

## **Legal Uncertainty Of Foreign Share Ownership In The Construction Services Sector**

**Aisyah Jasmine Yogaswara**

Magister Hukum Universitas Indonesia, Depok, Indonesia  
aisyahjasminey@gmail.com

### ***Abstract***

*This article is written to analyze the legal uncertainties found in the positive regulation related to the foreign ownership limitation in the construction services sector. In 2020, the Indonesian government issued the Job Creation Law (and amended by Government Regulation in Lieu of Law Number 2 Year 2022) which changed several laws and regulations including the Investment Law. According to the amended Investment Law, provisions regarding investment requirements are further regulated in a Presidential Regulation, in this case Perpres 10/2021 and Perpres 49/2021. However, both regulations do not stipulate any foreign ownership limitation in the construction services sector and the foreign ownership limitation regulated under other regulations instead. The most suitable method for this research is the normative juridical method, which is therefore used in this article. Until the writing of this article, there has been no research that examines the same subject matter, so the authors assess the importance of conducting this research. After this research was performed, it was found that legal uncertainty regarding restrictions on foreign shares in the construction services sector was found in the appendix of PP 5/2021 with the foreign ownership limitation for ASEAN BUJKA of 70% and Non-ASEAN BUJKA of 67%. As of the publication of this research, there is no similar research discussing the discrepancy in the regulation of foreign ownership limitations among the Job Creation Law and its implementing regulations.*

**Keywords:** Foreign Investment; Legal Uncertainty; Negative Investment List

## 1. INTRODUCTION

Investment is one of the instruments that can drive economic growth for a country, both in the form of foreign investment and domestic investment.<sup>1</sup> For a developing country, foreign direct investment (FDI) is one of the main sources for obtaining the funds for the development of the country. The increasing number of FDI will improve so many aspect, including absorbing investment recipient workers, increasing foreign exchange receipts in connection with export-import activities, increasing state revenues through the taxation sector, and transferring technology and knowledge brought in by the foreign investors.<sup>2</sup> Foreign investment can stimulate the economy of a country by investing capital, creating jobs, and developing technology.<sup>3</sup>

To decide whether they will invest, foreign investors will need certainty, swiftness, simplicity, and transparency.<sup>4</sup> one of the most significant issues in favour of creating a conducive investment climate in Indonesia are law enforcement issues, alongside other issues, including poor infrastructure, security, and socio-political stability.<sup>5</sup> Therefore, to increase FDI in Indonesia, the government issued Law No. 11 of 2020 on job creation as amended through Government Regulation in Lieu of Law No. 2 of 2022. Indonesian government ensures the legal certainty through Article 4(2) of the Law No. 25 Year 2007 concerning Investment (UUPM) which states that the government will provides equal treatment for domestic investors and foreign investors and guarantees legal certainty, business certainty and business security for all of the investors, from the beginning (the licensing process) until the investment ends, while still taking into account of the national interest.

The increase in investment needs to be tempered by the safeguarding of the domestic economic security. Therefore, the Negative Investment List (NIL). was issued. NIL is defined as a business sector compiled by the government as a reference for information for prospective investors regarding businesses that are not permitted in Indonesia and various regulations, especially with regard to ownership.<sup>6</sup> In simple terms, the NIL is a list that regulates the limits on foreign investment in various industries and economic sectors.

The regulation regarding the NIL itself is heavily influenced by the political factors of the current government issuing the regulations, as well as how the

---

<sup>1</sup> Noviana Ernawati, *Definisi Investasi Dalam Model Perjanjian Peningkatan Dan Penanaman Modal* (Yogyakarta: Universitas Gajah Mada, 2019).

<sup>2</sup> Feibe Engeline Pijoh and Isle Junita Melo, "Legal Study on Non-Commercial Risk Investment in Indonesia," *Advances in Social Science, Education and Humanities Research* volume 473 (2020): 52.

<sup>3</sup> Nanci Yosepin Simbolon et al., "Perlindungan Hukum Bagi Penanaman Modal Asing (PMA) Di Indonesia," *Jurnal Darma Agung* 28, no. 1 (n.d.): 66.

<sup>4</sup> Ferdinand Jason and David Tan, "Kepastian Hukum Bagi Penanam Modal Asing Sehubungan Dengan Inkonstitusional Undang-Undang Cipta Kerja," *UNES Law Review* 4, no. 3 (n.d.): 369.

<sup>5</sup> Ria Sintha Devi, "Perlindungan Hukum Bagi Penanaman Modal Asing (PMA) Di Indonesia," *Jurnal Rectum* 1, no. 2 (n.d.): 144.

<sup>6</sup> Badan Koordinasi Penanaman Modal, "Daftar Negatif Investasi Di Indonesia," <https://www.investindonesia.go.id/id/artikel-investasi/detail/daftar-negatif-investasi-di-indonesia, 2022>.

government plans to increase or limit FDI. Through the NIL, the government regulates which business sector is completely restricted for both domestic and foreign business entity, which business sector is only allowed to be worked on by local business entity, cooperation and/or Micro, Small and Medium Enterprise (MSMEs), which business sector is allowed to be partially owned by foreign business entity, and which sector is allowed for 100% foreign ownership.

Through Presidential Regulation 49/2021, the Indonesian government regulates additional business sectors which are deemed closed for any business activity, namely the industry of alcoholic beverages. The industries that are 100% closed to investment, both by domestic investors and foreign investors, are generally industries that are not related to public interest and safety. Closed industries include the narcotics industry, gambling, endangered fishing, coral and coral exploitation, the chemical weapons manufacturing industry, and the chemical industry that can damage the ozone layer. The certain industries/crucial production branches are only allowed to be run by the central government to ensure the availability of basic needs, equitable distribution, as well as guaranteeing guaranteed prices for the general public.<sup>7</sup>

The investment law (as amended by UUPM) is directly mandating the further provision of investment requirement to be regulated under Presidential Regulation and in accordance with the mandate of UUPM, therefore Perpres 10/2021 and Perpres 49/2021 regulate these provisions in the appendix. For certain business fields, Appendix III to Perpres 10/2021 and Perpres 49/2021 stipulates limits on the percentage of foreign shareholding. Related to the construction service business fields, both Perpres 10/2021 and Perpres 49/2021 did not regulate any limitation on foreign ownership. However, it is found that there are limitation of foreign shareholder ownership of the construction service business field, namely in the Government Regulation Number 5 year 2021 concerning Implementation Of Risk-Based Business Licensing (PP 5/2021).

Given the importance of legal certainty in investment and that NLI is one of the main considerations of foreign investors, this research has an important value to be one of the findings of legal uncertainty in the UUPM. If the government does not address or amend these uncertain gaps, then there is a possibility of discrepancies in the application of the rules, and even worse, disputes may arise between foreign investors and the government.

In relation to the above explanation, the research will focus on identifying and analysing the consequences of the legal uncertainty of the foreign ownership limitation in the construction services sector. Furthermore, the writing of this research is also motivated by the absence of similar research conducted before. Whereas the provision of foreign ownership limitation is one of the most important factors in direct foreign investment. The legal uncertainty (which will

---

<sup>7</sup> Anisa, "Urgensi Penanaman Modal Asing Indonesia Sebagai Upaya Pemenuhan Kesejahteraan Warga Negara Indonesia," *Al'Adl* 1 (2020): 185.

be discussed and elaborated in the following section) will directly affect foreign investors in the construction services sector.

## **2. METHOD**

This research considers that the most appropriate type of research to be used in conducting this research in accordance with the subject matter to be sought and the method of data collection is normative juridical law research. Normative juridical research is legal research conducted by examining secondary data in the form of library materials as a basis for analysis, in addition to conducting research on laws and regulations and other supporting literature.<sup>8</sup> This research will refer to and be based on legal norms as stipulated and enforced in statutory regulations and generally accepted norms in society.

Normative juridical research is carried out by searching, collecting data, studying and conducting studies, in which each process adheres to legal norms and principles, applicable laws and regulations, legal theories, legal doctrines, decisions of previous judges/jurisprudence, and other secondary legal materials in accordance with the research topic to answer the main issues to be studied.<sup>9</sup> Furthermore, this article will ensure that the legal norms that are the object of research have the characteristics of comprehensive, which is logically related to one another; Inclusive, to accommodate the legal issues that will become the object of research, so that no legal vacuum is found; and systematic, which has properties that are sequential, orderly and hierarchically arranged.<sup>10</sup>

## **3. RESULT AND DISCUSSION**

Fitzgerald states that investment is defined as efforts to withdraw sources of funds that are used to multiply capital goods at the time, and with that, the capital products will be produced in the future.<sup>11</sup> Meanwhile, Komarudin in his book states that basically, investment in a sense shall fulfill the following elements: a) an act of buying shares, bonds, or other forms of participation; b) an act of purchasing capital goods; and c) use and utilization of available funds (capital) for production activities to obtain income in the future.<sup>12</sup>

According to the source of financing, investment can be divided into FDI, where the investment is from the party overseas, and investment originating from within the country, hereinafter referred to as domestic direct investment (DDI). Furthermore, by regulation, foreign investment is defined as an activity of investing to do business in the territory of the Republic of Indonesia carried out by foreign investors, either using fully foreign capital or joint ventures with domestic

---

<sup>8</sup> Soerjono Soekanto and Sri Mamudji, *Penelitian Hukum Normatif: Suatu Tinjauan Singkat* (Jakarta: Rajawali Pers, 2015).

<sup>9</sup> Burhan Ashshofa, *Metode Penelitian Hukum* (Jakarta: Raja Grafindo Persada, 2010).

<sup>10</sup> Mukti Fajar and Yulianto Achmad, *Dualisme Penelitian Hukum Normatif & Empiris* (Yogyakarta: Pustaka Pelajar, 2010).

<sup>11</sup> Murfidin Haming and Salim Basamalah, *Studi Kelayakan Investasi Proyek Dan Bisnis* (Jakarta: PPM, 2003).

<sup>12</sup> Hulman Panjaitan and Anner Mangatur Sianipar, *Hukum Penanaman Modal Asing* (Jakarta: CV Indhill Co, 2008).

investors and domestic investment is defined as an investment activity to do business in the territory of the Republic of Indonesia which is carried out by domestic investors using domestic capital.

David Kairupan in his book *Legal Aspects of Foreign Investment in Indonesia* argue that the aspect of FDI are the investment which: a) done directly by investors, where investors also directly bear the risk of the invested capital; b) based on the laws and regulations in the country receiving capital which include the substance, procedures and conditions for FDI predetermined in the rules of the country receiving capital (in this case the government of the Republic of Indonesia); and c) used to carry out business activities in Indonesia in the form of a certain legal entity.<sup>13</sup>

Foreign investors' interest in investing in another country is influenced by various factors, both internal and external. Factors affecting investment include taxation, minimum wages for labor in receiving countries, openness, foreign exchange rates, costs, economic growth and trade climate balance.<sup>14</sup> In another study, it was stated that the factors that influence investment include the availability of natural resources, strategic geographical location, promising markets, stable cultural and political situations, cheap transportation and labor costs, as well as favorable government and economic policies. (including taxation, industrial policy, financial policy, etc.).<sup>15</sup>

Dunning also explained the driving factors for FDI are including, among others, comparative advantages derived from natural resources, good market access, low labor costs, and efficiency related to other labor costs.<sup>16</sup> In addition to the above, there are also several important points that are considered in carrying out FDI that foreign investors pay attention to, among other things, the safety/security of the capital they will invest and the returns or profits they will get.<sup>17</sup> The safety/security of the investment itself could only be achieved if there is a legal certainty of the investment regulation in the host country.

Sudikno Mertokusumo defines legal certainty as a guarantee that the law is implemented and enforced, giving rights granted by law and decisions from court institutions can be implemented.<sup>18</sup> The legal certainty will provide the confidence of the investor or another economic actor that they can easily predict the benefit and/ or income that they will get.<sup>19</sup>

---

<sup>13</sup> David Kairupan, *Aspek Hukum Penanaman Modal Asing Di Indonesia* (Jakarta: Kencana Premada Media, 2013).

<sup>14</sup> Reenu Kumari and Anil Kumar Sharma, "Determinants of Foreign Direct Investment in Developing Countries: A Panel Data Study," *International Journal of Emerging Markets* 12, no. 4 (2017): 658–82, <https://doi.org/10.1108/IJoEM-10-2014-0169>.

<sup>15</sup> Kumari and Sharma.

<sup>16</sup> John H Dunning, *Reevaluating the Benefits of Foreign Direct Investment* (New York: Transnational Corporations, 1994).

<sup>17</sup> Paul V Horn and Gomez Henry, "International Trade Principles" 4th edition (1964): 261.

<sup>18</sup> Sudikno Mertokusumo, *Mengenal Hukum Suatu Pengantar* (Yogyakarta: Liberty, 2007).

<sup>19</sup> Dina Luqyana and Azhari Yahya, "Legal Certainty Of Land Title In Facilitating Foreign Direct Investment In Aceh Province, Indonesia," *Student Journal of International Law* 1, no. 1 (August 2021): 50.

The legal certainty could further separated into formal and substantive certainty. Formal legal certainty includes legal predictability, especially court decisions, which means that the community's ability to predict the implementation, impact, and process of regulations and enforcement of regulations. Substantive legal certainty concerns the rationale for acceptance of decision-making.

Meanwhile, according to Apeldoorn, legal certainty can be assessed based on two sides, the first regarding the possibility of law formation in real and concrete matters (*bepaalbaarheid*). This can also be seen as how the public can find out the applicable law. Second, legal certainty in the sense of guaranteeing legal security. In this case, legal certainty must be able to provide protection for the public so that they are not treated arbitrarily by law and by law enforcement officials (eg police, judges).

Legal certainty does not only refer to the certainty of the rule of law, but also includes its implementation by authorized institutions and acceptance by the public.<sup>20</sup> Legal certainty in the rule of law, namely law that is born from and reflects the culture that exists in society. This legal certainty is referred to as realistic legal certainty, because there is harmony to understand the legal system between the government and the people.

On the contrary, in the case that the host country unable provide a legal certainty, foreign investors will be hesitant to perform the FDI in the home country. Legal uncertainty occurs when an individual is unsure of the provisions of the applicable legal system in relation to the impact of the legal action they take. In legal uncertainty, it will be impossible to predict whether certain events or actions will have the same effect.<sup>21</sup>

There are many factors that affect legal uncertainty, including unclear regulatory clauses, uncertain legal settlement mechanisms, as well as the extent of discretion that can be issued by the authorities, and the lack of legal transparency in the legal system. Legal uncertainty caused by the differences in the reasoning of the parties implementing or applying the law. Legal uncertainty arises when we cannot know whether certain facts will be associated/classified in certain rules. Lawmakers are considered to have failed to provide sufficient premises for society to cross the logical range between what is regulated by law and circumstances.

The legal uncertainty itself could be classified into subjective and objective legal uncertainty. In simple terms, subjective legal uncertainty is legal uncertainty caused by differences in the reasoning of those who carry out or apply the law. Legal uncertainty arises when we cannot know whether certain facts will be associated/classified in certain rules. Lawmakers are considered to have failed to

---

<sup>20</sup> Sidharta, *Karakteristik Penalaran Hukum Dalam Konteks Keindonesiaan* (Bandung: Alumni, 2006).

<sup>21</sup> Louis Kaplow et al., "Rules Versus Standards: An Economic Analysis," *142 Duke Law Journal*, 1992, 557.

provide sufficient premises for society to cross the logical range between what is regulated by law and circumstances.

Meanwhile, objective legal uncertainty refers to how law is constructed by judicial institutions differently.<sup>22</sup> Objective legal uncertainty does not only refer to unclear arrangements in statutory regulations, but also how law is constructed by judicial institutions differently. In general, legal uncertainties affecting investment in Indonesia including the issue of licensing process that takes a long time, absence and obscurity rules of law, inconsistent business incentives, and inconsistent dispute resolution.

The interest of foreign investor is determined by may factor, including the rule of law that could create the predictability/ certainty, fairness, as well as efficiency.<sup>23</sup> In Indonesia, despite the attempt of the government to attract the foreign investment, the overlapping and inconsistencies regulation is one of the highlights that will negatively impact the foreign investment.<sup>24</sup> For example, the inconsistency between UUCK, UUPM, Law No. 5 of 1960 concerning Basic Agrarian Regulations, Law No. 13 of 2003 concerning Manpower, Law Number 23 of 2014 concerning Regional Government and its amendments, Law Number 30 of 2009 concerning Electricity, and Law Number 4 of 2009 concerning Mineral and Coal Mining and their amendments which all regulates the restrictions on the activities of FDI and foreign limited liability companies.

One of the government's efforts to protect the interests of the state is to regulate restrictions on FDI in certain business fields by issuing a Negative Investment List (NIL). The NIL is referring to a compiled list determined by the type of business or activity applicable in Indonesia, Field Classification Indonesian Enterprises (Klasifikasi Baku Lapangan Usaha Indonesia - KBLI).<sup>25</sup> NIL is compiled by the government as a reference for information for prospective investors regarding businesses that are not permitted in Indonesia and various regulations, especially with regard to ownership.

The issuance of NILs has a major impact on the determinants and flow of investment. Firstly, NILs will determine the openness of a certain business sector to foreign investment.<sup>26</sup> Secondly, NILs can determine the magnitude of the flow of investment. The greater the restrictions of foreign investment imposed in a

---

<sup>22</sup> Anthony D ' Amato, "Legal Uncertainty," *California Law Review* 71 (1) (2010): 4.

<sup>23</sup> Jaja Ahmad Jayus, "Konsep Sistem Hukum Investasi Dalam Menjamin Adanya Kepastian Hukum," *Jurnal Litigasi (e-Journal)* 16, no. 2 (2016): 2907.

<sup>24</sup> Januari Nasya Ayu Taduri, "The Legal Certainty and Protection of Foreign Investment Againsts Investment Practices in Indonesia," *Lex Scientia Law Review* 5, no. 1 (May 30, 2021): 128–29, <https://doi.org/10.15294/lesrev.v5i1.46286>.

<sup>25</sup> Sentosa Sembiring, "Legal Aspect of Foreign Direct Investment in Indonesia Based on the Law of Number 25 of the Year 2017 Concerning Investment," *International Journal of Sociological Jurisprudence* 2, no. 1 (February 2019): 35.

<sup>26</sup> Wildatul Fitri Tatiara and Toshikiro Kudo, "The Impact of Negative Investment List (NIL) Introduction on Investment Decision of Foreign and Domestic Investors in Indonesia," *The Journal of Indonesia Sustainable Development Planning* 2, no. 2 (August 2021): 161.

particular sector, the lower the flow of investment will be. The lower the foreign investment, the greater the opportunity for domestic investors is.<sup>27</sup>

The NIL was issued by the government to protect the national interest and its citizens from the foreign interest, in this case in the form of FDI. However, restrictions in the form of NIL also run the risk of hindering the pace and existence of FDI in Indonesia. The OECD in 2018 reported that Indonesia was ranked the third country with the most stringent investment restrictions. Indonesia should at least consider the following main issues to create a friendlier investment climate: (i) how to attract foreign investors without disturbing the country's foreign exchange and resources; (ii) how to guarantee the rights of foreign investors and provide adequate protection and prevent the domination and negative impact of FDI from being excessive; and (iii) how to create regulatory and taxation systems to promote economic growth and attract foreign investors. In the context of guaranteeing rights and providing protection to foreign investment, investment law becomes a "tool" as well as a consequence of government intervention in economic growth, so that legal uncertainty on investment backfires and will not optimally attract foreign investors.

The NIL is structured to ensure that business sectors in Indonesia can be accessed by the public with equal opportunities, therefore, the NIL is structured by limiting the maximum permitted foreign ownership in the capital composition of a business sector.<sup>28</sup> Because the intention of the NIL is to limit the participation of foreign parties, it is also possible to relax the NIL to increase FDI in Indonesia. For example, in 2018, under Presiden Joko Widodo's command, the NIL is relaxed so that hopefully the FDI in Indonesia will increase and Indonesia reach a higher FDI number compared to other ASEAN neighbor countries such as Malaysia and Vietnam. The development of these countries is faster because they are more open to foreigner investment. Without the participation of FDI, it is difficult for a developing country to boost the local economy.

For example, changes to the DNI in Perpres 44/16 open up 20 additional business fields for FDI as an effort to increase investment in these sectors. Some of the business fields opened include the tourism business, two manufacturing industry business sectors, film services, cold storage services, electronic sales services (e-commerce) and construction consulting services. Under current regulation, the NLI has updated the list of lines of business which are open for FDI, making 54 lines of business open for investment.<sup>29</sup>

---

<sup>27</sup> Nanda Aisyah Rusli, Muhammad Ashri, and Said Nurfaidah, "Analisis Hukum Kebijakan Daftar Negatif Investasi Berdasarkan Peraturan Presiden Nomor 44 Tahun 2016 Terhadap Pengusaha Ritel Indonesia," *Nagari Law Review* 1, no. 2 (n.d.), <https://doi.org/10.25077/nalrev.v.1.i.2.p.126-137.2018>.

<sup>28</sup> Sulistiowati and Paripurna, "Mempertahankan Tujuan Peraturan Daftar Negatif Investasi Dalam Mengendalikan Dominasi Kepemilikan Asing (Studi Kasus Pada Industri Telekomunikasi)," *Jurnal Dinamika Hukum* 14, no. 2 (2014): 200.

<sup>29</sup> Nandang Sutrisno and Sigar Aji Poerana, "Reformasi Hukum Dan Realisasi Investasi Asing Pada Era Presiden Joko Widodo," *Undang: Jurnal Hukum* 3, no. 2 (2020): 244.

However, it should be remembered that the purpose of drafting the NIL is to create a balancing mechanism for the interests of receiving injections of foreign funds with the interests of the grassroots economy, so that the maximum limit for foreign capital varies between business sectors; for business sectors that are more open and require more foreign capital, the maximum limit of foreign ownership is higher.<sup>30</sup>

This regulation regarding the NIL also applies to construction service business activities. Although it is not regulated through Perpres 10/2021 and Perpres 49/2021 regarding limits on foreign ownership in the construction services sector, specifically for limiting share ownership for Foreign Construction Company Representative Office (BUJKA) and BUJKA Representative Office. BUJKA is a business entity legally established and domiciled in a foreign country which has a representative office in Indonesia, and is equivalent to a Limited Liability Company which is engaged in the construction services business.

The foreign ownership limitation of BUJKA and BUJKA Representative Office regulated through the Appendix of Government Regulation Number 5 of 2021 concerning Implementation of Risk-Based Business Licensing (PP 5/2021). It is stipulated that on-ASEAN BUJKAs can be controlled by 67% foreign ownership and ASEAN BUJKAs can be controlled by 70% foreign ownership. In addition to these ownership restrictions, there are specific requirements that must be met by BUJKA, including meeting investment criteria of having the form of a Construction Service Business Entity in the country of origin, own a certificate in the field of Construction Services in the country of origin which is equivalent in accordance with the applicable laws and regulations, classified as a big business entity qualified, and has the same business activities as the DDI (in the case of Joint Venture)

Other than the foreign ownership limitation above, the current regulation also regulates which business fields in the construction sector which are completely closed for the foreign ownership as the business sectors are allocated to or cooperate with MSMEs and cooperatives according to the Appendix II of Perpres 10/2021 as amended by Perpres 49/2021.

Talking about the contextualization of legal uncertainty regarding FDI regulations in the construction services sector, it is necessary to observe Presidential Regulation Number 44 year 2016 concerning List of Business Fields That Are Closed And Business Fields That Are Open With Conditions In The Investment Sector (Perpres 44/2016) as the applicable law prior the issuance of Perpres 10/2021 as amended by Perpres 49/2021.

In Appendix III of Perpres 44/2016, it specifically describes the maximum limit on the percentage of foreign ownership for each business sector open for investment, including the construction service business sector, for example oil and

---

<sup>30</sup> Sulistiowati and Paripurna, "Mempertahankan Tujuan Peraturan Daftar Negatif Investasi Dalam Mengendalikan Dominasi Kepemilikan Asing (Studi Kasus Pada Industri Telekomunikasi)."

gas platforms construction services with a maximum 75% of foreign ownership, oil and gas spherical tanks construction services: with a maximum 49% of foreign ownership, oil and gas upstream production installation with up to 100% of local ownership, installation of pipelines on land with up to 100% of local ownership, pipeline installation at sea with a maximum 49% of foreign ownership, and horizontal vertical tanks, storage installations with up to 100% of local ownership

The inclusion of the description of the maximum percentage limit for FDI above is different from Perpres 10/2021 as amended by Perpres 49/2021, because the current regulation does not include such information or details. Perpres 10/2021 as amended by Perpres 49/2021 simply lists which business sectors are priority sectors and which sectors are allocated for or must partner with MSMEs and cooperatives without any elaboration of what the maximum percentage of FDI is in the construction services business sector.

Based on the argument of the form of legal uncertainty explained in the early part of this article, legal uncertainty regarding FDI regulations in the Indonesian construction services sector can be categorized as subjective legal uncertainty. Subjective legal uncertainty is caused by laws that do not regulate clearly and there are legal loopholes in the regulation, so that people have the potential to abuse these loopholes or ambiguities to commit acts that are not expressly prohibited, but also not justifiable. In Perpres 10/2021 as amended by Perpres 49/2021, it is not clearly regulated regarding the maximum percentage limit for FDI involvement in the construction services sector. In fact, as explained in the previous sub-chapter, UUPM has emphasized that arrangements regarding criteria and lists of business sectors open and closed for investment are regulated by Presidential Regulations, meaning that Presidential Regulations must carry out the mandate of UUPM to clarify criteria and lists of business sectors. In fact, Presidential Regulations does not provide the detailed information mandated to it.

Legal uncertainty regarding FDI in the construction services sector can also be categorized as objective legal uncertainty. Objective legal uncertainty does not only refer to unclear arrangements in statutory regulations, but also how law is constructed by the judiciary differently. Objective legal uncertainty refers to uncertainty that is equally felt by the legal community, which includes legal instability and denial of justice. One form of objective legal uncertainty is hierarchical uncertainty. Hierarchical uncertainty is when two or more rules governing the same particular state have different arrangements.

In regards with the impact of the legal uncertainty in the FDI, we could conclude that, First, the lack of clarity regarding FDI regulations in the construction services sector has the potential to have an impact on inconsistencies in practice, both at the level of establishing a FDI limited liability company, permits, and submitting claims to court, especially Civil Court of Justice/Pengadilan Tata Usaha Negara (PTUN). Officials can interpret FDI arrangements in the construction services sector differently, especially regarding the maximum

percentage limit for FDI involvement, so the process of obtaining a FDI limited liability company establishment deed may vary for applicants. In addition, the granting of permits can also be affected by the understanding of different officials. The climax is, in the context of policy making, entrepreneurs and foreign investors will submit objections, appeals, and even lawsuits to the PTUN against state administrative decisions given by officials during the FDI limited liability company administration process. Then, court judges may also have different understandings of FDI arrangements in the construction services sector, so that attitudes or decisions at the same PTUN and between Administrative Courts in Indonesia may vary. Second, the uncertainty regarding FDI regulations in the construction services sector can also be categorized as objective legal uncertainty, because on the same content material, namely regarding the percentage of FDI involvement, there are two different instruments, namely PP 5/2021 and Perpres 10/2021 as amended by Perpres 49/202, causing hierarchical ambiguity; which legal instrument actually governs the related content material.

To understand the consequences and potential consequences of legal uncertainty regarding FDI in the construction services sector, it is necessary to know the climate status quo in the construction services sector as a benchmark for assessing the consequences. Based on the Central Statistics Agency, in general, in the 2019-2021 period, construction companies in Indonesia experienced fluctuations; based on 2019 data (168,868 companies), construction companies in Indonesia decreased in 2020 (159,308 companies), but increased again in 2021 (203,403 companies).<sup>31</sup>

Unfortunately, the BPS data above does not provide details of business entities involving FDI. However, specifically, based on data from the Ministry of Public Works and Public Housing, the data for a limited liability company for FDI in the construction services sector are 4,135 FDI limited liability companies which are FDI Specialist Contractors for each province; and 180 FDI limited liability companies which are FDI General Contractors in each province.

Currently, the number of DDI specialist contractors is still small, even though the Ministry of Public Works and Public Housing (PWPH) has stated that specialist contractors are urgently needed by Indonesia, because all public works tend to require specialists.<sup>32</sup> The Ministry of PWPH also said that the presence of BUJKA plays a role in strengthening the opportunities for national construction service business entity to obtain cooperation with foreign parties.

Apart from the insufficient amount of resources, based on the report of the National Legal Development Agency regarding the evaluation of the construction services sector, when compared to the total number of national business actors as

---

<sup>31</sup> Badan Pusat Statistik, "Banyaknya Perusahaan Konstruksi 2019-2021," <https://www.bps.go.id/indicator/4/216/1/banyaknya-perusahaan-konstruksi.html>, n.d.

<sup>32</sup> Biro Komunikasi Publik Kementerian PUPR, "Kementerian PUPR Dorong Kontraktor Indonesia Ekspor Jasa Konstruksi," <https://pu.go.id/berita/kementerian-pupr-dorong-kontraktor-indonesia-ekspor-jasa-konstruksi>, October 3, 2018.

a whole the number of FDI business actors is indeed small, but the scale of their financial capacity and ability to work is very high, for example getting a project strategic and equipped with qualified technology . This is what causes the role of FDI business actors to be significant in the structure of contracting companies in Indonesia. Informally, FDI construction business actors have also taken a significant portion in the construction business in Indonesia through assistance from international financial institutions.<sup>33</sup>

Although the number of construction business entities has almost always increased every year, Indonesia still lacks specialist contractors and the existence of BUJKA and Foreign Limited Liability Company is very significant for the development of the Indonesian construction business sector, because it provides specialist contractors and opens opportunities for PMDN business actors to cooperate with foreign parties. However, Foreign Limited Liability Company do simultaneously dominate the construction services sector, due to better financing and qualified resources, thus dominating vital and strategic projects, even though the number of Foreign Limited Liability Company is fewer than local business actors.

As a result, there are various negative impacts resulting from legal uncertainty regarding FDI regulations in the construction services sector. As previously explained, firstly , legal uncertainty is prone to opening opportunities for officials to make partial or unilateral discretion. This is illustrated by the potential for inconsistencies in state administrative decisions in the administrative process of a FDI limited liability company resulting from multiple interpretations and unclear legal regulations.

The outcome by officials in the context of carrying out administrative services based on incomplete or unclear regulations are called discretionary. This discretion can then injure the rights of foreign investors who are not given legal certainty in determining the upper limit on the percentage of FDI involvement in the construction services sector, so that mistakes in administrative files submitted by foreign investors are errors arising from legal loopholes that arise due to legal uncertainty. This problem can even spread to the level of judicial bodies, such as the Administrative Court, because between judges and Administrative Courts in various regions there is also disagreement regarding the regulation of FDI in the construction services sector.

Second , the legal uncertainty will impact the attractions of business sectors for foreign investors. It is widely known that the Indonesian government has the vision of having a Gross Domestic Product reach Rp. 27,000,000 (twenty-seven million rupiah) per capita per month in 2045 which could be embodied with the participation of FDI. Specifically in the construction sector, as elaborated above the importance of BUJKA and BUJKA Representative Office, the legal

---

<sup>33</sup> Edy Rachenjantono, "Analisa Dan Evaluasi Hukum Tentang Jasa Konstruksi" (Jakarta: Laporan Departemen Hukum dan HAM Badan Pembinaan Hukum Nasional, 2008).

uncertainty could impact the interest of foreign investors to invest in Indonesia. Without the legal certainty, there will be a risk for foreign investors to lose their capital. Indonesia needs a FDI contractor limited liability company because it is able to open up opportunities for Indonesian business actors to cooperate with foreign parties and provide resources. If the enthusiasm of FDI decreases, for example, then specialist contractors will also decrease and this will result in a shortage of contractors specializing in certain fields, even though Indonesia is currently still short of specialist contractors. In addition, because foreign contractors tend to have qualified technology and human resources, the departure of foreign contractors will also hurt the quality of the construction services sector.

In addition, legal uncertainty will also discourage foreign investors from investing in Indonesia to avoid disagreements in cooperative relations with Indonesian business actors which can lead to disputes; Indonesian business actors have different interpretations of regulations from these foreign investors regarding the amount of capital to be provided to form a FDI limited liability company. In this regard, legal uncertainty also increases the risk of disputes between investment partners. Foreign investors will certainly consider this scenario to assess investment risk. This risk assessment will influence the attitude and desire to invest. If the risk is too great due to dispute resolution in Indonesia which does not give legal certainty, then investors will certainly be reluctant to invest. The reluctance of foreign investors to invest in the construction services sector will also result in "fleeing" of foreign investors to other countries. Based on data from BKPM which is explained in Chapter II regarding Indonesia's economic growth compared to other ASEAN countries, Indonesia's growth is slower than the Philippines, Myanmar and Vietnam.

Third , legal uncertainty regarding FDI regulations in the construction services sector, raises questions about the legitimacy of the provisions of PP 5/2021 and Perpres 10/2021 as amended through Perpres 49/2021, because it reduces the credibility of the law made by the government itself, so that the level of public trust and foreign investment on law and government is also reduced, because they are unable to make laws that sound clearer.

As a result, the public and foreign investors have doubts about which provisions apply in setting the maximum limit for FDI involvement in the construction services sector, because they are worried that the policies and discretion taken by the government are unfair to FDI and are carried out unilaterally, because foreign parties do not understand the regulations due to legal uncertainty.

#### **4. CONCLUSION**

There is legal uncertainty in the limitation of foreign ownership in the construction services sector. Firstly, the restriction is regulated in a regulation that is not in accordance with the mandate of the Law, which should be regulated through a presidential regulation, yet the provision regulated in a government

regulation instead. Second, the presidential regulation does not mention any restrictions of the foreign ownership but PP 5/2021 regulates the limit of foreign share ownership in the construction services sector for Non-ASEAN BUJKA at 67% and ASEAN BUJKA at 70%. This situation creates legal uncertainty for: a. The emergence of inconsistencies in practice, both at the level of establishing a limited liability company for FDI construction services, permits, to submitting claims to court; and b. Considering that there are two different construction services NIL regulatory instruments that cause hierarchical ambiguity regarding which legal instrument actually regulates the related content material, the questions about the legitimacy of the provisions of the law is raised.

## **BIBLIOGRAPHY**

- Amato, Anthony D '. "Legal Uncertainty." *California Law Review* 71 (1) (2010): 4.
- Anisa. "Urgensi Penanaman Modal Asing Indonesia Sebagai Upaya Pemenuhan Kesejahteraan Warga Negara Indonesia." *Al'Adl* 1 (2020): 185.
- Ashshofa, Burhan. *Metode Penelitian Hukum*. Jakarta: Raja Grafindo Persada, 2010.
- Ayu Taduri, Januari Nasya. "The Legal Certainty and Protection of Foreign Investment Againsts Investment Practices in Indonesia." *Lex Scientia Law Review* 5, no. 1 (May 30, 2021): 128–29. <https://doi.org/10.15294/lesrev.v5i1.46286>.
- Badan Koordinasi Penanaman Modal. "Daftar Negatif Investasi Di Indonesia." <https://www.investindonesia.go.id/id/artikel-investasi/detail/daftar-negatif-investasi-di-indonesia>, 2022.
- Badan Pusat Statistik. "Banyaknya Perusahaan Konstruksi 2019-2021." <https://www.bps.go.id/indicator/4/216/1/banyaknya-perusahaan-konstruksi.html>, n.d.
- Biro Komunikasi Publik Kementerian PUPR. "Kementerian PUPR Dorong Kontraktor Indonesia Ekspor Jasa Konstruksi." <https://pu.go.id/berita/kementerian-pupr-dorong-kontraktor-indonesia-ekspor-jasa-konstruksi>, October 3, 2018.
- Devi, Ria Sintha. "Perlindungan Hukum Bagi Penanaman Modal Asing (PMA) Di Indonesia." *Jurnal Rectum* 1, no. 2 (n.d.): 144.
- Dunning, John H. *Reevaluating the Benefits of Foreign Direct Investment*. New York: Transnational Corporations, 1994.
- Edy Rachenjantono. "Analisa Dan Evaluasi Hukum Tentang Jasa Konstruksi." Jakarta: Laporan Departemen Hukum dan HAM Badan Pembinaan Hukum Nasional, 2008.
- Engeline Pijoh, Feibe, and Isle Junita Melo. "Legal Study on Non-Commercial Risk Investment in Indonesia." *Advances in Social Science, Education and Humanities Research* volume 473 (2020): 52.
- Ernawati, Noviana. *Definisi Investasi Dalam Model Perjanjian Peningkatan Dan Penanaman Modal*. Yogyakarta: Universitas Gajah Mada, 2019.

---

<sup>34</sup> {Citation}

- Fajar, Mukti, and Yulianto Achmad. *Dualisme Penelitian Hukum Normatif & Empiris*. Yogyakarta: Pustaka Pelajar, 2010.
- Haming, Murfidin, and Salim Basamalah. *Studi Kelayakan Investasi Proyek Dan Bisnis*. Jakarta: PPM, 2003.
- Horm, Paul V and Gomez Henry. "International Trade Principles" 4th edition (1964): 261.
- Jason, Ferdinand, and David Tan. "Kepastian Hukum Bagi Penanam Modal Asing Sehubungan Dengan Inkonstitusional Undang-Undang Cipta Kerja." *UNES Law Review* 4, no. 3 (n.d.): 369.
- Jayus, Jaja Ahmad. "Konsep Sistem Hukum Investasi Dalam Menjamin Adanya Kepastian Hukum." *Jurnal Litigasi (e-Journal)* 16, no. 2 (2016): 2907.
- Kairupan, David. *Aspek Hukum Penanaman Modal Asing Di Indonesia*. Jakarta: Kencana Premada Media, 2013.
- Kaplow, Louis, Lucian Bebchuk, James Boyle, Scott Brewer, David Charny, Erwin Chemerinsky, Stephen Choi, et al. "Rules Versus Standards: An Economic Analysis." *142 Duke Law Journal*, 1992, 557.
- Kumari, Reenu, and Anil Kumar Sharma. "Determinants of Foreign Direct Investment in Developing Countries: A Panel Data Study." *International Journal of Emerging Markets* 12, no. 4 (2017): 658–82. <https://doi.org/10.1108/IJoEM-10-2014-0169>.
- Luqyana, Dina, and Azhari Yahya. "Legal Certainty Of Land Title In Facilitating Foreign Direct Investment In Aceh Province, Indonesia." *Student Journal of International Law* 1, no. 1 (August 2021): 50.
- Mertokusumo, Sudikno. *Mengenal Hukum Suatu Pengantar*. Yogyakarta: Liberty, 2007.
- Panjaitan, Hulman, and Anner Mangatur Sianipar. *Hukum Penanaman Modal Asing*. Jakarta: CV Indhill Co, 2008.
- Rusli, Nanda Aisyah, Muhammad Ashri, and Said Nurfaidah. "Analisis Hukum Kebijakan Daftar Negatif Investasi Berdasarkan Peraturan Presiden Nomor 44 Tahun 2016 Terhadap Pengusaha Ritel Indonesia." *Nagari Law Review* 1, no. 2 (n.d.). <https://doi.org/10.25077/nalrev.v.1.i.2.p.126-137.2018>.
- Sembiring, Sentosa. "Legal Aspect of Foreign Direct Investment in Indonesia Based on the Law of Number 25 of the Year 2017 Concerning Investment." *International Journal of Sociological Jurisprudence* 2, no. 1 (February 2019): 35.
- Sidharta. *Karakteristik Penalaran Hukum Dalam Konteks Keindonesiaan*. Bandung: Alumni, 2006.
- Simbolon, Nanci Yosepin, Muhammad Yasid, Beny Syahputra Sinaga, and Nancy Saragih. "Perlindungan Hukum Bagi Penanaman Modal Asing (PMA) Di Indonesia." *Jurnal Darma Agung* 28, no. 1 (n.d.): 66.
- Soekanto, Soerjono, and Sri Mamudji. *Penelitian Hukum Normatif: Suatu Tinjauan Singkat*. Jakarta: Rajawali Pers, 2015.
- Sulistiowati and Paripurna. "Mempertahankan Tujuan Peraturan Daftar Negatif Investasi Dalam Mengendalikan Dominasi Kepemilikan Asing (Studi Kasus Pada Industri Telekomunikasi)." *Jurnal Dinamika Hukum* 14, no. 2 (2014): 200.

- Sutrisno, Nandang, and Sigar Aji Poerana. "Reformasi Hukum Dan Realisasi Investasi Asing Pada Era Presiden Joko Widodo." *Undang: Jurnal Hukum* 3, no. 2 (2020): 244.
- Tatiara, Wildatul Fitri, and Toshikiro Kudo. "The Impact of Negative Investment List (NIL) Introduction on Investment Decision of Foreign and Domestic Investors in Indonesia." *The Journal of Indonesia Sustainable Development Planning* 2, no. 2 (August 2021): 161.