

CHAPTER II

LITERATURE REVIEW

A. Land Plantation

The plantation business in Indonesia is still a promising sector as it can pass the economic and financial crisis. In other words, the investment in the plantation sector is potential to be developed. Therefore, the Indonesian Government considers plantation sector as a potential natural resource management that needs to be managed carefully, planned and developed professionally, and operated in responsible manner.⁶

Based on Basic Agrarian Law No.5 year 1960 on The Basic Provisions concerning the Fundamentals of Agrarian Affair (BAL), it is the duty of every individuals, corporate body, or institution which has legal relationship with land to take care of the land, to improve its fertility, and to prevent it from damage by taking into consideration the interests of the economically weak.⁷

Based on the Ministry of Agriculture Regulation No. 98 year 2013 on the Guidelines for Licensing of Plantation Businesses, the types of plantation business are:⁸

⁶Pelatihan SDM, 2016, "Hukum Perkebunan", <http://www.pelatihan-sdm.net/hukum-perkebunan/> accessed on Wednesday, November 22nd, 2017 at 4.11 pm.

⁷Article 15 of Basic Agrarian Law No. 5 year 1960 on the Basic Provisions concerning the Fundamentals of Agrarian Affairs

⁸Article 3 of The Ministry of Agriculture Regulation No. 98 year 2013 on the Guidelines for Lincensing of Plantation Businesses

1. Cultivation of plantation corps
2. Plantation product processing industry
3. Integrated plantation business between cultivation and plantation product processing industry

There are several types of Licensing of Plantation Enterprises such as, IUP-B (Cultivation Plantation Business License), IUP-P (Processing Plantation Business License) and IUP (Plantation Business License). The plantation companies that have the IUP or IUP-B have to build a community plantation within 20% of the total area. Community here refers to the people who live around the IUP or IUP-B area and they need to be recruited as the workers at the plantation.⁹

The IUP-B is given to businesses with an area of 25 acres or more. Then, IUP-P is given to businesses with a minimum of processing capacity, such as for more than 1000 TCD sugar cane, palm oil more than 5 tones per hour. IUP is given to the cultivation of which must be integrated with the processing unit, such as palm oil with an area of 1,000 hectares or more, sugar cane with an area of 2,000 acres or more.

B. Land Procurement

Based on Basic Agrarian Law No. 5 year 1960 on Basic Provision concerning the Fundamentals of Agrarian Affairs (BAL), in the interest of public as well as of the nation and of the state and in the collective interest

⁹Surya Abadi and Zaili Rusli, 2014, "Implementasi Perizinan Usaha Perkebunan", Vol. 2 No. 3, *Jurnal Administrasi Pembangunan*, Riau, p. 4

of the people, land rights can be revoked by providing appropriate compensation and in accordance with the procedure which is to be stipulated by way of an Act.¹⁰ The land procurement is the activities which related to the ownership of the land by giving the compensation to release or hand over the land, buldings, plants and all objects with it.

There are two parties that must have a balanced respect in the land procurement -public interest and government interest. The implementation of land procurement based on the Regulation of the Minister of Home Affairs No. 15 year 1975 is to release the legal relationship which originally exist between the owner or the holder of the land by giving the compensation.

On June 17th 1993, the Presidential Decree No. 55 year 1993 on land procurement for the implementation of development for public interest was issued.¹¹ Land procurement in the activities for public interest by the government are disposals or transfer of land rights. Beyond that, land procurement is carried out by saling and purchasing, exchanging and other ways. It means that private sector cannot utilize the president decree.¹² In this Presidential Decree, the land procurement is carried out on the basis of the direct discussion principle.

Based on Article 23 paragraph (1) and (2) Presidential Regulation No. 63 year 2013 on The National Land Agency of Republic Indonesia,

¹⁰Article 18 of Basic Agrarian Law No.5 year 1960 on The Basic Provisions concerning the Fundamentals of Agrarian Affairs

¹¹Maria S.W. Sumardjono, 2001, *Kebijakan Pertanahan antara Regulasi dan Implementasi*, Jakarta, Kompas. p. 72

¹²*Ibid.*

the Deputy structure of Land Procurement with the duty to formulate and implement a policy in the land procurement for development to public interest and the determination of land rights agency was formed.

When the land procurement is carried out by the Regional Office of National Land Agency, then the compositions of the membership in the implementing the procurement of land are:¹³

1. The head of regional office of the National Land Agency as chairman.
2. The head of Land Rights and Land Registration or an Echelon III levels official who is appointed as a member.
3. Head of the local Land Office at the location of land acquisition as a member.
4. The Officials of Unit Working Device Provinces most low level Echelon III: Land Affairs or official-level Echelon III appointed as members.
5. The Officials of the Regional Units Of the Device Work District/City level the lowest Echelon III: Land Affairs or official-level Echelon III appointed as members.
6. The Head of Sub-district (*Camat*) or other local name at the location of the provision of land as a Member.
7. The Head of the Village (*Lurah/Kepala desa*) or the another name of land procurement in the ground as a Member.

¹³Jarot Widya Muliawan, 2016, *Cara Mudah Pahami Pengadaan Tanah untuk Pembangunan*, Yogyakarta, Buku Litera Yogyakarta, p.54-55

8. The Head of Land Regulation Section officer-level Echelon IV who appointed as Secretary and interim members.

Land procurement is the activity obtaining the land by giving the compensation for a person/company which is entitled the land. It is usually related to the release of land rights to the public and private interests which are created the problems in society because everyone has different interest.¹⁴ Based on Law No. 2 year 2012 on The Land Procurement for the Development to Public Interest, land procurement is the activity of providing land by giving the compensation for fair losses to the right parties.¹⁵

Then based on Law No. 2 year 2012 in conjunction with Presidential Regulation No. 71 year 2012 on The Implementation of Land Procurement for Development for The Public Interest, among the parties who will receive the compensation are:¹⁶

1. Holders of land rights
2. Holders of management rights
3. Nadzir for land endowments
4. Former owner of customary land
5. The citizens of customary law
6. The parties who controls the state land in good faith

¹⁴Hengki Andora, 2016, “Aktualisasi Nilai-Nilai Pancasila dalam Pengadaan Tanah bagi Pembangunan untuk Kepentingan Umum”, Vol. 45 No. 2, *Masalah-Masalah Hukum*, ISSN: 2086-2695, Fakultas Hukum Universitas Diponegoro, Semarang, p. 108

¹⁵Article 1 paragraph 2 of Law No. 2 year 2012 on the Land Procurement for the Development to Public Interest

¹⁶Article 17 of Presidential Regulation No. 71 year 2012 on the Implementation of Land Procurement for the Development to Public Interest

7. Basic mastery of the holders of land
8. The owners of buildings, plants, or other objects which related to the basic land

C. Autonomy

The definition of Local Government is based on Law No. 23 year 2014 on Local Government. It is the implementation of government affairs by the local government and the legislature according to the principles of autonomy and assistance with the principle of broad autonomy within the system and the principles of the Republic of Indonesia as defined in the Constitution of the Republic of Indonesia Year 1945. In the paragraph (3) Local Government is the head of the official elements of the Regional Government led the implementation of government affairs under the authority of the autonomous region.¹⁷

This matter is related to the power and authority between central government and local government. The authority of local government comes from central government, because they have the highest power and authority in the government. Since Indonesia is an unitary state, then basically the responsibility of governmental duties are still remained in the central government.

The system of Indonesian government is decentralization; it means there are certain duties that were delivered by central government to local

¹⁷ Article 1 paragraph (1) and (2) of Law No. 23 year 2014 on Local Government

government.¹⁸ Decentralization is the handover of authority, power sharing, delegation of authority and regional division within the government structure in a unitary state. They create the authority of local government in the implementation of regional administration preceded by the division of regional government within the frameworks of the autonomous region.¹⁹

Indonesia is a big country. So, it is impossible to manage all the things through central government. That is why Indonesia has divided into several provinces and it also subdivided into smaller regions called local government which consists of:

1. Governor
2. Mayor
3. Regent
4. And all the devices of area

According to Adam Smith's theory on the authority, local government is divided into two systems namely, dual system and fused system. Local government in the dual system is carried out separately from central government. Whereas, in the fused system of central government and local government is implemented in one unit with a government official who appointed to supervise.²⁰

¹⁸ Indah Qurbani, 2014, "Hubungan Wewenang Antara Pemerintah Pusat dan Daerah dalam Negara Kesatuan Republik Indonesia", Vol. 9 No. 2, *Rechtidee Jurnal Hukum*, p. 3

¹⁹ Michael Barama, 2016, "Pelaksanaan Pemerintah Daerah dan Penerapan Sanksi Administrasi dalam Peraturan Daerah" Vol. 22, *Jurnal Hukum Unsrat*, Manado, p. 6

²⁰ Ni'matul Huda, 2009, *Hukum Pemerintahan Daerah*, Nusa Media, Bandung, p. 25

In carrying out their duties, Local Government still has relation with the central government and other local government, in term of authority, budget, public service, utilization of natural resource, and other resources, and it should be done in fair and consistent manner.²¹

D. Dispute Settlement on the Land Cases

1. The Definition of Dispute

Dispute is a conflict or controversy that occurs between individual and individual, individual and group, group and group, company and company, company and country, or country with another country, etc. Here is detail definition of dispute:²²

“Dispute is a conflict or controversy; a conflict of claims or allegations on the other. The subject of litigation; the matter for which a suit is brought and upon which issued is joined, and in relation to which jurors are called and witnesses examined”.

According to Nader and Fod in their book on Dispute Process in Fen Societies there are three phases in dispute process, they are:²³

- a. Pre-conflict is the State of the underlying sense of unsatisfied person
- b. Conflict is where the parties who aware of the feeling of dissatisfaction

²¹ Ibid, p.26

²² Henry Campbell Black, 1995, *Black's Law Dictionary Second Edition*, New Jersey, the Lawbook Exchanged LTD, p. 378.

²³Mulyo Putro, 2002, *Pluralisme Hukum dan Penyelesaian Sengketa di Luar Pengadilan*, Bandung, Fokusmedia, p. 188

c. Dispute is where the conflict is declared or involved the third parties.

The activities on establishment of factory which is not discipline will cause a lossess, illegal mining, waste dumps, or other things which create a dispute. The people feel in dispute if these undisciplined impacts will disturb their environmental lives. When the citizens are treated unfair of their rights, then the dispute occurs.If they cannot resolve it by themsleves, they ask the third parties to find the solution of the conflict.

There are several factors that trigger the dispute, such as:²⁴

a. Conflicts of Data

The conflicts were caused by lack of information, miss information, different ideas, different interpretation of data and different interpretation of procedure.

b. Conflicts of Interest

Every party has an interest in performing its activity; without activity there will be no cooperation. There are several things emerge in the conflict of interest:

- 1) Competitive feelings
- 2) The interest of the substance from the parties
- 3) Procedural interest
- 4) Psycological interest

²⁴Joni Emirzon, 2001, *Alternatif Penyelesaian Sengketa di Luar Pengadilan*, Jakarta, Gramedia Pustaka Umum, p.21-22

c. Relationship Conflict

Relationship conflict can occur by the presence of a strong emotion, misperception, poor communication or miss communication and repetitively negative behavior.

d. Structural Conflict

Structural conflict can occur due to a pattern of destructive behavior or interaction controls, the possession or distribution of resource, the presence of power and the power of geography; psychological factors are not the same or environmental factors that blocking the cooperation and less time.

e. Conflict of Value

Conflict of value occurs because of differences in opinion or behavior evaluation criteria. The existence of different ideology and religious view of life, presence of own judgment without considering other's judgements.

2. Land Dispute Settlement

a. Land Dispute

Land dispute is a conflict between two parties or more or a group who fight for what they have claimed before. In the end, there is a party who is more entitled than the other to the disputed land and therefore the settlement of the legal dispute depends on

the nature of the filed matter and the process will require several stages before obtaining the decision.²⁵

Based on Regulation of the Head of National Land Agency Republic of Indonesia No. 3 year 2011 on the assessment and handling of land management case defines land dispute between individual, legal entity or institution that has no socio-political impact.²⁶ The problem of land is now getting complex as a result of the increasing need for land. The competition to get a land causes a complicated problem. The implementation of BAL (The Basic of Agrarian Law) nowadays is more difficult because the parties were equally unwilling to advance.

Land dispute are divided into three, as follows:²⁷

- 1) Land dispute between individual, legal entity, or institution with no widespread impact
- 2) Land disputes between individual, group, organization, legal entity, or institution which has tendency or has wide impact
- 3) Land disputes handled and settled through the judiciary

There are two kinds of the nature of dispute. First, the state administrative dispute. The dispute arises because of the issuance

²⁵Juniyanto, 2016, "Peran Pemerintah Daerah Dalam Penyelesaian Sengketa Tanah Untuk Pengadaan Tanah Bagi Pertambangan Pasir Besi Di Kabupaten Kulon Progo" (Undergraduate Thesis, Faculty of Law Universitas Muhammadiyah Yogyakarta), p. 13

²⁶Article 1 paragraph (2) on Regulation of the Head of National Land Agency Republic of Indonesia No. 3 year 2011 on the Assessment and Handling of Land Management Case

²⁷Hukum Online, 2016, "Penyelesaian Sengketa Tanah Tanpa Melalui Pengadilan", <http://www.hukumonline.com/klinik/detail/lt530abe7cd936a/penyelesaian-sengketa-tanah-tanpa-melalui-pengadilan> accessed on Monday, November 20th, 2017 at 1.12 pm.

of a State Administrative Decree by the state administrative agency or official. So, this dispute should proceed to the Administrative Court. The second one is civil disputes. This dispute arises from a breach of contract or an unlawful act. A civil dispute is settled through a lawsuit to the General Court or it was settled by out of court.

b. Land Dispute Settlement

Land in the juridical definition is covers the surface of earth as regulated in Article 4 paragraph (1) of Basic Agrarian Law (BAL). The rights of land include the rights to a certain part which is bound on the surface of the earth. There are three factors causing the problem of land dispute, such as the system of land administration especially in the case of land ownership, uneven distribution of land ownership and the legality based on formal evidence (certificate).²⁸

There are two kinds of dispute settlement, they are litigation and non-litigation. In litigation, the dispute is settled by the court. In this case when one of party was submitted the case to the State Administrative Court or General Court based on the case. Non-

²⁸ Amelia Pratiwi, 2014, "Analisis Hukum atas Penyelesaian Sengketa Tanah Bumi Flora, Aceh", Vol. 2 No. 17, *Pena Justisia*, Fakultas Hukum Universitas Swadaya Gunung Jati, Jawa Barat, p. 10

litigation is when both of parties agreed not to bring the dispute to the court but they choose to settle it by themselves.

There are Alternative Dispute Resolutions; it means the parties may settle the dispute outside of the court with or without the assistance of third party, they are:²⁹

- 1) Negotiation, is a process where the parties or the representative trying to resolve the dispute without third party by discussion, persuasive approach and bargaining.
- 2) Mediation, is dispute resolution through negotiation process to reach the mutual agreement. In this process there will be third party to mediate.
- 3) Conciliation, is a process that similar to mediation but it is governed by the law which the party is required to attend through the process. The conciliator is responsible for the norms in accordance with the law and legal action will be arisen if the the parties cannot achieved the agreement.³⁰
- 4) Arbitration, where the parties are agreed to take their case to ask the third party's assistance namely arbitrator. The decision of arbitration is final and binding because it has a legal force.

²⁹Urip Santoso, 2016, "Penyelesaian Sengketa dalam Pengadaan Tanah untuk Kepentingan Umum", Vol. 21 No. 3, *Perspektif*, ISSN: 14103648, Fakultas Hukum Universitas Airlangga, Surabaya, p. 193

³⁰Cicut Sutiarto, 2011, *Pelaksanaan Putusan Arbitrase dalam Sengketa Bisnis*, Jakarta, Yayasan Pustaka Obor Indonesia, p. 52

Based on Article 2 Law No. 5 Year 1960 on the Basic Regulation of Agrarian Principles that land affairs are the authority of government also the land dispute settlement. It is also regulated in Presidential Regulation No. 63 Year 2013 on the National Land Agency as non-department government agency has the duty to carry out the government duties in the field of land nationally, regionally and sectorally. However based on the Presidential Decree No. 34 year 2003 about National Policy in the Field of Land, which mentions that most government authority in the field of land held is district government or city mayor who has the right to find dispute settlement of land affairs.³¹

³¹Ilyas, Abdurrahman dan Sufyan, 2015, “Kewenangan Pemerintah Daerah dalam Penyelesaian Sengketa Tanah”, Vol. 17 No. 65, *Kanun Jurnal Hukum*, ISSN: 25278428, Fakultas Hukum Universitas Syiah Kuala, Banda Aceh, p. 2