

Insights and Commentary from Dentons

The combination of Dentons and Hanafiah Ponggawa & Partners (Indonesia) offers our clients access to 9000+ lawyers in 167 locations and 73 countries around the world.

This document was authored by representatives of Hanafiah Ponggawa & Partners prior to our combination's launch and continues to be offered to provide clients with the information they need to do business in an increasingly complex, interconnected and competitive marketplace.

Looking Again at the 'Urgency' for the Execution of Presidential Instruction on the Moratorium on Oil Palm Plantation Licensing in Indonesia



A moratorium will always arouse conflicting views in virtually any case possible. A moratorium on oil palm licensing is a clear example. Business players will identify this as a threat whilst environmentalists will welcome the same. There is no wrong or right in picking sides, bearing in mind that both sides have their own arguments. It is down to the government to not pick either side or act against the other's interest. Accommodating the interest of all the parties concerned, that's the government's job in a nutshell.

Speaking of which, a draft Presidential Instructions has been in place for a quite some time now. Back in April 2016, the initial idea of moratorium on oil palm plantation licenses in forestry areas was brought up by the Indonesian government and yet, although it has been almost 2 years since then, no such draft has been penned by the President himself. However, we succeeded in obtaining a copy of the draft with the title 'Moratorium on and Evaluation of Oil Palm Plantation Licensing as well as Increases in Productivity of Oil Palm Plantations', which was approved and signed by the Coordinating Minister of the Economy, Darmin Nasution, on 22 December 2017 after the approval of the Secretary of Cabinet, Pramono Anung, on 6 November 2017 ("Presidential Instructions Draft"). But certainty on when such draft will eventually be approved and signed by President Joko Widodo remains minimal as no one is able to give definite information.

Contrary to the moratorium plan, as quoted in an event related to the oil palm industry back at the end of November 2017 in North Sumatra, the President stated that the government must pay more attention to the oil used as main ingredient for soaps, cooking oils, cosmetics, pharmacy, and even biodiesel and therefore he considers palm oil as Indonesia's green gold. This could mean that Indonesia will expand its oil palm industry, which may go hand in hand with the expansion in area of oil palm plantations.

In line with the above, in early November 2017, the President instructed the Minister of Agrarian Affairs and Land Spatial Planning to accelerate the land certification for the smooth processing of oil palm tree replanting programs. The legal status of the land is one of the main obstacles which hamper the acceleration of oil palm replanting programs. Therefore, the Government aimed to issue five million certificates by the end of last year, seven million in 2018 and nine million in 2019. However, it is reported that only one million eight hundred certificates were issued in 2017.

Setting aside all the sparks to expand oil palm plantations in Indonesia, the strength of the opposition which stands in the name of the nature cannot be ignored.

Environmentalists' View

Oil palm plantations in Indonesia have been linked to considerable deforestation in the 1900s and 2000s. Environmentalists have criticized Indonesia's palm oil expansion over the past 20 years with a claim that peatland and forest areas have been badly degraded. As quoted, the deputy director of Sawit Watch, an environmental group, said that an oil palm moratorium was urgently needed to stop environmental destruction in the form of land clearing for plantations. This is due to the close relationship between oil production and deforestation. To develop oil palm plantations, companies clear out the trees in tropical rainforest ...

causing the biodiversity in the region to be destroyed. Further, deforestation is a significant contributor to climate change; especially when the traditional farmers clear trees by burning timber and forest undergrowth, sending a tremendous amount of carbon emissions into the atmosphere.

Therefore, Sawit Watch along with several other NGOs has urged President Joko Widodo to fulfill his pledge to declare a moratorium on the issuance of new licenses for oil palm plantations with the argument that such a moratorium will play an important role in providing momentum to reorganize Indonesia's palm oil industry and forestry sector. In fact, the Indonesian government had already responded to such critics several years ago when President Joko Widodo enacted Instructions No. 8 of 2015 concerning a moratorium on the issuance of new licenses for primary forest and peatland areas.

Not fully satisfied with the moratorium, NGOs continue to put pressure on the government by bringing up the so-called 'sins' of oil palm plantations against environment and wildlife sustainability.

To that end, the pressure was intentionally directed toward the oil palm industry in relation to the deforestation rate in Indonesia, which is driven by transforming natural forest into plantation land. In response to those 'sins' and other qualitative data, the government intends to put a moratorium specifically on oil palm licensing in forestry areas as will be discussed herein.

Global Consumption of Palm Oil: Analysts' View

Data from the Food and Agricultural Organization of the United Nations (FAO) shows an increase of the area harvested from 204,000 hectares in 1980 to 7.4 million hectares in 2014 with hardly any changes in productivity. As quoted by the Indonesian Palm Oil Association from an unnamed forestry database, the conversion rate of forest areas into non-forest estates in Indonesia during the period of 1950-2013 was in the region of 75.3 million ha.

Meanwhile, the total area of oil palm plantation

alone in 2013 was only 14% of the total conversion rate of forest areas into non-forest estates. If we look at the details using satellite sensing on the area of the converted forest, only 2.5 million ha of the oil palm plantation area was generated from direct conversion from forest area. The remaining 7.8 million ha originated from the conversion of agricultural lands and/or abandoned lands. In brief, the other 86% of forest area conversion were utilized for other sectors and not for oil palm plantations, according to the Indonesian Palm Oil Association.

Apart from those inaccurate allegations against the oil palm industry Thomas Mielke, the executive director of Oil World -a research organization that provides global supply, demand and price analysis, statistics and forecasts for all the major oilseeds, vegetable oils and animal fats and oilmeals as well as for biodiesel and other products, stated that beyond 2018 the slowdown in the expansion of the area planted in 2015 and 2016, primarily in Indonesia, would create production problems worldwide and deficits in in 2019 or 2020. He forecast that world imports of Crude Palm Oil (CPO) are likely to rise by 2.5 million year-on-year and within a decade the world will need approximately 25 million tonnes more CPO per year. A rise in CPO prices is inevitable as far as the supply side is concerned. He added that the government should not be persuaded by the lobby for a moratorium on oil palm planting as contrary to what Greenpeace argues there is just not enough vegetable oil to go around.

What's in the Presidential Instructions Draft?

At first glance, this Presidential Instructions Draft seems to completely halt any issuance of oil palm plantation licensing in Indonesia and even further will re-evaluate and cancel any unqualified application upon its enactment. However, if we go into details in the draft, there are some points worth noting regarding the moratorium. The full article of Second Instruction point 1 of the Presidential Instructions Draft reads as follows:

(1) *The minister of Environment and Forestry will impose a moratorium on relinquishment and exchange of forest areas for oil palm plantations for:*

- a) *new applicants;*
- b) *applications which have been submitted but have not fulfilled the requirements or have fulfilled the requirements but the proposed area is within a forest area which still has forest cover; or*
- c) *applications which have obtained a principle approval but the boundaries have not been set and which are submitted for a forest area located within a productive forest area.*

Further, point 2 of the Second Instruction exempts from the moratorium applications for relinquishment and/or exchange of forest areas for oil palm plantations through the implementation of the provisions of Article 51 of Government Regulation No.104 of 2015 concerning Procedure for Changing the Designation and Function of Forest Areas in non-productive forest areas to the extent that such applications have fulfilled and complied with the technical requirements and provisions and were submitted by the end of December 2016.

From the Presidential Instructions Draft, we may note some 'flaws' which can be deemed a line of hope for applicants for oil palm plantations in forest areas. If an ongoing application fulfils the qualifications and does not overlap with any forest areas which still has cover; or if an application has fulfilled the requirements, has boundaries and is located in a non-productive forest area, the application will be approved by the authorities. However, a clear measure on how to determine a forest area which still has cover must be published to avoid any misinterpretation. The other 'flaw' is that although by reading the title of the Presidential Instruction Draft which seems very broad and will definitely halt any application for an oil palm plantation, actually there is still no moratorium on application for areas other than forest areas, e.g. Non-Forest Estate (*Areal Penggunaan Lain* – APL) including agricultural estate. Looking back at the period of 2005-2014, there were a lot of conversions of agricultural estates into oil palm plantations totaling 15,616 ha in Jambi alone. However, in the long run, this moratorium will have a definite impact

on the oil palm plantation industry in Indonesia since there will be fewer and fewer of Non-Forest Estates in Indonesia in the upcoming years and decades.

PROGRESS OF THE DRAFT OF MORATORIUM

The draft of the moratorium has reached the approval from the Coordinating Minister of the Economy and is now waiting the final approval from the President. We have tried to obtain information from officials at the Ministry of Forestry, but no one at the Ministry is able to confirm the exact date on when the President will put his pen to the draft. So long as there is no legal force to the moratorium, the business activity of oil palm licensing remains at the status quo.

Things for the Government to consider before implementing the moratorium on oil palm plantations in Indonesia.

- Improvement on the poor dissemination of information on the moratorium;
- Issuance of land certificates to accelerate oil palm tree replanting;
- Discriminatory (partial) protection of forest areas;
- Weak law enforcement;
- Education of the local farmers to improve productivity and sustainable clearing methods;
- Focus on target-based and achievement indicators rather than time restricted periods. Indicators such as rejuvenation, sustainability, lowering carbon emissions, legal clarity of land status;
- Providing clear guidance on the classification of which forest areas still have cover, and which do not.

What Can Be Done?

Although the draft of Presidential Instruction Draft has reached the approval from the Secretary of Cabinet, there is still a bit of hope that President Joko Widodo and his government will realize the 'actual' problems of deforestation in Indonesia. It is worth noting that oil palm plantations are not the primary drivers for deforestation in Indonesia as the percentage of forest conversion used for oil palm plantations does not even reach 15% of the total forest area converted in Indonesia. Therefore, it is a justifiable argument to say that oil palm plantations cannot be solely blamed for the deforestation in Indonesia.

The oil palm industry could and should suggest to the President that he revisit such moratorium on oil palm licensing bearing in mind that there are other causes responsible for 85% of deforestation

in Indonesia which need to be scrutinized. Only by such careful investigation can the wrong labeling of oil palm plantations be remedied. However, it is also important for the government, rather than imposing a moratorium on new licenses, to improve the productivity of smallholders, solve labor problems in the short term and improve mechanization in the longer term. Thomas Mielke predicts that the demand for CPO within the next decade will rise significantly and a moratorium on oil palm plantations along with low productivity will bring the risk of potential global catastrophe if no remedial and improvement actions are taken.

We should all be hoping that what Thomas Mielke is afraid of will not come to reality, at least during the ..

lifespan of this Presidential Instruction for the next 3 years upon its enactment.

He once said that this is going to have an impact on processing if the production does not catch up as quickly as expected. At the moment, it looks like the recovery in CPO production is slower than expected and slower than many consumers wish, as consumers are waiting for prices to fall so that they can replenish their stock. And that time will come. He continued said that he is very bearish for the price outlook for 2018. If there is a limit on the expansion of oil palm planting, vegetable oil prices will soar to such unreasonable levels that more poor people will go hungry.

-oOo-

*The article above was prepared by **Al Hakim Hanafiah** (Partner), **Maurice Maulana Situmorang** (Partner) and **Omar Syarif Smith** (Associate).*

This publication is not intended to be a comprehensive review of all developments in the law and practice, or to cover all aspects of those referred to. Readers should take legal advice before applying the information contained in this publication to specific issues or transactions or matters. For more information, please contact us at hplaw@hplaw.co.id.

No part of this publication may be reproduced by any process whatsoever without prior written permission from Hanafiah Ponggawa & Partners.