

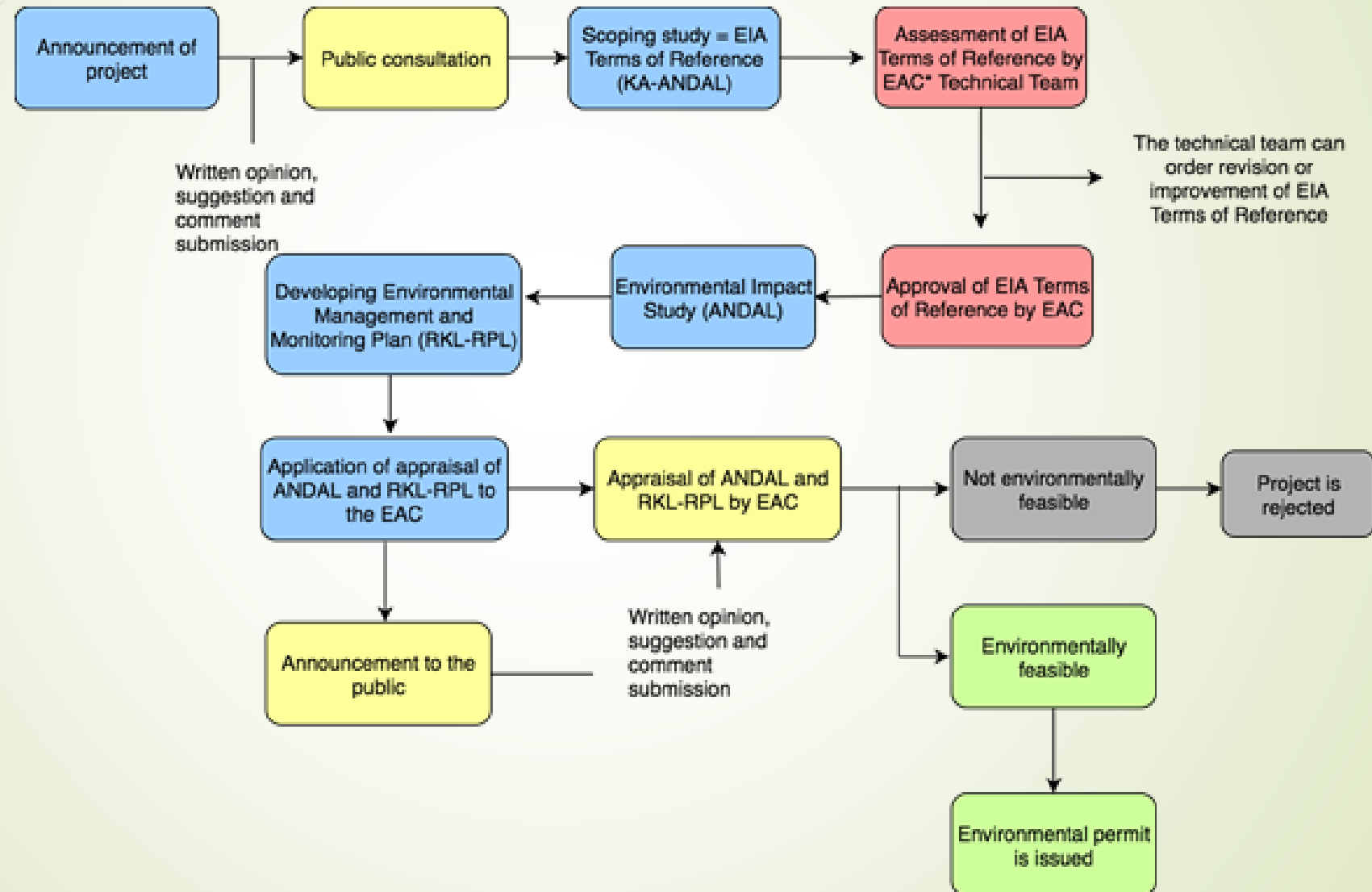
SUING ENVIRONMENTAL PERMIT; CHALLENGES IN INDONESIA ADMINISTRATIVE COURT LITIGATION

Osaka, 22 September 2018

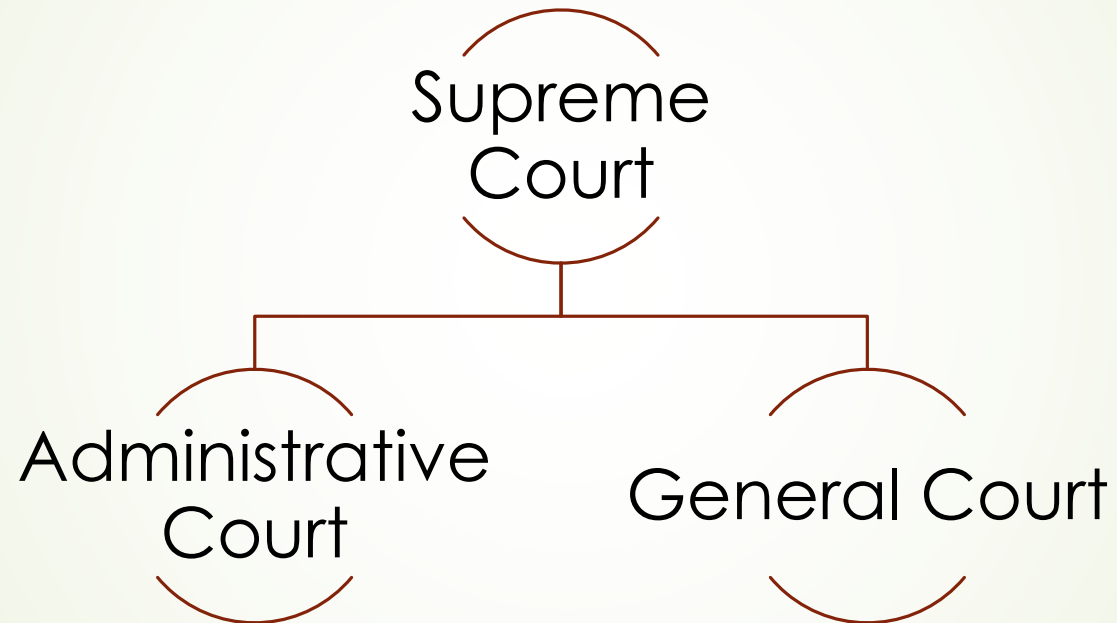
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Indonesia EIA Procedure



Indonesia Environmental Case Adjudication



- Trial by certified environmental judges
- EIA related : Administrative case related to permit


- Trial by certified environmental judges
- EIA related : Criminal case (e.g falsified of information) and civil case (demand for compensation and restoration)



Challenges in Environmental Permit Litigation



Legal standing



Assessing
adequate
participation



Adjudicating
of EIA scientific
substance



Injunction



Meaningful
court decision
execution

(1) Legal standing



Statue of limitation

Statue of limitation for filing administrative lawsuit:

- **90 days** since the administrative decision is announce or received
- For third party, 90 days is calculated **since they know** about the administrative decision which violate their interest

Problem : How to determine that “people know?”

(1) Legal standing

Kendeng- Rembang Case



(1) Legal standing

7th June
2012:
Environmental permit is
issued

22nd June
2013 :
Socialization
by local
govt

18th June
2014 :
Access to
Information
request



11th June
2012: Permit
is published
in website
and local
environmental agency
office

Late 2013 :
Villagers
protest

1st
September
2014 : The
lawsuit is
filed

(1) Legal standing

▶ Rejected by First Instance and appeal court



No legal standing because the statute of limitation is exceeded

▶ Granted by Supreme court



- People considered “know”, when their **access to information is substantially fulfilled**
- The publication **did not fulfilled** this access since it **did not considered** the **social and cultural condition**



(1) Legal standing



Potential damage :
Proofing interest

- *Point d'interest point d'action*
- Interest in the form of **concrete damage** vs **potential damage**

Problem : Level of certainty/probability judges want when assessing potential damage

(1) Legal standing

Celukan Bawang Coal Power Plant Phase II



(1) Legal standing

▶ Rejected by First Instance appeal court



- No legal standing
- **Potential damage** is considered as **assumption** without strong scientific evidence
- Technology can manage the risk



Should have applied precautionary principle!



(2) Assessing adequate public participation

- The absence of public participation makes EIA procedurally defect
- This is the legal base to revoke environmental permit

Problem : In practice, it is not that there is no public participation, but the public participation is not adequate and meaningful.


(2) Assessing adequate public participation

Kendeng case

▶ Granted by Supreme court



- Link between **access to information** and **public participation**
- **Adequate representativeness of different group of interest** as one tool to assess public participation



(3) Adjudicating of EIA scientific substance

- Aspect to be considered in administrative case adjudication :
 - a) procedural aspect, (e.g lack of public participation : Kendeng case)
 - b) Authority, (e.g issued not by correct authority : Indramayu power plant case)
 - c) substance of administrative decision

Problem : Administrative judges are still precautionous in adjudication EIA scientific substance, as judges are not scientists.

(3) Adjudicating of EIA scientific substance

In some cases, Administrative judges actually assess the scientific substance, but does not highlighted it as lack in scientific substance

Kendeng case



- EIA failed to recognize the vulnerability of mining in ground water water basin area, so it **did not prepared proper mitigation**
- EIA **failed to provide concrete mitigation** to several community concerned (e.g clean water and agriculture)

Nowadays, there are more cases required administrative judges to assess the scientific substance (e.g Celukan Bawang case)



(4) Injunction

- Request to suspend the implementation of administrative decision can be granted, with the condition :
 - a) There is urgency which will cause tremendous damage to the plaintiff
 - b) No public interest in development involved

Problem : How to define “public interest” and weight between public interest and plaintiff’s damage

(4) Injunction

Jakarta reclamation island case

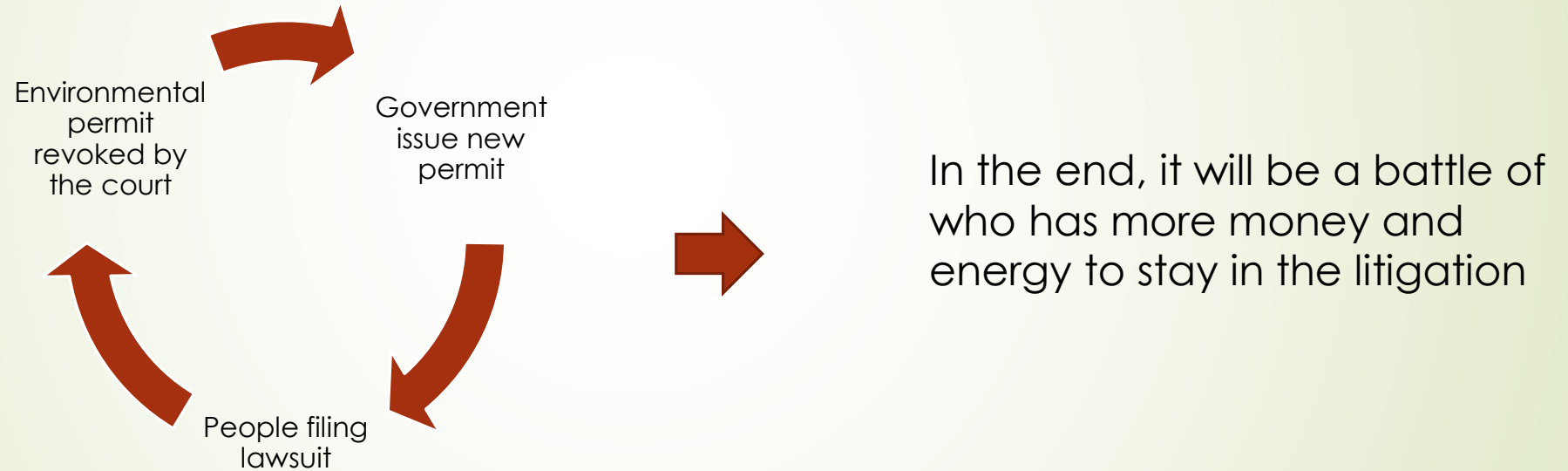


One of the very-very-very few case in which injunction is granted.

Judges decided that no public interest involve in the reclamation project

(5) Meaningful execution of court decision

- The circle of hell in suing environmental permit

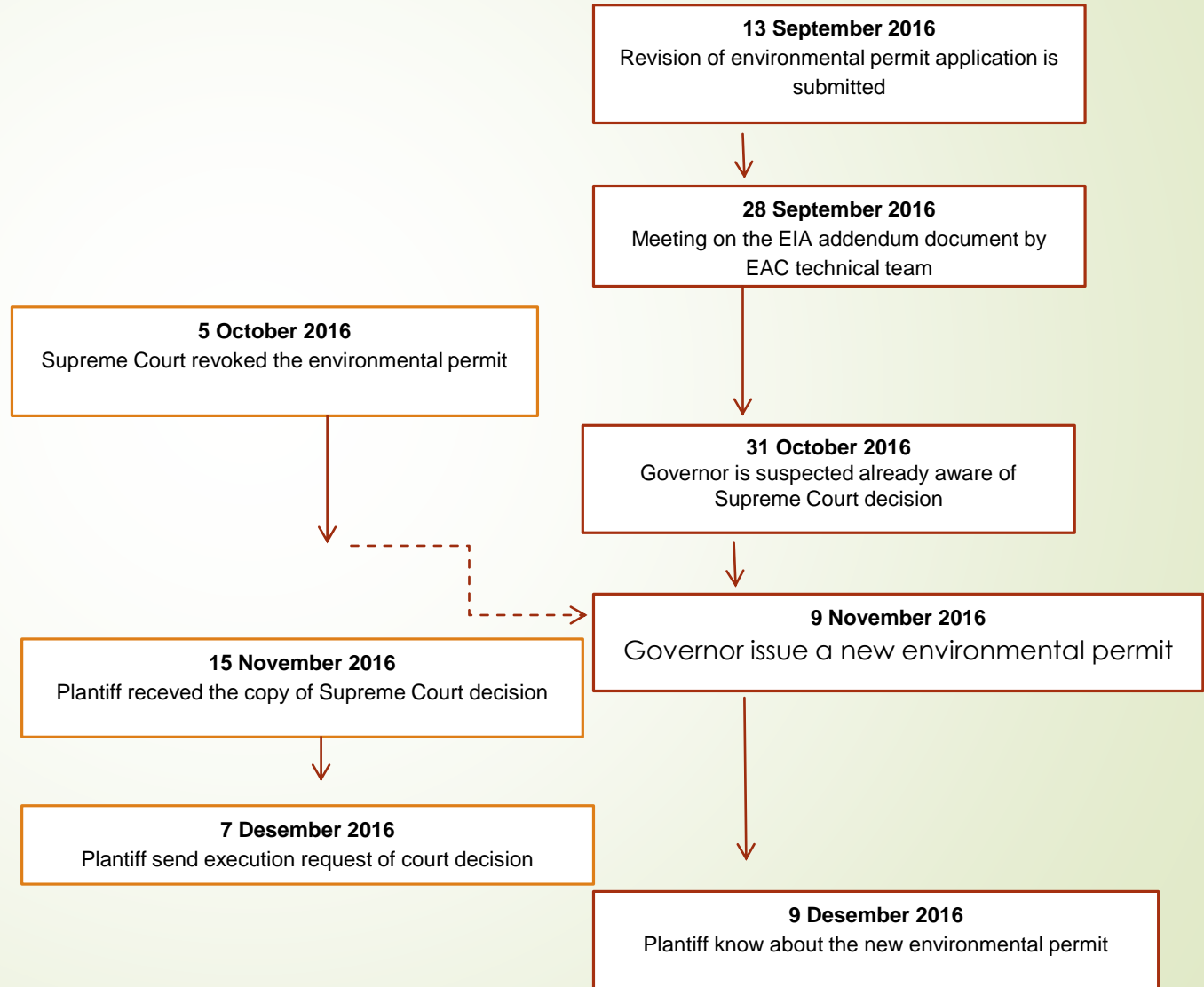


Problem : Administrative court can only order revocation of permit, without ordering how to “rewrite” the permit

(5) Meaningful execution of court decision

Kendeng Case

Central government order to conduct Strategic Environmental Assessment (SEA) study for Kendeng mountains area



(5) Meaningful execution of court decision

- **Cirebon power plant phase II case**

First instance
revoke the
permit in the
base of that
the plant
against spatial
planning

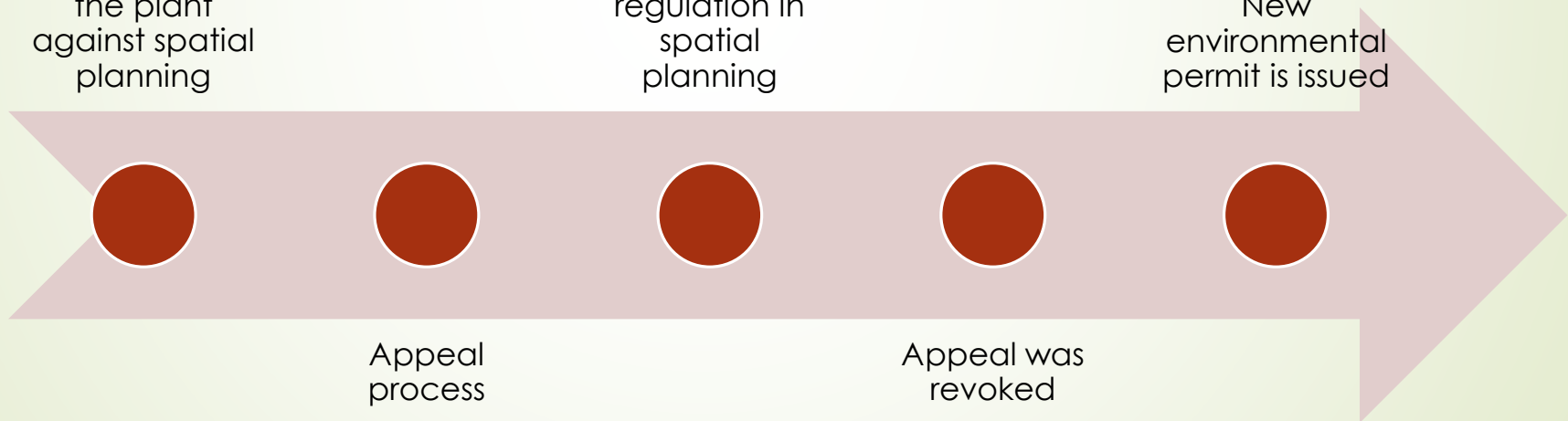
New
government
regulation in
spatial
planning

New
environmental
permit is issued



Appeal
process

Appeal was
revoked





Conclusion

- ▶ Not all loophole can be solved with law. In fact, we can not formalized everything
- ▶ Exercise of cases, jurisprudence showing several scenario and lesson learnt are important to shape better understanding and intrepertation of the law



Thank you

Osaka, 22 September 2018

Rika Fajrini

