

Job Creation Law and Foreign Direct Investment in Tourism in Indonesia: Is It Better than Before?

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Abstract

Foreign direct investment plays a critical role in a host country's economic development. Tourism, with its distinct character as a service business, is one of the most appealing investment industries. It has made a substantial contribution to the creation of jobs, tax revenue, and domestic value-added. The existence of domestic laws and regulations is critical in determining the extent to which a country's performance in getting benefits from investment can be maximized while reducing the negative impact. This article is aimed to examine whether the newly-enacted Job Creation Law provides a better arrangement on foreign direct investment in tourism compared to the previous laws and regulations. This article employs a normative approach by analyzing relevant laws and regulations concerning foreign direct investment in tourism in Indonesia. By looking at aspects on the choice of business fields, the issuance of business permit, land ownership, and labour, this article contends that Job Creation Law fails to provide integrated and comprehensive arrangements on the existence of foreign direct investment in tourism.

Keywords: Foreign Direct Investment; Indonesia; Job Creation Law; Tourism

1. INTRODUCTION

1.1 Background

Foreign direct investment (FDI) is becoming gradually important to a host country's economic development.¹ It has helped a host country achieve greatness by creating jobs, increasing export productivity,² and expanding delivery channels for domestic businesses.³ FDI in tourism, particularly, has assured more jobs due to the nature of tourism, which is more labor-intensive

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¹ Danish and Zhaohua Wang, "Dynamic Relationship Between Tourism, Economic Growth, and Environmental Quality," *Journal of Sustainable Tourism* 26, no. 11(2018): 1928.

² I Gusti Ngurah Parikesit Widiatedja, "Incorporating Local Wisdom into the Consumer Protection Legal Regime: A Comparison between Indonesia and Australia," *Udayana Journal of Law and Culture* 1, no. 1 (2017): 32. See also Regina Scheyvens and Emma Hughes, "Can tourism help to end poverty in all its forms everywhere? The challenge of tourism addressing SDG1," *Journal of Sustainable Tourism* 27, no.7 (2019): 1064.

³ Canh Phuc Nguyen, Pham Thai Binh and Thanh Dinh Su, "Capital Investment in Tourism: A Global Investigation," *Tourism Planning & Development* (2020). See also Huiya Chen and Deborah L Swenson. "Multinational Exposure and the Quality of New Chinese Exports," *Oxford Bulletin of Economics and Statistics* 76 (2014): 56.

than agronomic sectors,⁴ allowing for more semi-skilled and low-skilled workers as well as an acceptable rate supported by a diverse range of products.⁵

Indonesia has developed myriad rules in accepting FDI in tourism for maximizing the benefits and mitigating the negative repercussions of FDI. Their presence will have a substantial impact on Indonesia's ability to profit from FDI in the tourism sector.⁶ Because the benefits of FDI are not automatic, effective and comprehensive nationwide laws are required to support them.

Nonetheless, Indonesia's FDI governance is regulated by a patchwork of laws and rules. To put it another way, Indonesia has failed to adopt clear and comprehensive regulations to regulate FDI, particularly in the tourism sector. Overcoming this problem, Law No. 11 of 2020 concerning Job Creation (Job Creation Law) has given a huge expectation for better investment governance in Indonesia. This Law changes and replaces around 74 laws, including Law No. 25 of 2007 concerning Investment (Investment Law), that are regarded to be impediments to job development and investment in Indonesia. The government claims that Job Creation Law will be beneficial for Indonesia. It includes opening up new jobs for the citizens by attracting more foreign investors, simplifying the process of opening a business, and eradicating illegal levies which are the origin of corruption.⁷

Furthermore, the Law will increase the enthusiasm of foreign investors to invest in Indonesia through the simplification of various overlapping investment regulations. With the presence of investors in Indonesia, it will open up a lot of job opportunities for the community, which in turn will accelerate Indonesia's economic growth and strengthen Indonesia's competitiveness internationally.⁸

However, Job Creation Law could lead to legal uncertainty as it needs to be revised within two years. This is because the Constitutional Court has declared the law as conditionally unconstitutional due to lack of public participation and improper law-making mechanism.⁹ When the government fails to follow this decision in a timely manner, this Law would be no longer

⁴ Carvalho, Miguel Ángel Márquez and Montserrat Díaz-Méndez, "Policies to increase business tourism income: A dynamic panel data model," *Journal of Convention & Event Tourism*, 19 no.1 (2018): 64. See also Soheila Khoshnevis Yazdi, Niloofar Nateghian and Niloofar Sheikh Rezaie, "The causality relationships between tourism development and foreign direct investment: an empirical study in EU countries," *Journal of Policy Research in Tourism, Leisure and Events* 9, no. 3 (2017): 247.

⁵ Jonathan Mitchell and Caroline Ashley. *Pathways to Prosperity – How Can Tourism Reduce Poverty: A Review of Pathways, Evidence and Methods* (Washington D.C.: World Bank, 2007), 49.

⁶ I Gusti Ngurah Parikesit Widiatedja and I Gusti Ngurah Wairocana. "Fragmented and Unclear Laws and Regulations of Foreign Direct Investment in Tourism in Indonesia," *Padjajaran Journal of Law* 5, no.3 (2018): 409.

⁷ Muhammad Idris, "3 Benefits of Job Creation Law for the People, Which Claimed by Jokowi," <https://money.kompas.com/read/2020/10/11/090645726/3-manfaat-uu-ci-pta-kerja-untuk-rakyat-se-perti-yang-diklaim-jokowi?page=all>.

⁸ Nur Rohmi Aida, "Strengths and Weaknesses of the Job Creation Law from a Political Observer's Point of View," <https://www.kompas.com/tren/read/2020/10/10/103000865/kelebihan-dan-kekurangan-uu-ci-pta-kerja-dari-kacamata-pengamat-politik?page=all>

⁹The Constitutional Court Decision No. 91 /PUU-XVIII/2020, para [3.20.3], 413.

in effect and, of course, there would be a significant uncertainty regarding the regulation of FDI in Indonesia.

1.2 Purposes

This article is aimed to examine whether Job Creation Law provides a better arrangement on FDI in tourism compared to the previous laws and regulations. By looking at aspects on the choice of business fields, the issuance of business permit, land ownership, and labour, this article contends that scrappy and confusing provisions have managed the presence of FDI in tourism. This is pretty similar to investment governance before the issuance of Job Creation Law.

1.3 Method

This article adopts a normative approach by identifying and examining relevant laws and regulations concerning FDI in tourism in Indonesia, as well as the outcome of research, assessment, and other references related to this issue. It employs the statute approach as it analyzes relevant legal arrangement in FDI in tourism. All data collected is then processed by using qualitative methods and the finding is descriptively explained.

This paper begins by outlining the presence of FDI, including its definition and aims. The existence of FDI in tourism is then explained, as well as the expanding significance of tourism, the particular nature of tourism as a service business, and the effect of FDI in tourism in Indonesia. This paper then explains some laws and regulations that govern FDI in tourism. Finally, by looking at investment-related provisions on Job Creation Law, it examines how this Law has governed FDI in tourism, analysing whether it has better arrangement compared to the previous one.

1.4. Literature Review of Foreign Direct Investment in Tourism

1.4.1. Tourism's Distinctive Characteristics as a Business Sector

Recognizing the importance of tourism, practically all governments are taking innovative steps to promote inclusive, competitive, and long-term tourism growth. A unified whole-of-government perspective to tourism is seen as a critical element of a successful government structure in many nations.¹⁰ These unified measures promote the consistency of policy and the efficacy of private and/or public tourist programs.¹¹

¹⁰ I Gusti Ngurah Parikesit Widiatedja, *et.al.* "Retire in Paradise: Urgensi Pengaturan Pariwisata Pensiunan (Retirement Tourism) di Indonesia," *Arena Hukum* 11, no.1 (2018): 4.

¹¹ Fernando Almeida-García, "Analysis of tourism policy in a developing country: the case of Morocco," *Journal of Policy Research in Tourism, Leisure and Events* 10, no.1, (2018): 49.

Tourism, as a service segment, has notable peculiarities from most other service sectors, according to certain tourism researchers.¹² As a result, these distinctions will have an impact on how the government issues and executes laws and policies relating to FDI in tourism.

Tourism is intangible memory and experience products that cannot be duplicated or recreated. Neither can the sensation of consuming be fully appreciated.¹³ Tourism is a collection of amenities and attractions in a destination country that includes both tangible and intangible elements such as lodging, dining, entertainment, conveyance, communication, and the openness of the local inhabitants, all of which are intertwined and accompaniment one another.¹⁴

Tourism is perishable since it is created and consumed in the same area and at the same time.¹⁵ Tourism accommodation and transportation providers confront the matters of matching demand-supply since a surplus of capacity that is not sold on a certain day is lost and cannot be regained.¹⁶

The seasonality of tourism demand is the next distinguishing feature of tourism. The demand for tourism items has an asymmetric temporal distribution.¹⁷ Every year, there are high-demand and low-demand weeks and months. This inequitable allocation varies by country and by destination.¹⁸

Human resources are crucial in the tourism industry. The contact between the employees and the client, in particular, determines the consumer's sense of quality.¹⁹ When it comes to serving tourism items, the attitude of the employees is often a critical factor. Another distinctive feature of tourism is the unequal power distribution among industry participants.²⁰ This is seen, as an instance, in Disney World in Orlando, where a corporation is far larger compared to other businesses operating within the destination.²¹

The final distinguishing aspect of tourism is the links between tourism and other policy areas such as transportation, economy, infrastructure, culture spatial plan, and local and regional development. The monetary policy impacting exchange rates may have an impact on tourists and foreign

¹² See, e.g., Arvid Flagestad and Christine A. Hope, "Scandinavian Winter: Antecedents, Concepts and Empirical Observations Underlying Destination Umbrella Branding Model," *Tourism Review* 56, no. 5 (2001): 12.

¹³ *Ibid.*

¹⁴ J.R. Brent Ritchie and Robin J.B. Ritchie, "The Branding of Tourism Destinations – Past Achievements and Future Challenges," <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.201.9520&rep=rep1&type=pdf>, 7.

¹⁵ *Ibid.*

¹⁶ Norbert Vanhove. *The Economic of Tourism Destination* (Oxford: Elsevier Butterworth Heinemann, 2005), 14.

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ Jane Stacey. "Supporting Quality Jobs in Tourism." OECD Tourism Papers, 2015, 9.

²⁰ Ritchie, *op.cit.*, 25.

²¹ *Ibid.*

exchange.²² Domestic tourist policies can boost international demand and improve the payments balance.²³ Next, transportation regulation may be used to encourage people to use more environmentally friendly modes of transportation.²⁴

1.4.2. The Consequences of Foreign Direct Tourism Investment

FDI in tourism has provided economic benefits in developing nations that help reduce poverty in two ways.²⁵ To begin with, one of tourism's direct effects is an increase in the wages and incomes of entrepreneurs and workers.²⁶ According to worldwide evidence, tourism is more labor-intensive than other non-agricultural professions.²⁷ Tourism has always been a major employer, particularly for low-skilled, female, and younger workers.²⁸ Second, tourism has unintended consequences that occur throughout the value chain.

According to evidence, inter-sectoral impacts create an additional 60-70 percent in poor nations, in addition to the direct effects of tourism.²⁹ The tourism industry is also a significant source of cash for the government. While data on tourism-related tax receipts is not yet available, counting that spans expected revenues from the corporation and income tax, hotel room taxes, custom duties, and exit taxes demonstrates that tourism-related tax revenues make up a significant portion of each country's tax revenues.³⁰

Finally, tourism would elevate the level of life of the local peoples, the business climate for Small and Medium Enterprises (SMEs), the local economic growth strategy, and the destination's natural resource and infrastructure base.³¹ Local art and crafts account for a significant portion of tourists' out-of-pocket spending, and this spending primarily represents

²² Peter Haxton, "A Review of Effective Policies for Tourism Growth." OECD Tourism Papers, 2015, 2.

²³ *Ibid*

²⁴ *Ibid*.

²⁵ Xianrong Luo and Jigang Bao, "Exploring the Impacts of Tourism on the Livelihoods of Local Poor: The Role of Local Government and Major Investors," *Journal of Sustainable Tourism* 27, no. 3 (2019): 344.

²⁶ Mitchell., *loc.cit*. See also Anders E. Kristensen, "Foreign direct investment in the Chinese outbound tourism industry: the policies, participants and possibilities," *Journal of Policy Research in Tourism, Leisure and Events* 12, no. 1 (2020): 19.

²⁷ Hanitra Rakotondramaro and Louisa Andriamasy, "Multivariate granger causality among tourism, poverty and growth in Madagascar," *Tourism Management Perspectives* 20, (2016): 109.

²⁸ United Nations Conference on Trade and Development, "The Contribution of Tourism to Trade and Development," http://unctad.org/en/Docs/cid8_en.pdf

²⁹ Mitchell, *loc.cit*. See Also Magnus Bohlin, Daniel Brandt and Jörgen Elbe, "Spatial Concentration of Tourism – a Case of Urban Supremacy" *Tourism Planning & Development* (2020).

³⁰ Evridiki Tsounta, "What Attracts Tourists to Paradise?," <https://www.imf.org/external/pubs/ft/wp/2008/wp08277.pdf>, 4.

³¹ United Nations Conference on Trade and Development, "Sustainable tourism: Contribution to Economic Growth and Sustainable Development", http://unctad.org/meetings/en/SessionalDocuments/ciem5d2_en.pdf, 2.

direct money to local society.³² Furthermore, the tourists' interaction with local enterprises may increase the branding of the destination.³³

Despite the positives, only a small amount of empirical study has been done on the harmful effect of FDI in tourism. Nonetheless, several international organizations have demonstrated that FDI in tourism can have disastrous implications for the host country. The United Nations Conference on Trade and Development (UNCTAD) stated in 2010 that developing countries face major social, economic, and environmental hurdles in pursuing tourism-related gains.³⁴ Tourism's impact on the environment, according to the United Nations Environment Programme (UNEP), includes increased pressure on already depleted water resources, rising of greenhouse gas (GHG) emissions, and negative effects on biodiversity.³⁵

Similarly, the United Nations World Tourism Organization (UNWTO) claimed in 2004 that FDI in tourism has a detrimental impact on the environment due to its low relative to local competitors.³⁶ Because foreign hotels make up the majority of hotels in some countries, the negative effects of FDI can be higher than those of domestic businesses.³⁷ High-end hotels (4-star or 5-star hotels) are largely FDI in Bali, and some of them are part of worldwide hotel chains.³⁸

The higher the hotel's rating, the greater the risk of environmental damage, especially because such hotels are required to complete all facilities in accordance with the mandatory standard as a high-rated hotel or as a part of an international chain hotel, which puts an enormous strain on the environment. According to Barrowclough (2007), foreign hotels will have a greater environmental impact than local hotels since they are larger and utilize more resources, such as energy and water.³⁹

³² Eva Parga Dans and Pablo Alonso González, P., "Sustainable tourism and social value at world heritage sites: Towards a conservation plan for Altamira, Spain," *Annals of Tourism Research*, 74 (2019): 69.

³³ *Ibid.* See also Menelaos Gkartzios and Philip Lowe, "Revisiting neo-endogenous rural development," *The Routledge Companion to Rural Planning*, (2019): 159.

³⁴ United Nations Conference on Trade and Development, "The Contribution of Tourism to Trade and Development," http://unctad.org/en/Docs/cid8_en.pdf, 3. See also Aldi Lasso and Heide Dahles, "Are tourism livelihoods sustainable? Tourism development and economic transformation on Komodo Island, Indonesia," *Asia Pacific Journal of Tourism Research*, 23 no. 5, (2018): 473.

³⁵ United Nations Environment Programme, "Green Economy and Trade: Trends, Challenges, and Opportunities," <http://www.unep.org/greeneconomy/Portals/88/GETReport/pdf/FullReport.pdf>, 4. See also Sudharshan Reddy Paramati, Md. Samsul Alam and Chi Keung Marco Lau, "The effect of tourism investment on tourism development and CO2 emissions: empirical evidence from the EU nations," *Journal of Sustainable Tourism* 26, no.9, (2018): 1587.

³⁶ United Nations World Tourism Organisation, *General Guidelines for the Development of Foreign Direct Investment Indicators on the Tourism Sector*. (Geneva: Department of Statistics and Economic Measurement of Tourism), 2004: 166.

³⁷ *Ibid.*

³⁸ I Gusti Ngurah Parikesit Widiatedja. *Kebijakan Liberalisasi Pariwisata: Konstruksi Konsep, Ragam Masalah, dan Alternatif Solusi* (Denpasar: Udayana University Press, 2011), 41.

³⁹ Diana Barrowclough, "Foreign Investment in Tourism and Small Island Developing States," *Tourism Economics* 13, no. 4 (2007): 622.

Anti-competitive business practices in the tourism industry also lead to economic leakage. Foreign tourism businesses, in particular, engaged in vertically integrated practices. Many significant foreign tour operators are vertically integrated, according to the UNWTO, since they own or are affiliated with villas, airlines, hotels, or reservation systems.⁴⁰ As a result, these operators can give extra services.⁴¹ In the tourist industry, vertical integration is popular, with hotel groups such as Sol Meliá and Club Med investing in delivery links (tour operators and travel agencies) to generate new products.⁴²

2. RESULT AND ANALYSIS

2.1. The Regulations of Foreign Direct Investment in Tourism Before Job Creation Law

Before the enactment of Job Creation Law, there are certain regulations in Indonesia that restrict FDI in tourism, demonstrating how FDI governance in Indonesia has been governed through fragmented laws and policies. To put it another way, Indonesia has failed to develop clear and comprehensive legislation in regulating FDI, notably in the tourism sector. Here are some of the most significant laws explained.

2.1.1. Investment Law

Law No. 25 of 2007 concerning Investment is the first law that controls the existence of FDI. The goal of this legislation is to boost national economic growth.⁴³ Investment Law also ensures that FDI and local investors are treated equally.⁴⁴ This measure is questionable because Indonesia is not required to take it. The distinction between FDI and local investors is still lawful under the General Agreement on Trade in Services (GATS) and the World Trade Organization (WTO).

After joining the WTO agreement, Indonesia has updated its negative investment list. This list consists of both investment-restricted and investment-open categories.⁴⁵ Public museums, ancient heritage, residential environment, monuments, and gambling are some of the business fields in Indonesia that are fully closed to FDI and local investors in tourism. A list of open business fields subject to investment constraints can be categorized

⁴⁰ United Nations World Tourism Organization, "Tourism in the Age of Alliances, Mergers and Acquisitions," http://sete.gr/files/Media/Ebook/110301_Tourism%20in%20the%20Age%20of%20Alliances,%20Mergers%20and%20Acquisitions.pdf, 2.

⁴¹ *Ibid.*

⁴² *Ibid.*

⁴³ Law No. 25 of 2007 concerning Investment, Art. 1(2).

⁴⁴ *Ibid.*, Art. 3 (1).

⁴⁵ Elucidation of Presidential Regulation Number 44 of 2016 on lists of business fields that are closed to and business fields that are open with conditions to investment.

into numerous groups. Foreign service providers can operate and supply services with 51 percent, 67 percent, or 100 percent of capital ownership.⁴⁶

Surprisingly, Indonesia's list is more liberal than the rest of the ASEAN bloc. Thailand only authorizes FDI in tourism through a commercial presence of no more than 49 percent.⁴⁷ Malaysia only allows FDI in hotels of up to 30 percent for four-star hotels and 35 percent for five-star hotels.⁴⁸ But these two neighboring countries hosted more visitors than Indonesia.⁴⁹ Only Singapore has fully liberalized its tourism sector among ASEAN countries.

2.1.2. Tourism Law

Despite the fact that it recognizes the non-discrimination principle and the right to tourism, the substance of Law No. 10 of 2009 concerning Tourism (Tourism Law) has yet to adopt the tourism perspective as a trade in services, which includes all of tourism's distinctiveness.⁵⁰ This legislation product says nothing about the classification tourism as a service industry rather than a normal economic activity. Although there was no requirement to accept the UNWTO Global Code of Ethics for Tourism, this legislation largely referenced it.⁵¹ Indonesia's Tourism Law is likely to incorporate GATS as a result of the WTO Agreement's acceptance. Furthermore, the GATS classification of tourism-related sectors was not reflected in tourism law. While the GATS separates tourism and recreational services, the law includes service on recreation in the tourist category.

2.1.3. Environmental Law

The existence of FDI is likewise regulated by Law No. 32 of 2009 concerning Environmental Protection and Management (Environmental Law). The technique for Environmental Impact Assessment (EIA) is one of the most concerning aspects of environmental law. According to Environmental Law, an EIA is a study of the significant environmental impact of a certain activity that is undertaken during the planning stages and will be used as the legal foundation for evaluating whether such activity will have a negative environmental impact.⁵²

A company that wants to start a business or grow its operation can apply for an environmental license after passing the EIA.⁵³ After receiving an

⁴⁶ Such as: bars, cafes, restaurants, four-star hotel, five-star hotel.

⁴⁷ See detail at The Secretariat of ASEAN, "Schedule of Specific Commitments of Thailand", http://www.aseansec.org/economic/services/2nd_tha.pdf

⁴⁸ See United Nations World Tourism Organization, "Tourism Highlight 2014." <http://www.e-unwto.org/doi/pdf/10.18111/9789284416226>

⁴⁹ See detail at The Secretariat of ASEAN, "Schedule of Specific Commitments of Malaysia" http://www.aseansec.org/economic/services/2nd_mal.pdf

⁵⁰ Law No.10 of 2009 concerning Tourism, Art 2.

⁵¹ *Ibid*, Art. 5.

⁵² Law No. 32 of 2009 concerning Environmental Protection and Management, Art 1(11).

⁵³ *Ibid*, Art. 36.

environmental license from the government, a corporation can apply for a commercial license to legalize its operations in Indonesia.⁵⁴ In other words, Environmental Law made it illegal for a corporation to start or expand its operations without first undertaking an EIA. In reality, many businesses have gotten a commercial license and have begun operations despite the fact that the EIA has not yet been completed.

2.1.4. Labour Law

FDI companies must prioritize Indonesians when hiring employees, according to investment regulations. According to the law, foreign employees can only work in specific roles and with specialized knowledge. They are required by legislation to improve the competency of Indonesian employees vocational training.⁵⁵ The Law No. 13 of 2003 concerning Manpower then lays out requirements for foreign workers, including obtaining a permit from the ministry, prohibiting individual employers from employing expatriates, and allowing expatriates to work in Indonesia only within working relationships for a specific position and time period.⁵⁶

Even though foreigners are only allowed to work in limited time and certain positions, and their employment must be tied to the presence of FDI, the reality is not the same. Tourism is one of the most appealing industries for low-skilled international employees.⁵⁷ Foreigners have been engaged at some Bali hotels, even at modest levels of expertise.⁵⁸ The availability of foreigners (using tourist visas) working as guides for tourists who come from similar home countries has been a widespread practice for the previous ten years.⁵⁹

2.1.5. Land Ownership Law

Only Indonesian nationals are authorized to own land (*hak milik*) under Law No 5 of 1960 concerning Basic Regulations on Agrarian Principles (Basic Agrarian Law/BAL). There are three types of rights available to foreigners: right of use (*hak pakai*), leasehold (*hak guna usaha*), and building rights (*hak guna bangunan*). In other words, foreigners (both individuals and businesses) are not permitted to get ownership rights. However, there has been a widespread illegal practice, notably in the tourism industry, in which foreigners purchase land under the names of Indonesians in order to get ownership rights. They signed other relevant

⁵⁴ *Ibid* Art. 40.

⁵⁵ Law No.10 of 2009 concerning Tourism, Art. 10.

⁵⁶ Law No. 13 of 2003 concerning Manpower, Art. 42.

⁵⁷ Achmad Dwi Afriyadi, "KSPI: TKA Kasar Masuk RI Paling Banyak di Sektor Pariwisata," <https://finance.detik.com/berita-ekonomi-bisnis/d-3999587/kspi-tka-kasar-masuk-ri-paling-banyak-di-sektor-pariwisata>

⁵⁸ Posbali, "Ancaman Tenaga Asing Mulai Melanda Sektor Pariwisata di Bali," <https://www.posbali.id/ancaman-tenaga-asing-mulai-melanda-sektor-pariwisata-di-bali/>

⁵⁹ Okenews, "Tenaga Kerja Asing Ilegal Berkedok Wisatawan Merajalela di Bali," <https://news.okezone.com/read/2014/04/13/340/969534/tenaga-kerja-asing-ilegal-berkedok-wisatawan-merajalela-di-bali>

agreements to bind both parties (foreigner and Indonesian), such as a debt recognition deed, which explains that the foreigner lends money to Indonesian and the land purchased is used as collateral to ensure Indonesian's obligation. Despite the fact that this method does not break any Indonesian laws, it has resulted in the transfer of property rights, allowing foreigners to gain control over Indonesian land.

2.2. Job Creation Law and The Regulation of FDI in Tourism

The introduction of the Omnibus Bill on Job Creation is unusual in Indonesian regulation-making practice. This is more generally used in the common law system than in the Indonesian civil law system. The government, on the other hand, maintains that this is the greatest way to enhance the regulatory structure, particularly the ease with which businesses can operate in Indonesia. The goal of this bill is to deregulate the overlapping, disparate, and conflicting rules that govern corporate activity. Finally, on 5 October 2020, the government enacted this Bill as Law No. 11 of 2020 on Job Creation.

The government is justified in claiming that Indonesia's quantity of laws and regulations has reached hyper-regulation levels. There are currently 1693 laws, 182 government regulations in lieu of laws, 4605 government regulations, 2109 presidential regulations, and 15971 regional regulations, to name a few.⁶⁰ Indonesia's competitiveness has suffered as a result of excessive regulation, making it unattractive to investors. According to the World Bank's 2019 Doing Business Index, Indonesia ranks 73rd out of 190 nations in terms of business ease. President Joko Widodo then established a goal for Indonesia to get to the 40th place by the conclusion of his term in 2024.⁶¹

The government claims that Job Creation Law will be beneficial for Indonesia. It includes opening up new jobs for the citizens by attracting more foreign investors, simplifying the process of opening a business, and eradicating illegal levies which are the origin of corruption.⁶² The Covid-19 pandemic has exacerbated the economic crisis that has hit countries hard over the last few years. Indonesia as one of the countries affected by this crisis is trying to revive the country's economic growth by trying to attract foreign investors to invest in Indonesia.⁶³ The government believed that the Law will be able to help Indonesia out from this difficult situation.⁶⁴

⁶⁰ The Government of Indonesia, "Omnibus Law: the Solution and Legal Breakthrough,"

<https://www.indonesia.go.id/narasi/indonesiadalamangka/ekonomi/omnibus-law-solusi-danterobosan-hukum>

⁶¹ *Ibid.*

⁶² Muhammad Ideris, *loc.cit*

⁶³ News Desk, "Jobs Law Needed for Indonesia to Advance Amid Pandemic, Jokowi Argues," <https://www.thejakartapost.com/news/2020/10/25/jobs-law-needed-for-indonesia-to-advance-amid-pandemic-jokowi-argues.html>

⁶⁴ Callistasia Wijaya, "Indonesia: Thousands Protest Against Omnibus Law on Jobs," <https://www.bbc.com/news/world-asia-54460090>

Furthermore, some scholars argue that the Law will increase the enthusiasm of foreign investors to invest in Indonesia by simplifying various overlapping regulations related to investment. With the presence of investors in Indonesia, it will open up a lot of job opportunities for the community, which in turn will accelerate Indonesia's economic growth and strengthen Indonesia's competitiveness internationally.⁶⁵ A developed country such as the United States of America has also expressed its support for the government in its efforts to simplify the complicated regulatory and investment processes in Indonesia.⁶⁶

The government further asserted that the newly-enacted Job Creation Law will not have negative impacts on the public.⁶⁷ The discourse about the Law has been discussed for about four years, involving academics from various expertise. Moreover, the government stated that they had also held direct talks with trade union leaders before coming to the decision.⁶⁸ Therefore, it is not fair if certain groups of the community claim that the creation of the Law is undemocratic and does not involve the community members.⁶⁹

However, the wave of public resistance, especially from the labour association along with erroneous assumptions regarding the contents of the Law required the government to clarify the false information circulating in the community. One such issue is the elimination of the EIA, which has been refuted and straightened out.⁷⁰ Moreover, the process of drafting this Bill is undemocratic as it is not transparent and hastily conducted.⁷¹ Furthermore, the target to complete it within 100 days is unrealistic as the content of this Bill will significantly change some existing laws in Indonesia, including Investment and Environmental Laws. Its impacts are as massive as its size so it entails public debate and vigilant analysis by lawmakers.⁷² In relation to FDI in tourism, some provisions are regulating the existence of this business sector including the following:

⁶⁵ Nur Rohmi Aida, "Strengths and Weaknesses of the Job Creation Law from a Political Observer's Point of View," <https://www.kompas.com/tren/read/2020/10/10/103000865/kelelahan-dan-kekurangan-uu-cipta-kerja-dari-kacamata-pengamat-politik?page=all>

⁶⁶ Tri Indah Oktavianti, "Pompeo Praises Indonesia's Reform Effort to Cut Red Tape," <https://www.thejakartapost.com/news/2020/10/29/pompeo-praises-indonesias-reform-effort-to-cut-red-tape.html>

⁶⁷ Ade Miranti Karunia, "Luhut Claims the Omnibus Law on Job Creation Will Not Harm the People," <https://money.kompas.com/read/2020/10/07/134300626/luhut-klaim-omnibus-law-uu-cipta-kerja-tak-merugikan-rakyat>

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*

⁷⁰ Dewa Ketut and Azis Kurmala, "Government Ensures Amdal Not Eliminated in Omnibus Law," <https://en.antaraneews.com/news/158577/government-ensures-amdal-not-eliminated-in-omnibus-law>

⁷¹ Rofiq Hidayat, "Maria Farida's concern on Omnibus Law," <https://www.hukumonline.com/berita/baca/1t5de4f9c9216d0/kekhawatiran-maria-farida-terkait-omnibuslaw/>

⁷² *Ibid.*

2.2.1. Investment Law

In relation to investment, according to Article 77 of Job Creation Law, several provisions in Investment Law are amended, including Article 12 (1) that determines the exception of business fields. Presidential Regulation No. 49 of 2021 concerning the Business Fields of Investment then explains which tourism sectors are opened or closed for foreign investors. For example, four-star and five-star hotels are opened for FDI while one-star hotel, villa, guest house, travel agent and tourist's guide are reserved for small-medium enterprises. This arrangement is pretty similar compared to the previous negative-list investment that was amended almost every five years.

Article 18 (1) of the newly amended Investment Law then states that the central government will provide special facilities to investors who make investments within the following categories, among other things:

- a. absorbs a lot of manpower;
- b. belongs to a high priority scale;
- c. includes infrastructure development;
- d. transfers technology;
- e. carries out pioneer industry;
- f. located in remote areas and underdeveloped areas, and
- g. preserving the environment.

Presidential Regulation No. 49 of 2021 then explains which tourism business fields are granted these kinds of facilities, including: five-star and four-star hotels if they are located in North Sumatera, Bangka Belitung and East Indonesian Area, and Golf course in North Sumatera and East Java.

This new revision has expanded investment facilities not only for investors who establish tourism business in the eastern area, but also for those who choose a location in other areas, such as North Sumatera and East Java. Similar to Investment Law, there will be no differential treatment between local and foreign investors. This policy will put foreign investors in the dominant position as they will have more financial and technological supports.

Applying discriminatory measures is possible under international law. Host countries may even impose local restrictions that are more burdensome than necessary during the pre-establishment period, for example.⁷³ In addition, FDI may be subject to various levies and may be denied access to specific support schemes.⁷⁴

⁷³ APC Subhashini Abeysinghe. "Services Trade in South Asia: the India-Sri Lanka CEPA" in *The Preferential Liberalization of Trade in Services: Comparative Regionalism*, compiled by Pierre Sauvé and Anirudh Shingal (Cheltenham: Edward Elgar, 2014), 312.

⁷⁴ *Ibid*

In the post-establishment phase, host governments can impose a range of performance standards on FDI, such as the requirement to undergo managerial training.⁷⁵ For example, under the GATS, host countries have a lot of leeway in deciding how open their liberalisation process should be, considering their economic progress and domestic policy objectives.⁷⁶ As a result, they have the authority to decide whether certain sectors are accessible to FDI or not, to limit foreign ownership in specific sectors, and to impose extra FDI conditions unilaterally (such as the requirement to form a joint venture business with local SMEs).

Job Creation Law also reflects the centralistic approach of central government. The determination of open and closed tourism businesses along with the grant of investment facilities are decided by the central government.

2.2.2. Tourism Law

In relation to Tourism, Article 67 of Job Creation Law states that, in order to provide better and conducive arrangements for investors in obtaining business permits, several provisions in Tourism Law are amended. For instance, Article 15 (1) of the same law states that tourism entrepreneurs are required to fulfill business permits from the central government or regional governments in accordance with their respective authorities based on the norms, standards, procedures and criteria determined by the central government.

Article 54 of the newly amended Tourism Law then states that products, services, and management of tourism businesses have business standards. Government Regulation No. 5 of 2021 determines these standards in more detail. Article 142 (1) explains that standards for implementing tourism business activities are standards that include facilities, organization and human resources, services, product requirements, management systems, conformity assessments, and supervision. The standard of tourism business includes the following elements: a. prioritizing the use of local community products and domestic products as well as providing opportunities for local workers; and b. partnership development with MSEs and local cooperatives.

Article 143 (1) of the newly amended Tourism Law then explains that the tourism business standard for tourism sector business activities with a medium high-risk level and a high-risk level shall be verified by the tourism business certification agency. This agency is an institution accredited by a government agency that has the authority to carry out accreditation. Although it seems promising, the domination of the central government is obvious as it will determine the norms, procedures, and standards in tourism management. Moreover, the implementing regulations to arrange the certification process are yet to be issued.

⁷⁵ *Ibid*.

⁷⁶ *Ibid*.

Local community involvement is the next emphasis under Job Creation Law. Article 26 (1) of the newly amended Tourism Law states that every tourism entrepreneur is obliged to, among other things: maintain and respect religious norms, customs, culture, and values that live in the local community; develop partnerships with local micro, small and cooperative enterprises; prioritizing the use of local community products, domestic products, and providing opportunities for local workers; and improve the competence of the workforce through training and education. However, there is no further explanation on how this emphasis is done and what consequences will be imposed if investors do not involve the surrounding community in their business activities.

2.2.3. Environmental Law

Interestingly, one of the most controversial provisions of the Job Creation Law is the relaxing of requirements for developers and businesses to conduct the EIA. Under Environmental Law, the EIA is a compulsory requirement to get an environmental permit from either the central or local governments, depending on the scope of the project.⁷⁷ The environmental permit is then required to obtain a business permit. Once the business permit is granted, the project can be started.⁷⁸ The Law will degrade the position of the environmental permit. It will be transformed into an environmental approval. Along with other approvals, such as the building and spatial plan approvals, environmental approval will become a prerequisite for the approval of a business permit.

The Law also introduces a risk-based approach in specifying the kind of business permit that businesses and developers need to secure.⁷⁹ The government will determine the risk level of business activities based on the hazard level and the potential hazard level⁸⁰ by looking at four factors: the environment, safety, health, and/or natural resources utilization and management.⁸¹ All business activities are divided into three levels, namely low, medium and high risks.⁸²

The Minister of Environment and Forestry states that under the new approach, the EIA is still required and it is allocated as a standard instead of a requirement for obtaining a permit.⁸³ Putting it as a standard will enable the government to consistently monitor the environmental impact of

36. ⁷⁷ Law No. 32 of 2009 concerning Environmental Protection and Management, Art.

⁷⁸ *Ibid*, Art. 40.

⁷⁹ Law No. 11 of 2020 concerning Job Creation, Art. 7(1).

⁸⁰ *Ibid*, Art. 7(2).

⁸¹ *Ibid*, Art.7(3).

⁸² *Ibid*, Art.7(7), Art 8, Art 9, Art 10.

⁸³ Giri Hartomo, "Ministry Siti: the EIA would not be revoked although there is Omnibus Law on Job Creation," <https://economy.okezone.com/read/2020/02/12/470/2167468/menteri-siti-amdal-tidak-di-hapus-meski-ada-omnibus-law-ci-ptaker>

particular activities.⁸⁴ Moreover, the government has more power to prosecute companies that adversely affect the environment.⁸⁵

It seems clear that the government assumes the problem of the EIA regulations caused by its burdensome procedure, making it is impractical to be implemented. Hence, it is more viable to replace the EIA with a kind of environmental standard, particularly for low and medium-risk projects. However, there should be a clearer benchmark of what constitutes a project with a 'significant impact' and how it falls within the category of medium or high-risk activities. If this does not happen, a particular tourism project could not be classified as a high-risk activity although it might have a 'significant impact'. As a result, it would not be required to complete the EIA and involve the affected community.

2.2.4. Land Management

According to Article 123 of Job Creation Law, several provisions in Law No. 2 of 2012 concerning Land Procurement for Development in the Public Interest (Land Procurement Law) are amended. Article 144 (1) of this law states that ownership rights to an apartment unit may be granted to foreign nationals who have permits in accordance with the provisions of laws and regulations. These rights may be transferred or pledged as collateral.

This arrangement is controversial because prior laws and regulations only gave foreigners use or leasing rights. Article 33 paragraph (3) of the 1945 Constitution of the Republic of Indonesia and Basic Agrarian Law, are both in opposition to this shift in ownership status. Foreigners' rights to shared land are indirectly enabled by providing foreigners ownership rights to flat units. Shared land is land that exists in Indonesia and that, according to the BAL idea of property rights, can only be owned by Indonesians.

Based on this view, the government should evaluate the articles pertaining to flats in the Job Creation Law and other derivative legislation, making the appropriate changes to the status and nature of foreigners' property rights over flat units. The change tries to avoid ambiguous interpretations and legal ramifications (*fraus legis*). As a result, flat management would be consistent with national ideals, the concept of property rights, and national interests, allowing the Indonesian people to grow and prosper.

2.2.5. Labour Law

In relation to the use of foreign labour, Article 2(1) of Government Regulation No. 34 of 2021 concerning the Use of Foreign Workers then obliges every employer of foreign workers to prioritize the use of Indonesian workers in all types of available positions, with an exception that of there is no domestic workers has a capacity to occupy it. Afterwards, the use of

⁸⁴*Ibid.*

⁸⁵*Ibid.*

foreign workers is conducted by considering the labour market situation. Besides, Article 3 (1) states that employers of foreign workers include, among other things: foreign private companies operating in Indonesia.

This regulation does not change much from the existing labour regulations. Foreign workers are allowed with certain requirements, such as only for positions that cannot be occupied by local workers, related to the use of new technology, and minimal manager-level positions. What deserves attention, especially in the tourism sector, many foreigners in facts work in positions that should be occupied by local workers.

In the current situation, the Constitutional Court finally proclaimed the law as conditionally unconstitutional. The court decision provides the House of Representatives and the central government two years to revise the law following law-making mechanism and wider public participation.⁸⁶

A constitutional law expert, Zainal Arifin Mochtar, has criticized this decision as it does not directly declare Job Creation Law as invalid. The Constitutional Court should state that everything that has broad and strategic implications under Job Creation Law is suspended and this Law is no longer in effect.⁸⁷ The unclear decision has opened an opportunity for the government to still apply the Job Creation Law and its derivatives regulations. As a result, the government could hide behind the obscurity to make things even more unclear.⁸⁸

From the perspective of investment, this decision could create legal uncertainty as the government can no longer able to enact technical regulations, particularly regarding the opening and the sustainability of FDI. What governments should do is to follow any necessary formal procedure within two years. They should promptly announce to reassure that the point of the decision is merely related to the law-making mechanism and not about the content of the Law.

3. CONCLUSION

The Job Creation Law brought an expectation that the investment legal framework will be arranged comprehensively. Moreover, the purpose of this law is to improve the investment climate in Indonesia. One of the sectors that attract foreign investors is tourism, especially since this sector has its own uniqueness which is Indonesia's comparative advantage. Laws and regulations are the keys to ensuring that the purpose of foreign investment is to increase economic growth and development in Indonesia.

Unfortunately, regulations related to FDI, especially in the tourism sector, are carried out separately and are contained in various laws, such as environmental law, investment law, labour law, and land management law.

⁸⁶ The Constitutional Court Decision, *loc.cit.*

⁸⁷ Nurhadi Sucahyo, "Ketidakjelasan Bayangi Putusan MK Soal UU Cipta Kerja," <https://www.voaindonesia.com/a/ketidakjelasan-bayangi-putusan-mk-soal-uu-cipta-kerja-/6338052.html>

⁸⁸ *Ibid.*

This pattern in its implementation has led to bureaucratic impediments and overlapping authorities that cause, among other things, inefficiency in licensing management. Job Creation Law should resolve any matters that occurred before. Moreover, the goal of this controversial Law is to encourage investment as a means of supporting economic development. However, this Law seems to maintain the previous approach by fragmenting FDI in tourism under different regulations. This will raise the question of whether the goal of increasing FDI is still possible while the same approach is applied.

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