

Management and Utilization of Nusa Penida Island by Foreign Nationals in Relation to Licensing Regulations in Indonesia

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Abstract

This paper examines the management and utilization of small islands in Indonesia, specifically Nusa Penida, by foreign nationals (WNA) in relation to the prevailing legal regulations on land and investment permits. Indonesia, being an archipelagic nation, is home to numerous islands that attract both local and foreign investors, especially in tourism. The legal framework governing foreign investment in small islands, including the necessary permits, is explored, with particular focus on the requirements set out in the Indonesian legal system, such as the UUPA (Agrarian Law), the Management of Coastal Areas and Small Islands (PWP3K Law), and various ministerial regulations.

The paper addresses how foreign nationals engage in island management in Nusa Penida, particularly in tourism-related ventures like hotels, resorts, and recreational activities such as diving and snorkeling. It evaluates the impact of such foreign investments on the local community, highlighting both positive and negative aspects. One significant issue discussed is the long-term land leasing agreements between foreign nationals and Indonesian landowners, which may potentially lead to unintended ownership transfers and

legal disputes, as well as challenges in ensuring compliance with Indonesian land laws.

The study also delves into the regulatory gaps in the implementation of these laws, particularly the lack of clear procedural guidelines for foreign investment in small islands. Furthermore, it calls for stricter enforcement and monitoring of land use and property transactions to prevent the unregulated acquisition of land by foreign nationals and to protect the national interest. Finally, the paper offers recommendations for improving legal oversight, such as ensuring proper registration of land transactions, enhancing the role of notaries and land officials in verifying the legality of land agreements, and ensuring that foreign investments are aligned with Indonesia's economic and environmental goals. The findings suggest that while foreign involvement in small island management can contribute to the local economy, stringent legal frameworks and thorough monitoring are essential to safeguard the nation's sovereignty over its natural resources.

1. Background

Nusantara, as defined in the Big Indonesian Dictionary, denotes all regions within the Indonesian archipelago. Indonesia boasts tens of thousands of islands, earning it the moniker of an archipelago. Among these islands, some are populated by indigenous communities, others serve as tourist destinations, and there are even uninhabited islands. The natural panorama of Indonesia is so beautiful that it is an attraction for local and foreign tourists to visit, holiday, and even invest in small islands scattered in Indonesia.

Indonesia is recognized as an archipelago due to its approximately 17,508 islands.¹ These numerous islands are classified into several categories, namely large islands and small islands. Small islands are defined as those with an area

¹ Ambo Tuwo, *Coastal and Marine Ecotourism Management: Ecological, Socio-Economic, Institutional, and Regional Facilities Approaches* (Surabaya: Brilian International, 2011).

smaller than or equal to 2.000 km² (two thousand square kilometers) and their associated ecosystem units.² The regulation of spatial utilisation of some small islands requires everyone to have a Location Permit which is the basis for granting a Management Permit.³

Management permits issued to foreigners for small islands are restricted to utilization for business purposes. Additionally, foreign investment in the small island utilization sector necessitates a permit from the Minister of Maritime Affairs and Fisheries. This regulation is reiterated in Article 26A of the PWP3K Law, wherein the utilization of small islands and the utilization of surrounding waters in the context of foreign investment must acquire approval from the Minister of Maritime Affairs and Fisheries.⁴

Moreover, foreign investment must prioritize national interests. This license is also issued subsequent to receiving a recommendation from the regent/mayor. Therefore, foreign management in the form of full ownership is prohibited. What can be granted to foreign nationals is solely a form of 'permit' for utilization within the framework of foreign investment.

However, the provisions for granting management licenses in the PWP3K Law do not currently include regulations for foreign investment in small islands concerning the technical procedures that must be adhered to (Ministry of Law and Human Rights of the Republic of Indonesia, Analysis and Evaluation Report on the Management of Coastal Areas and Small Islands, Jakarta: BPHN, 2015, pp. 32). Article 26A of the PWP3K Law has not addressed foreign investment in coastal areas through its presidential regulation. This omission is crucial for further regulation of share transfers and land allocation. Failure to promptly establish implementing regulations may impede investment.

Therefore, foreign investment in small islands is not prohibited, provided that investors adhere to the established regulations. Specifically, the gradual transfer of shares to Indonesian participants and land allocation, considering ecological, social, and economic aspects, is mandated to be specified through a Presidential Regulation (Article 26A, paragraph 5 of Law Number 1 Year 2014). Therefore, this article will examine the management of small islands by foreigners and natives in Indonesia, especially Nusa Penida Island. How it is utilised and what problems may arise if the management is carried out by foreigners and how to protect the small islands so that they are not controlled by foreigners.

² *Law on the Management of Coastal Areas and Small Islands*, Law No. 27/2007, Art. 1 point 3.

³ *Ibid.*, Art. 16 paragraph (1).

⁴ *Law on the Management of Coastal Areas and Small Islands*, Law No. 27/2007, Art. 26A.

2. Research Problem/Research Question

Drawing from the aforementioned background, the research questions to be explored in this paper are as follows:

- A. How is Nusa Penida Island managed by foreigners?
- B. How does the utilization of Nusa Penida Island management by foreign nationals affect the surrounding community?
- C. What problems will arise if foreign nationals manage?
- D. How can small islands be safeguarded to prevent them from being controlled by foreign nationals?

3. Results And Discussion

Indonesia is a country abundant with beautiful and exotic islands, attracting numerous foreign nationals who visit solely for leisure, seeking to revel in the natural panoramas. Many even choose to reside in Indonesia and engage in investment ventures. Among the investments they pursue is the management of small islands across Indonesia, involving activities such as hotel/resort/cottage management, diving/snorkeling tours, restaurants, and more, particularly on Nusa Penida Island. Administratively, this island is located in Nusa Penida Sub-district, Klungkung Regency, Bali Province and has an area of 192.72 km² and consists of 14 villages.⁵ Bali Island and its surroundings are indeed one of the most visited destinations in Indonesia by foreign tourists and local tourists because in addition to its natural panorama, Bali Island is also famous for its unique cultural customs and traditions and interesting to enjoy. Bali Island is always crowded with tourists, making domestic and foreign investors interested in investing. The tourism business favoured by foreign investors in terms of investing in Bali is the hotel business.⁶

Before delving deeper into the management of small islands by foreigners in Indonesia, particularly on Nusa Penida Island, Bali Province, we will initially explore the rights that foreigners can possess while in Indonesia. According to Article 21 and Article 22 of the Basic Agrarian Law Number 5 of 1960 (referred to as UUPA), only Indonesian citizens are eligible for property rights. Foreigners who acquire property rights through inheritance without a will or through marital asset mingling are required to relinquish these rights within one year from the acquisition.⁷

Nevertheless, foreigners or foreign legal entities are still permitted to obtain land rights in the form of usage rights, as outlined in the regulations specified in Article 42 of the UUPA. This provision aims to enable foreigners to contribute to

⁵ http://www.ppk-kp3k.kkp.go.id/direktori-pulau/index.php/public_c/pulau_info/4873#:~:text=Islands%20which%20are%20extensive%20192%2C72,and%20consist%20of%2014%20villages.

⁶ Dewa Gede Satriawan, *Indonesian Investment Law*, (Malang: Literasi Nusantara), cet. 1, 2021, pp. 338.

⁷ *Basic Agrarian Law No. 5/1960*, Art. 21 and Art. 22

the development of tourism in Indonesia and facilitate the realization of investment objectives, in alignment with Article 3 of Law No. 25/2007 on Investment, which states:⁸

1. Increase national economic growth.
2. Create employment opportunities.
3. Promote sustainable economic development.
4. Enhance the competitiveness of national businesses.
5. Enhance national technological capacity and capability.
6. Foster the development of the people's economy.
7. Transforming the potential economy into tangible economic strength by utilizing funds from domestic and foreign sources, and
8. Enhance people's welfare.

In addition to the right of use, foreigners also qualify as subjects of lease rights, as formally stipulated in Article 45 of the UUPA. This includes individuals and entities other than Indonesian citizens, such as foreigners residing in Indonesia, legal entities established under Indonesian law and domiciled in Indonesia, and foreign legal entities with representatives in Indonesia.⁹ The regulation proves that foreigners are not given the opportunity to own land with the status of property rights in Indonesia but can still be granted the right of use or the right to lease, be it the Right to Lease for Buildings or the Right to Lease on Buildings. The building can only be utilised for a residence or residential house and cannot be utilised for other activities such as office houses (Rukan) and shop houses (ruko).¹⁰

The lease rights in question encompass Hak Sewa Untuk Bangunan (HSUB) and Hak Sewa Atas Bangunan (HSAB).¹¹ HSUB entails the landowner transferring their land in a vacant state to the tenant with the understanding that the tenant can erect a building on the land. According to law, the building becomes the property of the tenant unless there is an alternative agreement between the landowner and the tenant, indicating that the landowner does not necessarily retain ownership of the structures on it. On the other hand, HSAB involves the tenant renting a building situated on another individual's land, paying a specified amount of rent for an agreed-upon period of time set by the landlord and the tenant. Therefore, the focus of legal action is on the building rather than the land.¹²

⁸ Law Number 25 Year 2007 on Capital Investment, Art 3.

⁹ Basic Agrarian Law Number 5 of 1960, Article 45

¹⁰ *Ibid.*

¹¹ Sofian Haji Raswin, *Tenure and Use of Land by Foreign Nationals Based on Lease Agreement in Alor Regency (Case research in Kepa Island, Alor Kecil Village, Alor Barat Laut Sub-district)*, Thesis, National Land College, Yogyakarta, 2015, p. 3. 3

¹² Urip Santoso, *Agrarian Law Comprehensive research*, (Jakarta: Kencana), 2013, p. 130

This implies that leases between foreigners and indigenous landowners with property rights status are permissible, provided that the utilization is solely for residential purposes and not for commercial activities. However, if the intention is to utilize the property for business ventures, such as hotels/lodging, diving/snorkeling tours, or restaurants, then the foreigner must first act on behalf of a foreign legal entity. This is so that the foreigner can have a positive impact in the form of income for state revenue, as stipulated in Article 8 paragraph (5) letter b of Law Number 25 Year 2007 on Capital Investment that the Government has the right to receive taxes and/or royalties and/or other government revenues from investment in accordance with the provisions of laws and regulations.¹³. Thus, in accordance with these regulations, the management of Nusa Penida Island by foreigners must adhere to Business Licenses acquired from either the Central Government or Regional Governments, in alignment with their respective authorities, based on the norms, standards, procedures, and criteria established by the Central Government.¹⁴

In this journal, we will explore the utilization and management of Nusa Penida Island by foreigners. Therefore, based on data collected by the author from the Sub-Directorate of Coastal Area Control, Small Islands, Borders, and Special Areas (Subdit WP3WT), there are 35 (thirty-five) sites in 6 (six) villages designated for observation in monitoring and evaluating small islands under foreign ownership on Nusa Penida Island. Out of these 35 sites, 9 were found to be managed by foreigners, while the remaining 26 were managed by Indonesian citizens.¹⁵

Out of the nine sites in question, the majority are utilized for diving and snorkeling tourism, with a smaller portion allocated for hotels, cottages, resorts, and restaurants. The acquisition of land for sites managed by foreigners is typically secured through lease agreements between foreigners and landowners for a specific duration, typically ranging from 15 to 30 years. In addition, it is also known that there are foreigners who lease back some of the land they rent to other foreigners. This should not have happened because Article 1559 of the Civil Code states that without permission from the lessee, the lessee may not misuse the leased property or relinquish the lease to another person.¹⁶ Although in the lease agreement it is regulated that it is allowed or permitted to lease back the object that has been leased, this should be avoided by the leasing party and the lease

¹³ Law Number 25 Year 2007 on Capital Investment, Art 3.

¹⁴ Law on Job Creation Number 11 of 2021 Concerning the Amendment of Law Number 25 of 2007 on Capital Investment, Article 25 paragraph (4).

¹⁵ The Sub-Directorate of Control of Coastal Areas, Small Islands, Borders and Certain Areas (Sub-Directorate WP3WT) is a sub-directorate within the Directorate of Land Rights Control, Land Use Change, Islands and Certain Areas, which is under the auspices of the Directorate General of Land and Spatial Control and Order, Ministry of Agrarian Affairs and Spatial Planning/National Land Agency (ATR/BPN).

¹⁶ Civil Code, Art. 1559.

agreement should emphasise the prohibition to lease back the object because it is feared that if the object has been controlled by a third party, it can cause losses to the leasing party and the possibility of disputes between the parties.

Based on the aforementioned explanation regarding leasing, it is essential to establish regulations governing land leases, particularly those conducted for extended periods, aimed at mitigating potential conflicts that may arise in the future among the involved parties. For instance, in instances where the leased property is held for an extended duration, there is a possibility that one of the parties may pass away, declare bankruptcy, transfer ownership to a third party, or encounter other unforeseen circumstances. Furthermore, such regulations are imperative for establishing an organized, systematic land registry and maintaining a comprehensive land history.

The utilization of land by foreigners for residential purposes can be directly conducted by foreigners through lease agreements with landowners. However, if the purpose is for business activities, foreigners must first establish a legal entity in the form of a Limited Liability Company (PT). Consequently, the lease agreement is executed between the legal entity and the respective landowner. In other words, the subject of the lease right is the legal entity (PT).¹⁷

Hence, if foreigners aim to participate in land management in Indonesia, particularly on Nusa Penida Island, Bali Province, as per Ni Ketut Sukmawati's suggestion, they must adhere to the established foreign investment procedures in the tourism sector, namely:¹⁸

1. Foreign investors must establish a limited liability company (PT) in accordance with Indonesian law and domicile it within the territory of the Republic of Indonesia (Article 5 of the Investment Law and Article 21 of the Head of BKPM Regulation No. 5 of 2013).
2. Foreign investors must take into consideration the business sectors that are open and closed to investment activities as specified in Presidential Regulation No. 39/2014.
3. Foreign investors must pay attention to the Bali Province Regional Regulation Number 16 of 2009 concerning the Regional Spatial Plan of Bali Province Year 2009-2029 to find out the areas that are allowed to conduct hotel business activities in Bali.
4. Prior to commencing investment activities, foreign investors are required to apply for a Principle License (Article 23, paragraph (2) of the Head of BKPM Regulation No. 5/2013).
5. Foreign investors must also obtain local permits, such as the Building Construction Permit (IMB), Business License (SITU), Environmental Impact

¹⁷ *Op.Cit.*, p. 6.

¹⁸ *Op.cit.*, p. 339.

Assessment (AMDAL), or Environmental Management Efforts (UKL), and Environmental Monitoring Efforts (UPL).

6. Investors are obligated to submit an Investment Activity Report (LKPM) every 3 months (quarterly) during the construction phase and every 6 months (semester) once the business commences operations, continuing for the duration of the company's existence. This LKPM is utilized by BKPM to monitor the activities of a company.
7. After taking care of local permits, foreign investors must apply for a business licence to be able to run their business. For the tourism sector, investors no longer need to apply for a permanent business licence because the business licence and permanent business licence have been merged into one and called Tanda Daftar Usaha Pariwisata (TDUP).

Moreover, in monitoring the sites conducted by Subdit WP3WT, it was discovered that there were 21 sites managed by both foreigners and Indonesian citizens without permits. This was primarily due to the fact that most of these 21 sites had indeed applied for permits, but faced constraints related to the location or positioning of the sites. The majority of these sites were situated on beaches and encroached upon border areas, which did not align with Klungkung Regent Regulation Number I of 2020 regarding the Implementation of Regional Regulation Number 8 of 2016 concerning Building.

According to an interview with Magfirah Suryani Bakri, a Land Analyst from the WP3WT Sub-Directorate, "some of the 21 sites mentioned earlier lack permits because they are not registered by the business owners. This came to light during a survey conducted by the BPK (Supreme Audit Agency) regarding taxes. It was revealed that the business owners had not paid taxes, leading to the discovery that they lacked a business permit and therefore were not registered." The business owner had also been written to but there was no follow-up at all by the business owner. Based on these outcomes, the Ministry of Maritime Affairs and Fisheries coordinated with the WP3WT Sub-Directorate to conduct monitoring related to Foreign Owned Small Islands on Nusa Penida Island." If there is no permit or in other words, the foreigner does not get permission from the relevant party in charge of issuing a permit for the management of an object managed by a foreigner, then the management activity can be cancelled or dissolved due to the unclear basis of the right to control the object managed by the foreigner.

As a result of the Field Monitoring conducted by the WP3WT Sub-Directorate on Nusa Penida Island, it has been observed that some businesses owned by foreigners acquire land for their operations through direct leasing agreements with local landowners for extended periods, without proper legal authorization as stipulated by the law. This practice could potentially violate Article 26, paragraph (2) of the UUPA, which states, "Every sale, exchange, donation, and

other acts intended to directly or indirectly transfer property rights to a foreigner, to a citizen who in addition to his Indonesian citizenship has foreign citizenship or to a legal entity except those stipulated by the Government as referred to in Article 21 paragraph (2), shall be void by operation of law and the land shall revert to the State, provided that the rights of other parties encumbering it shall continue and all payments received by the owner shall not be reclaimed".¹⁹ For this regulation, the words "other acts intended to directly or indirectly transfer ownership rights to foreigners", when examined further, the intention is still quite vague and it is unclear what other acts are intended in the article.

Although the management of Nusa Penida Island by foreigners brings benefits to the surrounding community, such as the creation of employment opportunities, the lengthy lease periods could potentially serve as a gateway for indirect transfer of property rights due to the absence of legal justification, especially concerning leases initiated by foreigners. This concern is amplified by the fact that these leases are not intended for private residences but rather for establishing businesses such as hotels/resorts/cottages, diving tours, and restaurants. Additionally, Magfirah also raises doubts regarding the residency permits of foreigners who establish businesses on the island. This skepticism arises from the discovery during field monitoring that not all foreign business owners could present their Limited Stay Permit Cards (KITAS) for various reasons.

4. Research Methodology

This study employs a combination of normative juridical and empirical juridical approaches. The normative juridical approach is used to examine the prevailing laws and regulations in Indonesia related to the management of small islands, land ownership by foreign nationals (WNA), and investment licensing. This approach focuses on analyzing written legal norms, such as the Basic Agrarian Law (UUPA), Law Number 25 of 2007 on Investment, and Law Number 27 of 2007 in conjunction with Law Number 1 of 2014 on the Management of Coastal Areas and Small Islands (PWP3K), as well as their implementing regulations.

Meanwhile, the empirical juridical approach is employed to understand how these legal provisions are implemented in practice, particularly in relation to the management and utilization of Nusa Penida Island by foreign nationals. This approach involves observing real conditions in society, primarily through field data collected from the Sub-Directorate for Coastal Area, Small Islands, Borders, and Special Region Control (Sub-Directorate WP3WT), as well as interviews with relevant stakeholders such as land analysts, notaries, and business actors.

¹⁹ Basic Agrarian Law Number 5 of 1960, Art. 26 paragraph (2).

This research is descriptive-analytical in nature, which means it systematically describes legal facts and real-life practices and then analyzes them based on the applicable legal framework. The objective is to identify gaps between legal norms and their practical implementation, and to offer constructive solutions to the problems encountered.

The sources of data used in this research include:

1. Primary data: obtained from direct interviews, field monitoring data by the WP3WT Sub-Directorate, and lease agreements between foreign nationals and landowners.
2. Secondary data: consisting of primary legal materials (laws and regulations), secondary legal materials (books, journals, and legal literature), and tertiary legal materials (legal dictionaries and legal encyclopedias).

The data collection techniques employed include library research, documentary studies, and interviews. The collected data is analyzed using a qualitative analysis method, which involves systematically interpreting the data to draw conclusions based on legal principles and empirical facts.

5. Conclusion

The form of safeguards that the government should implement in this regard is to intensify the supervision and control of the management of small islands in Indonesia, whether managed by foreigners or natives. All transactions related to the transfer of rights, whether through buying and selling, leasing, or any other means, should be promptly registered at the land office. This ensures that the local land office is informed of any land activities occurring within its jurisdiction. Apart from that, one of the most important stakeholders is the Notary or Land Deed Official (PPAT), as a public official who is authorised and has a big role in the agreement between the parties who want to make a sale and purchase or lease agreement. These public officials must possess a thorough understanding of the traces or history of the land or property that is the subject of the agreement, including all types of rights associated with it or that have been associated with it, as well as the history of ownership and/or transfer of rights to the property. Additionally, the notary must consider the price or amount to be paid by the lessee, particularly those with foreign nationality, for the leased property. Is the agreed-upon price for the lease payment reasonable and suitable for a lease spanning decades?

For instance, consider the lease agreement deed obtained by the WP3WT Sub-Directorate from their monitoring activities on Nusa Penida Island. The deed indicates that the rental price for the leased property is merely 400 million rupiah for a lease period of 20 years, covering a land area of 7400 m² and 470 m², involving 2 plots of land (Subdit WP3WT). This price, given the extended duration and

substantial land size, appears exceptionally low and disproportionate. Consequently, a notary must exercise meticulousness and discernment when considering offers to draft lease agreements for properties, whether involving foreigners or Indonesian citizens, in order to prevent legal circumvention by the parties, particularly for leases spanning significant durations.

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