is intended to solve urgent and sudden problems that are cumulative in

²⁸ Marcus Lukman, *Eksistensi Peraturan Kebijaksanaan dalam bidang Perencanaan dan Pelaksanaan Rencana Pembangunan di Daerah serta Dampaknya Terhadap Pembangunan Materi Hukum Tertulis Nasional* (Existence of Policy Regulations in the field of Planning and Implementation of Regional Development Plans and their Impact on the Development of National Written Legal Materials), Disertasi, Universitas Padjajaran, Bandung, (1996), p. 203. See also Subadi, *Diskresi Berbasis Percepatan Investasi Daerah*, (Dialektika, Yogyakarta, 2018), p. 63.

²⁹ Until now, oil and gas are still very vital needs, while the amount of production continues to decline, one of the causes is the land acquisition mechanism which is known to be very difficult and complicated. It is quite logical and reasonable, if the Ministry of Agrarian Affairs is forced to seek legal breakthroughs for land acquisition to accelerate upstream oil and gas activities.

³⁰ E. Utrecht, 1988, *Pengantar Hukum Administrasi Negara Indonesia* (Introduction to Indonesian State Administrative Law), Pustaka Tinta Mas, Surabaya, p. 30.

³¹ Marcus Lukman, above n 27, p. 205.

nature.³² In this case, there is a possibility that issues that are important but not urgent to be resolved are also possible, there is also a possibility that issues that are urgent but not too important to be resolved may arise. A new issue can qualify as an important issue if the issue concerns the public interest, while the criteria for public interest must be determined by a statutory regulation.³³

Based on the foregoing, it can be concluded that the use of discretionary authority by government administrative bodies / officials can only be carried out in certain cases where the prevailing laws and regulations do not regulate it or because the existing regulations governing something is unclear and this is done in an emergency. / urgent in the public interest that has been determined in a statutory regulation.

Theoretically, Marcus Lukman states that the benchmarks for important urgent issues must contain at least the following elements:

- a) The problems that arise must be related to the public interest, namely: the interests of the nation and the state, the interests of the wider community, the interests of the common people or the interests of development.
- b) The emergence of the problem suddenly, outside the predetermined plan.
- c) To solve these problems, the laws and regulations have not regulated it or only regulate it in general, so that the state administration has the freedom to solve it on its own initiative.
- d) The procedure cannot be completed according to normal administration, or if it is completed according to normal

administrative procedure it is less efficient and efficient.

- e) If the problem is not resolved quickly, it will cause harm to the public interest.³⁴

Based on the foregoing, a limitation can be given that discretion by government officials is an act of state administration law, if an action is carried out by a government official in certain cases where the prevailing laws and regulations have not regulated it, or existing regulations that govern the action/act is unclear so freedom of judgment is needed from government officials and the action/act can only be carried out in the sense of a compelling / urgent situation for the sake of the public interest which has been stipulated in a statutory regulation, with limits / benchmarks. as follows:

- a) Discretion in the form of policy rules must not conflict or deviate or conflict with the above rules. In the sense that it must comply with the hierarchy of statutory regulations;
- b) The discretion used must not violate the human rights and obligations of citizens in the sense that it is not used arbitrarily;
- c) The discretion used is still within the scope of its basic rules;
- d) Discretion is used in a compelling / urgent situation for the sake of public welfare / interest;
- e) The discretion used must be based on the general principles of good governance.³⁵

Based on the aforementioned explanations, theoretically the use of discretion for land acquisition for upstream oil and gas activities, it seems clearer. Furthermore, juridically discretion has been regulated in Law Number 30 of 2014

³² Anna Erliyana, 2005, *Hukum Administrasi Negara* (State Administrative Law), Badan Penerbit Fakultas Hukum Universitas Indonesia, Jakarta, p. 138.

³³ Ibid.

³⁴ Lukman, Marcus, *Eksistensi ...*(1996), above n 27., p. 203. See Also Subadi, *Diskresi....* (2018), above n 17, p. 63.

³⁵ Ibid.

concerning Government Administration (Law No. 30 of 2014), in particular Article 22 explains, that:

- (1) Discretion can only be exercised by authorized Government Officials.
- (2) Every use of a Government Official's Discretion aims to:
 - a. Smooth governance;
 - b. Fill in the legal void;
 - c. provide legal certainty; and
 - d. overcoming government stagnation in certain circumstances for the benefit and public interest.³⁶

Law No. 30 of 2014, has defined discretion by stating that government officials and / or other legal entities that use discretion in making decisions are obliged to consider discretionary objectives, laws and regulations that serve as the basis for discretion and general principles of good governance.³⁷

Furthermore, what is the procedure for using discretion? Answering this question, then based on the provisions of Article 26, it is explained that:

- (1) Officials using the Discretion as referred to in Article 25 paragraph (1) and paragraph (2) must describe the purpose, objective, substance, and administrative and financial impact.
- (2) Officials using Discretion as referred to in paragraph (1) are required to submit a written application for approval to the Supervisor of the Official.
- (3) Within 5 (five) working days after receipt of the application documents, the Supervisory Officer shall determine approval, correction instructions, or rejection.

- (4) If the Supervisory Officer as intended in paragraph (3) refuses, the Supervisor of Officer must provide reasons for rejection in writing.³⁸

Furthermore, Article 28 paragraph (2) and paragraph (3) states that the use of discretion must be held accountable to the superior officials and the public who are harmed by the discretionary decision that has been taken and can be tested through administrative efforts or a lawsuit in the State Administrative Court. This provision means that the draft government administration law will not only limit the use of discretion by government administrative bodies / officials but also regulates the accountability of government administrative bodies / officials for the use of discretion which is not only passive in the sense of waiting for a lawsuit from the public through the State Administrative Court but also has an active character with the obligation to account for the use of discretion to their superior officials, considering that this is an obligation inherent in the authority which is the basis for the existence of discretion itself.

However, the unfortunate thing is even though in Article 28 paragraph (2) and (3) Law No. 30 of 2014 has regulated the obligation to report discretionary actions to superiors in written form by providing reasons for discretionary decisions, but if these provisions are not implemented there are no sanctions so that it can cause government administrative bodies/officials who issue discretionary decisions to argue that the decision what he made was neither a discretionary decision nor an excuse that he did not know that it was a discretionary decision.

³⁶ Article 22, Law Number 30 of 2014 on Government Administration.

³⁷ Article 24, Law Number 30 of 2014 on Government Administration.

³⁸ Article 26, Law Number 30 of 2014 on Government Administration.

Nevertheless, at least the limits on the use of discretion will be made as a binding norm; this is sufficient to avoid the use of abuse of authority (*detournement de pouvoir*) and arbitrary actions (*willekeur*) by government administrative bodies/officials, for the purpose of the main thing of normalization is to create and make State Administrative Law support legal certainty that provides legal guarantees and protection for both citizens and State administrators.

Based on the theoretical and juridical basis as described above, the Ministry of Agrarian Affairs and Spatial Planning and the Land Agency (ATR / BPN) authorizes the Special Task Force for Upstream Oil and Gas Activities (SKK Migas) for land acquisition. This granting of authority aims to expedite and accelerate national oil and gas projects.³⁹

The Minister of Agrarian Affairs and Spatial Planning, Sofyan Djalil, said that the upstream oil and gas sector often has difficulty obtaining land for project development. This is an obstacle to the development of Indonesia's upstream oil and gas activities. One of the obstacles is because new exploration is not too much, one reason is because of the obstacles to obtaining land, especially in the regions.⁴⁰ To overcome these obstacles, Minister Sofyan also provided convenience in land acquisition through discretion to SKK Migas as the regulator of Indonesia's upstream oil and gas activities. Discretion was given because the oil and gas sector was not included in the object of Law Number 2 of 2012. This has been agreed in the memorandum of understanding.

Based on the reason for making it easier for SKK Migas in increasing oil and gas production, Minister Sofyan Djalil's optimism is easy to make it easy for him to formulate rules supporting discretion and problems in implementation in the field.

As a form of realization of this discretion, the Ministry of Agrarian and Spatial Planning / National Land Agency (ATR / BPN), together with the Special Task Force for Upstream Oil and Gas Business Activities (SKK Migas), have signed an agreement (MoU) related to land certification. The MoU between the Minister of ATR / BPN and the Special Task Force for Upstream Oil and Gas Business Activities (SKK Migas) on Monday, January 28, 2020, has so far been known that other institutions have had difficulty obtaining land. Therefore, we accelerate. In fact, we will later describe that the interests of oil and gas are public interests that can be used based on Law Number 2 of 2012.⁴¹

On the other hand, SKK Migas, through Deputy for Business Support M. Atok Urrahman, explained that more than 60 percent (60%) of oil and gas search activities or upstream activities are carried out on land; every activity carried out on land requires land. Therefore, the role and assistance of the Ministry of Agrarian Affairs and Spatial Planning or the National Land Agency are essential for the upstream oil and gas industry. SKK Migas requires assistance in land acquisition for the public interest, land registration and certification, resolution of land asset problems and overlapping land, as well as spatial suitability so that upstream oil

³⁹ PetroNews, 2020, *Majalah Ekonomi Peduli Lingkungan* (Environmental Care Economy Magazine).

⁴⁰ Explanation from Minister Sofyan A. Djalil, at the *Ministry of Agrarian Affairs and Spatial Planning Office*, (Jakarta, Monday, January 28, 2019).

⁴¹ <https://nasional.kontan.co.id/news/kementerian-agraria-teken-kerjasama-sertifikat-tanah-dengan-skk-migas>, Accessed 8 October 2020.

and gas operations can run according to the specified target.

Every year SKK Migas carries out more than 200 (two hundred) small-scale land acquisitions. This year, SKK Migas is conducting 13 (thirteen) large-scale land acquisitions in which the land is urgently needed for drilling activities and building oil and gas production facilities.

In contrast to industry and other projects that have flexibility in determining the location of their activities, location the upstream oil and gas industry is determined by the structure and conditions below the ground, namely the oil and gas reserves themselves. Therefore, wherever the possibility/potential of oil and gas reserves is, it must carry out a land acquisition on it. Therefore, it is not uncommon for SKK Migas to conduct land acquisition to face obstacles and challenges, such as; 1) refusal from the landowner; 2) inconsistencies in spatial layout; 3) the existence of land and other disputes. Therefore, we really need assistance from the Ministry of ATR to facilitate these problems.⁴²

Based on the memorandum of understanding (MoU), assistance from the ATR / BPN can assist and ensure that land acquisition for the upstream oil and gas industry will run more easily, quickly, effectively, and efficiently. Thus, Indonesia's oil and gas production can increase significantly. In such a simple mindset, SKK Migas must remain committed to promoting a sense of justice and avoiding power approaches that tend to violate the basic rights of land voters.

With the latest developments after the law on the Omnibus Law and the enactment of the Employment Creation Law, it is

possible that land acquisition for upstream oil and gas activities will undergo changes. However, the crucial issue of compensation within the implementation of the policy of land procurement regards the non-equivalence of land value, both utility value and economic value of structures and landscapes, to the monetary compensation. The use of the legal culture approach is to provide answers and implement them to resolve issues of land procurement for public interests in the omnibus law regime to maintain justice to landowners and preserve the environment.⁴³

The correlation of the cultural approach and activities of land procurement is that culture refers to the target of the national conscience, and the cultural approach based on the growth mindset will result in wisdom and nobility of the decisions of public officials to prioritize the people rather than interests of investment.⁴⁴

I agree with this statement that the resolution of crucial problems, especially the provision of compensation for land owned by the people, must be based on the principle for the greatest prosperity of the people and prioritize local cultural wisdom.

IV. CONCLUSION

Land acquisition for upstream oil and gas activities through the business to business (B to B) mechanism often faces difficulties and many obstacles, among others; 1) refusal from the landowner; 2) inconsistencies with the spatial layout; 3) there is a land dispute with another party; 4) difficulty for oil and gas contractors to process land registration and certification. All of these have resulted in delayed production targets which have resulted in

⁴² Ibid.

⁴³ Imam Koeswahyono dan Hikmatul Ula, Institutional Policy in Land Procurement under the

Omnibus Law Regime, (2020) 7 (1) *Brawijaya Law Journal*. p.27.

⁴⁴ Ibid

increased production costs. After being passed Law no. 2 of 2012, Presidential Regulation Number 71 of 2012 in conjunction with Presidential Regulation Number 40 of 2014 and Decree of the Head of SKK Migas No. 76 of 2014, land acquisition is easily accounted for, both for pragmatic operational needs and for legal administration. The PSC contractor will immediately be able to secure land assets that have been controlled as state property which must be registered and issued a Business Use Rights (HGU) certificate.

The use of discretionary land acquisition for upstream oil and gas activities can be considered as the use of the authority granted by Law No. 2 of 2012 and Law No. 30 of 2014 concerning Government Administration. Theoretically, it can be justified to be a creative and innovative solution to overcome the need, deadlock, legal vacuum, policies, and regulations for accelerating land acquisition and accelerating oil and gas production. Meanwhile, juridically; a) in accordance with the objective of discretion as referred to in Article 22 paragraph (2); b) does not conflict with the provisions of laws and regulations; c) in accordance with the AUPB; d) based on objective reasons; e) does not create a conflict of interest; and f.) done in good faith.

V. ACKNOWLEDGEMENT

The author is grateful to the Directorate of Research and Community Service (DRPM), Director General of Research and Development Strengthening, Ministry of Research, Technology, and Higher Education (Kemristekdikti) for funding this research. The Institute for Research and Community Service (LPPM) Merdeka University of Madiun has provided many facilities to support the smooth running of research. Also, all parties who have

contributed provide data and information, both primary and secondary data, to complete this research.

REFERENCES

Book

- Atmosudirjo, S. Prajudi, *Hukum Administrasi Negara* (State Administrative Law), (Ghalia Indonesia, Jakarta, 1994).
- Basah, Sjachran, *Eksistensi dan Tolok Ukur Badan Peradilan Administrasi di Indonesia* (Existence and Benchmarks of Administrative Courts in Indonesia), (Alumni, Bandung, 1997).
- Erliyana, Anna, *Hukum Administrasi Negara* (State Administrative Law), (Badan Penerbit Fakultas Hukum Universitas Indonesia, Jakarta, 2005).
- Indroharto, *Usaha Memahami Undang-Undang Tentang Peradilan Tata Usaha Negara* (Efforts to Understand the Law on State Administrative Courts), (Pustaka Sinar Harapan, Jakarta, 1993).
- Koentjoro, Diana Halim, *Hukum Administrasi Negara* (State Administrative Law), (Ghalia Indonesia, Bogor, 2004).
- Lukman, Marcus, *Eksistensi Peraturan Kebijaksanaan dalam bidang Perencanaan dan Pelaksanaan Rencana Pembangunan di Daerah serta Dampaknya Terhadap Pembangunan Materi Hukum Tertulis Nasional* (Existence of Policy Regulations in the field of Planning and Implementation of Development Plans in Regions and their Impact on the Development of National Written Legal Materials),

- Disertasi, (Universitas Padjajaran, Bandung, 1996).
- Manan, Bagir dan Kuntana Magnar, *Peranan Peraturan Perundang-undangan dalam Pembinaan Hukum Nasional* (The Role of Legislation in the Development of National Law), (Armico, Bandung, 1997).
- Subadi, *Diskresi Berbasis Percepatan Investasi Daerah* (The Role of Legislation in the Development of National Law), (Dialektika, Yogyakarta, 2018).
- Utrecht, E., *Pengantar Hukum Administrasi Negara Indonesia* (Introduction to Indonesian State Administrative Law), (Pustaka Tinta Mas, Surabaya, 1988).
- Warassih Puji Rahayu, Esmi, *Pranata Hukum Sebuah Telaah Sosiologis* (Legal Institutions A Sociological Study), (Suryandaru Utama, Semarang, 2005).
- Journal**
- Karim, Mirza, Mills, Karen, and Qadrya , Intan Ajrina, 'Indonesia and OPEC', (2016) 9, *Journal of World Energy Law and Business*.
- Koeswahyono, Imam and Hikmatul Ula, Institutional Policy in Land Procurement under the Omnibus Law Regime, (2020) 7 (1), *Brawijaya Law Journal*.
- Manan, Bagir, 'Penelitian Hukum (Legal Research)', *Jurnal Hukum* (Legal Journal), Puslitbangkum Unpad, Bandung, (Perdana; January, 1999).
- Mustama, Julista, 'Diskresi dan Tanggungjawab Administrasi Pemerintahan (Discretion and Government Administration Responsibilities)', *E-Jurnal Unpati*, <https://ejournal.unpati.ac.id>, diakses pada 11 Mei 2017.
- Purwati, Yuni dan Sigit Sapto Nugroho, 2016, 'Pengadaan Tanah Untuk Kegiatan Hulu Minyak dan Gas Bumi di Indonesia' (Land Acquisition for Upstream Oil and Gas Activities in Indonesia), *Competitive Grant Research Report* (Not Published), LPPM Unmer, Madiun.
- Subadi dan Tiara Oliviarizky Toersina, 'Perkembangan Konsep atau Pemikiran Teoritik tentang Diskresi Berbasis Percepatan Investasi di Daerah' (The Development of Concept or Theoretical Thought on Discretion Based on Accelerated Investment in Regions), (2018) 30 (1) *Mimbar Hukum*.
- Sumanto, Heri, 'Pengelolaan Migas di Blok Cepu Kabupaten Bojonegoro, Jawa Timur Pasca Putusan Mahkamah Konstitusi (Oil and Gas Management in the Cepu Block, Bojonegoro Regency, East Java after the Constitutional Court Ruling) Nomor 002/PUU-1/2003', (2011) I(1 Edisi Juni) *Jurnal Kontitusi FKK*. FH. Unmer Madiun – MK RI. ISSN. 1829-7729.
- Regulations**
- Law Number 22 Year 2001 on Oil and Natural Gas.
- Law Number. 2 of 2012 on Land Acquisition for Development for Public Interest.
- Law Number 30 of 2014 on Government Administration.
- Presidential Regulation Number 71 of 2012 on Implementation of Land Procurement for Development for Public Interest.
- Presidential Regulation Number 40 of 2014 on Implementation of Land

Procurement for Development in the Public Interest.

Internet

Anastasia Arvirianty, CNBC Indonesia, Petro News, Majalah Ekonomi Peduli Lingkungan (Environmental Care Economy Magazine), <https://www.cnbcindonesia.com/news/20190128120839-4-52620/percepat-proyek-skk-igas->

dapat-diskresi-pembebasan-lahan, Diakses tanggal 6 Oktober 2020.

ATR: Pengadaan Lahan untuk Proyek Migas Dipermudah (Facilitated Land Procurement for Oil and Gas Projects); <https://nasional.kontan.co.id/news/kementerian-agraria-teken-kerjasama-sertifikat-tanah-dengan-skk-migas>, Diakses Tanggal 8 Oktober 2020.