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Legal Issues and Proposed Remedies

Nasir, M.; Bakker, L. ; van Meijl, T.

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Mohamad Nasir*, Laurens Bakker and Toon van Meijl

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Abstract: Palm oil is a major Indonesian export product, but governmental supervision of plantation corporations' activities on the ground frequently fails, which leads to environmental damage as well as conflict between companies and communities. By employing a socio-legal approach, this study found that the legal framework of the development of oil palm plantations is imprecise, unclear and incomplete and, as a consequence, causes the government's weakness in supervising oil palm plantation operations. We discovered three main causes of this incompleteness of law in supervising oil palm plantations: the delay in establishing the implementing regulations, the absence of sanctions in case of non-compliance, and the use of imprecise words, and complex terms and language. In addressing such incompleteness, this study suggests drafting more detailed rules to minimize delegation to lower regulations, using more precise terms and concepts, and considering sanctions for officials who do not carry out their obligations. Furthermore, discretion can be an alternative to overcome the existing legal incompleteness in supervising oil palm plantation operations.

Keywords: legal incompleteness; government supervision; oil palm plantations; plantation permits; Indonesia

1 Introduction

Palm oil provides significant economic benefits for Indonesia. From 2017 to 2021, it contributed 3.5 percent to the country's gross domestic product (GDP) on average.[1] In

1 BPS, *Statistik Indonesia 2022* (Jakarta: Badan Pusat Statistik [BPS], 2022), p. 683.

***Corresponding author: Mohamad Nasir**, Anthropology and Development Studies, Radboud University, Nijmegen, Gelderland, The Netherlands; and Faculty of Law, Universitas Balikpapan, Balikpapan, East Kalimantan, Indonesia, E-mail: mohamad.nasir@uniba-bpn.ac.id. https://orcid.org/0000-0002-9375-9168
Laurens Bakker, Anthropology, University of Amsterdam, Amsterdam, Noord-Holland, The Netherlands, E-mail: l.g.h.bakker@uva.nl
Toon van Meijl, Anthropology and Development Studies, Radboud University, Nijmegen, Gelderland, The Netherlands, E-mail: Toon.vanmeijl@ru.nl

addition, the national palm oil industry supports poverty alleviation[2] and offers employment to more than 16 million workers.[3] Indonesia has become the world's largest exporter of palm oil. In 2022, Indonesia produced 46,500 metric tons.[4] Such production requires large areas of oil palm plantations. In December 2019, the Ministry of Agriculture (MoA), in decree Nr. 833 of 2019, declared that oil palm plantations had reached 16,381 million hectares spread over 26 provinces.

Given that the global palm oil market is expected to grow further, rapid oil palm plantation expansion will continue to be a significant feature of land use and land cover (LULC) change in Indonesia.[5] Oil palm plantations are a major driver of deforestation in Indonesia.[6] 3.4 million hectares, or 20.2 percent of the total plantation areas, are in forest areas.[7] In 2021, the Audit Board of the Republic of Indonesia reported that by 2020, there were around 2.9 million hectares of oil palm plantations in forest areas without forestry permits.[8]

Such expansion causes conservationists and environmental organizations to raise the alarm about its devastating effects on the environment, such as threats to biodiversity and increased greenhouse gas emissions.[9] Oil palm plantation expansions also limit the land available to local communities, triggering land conflicts between communities and

2 M. Mardiharini *et al.*, *Palm Oil Industry towards Sustainable Development Goals (SDGs) Achievements*, 892 IOP Conference Series: Earth and Environmental Science, no. 1 (November 1, 2021), 3.

3 See "Industri Kelapa Sawit Nasional Perkuat Kemitraan Petani Sawit untuk Masa Depan Sawit Indonesia yang Berkelanjutan," Coordinating Ministry for Economic Affairs, October 5, 2021, available at: <www.ekon.go.id/publikasi/detail/3349/industri-kelapa-sawit-nasional-perkuat-kemitraan-petani-sawit-untuk-masa-depan-sawit-indonesia-yang-berkelanjutans>, accessed January 2, 2023.

4 "Oilseeds: World Markets and Trade," USDA, February 2024, available at: <https://apps.fas.usda.gov/psdonline/circulars/oilseeds.pdf>, accessed January 2, 2023.

5 Yu Xin, Laixiang Sun, and Matthew C. Hansen, *Biophysical and Socioeconomic Drivers of Oil Palm Expansion in Indonesia*, 16 Environmental Research Letters, no. 3 (2021), 2.

6 Kemen G. Austin *et al.*, *What Causes Deforestation in Indonesia?*, 14 Environmental Research Letters, no. 2 (2019), 4; David L. A. Gaveau *et al.*, *Slowing Deforestation in Indonesia Follows Declining Oil Palm Expansion and Lower Oil Prices*, 17 PLoS One, no. 3 (2021), 4–6.

7 I. Nugraha, "Menyoal Jutaan Hektar Kebun Sawit Dalam Kawasan Hutan," Mongabay, October 30, 2019, available at: <https://www.mongabay.co.id/2019/10/30/menyoal-jutaan-hektar-kebun-sawit-dalam-kawasan-hutan/>, accessed April 2, 2020.

8 BPK, *Ikhtisar Hasil Pemeriksaan Semester (IHPS) II Tahun 2021* (Jakarta: Badan Pemeriksa Keuangan [BPK], 2022), p. 26.

9 R.R.M. Paterson, *Depletion of Indonesian Oil Palm Plantations Implied from Modeling Oil Palm Mortality and Ganoderma Boninense Rot under Future Climate*, 7 AIMS Environmental Science, no. 5 (2020), 366–79; H. Purnomo *et al.*, *Reconciling Oil Palm Economic Development and Environmental Conservation in Indonesia: A Value Chain Dynamic Approach*, 111 Forest Policy and Economics (2020), 5 et seq.

companies.[10] These issues drove the central government to introduce a moratorium[11] on the expansion of oil palm plantations through Presidential Instruction Nr. 8 of 2018 on Postponement and Evaluation of Palm Plantation Permits and Increasing Productivity of Palm Plantations. This moratorium intends to halt new permits, providing time to evaluate existing permits and increase the productivity of existing palm plantations.

Current studies of oil palm plantations in Indonesia focus predominantly on four main issues. First, the impact of oil palm plantations on the environment. The expansion of oil palms has replaced tropical forests with monoculture crop systems and caused deforestation, clearing peatlands, forest fires, and biodiversity loss.[12] Second, a strong focus is placed on human rights issues. The expansion of oil palm plantations in Indonesia has adversely affected indigenous people's rights and access to natural resources such as forests, livelihood, food, and water.[13] Third, the development of oil palm plantations frequently gives rise to land conflicts. Disputes over boundaries, lack of consultation, land grabbing, and broken promises by companies often trigger conflicts between communities and oil palm companies.[14] Fourth, the laws and policies governing plantations often overlap with those of the environmental, forestry, agrarian, and spatial planning sectors.[15] As a result, it causes legal uncertainty and governance complexities.

10 Ward Berenschot et al., *Palm Oil Expansion and Conflict in Indonesia* (Leiden: POCAJI, 2021), pp. 13–18; Soelthon Gussetya Nanggara, et al., *Silang Sengkarut Pengelolaan Hutan Dan Lahan di Indonesia* (Bogor: Forest Watch Indonesia [FWI], 2017), pp. 69–109.

11 The moratorium is intended to solve problems common to the palm oil industry, such as plantations laid out in protected forest areas, land clearing in High Conservation Value (HVC) areas, and overlapping policies and regulations.

12 David L.A. Gaveau *et al.*, *Rise and Fall of Forest Loss and Industrial Plantations in Borneo (2000–2017)*, 12 Conservation Letters, no. 3 (2019), pp. 2–7; I. Bakhtiar *et al.*, *Hutan Kita Bersawit* (Jakarta: Yayasan Kehati, 2019), pp. 15–26; E. Meijaard *et al.*, *The Environmental Impacts of Palm Oil in Context*, 6 Nature Plants, no. 12 (2020), 1419–1423.

13 A. Andrianto, Heru Komarudin, and Pablo Pacheco, *Expansion of Oil Palm Plantations in Indonesia's Frontier: Problems of Externalities and the Future of Local and Indigenous Communities*, 8 Land, no. 56 (2019), 11–13; Human Rights Watch, *Why Our Land? Oil Palm Expansion in Indonesia Risks Peatlands and Livelihoods* (New York: Human Rights Watch, 2021), pp. 43–49.

14 P. Semedi and Laurens Bakker, *Between Land Grabbing and Farmers' Benefits: Land Transfers in West Kalimantan, Indonesia*, 15 The Asia Pacific Journal of Anthropology, no. 4 (2014), 381–387; R. Rutten *et al.*, *Smallholder Bargaining Power in Large-Scale Land Deals: A Relational Perspective*, 44 Journal of Peasant Studies, no. 4 (2017), 896–900, at 910–911; T.M. Li and Pujo Semedi, *Plantation Life. Corporate Occupation in Indonesia's Oil Palm Zone* (Durham: Duke University Press, 2021), pp. 158–184.

15 Daemeter Consulting, *Overview of Indonesian Oil Palm Smallholder Farmers: A Typology of Organizational Models, Needs, and Investment Opportunities* (Bogor: Daemeter Consulting, 2015), p. 13; J. Khatarina, *Palm Oil in Indonesia and Natural Resources Management: Why the Lack of a Legal Framework*, 19 Australian Journal of Asian Law, no. 1 (2018), 6–13; G. Schouten and Otto Hospes, *Public and Private Governance in Interaction: Changing Interpretations of Sovereignty in the Field of Sustainable Palm Oil*, 10 Sustainability, no. 12 (2018), 167–173.

This study examines to what extent the development of policies regarding oil palm plantations contributes to the government's weakness in controlling the activities of oil palm plantation companies. We argue that the legal framework of the development of oil palm plantations is imprecise and also incomplete and, as a consequence, causes the government's weakness in supervising oil palm plantation operations. In addressing those issues, this article explores the legal issues of this supervisory shortfall within the legislation monitoring oil palm plantations. Second, it investigates the practice of oil palm plantation supervision, the obstacles, and what alternative solutions can be taken.

The following section presents a legal review of the government's authority (central, provincial, and district) in supervising oil palm plantations. Section three investigates how the district government oversees large private plantations, covering about 88 percent of the total oil palm plantations in the Kutai Kartanegara district, East Kalimantan. Finally, we conclude this paper by discussing the implications and contributions of such legal uncertainty to the district government's performance weakness and commitments to supervise oil palm plantations.

2 Methods

2.1 Research Approach

This study adopted a socio-legal approach to address the research questions. By employing this approach, we examine the law as the norm as it is perceived in legislation and as a social phenomenon.[16] To collect data and information about the research object, we carried out a desk review. At this stage, we identified and made an inventory of laws and regulations related to the supervision of oil palm plantation operations at the central, provincial, and district levels. In addition, we gathered and reviewed several licensing documents, reports from related government agencies, newspaper articles, and other media reports to further contextualize events in these cases.

The second step constituted a field study of oil palm plantation supervision. We focused on a holding company with eight subsidiaries that operated the most extensive oil palm plantations, or 64 percent of the total large private plantations in the district. Investigating the supervision of a holding company, we aimed to obtain a

16 F. Cownie and Anthony Bradney, "Socio-Legal Studies: A Challenge to the Doctrinal Approach," in Dawn Watkins and Mandy Burton (eds), *Research Methods in Law* (New York: Routledge, 2013), p. 35.

thorough understanding of how the district government performed its obligations. We collected our data through field visits, where we investigated the state of oil palm plantations in several locations, conducted interviews, and had shorter conversations with the stakeholders involved. We also observed how the legal texts were understood and applied at the research site.[17] In order to analyze the data, we began with a doctrinal analysis by identifying and reviewing the legal framework of the supervision of oil palm plantations. Finally, we linked the analysis results to the dynamics of the implementation of the legal text in the social, cultural, economic, and political context and the actors influencing its implementation.[18]

2.2 Study Site

We conducted our research in the district of Kutai Kartanegara, East Kalimantan province. This district has the second-largest oil palm plantation area in the province[19] but was the first to initiate its policy instruments for oil palm plantation governance.[20] In 2014, to follow up on higher regulations, the district promulgated two local regulations: one on plantation governance and the other on environmental management guidelines for oil palm plantations. These were followed by Regent Regulation Nr. 1 of 2016 regarding Plantation Business Partnership, which obliges a permit holder with more than 25 ha to, among others, establish partner farmers' plantations on at least 20 percent of the total permit area and improve their partner's capacity to manage their plantation.[21]

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17 H. Taherdoost, *Data Collection Methods and Tools for Research; A Step-by-Step Guide to Choose Data Collection Technique for Academic and Business Research Projects*, 10 International Journal of Academic Research in Management, no. 1 (2021), 23.

18 Darren O'donovan, "Socio-Legal Methodology: Conceptual Underpinnings, Justifications and Practical Pitfalls," in Laura Cahillane and Jennifer Schweppe (eds.), *Legal Research Methods: Principles and Practicalities* (Dublin: Clarus Press, 2016), p. 110.

19 In 2020, the top five districts with the most extensive oil palm plantations area were East Kutai district (459.593 hectares), Kutai Kartanegara district (231.958 hectares), Paser district (183.575 hectares), West Kutai district (145.175 hectares), and Berau district (135.092 hectares).

20 The West Kutai district has a policy on partnership plantations (2017), and Berau District established a regulation on sustainable plantations at the end of 2019. While at the provincial level, the policy on sustainable plantations was regulated through local regulations in early 2018.

21 A partner farmer is a local farmer who manages plantations with an area of fewer than 25 hectares or a farmer who has been approved to be included in the plantation development partnership program as a candidate for the recipient of the fostered plantation from the oil palm plantation company. The district government needs to organize partnerships to increase income and create job opportunities for communities around oil palm plantations.

3 Theoretical Framework

Regional decentralization, which started in Indonesia in 1999, is the background and starting point of this study to investigate the dynamic of laws and policies regarding the supervision of oil palm plantations. Under a decentralization framework, the authority for issuing permits for plantations and overseeing their operations was divided between the central government and regional authorities at the provincial, district, and municipal levels. It also endows them with legislative and executive law-making powers to formulate policies and laws under their jurisdiction.[22] This approach has made the governance of plantations a dynamic sector but also one that is challenging to predict and keep track of,[23] which has created a widening gap in each policy-making process.[24] In addition to its tiered structure, the legislation of the governance of palm oil plantations is complex because it is simultaneously interconnected with other sectors, such as the environment, land, and forestry, resulting in sectoral-based legislation.

As a result, policies and laws regulating natural resources evolve rapidly in response to the dynamics of each sector and each level of government. The overlapping responsibilities between various tiers of government and sectors can also blur the distinction between national and local duties, which may lead to adverse environmental[25] and social consequences.[26] Indeed, this situation caused decentralization to increase the opportunities for existing district elites to extract resources and expand their businesses under district regulations. In this sense, rather than establishing a new system, regional autonomy extended well-established district modes of clientelism.[27] Simarmata has also demonstrated that decentralization has provided opportunities for local bureaucrats to influence the law-making

22 S. Butt, *Regional Autonomy And Legal Disorder: The Proliferation of Local Laws in Indonesia*, Singapore Journal of Legal Studies (2010), p. 2.

23 M. Nasir, Laurens Bakker, and Toon van Meijl, *Coal Mining Governance in Indonesia: Legal Uncertainty and Contestation,* 22 Australian Journal of Asian Law, no. 1 (2022), 54.

24 E.I.K. Putri, *et al. The Oil Palm Governance: Challenges of Sustainability Policy in Indonesia*, 14 Sustainability, no. 1820 (2022), 6.

25 Elías Cisneros, Krisztina Kis-Katos, and Nunung Nuryartono, *Palm Oil and the Politics of Deforestation in Indonesia,* EFForTS Discussion Paper Series, no. 31, (Göttingen, 2020), 4; Human Rights Watch, *Why Our Land? Oil Palm Expansion in Indonesia Risks Peatlands and Livelihoods* (New York: Human Rights Watch, 2021), pp. 57–60.

26 L. Bakker, *Custom and Violence in Indonesia's Protracted Land Conflict*, 8 Social Sciences & Humanities Open, no. 1 (2023), 3–4; T.A.S. Negara, Syahriza Alkohir Anggoro, and Imam Koeswahyono, *Indonesian Job Creation Law: Neoliberal Legality, Authoritarianism and Executive Aggrandizement Under Joko Widodo,* 16 Law and Development Review (2023), 3.

27 John F. McCarthy, *Changing to Gray: Decentralization and the Emergence of Volatile Socio-Legal Configurations in Central Kalimantan, Indonesia*, 32 World Development, no. 7 (2004), 1216–1218.

process to serve individual and group interests.[28] Lund illustrated this as the paradox of law and power. Implementing the law requires the redoubtable powers of enforcement of the state, but, at the same time, the state can make non-statutory claims, rules, and forms of access appear legal and may give them the same status and enforcement.[29]

Regarding the legal framework of oil palm plantations, we argue that the tiered and sector-based legislation has created the incompleteness of provisions, which in turn has led to legal uncertainty in the supervision of oil palm plantation operations. According to Pistor and Xu,[30] a law may be incomplete for two primary reasons. Firstly, it may not encompass all the actions under its purview. Secondly, it may employ open-ended and vague language, making it challenging to demarcate the law's boundaries precisely. Such incomplete laws cannot be implemented in cases without clarifying the meaning of the law.

It is worth noting that the term 'incomplete' can also pertain to instances where the required regulations or guidelines for implementation, as mandated by higher authorities, are absent. This can lead to a substantial degree of uncertainty, as noted by Waddell.[31] Moreover, the absence of these regulations can result in a delay in their execution. In this regard, we argue that detailed or technical rules are necessary to implement general provisions accurately.

Additionally, implementing regulations are required to prevent any subjective interpretation by the government. The government's unilateral action that puts its interpretation as a primary guideline in implementing a provision is not legally binding because interpretation cannot be used as a legal basis to set out formulations that contain norms.[32] Therefore, it is debatable and has even been contested in the Constitutional Court to determine its validity.[33]

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28 Rikardo Simarmata, "The Role of Local Bureaucrats in the Law-making Process" in Adriaan Bedner and Barbara Oomen (Eds.), *Real Legal Certainty and Its Relevance* (Leiden: Leiden University Press, 2019), p. 109.

29 Christian Lund, *An air of legality – Legalization under Conditions of Rightlessness in Indonesia*, 50 The Journal of Peasant Studies, no. 4, (2023), 1308; *see also* Christian Lund, *Nine-Tenths of the Law: Enduring Dispossession in Indonesia* (New Haven: Yale University Press, 2020), pp. 12–17.

30 K. Pistor & Chenggang Xu, *Incomplete Law*, 35 Journal of International Law and Politics, no. 4 (2003), 931–1013, at 931–932.

31 Sarah K. Waddell, *The Role of The 'Legal Rule' in Indonesian Law: Environmental Law and Reformasi of Water Quality Management* (Sydney: University of Sydney, 2004), p. 186.

32 See Appendix II of Law 12 of 2011 on Lawmaking.

33 See Constitutional Court decision Nr. 138/PUU-XIII/2015 concerning judicial review of Law Nr. 39 of 2014 concerning Plantations (It can be seen, for example, in the judicial review proposed by several NGOs and farmers' alliances against the 2014 Plantations Law to the Constitutional Court in October 2015. One of the articles tested for validity is Article 42, which states that a company plantation can perform its plantation operation once it has obtained a right to land and/or plantation license. The

Furthermore, the tiered and sectoral-based legislation related to monitoring the operation of oil palm plantations leads to inconsistencies in their execution. In implementing the rules, government agencies may take action that is not prescribed by law. For instance, the absence of sanctions may enable the licensor to refrain from exercising their authority to revoke the plantation permit, even if the permit holder has repeatedly violated their obligations. This action contradicts the original intention of granting the authority to cancel or revoke permits to prevent or stop violations.[34] This issue is further exacerbated by the fact that different institutions and officeholders often enact regulations that contradict one another. These contradictions may occur vertically, between hierarchically different legislation, and horizontally, between rules at equal levels.[35] Such inconsistencies can lead to confusion and hinder the implementation of effective policies and measures.

4 The Legal Framework of Oil Palm Plantations Supervision in Indonesia

The 2014 Plantation Law (as amended by Law Nr. 11 of 2020 on Job Creation) and the MoA Regulation Nr. 98 of 2013 concerning Guidelines for Plantation Business Permit (last amended in 2017: the 2013 Plantation Permit Regulation) divide plantation permits into three types: plantation business permit for cultivation (*Izin Usaha Perkebunan untuk Budidaya*: IUP-B), plantation business permit for processing (*Izin Usaha Perkebunan untuk Pengolahan*: IUP-P), and plantation business permit (*Izin Usaha Perkebunan*: IUP).

In the case of cultivation carried out in an area of fewer than 25 ha, an applicant only requires a Plantation Business Registry Certificate (*Surat Tanda Daftar Usaha Perkebunan Budidaya*: STD-B). It also applies to small processing businesses (see Table 1), where an applicant only needs to obtain a Plantation Processing Business Registry Certificate (*Surat Tanda Daftar Usaha Pengolahan*: STD-P). The following Table 1 shows the plantation businesses' classification and the required types of permits.

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plaintiffs argue that the term "and/or" means cumulative (and), so a plantation operation must obtain rights to land and plantation license before commencing its activities. On the other side, the government and plantation companies consider "and/or" as alternatives (or). So, plantation activities could be carried out when they have a right to land or a plantation license. In this regard, the Constitutional Court declared that "and/or" means cumulative).

34 Philipus M. Hadjon *et al.*, *Pengantar Hukum Administrasi Indonesia* (Yogyakarta: Gajah Mada University Press, 1994), p. 247.

35 S. Butt and Tim Lindsey, *Indonesian Law* (Oxford: Oxford University Press, 2018), pp. 52–53.

Table 1: Classification and permit type of plantation business.

Classification of plantation business		Type of permits	Validity period
Cultivation business of plantation plants	Cultivation business of plantation plants with the size of land less than 25 ha	Registry Certificate of Plantation Business (STD-B)	Valid as long as the company still carries out activities following technical standards, laws, and regulations.
	Cultivation businesses of plantation plants with the size of land 25 ha or more	Plantation Business Permit for Cultivation (IUP-B)	
Plantation product manufacture	The plantation product manufacturing business has a capacity below five tons of fresh fruit bunch/hour	Registry Certificate of Plantation Product Manufacture (STD-P)	
	The plantation product manufacturing business has five tons or more capacity of fresh fruit bunch/hour	Plantation Business Permit for Processing (IUP-P)	
Cultivation business of plantation and integrated with plantation product manufacturing	The cultivation business of plantations having a size of 1000 ha or over and having a plantation processing unit	Plantation Business Permit (IUP)	

This article focuses on two main types of permits, IUP-B and IUP because both require a large area of land and oblige facilitating the development of partner farmers' plantations on at least 20 percent of the total permit areas.

4.1 Complexity of Supervision in the Oil Palm Sector

Under Article 98 of the 2014 Plantation Law, the Minister of Agriculture (MoA), the governor, or a regional head takes care of the supervision of oil palm plantations following their respective jurisdiction. The regent should supervise the IUP or IUP-B when a permit is in a district territory. The governor is authorized to control a license when the IUP or IUP-B is located in two or more districts or municipalities. If the permit is located in two or more provinces, the MoA has the authority to control it. Further, under Article 99, the supervision is carried out in two ways: first, evaluation of the plantation company's performance by reviewing the permit holders' periodic report, and second, monitoring and evaluating plantation businesses' implementation and progress.

In addition to the 2014 Plantation Law, oil palm plantation permits are also subject to the Indonesian Sustainable Palm Oil (ISPO) standards and the Roundtable on Sustainable Palm Oil (RSPO). Both palm oil certification systems aim to set

sustainable and environmental sustainability principles for all plantation companies. The RSPO is voluntary and can open up opportunities for Indonesian products made of crude palm oil (CPO) to be accepted in the international market.[36] The ISPO is mandatory. It aims to respond to the demands of international institutions, needs, and communities, requiring that the oil palm industry practices be more sustainable than before the ISPO is stipulated.[37]

ISPO obligations arise from the enactment of the MoA Regulation Nr. 19/Permentan/OT.140/3/2011 concerning Guidelines on Sustainable Palm Oil Indonesia, which was replaced by Presidential Regulation Nr. 44 of 2020 concerning the Certification System for Sustainable Palm Oil Plantation in Indonesia (the 2020 ISPO Regulation). According to this presidential regulation, the central and regional governments (governors and regents) supervise the implementation of ISPO certification for business actors under their duties, functions, and authorities. The supervision of oil palm plantations covers the performance of plantation companies as permit holders, the implementation of plantation businesses, and companies' compliance with ISPO principles and criteria.

Under MoA Regulation Nr. 7 of 2009 concerning the Guidelines of Plantation Business Assessment (the 2009 Plantation Assessment Regulation), this evaluation must occur during the development[38] and operational[39] phases. In addition, the assessment must occur at least once a year during the development phase (Article 5). Evaluation at this stage includes nine aspects: legality, management, settlement of land rights, realization of plantation development, facilities and infrastructure prevention and control of fires and plant pest organisms, implementation of environmental assessment, community empowerment, and reporting. During the implementation phase, the regent, governor, and director-general of the plantation, following their respective jurisdiction, delegate the assessment to the plantation business assessment team. During the development stage, the government must determine the category of the plantation and identify issues that may require

36 F.H. Rosyadi *et al.*, *Impact of Roundtable on Sustainable Palm Oil (RSPO) Certification on The Indonesian CPO Exports to The Destination Countries*, 31 Agro Ekonomi, no. 1 (2020), 42.

37 N.K. Hidayat, Astrid Offermans, and Pieter Glasbergen, *Sustainable Palm Oil as a Public Responsibility? On the Governance Capacity of Indonesian Standard for Sustainable Palm Oil (ISPO)*, 35 Agriculture and Human Values, no. 1 (2018), 230; G W. van der Elst, *Creating Legitimacy for the Indonesian Sustainable Palm Oil Certification Scheme* (Wageningen: Wageningen University, 2018), p. 47.

38 Ministry of Agriculture Regulation Nr. 7 of 2009 (The development phase is the period that starts with obtaining the permit (IUP or IUP-B) and ends once the company begins production).

39 *Id.* (The operational phase is the period during which the plantation is actually in production. It runs until the end of the permit).

improvement. This assessment determines whether the plantation company is classified as A, B, C, D, or E (Article 18 paragraph [1]).[40]

In cases where a plantation company is classified as class D or E, the licensor (regent, governor, or director-general of the plantation) will issue recommendations that the plantation company must address in order to improve its performance during the development stage. The regulation speaks of 'recommendations' (*rekomendasi*), but these are compulsory because non-compliance will entail sanctions. The licensor will give three warnings to a company with a D classification at 4 month intervals if the company fails to follow up on these suggestions. On the other hand, a company that classifies as E will receive only a single notice when it fails to follow up on such instructions (Article 22). Furthermore, if D and E companies fail to implement the recommendations within the stipulated time frame, the licensor will revoke their plantation business permits (Article 26).

The next form of supervision is an assessment at the operational phase that must be performed at least once every 3 years. This evaluation largely concerns management, plantation, product processing, corporate social responsibility, and the environment (Article 6). As in the development stage assessment, the operational phase evaluation is carried out by the plantation business assessment team. Based on the result, plantation companies are classified as I, II, III, IV, or V (Article 18 paragraph [2]). This qualification is required to ensure regulatory compliance and identify potential areas of improvement. This classification will also enable the government to monitor the companies closely and hold them accountable for their actions. The assessment result also provides suggestions for improvement for plantation companies categorized in class IV or V. The licensor will give three warnings to a company under class IV with an interval of 6 months and a single notice to the companies under category V if they fail to act on these suggestions (Article 22). In addition, the licensor will revoke the plantation business permit if the company fails to comply (Article 26).

Supervision is also carried out on the performance of a plantation company. It aims to ensure company compliance with the obligations stated in the permit. As per the 2013 Plantation Permit Regulation, the governor or regent has the authority to supervise the performance of plantation companies. The implementation of this responsibility is assigned to the agency responsible for the plantation sector. Such an evaluation should be undertaken at least once every 6 months through a field inspection to investigate the suitability of the plantation business development report with the facts on the ground (Article 44 paragraph [4]). This evaluation examines the

40 *Id.* at Art. 18, para. 1 (Plantation companies are classified from A to E based on their scores. A is for >80–100, B is for >60–<80, C is for >40–<60, D is for >20–<40, and E is for 0–<20).

progress of licensing implementation, total production, the performance of partnerships, processing plants, marketing, and environmental management.

To evaluate compliance with ISPO guidelines, the 2020 ISPO Regulation introduced the ISPO Certification Body. Every year, this institution assesses the compliance of the holder of ISPO certificates with ISPO requirements. Based on the assessment results, this body can issue, temporarily freeze or even cancel ISPO certificates (Article 7). However, it is essential to underline that apart from the ISPO Certification Body, under Article 16, the MoA can also freeze or revoke ISPO certificates if the holder does not meet ISPO principles and criteria. In East Kalimantan, the provincial government promulgated regulation Nr. 7 of 2018 concerning implementing Sustainable Plantations (the 2018 Provincial Regulation). This regulation arranges supervision in Article 71, reiterating the higher regulation provisions that the control is conducted by examining the permit holder's periodic reports through monitoring and evaluating plantation business' implementation and progress. Further, the regulation states that more detailed provisions regarding evaluation will be set in a governor's regulation (Article 72), which was not available at the time of writing (October 2023). The absence of such regulation creates a legal gap in supervision and contributes to the ineffectiveness of supervision.

In Kutai Kartanegara, the local government enacted District Regulation Nr. 6 of 2014 concerning Plantation Governance (the 2014 District Regulation) to implement the district jurisdiction in plantations. Under this regulation, the regent supervises through the relevant agencies. This district supervision is organized in two ways: direct monitoring and evaluation at the plantation location and the periodic plantation assessment progress report. The regulation also accommodates the district's interests through additional obligations such as obtaining a land clearing permit, using local labor, and paying user charges (*retribusi*) to the district government. However, as with the regulation at the provincial level, the district-level regulation does not explain in detail how supervision should be carried out. Without clarity and certainty of the monitoring mechanism, the district government cannot effectively control oil palm plantation operations.

4.2 Supervision by the Environmental Sector

Under the 2014 Environmental Law (as amended by Law Nr. 11 of 2020 on Job Creation), the Minister of Environment and Forestry (MoEF), the governor, and the regent are obliged to supervise permit holders' compliance with the conditions of environmental approval. However, they can delegate this authority to specific

officials or the environmental inspector (EI), a specialized agency responsible for environmental protection and management.

The supervision of the environmental impact is regulated in GR Nr. 22 of 2021 concerning the Implementation of Environmental Protection and Management. This GR authorizes the EI to perform direct and indirect supervision. Direct supervision means the supervisor regularly or spontaneously visits the plantation areas to oversee the operations and ensure everything runs as expected. For indirect control, the supervisor does this by reviewing the data from the permit holder's regular reports or data in the environmental information system. Further regulation on EI supervision is set out in the Regulation of the Minister of State Apparatus Empowerment and Bureaucratic Reforms Nr. 22 of 2019 concerning The Functional Position of the Environmental Inspector and consists of direct and indirect supervision, law enforcement, and assessment and analysis.[41]

The MoEF can supervise the compliance of environmental permit holders (as issued by local governments) if the MoEF considers severe violations have arisen from ongoing environmental management. The 2009 Environmental Law also introduces tough sanctions for government officers who intentionally fail to supervise the compliance of permit holders.[42] A government official found guilty may be sentenced to a maximum of 1 year imprisonment or a maximum fine of five hundred million rupiahs.

4.3 Supervision by the Land (Agrarian) Sector

A plantation permit holder must also hold the cultivation right (*Hak Guna Usaha*: HGU). The permit holder must apply for this right to the Minister of Agrarian Affairs and Spatial Planning/National Land Agency (MoAASP/NLA) in a separate procedure. The MoAASP/NLA regulates the supervision of the right to cultivation in Regulation Nr. 7 of 2015 concerning the Arrangement and Procedure for Establishing the Cultivation Right. This supervision is divided as follows:

1. The Head of the Land Office (district level) supervises HGU of up to 25 ha;
2. The Head of the Regional Land Office (provincial level) oversees HGU between 25 and 250 ha; and
3. The MoAASP/NLA manages HGU of more than 250 ha.

41 See Minister of State Apparatus Empowerment and Bureaucratic Reforms Regulation Nr. 22 of 2019, Art. 7 and 8 (For more details about the various forms of direct and indirect supervision, law enforcement, and assessment and analysis).

42 A government official is categorized as intentionally failing to supervise when a violation of laws or permits results in pollution or environmental damage that causes loss of human life.

Under Article 204 of the MoAASP/NLA Regulation Nr. 18 of 2021 concerning Procedures for Determining Management Rights and Rights to Land, monitoring, and evaluation of HGU and land use for cultivation are carried out based on reports produced by holders of HGU, public complaints, or the results of supervision in the field, which are held periodically, starting 1 year after the certificate for an HGU has been issued. The article also stipulates that the minister supervises and controls cultivation rights through the provincial or district office. This supervision covers three main aspects: ensuring that land use conforms to land allocation and utilization planning documents, conformity with spatial planning, and compliance with any relevant obligations and prohibitions.

4.4 Supervision by the Forestry Sector

The use of forest areas for oil palm plantations is allowed as long as the plantation company obtains approval for forest area release (FAR) from the MoEF. Under the MoEF Regulation Nr. 8 of 2021 concerning Forest Management, Preparation of Forest Management Plans, and Forest Utilization in Protection and Production Forests, to occupy a forest area for plantation, the company must apply for FAR to the MoEF. When the location is still covered with trees, the company also needs approval for the use of timber for non-forestry activities (*Pemanfaatan Kayu untuk Kegiatan Non-Kehutanan*: PKKNK) for land clearing to prepare the area for oil palm plantations. PKKNK holders must submit a monthly report on the realization of PKKNK production to the head of the provincial forestry agency, which supervises the implementation of the PKKNK.

In sum, the types of permits and certificates and the institutions that oversee their issuance are shown in Table 2.

Table 2: Type of permit or certificate and the supervisory agency.

No	Permit/certificate	Supervisor
1	Plantation permit	MoA and the provincial and district plantation offices
2	ISPO certificate	ISPO Certification Board and MoA
3	Environmental approval	MoEF, provincial, and district environmental agencies
4	HGU certificate	MoAASP/NLA, the provincial land office, and district land offices
5	Approval of the release of forest areas	MoEF
6	PKKNK	The provincial forestry agency

5 The Implementation of Supervision of Oil Palm Plantation Operation: Experiences from the Kutai Kartanegara District

The oil palm plantations in the Kutai Kartanegara district reach 231,958 ha, consisting of both large private plantations (204,373 ha) and smallholder plantations (27,585 ha).[43] In this section, we examine how the district government supervises 68 large private plantations, covering about 88 percent of the total area of oil palm plantations. Of these 68 companies, eight are members of a holding company called Borneo Investama (BI). Five subsidiaries obtained their permits in 2006, one in 2007, and the remaining two in 2008, as presented in Table 3.

This section examines how the district government supervises BI subsidiaries, considering that this holding company operates the most extensive oil palm plantations or 64 percent of the total large private plantations in the district. We selected this holding company's case to illustrate the complexity of supervision and identify structural problems.

5.1 Evaluation of the Implementation of Plantation Businesses

The supervision of oil palm plantations' activities is conducted along two axes. First, it is carried out by each level of government (central, provincial, and district/

Table 3: List of the sub-companies (pseudonyms) and size of permit and HGU areas.

	Companies	Permit areas	HGU areas
1	PT. Borneo I	19.000 ha	8.230 ha
2	PT. Borneo II	9.500 ha	6.972 ha
3	PT. Borneo III	20.000 ha	8.349 ha
4	PT. Borneo IV	21.000 ha	9.766 ha
5	PT. Borneo V	20.000 ha	15.136 ha
6	PT. Borneo VI	18.000 ha	6.756 ha
7	PT. Borneo VII	20.000 ha	15.371 ha
8	PT. Borneo VIII	21.000 ha	8.294 ha
	Total	148.500 ha	78.874 ha

43 BPS Kaltim, *Provinsi Kalimantan Timur Dalam Angka 2021* (Samarinda: Badan Pusat Statistik Kalimantan Timur [BPS Kaltim], 2021), pp. 385, 395, 397.

municipal) under their respective jurisdiction. Supervision oversees the technical aspects of plantations during the development and operational stages. Second is sector-based supervision, performed by sectors related to plantations, such as the environment, land, and forestry. Supervision is carried out by the relevant ministries representing the central government (MoA, MoEF, and MoAASP/NLA), the provincial governor through the local plantation and environmental agencies, and the regent through the district plantation and environmental agencies.

The complexity of these rules and the division of supervisory authority give rise to conflicts in carrying out supervision, as we will show below. Furthermore, the regulations made by these various sectors also tend to be incomplete and often create a legal gap in supervision. It may, for example, lead to an invalid investigation because the wrong supervisor or institution carried it out.

5.1.1 Supervision at the Plantation Development Stage

Within 3 years of obtaining the permits, none of the eight subsidiaries had facilitated the development of community plantations. Neither did the companies fulfill their obligations to establish partnerships with smallholders, employees, and surrounding communities. Six of the eight plantation companies planted oil palms outside their permit areas (2.017 ha). Furthermore, the plantation companies failed to periodically report their activities to the Kutai Kartanegara district plantation agency. Based on our review of licensing documents, the companies submitted their last report in November 2015.

The district plantation agency issued three warnings to the eight plantation companies in response to such violations. On November 7, 2016, the first warning addressed the companies' negligence in realizing the planting in the designated area. Regarding the remaining land of the permit areas that cannot be cultivated, the plantation agency advised the companies to apply to the regent for permission to reduce the required planting area. The letter also warned the company not to carry out plantation development activities outside the permit area. The second warning was given on August 29, 2017. The content of this letter was the same as the first notice. Since the companies ignored both letters, the plantation agency was given a third warning on February 6, 2018. This third notice repeated the contents of the previous two letters and reprimanded the companies' attitudes for not complying with the earlier letters.

We underline three issues regarding the district government's response to these violations. First, the district government did not determine the class of these eight companies, whether included in the A, B, C, D, or E classifications, as stated in Article 18 of the 2009 Plantation Assessment Regulation. It is crucial to define the plantation

class as it relates to recommendations about the issues that need to be improved by plantation companies during the development stage. Without identifying the plantation classes, it becomes challenging to stipulate the factors that require improvement. It is also vital to highlight that under Article 19 of the 2009 Plantation Assessment Regulation, if the regent does not set the plantation class within 2 months after receiving the assessment results, the plantation business is considered Class A. This, in turn, has a significant consequence, especially considering that the eight subsidiaries of BI have failed to comply with most of their obligations during the development stage.

The second issue is that the warnings contained some inaccuracies, which caused legal uncertainty. For instance, it is shown by the first warning issued to PT. Borneo II mentioned that the company had planted 2078 ha, but the subsequent letters mentioned only 1804 ha. Further, in issuing the second and third warnings, the plantation district agency was also imprecise in referring to the letters' reference numbers. Such errors occurred in almost all second and third warnings to all companies. Third, given that the third warning letter was dated February 6, 2018, the licensor should have revoked the plantation business permits in June 2018 since the companies did not implement the recommendations within the stipulated warning period. However, the district government has not repealed the permit even though the deadline has passed, without any apparent reason.

On the ground, the companies seem not to have been operational in the last few years, and the plantations appear neglected and abandoned. The head of Loa Tebu village, Tenggarong sub-district, confirmed this: "I even helped with the costs of treating some employees who could not afford to pay a doctor and medicines," he said.[44] In Jembayan village, Loa Kulu sub-district, villagers have started reclaiming their land in the company's concession area because it has been abandoned for years.[45]

The district government's inaccuracy in issuing the warning letter is in violation of the principles of good governance, particularly the principles of accuracy and legal certainty. Our earlier research in reviewing administrative court decisions regarding plantation and mining permits in Kukar (2002–2008) demonstrates that the Kutai Kartanegara district government's loss in the administrative court cases was mainly due to their non-compliance with these two principles.[46]

44 Interview with the head of Loa Tebu village, Tenggarong sub-district (April 2019).

45 Interview with the head of Jembayan village, Loa Kulu sub-district (April 2019). At the time of writing (October 2023), such repossessed lands remained in use by these villagers.

46 M. Nasir, *Implementasi 9 (Sembilan) Urusan Pertanahan Di Kabupaten Kutai Kartanegara* (Tenggarong: Bagian Pertanahan Sekretariat Daerah Kabupaten Kutai Kartanegara, 2010), pp. 87–106.

5.1.2 Supervision at the Operational Stage

Dealing with the operational stage, the plantation agency conducted a series of plantation business assessments between April and June 2018. Based on the assessments, in September 2018, the regent issued decree Nr. 525 of 2018 regarding the Determination of Plantation Class Based on the 2018 Plantation Business Assessment Results. The decree classified the companies as grade V (fail). Subsequently, on December 17, 2018, the regent issued a notice that ordered the companies to improve their management, corporate social responsibility, regional economic, environmental, and reporting aspects of their operations. It also mentioned that if the companies did not comply with the order within 6 months, the regent would revoke the plantation permits on June 17, 2019. However, when this date arrived, the district government decided without any explicit consideration not to revoke the eight companies' plantation permits, even though the companies had failed to implement the recommendations.

In terms of authority, the district government can revoke the plantation permits, considering that since February 2019, the vice-regent (previously acting regent) has been appointed as the definite regent, as explained above. The regent argued that the companies' management had requested that the permits not be revoked And promised to reorganize the companies.[47] According to the Head of Business and Counseling of the District Plantation Agency, in March 2020, the agency submitted technical advice concerning the revocation of the permits to the District One-stop Investment and Integrated Services Agency – which organizes integrated licensing services in the district.[48] In June 2021, on behalf of the regent, the District One-stop Investment and Integrated Services Agency revoked all of the plantation permits of BI's subsidiaries.

This case demonstrated that the district government did not comply with the period of imposition of sanctions as stipulated in the legislation. The district government should have revoked the permits for the eight subsidiaries in June 2019, but the sanctions were only imposed 2 years later, in June 2021.

5.2 Evaluation of the Performance of Plantation Companies

Under the 2013 Plantation Permit Regulation, the performance evaluation of the plantation company is carried out based on a plantation business development

47 Interview with the regent (November 14, 2019).

48 Interview with the Head of Business and Counselling, The District Plantation Agency (April 17, 2020).

report. Evaluation is held through a field inspection to ascertain whether the report is aligned with the facts on the ground.

After November 2015, the district government did not evaluate the performance of BI subsidiaries because the companies had never submitted their report to the district government. In that last evaluation, the district government had warned the BI subsidiaries about two issues: the companies' negligence in submitting reports on plantation business developments and the poor financial performance of the companies.

Although the 2014 Plantation Law and the 2013 Plantation Permit Regulation oblige plantation companies to submit their plantation business development reports periodically, neither regulation provides sanctions if they do not submit the reports. Also, when the company's performance evaluation result suggests recommendations for performance improvement, the laws do not provide sanctions for a company that does not fulfill the recommendations. Thus, this situation is different from the evaluation of the implementation of plantation businesses, where the licensor can revoke the permit if the plantation company does not comply with the recommendations within a certain period.

5.3 Evaluation of the Environmental Permits

As set out in the 2009 Environmental Law, the regent can delegate the authority to supervise technical officials or agencies. For example, in the Kutai Kartanegara district, the environment and forestry agency was responsible for supervising environmental permit holders' compliance.

In the case of Borneo Investama, according to the environmental agency, they cannot carry out the monitoring. "The offices are more often closed than open. Even if the offices were open, we did not find anyone responsible for managing the companies' environment."[49] In September 2014, based on reports from residents of Santan Ulu Village, Marangkayu District, the Environment Agency evaluated PT Borneo II for allegedly polluting the Panggul River. The alleged pollution was confirmed by the results of laboratory tests conducted by the Environmental Research Center at Mulawarman University, which indicated that the acidity of the Panggul River water was beyond the environmental quality standards. The district environmental agency then invited the company and the community to reach a case settlement. Despite being asked multiple times to clarify the alleged contamination,

49 Interview with the environmental agency's head of environmental law enforcement (April 17, 2019).

the company never came and even rejected the accusation of polluting the environment. However, the environmental agency head did not want to bring the case to court. According to him, the district government just attempted to mediate the dispute between the company and the community on pollution.[50]

Furthermore, in March 2020, the environmental agency suspended PT Borneo III's environmental permit. This administrative sanction was based on two reasons. First, PT Borneo III did not manage the waste following the procedures set out in the environmental permit. Second, the company's owner was transferred to another management, but the license still contained the identity of the former licensee. Therefore, in the case of changes to company ownership, the company should also make adjustments to the environmental permit document.[51]

In sum, the supervision of the BI subsidiaries demonstrates three issues: the first is that the control carried out by the district government violated good governance principles, mainly the principles of accuracy and legal certainty, as stipulated in Law Nr. 30 of 2014 concerning Government Administration. For example, the regent was authorized to revoke the plantation permits, but he did it only 2 years after issuing the third and final warning letter (June 2019). The second issue is the incompleteness of supervisory norms exemplified by the absence of sanctions for local governments that are late in imposing sanctions on plantation permit holders. In addition, in the case of plantation performance evaluation, the company's obligation to submit reports on the progress of plantation activities is not accompanied by sanctions for violators. The last issue is the opportunity to exploit legal incompleteness for the company's benefit. Without sanctions for district governments that do not impose sanctions on companies that violate rules, it provides opportunities for plantation companies to influence local governments in making decisions regarding permits. In the context of the Kutai Kartanegara district, this needs to be underlined, considering also that the previous regent was dismissed due to a bribery case related to plantation licensing.[52]

On the other hand, in certain situations, implementing the supervision of oil palm plantations becomes complex because it is also related to other regulations

50 U. Mubin, "PT Kutai Sawit Plantation Siap Menempuh Jalur Hukum," Kompasiana, June 17, 2015, available at: <https://www.kompasiana.com/ufqilmubin/54f96a52a33311ef048b4e1c/pt-kutai-sawit-plantation-siap-menempuh-jalur-hukum>, accessed April 15, 2020.

51 R. Pahlevi, "PT MSPG Disanksi Pembekuan Izin Lingkungan, DLHK Ungkap Penyebabnya," Koran Kaltim, March 11, 2020, available at: <https://korankaltim.com/berita-terkini/read/29243/pt-mspg-disanksi-pembekuan-izin-lingkungan-dlhk-ungkap-penyebabnya>, accessed April 15, 2020.

52 See "Divonis 10 Tahun, Ini Detail Gratifikasi Bupati Rita Widyasari," Tempo, July 7, 2018, <https://nasional.tempo.co/read/1104550/divonis-10-tahun-ini-detail-gratifikasi-bupati-rita-widyasari>, accessed February 6, 2023.

governing the authority. For example, as we explained above, the central government, through Law Nr. 30 of 2014 and GR Nr. 6 of 2005, states that in the case of a district being led by an acting regent, he is not authorized to take strategic decisions or actions that impact changes in legal status, such as revocation of permits. So, when permit violations occur in the Kutai Kartanegara district, the acting regent cannot revoke the license. This situation constitutes a legal vacuum in the necessary supervision of oil palm plantations.

6 Challenges in Developing Supervision Governance of Oil Palm Plantation: The Incompleteness of Law and Economic Interest

In November 2019, the President of Indonesia issued Instruction No. 6 of 2019, which outlines the National Action Plan for Sustainable Palm Oil Plantations 2019–2024. This move serves as a significant stride towards promoting sustainable practices within the country's palm oil industry. This instruction emphasizes the need to enhance planters' capacity and capability, carry out environmental management and monitoring, improve plantation governance and legalize land ownership, promote palm oil as a renewable energy, and prioritize diplomacy to achieve sustainable palm oil plantations.

The five priorities above show that the government places great emphasis on the development of oil palm plantations due to its significant economic, socio-cultural, and ecological impact, surpassing that of other plantation commodities. It is made apparent through various government policies, including a privilege under Law Nr. 11 of 2020 on Job Creation and Government Regulation Nr. 24 of 2021, which covers the procedures for imposing administrative sanctions and non-tax state revenue originating from administrative fines in the forestry sector. This industry is granted the privilege of "amnesty" from criminal penalties under Law Nr. 41 of 1999 on Forestry and Law Nr. 18 of 2013 on Prevention and Eradication of Forest Destruction. The imposition of criminal sanctions under these two laws has been replaced with the obligation to pay fines, which are calculated based on the applicable regulations. This policy also covers the plan to legalize 3.3 million hectares of oil palm plantations situated in forest areas.[53] This action is actually not that surprising, as Greenpeace

53 W.M.C. Nababan, "Perbaikan Tata Kelola, Pemerintah Akan Putihkan 3,3 Juta Hektar Sawit di Kawasan Hutan," Kompas.id, June 23, 2023, available at: <https://www.kompas.id/baca/ekonomi/2023/06/23/perbaikan-tata-kelola-pemerintah-akan-putihkan-33-juta-hektare-sawit-di-kawasan-hutan>, accessed October 18, 2023.

reported that the Indonesian government had also granted such an "amnesty" to oil palm plantations in forest areas in both 2012 and 2015.[54]

This sector's protection by the government is also demonstrated by the MoAASP/NLA's reluctance to provide data and information about HGU for plantations in Central, West, East, South, and North Kalimantan, despite a Supreme Court order on March 26, 2020, requiring them to do so for Forest Watch Indonesia. Even in December 2022, the Ombudsman of the Republic of Indonesia declared that the MoAASP/NLA's actions constituted maladministration.[55] The Minister of AASP/NLA has declined to comply, stating that the information is not meant for public consumption. The minister believes that if the HGU data is made public, it could pose a risk to national interests, particularly the palm oil industry.[56]

In East Kalimantan, the provincial government launched the Green Kaltim program in 2010, intending to promote a green economy. One way to achieve this goal was by encouraging the development of sustainable oil palm plantations in the region. Oil palm is the primary plantation commodity in East Kalimantan, which spans a staggering 1.41 million hectares of land in 2022. Plantations have substantially bolstered the region's economy, representing around 4.5 percent of its Gross Regional Domestic Product (GRDP) between 2018 and 2022.[57] Considering the significant contribution of oil palm plantations to the economy of East Kalimantan, the governor rejected European Union (EU) propaganda, which stated that oil palm plantations cause damage to forests and ecosystems. He argued it is merely a business strategy of the EU because Europe is the leading sunflower oil producer.[58]

Furthermore, to follow up on the national action plan, in July 2022, the governor of East Kalimantan issued Regulation No. 19 of 2022, which outlines the regional action plan for sustainable palm oil plantations in the province for 2019–2024. It is noticeable that the policy was released more than 2 years after the president's initial instructions. It raises concerns about the policy's effectiveness since the action plan

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54 Greenpeace, *Sawit Ilegal dalam Kawasan Hutan: Karpet Merah Oligarki* (Jakarta: Greenpeace, 2021) pp. 60–61.

55 *See* Ombudsman Republik Indonesia, *Rekomendasi Nomor: 0002/RM.03.01/0750.2017/XII/2022*, available at: <https://ombudsman.go.id/produk/lihat/767/16_file_20230328_094150.pdf>, accessed October 17, 2023.

56 "Koalisi LSM Polisikan Kementerian Agraria Soal Data HGU," CNN Indonesia, March 25, 2019, available at: <https://www.cnnindonesia.com/nasional/20190325213224-12-380621/koalisi-lsm-polisikan-kementerian-agraria-soal-data-hgu>, accessed October 18, 2023.

57 BPS Kaltim, *Provinsi Kalimantan Timur dalam Angka 2023* (Samarinda: Badan Pusat Statistik Provinsi Kalimantan Timur [BPS Kaltim], 2023), p. 671.

58 E. Nasrul, "Gubernur Kaltim: Industri Sawit Indonesia Ramah Lingkungan," Republika, July 18, 2023, available at: <https://ekonomi.republika.co.id/berita/rxzz90451/gubernur-kaltim-industri-sawit-indonesia-ramah-lingkungan>, accessed October 15, 2023.

will only be in effect for just over 2 years, as it was enacted in July 2022 and is set to end in 2024.

The dynamics of oil palm plantation developments, as explained above, demonstrate that the government's commitment to execute plantation governance in the oil palm industry is often overshadowed by the interests of investors who claim to act in the name of the national economy.[59] The development of policies in the industry is dynamic and unpredictable since they reflect the constant struggle between the government's vision of sustainable and socially responsible development on the one hand and the investors' short-term economic goals on the other. We argue that the tendencies and policy choices shown by the central and provincial governments when faced with non-compliance with plantation companies become precedents or preferences for district governments in overseeing oil palm plantation activities within their respective regions.

As discussed above, legislation concerning the supervision of oil palm plantation operations is also spread across various sectors, such as agriculture, forestry, environment, and land. One ministry is unlikely to pay regard to a statute primarily directed at regulating the portfolio of another. In performing its function, for example, MoA is likely to primarily refer to the regulations in their jurisdiction rather than other environmental, forestry, and spatial planning regulations, even though such related rules might also be related to plantation issues. Besides, it is also regulated by central, provincial, district, or municipal governments. The consequence of sector-based and tiered legislation is the incompleteness of provisions, often leading to a lack of supervision of oil palm plantation operations.

6.1 The Causes of Legal Incompleteness

This research identified three main causes of this incompleteness of law. *First* is the delay in establishing and implementing regulations. Most of the laws that regulate the supervision of oil palm plantation operations only provide general provisions of supervision and monitoring, and they require the government (central, province, and district) to issue further regulations. In many cases, these implementing regulations also need further regulations to implement them. For example, a government regulation always requires another instrument, such as presidential or ministerial regulations, for its implementation. At the regional level, provincial or district regulations entail regulations and decisions from the governor or regent.

59 See, e.g., BersihkanIndonesia, *Omnibus Law: Kitab Hukum Oligarki*, (Jakarta: #BersihkanIndonesia, 2020); S. Riyanto, *et al.*, *Kertas Kebijakan: Catatan kritis terhadap UU No. 11 Tahun 2020 tentang Cipta Kerja* (2nd ed., Yogyakarta: Fakultas Hukum Universitas Gadjah Mada, 2020).

The problem in practice is that often there is a long delay in providing the implementing regulations if they are issued at all. For example, the 2018 Provincial Regulation delegated the formation of 13 gubernatorial rules and one decree. As of October 2023, of the 13 delegated regulations, the provincial government has only issued three, two concerning management and criteria for areas with HCV (2021) and the other regarding sustainable plantation communication forums (2018). Also, to follow up on the National Action Plan for Sustainable Palm Oil Plantations 2019–2024, the governor of East Kalimantan issued Regulation No. 19 of 2022 in July 2022, which outlines the regional action plan for sustainable palm oil plantations in the province for 2019–2024. It is worth noting that the policy was released more than 2 years after the president's initial instructions. It raises concerns about the policy's effectiveness since the action plan will only be in effect for just over 2 years, as it was enacted in July 2022 and is set to end in 2024. In another example from Kutai Kartanegara district, the 2014 District Regulation requires 15 heads of district regulations and two decrees. At the time of writing, the district government had only promulgated one head of district regulation concerning plantation business partnerships in 2016. For law enforcement, this delay in establishing and implementing regulations creates a risk that the provisions of the regional regulations will remain inoperable.

The *second* factor is the absence of sanctions. Many, if not most, laws and regulations in Indonesia set government obligations without being accompanied by sanctions if the government fails to fulfill them. In terms of plantation supervision, as illustrated in the case in Kutai Kartanegara district, the regent did not revoke the plantation permit even though the permit holders had violated their obligations and the procedural requirements for revocation had been met. Additionally, we perceive the regent's reluctance to revoke the permits due to economic considerations, given that this holding company holds 64 percent of the total large private plantations in the district.[60] The choice was also influenced by the policy model of the central government in addressing plantation companies' violations at the national level. It is, for instance, demonstrated by the central government's plans to legalize 3.37 million hectares of illegal plantations under a sweeping amnesty program introduced under the 2020 Job Creation Law. The proposal suggests that companies be given a three-year grace period to obtain the necessary permits, including rezoning their operational area to allow palm cultivation and paying any required fines to resume their operations.[61]

Similarly, with regard to the responsibility of preparing delegated regulations, various levels of government or related agencies sometimes neglect the need to draft

60 BPS Kaltim, *supra* note 43.

61 See, e.g., H.N. Jong, "Report: Half of Plantations in Indonesia's Palm Oil Heartland Are Illegal," Mongabay, October 13, 2023, available at: <https://news.mongabay.com/2023/10/report-half-of-plantations-in-indonesias-palm-oil-heartland-are-illegal/>, accessed January 24, 2024.

such implementing regulations despite acknowledging that technical regulations are necessary for effective rule enforcement. Moreover, applying a regulation without accompanying implementing rules may lead to legal uncertainty, as subjective interpretations of its execution may arise. This situation may also result in law enforcement breaches due to incomplete guidelines.[62] By the same token, whereas some regulations contain deadlines by which implementing regulations must be enacted, those regulations rarely impose any consequences for breaching the time limits. The absence of sanctions allows the government to ignore deadlines, which creates a risk that provisions cannot be appropriately implemented.[63]

Further, the style of legal drafting is a *third* factor that creates legal incompleteness. Laws and even (implementing) regulations in Indonesia commonly consist of statements of principle or policy rather than rules and tend to avoid precise rule formation. It is, for example, indicated by the term 'reward' in Article 12 of the 2014 Plantation Law. This term refers to something indigenous peoples receive when they allow their land to be used as a plantation area. The article's explanation stated 'rewards' as, among other things, money or shared ownership. However, the term 'reward' is not entirely clear since, in several cases, the plantation company determines the type and amount of reward without the communities' consent.[64] Therefore, the Agency of National Law Development (BPHN) has recommended replacing the term 'reward' because it can be misused to advance specific interests and lead to an abuse of power.[65]

The legal drafting style often employs imprecise or ambiguous words, complex terms, and language that is hard to understand, even in the elucidation of a regulation. Whereas the elucidation serves to clarify complex terms used in the legislation, it is often limited to simple phrases such as 'sufficiently clear' (*cukup jelas*), even though the term's meaning is unclear and needs clarification. Take, for example, Article 37 (1) of the 2013 Plantation Permit Regulation. Under this provision, one of the reasons for rejecting an application for plantation business diversification is if the business to be carried out is contrary to public order (*ketertiban umum*). This regulation does not clarify, not even in its elucidation, what public order means and when and in what cases a business can be categorized as disturbing public order. Incomplete norms due to complex terms are also found in Article 31 (2) of the 2018 Provincial Regulation. This clause states that the plantation permit is granted upon

62 M. Yusuf, *Keberlakuan Peraturan dalam Undang-Undang Yang Tidak Kunjung Diterbitkan Peraturan Pemerintah sebagai Peraturan Pelaksananya*, 5 Jurnal Restorasi Hukum, no. 1 (2022), 84.

63 See *supra* note 30, Philipus M. Hadjon (ed.), Pengantar Hukum Perizinan (Surabaya: Yuridika, 1993), p. 56

64 M. Nur Sholikin, *Regulasi Eksploitatif Penebar Ancaman* (Jakarta: ELSAM, 2016), pp. 26–29.

65 BPHN, *Laporan Akhir Analisis dan Evaluasi Hukum Dalam Rangka Peningkatan Kedaulatan Pangan* (Jakarta: Badan Pembinaan Hukum Nasional [BPHN], 2016), p. 56.

consideration of the technical aspects of the plantation and economic, social, and environmental feasibility. However, no clarification as to what constitutes 'feasibility' is given, neither in the clause nor in the article's elucidation.

6.2 The Impacts of Legal Incompleteness

The incompleteness of legal norms on supervision prevents local governments from optimally supervising oil palm plantation activities and even has them decide to not, or to postpone, revoking plantation permits. This study identified that such weaknesses in supervision due to the incompleteness of provisions cause *environmental damage.* If the provisions regarding supervision are general statements lacking technical instructions as to when, how, and who is authorized to control plantation activities, provisions regarding supervision cannot be appropriately implemented. In the case of Kutai Kartanegara district discussed above, the district government preferred an out-of-court settlement when a plantation company was suspected of committing pollution. Even when the plantation company failed to honour the government's mediation invitation, the government did not impose any sanctions on the company. The absence of implementing regulations regarding supervision made the district government hesitant to take firm action against the company suspected of polluting the environment.

The second consequence of incomplete norms is *conflict between plantation companies and communities*. For instance, in the Kutai Kartanegara district, such conflict arose through environmental damage caused by oil palm plantation activities. As explained above, the local government's indecisiveness to act against palm oil companies triggered protests from the impacted communities, causing conflicts between them and the companies.[66] Another cause of company–community conflict is the failure of a company to fulfill its promise to develop partnership plantations. In the case of the Kutai Kartanegara district, villagers reclaimed land that would be used for an oil palm plantation because the company did not meet its promise to facilitate the development of partnership gardens around the plantation concession.

6.3 Overcoming Legal Incompleteness

In order to ensure that supervisory regulations are accurate and comprehensive, the government should provide more detailed rules, which can reduce the number of

66 Human Rights Watch *supra* note 25, at 57–60; see also Berenschot, *supra* note 10, at 17–18.

delegated regulations. This has been demonstrated over the last 3 years, when government regulations, such as implementing the regulations of the 2020 Job Creation Law, have contained detailed rules in hundreds of articles. This legal drafting style can also be adopted at the provincial and district levels by making laws more detailed so that they do not require further arrangements in gubernatorial and head of district regulations or decrees. When delegation to regional head regulations is unavoidable, the preparation of implementing regulations can be drafted simultaneously with provincial or district regulations so that they can be enacted in a short period following the promulgation of provincial or district regulations.

Furthermore, drafters should avoid complicated terms that require further clarification in drafting regulations. If these cannot be avoided, then the article's elucidation must explain what is meant. Finally, drafters need to include sanctions for officials who do not carry out obligations stipulated in regulations. Without such sanctions, it will become a voluntary rather than mandatory option if they do not.

Meanwhile, to address the existing legal incompleteness, discretionary power might be an alternative. Under Law Nr. 30 of 2014 concerning Government Administration, discretion is a government official's deed or decision to overcome concrete problems faced in the administration of government in terms of laws and regulations that provide choices, do not regulate, are incomplete or unclear, or when there is government stagnation. In order to avoid misuse, government officials should ensure that employing discretion in overcoming legal incompleteness follows statutory provisions and good governance principles, is based on objective reasons, does not cause a conflict of interest, and is carried out in good faith (Article 24).

7 Conclusions

This article has highlighted a series of problems in the existing legal framework of the development of oil palm plantations that regulate and supervise the activities of oil palm plantation corporations in Indonesia, especially in the Kutai Kartanegara district. The regulation on supervision of oil palm plantations spans multiple levels of government (central, provincial, and district) that all hold relevant authority. The control is also cross-sectorally based since plantation permit holders are subject to environmental permits, ISPO certification, HGU certification, PKKNK, and MoEF approval on FAR. Each permit and certificate imposes different obligations, the implementation of which is supervised by various agencies from the plantation, environmental, land, and forestry sectors. The consequence of sector-based and tiered legislation is the incompleteness of provisions, overlaps, and also a lack of clarity about respective authorities, which makes the supervision overly complicated.

This research discovered three main causes of this incompleteness of law in supervising oil palm plantations: the delay in establishing the implementing regulations, the absence of sanctions in case of non-compliance, and the use of imprecise or ambiguous words and complex language. This kind of incompleteness of norms gives rise to legal uncertainty in supervising oil palm plantations, weakens governmental supervision of oil palm plantations, and can lead to environmental damage and conflict between oil palm plantations and villagers.

Furthermore, this legal incompleteness benefits oil palm plantation companies. Although government agencies undertake a series of supervisions, these are hampered by the incompleteness of regulations. The district government, for instance, can consider delaying or not imposing penalties for permit violations in light of the absence of consequences to the district government in cases they do not revoke the permits.

In order to address such incompleteness, this study proposed preventative action in drafting regulations. This strategy entails crafting more comprehensive guidelines to reduce the need to delegate authority to lower levels of government. When such delegation is necessary, implementing regulations can be developed along with the parent regulation to expedite their implementation soon after the higher rule is promulgated. Subsequently, drafters should avoid complicated terms that require further clarification in drafting regulations. If it cannot be avoided, then the article's explanation must explain what the word or concept means. Finally, drafters need to consider sanctions for officials who do not carry out the obligation as stipulated in regulations. Furthermore, concerning the existing legal incompleteness, government officials should be able to apply discretion to address the legal gap. This policy instrument is designed to overcome laws and regulations that provide choices, do not regulate, are incomplete or unclear, or when there is government stagnation.

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