Source : Sol Milne

POLICY BRIEF

MAKING MORATORIUM AND EVALUATION OF PALM OIL PERMITS WORK

Coalition of Civil Societies for Indonesian Palm Oil Moratorium

Recommendation of Civil Societies Policy Brief for Palm Oil Moratorium

In short, the following are recommendations from Civil Society to make implementation or road map to Presidential Instruction 8/2018 work:

1. Officially engage civil society and indigenous communities in the Presidential Instruction 8/2018 task force through a self-election mechanism.
2. Establish a communication forum with civil society and indigenous communities to implement Presidential Instruction 8/2018. Existing civil society coordination/communication forum may be used for this. Note that this communication forum can be used as the government's channel to: (i) collect feedback from civil society on which permits to evaluate; (ii) collect feedback from civil society on local and site level implementation of Presidential Instruction 8/2018 and any occurring violations, (iii) share progress and results of Presidential Instruction 8/2018 implementation, (iv) garner civil society support for Presidential Instruction 8/2018 implementation at national, province and district levels, such as support for mapping, data collection, etc
3. Deliver routine public report on Presidential Instruction 8/2018 implementation progress and results in addition to the routine report for the president, or create a term in which the routine report on Presidential Instruction 8/2018 implementation can be accessed by public as stipulated in Presidential Regulation on Agrarian Reform No. 86/2018.
4. Strengthen commitment to public information disclosure based on applicable regulations, including disclosing oil palm HGU data which has been decided as public information
5. Synergize the various agenda and milestones of the number of teams in a coordination meeting that should:
    a. Focus on resolving overlapping forest areas with oil palm plantations. The task force should share the area and location of overlapping forest area and oil palm plantations. This is based on the assumption that the Presidential Instruction is only effective in resolving forest and oil palm plantation issues.
    b. Once the work area is agreed, it is important for the Task Force Coordination Meeting to connect with other teams also working in areas of overlapping forests and oil palm plantations, such as team for accelerating land tenure resolution in forest areas, national agrarian reform team, agrarian reform task forces, and others
    c. The Task Force Coordination Meeting should also coordinate with the Coordination and Supervision Team for Forestry and Plantations, especially for National Movement to Save National Resources (Gerakan Nasional Penyelamatan Sumberdaya Alam/ GNPSDA) since they operate in the same work area.
6. Take an action on law enforcement for the permits that have been proven to have committed violations and have had enviromental and social impact based on coditions and sanctions.

Kaoem Telapak, Jaringan Pemantau Independent Kehutanan (JPIK), Madani Berkelanjutan, Lembaga Study dan Advokasi Masyarakat (Elsam), Indonesia'n Center of Enviromental and Law (ICEL), Sawit Watch, Forest Watch Infonesia (FWI), Kemitraan, Green Peace

A. Background

Indonesia's oil palm plantation currently covers 22.2 million ha (Sawit Watch, 2018) and 30% is owned by smallholders.[1] Palm oil industry is a major contributor to the national economy, with crude palm oil (CPO) export reaching 12% of the national export and total production reaching 31 million tons in 2016. This export contribution is valued at USD 17.8 billion or IDR 231.4 trillion.[2] Domestically, the Indonesian government is promoting palm oil for biodiesel and targeting CPO production to 40 million tons/year by 2020.

In addition, oil palm plantations in Indonesia face a number of issues, from environmental degradation, agrarian conflict, neglected workers conditions, threat to food availability, and more. Sawit Watch (2016) has recorded 782 communities in conflict against large scale oil palm plantations.

Empirically speaking, there are numerous problems with oil palm plantation development in Indonesia: (1) deforestation due to land clearing by clear cutting; (2) overlapping land concession permits; (3) land grabbing of (indigenous) community's land due to lack of Free, Prior, Informed Consent (FPIC) mechanism; (4) plantation businesses disregarding policies, such spatial plan regulation; (5) challenges in information disclosure; (6) covert expansion by smallholders; (7) lack of land conflict resolution mechanism; (8) existing oil palm in forest estate; and (9) illegal oil palm plantations. [3]

With increasing trends in oil palm plantation growth along with the empirical problems trailing behind, there must be strong government effort to resolve every issue in palm oil governance. As an initial step, oil palm permit moratorium must become the government's stand. This moratorium is critical to provide a time interval for the government to review and reorganize all existing oil palm plantations.

On 14 April 2016, President Joko Widodo announced temporary moratorium for oil palm plantation and coal permits. This commitment finally became reality in the form of Presidential Instruction No. 8 of 2018 on Oil Palm Plantation Permit Moratorium and Evaluation and Increasing Oil Palm Plantation Productivity.

Through this regulation, the government is attempting to improve sustainable oil palm plantation governance, provide legal certainty, maintain and protect environmental sustainability as well as reduce greenhouse gases (GHG) emission, and increase oil palm smallholder facilitation and increase palm oil productivity.

Oil palm plantation permit moratorium and evaluation is the right momentum to improve oil palm plantation governance in Indonesia. This brief provides information on the challenges in implementing Presidential Instruction No. 8 of 2018, and further elaborate on how to connect this policy with other regulations so that the Presidential Instruction is effective and well implemented considering its limited validity period of 3 years.

B. Scope

1. The scope of the Presidential Instruction's targets legality of business permits and land for oil palm plantation in forest estate

In general, Presidential Instruction 8/2018 instructs the following:

a. Moratorium for permits and investment for new permits or oil palm plantation expansion inside forest estate.

b. Evaluate permits and Land Use Rights (Hak Guna Usaha/HGU) of existing oil palm plantations located inside forest estate.

c. Allocate and distribute land from oil palm plantations which have been released for

communities.

d. Increase oil palm plantation productivity through compliance with ISPO instruments and strengthening smallholders institutions.

Based on its scope, Presidential Instruction 8/2018 mostly targets overlaps between forest estate and oil palm plantations. This is linked to the fact that oil palm plantations exist in forests which plausibly lack clear land status. There are 2.3 million ha oil palm plantations in forest estate or overlapping areas.[4] This condition halts the implementation of ISPO as a mandatory instrument for Indonesian sustainable palm oil. According to the Directorate General of Estates of the Ministry of Agriculture, a portion of the 11.3 million national oil palm plantation area is still embroilled in issues. For example, out of 6.7 million ha company-managed and state-owned oil palm plantations, it is estimated that 800,000 ha are indicated to be located inside forest estate, according to the Coordinating Ministry for Economic Affairs, 2.5 million ha do not have HGUs. [5]

Oil palm plantation governance is complex. And moreover with the concept of "sustainability", the complexity of problems and its link to ecology, tenure and social issues, is faced not only by plantations overlapping forest estate and therefore cannot be entirely addressed by the scope of this regulation. However, the government's decision in this Presidential Instruction may be a beginning in untangling this convoluted problem. In addition, it can be understood that this option is seen as a win-win solution for everyone involved.

Regardless of the scope of the Presidential Instruction that is still unable to target comprehensive oil palm plantation governance improvement as expected by civil society, the instruction on permit evaluation is critical becaue it addresses issues that have acted as obstacles in oil palm plantations. There are five points of recommendations and considerations to undertake for permit evaluation results:

1. Re-designation of areas released or swapped as forest estate. This may be done as forest estate gazettement.[6] As stipulated in the Forestry Law, forest estate gazettement is a series of processes comprising (a) forest estate designation, (b) forest estate boundary demarcation, (c) forest estate mapping, and (d) forest estate stipulation (see Article 15 of the Forestry Law);
2. Stipulation of land released from forest estate as state land. This may be inferred to as a process in stipulating one of the rights to land in the form of HGU issued on state land;
3. Norms, standards, procedures, and criteria for plantation business permit (Izin Usaha Perkebunan/IUP) or Plantation Company Registration Certificate (Surat Tanda Daftar Usaha Perkebunan). In this case, the likely framework is through integration with an online permit system (OSS system);[7]
4. Stipulation of abandoned land and suspending HGU issueance or revoking HGU; and/or
5. Legal action and/or demand for compensation for use of forest estate for oil palm plantation based on data verification and evaluation of forest estate land release or swap for oil palm plantation.

2. Synergy with other relevant policies

This presidential instruction is a regulation with limits to its authority. To make up for what it lacks, there are seven other regulations with stronger legal standing and relevance to enforce in parallel and synergy with Presidential Instruction 8/2018:

a. Presidential Regulation 88/2017 on Resolving Land Tenure in Forest Estate

A team for Accelerating Land Tenure Resolution in Forest Estate was formed through this regulation. The future challenge is to synergize this team with the Task Force formed under Presidential Instruction 8/2018.

	Prior to Stipulation				After Stipulation							
Forest Estate in Each Province	Not linked to forest estate				Forest estate <30%				Forest estate >30%			
Uses	Settlements	Social & public facilities	Cultivation	Customary*	Settlements	Social & public facilities	Cultivation	Customary*	Settlements	Social & public facilities	Cultivation	Customary*
Means of Resolution	Land is excluded (K)				Exclusion (K), Land swap (T), Social Forestry (PS), Resettlement (R)							
Forest Functions												
Conservation	K				*Resettlement (all condition)*							
Protection	K				R		PS		R		> 20 year: K (in TORA)<20 year: PS ,	
Does not meet criteria as Protected Forest (?)	K				T		??		K		??	
Production	K				R		PS		K		> 20 year: K(in TORA) <20 year: PS	

Source: Hariadi K, 2017

b. Presidential Regulation 86/2018 on Agrarian Reform

Agrarian reform and oil palm moratorium are interlinked. A possible output from this oil palm plantation evaluation process is land designation for agrarian reform land object (Tanah Objek Reforma Agraria/TORA) from HGUs that are not extended or revoked HGUs and allocating 20% of forest estate released to oil palm plantations to be given to communities or 20% of HGUs to be developed for community plantation. In addition, another point in this agrarian reform regulation that calls for attention is land redistribution object in the form of ex-abandoned land utilized for public and state interest through agrarian reform.[8] From an operation view, abandoned land requires the formation of a special committee to identify and research abandoned land (Panitia C). The subsequent process is abandoned land gazettement by Head of the Province Land Agency. Data on abandoned land and land often identified as area of agrarian dispute between community and oil palm company is critical and requires urgent remediation through TORA.

One of the challenges in this Agrarian Reform Presidential Regulation is the existence of a National Agrarian Reform Team. The team is chaired by the Coordinating Minister of Economic Affairs and assisted by the Agrarian Reform Task Force, comprising central, province, and city/district level task forces. Its mechanism and governance is further regulated through a ministerial regulation (not clarified). The central, province and city/district task forces must be formed 3 months after the ministerial regulation is passed at the latest. Ways to synergize the Presidential Instruction Moratorium Task Force, National Agrarian Reform Team, and the

Agrarian Reform Task Forces must be determined, as well as ensuring whether a Presidential Instruction Moratorium Task Force consolidation meeting would be a good entry point for that synergy.

c. Public Information Disclosure on HGU and HGU Maps

Though already stipulated in a number of regulations, such as Law 14/2008 on Public Information Disclosure, Law 41/1999 on Forestry, Law 26/2007 on Spatial Planning, Law 32/2009 on Environmental Protection and Management, and Law 39/2014 on Plantations, information disclosure especially in the plantation sector has yet to be seen. Although supported by court decision – including the Supreme Court – that HGU and its map are open to public, to this day owners of IUP and HGU information are still unwilling to disclose this information to the public.[9]

d. ISPO (Indonesian Sustainable Palm Oil)

For the past 3 years, the government has strengthened its ISPO certification system. ISPO is a mandatory certification under the legal framework of Regulation of Minister of Agriculture No. 11/Permentan /OT.140/3/2015. ISPO is a national policy for building Indonesia's version of sustainable oil palm plantation standard and can play a tangibe role in improving performance, competitiveness and sustainability of Indonesia's palm oil commodity.

Along with the Presidential Instruction on Moratorium, the president must ensure that a Presidential Regulation on ISPO is issued soon, which includes strong standards, principles and criteria in line with civil society's inputs or at the very least include aspects of legal compliance; protection of natural forest, peat and the environment; good plantation management; responsibility toward workers and social components; community empowerment; traceability and transparancy, and respect for human rights.

e. NDC (*Nationally Determined Contribution*) to Reducing Greenhouse Gas Emission

One of the explicit objectives of the oil palm moratorium is the reduction of GHG emissions. Therefore this policy fits into the framework of achieving NDC targets, especially to reduce deforestation and forest degradation (REDD+). However, Presidential Instruction 8/2018 only links sustainability of the palm oil industry with ISPO certification system, which is still being strengthened.

To achieve its objectives of contributing to GHG emission reduction, the sustainability aspect of this Presidential Instruction's implementation cannot rely on or be entrusted upon ISPO certification only, but instead must be implemented along with the following:

(1) Prioritizing saving natural forests that can still be saved in oil palm plantation concessions to reduce deforestation by considering the ecological urgency and government commitment to reduce emission from deforestation and forest degradation.

(2) To save the remaining natural forest, government must clarify what is meant by 'productive forest' that can potentially be re-gazetted as forest estate.

(3) Leverage the forthcoming oil palm plantation permit evaluation opportunity to increase effectiveness of law enforcement and relevant regulations on peat ecosystem protection against oil palm plantation companies.

f. One Map Policy

The oil palm moratorium will contribute to accelerating the One Map Policy which only has a few months left in its implementation (June 2019), because this polity mandates mapping, collection, and verification of data and maps on oil palm plantations, including smallholder plantations whose data and maps are absent/incomplete. On the other hand, data and map collection and verification in the oil palm moratorium policy also rely on the compiled, integrated and synchronized data and maps to accelerate One Map Policy. In both processes,

the key to success and legitimacy of their results are transparency and participation.

g. Eliminating Corruption

Corruption is a cross-sectoral issue in Indonesia's natural resources management. In 2016, the Corruption Eradication Commission (Komisi Pemberantasan Korupsi/KPK) published a study on Oil Palm Commodity Management System, highlighting three key issues in the sector: (1) unaccountable oil palm plantation permit monitoring; (ii) ineffective implementation of CPO export levies; and (iii) nonoptimal tax collection in the oil palm plantation sector. According to KPK there are 4.69 million ha overlapping oil palm plantation permits. KPK found 3 million ha HGU to be overlapping with mining concessions, 534,000 ha overlapping with timber plantations, and 349,000 ha overlapping with logging concessions. In addition, 801,000 ha HGU concessions are located on peat domes. Corruption eradication is one way to help resolve this matter.

To ensure that oil palm moratorium contributes to improving plantation governance as stated as its objective, the government must ensure coordination and collaboration with KPK in oil palm plantation permit processes as well as its follow-ups, especially law enforcement.

3. Unclear Task Force organization and structure

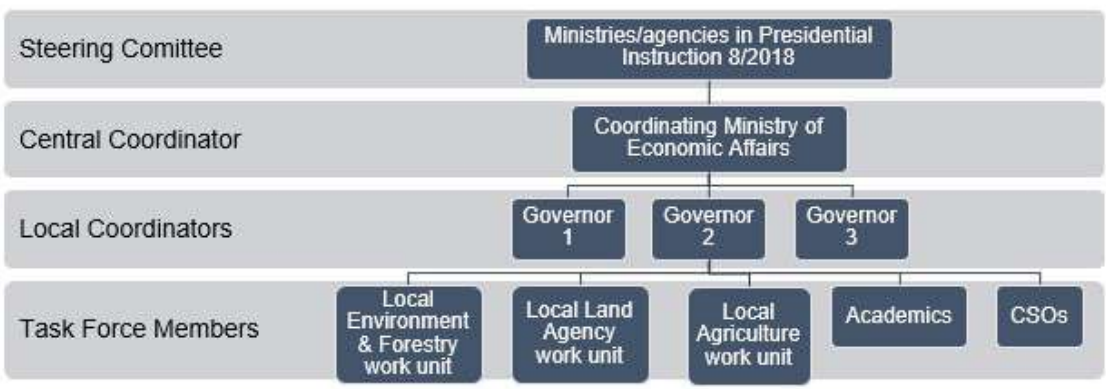
Presidential Instruction 8/2018 mandates the Coordinating Minister of Economic Affairs to establish a task force for coordination. However, no further details are provided regarding the what, who, and how this task force carries out its duties. We would like make a proposal for this task force based on at least three major points. First, the task force's work must be based on good environmental management principles in line with the mandate in Law 32/2009. Second, the task force institution must operate at the central and local levels. Third, there is a mechanism for monitoring and reporting the task force performance in a transparent, accountable, and publicly responsible manner. The justification for the aforementioned points are as follow :

First, why must the task force's work be based on good environmental management practices? This is stated in the opening paragraph of Presidential Instruction 8/2018, "To improve sustainable oil palm plantation governance, provide legal certainty, maintain and protect environmental sustainability including reduce greenhouse gases (GHG), and increase oil palm smallholder facilitation and increase palm oil productivity..." Most of these can be answered through principles of good environmental management. Law 32/2009 mandates that the use of natural resources must be in line, harmonious and balanced with the environmental functions. As a consequence, development plans and/or programs must be inspired by the obligation to preserve the environment and realize goals of sustainable development.[10] This Presidential Instruction is greatly appreciated because it is a normative realization of said principle. Nonetheless, its implementation must be consistent with the underlying principles.

Second, why must the task force be based at central and local levels? Most oil palm plantations are located outside of Java Island, such as in Sumatra, Kalimantan, Sulawesi and Papua. It would pose as a challenge if the task force was formed and based only in the capital. Local governments, especially governors and mayors/heads of district as issuers of Plantation Company Permits,[11] must have a greater understanding of the permits they issue, both at the technical level as well as on the ground.

The local government through its Local Government Organization Unit (Satuan Organisasi Pemerintah Daerah/SOPD) or Local Government Work Unit (Satuan Kerja Perangkat Daerah/SKPD) must also understand current permit proccesses, and whether permits must be suspended if they fall under the moratorium object as stipulated in the Presidential Instruction. If needed, ground truthing would be easier done by local governments, which surely will help with the moratorium process. Based on the work scope and competency required, the SKPD proposed to join the task force are local work units from MoEF, Ministry of Agriculture, and Ministry of Agraria and Spatial Plan.

In addition, to accommodate public participation, it is recommended that the task force involve academics and civil society organizations (CSO). CSO is a form of democracy and public participation in government policy. In addition, CSOs possess various capacities, whether at grassroots facilitating communities impacted by palm oil, or those working on specific issues such as forest governance, mapping, environmental law, etc. CSO engagement as an element of public participation is also in accordance with the three main pillars of environmental management: access to public participation, access to information, and access to justice. On the other hand, academics act as independent and objective checks and balances and means for capacity building for government through their work units as well as for CSOs in the task force. The academics must have the capacity, competency, and integrity in related discipline, including but not limited to knowledge in oil palm plantation permit administration and governance, forestry, agriculture, environmental law, spatial mapping, and other relevant fields. The following is the proposed organizational structure:



Third, there is a transparent, accountable and publicly responsible mechanism for monitoring and reporting task force's performance. This is also the reason why CSO involvement in the task force is recommended. However, it would not be a problem if CSOs are not involved in the task force, as long as the task force's work in carrying out its mandate as stipulated in the Presidential Instruction is measurable, transparent, accountable, and can be monitored by public. One concrete example would be reporting the task force's work not only to the President but also to public, whether through face-to-face discussion or online which is accessible to the general public through relevant ministry/agency's website.

4. There is no law enforcement or follow up of problematic permits

If we look at the ideal condition for a successful implementation of this oil palm plantation permit moratorium Presidential Instruction, there are two likely types of permits. First are permits that comply to all requirements and obligations and therefore can continue, and second are problematic permits that must be resolved. The question is what will the government do with these problematic permits?

Several frequently encountered issues surrounding oil palm plantation permits include (1) overlapping permits, whether with forest estate or other companies; (2) failure to fulfill obligations in various sectors such as environment, tax, community plantation (plasma), community partnership, etc.; and (3) legal violations, such as cases of plantations polluting the environment, creating conflict with surrounding communities, etc. What is the government's commitment when they encounter such problematic permits?

There must be strict sanction for anyone proven to have committed the violations above, whether administrative or criminal sanctions, in accordance with applicable regulations. Environmental administrative sanctions may include:[12]

Sanctions	Conditions
Written Warning	Violating terms and oblications stated in permit, although no negative impact on the environment yet.
Administrative Order	Violating terms and obligations stated in permit, causing negative impacts on the environment in the form of environmental pollution/degradation.
Permit Suspension	Neglecting to carry out administrative order, conducting actions not listed in permit, or alledgedly falsifying documents required for permit.
Permit Revocation	Transferring business to another party, or failing to carry out most or all of the administrative order set under a certain time period, or causing environmental pollution and/or degradation that endangers human health and safety.

Results obtained by the task force is crucial as the foundation and justification for applying sanctions to the party committing the violations. Follow-up to the task force's finding must be disclosed to public, including data on:

1. Companies with problematic permits
2. Sanctions given to such companies
3. Execution on the ground and routine monitoring of sanction execution

C. Conclusion and Recommendations

In short, the following are recommendations from Civil Society to make implementation or road map to Presidential Instruction 8/2018 work:

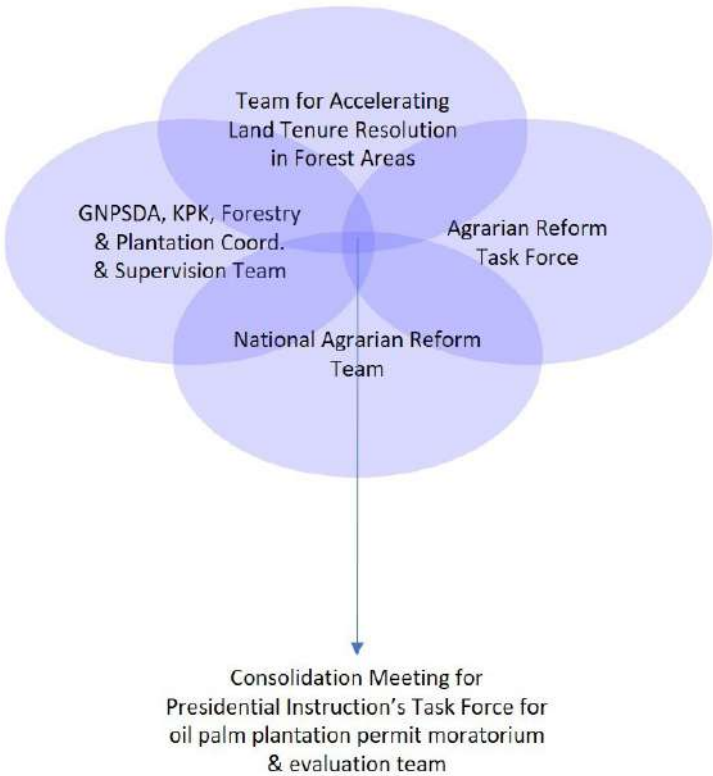
1. Officially engage civil society and indigenous communities in the Presidential Instruction 8/2018 task force through a self-election mechanism.
2. Establish a communication forum with civil society and indigenous communities to implement Presidential Instruction 8/2018. Existing civil society coordination/communication forum may be used for this. Note that this communication forum can be used as the government's channel to: (i) collect feedback from civil society on which permits to evaluate; (ii) collect feedback from civil society on local and site level implementation of Presidential Instruction 8/2018 and any occurring violations, (iii) share progress and results of Presidential Instruction 8/2018 implementation, (iv) garner civil society support for Presidential Instruction 8/2018 implementation at national, province and district levels, such as support for mapping, data collection, etc
3. Deliver routine public report on Presidential Instruction 8/2018 implementation progress and results in addition to the routine report for the president, or create a term in which the routine report on Presidential Instruction 8/2018 implementation can be accessed by public as stipulated in Presidential Regulation on Agrarian Reform No. 86/2018.
4. Strengthen commitment to public information disclosure based on applicable regulations, including disclosing oil palm HGU data which has been decided as public information
5. Synergize the various agenda and milestones of the number of teams in a coordination meeting that should:

    d. Focus on resolving overlapping forest estate with oil palm plantations. The task force should share the area and location of overlapping forest estate and oil palm plantations. This is based on the assumption that the Presidential Instruction is only effective in resolving forest and oil palm plantation issues.

e. Once the work area is agreed, it is important for the Task Force Coordination Meeting to connect with other teams also working in areas of overlapping forests and oil palm plantations, such as team for accelerating land tenure resolution in forest estate, national agrarian reform team, agrarian reform task forces, and others

f. The Task Force Coordination Meeting should also coordinate with the Coordination and Supervision Team for Forestry and Plantations, especially for National Movement to Save National Resources (Gerakan Nasional Penyelamatan Sumberdaya Alam/ GNPSDA) since they operate in the same work area.

6. Take an action on law enforcement for the permits that have been proven to have committed violations and have had enviromental and social impact based on coditions and sanctions.



Endnotes

1 Sawit Watch. 2016. *Menerka Luasan Kebun Sawit Rakyat*. Bogor.

2 http://www.netralitas.com/bisnis/read/17817/menkeu-sri-mulyani-harapkan-sumbangan-industri-sawit accessed on 29 April 2017 at 8 pm WIB

3 Roadmap Masyarakat Sipil untuk Reforma Perkebunan Sawit Indonesia Berkeadilan, 2018.

4 There are varying data on oil palm plantations inside forest estate. Minister of Environment and Forestry states 2.3 million ha (http://www.mongabay.co.id/2018/10/20/menteri-lingkungan-bakal-evaluasi-23-juta-hektare-kebun-sawit-di-kawasan-hutan/). Gadjahmada University's study concludes that 2.8 million ha oil palm plantation is located inside forest estate in which 35% are managed by communities while the rest is managed by companies; see http://www.mongabay.co.id/2018/11/04/kajian-ugm-28-juta-hektare-kebun-sawit-di-kawasan-hutan-65-milik-pengusaha-solusinya/ Meanwhile Forest Watch Indonesia (2017) cites 8.9 million ha forest estate is overlapping with logging, timber plantation, and oil palm concessions in 8 provinces; see http://www.mongabay.co.id/2017/12/13/kajian-fwi-89-juta-hektare-lahan-tumpang-tindih-di-8-provinsi/.

5 https://www.infosawit.com/news/8131/mengurai--kendala-skim-berkelanjutan-ala-indonesia.

6 See Constitutional Court Decision No. 45/PUU IX/2011 for further information

7 See Government Regulation No. 24 of 2018 on Elecronically Integrated Business Permit Services .

8 For further information on abandoned land see Government Regulation No. 11 of 2010 on Regulating and Utilizing Abandoned Lands

9 Mongabay, "Setahun Lebih Putusan Mahkamah Agung, Kementerian ATR Belum Buka Data HGU Sawit" http://www.mongabay.co.id/2018/06/22/setahun-lebih-putusan-mahkamah-agung-atr-belum-buka-data-hgu-sawit/

10 Law No. 32 of 2009 on Environmental Protection and Management, LN No. 140, TLN No. 5059, Point 3 of Elucidation.

11 Law No. 39 of 2014 on Plantations, LN No. 308, TLN No. 5613, Article 48 par. (1)

12 Compiled based on Regulation of Minister of Environment No. 2 of 2013 on Guide to Implement Administrative Sanctions in Environmental Protection and Management