THE EXTENT OF LAND OWNERSHIP BY FOREIGNERS IN INDONESIA

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Introduction

The basis of modern Indonesian Land Law is Law Number 5 year 1960 (UU 5/1960), also referred to as UUPA (Undang-Undang Pokok Agraria/the Basic Agrarian Law Act). UUPA not only regulates agricultural land, but all land in Indonesia, ranging from urban land, forests, rice lands, plantations, mines, and coastal waters including fisheries.

Significantly Article 33 Section 3 of the Indonesian Constitution (Undang-Undang Dasar 1945/UUD 1945) forms the basis of framing the basic assumptions of the new Land Law of 1960. It stipulated: "Bumi, air dan kekayaan alam yang terkandung di dalamnya dikuasai oleh Negara dan dipergunakan untuk sebesar-besar kemakmuran Rakyat". Meaning that the land, waters and natural wealth contained within them are controlled by the State and shall be utilized to increase the prosperity of the People.

The Basic Agrarian Law (UUPA or Law No. 5/1960) created a uniform system of land rights throughout Indonesia. UUPA is viewed by Indonesian legal scholars as an expression and execution of the aspirations declared in Article 33 Section 3 of the Indonesian Constitution. As such, it is impossible under the UUPA for foreign individuals or foreign legal entities to legally own or use land in Indonesia.

Land titles under the Basic Agrarian Law are classified as primary titles, i.e., those granted by the holder of a primary title.

A. Primary Land Titles

All primary land titles are certified and registered with the National Land Agency (Badan Pertanahan Nasional/BPN). Forms of land title in Indonesia are regulated by the UUPA (Law No. 5/1960) and issued by the National Land Board as follows:

1. Hak Milik/HM (Right of Ownership):

Hak Milik is the most complete form of land ownership in Indonesia. Subject to zoning restrictions, the holder can use the land for any purpose, although it does not entitle the owner to exploit the natural resources found on or under the land. The right to exploit the natural resources is regulated by the basic Mining Law (Law No. 11/1967). Based on Article 21 of UUPA No. 5/1960 the only ones who may hold this title are individuals of Indonesian nationality and special bodies stipulated by the government, e.g. government banks, cooperatives and religious and social bodies. Consequently, neither limited liability companies (PT/Perusahaan Terbatas) nor foreign individuals may obtain land with an HM title.

The title has no time limit and may be sold, gifted, exchanged and bequeathed. Hak Milik may be made the subject of a security interest in the form of a mortgage (Hak Tanggungan). The holder of a Hak Milik may also grant inferior titles over the land to third parties, while retaining the reversionary rights.
2. **Hak Guna Bangunan/HGB (Right to Build):**

The holder of *Hak Guna Bangunan* is entitled to construct and own buildings or other structures on the land in state-owned land (*Tanah milik negara*), HM (*Hak Milik*) land, and HPL (*Hak Pengelolaan*) Land.

This is the most common title for residential, commercial and industrial properties. According to Article 21 of Government Regulation No. 40/1996, Individuals of Indonesian nationality, and Indonesian legal entities including Foreign Capital Investment (*Penanaman Modal Asing*-PMA) and Domestic Capital Investment (*Penanaman Modal Dalam Negeri*-PMDN) companies can own this title of *Hak Guna Bangunan* (HGB). Thus, any legal entities such as limited liability companies (*Perusahaan Terbatas* /PT) which are established under Indonesian law and domiciled in Indonesia may obtain HGB (*Hak Guna Bangunan*).

Basically, the right is granted for an initial period of up to 30 years, although it may be extended for a further 20 years. Based on Article 25 of Government Regulation No. 40 year 1996 regarding *Hak Guna Usaha, Hak Guna Bangunan* and *Hak Pakai*, an approved capital investment company (i.e., a PMA or PMDN Company) may obtain HGB rights for a period of 80 years (i.e., 30-year initial term, plus 20-year extension term, plus 30-year renewal term) by payment of certain up-front official costs (*Uang Pemasukan*).

Likewise, HGB can also be sold, gifted, exchanged, bequeathed by an Indonesian, and/or encumbered by a mortgage.

**B. Hak Guna Usaha/HGU (Land Cultivation Rights Title):**

HGU may be owned by Indonesian citizens or by corporations established under Indonesian law and domiciled in Indonesia. HGU gives the right to use a state-owned land for the purpose of agriculture; in particular agricultural projects, including plantations, fisheries and cattle ranches. Foreigners and foreign legal entities, in principle, cannot be granted an HGU. However, Foreign Capital Investment Companies engaging in agriculture are permitted to obtain an HGU, even if they are 100% foreign-owned.

Such title is granted for a period of 30 years, and may be extended for a further 25 years. The provisions of Government Regulation No. 40/1996 also apply to HGU titles, thereby allowing PMA and PMDN Companies longer-term certainty with respect to their land rights. According to Article 5 of the Government Regulation No. 40/1996, HGU titles cannot be granted on areas less than five hectares in size and special rules apply for areas over 25 hectares. This right can also be sold, gifted, exchanged, bequeathed, and/or encumbered.

**C. Hak Pakai (Right of Use):**

This is the right to use and/or harvest from land directly owned by the state, or private land by the agreement with the owner of the land. *Hak Pakai* entitles the holder to use the subject land for specific purposes described in the deed of conveyance. Foreign individuals and foreign representative offices, as well as Indonesian citizens and legal entities, are entitled to hold *Hak Pakai* titles. Traditionally, this title has been granted to various foreign governments, religious and social institutions, (e.g. embassies, consulates and churches) for an indefinite period as long as the premises continue to be used for the agreed purpose.

In Article 45 of Government Regulation No. 40/1996, *Hak Pakai* for most commercial uses can be granted for up to 25 years and extended for another 20 years, and like HGB and HGU a longer term of fixed rights may be obtained by an up-front payment of the *Uang Pemasukan*.

Slightly different procedures apply to *Hak Pakai* titles granted by the owner of a *Hak Milik* title. *Hak Pakai* titles may be sold, gifted, exchanged and/or bequeathed, unless the deed of conveyance specifies otherwise. With the enactment of the Mortgage Law No. 4/1996, *Hak Pakai* titles derived from State land or *Hak Pengelolaan* titles (Right of Management) may be encumbered for security purposes, but not those derived from *Hak Milik* titles.
The most prevalent commercial use of *Hak Pakai* titles is in connection with modern condominium and other strata title projects aimed at attracting direct purchases by foreign individuals and companies.

**D. Hak Pengelolaan/HPL (Right of Management):**

The HPL right is given to state companies as well as Provincial (level I) and Regional Governments (level II) with respect to the planning and development of state land. The right is usually given for land to be used for industrial and business purposes, such as industrial estates, low-cost housing projects and port facilities. The holder has the power to grant HGB and *Hak Pakai* rights. The duration of the right is usually tied to the length of time the holder uses the land for the intended purpose. This title may be sold and transferred but may not be encumbered by a mortgage.

**B. Secondary Land Titles**

The holder of a primary title contractually grants secondary land titles; including *Hak Sewa* (Right of Lease), *Hak Usaha Bagi Hasil* (Right of Share Cropping), *Hak Gadai* (Right of Pledge) and *Hak Menumpang* (Right of Lodging). The most relevant secondary land title for most foreign individuals is *Hak Sewa*.

*Hak Sewa* (Right of Lease) grants the holder the right to build or to use buildings on someone else’s land for a fixed period of time. The period of lease must be specified, but there is no limit on the duration of the lease. In accordance with general principals of lease law, the right cannot normally be sold or otherwise transferred without the consent of the lessor. *Hak Sewa* cannot be encumbered by an Indonesian mortgage nor can it be registered with the National Land Agency. Indonesian Individuals, Indonesian legal entities, and foreign individuals and legal entities resident in Indonesia may acquire *Hak Sewa*. Leases of office space, factory buildings and residential premises are all examples of *Hak Sewa* titles.

Residential properties in Jakarta include apartments, condominiums, town houses and stand-alone houses. Rental agreements vary, but one or two years rental in advance is common, especially for privately leased houses. VAT and withholding tax provision apply and should be addressed early in rental negotiations.

**C. Strata Title**

Strata title is a relatively new concept in Indonesia, but can be acquired in numerous office and residential properties in Jakarta. The qualifications for ownership of a strata title depend on the underlying land title, e.g., if the underlying title is *Hak Guna Bangunan* (HGB), only persons qualified to hold HGB titles may purchase a floor or unit within the strata title building.

**Foreign Ownership Rules**

The rules applicable to PMA companies, Foreign Representative Offices and foreign individuals are discussed below.

**A. PMA and PMDN Companies**

PMA and PMDN Companies are entitled to hold HGB, HGU and *Hak Pakai* titles, thereby permitting them to purchase land and buildings for nearly any type of commercial or residential use. PMA and PMDN companies can enter into short or long-term leases of land and/or buildings and can acquire strata title in many commercial and residential properties.

**B. Foreign Representative Offices**

Foreign Representative Offices refers to any of the various types of representative offices permitted under Indonesian law, including Regional Representative Offices (approved by the Board of Investment and State-owned Enterprises), Bank Representative Offices (approved by the Minister of Finance), Trade Representative Offices (approved by the Minister of Industry and Trade), Construction Representative Offices (approved by the Minister of Public Works) and other similar offices.

Foreign Representative Offices can hold *Hak Pakai* titles and also enter into short or long-term leases for both commercial and residential property. However, they are not permitted to hold HGB or HGU titles.
C. Foreign Individuals

Foreign individuals are still very much restricted in their access to the Indonesian property market. Recent regulatory changes, however, allow foreign individuals to purchase *Hak Pakai* titles over State-owned land or enter into long-term leases for residential, but not for commercial, purposes. Moreover, the leasing out of the premises during the owner’s absence is expressly authorized. A foreign individual is permitted to purchase only one residence, unless the local regional authority otherwise regulates the area.

Land Acquisition

Every transfer of a primary land title in Indonesia must be prepared by a Land Deed Official (*Pejabat Pembuat Akta Tanah* / PPAT), who is usually also a local notary.

The procedures for large land acquisitions have recently been improved, as reflected in State Minister of Agrarian Affairs/Chairman of National Land Agency Regulation No. 22/1999 regarding Location Permits. Different procedures apply depending on whether the land is State-owned or privately owned.

Conclusion

The most preferable way to possess land in Indonesia is through the use of certain laws that are already mentioned above, through establishing a limited liability company (*Perusahaan Terbatas* / PT) under Indonesian law, domiciled in Indonesia, either for 100% foreign-owned entities or joint ventures. The establishment of a limited liability company in Indonesia is regulated by Law No. 1/1995 on Limited Liability Company (*Undang-Undang Perusahaan Terbatas* No.1/1995).

In *Hak Guna Bangunan* (HGB), *Hak Guna Usaha* (HGU), and *Hak Pakai*, the titleholder is entitled to make use of the land for profit. The Secondary Land Titles are based on an agreement whereby a Primary Title holder grants the Secondary Title to a third party. Only Primary Titles are appropriate for establishing a business in Indonesia, besides *Hak Milik* (HM).

Most direct foreign investment in Indonesia other than in the oil, gas and financial sectors is carried out by Foreign Capital Investment companies (*Penanaman Modal Asing* / PMA) approved through the Indonesia Capital Investment Coordinating Board (*Badan Koordinasi Penanaman Modal* / BKPM) and State-owned Enterprises (*Badan Usaha Milik Negara* / BUMN). Domestic Capital Investment Companies (*Penanaman Modal Dalam Negeri* / PMDN) require similar approvals and obtain similar duty exemptions and other facilities.