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Legal Analysis

Protection of High Conservation Value Areas in Palm Plantations in Indonesia

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*This short analysis discusses legal challenges and opportunities as well as policy
recommendations to safeguard High Conservation Value Areas in palm plantations in
Indonesia*

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Legal Analysis

HCV Protection in Indonesia's Laws

1. Overview of HCV

In 2004, the roundtable on sustainable palm oil (RSPO) began, driven by market players. It involved communities and NGOs and was intended to produce standards and criteria for sustainable oil palm. One of the hot issues discussed was High Conservation Value Forests (HCVF), which are defined as those that possess one or more of the following attributes:

- HCV1** Forest areas containing globally, regionally or nationally significant concentrations of biodiversity values (e.g. endemism, endangered species, refugia).
- HCV2** Forest areas containing globally, regionally or nationally significant large landscape level forests, contained within, or containing the management unit, where viable populations of most if not all naturally occurring species exist in natural patterns of distribution and abundance.
- HCV3** Forest areas that are in or contain rare, threatened or endangered ecosystems.
- HCV4** Forest areas that provide basic services of nature in critical situations (e.g. watershed protection, erosion control).
- HCV5** Forest areas fundamental to meeting basic needs of local communities (e.g. subsistence, health).
- HCV6** Forest areas critical to local communities' traditional cultural identity (areas of cultural, ecological, economic or religious significance identified in cooperation with such local communities).

The HCVF concept was developed by Forest Stewardship Council (FSC), an international certification organisation established in 1999 and is incorporated in its certification principles and criteria. The RSPO's Principles and Criteria then adopt the HCVF concept in Principle # 7 on responsible development of new plantings. HCVF is part of Criteria #7.1 stating that a comprehensive and participatory independent social and

environmental impact assessment is undertaken prior to establishing new plantings or operations, or expanding existing ones, and the results incorporated into planning, management and operations. To achieve this needs a guideline that:

- 1) Explains who participates
- 2) Is independent, conflict-free and professional
- 3) Explains how to undertake an HCVF assessment

In the field, as a result of HCVF identification, there lie pieces of landscape on a plantation. The pieces become new parts of physical management to be undertaken by the concessionaire.

The legal analysis attempts to provide a description of legal room that can be used to safeguard HCV areas in plantation operations in Indonesia.

2. Legal aspects of plantation concession

2.1. Status and Functions of Forests

Forests in Indonesia are defined by nature and political approaches. In the nature approach, forests are defined as ecosystem units in the form of a landscape containing biological resources dominated by trees within their unity with the surroundings, all of which are inseparable. In the political sense, a forest is defined as a given forest area designated and gazzetted by the government to maintain its existence as a permanent forest. The direct implication of both definitions is that forests can be a landscape with no trees on it.

The definitions imply forestry affairs, which are understood as a management system of forest, forestland and forest products that is implemented in an integrated way. This also applies to areas outside what is referred to as the State's forests.

Law No. 41 of 1999 on Forestry, in the initial parts, determines forests based on title status (i.e. ownership right) and based on ecological functions set forth by the Department of Forestry as the agency responsible for forestry affairs in Indonesia. Article 5 of the Forestry Law determines forests based on their status: a) state's forests and b) *hutan hak*, forests encumbered with rights. Customary forests are included in State's forests. According to the definition, customary forests are State's forests whose management is granted to customary law communities (*rechtsgemeenschap*). Customary forests were previously called *hutan ulayat*, *hutan marga*, *hutan pertuanan*, and some others. *Hutan hak* is defined by the law as forests lying on land encumbered with rights and are commonly called community's forests.

The Forestry Law classifies forests based on three functions a) conservation, b) protection, and c) production. Production forests are those designated to produce forest products; protection forests are those designated to protect life supporting system that regulates water system, prevents floods, controls erosion, prevents sea water intrusion and maintains soil fertility; and conservation forests are those with specific attributes functioning to preserve flora and fauna diversity and the ecosystems.

2.2. Forests for Plantation Purpose

Governmental Regulation (PP) No. 47 of 1997 on the National Spatial Plan introduced conversion production forests, which later become plantations. The PP was replaced with PP No. 26 of 2008 on the National Spatial Plan, which divides areas into 10 national protection areas and cultivation areas having national strategic values (Article 50). Plantations are developed in cultivation areas. Below is the division of the areas according to the national spatial plan.

Table 1. Cultivation Areas

| Cultivation Areas | Function | Criteria and Requirements |
|--------------------------------------|---------------------------------------|--|
| Areas for production forests; | Areas for limited production forests; | Have sloping factors, soil type and rainfall intensity with the total score of 125 - 174 |
| | Areas for permanent production | Have sloping factors, soil type and |

| | |
|---|--|
| forests; | rainfall intensity with the maximum score of 124 |
| Areas for production forests that can be converted. | <ul style="list-style-type: none"> a. Have sloping factors, soil type and rainfall intensity with the maximum score of 124 and or b. If converted, can preserve their carrying capacity and absorption capacity (<i>daya tampung</i>). |
| Areas for community's forests; | |
| Areas for agriculture; | |
| Areas for fishery; | |
| Areas for mining; | |
| Areas for industry; | |
| Areas for tourism; | |
| Areas for settlement, and or other purposes. | |
| Part Three, cultivation areas having national strategic values Paragraph 1 Cultivation Areas, Article 63 | Paragraph 2, Criteria for Cultivation Areas, Article 64 |

Land released for plantation purposes, according to Presidential Instruction (Keppres) No. 55 of 1993, which was replaced with Presidential Regulation No. 36 of 2005, should be done through purchase and sale, exchange, or other means agreed voluntarily by the parties concerned. Two previous regulations – Law No. 20 of 1961 and Presidential Instruction No. 9 of 1973 – open opportunities of provision of land for plantation purposes on the ground that such provision is of public interests.

Based on the origin, land for plantations can be divided into two: State's forests and land whose right is hold by communities. The term "State's Forest" first appeared in Governmental Regulation (PP) No. 8 of 1953 on Control of State's Land. Article 1 letter a states that State's land is that under full control of the State. The general Explanation to this PP states that:

"In accordance with "domeinverklaring", which among others was stated in Article 1 of "Agrarisch Besluit", all land is totally free from anyone's rights (either based on Indonesia's indigenous law or western law), and considered as "vrij landsdomein", i.e. land owned and fully controlled by the State. This land is what is stated as "the State's Land" in this Governmental Regulation."

On the other hand, Article 1 number 3 of PP No. 24 of on Land Registration determined that

the State's land or land directly controlled by the State is that burdened with no rights.

The Forestry Law defines forest as an area designated and or determined by the government to maintain its existence as a permanent forest. Inside forestland lie the State's forests, which are not encumbered with any right; *hutan hak*, those encumbered rights; and customary forests, in which lie the State's forests.

The State's forests lie on land not encumbered with any right so they are the most potential areas for plantation development. Therefore, the national spatial plan reserves part of the cultivation areas for plantations, popularly called Conversion Forest Areas or Convertible Production Forests [*Hutan Produksi Konversi* (HPK)]. Areas for convertible production forests are determined by the following criteria:

- a. Having sloping factors, soil type and rainfall intensity with the maximum total of 124, and or
- b. If converted, being able to preserve their carrying capacity and absorption capacity (*daya tampung*).

Other forest areas used for plantations are Areas for Other Uses (APL) or Non-forest Cultivation Areas (KBNK). APL or KBNK are the State's forests designated under the Forestry Minister's Decree on Designation of Forestland and Provincial Waters as Non-Forestland.

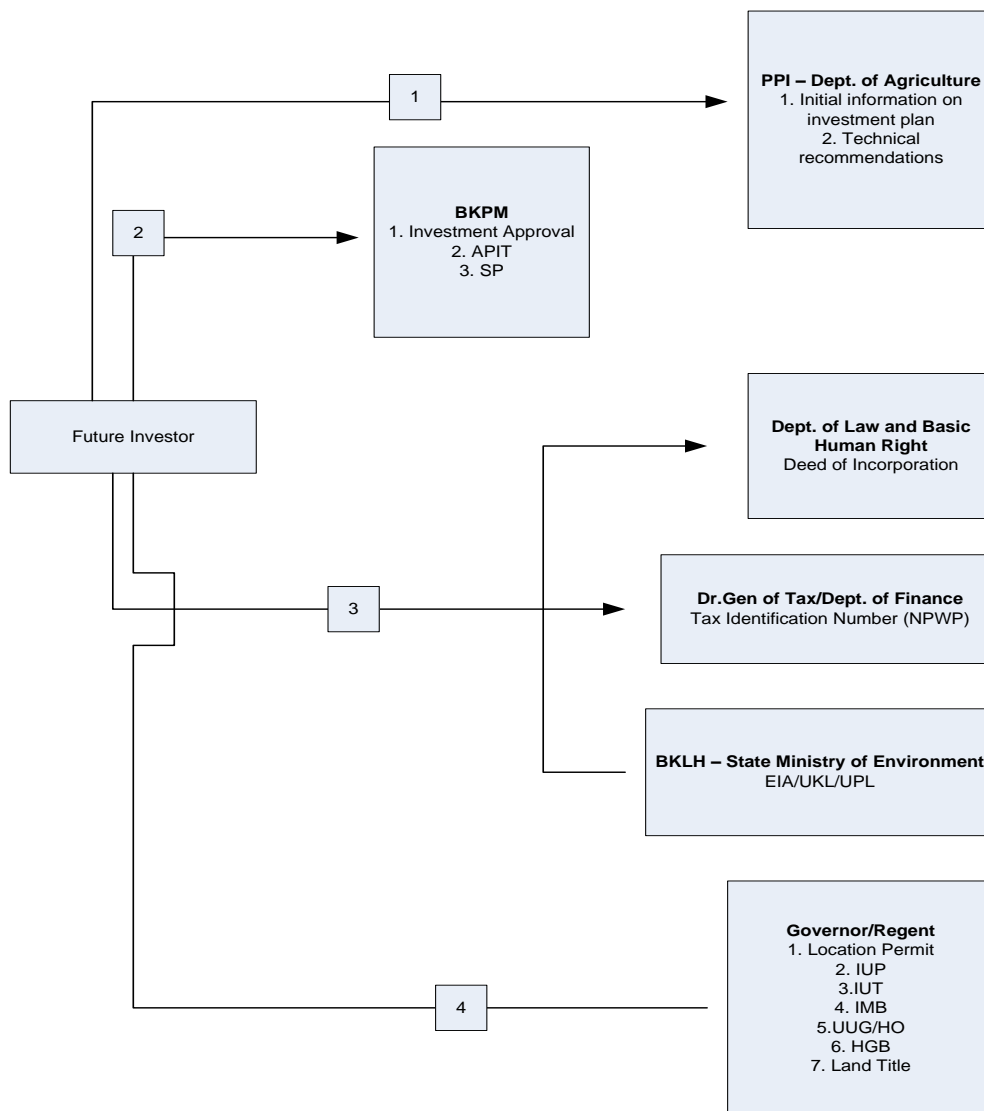
Forests are designated for plantations after being released through plantation licensing procedures. The procedures are as follows:

1. Submitting proposal for technical recommendation to the Agricultural Minister c.q *Pusat perizinan dan Investasi* (PPI) (Center for Licensing and Investment).
2. Submitting proposal for domestic investment to *Badan Koordinasi Penanaman Modal* (BKPM) (Investment Coordination Agency) (filling out Form I/PMDN).

3. Submitting proposal for company establishment to the Minister of Law and Basic Human Rights.
4. Submitting proposal for Tax Identification Number (*Nomor Pendaftaran Wajib Pajak* (NPWP) to the Directorate General of Tax of the Department of Finance.
5. Submitting proposal for AMDAL/UKL/UPL Approval documents.
6. Submitting proposal for 1) location permit, 2) IUP (plantation permit), 3) IUT, 4) IMB (construction permit), 5) HO permit, 6) HGB (building use permit), and 7) land certificate to the Governor/Regent

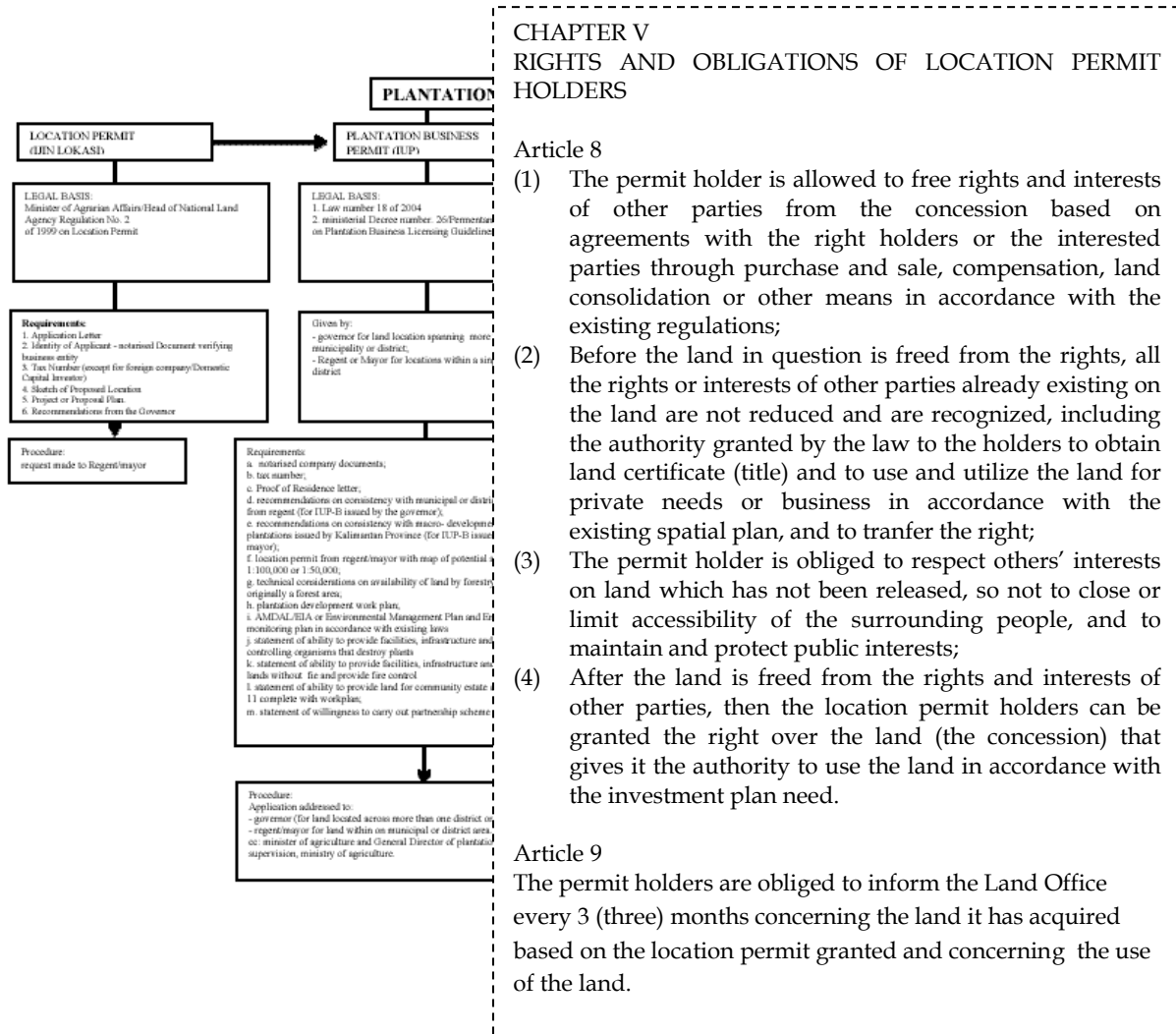
The chart below illustrates the domestic investment procedure in the plantation sector.

Chart 1. Plantation Investment Procedure



Following the procedures – the initial phase – applicants should go through four legal processes: 1) location permit, 2) plantation permit, 3) forest area release process and 4) Business Use Permit (HGU). The chart below illustrates the important aspects of the four legal processes.

Chart 2 : Plantation Permit Procedure in Indonesia



2.3. Location Permit

Land relinquishment process starts after the applying company obtains the location permit from the local district/municipality government. The permit is regulated by the decree of the State Minister for Agrarian Affairs/Head of National Land Agency No. 2 of 1999 on Location Permit. The ‘considering’ section of the law states that location

permit is meant a) that, to regulate investment, it is stipulated that location permit must be obtained before a company obtain the land needed for its investment; b) that the location permit basically directs the investment location as the implementation of the spatial arrangement in its land aspect; c) that the location permit has been expanded to include permit to get land for non-investment purposes, and d) that to ensure the effectiveness of the location permit purposes above, it deems necessary to return the functions of the location permit and to limit it to investment purposes only through implementation of the general stipulations of location permit set forth in the Decree of the State Minister of Agrarian Affairs/Head of National Land Agency.

Location permit is a permit granted to a company to obtain a piece of land needed for its investment applicable as a permit to transfer the right, and to use the land for its investment. Location permit is mandatory for any investment (foreign and domestic investments), but is not mandatory on specific conditions that a) the land concerned is non-cash contribution (*inbreng*) from stockholders; b) the land has been controlled by another company and to be used to continue part of or the entire company's investment plan, the purpose of which has been approved by the relevant agency; c) the land is needed to set up an industry within an industrial site; d) the land is obtained from the authority or a development agency in accordance with the region spatial plan; e) the land is needed for expansion of the ongoing business operation whose purpose has been approved consistent with the existing regulation and the land in question borders on the related business site; f) the land is needed for the implementation of an investment on land not exceeding 25 hectares in size for agricultural operation or not exceeding 10,000 m² in size for non-agricultural operations, and g) the land has been owned by the company concerned on condition that the land lies in locations allocated for the purpose consistent with the investment plan.

The period of the permit depends on the size of the needed land. If the land size is up to 25 hectares, the permit lasts 1 year. For land in a 25-50 hectare size range, the permit lasts 2 years. For land exceeding 50 hectares in size, the permit lasts 3 years. If in one permit period, the land relinquished has not reached the size needed but has reached 50% of it, extension may be granted for another year. But, if the relinquishment still cannot be realised during the permit period and its extension, the land having been

relinquished may a) be used to implement the investment plan, which is adjusted to the development scale on condition that, if needed, the relinquishment can be continued until the whole relinquished size (an unbroken lot of land) is met, or b) be relinquished to another eligible company or party.

The decree of the State Minister for Agrarian Affairs/Head of National Land Agency No. 2 of 1999 on Location Permit stipulates the maximum size of the land to be used. For plantation, location permit can be granted to an eligible company so if the company can manage to relinquish all the allocated land, the size of the land controlled by the company along with the others, which are in the same group, may not exceed the following: 1) 60,000 hectares per province and 150,000 hectares nationally for sugarcane; and 2) 20,000 hectares per province and 100,000 hectares nationally for the other commodities.

The decree endorsing the location permit is signed by the Regent/Mayor or the Governor (for the Capital Special Region of Jakarta), following coordination meetings with all the related agencies presided by the Regent/Mayor or the Governor (for the Capital Special Region of Jakarta), or a permanent Regent/Mayor/Governor-appointed official. The decree is granted upon consideration of land control and technical aspects of land use encompassing the right and control of the land in question, region's physical analysis, land use and land capacity.

The local head of the National Land Agency (BPN) holds a coordination meeting to produce considerations for the regional head, which include the obligation to have consultations with the right holders of the land about the following aspects a) dissemination of information on the investment plan, the scope of the impacts and the plan to obtain the land as well as resolutions to problems relating to the plan to obtain the land; b) opportunity for the right holders of the land to get explanation on the investment plan and to seek alternative resolutions to the problems arising; c) direct information collection from communities to gather all the needed data on social and environmental aspects; and d) community's role, i.e. suggestions concerning alternative form and amount of compensation for the relinquishment of the land.

Article 8 determines that, after the company obtains the location permit, it has the right to free the land within the permit area from other parties' right and interests based on agreement with the right holders or other interested parties by purchase and sale, compensation, land consolidation or other applicable means. Before the land is released, all the rights on and interests of the land are not reduced and are recognized, including the authority granted by the law to the right holders to obtain land certificate and the authority to use and utilise the land for his/her private needs or business in accordance with the existing spatial plan and the authority to transfer the right to other parties. Location permit holders are obliged to respect others' interests on land which has not been released, so not to close or limit accessibility for the local people and to maintain and protect public interests. After the land is relinquished from the right and interests of other parties, then the location permit holders can be granted the right over the land (the concession) that gives it the authority to use the land consistent with the investment plan need.

2.4. Plantation permit

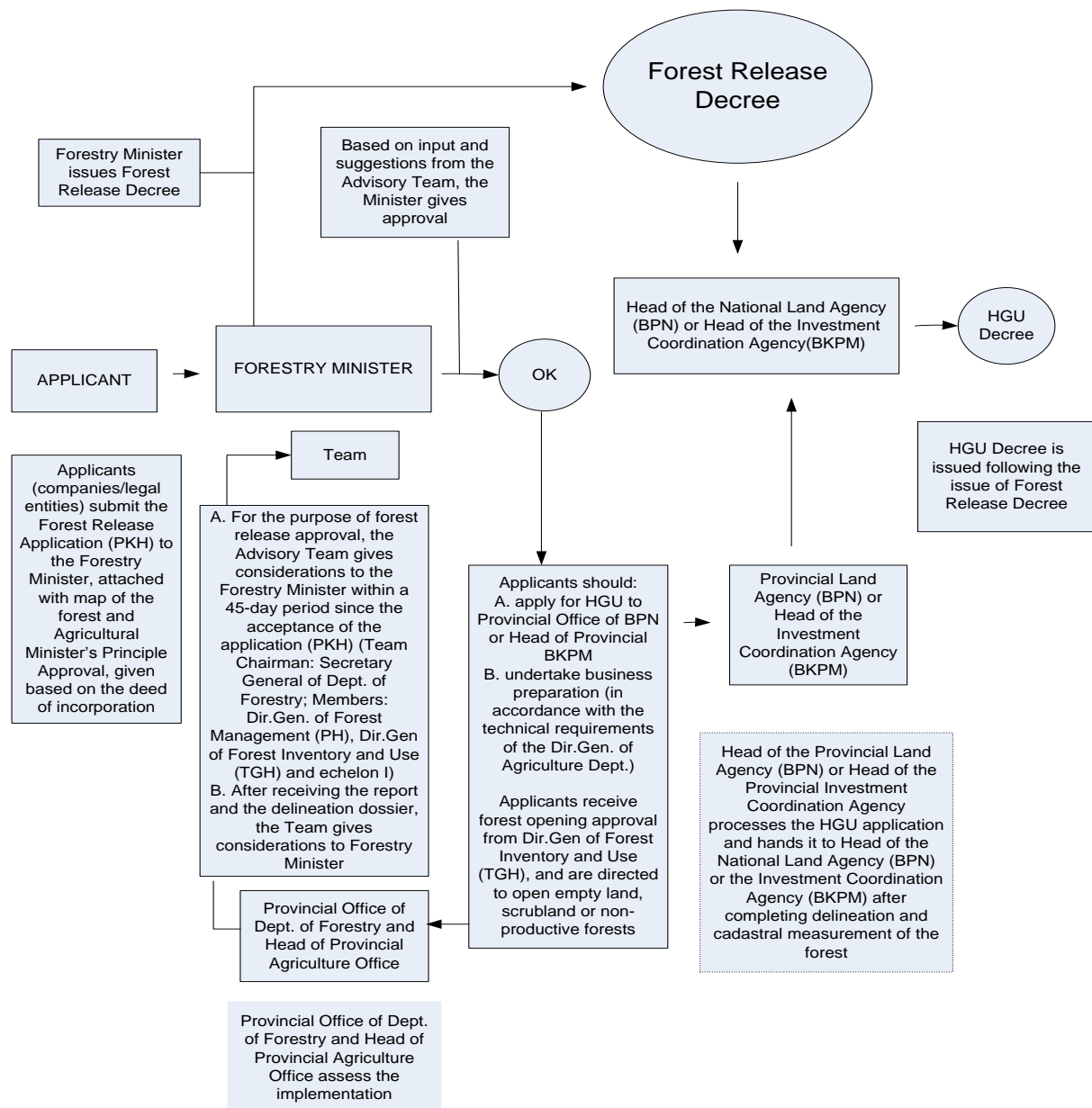
Plantation permit is regulated by the Decree of the Minister of Agriculture No. 26/Permentan/OT.140/2/2007 on guidelines to plantation licensing. Article 17 determines that to obtain IUP, a company should submit a written application to the regent/mayor or governor in accordance with the location of the requested area plus the following documents:

- 1) Deed of Incorporation (*Akta Pendirian Perusahaan*) and its latest change(s);
- 2) Tax Identification Number (NPWP);
- 3) Domicile document;
- 4) Recommendation letter from the Regent/Mayor about the consistency with the district/municipality spatial plan for IUP issued by the Governor;
- 5) Recommendation letter from the Regent/Mayor about the consistency with the provincial plantation macro development for IUP issued by the Governor;
- 6) Location permit from the Regent/Mayor accompanied by the location map with a 1:100,000 or 1:50,000 scale;
- 7) Technical consideration of land availability from the forestry offices (if the area is released from forestland);
- 8) Guarantee of raw material supply, acknowledged by the Regent/Mayor;
- 9) Work plans for plantation establishment and processing facilities;
- 10) The outputs of environmental impact assessment (AMDAL), or Environmental Management Plan (UKL) and Environmental Monitoring Procedure (UPL) in accordance with the existing regulations;
- 11) Letter telling the company does not control land exceeding the maximum size allowable;
- 12) Letter telling the capability to build facilities, infrastructure and system to control organisms destroying crops (pest control);
- 13) Letter telling the capability to build facilities, infrastructure and system for non-burning landclearing and fire control;
- 14) Letter telling willingness and work plan for plantation establishment for communities;
- 15) Letter telling willingness and work plan partnership.

2.5. Forest Release

Forest release procedures are regulated in the Joint Decrees of the Minister of Forestry, the Minister of Agriculture and BPN (national land agency) Nos. 364/KPTS-II/1990, 519/KPTS/HK.050/7/1990, and 223-VIII-1990 on Provisions on Forest Release and Granting of Business Permit for Agricultural Development. The chart below illustrates the procedures.

Chart 3. Forest Release Procedures



The important point of the joint decrees (SKB) on forest release guidelines is that forest release for plantation purposes is directed to empty areas, scrubland, or non-productive forests suitable for the plantation purposes.

When the SKB was still effective, a large number of diversion occurred. After forestland was released, the plantation was not established or it was alleged that the release was advantageously used to collect timber only. Therefore, in 2003 the Forestry Minister issued a Decree No. 146/Kpts-II/2003 on Forests'/Ex-HPH's Use Evaluation Guidelines for Plantation Development. The decree was made on consideration that based on the Joint Decrees Nos 364/Kpts-II/90; 519/Kpts/HK.050/7/90 and 23-VIII-90 dated 25 July 1990 provisions and requirements had been made concerning Forest Release and Granting of Business Permit for Agricultural Development. However, facts show that many applicants obtaining the release decree do not implement its provisions.

In 2010, the government developed a new regulation directly concerning forest release, i.e. PP No. 10 of 2010 on Forest Determination and Function Change Procedure. The regulation regulates that forest determination may be changed:

- a. partially; or
- b. province-wide.

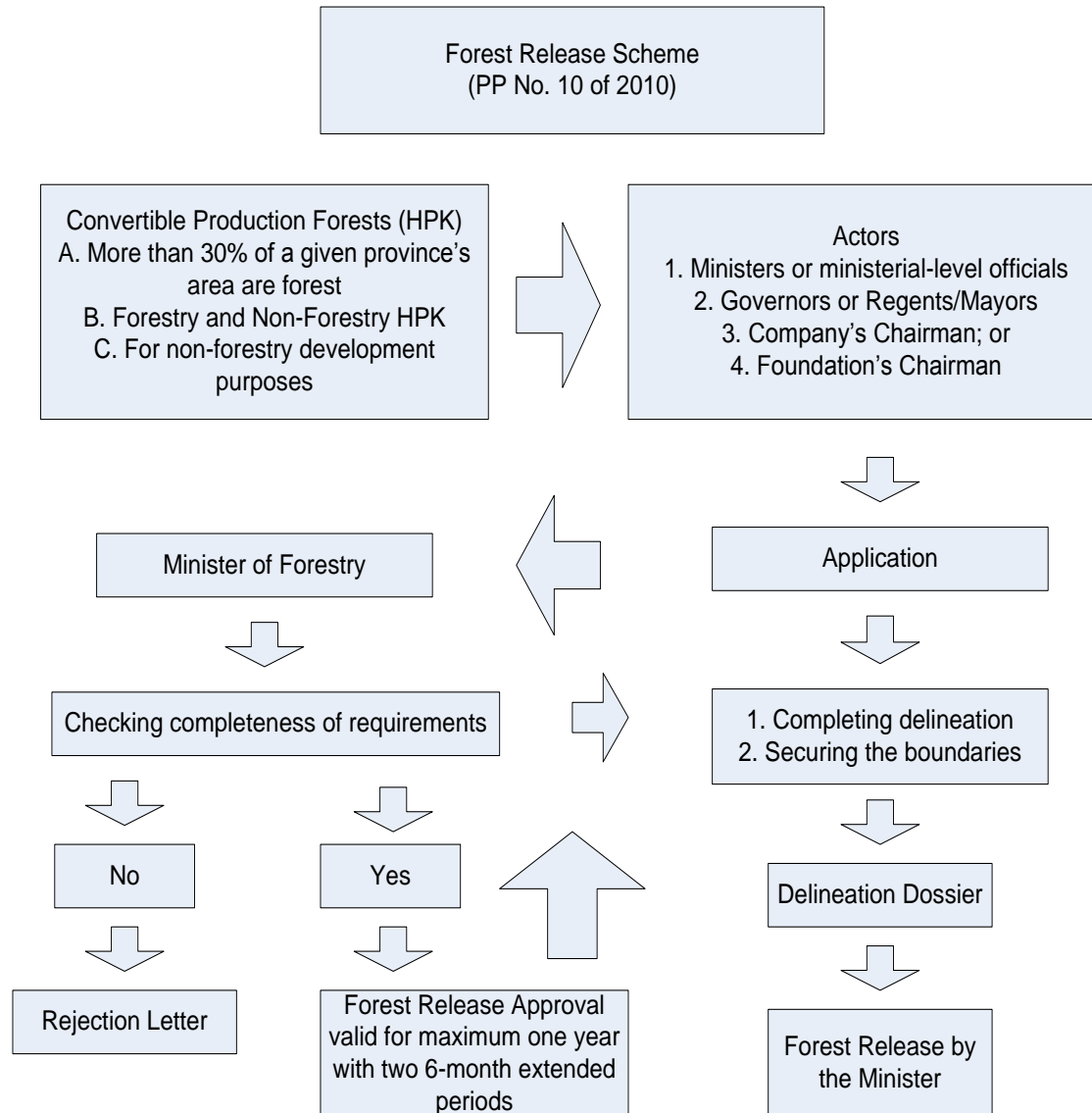
The partial change is divided into:

- a. forest exchange; or
- b. forest release.

The partial forest change is done upon request, made by:

- a. ministers or officials of the same level;
- b. governors or regents/mayors;
- c. chairman of a legal entity; or
- d. head of a foundation

The PP regulates forest release procedures for non-forestry purposes requested by the actors, including chairman of a legal entity of a company. The scheme below illustrate the procedures:



2.6. Business Use Permit [*Hak Guna Usaha (HGU)*]

Business Use Permit [*Hak Guna Usaha (HGU)*] is regulated in UUPA and PP No. 24 of 1997 on Land Registration and PP No. 40 of 1996 on Business Use Permit, Building Use Permit and Land Use Permit.

Chapter five regulates the obligations and rights of HGU holders. Article 12 of PP No. 40 of 1996 stipulates that

(1) HGU holders are obliged to:

- a. Pay the permit fee (*pemasukan*) to the State;
- b. Implement agricultural, plantation, fishery and or husbandry practices consistent with the purpose and requirements stipulated in the decision;
- c. Self-utilize the land appropriately in accordance with business suitability based on the criteria set forth by the technical agency;
- d. Build and maintain the facilities and infrastructure and the land within the HGU site;
- e. Maintain soil fertility, prevent natural resource destruction and preserve nature capacity in accordance with the existing regulations;
- f. Submit a written report annually concerning the use of the HGU;
- g. Hand the HGU land back to the State upon permit expiration;
- h. Submit the expired HGU certificate to the head of the Land Affairs Office

(2) HGU holders must not transfer the right to other parties, except on conditions allowable under the existing regulations.

Furthermore, article 13 stipulates that if the HGU land due to geographical or environmental conditions or due to other causes blocks or enclose parts of public roads or water ways, the holders are obliged to provide an exit or water passages or accessibility to the enclosed areas.

Article 17 regulates termination of HGU, which returns the land to the State. HGU can be terminated upon

- a. Expiration of the permit period as stipulated in its decision or extension;
- b. Revocation by authorized officials before the permit expires due to:
 - (1) the holder's failure to meet his obligation and or violation of stipulations as meant in Articles 12, 13 and or 14;
 - (2) court final decision, which bears fixed legal power;
- c. voluntary returning by the holders before the permit expires;
- d. revocation under Law No. 20 of 1961;
- e. negligence;

- f. destruction of the land;
- g. stituation set forth in Article 3 paragraph (2).

Based on the Decree of the State Minister of Agrarian Affairs/Head of the National Land Agency No. 3 of 1999, the authority to grant right over land is regulated as follows:

- 1) HGU is granted by:
 - a) BPN: for land exceeding 200 Ha in size;
 - b) Provincial Land Agency (*Kantor Wilayah BPN Provinsi*): for land up to 200 Ha in size.
- 2) Building Use Permit [*Hak Guna Bangunan (HGB)*] is granted by:
 - a) BPN: for land exceeding 15 Ha in size;
 - b) Provincial Land Agency (*Kantor Wilayah BPN Provinsi*): for land exceeding 2,000 m² up to 15 Ha in size;
 - c) District/Municipal Land Agency (*Kantor Wilayah BPN Provinsi*): for land up to 2,000 m² in size.
- 3) Agricultural Use Permit [*Hak Pakai (HP) Pertanian*] is s granted by:
 - a) Provincial BPN: for land exceeding 2 Ha in size;
 - b) District/Municipal BPN: for land up to 2 Ha in size.
- 4) Non-Agricultural Use Permit [*Hak Pakai (HP) Non Pertanian*] is granted by:
 - a) BPN: for land exceeding 15 Ha in size;
 - b) Provincial BPN: for land exceeding 2,000 m² up to 15 Ha in size;
 - c) District/Municipal BPN: for land up to 2,000 m² in size.

3. Legal Room for HCV Status Certainty

Analysis of legal room for HCV status certainty in this section is a series of legal opinion about various regulations, especially those directly relating to plantation industry.

3.1. HCV in Location Permit

CHAPTER V, Article 8, Decree of the Minister of Agrarian Affairs/Head of National Land Agency No. 2 of 1999 on Location Permit stipulates that:

- (1) The permit holder is allowed to free rights and interests of other parties from the concession based on agreements with the right holders or the interested parties through purchase and sale, compensation, land consolidation or other means in accordance with the existing regulations;
- (2) Before the land in question is freed from the rights, all the rights or interests of other parties already existing on the land are not reduced and are recognized, including the authority granted by the law to the holders to obtain land certificate (title) and to use and utilize the land for private needs or business in accordance with the existing spatial plan, and to transfer the right;
- (3) The permit holder is obliged to respect others' interests on land which has not been released, so not to close or limit accessibility of the surrounding people, and to maintain and protect public interests;
- (4) After the land is freed from the rights and interests of other parties, then the location permit holders can be granted the right over the land (the concession) that gives it the authority to use the land in accordance with the investment plan need.

Article 9 stipulates that the permit holders are obliged to inform the Land Office every 3 (three) months concerning the land it has acquired based on the location permit granted and concerning the use of the land.

Paragraph 2) and paragraph 3) of Article 8 of the Decree above can be used as the basis to protect HCV areas as long as there are rights or other parties' interests and access of the local people and public interests on the areas. HCV areas must be placed as an important part in relation to people's and local interests. The important step is to ensure that these reasons will not make companies neglect their obligations to manage and safeguard HCV areas identified in the plantation planning.

3.2. HCV in Plantation Environmental Impact Assessment

The Second Section (Prevention), Law No. 32 of 2009 on Environmental Protection and Management, Article 14 stipulates that the instruments to prevent pollution and or environmental destruction consist of:

- a. KLHS;
- b. Spatial use;
- c. Environmental quality standards;
- d. Criteria for environmental quality standards;
- e. EIA;
- f. UKL-UPL;
- g. Licensing;
- h. Environmental economic instruments;
- i. Environmental-based regulations;
- j. Environmental-based budget;
- k. Environmental risk analysis;
- l. Environmental audit; and
- m. Other instruments according to the needs and or scientific development.

Important Understanding

EIA is an assessment of significant and critical impacts of a planned business and or activity on the environment, which is needed in the decision-making process concerning the implementation of the said business and or activity.

Significant and critical impacts are fundamental changes to the environment arising out of a given business and or activity. The reference framework is the scope of the environmental impact assessment as a result of scoping.

EIA is an careful and in-depth analysis of significant and critical impacts on a planned business and or activity. Environmental Management Plan (RKL) is an effort to address significant and critical impacts on the environment arising out of a planned business and or activity.

Environmental Monitoring Plan (RPL) is an effort to monitor environmental components heavily and significantly affected by a planned business and or activity.

EIA is an important part of plantation licensing process. One of the requirements of the process is EIA (AMDAL), or Environmental Management Plan (UKL) and Environmental Monitoring Procedure (UPL).

As Law No. 32 of 2009 is a new government regulation on EAI, the implementation of EIA still refers to the old government regulation. Government Regulation No. 27 of 1999 on EIA stipulates that it is mandatory for businesses and or activities that potentially bring significant and critical impacts on the environment to have EIA. The said activities are as follows:

- 1) changing land forms and landscapes;
- 2) exploiting renewable and non-renewable natural resources ;
- 3) wasting, pollute and damaging the environment, and eroding natural esources;

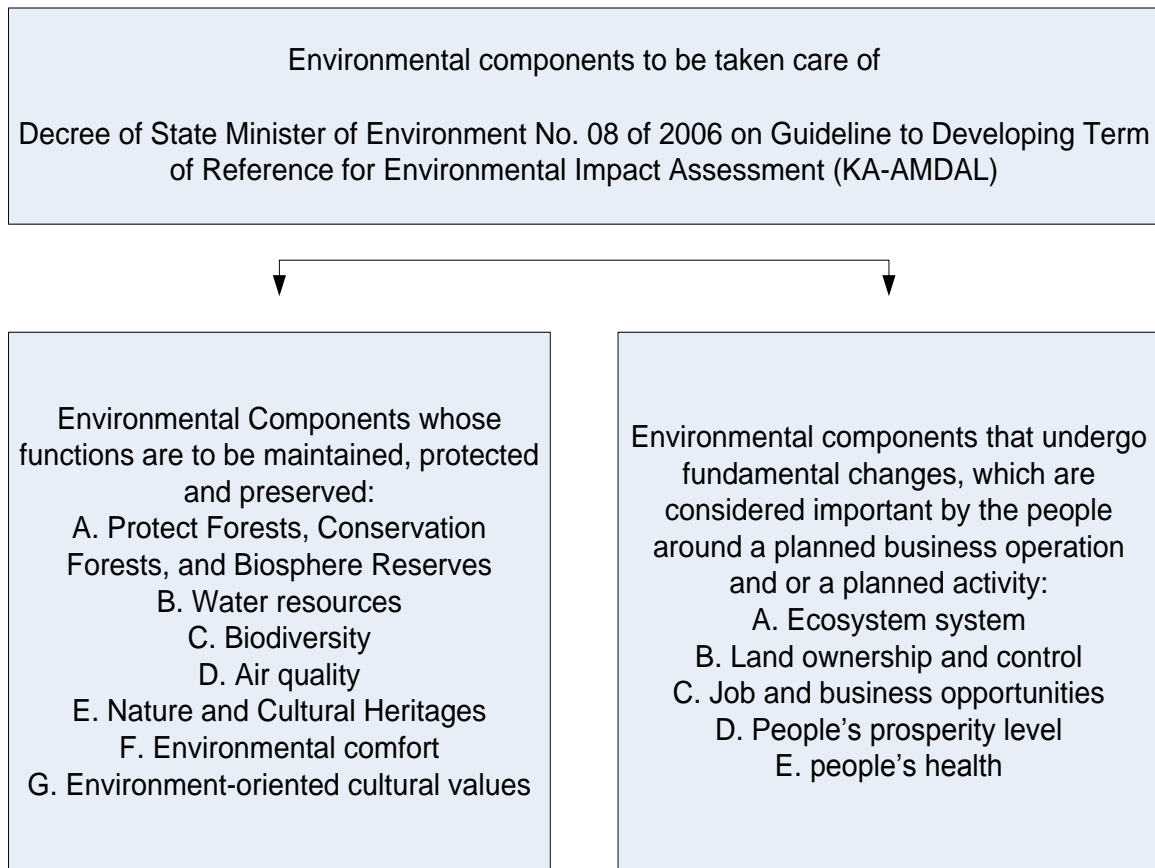
- 4) affecting the natural environment, artificial environments, as well as the cultural and social environment;
- 5) affecting natural resource conservation areas and/ or cultural heritage sites;
- 6) introducing plants, animals and micro-organisms;
- 7) the creation and use of bio and non-bio materials;
- 8) applying technology which may affect the environment significantly;
- 9) high risk activities and /or affect state land affairs

The criteria for significant and critical impacts of a business and or activity on the environment include:

1. The number of people who will be affected;
2. The total area affected;
3. The intensity and duration of the impact(s);
4. The number of other environmental components affected;
5. Cumulative nature of impact(s);
6. Whether it is reversible or irreversible.

Plantation practices are among the activities obliged to have EAI. The EIA development procedure is regulated in the Ministry of Environment Decree No. 8 of 2006 on Guidelines to EIA's TOR development. The decree lists environmental components to be preserved and requires observation of any changes in the components. The chart below illustrates the components.

Chart 4. Environmental Components in EAI



HCV is an important part to be identified in EIA document. In addition to the identification, HCV management must be part of the Environmental Monitoring Plan (RPL) document. RPL is a plan to monitor environmental components which are heavily and significantly affected by a planned business and or activity. HCV should become an important point to be assessed in EIA document assessment.

3.3. HCV in Forest Release

Forest release is changes in forest status into land directly controlled by the State for agricultural purposes. The release process is implemented as noted above.

The key protection position of HVC based on the process lies in the advisory team, who provides considerations and advice for the release of a given forest area, comprising the Secretary General, Director General of Forest Utilization, Director General of Forest Inventory and Governance and the related echelon I of the Department of Forestry.

Although approval for forest release for agricultural purposes is more of administrative and technical considerations, the advisory team may heighten the advisory standards by requiring safeguard and management of HCV areas. However, it should be noted that after the approval is received by the applicant, the area concerned is under control of the relevant regional government.

3.4. HCV in HGU

As noted above, in the Fifth Section that regulates the Obligations and Rights of HGU holders, Article 12 paragraph (1) of PP No. 40 of 1996 stipulates that HGU holders are obliged to:

- a. Pay the permit fee (*pemasukan*) to the State;
- b. Implement agricultural, plantation, fishery and or husbandry practices consistent with the purpose and requirements set forth in the approval decision;
- c. Utilize the HGU concession properly by themselves in accordance with business appropriateness standard based on the criteria set by the technical institution;
- d. Build and maintain environmental infrastructure and the land within the HGU concession;
- e. Maintain the soil fertility, prevent natural resource destruction and preserve the environment in accordance with the existing regulations;
- f. Submit a written report in the end of the year concerning the use of the permit;
- g. Hand the concession back to the State upon permit expiration;
- h. Hand the expired permit document back to the head of the Land Office.

Points d and e determines the building and maintenance of environmental infrastructure and the land within the concession, maintenance of soil fertility, prevention of natural resource destruction and preservation of the environment in accordance with the existing regulations. The regulations can become the basis of HVC in plantation areas. HCV is a land facility that can maintain the sustainability of the environment. Should the obligations not be met, the HGU can be revoked.

4. Legal Challenges for HCV

4.1. Legal apertures in Location Permit Regulations

As elaborated above, those wanting to obtain land for plantations should have the Location Permit.

Chapter III of the Decree of the State Minister of Agrarian Affairs/Head of the National Land Agency No. 2 of 1999 on Location Permit Licensing Procedure for Foreign/Domestic Investment regulates the duration of the permit period:

Article 5

(1) Location Permit is granted for the following periods:

- c. Location Permit for land up to 25 hectares in size: 1 (one) year;*
- d. Location Permit for land ranging from 25 to 50 hectares in size: 2 (two) years;*
- e. Location Permit for land more than 25 hectare in size: 3 (three) years.*

(2) The land acquisition must be completed within the permit period.

(3) If within the period of Location Permit as meant in paragaph (1), the land acquisition cannot be completed, the permit period may be extended for another year; if the land acquisition reaches 50% and the full acquisition cannot be completed within the permit period and the extension as meant in paragraphs (1) dan (3), the land in question cannot be acquired by the permit holder, and the land already acquired has to be:

- a. Used to implement the investment plan with adjustment to the development size on condition that if needed the land is still possible to be fully acquired until the whole land is fully acquired;*
- b. Released to other eligible companies or parties*

In a specified period, plantation managers are obliged to submit a report on the acquisition progress to the regional government granting the permit.

Companies have acknowledged that in this process, they are faced with obstacles of HCV allocation on the land acquired. According to them, the Regent then reallocated the acquired land to other parties.

4.2. *Legal Appertures in Neglected Land Regulations*

In 2010, the government issued PP No. 11 of 2010 on Control and Utilization of Neglected Land. The regulation states that negligence in managing land has caused social, economic and prosperity gaps among the communities and declined environmental quality so that rearrangements must be made to control and utilize the neglected land. Therefore, PP No. 36 of 1998 on Control and Utilization of Neglected Land, which serves as the basis of the previous regulation, can no longer be used as the reference, and must hence be replaced.

PP No. 10 of 2010 stipulates that the target land includes that with encumbered with rights granted by the government, i.e. private land, HGU, HGB, Use Permit and Management Right, or land not utilized, nor used in accordance with its conditions or the nature and purposes of its designation (Article 2).

Provisions on neglected land can be used to take over land having been planned and allocated for plantation companies as HCV areas.

5. Legal Scenario of HCV Safeguard

Based on the elaborations in the previous chapters, this chapter will elaborates some alternative solutions which are likely to be implemented to develop a legal protection among unclear laws.

5.1. *General Recommendations*

The general recommendations in this section are those for HCV safeguard through changes in and development of policies either directly or indirectly concerning plantations.

- 1) Combining RSPO provisions with the National Laws

The RSPO standards applicable to the member parties are relatively higher than those in the national laws. As such, the RSPO standards and criteria can be used to heighten the standards in the national laws, especially those relating to palm industry.

The RSPO standards can be used as the basic material to improve national policies and can be wholly internalized in either national or local regulations. At national level, the RSPO standards need to be internalized in land policies concerning palm plantations such as location permit and negotiation procedure to obtain plantation land. In addition, these principles and criteria must be internalized in environmental policies such as improvement to the EIA policy.

On the other hand, at local level, the RSPO standards can be given a legal framework in the form of regional regulations such as those being piloted to improve the Central Kalimantan regulation on plantations or can be attached to Governor's or Regent's Decrees as the explanation to the regional regulation on plantations.

2) Changes in National Policies on Plantation and Forestry

Most of Indonesia's palm plantations were only established in the 1980s. So far, there has been no thought of how to regulate the spatial determination in such plantations. The spatial arrangement in palm plantations has so far used economic approaches, such as dividing the land into nucleus and smallholder. Considering the size of the plantations, the spatial plan should have used better approaches by internalizing areas to be protected.

On comparison, the forestry industry, i.e. the industrial plantation forest (HTI) industry, has long had Forestry Minister's Decree No: 246/Kpts-II/1996 on Changes to Forestry Minister's Decree No. 70/KPTS-II/1995 on HTI Spatial Plan.

Article 2 of the Decree states that HTI spatial plan is intended to regulate the use of a given unit within the concession in accordance with its purpose, namely:

- a. Area for main plant species;

- b. Area for superior plant species;
- c. Area for life plant species;
- d. Protected area;
- e. Facility and infrastructure area.

On way forward, a new regulation should be developed concerning palm plantation spatial plan that integrates economic, social and environmental approaches. It is in this regulation that HCV is incorporated as part of the management.

5.2. HCV and Hutan Hak

Law No. 41 of 1999 on Forestry introduces *Hutan Hak*, i.e. forests encumbered with rights. In the beginning, *Hutan Hak* was part of what was regulated in PP No. 34 of 2002, which provides the legal basis for Forestry Minister's Decree No. P.26/Menhut-II/2005 on Guidelines to Utilization of *Hutan Hak*. The Decree reaffirms the definition of *hutan hak* as forests lying in land encumbered with rights, proven by the land title commonly called as people's forests, which are dominated by trees within ecosystems determined by the respective Regents/Mayors.

Article 2 of the Decree stipulates that lands bearing titles or rights to land in the form of ownership titles, Business Use Rights and Usage Rights, can be established as *hutan hak* consistent with its function. This is based on District/Municipal Spatial Planning. *Hutan Hak* has three functions, a) conservation b) protection and c) production, the criteria for which are established in National Spatial Plans.

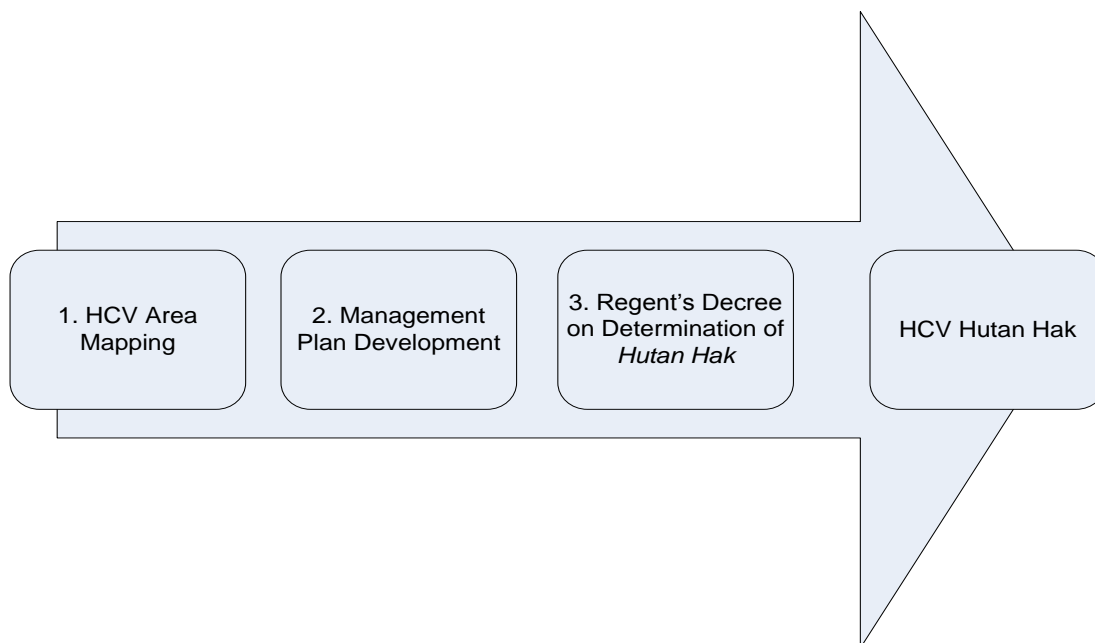
In 2007, PP No. 34 of 2002 expired and was replaced with PP No. 6 of 2007 and then in 2008 the PP was changed and accompanied by PP No. 3 of 2008. PP No. 6 of 2007 determined that *hutan hak* has three functions, a) conservation b) protection and c) production. Utilization of *hutan hak* is implemented by the relevant right holder consistent with its function and such utilization is intended to generate optimum benefits for the right holder without reducing its function. If *hutan hak* is then declared by the government as conservation and protected forests, the right holder will get

compensation. The consequence is that these *hutan hak* designated as conservation and protected forests are included in the so-called forest areas.

Thus far, forestry policies on *hutan hak* are still oriented towards timber, therefore, regulations on *hutan hak* are regulations on timber utilization, such as Forestry Minister's Decree No. P.33/Menhut-II/2007 on the Second Amendment to Forestry Minister's Decree No. P.51/Menhut-II/2006 on Letter of Origin (SKAU) for Transportation of Forest Produce Originating from Hutan Hak.

HCVFs in plantation areas are ecosystem units in the form of a landscape containing biological resources dominated by trees within their unity with the surroundings, all of which are inseparable. Based on the land status, HCVFs lie on HGU land so referring to the definition of *hutan hak* under Forestry Minister's Decree No. P.26/Menhut-II/2005, HCVFs are *hutan hak*. However, HCVFs must be determined by the local Regent/Mayor.

Hutan Hak Determination Process by the Regent



5.3. HCV and Recognition of Indigenous Peoples' Rights

The third amendment to the 1945 Constitution adds several provisions concerning indigenous peoples and their rights to natural resources. The provisions are as follows:

a) Article 18B paragraph (2) of the 1945 Constitution (UUD 1945):

The state shall recognize and respect the units of traditional society with their traditional rights as long as they still exist and are in accordance with community development and the principle of a Unitary State of the Republic of Indonesia, as regulated by the laws.'

b) Article 28I paragraph (3) of the 1945 Constitution (UUD 1945):

The cultural identity and traditional society rights shall be respected in line with age progress and human civilization.

Despite the addenda, the derivative provisions included in Law No. 5 of 1960 on Basic Provisions of Agrarian Affairs or commonly known as UUPA are not changed. In UUPA, the rights of indigenous peoples are recognized:

Article 3 of UUPA states:

" In view of the provisions contained in Articles 1 and 2, the implementation of the ulayat rights and other similar rights of adat-law communities --as long as such communities in reality still exist-- must be such that it is consistent with the national interest and the State's interest and shall not contradict the laws and regulations of higher levels."

Furthermore, Article 5 states:

"The agrarian law applicable to the earth, water, and airspace is adat provided that it is not contrary to the national interest and the interest of the State, which are based on national unity, to Indonesian socialism, to the provisions stipulated in this Act, nor to other legislation, all with due regard to elements which are based on religious law."

After decades of the non-existence of UUPA's derivative provisions, in 1999 the government issued the Decree of the State Minister of Agrarian Affairs/Head of National Land Agency No. 5 of 1999 on Guidelines to Resolution to Matters Concerning *Hak Ulayat* of Customary Law Communities.

The Decree determines that, *hak ulayat* and other similar rights of customary law communities (hereinafter referred to as *hak ulayat*), are the rights granted by customary laws that are possessed by customary law communities over a given area that serves as their living space where they can get the benefits from the natural resources, including the land, for their survival, which arise out of the physical and spiritual relationship, uninterruptedly inherited, between them and the area.

Chapter II on Implementation of *Ulayat* Land Control, Article 2 determines:

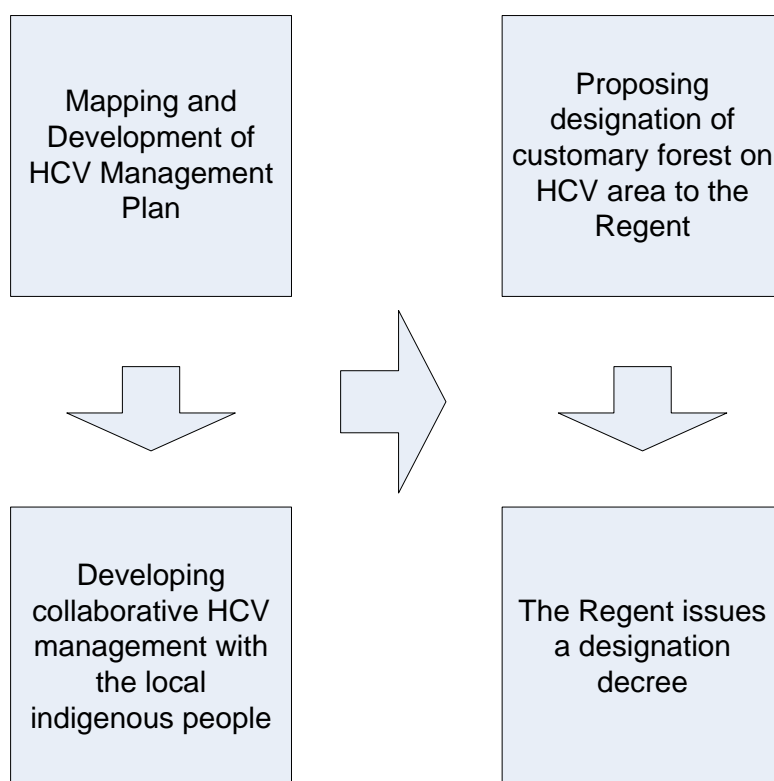
1. Implementation of *hak ulayat* as long as they still exist and observed by customary law communities in accordance with the existing local customary laws.
2. *Hak ulayat* are considered to exist as long as:
 - f. There are a group of people still bound by their customary laws as a collective members of a given legal association, who recognizes and observes the association's regulations in their daily lives,
 - g. There is a specific *ulayat* land serving as the living space of the members of the legal association, from which they collect their basic needs, and
 - h. There is a customary law system, which regulates matters, control and use of *ulayat* land and which is observed by the members of the legal association.

Hereinafter, recognition of *hak ulayat* was traced through a series of researches, which ends up in the birth of the bylaw on recognition of *hak ulayat*.

However, in the context of HCV safeguarding, it suffices to place Permennag No. 5 of 1999 as the substantive guideline to identifying indigenous peoples who possess *hak ulayat* to a given area. Plantation companies simply need to develop a collaborative HCV management with the local indigenous peoples and ask the Regent to issue a decree endorsing the land as a customary area in the HCV area. As HCV areas lie outside the State's forests, the Regent has the authority to take care of such areas.

The strategy is proposed to help solve the complexities in the development of bylaws which recognize indigenous peoples. The simple chart below illustrates how customary forests in HCV areas are determined.

Customary Forest Determination in HCV Areas



Another way to do is that the Regent designates HCV areas as forestland for specific purposes, the right of which is held by indigenous peoples upon approval by HGU holders/companies. Examples of how the Regent determines forest management for people are:

1. Bengkayang Regent's Decree No. 131 of 2001 on Determination of Customary Forest in Sahan Village, Seluas Sub-district, Bengkayang District as the Main Forest Producing Seeds/Specific Seeds of Bengkayang District That Is Protected and Preserved.
2. Kapuas Hulu Regent's Decree No. 77 of 2004 on Determination of Lake Sadong in Tanjung Karang Hamlet, Padua Mendalam Village, Putusibau Sub-district as Protected Lake.

5.4. *HCV and Amendments to the Conservation Laws*

From the end of 1999 to the end of 2010, the National Forestry Board (DKN) along with the Ministry of Forestry formed a team to formulate amendments to Law No. 5 of 1990 on Conservation of Natural Resources and Their Ecosystems.

As HCV areas in plantations was one of the interesting topics, they were elaborated in the academic paper and the amendments to the Conservation Law document. The team considered it important to include HCV as one of the conservation activities in Indonesia.

It is in Chapter III on Conservation Matters of the academic paper that elaborates amendments to the Conservation Law.

3. Rapid development has accelerated environmental destruction so that many important ecosystems outside the State's conservation areas are degraded or threatened to degradation. Law No. 5/90 has yet to explicitly regulate conservation of areas outside the State's conservation areas such as conservation of wildlife corridors, HCVFs, WETLANDS, KARST. Similarly, the conception of conservation areas' buffering zone arrangement in the decentralization era has not been explicitly regulated.

This part leads to the development of Chapter II regulating BIODIVERSITY PROTECTION where paragraph three on Ecosystem Protection:

Regulates the determination norms, criteria for conservation areas and their protection norms, which contain activities allowed and prohibited.

The criteria for conservation areas cover conservation areas as set forth in in IUCN's I-IV categories, which are mandatory to be protected to the maximum extent, and conservation areas outside the categories such as wildlife corridors, buffer zones, HCVA (IUCN Categories V and VI and nationally-protected areas and community conserved areas/CCA).

Conservation areas are determined by the government while considering regional governments' recommendations and after public consultation, especially with the local peoples concerned.

Amendments to the Conservation Law document regulates HCV safeguard as follows:

| | | |
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| | <p style="text-align: center;">Article 41</p> <p>(1) Conservation areas with full protection as meant in Article 39 paragraph (2) letter a consists of:</p> <ol style="list-style-type: none"> a. Conservation Area Category I : Reserves b. Conservation Area Category II: National Parks c. Conservation Area Category III : Sanctuary and Hunting Park d. Conservation Area Category IV : TWA <p>(2) Conservation Areas with limited protection as meant in Article 39 paragraph 2 letter b consist of:</p> <ol style="list-style-type: none"> a. Conservation Area Category V: Great Forest Park (<i>Taman Hutan Raya</i>) b. Conservation Area Category VI : Integrated protection and utilization areas | <p>Article 41 Paragraph (1)</p> <p>Paragraph (2) Integrated protection and utilization areas can be: wildlife corridors, buffer zones, inter-habitat connecting ecosystems and or conservation areas, restoration production forest, HCVF/essential ecosystem areas.</p> |
|--|--|--|