

# THE LEGAL CONSEQUENCES OF THE GOVERNMENT'S POLICY OF ATTRACTING FOREIGN INVESTORS BASED ON THE OMNIBUS LAW

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**Abstract:** *Legal issues have arisen regarding the existence of an article that is quite controversial among law enforcers, economic, social and political, regarding the granting of a period of Management Rights over HGB and HP land which is granted within a period of 90 years as regulated in the Job Creation Act: Omnibus Law in Prolegnas so as to reduce the authority of the Land Bank then by the procedure for granting it is carried out through derivative regulations which will then be formed by Members of the Legislative Formation Commission in the DPR, this raises pros and cons over the issue of supremacist violations against foreign investment business entities that violate the decision of the Constitutional Court. because then the HGU or Right of Use on HPL land can be given an extension at once as well as the authority to cancel regional regulations through presidential regulations which have indirectly violated the constitutional obligations of the State and Government over agrarian resources in the country so that they are managed as much as possible for the prosperity of the people through the principle of the democratic pattern of the Indonesian economy, in the form of a business entity or cooperative with the spirit of gotong royong. because the setting at least does not refer to this principle. Besides that, there is also a violation of motives in the monopoly speculation of the land bank. To accommodate, manage and carry out transactions for buying and selling state lands, the Land Bank (BT) institution was formed. BT manages the lands claimed by the state as a result of the implementation of the domain verklaring above, and then they are designated as assets of the Land Bank in the form of HPL. Even though it is claimed to be a non-profit institution, in fact the source of its funding can come from third parties, including debts from foreign institutions. so that this gives the authority flexibility over the limits of state authority through the practice of conflicts of interest violating the elements of the provisions of the granting of management rights.*

**Keywords:** *Government Policy, Foreign Investors, Omnibus Law*

## Introduction

Analysis of the factors that determine economic growth can be concluded that the level and rate of growth of an economy is determined through the theory of growth, the rate of economic growth is mainly determined through population development, investment development and technological progress. With regard to the issue of increasing foreign attractiveness to invest in Indonesia, the government is competing with other countries to formulate strategies and provide answers to the question, what is the appropriate pattern to increase economic growth through investment? Can improve the

efficiency and effectiveness of investment activities to be implemented. Efforts needed to increase development certainly require investment in such a way, so that throughout the development process there will be no obstacles originating from supply or demand. This relates to the terms balanced and unbalanced development. Which is inversely proportional to the obstacles that come from supply as described above. These terms are used to indicate that development programs and policies are structured in such a way that there is an excess and shortage of economics in various sectors, resulting in distortion and instability in the economy. According to one expert who developed the balanced and unbalanced theory, Hirschman, if the economy wants to be maintained so that it continues to advance, in its existence, development policy can serve as a defense against shocks, disproportions and imbalances (Sakino, 2007).

A balanced development program is implemented, the amount of investment that must be made far exceeds the level of investment in the period before the development effort was carried out. This theory of development, which is also called balanced and unbalanced, has the aim of emphasizing the capacity of the need for large amounts of investment for the benefit of development programs so that in the long term the rate of economic growth is always greater than the rate of population growth, so that the level of community welfare can be realized. To achieve public welfare, the government has issued various rules and policies to achieve this. Indonesia itself is well-known among ASEAN countries as the owner of a convoluted regulatory system, policy and bureaucracy, and there are other things that hinder investment/investment such as political turmoil, legal certainty, infrastructure. This is due to the quality of human resources. Until now it is still inadequate and infrastructure in remote areas that are famous for their tourism is still lacking. This is contained in the index on the coordinating body for foreign investment which states that there is a decline in PMA. The economic growth system in the year of SBY's government stated that the realization of foreign investment reached 16.21 billion in the first period and in the final period in 2014 the realization reached 28.53%, namely there was a jump of around 14%, this is inversely proportional to only an increase of 0.1% which was initially in 2015, 29.27 billion and 2018 the realization reached 29.30. Another factor that is still worsening is that it is said that for every 1 million US dollars that enters Indonesia, this only results in the achievement of job openings of 32 people. With the decline in human resources and investment, it is impossible to increase economic development growth (Gumiwang, 2019).

Companies in several trade sectors that make Indonesia an attractive place for foreign investment, such as Europe and the United States, are capital-intensive sectors (automotive, logistics, and pharmaceutical). One of the government's efforts in increasing economic growth is to form various arrangements that have global competitiveness, which summarize the bureaucracy and ease of licensing. Regulations in the field of job creation laws and increasing the growth of foreign investment investment, namely: omnibus law. According to the chairman of the legislative body (Baleg) of the DPR, Supratman in his presentation at the plenary meeting explained that the work creation bill was discussed in 64 meetings from April 20 to October 3, 2020. The law, which before being ratified, consisted of 15 chapters and 174 articles, which were later ratified in October 3, 2020. One of the things discussed in the articles of the omnibus law is the management right as one of the foundations of a right granted to certain legal subjects by the government in managing the type of concession land owned by the state, based on article 127 paragraph

(3) management rights are granted for 90 years. Which then can be granted the right to use the right to cultivate (HGU), the right to use the building (HGB) and the right to use (HP), use rights on land (HPL).

This has pro and contra impacts, one of the contra effects is the deviation of the right to control from the state (HMN) and has a high potential to misuse power or terms in the dictionary (abuse of power). This management right, if seen in history, is a land right which has no term at all in the basic agrarian law and specifically for rights as well as its extent is outside the provisions of the UUPA. Indirectly, Article 2 paragraph 4 states that the implementation of the state's right of control above can be delegated to autonomous regions and customary law communities, only as necessary and not contradicting the national interest, according to the provisions of government regulations. for the delegation of authority to exercise the right to control the state it is referred to by existing regulations as management, while for the delegation of the exercise of authority to exercise the right to control the state to indigenous peoples there is no regulation that regulates it so that it is still a *das sollen*, even though the law is flexible enough to accommodate a provision in the future. management rights for rural areas listed in a particular legal community. This is closely related to the level III area of autonomy that is being planned by the government. Perhaps in the future, to make it easier to understand, let's call it a village management right, in addition to a general management right. In Article 3 of the UUPA (Basic Agrarian Law), certain rights are given to customary rights which are recognized by the UUPA as an institution which even though it existed before the UUPA, the right to life and its role are given a place in the national agrarian law system.

Article 2 of the UUPA further explains that Article 33 paragraph 3 of the 1945 Constitution reads: "Earth, water and natural resources contained therein are controlled by the state and used for the maximum benefit of the people's prosperity." Meanwhile, Article 2 paragraph 1 of the UUPA states that: based on the provisions in Article 33 paragraph 3 of the Constitution and the matters referred to in Article 1, the earth, water and space, including the natural resources contained therein, are at the natural level. contained in it is at the highest level controlled by the state, as an organization of power for all the people. As noted in UUD 45 it is stated that the earth, water and natural resources contained therein, while in Article 2 paragraph 1 it is stated that the earth, water, space and natural resources contained therein are controlled by the state. This broad understanding, as a clear attitude that the three understandings are an integration and should also be arranged and resolved in an integrated manner.

Based on the explanation above, the writer formulates two problem formulations, including how is the right of management applied in Indonesia? And what are the solutions and policies for the application of management rights for a period of 90 days which are contrary to the constitutional rights of local governments in managing foreign investment that enters Indonesia?

### **Research method**

The research method used in this paper is a normative research method. Meanwhile, according to an expert in the field of research methods, legal research methods are systematic and certain thoughts that have elements to analyze all the symptoms and problems being studied. As for this research method, it is more specific to discuss the

dilemmas that occur in legal arrangements and principles, legal history and legal comparisons (marzuki, 2011).

## **Result and discussion**

### *The Breadth Of The Meaning Of The Right To Control The State And Its Regulation In National Agrarian Law*

How the extent of the state's right to control is stated in article 2 paragraph uupa, while the state's right to control as referred to in this article gives the authority to:

- a. Regulate and administer the designation, use, supply and maintenance of the earth, water and space.
- b. Determine and regulate legal relations between people and the earth, water and space.
- c. Determine and regulate legal relations between people and legal actions concerning earth, water and space.

The various kinds of rights contained in the law, precisely in Article 4, have provided a detailed explanation of the rights to the earth's surface, which are referred to as the right to control by individuals or collectively, thus the government in carrying out this law will try to create several legal institutions. to comply with the provisions of this article. From the above description it is clear that the authority of HMN is the authority of the central government and this is proven as stated in Article 2 paragraph 4 which states that the implementation of HMN can be authorized to autonomous regions and customary law communities.

### *History And Concept Of Management Rights*

This HPL has properties and characteristics that are not easy to understand, it can even lead to misinterpretation when juxtaposed with land rights regulated in Article 16 of the UUPA (ownership rights, cultivation rights, building rights and use rights) (Maria, 2008) ). Management rights from the beginning were a translation of the Dutch language *Beheersrecht*, so at that time it was translated with tenure rights and for a long time this term survived and was used which we will know from the descriptions below:

- If it is read to PP 8/53, the original term was control rights which contained:
- a. Plan, designate, use the land.
  - b. Use the land for the purposes of carrying out their duties.
  - c. Receiving income/compensation and/or annual mandatory money.

The government's determination at that time was to change all land regulations with the aim of obtaining the status quo in the issuance of new *eigendom* rights (before the enactment of our UUPA, because it was still controlled by the b.w. regime) but apparently due to urban development, the city government needed land for land use. the implementation of their duties, as well as many deviations from the land purchased by the people for the purposes of the government, including the occurrence of lands belonging to the right of control from the regional government that are sometimes sold/exchanged without the government issuing government regulation no. 8 of 1953.

Land designation and use can be interpreted as use planning or in the city it is called zoning planning, and designation is a special *bestemming* of a use planning. In the agrarian minister's decree no. Sk vi/5/ka dated January 20, 1962, which mentions:

1. The right of control (beheer) by a department, agency or autonomous region over land controlled directly by the state, based on government regulation no. 8 of 1953 (l.n. of 1953 no. 14) or other laws and regulations that are enacted by government regulations regarding this matter.

2. Right of use with a period of more than 5 years with the understanding that if the period of time is not specified, it is considered as more than 5 years..

Meanwhile, regarding eigendom rights through a circular letter from the Minister of Agrarian Affairs cq Head of the Planning and Legislation Bureau, which was addressed to the Head of West Java Agrarian Inspection dated March 1, 1962 number ka.3/1/1 it was stated that:

1. If the eigendom right is affected by the law on the abolition of particular lands, the land in question will be granted by a decree of the minister of agrarian affairs with the right of control (beheer) to the municipality which previously had the eigendom right.

2. In the case of eigendom lands which are only in the form of small parts which are imposed in the law on the abolition of particular lands, then as it is known based on the conversion provisions of the basic agrarian law, the eigendom rights have been converted into building use rights. Since such lands have generally been encumbered with erpacht or postal rights, they should be converted into tenure rights, the confirmation of which is carried out by a decree of the agrarian minister as a conversion of the basic agrarian law article 1 paragraph 5.

Furthermore, regarding lands controlled by regions that do not yet have any rights, derived from the liberation of people's rights, the lands will also be given to the region concerned with the right of control. The right of control itself is given to the municipality/regency with the following provisions:

1. Municipalities/districts are given the authority to determine the allocation and conduct verification.

2. The granting of property rights, building use rights and other rights is still carried out by agrarian agencies according to sk 112/ka/61.

3. Compensation for other payments is still received by the municipality/regency.

Similarly, we can read about the decision of the minister of agriculture and agrarian no. Decree 12/ka/1973 regarding the conversion of opstal and erfpacht rights on municipal eigendom lands, then in deciding to stipulate, first confirming that postal and erfpacht rights on municipal eigendom lands, on the basis of the provisions of article v (the provisions of Article v) the conversion of the basic agrarian law, according to the law it was converted into building use rights, since September 24, 1961.

The concept of management rights was introduced in Government Regulation (PP) no. 9/1953 concerning the control of state lands (Parlindungan, 1989), according to its title, PP no 8/1953 regulates the control of state land that:

a. Control over state land can be handed over to the ministry in the egari (Kemendagri), except when the state land has been handed over to the ministry/office or autonomous region. (articles 2 and 3).

b. Land control over state land can be given and handed over to the ministry/service or autonomous region. To organize the public interest in the area itself. (article 4)

c. If the land in point b is no longer used, the ownership is handed back. To the Minister of Home Affairs (Article 5).

- d. Ownership of land granted to a ministry/service or autonomous region can be revoked if the first handover has not been or is not in accordance with the relationship of the intended purpose. The two areas of land that were handed over exceeded their needs, and the three lands were not maintained or not used properly. (article 8).
- e. State land whose control is handed over to a ministry/office can be handed over through a ministry permit to another party with a short period of time that must be determined.
- f. The head of an autonomous region may be granted control over state land to be given to other parties a right in accordance with the regulations of the Minister of Trade of the Republic of Indonesia.

#### *Characteristics Of Management Rights In Participation In Economic Growth Policies Through Investment*

Reviewing the provisions in the UUPA, it can be seen that hpl. It is not a land right, because it is not stated in Article 16 paragraph (1) of the UUPA which regulates the types of land rights (Winahyu and Fakhrizya. 2019), nor is it an entity of its own right of control, because in the general explanation III, the UUPA only mentions 3 (three) land tenure rights, namely HMn, land rights, and ulayat rights. The legal basis for management is stated in the UUPA, whose existence is an interpretation of the provisions of Article 2 paragraph (4) of the UUPA, which states that: "The right to control The implementation of the above mentioned state can be delegated to autonomous regions and does not conflict with national interests, according to the provisions of government regulations. In 1972, HPL was regulated in a concrete manner, namely in Article 12 of the Minister of Home Affairs Regulation No. 6 of 1972 concerning the delegation of authority to grant land rights mandated by the Ministry through the issuance of decisions on applications, renewals and the release of cancellation transfer permits in Perkaban No. 1 of 2011 and its amendments (Perkaban No. 3 of 2012) which HPL is given by the National Land Agency or abbreviated as HPL.

The granting of land rights with management rights or HPL is approved by the government, if on the land given HPL there are still other land rights. Before giving HPL to certain legal subjects, it must be noted that the land to be given HPL must be in a clear and clean condition. As explained that the implementation of the HPL is of course carried out by the competent government officials where the area lives, as in some areas the GSBK is, a stadium that was started to be built in the middle. For the first time this GSBK was completed in 1962 which was intended for the Asian Games IV in Jakarta and was managed by authorized officials in accordance with applicable laws and regulations.

As for the authority of the management right holder, substantially from the various laws and regulations governing HPL, the authority granted to HPL holders includes, among others:

- a. Planning the allocation and use of the land in question;
- b. Use the land for the purposes of carrying out its business;
- c. Handing over parts of the land to a third party according to the requirements determined by the company holding the right, which includes aspects of designation, use of time period and financial system. And given the authority by the official in accordance with applicable regulations and not contradictory.

The detailed authority in granting management rights over state land is then limited, namely:

- a. Land with a maximum area of 1000m<sup>2</sup> (one thousand square meters);
- b. Only Indonesian citizens and legal entities formed under Indonesian law and domiciled in Indonesia;
- c. Granting rights for the first time only. Provided that the change, extension and replacement of the right will be carried out by the agrarian agency concerned, in principle it does not reduce the income previously received by the right holder (article 6 paragraph (2)).

Along with the dynamics of regulation in the field of hpl, there is a shift in the nature of hpl that tends to return to the public, therefore after a long time there are various confusions of understanding about hpl, and various implications, the correction of the position of hpl began in 1996. What can be seen in pp no. 40 of 1996 which states that the right to cultivate, the right to use the building and the right to use the land, in article 1 point 2 hpl are the control rights of the state authorized to exercise part of the state's abundance authority to the holder. In the concept of land itself, the assignment of land rights can be carried out on it with HGB and HP. The three provisions are regulated in:

- a. For building use rights, it can be found in article 21, 22 paragraph (2), article 26 paragraph (2), article 30 letter d, article 34 paragraph (7), article 30 letter d, article 34 paragraph (7), article 35 paragraph (1) letter b, article 36 paragraph (2) and article 38.
- b. Right of use, for the provisions on the use of the right to use and all aspects regulated are contained in article 41, 42 paragraph (2), article 46 paragraph (2), article 50 letter d, article 54 paragraph (9), article 55 paragraph (1) letter b, chapter 58.

In essence, HGB and HP occur on HPL, HGB and HP land which are given a decision through rights approval by the minister and by an appointed official at the proposal of the HPL holder. The later officials who can be given the authority to manage HPL, namely:

- a. Government agencies including local governments;
- b. State-owned enterprises;
- c. Regional owned enterprises;
- d. PT. company;
- e. Authority body;
- f. Other government legal entities appointed by the government.

#### *Relationship Between HPL Holders And Third Parties*

The legal relationship that forms the basis for granting land rights by HPL holders to third parties is stated in the land use agreement (SPPT). In practice, the SPPT can be referred to by another name, namely a letter of agreement for the transfer, use and management of land rights. Agreements are made in the context of implementing development agreements, ownership and management, handover of land, buildings and supporting facilities, also known as bots or build, operate and transfer. Regarding the bot agreement, it can be interpreted as an agreement between two parties, where the first party surrenders the use of its land to build a building on it by the second party, and the second party has the right to operate and manage the building for a certain period of time. The things that make up the content/substance of the agreement are broadly the same as the agreement. Broadly speaking, the meaning is the same as the content of the BOT agreement.

If then the party is unable to keep the agreement, breach of contract or default. Then the HPL holder submits the use of the land as well as the management and implementation of any and all obligations contained in the agreement. While the legal consequences in the form of the application of sanctions in the form of:

- a. Written warning to correct or recover the event of default within a certain period of time (recovery time);
- b. If point a cannot be implemented, a deliberation will be held at a certain time (deliberation time);
- c. If point b is not achieved, the party who breaches the contract is obliged to pay compensation within a certain time.

For the expiration of the HPL agreement, it ends due to the expiration of the term and is terminated by the decision of the parties in the BOT agreement.

#### *State Land Assets*

Law no. 1/2004 states that state property is all goods purchased or obtained at the expense of the state budget originating from other legitimate acquisitions. Regarding state assets in the form of land, it is regulated in the circular letter of the minister atr/bpn no. 500-468 dated January 12, 1996 regarding the issue of Ruslag on government lands. In the provisions of the circular, it is stated that (Harsono, 1997):

- a. Lands that are not lands of other parties and which have been physically controlled by the state;
- b. These lands are managed and maintained/maintained through the government's budget;
- c. The land has been registered in the inventory list of the relevant government agency;
- d. Physical land is controlled or utilized by other parties based on legal relationships made, among others, by the parties and government agencies.

Through other provisions governing the management of state/regional property, the granting of HP and HGB over HPL to third parties can still be carried out according to the procedures stipulated in the laws and regulations in the land sector. It can be seen that the framework of the mindset of HP/HGB over HPL is based on the basis of cooperation in the use and use of it through the principle of efficiency in the management of state property, with standards for the use of needs that are directed at optimally carrying out main tasks and government functions.

#### *Foreign Investment in Indonesia*

The theory of development regarding foreign capital takes the position that foreign capital provides many benefits to countries receiving capital, which are almost entirely developing countries. The arrival of foreign capital into a country makes that country allocate its limited funds for other purposes. Foreign capital will open up new jobs. Thus the problem of unemployment can be resolved and workers will get wages as expected. The beneficial aspects of foreign capital bring the argument that foreign capital from the point of view of international law must be protected. Protection will facilitate the flow of foreign capital to a country which encourages economic development, especially for free market developing countries from America and Europe to ensure the flow of foreign capital coming to these countries (Guguk, 2011). In order to ensure that capital inflows through



developing and developed foreign countries urge GATT/WTO which contains TRIPs, TRIM's dan GATs. The attitude of world bodies such as the world bank and the IMF encourages economic liberalization, which means that it is left to market forces managed by third parties, namely the private sector, for a climate of privatization.

In fact, the theory of development can advance developing countries with evidence that says otherwise, developing countries continue to depend on developed countries, so that developing countries rely on foreign exchange from their exports to developed countries, making developing countries dependent on developed country markets. In order to promote economic growth so that it does not depend solely on developed countries, the government devises a strategy to attract foreign capital, developing countries need political stability. One of them in the middle of the end of yesterday, the government passed the regulation on job creation which aims to attract foreign investors to invest their capital in Indonesia. In order to increase competitiveness and encourage investment in Indonesia.1 the problem is whether the number of regulations is a problem or there are other things, such as disharmony regulations that are actually a problem. If many regulations are a problem, then simplifying regulations through the omnibus law concept is certainly the right step. This is because the omnibus law is a law that focuses on simplifying the number of regulations because it revises and revokes many laws at once. Which aims to promote economic growth in increasing local and international competitiveness. The things that are feared then include the rights that are taken away through material facts in the field through the aspect of examples of workers who do not allow the right to strike, both goods must be sold cheaply and reduce production costs. This is then what the public in general is afraid of.

Another thing is allegedly regarding management rights as the root basis of the monopoly liberalization system in the interest of land rights control which is feared to occur in the government system later after all elements of the omnibuslaw mechanism legal system are running and its derivative regulations, especially on the land tenure system in national agrarian law.

## **Conclusion**

As for the related issues regarding the management of the sale and purchase of state land formed through a land bank institution or abbreviated as bt, it is necessary to note that the land claimed by the state or domain verklaring above, is then designated as a land bank asset in the form of hpl, this creates a monopoly in inequality of control over Assen land bank land plus a fairly long period of time which can be up to 90 years and can be extended. So that it gives rise to supremacist rights and government institutions can be easily controlled by the role of investors in creating policies that are more pro to foreign investors which are generally aimed at making profits. This certainly robs people of their constitutional rights in business competition, plus inequality in society is still ongoing and very difficult to solve.

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