



## Foreign Direct Investment in Tourism and the Feasibility of Incorporating the United Nation Guiding Principles on Business and Human Rights in Indonesia

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### Abstract

Foreign direct investment (FDI) is critical to Indonesia's economic development. Tourism is one of the most appealing investment industries. It has made a significant contribution to employment creation, tax revenue and domestic value addition. However, FDI in tourism has had negative environmental consequences. Moreover, Indonesian trade agreements and investment treaties do not reflect environmental concerns. The schedule under the General Agreement on Trade in Services (GATS) follows a similar trend, although other countries' practices have shown that Indonesia can add this concern. Domestic laws and policies are also silent because the goal of economic growth outweighs protecting the environment. The United Nations Guiding Principles on Business and Human Rights (Guiding Principles) govern states' obligations to defend human rights and companies' obligations to respect and give remedy. This article examines the feasibility of incorporating the Guiding Principles into FDI in tourism. The Guiding Principles, together with the Global Code Ethics for Tourism, would provide a starting point for more robust legal frameworks for foreign tourism companies and emphasise sustainable development. **Keywords:** UN Guiding Principles; Environmental Concern; FDI; Tourism; Indonesia.

### Introduction

Foreign direct investment (FDI) results in significant gains for host countries. It provides job opportunities in host nations that are critical for lowering unemployment and poverty. Foreign investors' businesses hired 6.1 million workers in 2013, with 2.4 million secondary and induced jobs totalling 8.5 million.<sup>1</sup> Meanwhile, Lipsey and Sjöholm found that foreign-owned industrial

<sup>1</sup> Julian Richards and Elizabeth Schaefer, 'Jobs Attributable to Foreign Direct Investment in the United States' (2016) <[www.trade.gov/mas/ian/build/groups/public/@tg\\_ian/documents/webcontent/tg\\_ian\\_005496.pdf](http://www.trade.gov/mas/ian/build/groups/public/@tg_ian/documents/webcontent/tg_ian_005496.pdf)>.

plants in Indonesia created more jobs between 1975 and 2005 than domestic plants under national control.<sup>2</sup>

Tourism has contributed significantly worldwide to economic growth, job creation, export earnings and domestic value added. Tourism contributes to 21.3 per cent of service exports, 5.9 per cent of employment and 4.1 per cent of GDP in Organisation for Economic Co-operation and Development countries. It is expected that about 80 per cent of tourism exports will generate higher domestic value added than the national average.<sup>3</sup> Tourist arrivals worldwide totalled 1.1 billion in 2014, up 4.2 per cent from the previous year. International visitor arrivals in emerging nations are predicted to double the pace of developed economies by 2030, bringing the total to 1.8 billion.<sup>4 5</sup>

Recognising the importance of tourism, governments are taking innovative steps to promote inclusive, competitive and long-term tourism growth. An integrated whole-of-government approach to tourism is considered a critical component of a successful government structure in many nations. Such an approach promotes consistent policy and efficacious public and/or private tourist activities.<sup>6</sup>

Nonetheless, some scholars investigated the detrimental environmental effects of FDI on tourism. The so-called 'pollution haven theory' points to FDI's harmful influence on tourism.<sup>7</sup> Some businesses have shifted from states with rigorous environmental regulations to states with more lenient environmental standards, manoeuvring the lack of environmental policy.<sup>8</sup>

The United Nations World Tourism Organization (UNWTO) examined how FDI in tourism has impacted the environment due to its dominant position over

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<sup>2</sup> Robert Lipsey and Fredrik Sjöholm, 'FDI and Growth in East Asia: Lessons for Indonesia' (2010).[20].

<sup>3</sup> *ibid.*

<sup>4</sup> UNWTO, 'UNWTO Tourism Highlights 2015 Edition' (2015) <[www.e-unwto.org/doi/pdf/10.18111/9789284416899](http://www.e-unwto.org/doi/pdf/10.18111/9789284416899)>.

<sup>5</sup> *ibid.* see also I Gusti Ngurah Parikesit Widiatedja, 'Retire in Paradise: Urgensi Pengaturan Pariwisata Pensiunan (Retirement Tourism) Di Indonesia' (2018) 1 Arena Hukum.[34].

<sup>6</sup> *ibid.*

<sup>7</sup> Daniel Bodansky and Jessica Lawrence, *Trade and Environment* in Daniel Bethlehem and Others (Eds) (The Oxford Handbook of International Trade Law 2009).[511].

<sup>8</sup> *ibid.*

local enterprises.<sup>9</sup> Foreign-owned businesses, such as hotels, were in the majority in some countries, including Indonesia, so the negative consequences of FDI may be greater than domestic businesses.<sup>10</sup> High-end hotels (4-star or 5-star hotels) account for the majority of FDI in Bali, and some of those hotels are part of international hotel chains. Foreign hotels will have a greater environmental impact than local hotels, according to Barrowclough, because they are larger and use more resources, such as energy and water.<sup>11</sup>

Indonesia is vulnerable to environmental problems due to its international agreements and domestic policies. Indonesia has defied the trend of including environmental concerns in international investment treaties. Only a few preferential trade arrangements (PTAs) have included measures addressing environmental concerns. Furthermore, Indonesia's schedule under the General Agreement on Trade in Services (GATS), particularly in mode 3, allows FDI in tourism but without any environmental safeguards.

Only a few restrictions in domestic policy address the need for international corporations to respect the environment. For example, article 74 of Law No 40/2007 on Limited Liability Companies ('Limited Liability Companies Law') solely emphasises the presence of natural resource companies that engage in social and environmental responsibility activities. Law No 25/2007 on Investment ('Investment Law') compels investment businesses to engage in social responsibility initiatives and requires corporate actors to respect local cultural traditions and conserve the environment. Law No 11/2020 on Job Creation ('Job Creation Law') jeopardises the environment by easing the requirements for firms to complete environmental impact assessments (EIAs). Environmental permits will no longer be necessary for a business permit, and an EIA will be required only for high-risk projects with significant environmental and societal impacts.

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<sup>9</sup> UNWTO (n 4).[167].

<sup>10</sup> *ibid.*

<sup>11</sup> Diana Barrowclough, 'Foreign Investment in Tourism and Small Island Developing States' (2007) 13 *Tourism Economics*. [622].

The environment and human rights are intrinsically linked. A clean, safe, healthy and sustainable environment advances our human rights; polluted, dangerous or otherwise unhealthy environments may infringe on them. The United Nations (UN) Guiding Principles on Business and Human Rights (Guiding Principles) were adopted in 2011 in response to the absence of human rights accountability for businesses.<sup>12</sup> These non-binding principles inform states and enterprises on how to prevent harmful human rights consequences. The Guiding Principles contain three pillars: the obligation of the state to give protection (protect), the responsibility of corporations to respect (respect) and the need to confirm that sufferers of human rights breaches have recourse (remedy).<sup>13</sup>

That environmental damage has occurred after the presence of FDI in tourism provides for an interesting analysis of whether the Guiding Principles could be adopted in Indonesian legislation. The incorporation of these principles could help prevent and mitigate the likelihood of environmental damage after the presence of FDI in tourism.

This paper is organised as follows. The second section discusses the links between environmental damage and FDI in tourism. The third section explains how Indonesian international agreements do not reflect environmental concerns. The fourth section discusses the domestic laws and the lack of regulation expressly adopting the Guiding Principles. The fifth section discusses the feasibility of incorporating these principles into domestic laws and Indonesian international agreements. It also compares the practices of other countries that have adopted the Guiding Principles. Finally, the sixth section concludes the paper.

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<sup>12</sup> Human Rights Council, 'Guiding Principles on Business and Human Rights: Implementing the United Nations: Protect, Respect and Remedy Framework' <A/HRC/17/31>.

<sup>13</sup> Sarah Joseph, 'Is Fox News a Breach of Human Rights? The News Media's Immunity from the Guiding Principles on Business and Human Rights' (2016) 1 Business and Human Rights Journal.[230].

### Environmental Damage and Fdi In Tourism

There has been minimal research on the negative effects of FDI on tourism. The effects of FDI on tourism have been overlooked<sup>14</sup> in part due to the difficulty in obtaining information and data.<sup>15</sup> Furthermore, this sector is not a single action.<sup>16</sup> Tourism encompasses a broad range of activities, including food and beverage, lodging, sports, transportation, entertainment, culture, trade shows and recreation. Tourism also features a range of companies, from multinational corporations (MNCs) to small businesses, allowing for a diverse scale and participation level in the market.<sup>17</sup>

Nonetheless, several researchers examined the environmental damage caused by FDI in tourism. This impact is linked to the so-called pollution haven theory.<sup>18</sup> Researchers argue that some businesses have migrated from states with rigorous environmental values to states with more lenient environmental standards.<sup>19</sup> Host governments may also relax environmental norms and laws to lure additional FDI.<sup>20</sup> Furthermore, host countries failed to respect domestic norms to preserve current FDI, stating that the economic benefits derived from the presence of FDI would play a critical role in their development, implying a disregard for environmental concerns.<sup>21</sup>

The UNWTO looked into how FDI in tourism has harmed the environment due to its dominant position over local businesses.<sup>22</sup> Foreign enterprises, such as hotels, were in the majority in some nations, including Indonesia, so the

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<sup>14</sup> Larry Dwyer and Peter Forsyth, 'Foreign Tourism Investment: Motivation and Impact' (1994) 21 *Annals of Tourism Research*. [516].

<sup>15</sup> Peter Buckley and Necla V Geyikdagi, 'Explaining Foreign Direct Investment in Turkey's Tourism Industry' (1996) <[http://unctad.org/en/docs/iteiitv5n3a5\\_en.pdf](http://unctad.org/en/docs/iteiitv5n3a5_en.pdf)>. accessed 17 February 2020.

<sup>16</sup> UNCTAD Current Studies on FDI and Development, 'FDI in Tourism: The Development Dimension' (2007) <[https://unctad.org/system/files/official-document/iteiia20075\\_en.pdf](https://unctad.org/system/files/official-document/iteiia20075_en.pdf)>. accessed 17 February 2020.

<sup>17</sup> *ibid.*

<sup>18</sup> Daniel Bodansky and Jessica Lawrence (n 7). [511].

<sup>19</sup> *ibid.*

<sup>20</sup> *ibid.*

<sup>21</sup> Nick Mabey and Richard McNally, 'Foreign Direct Investment and the Environment: From Pollution Havens to Sustainable Development (UK Report 1999)' (1999). [13].

<sup>22</sup> UNWTO (n 4). [167].

negative consequences of FDI may be greater than domestic businesses.<sup>23</sup> High-end hotels, such as 5-star hotels, are largely FDI in Bali and are part of international hotel chains. The higher the hotel's rating, the more likely environmental damage may occur. In particular, foreign hotels have a greater environmental impact than local hotels because they are larger and consume more resources, such as energy and water.<sup>24</sup>

Various empirical studies have shown that FDI negative influences tourism. Research published by the United Nations Environment Programme (UNEP) and the UNWTO in 2012 showed that a large-scale hotel project with foreign ownership negatively impacts biodiversity, including coastal wetlands, land conversion and coral reefs.<sup>25</sup> According to Perrin (2001), GATS has greatly increased FDI in tourism. However, in Belek, Turkey, the increased FDI has led to an over-concentration of activity in central sites, resulting in the misuse of other resources in the region. The erection of coastal hotels and the influx of travellers has severely influenced the delicate dune habitat.<sup>26</sup>

Equations investigated the influence of India's GATS membership on small villages in Goa using two case studies (Chapora-Sinquerim and Miramar-Caranzalem) and two international hotel chains (Taj Fort Aguada Resort and Marriott Goa).<sup>27</sup> The outcomes of this study demonstrated that FDI in hotels had adverse consequences on the sand dune ecosystems along the Goan coast. Furthermore, garbage issues have arisen in Goa because of inefficient waste management infrastructure.<sup>28</sup> After examining the causes of the environmental damage, the report concluded that GATS lacked appropriate protections from the negative effects of FDI in tourism.<sup>29</sup> In

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<sup>23</sup> *ibid.*

<sup>24</sup> Diana Barrowclough (n 11).[622].

<sup>25</sup> United Nations Environment Programme (UNEP) and World Tourism Organization (UNWTO), 'Tourism in the Green Economy Background Report' (2012) <<https://www.cbd.int/financial/doc/tourism-greeneconomy.pdf>>.[5].

<sup>26</sup> *ibid.*

<sup>27</sup> Kamal Sohi, 'Weighing The Gats On A Development Scale The Case Of Tourism In Goa, India' [2002] Equations.[5].

<sup>28</sup> *ibid.*[19].

<sup>29</sup> *ibid.*[5].

addition, this report questioned India's tourist schedule under GATS, claiming that it did not adequately fit India's tourism development strategy, particularly in Goa.<sup>30</sup>

The Ministry of Tourism and the International Labour Organization found that upscale hotels in several tourist sites in Indonesia led to a large rise in energy and water consumption and trash creation.<sup>31</sup> The city of Balikpapan, East Kalimantan (2015), reported a rise in solid waste volume due to the city's increasing number of hotels, but some hotels have yet to establish an integrated waste treatment facility. The construction of hotels and other tourism amenities on Tidung Island, Kepulauan Seribu, Jakarta, resulted in the loss of coastal areas, which Khrisnamurti, Heryanti Utami and Rahmat Darmawan attributed to a lack of spatial planning law.<sup>32</sup>

Bali is Indonesia's most popular tourist destination and has been used as a case study in several empirical studies. For instance, due to a lack of planning, the fast development of tourism amenities like restaurants and hotels in Kuta, Badung, Bali did not include public and private waste and sewerage disposal systems and water and electricity sources.<sup>33</sup> Similarly, certain hotels in Bali lacked effective solid waste management, resulting in environmental damage.<sup>34</sup> The growth of tourism amenities in Ubud, Gianyar harmed the ecosystem, straining the water table and forcing diverse wildlife to relocate.<sup>35</sup> The failure of groundwater levels, salinity intrusion and soil subsidence were clear consequences of the construction of enormous tourism facilities in Bali.<sup>36</sup>

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<sup>30</sup> *ibid.*

<sup>31</sup> Ministry of Tourism and Creative Economy of the Republic of Indonesia in cooperation with the International Labour Organization, 'Strategic Plan Sustainable Tourism and Green Jobs for Indonesia' (2012).[23].

<sup>32</sup> Heryanti Utami and Rahmat Darmawan Khrisnamurti, 'Dampak Pariwisata Terhadap Lingkungan Di Pulau Tidung Kepulauan Seribu' (2016) 21 *Kajian*. [269].

<sup>33</sup> Wiwik Dwi Pratiwi, 'Tourism and Built Environment Changes in Traditional Communities Kuta and Nusa Dua, Bali, Indonesia as the Case Studies' (The University of Sheffield 2004).[187].

<sup>34</sup> Janeen Tang, 'A Case Study of a Hotel Solid Waste Management Program in Bali' (University of Waterloo 2004).[90].

<sup>35</sup> Gregory Stuart Parker, 'Living in Two Worlds: How Tourism Has Influenced the Balinese World View of Tri Hita Karana' (Massey University 2011).[72].

<sup>36</sup> Stroma Cole, 'A Political Ecology of Water Equity and Tourism: A Case Study from Bali' (2012) 39 *Annals of Tourism Research*. [1241].

### **The Lack of Environmental Concern in Indonesian International Investment Agreements Bilateral Investment Treaties**

Since 2014, Indonesia has displayed a lack of enthusiasm for joining bilateral investment treaties (BITs). UNCTAD data show Indonesia has terminated roughly 24 BITs.<sup>37</sup> Muchlinski noticed that when investment treaties first emerged, they tended to focus only on economic considerations, disregarding some bad outcomes.<sup>38</sup> As a result, it is crucial to balance investors' legitimate interests (eg a clear and foreseeable investment policy) and the host country's legitimate interests (eg a 'right to regulate' for policy goals, notably environmental concerns).<sup>39</sup> Besides investment liberalisation, protection, promotion and facilitation, UNCTAD recommends that international investments agreements (IIAs) include measures enabling host nations to mitigate negative societal or environmental consequences.<sup>40</sup>

Gordon and Pohl detected environmental issues in 133 IIAs or 8.2 per cent of their overall sample.<sup>41</sup> In addition, 30 of the 49 countries analysed had addressed environmental issues in at least one treaty.<sup>42</sup> The countries with the highest levels of concern were Canada (83 per cent), New Zealand (75 per cent), Japan (61 per cent), the US (34 per cent) and Finland (26 per cent). In contrast, only one environmental agreement was found in Egypt and Indonesia out of 73 and 45 accords in the sample, respectively.<sup>43</sup>

Indonesia did not join the trend of integrating eco-friendly issues in international investment treaties. This situation could intensify the negative effects of FDI on the environment. However, because Indonesia's IIAs do not include

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<sup>37</sup> UNCTAD, 'International Investment Agreements Navigator' (*United Nations*) <<https://investmentpolicy.unctad.org/international-investment-agreements/by-economy>> accessed 23 March 2022.

<sup>38</sup> Peter Muchlinski, "Policy Issues" in Peter Muchlinski, Federico Ortino and Christoph Schreuer *The Oxford Handbook of International Investment Law* (Eds) (OUP 2008).[12].

<sup>39</sup> *ibid.*[15].

<sup>40</sup> United Nation's Conference on Trade and Development, 'Investment Policy Framework For Sustainable Development' (2015).[30].

<sup>41</sup> Kathryn Gordon and Joachim Pohl, 'Environmental Concerns in International Investment Agreements: A Survey' (2011).[9].

<sup>42</sup> *ibid.*

<sup>43</sup> *ibid.*



environmental concerns, it may be difficult for the Indonesian government to foresee environmental damage by FDI projects and impose sanctions.

Other countries have reflected environmental concerns in the preambles of their IIAs. The US–Uruguay BIT states that the parties want to attain their economic goals ‘while ensuring the preservation of health, safety, and the environment.’<sup>44</sup> Other countries inserted provisions emphasising the host state’s regulatory autonomy to impose environmental measures. For instance, article 21(2) of the Japan–Colombia BIT notes that ‘Each Contracting Party may adopt, maintain or enforce any measure that it considers appropriate to ensure that investment activities in its Area are undertaken in a manner not incompatible with its environmental law, provided that such measure is consistent with this Agreement’.<sup>45</sup>

Some countries have even inserted environmental protection provisions in their IIAs. The regulations prohibit governments from weakening environmental standards to entice FDI. The parties understand that it is unacceptable to attract investment by weakening or diminishing the safeties granted by state-level environmental laws, according to article 12(2) of the US Model BIT.<sup>46</sup>

### **Preferential Trade Arrangements**

Indonesian PTAs are likewise unconcerned about the environment. Only two – US–ASEAN Trade and Investment Framework Arrangement and the JAPAN–ASEAN Free Trade Agreement – have included environmental concerns. However, the incorporation of environmental concerns is rather vague, stating that the party will respect the balance between trade liberalisation and sustainable development and how mutually supporting trade and environmental policies should be evaluated. No further explanation or clarification is given on how the two parties should carry out this process.

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<sup>44</sup> Treaty between the United States of America and the Oriental Republic of Uruguay concerning the Encouragement and Reciprocal Protection of Investment (signed 4 November 2005, entered into force 1 November 2006) preamble.

<sup>45</sup> Agreement between Japan and the Republic of Colombia for the Liberalization, Promotion and Protection of Investment (signed 12 September 2011, not yet in force) art 21(2).

<sup>46</sup> United States Model Bilateral Investment Treaty art 12 (2). 2012.

In other countries' practices, the preamble to the Economic Partnership Agreement between the CARIFORUM States and the European Community reflects the parties' need 'to promote economic and social progress for their people in a manner consistent with sustainable development by respecting basic labor rights... and by protecting the environment'.<sup>47</sup>

### **Schedule under the GATS**

FDI in tourism in Indonesia was permitted under the country's GATS schedule, particularly in mode 3. This schedule may lead to environmental damage caused by FDI in tourism because no national or public interest has been identified that justifies the government taking steps to maintain those interests, including the environment.<sup>48</sup> In contrast, other WTO members have explicitly stated their national interests in their GATS schedules. They have the authority to refuse FDI if it will conflict with or jeopardise national or public interests. Furthermore, if the presence of FDI within their borders would have negative consequences, they might impose measures to preserve those interests, including the environment.

For instance, in Australia, every commercial presence or FDI plan under the GATS schedule, particularly in its horizontal commitments, is evaluated in accordance with 'Australia's foreign investment policy guidelines and the Foreign Acquisitions and Takeovers Act 1975... and are permitted unless national interest considerations arise'.<sup>49</sup> FDI is permitted in all areas under Colombia's schedule except for 'investment projects in industries related to national defense and the processing and disposal of poisonous, hazardous, or radioactive waste'.<sup>50</sup>

Some WTO members have gone even further, expressing concern about FDI in tourism to protect their economic, social and environmental interests. According to the European Communities' tourism schedule, FDI authorisation 'may be withheld

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<sup>47</sup> Economic Partnership Agreement between the CARIFORUM States, of the one part, and the European Community and its Member States, of the other part (signed 15 October 2008) preamble.

<sup>48</sup> INDONESIA Schedule of Specific Commitments General Agreement On Trade In Services 1994.

<sup>49</sup> Schedule of Specific Commitments: Australia 1994.

<sup>50</sup> Schedule of Specific Commitments: Colombia 1994.

in order to conserve sites of outstanding historic and cultural interest' in Portugal, Spain and Greece.<sup>51</sup> Meanwhile, in Italy, a local economic needs assessment is required prior to opening new foreign-owned pubs, cafés and restaurants. Under Mexico's schedule, 'Foreigners may not acquire direct ownership of land and water in a 50-kilometer strip along the coastline and a 100-kilometer zone along the borderlands'.<sup>52</sup>

### **Domestic Laws and Policies**

Only a few regulations discuss the responsibility of companies doing business in Indonesia. Article 1 paragraph (3) of the Limited Liability Companies Law highlights the company's commitment to contribute to long-term economic development to better people's lives and the environment. Article 74 regulates the obligation of every business actor in the field of natural resources or those related to it to be responsible for environmental conditions and the community in which the company runs its business. However, this regulation does not provide the form of sanctions imposed on companies that do not implement this principle.

Relevant regulations regarding corporate environmental and social responsibility can be found in articles 15, 16, 17 and 34 of the Investment Law. According to this law, social responsibility means 'the responsibility inherent in every investment company to continue to create a harmonious, balanced, and in accordance with the environment, values, norms, and culture of the local community.' This law mandates that investment businesses carry out social responsibility activities and those corporate actors respect the cultural traditions of the surrounding community and preserve the environment.

The Job Creation Law emphasises the existence of FDI in tourism. Article 77 amends several provisions of the Investment Law. Article 12 (1) states that all business fields are accessible to investment activities except those deemed closed to investment or those that only the central government can carry out. Presidential

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<sup>51</sup> Schedule of Specific Commitments: European Communities and their Member States 1994.

<sup>52</sup> Schedule of Specific Commitments: Mexico 1994.

Regulation No 49/2021 defines which tourism industries are open or closed to foreign investors. For example, four- and five-star hotels are available for FDI, but one-star hotels, villas, guest houses, travel agents and tourist guides are reserved for small and medium businesses. This arrangement is comparable to the former negative-list investment, which changed every five years.

Article 67 of the Job Creation Law amended several provisions of Law No 10/2009 on Tourism. According to article 26 (1), every tourism entrepreneur must maintain and respect religious traditions, customs, culture and values in the local community; form relationships with local micro, small and cooperative businesses; prioritise the use of local community products, domestic products; and provide opportunities for local people to participate in tourism. However, no further explanation is given as to how this emphasis is achieved or what sanctions will be enforced if investors do not include the local community in their commercial activities.

One of the most contentious elements of the Job Creation Law is the relaxation of the EIA standards for developers and enterprises. Depending on the extent of the project, the EIA is a mandatory obligation under Law No 36/2009 on Environmental Law to get an environmental permit from the central or municipal governments.<sup>53</sup> An environmental permit is required to secure a business permit. The project can begin once the business permission has been issued.<sup>54</sup> The Job Creation law weakens the environmental permit's standing. It will be changed into an approval for the environment. Environmental permission will become a prerequisite for the approval of a business permit, alongside other approvals such as construction and spatial plan permits.

The law also establishes a risk-based approach to determining the type of business permit developers and firms must get.<sup>55</sup> The government assesses the risk level of business activities based on the amount and possibility of hazard<sup>56</sup> by

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<sup>53</sup> Law No 36/2009 on Environmental Law art 36.

<sup>54</sup> *ibid.* article [40].

<sup>55</sup> 'Law No 11/2020 on Job Creation Art 7(1) (Job Creation Law)'.

<sup>56</sup> *ibid.* article 7 [2].

considering four factors: the environment, safety, health, safety and/or the use of natural resources.<sup>57</sup> All company activities are categorised into three levels of risk: low, medium and high.<sup>58</sup>

The government appears to recognise that the EIA regulations have an issue because of their lengthy approach, which makes them impractical to apply. As a result, replacing the EIA with a form of an environmental norm is more feasible, especially for low- and medium-risk projects. However, a better definition of what constitutes a project with a ‘substantial impact’ and how it falls into the medium or high-risk category should be established. If this does not occur, a tourism project may not be classed as a high-risk activity, even though it may have a ‘substantial impact’. As a result, completing the EIA and involving the impacted communities would be unnecessary.

### **Un Guiding Principles on Business and Human Rights**

A large international debate is currently raging around commercial entities’ human rights duties and responsibilities. The binding legal and moral frameworks to guide MNCs are lacking.<sup>59</sup> Responding to this concern, the UN approved the Guiding Principles in 2011.<sup>60</sup> As mentioned earlier, there are three pillars in the Guiding Principles: the governmental duty to give protection, the business responsibility to respect, and the necessity to guarantee that sufferers of human rights violations have access to remedies.<sup>61</sup>

The first pillar identifies the state’s obligation to protect a person’s rights from violation by commercial entities. It is part of the state’s broad obligation under international human rights law to guard individuals against human rights violations committed by third parties within its jurisdiction and territory. This entails proper efforts to avoid, examine, punish and repair such abuse through effective policies and

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<sup>57</sup> *ibid.* article 7.[3].

<sup>58</sup> *ibid.* article 7[7] and [8 - 10].

<sup>59</sup> Oyeniyi Abe, ‘The Feasibility of Implementing the United Nations Guiding Principles on Business and Human Rights in the Extractive Industry in Nigeria’ (2016) 7 *Journal of Sustainable Development Law and Policy*. [137].

<sup>60</sup> Human Rights Council (n 12).

<sup>61</sup> Sarah Joseph (n 13).

regulations.<sup>62</sup> As a result, states have international obligations to control MNCs and prevent them from violating human rights.<sup>63</sup> The obligation to guard is a standard of conduct rather than an outcome. Hence, states are not directly liable when an MNC violates human rights. However, states may violate their international human rights law duties if they are unable to take necessary actions to avoid such violations.<sup>64</sup>

With the second pillar, MNCs have an autonomous responsibility to uphold human rights that is distinct from the state's responsibilities under the first pillar. The 'responsibility to respect' originates from a worldwide benchmark of projected conduct for all MNCs, wherever they operate. As a result, the second pillar extends beyond the strict confines of international human rights legislation and into the area of business's social (rather than legal) obligations.<sup>65</sup> MNCs must avoid inflicting harm or violating human rights and take measures to prevent or mitigate such consequences.<sup>66</sup> This pillar highlights MNCs' responsibility to respect human rights and specifies a due diligence process that firms must follow. This pillar necessitates the most profound conceptual divergence from traditional human rights language and has been the Guiding Principles' focal point.<sup>67</sup>

The third pillar is that sufferers of negative human rights effects from MNCs must be able to seek redress. Remedies may be accessible through formal methods overseen by the state or through less formal processes overseen by MNC-created self-regulatory bodies.<sup>68</sup> In other words, states must ensure that affected persons have access to an adequate remedy by administrative, judicial or other proper means.<sup>69</sup> In addition to court remedies, state-based non-judicial and non-state-based methods may be employed.<sup>70</sup>

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<sup>62</sup> United Nations Human Rights, 'Guiding Principles on Business and Human Rights' (2011).

<sup>63</sup> *ibid.*

<sup>64</sup> John Gerard Ruggie, *Just Business Multinational Corporations and Human Rights* (WW Norton and Company 2013).[84].

<sup>65</sup> *ibid.*

<sup>66</sup> *ibid.*

<sup>67</sup> John Gerard Ruggie, (n 64).[90].

<sup>68</sup> Human Rights Council (n 12). Guiding Principle No 25.

<sup>69</sup> *ibid.*

<sup>70</sup> *ibid.*

## **The Feasibility of Incorporating the Guiding Principles in Indonesia Country's National Plan as A Starting Point**

The UN Working Group on Business and Human Rights, which is tasked with developing and encouraging the effective implementation of the Guiding Principles, suggests numerous strategic actions that should be included in a country's National Action Plan (NAP).<sup>71</sup> First, creating and enforcing legislation requiring human rights due diligence for corporate participation in government procurement tenders, getting export credits and listing their shares on the stock exchange.<sup>72</sup> Next is the adoption of human rights obligations to investors in BITs and other multilateral agreements that facilitate trade and the entry of foreign investment.<sup>73</sup>

A country should also ensure and supervise that the NAP has covered all of the necessary government agencies' tasks and that the perspectives of employees, non-governmental organisations and affected communities have been heard and considered.<sup>74</sup> Furthermore, a country should strengthen the process for resolving human rights breaches associated with corporate economic activity.<sup>75</sup> Finally, assurances should be provided that government institutions and officials will act in conformity with the state's human rights commitments.<sup>76</sup> As a result, executives in important positions in corporate business departments are likewise dedicated to adopting the Guiding Principles.<sup>77</sup>

In Indonesia, the Ministry of Law and Human Rights has been the national focal point for the Guiding Principles since 2020.<sup>78</sup> Indonesia has prepared a 2020–2024 Human Rights NAP.<sup>79</sup> Unfortunately, recent developments show that business

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<sup>71</sup> UN Working Group on Business and Human Rights, 'Guidance on National Action Plans on Business and Human Rights' (*OHCHR*) <[www.ohchr.org/documents/issues/business/unwg\\_napguidance.pdf](http://www.ohchr.org/documents/issues/business/unwg_napguidance.pdf)> accessed 30 October 2021.

<sup>72</sup> *ibid.*

<sup>73</sup> *ibid.*

<sup>74</sup> *ibid.*

<sup>75</sup> *ibid.*

<sup>76</sup> *ibid.*

<sup>77</sup> *ibid.*

<sup>78</sup> International NGO Forum on Indonesian Development, 'UNGPs on BHR (United Nations Guiding Principles on Business and Human Rights)': <[www.infid.org/publication/read/ungps-bhr-mengenai-lebih-jauh](http://www.infid.org/publication/read/ungps-bhr-mengenai-lebih-jauh)> accessed 30 October 2021.

<sup>79</sup> *ibid.*

and human rights issues are not included as targets and are not explicitly specified in a document that will be used to assure the contentment of human rights during the next five years. It will only be implemented via the four current focus targets. Women, children, communities and people with disabilities are the four core issues addressed by the fifth-generation NAP.<sup>80</sup>

The fact that business and human rights issues are not the main agenda shows that Indonesia seems reluctant to incorporate the Guiding Principles into its legal and moral frameworks. Moreover, the goal of pursuing economic growth has been the main priority. All relevant rules that are considered a barrier to economic growth will be removed.

### **Other Countries' Practices**

Having identified Indonesia's NAP on human rights, this paper examines other countries' practices in incorporating the Guiding Principles. It provides important information on incorporating these kinds of principles within a national framework, particularly avoiding environmental damage by FDI in tourism. Globally, these principles have already had a considerable impact on a number of other public and private company authority tools, such as the Global Compact, the Organisation for Economic Co-operation and Development's Guidelines for Multinational Enterprises, ISO 26000, and the country's national legislation and policy.

Human rights due diligence may be required as a standard of conduct under domestic regulatory governments. In Canada, due diligence has evolved beyond a simple business risk assessment procedure into a core aspect of compliance with a wide range of environmental, health, safety and other rules requiring strict liability crimes.<sup>81</sup> Corporate officers must implement internal corporate procedures to prevent regulatory infractions and mitigate their negative consequences to perform

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<sup>80</sup> *ibid.*

<sup>81</sup> Marco Fasciglione, 'The Enforcement of Corporate Human Rights Due Diligence: From the UN Guiding Principles on Business and Human Rights to the Legal Systems of EU Countries' (2016) 10 Human Rights & International Legal Discourse.[95].



due diligence.<sup>82</sup> Similarly, in Spain, article 31*bis* of the Spanish Criminal Code was amended by Organic Law 5/201046, which established corporate criminal liability.<sup>83</sup> Even under the Spanish legal system, corporations have a due diligence responsibility, and proof of thorough fulfilment of the tasks of supervision and monitoring of the conduct of employees and other contractual workers serves as a due diligence defence.<sup>84</sup>

In France, the duty of vigilance law involves corporations with at least 5,000 employees or 10,000 employees across their entire company to issue an effective vigilance plan outlining risk documentation and prevention measures for severe human rights violations resulting directly or indirectly from their operations.<sup>85</sup> A Responsible Business Proposal and accompanying parliamentary initiative in Switzerland have been proposed, requiring firms to undertake due diligence in their activities and the companies they manage.<sup>86</sup> It applies to businesses that surpass certain criteria and businesses that engage in specific high-risk activities, irrespective of their size; however, it does not apply to large businesses that engage in specific low-risk activities.<sup>87</sup>

In German, the Federal Government stated its intention that all businesses implement company due diligence in a way proportional to their size, industry, and location in the supply and value chain.<sup>88</sup> Since 2018, compliance has been assessed on an annual basis. In the absence of proper compliance, the government will determine additional steps, which might include legislative actions and a broadening of the list of businesses under investigation.<sup>89</sup> By 2020, the goal is for at least half

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<sup>82</sup> *ibid.*

<sup>83</sup> *ibid.*

<sup>84</sup> *ibid.*

<sup>85</sup> Harald Christian Scheu and Jitka Brodska, 'The UN Guiding Principles on Business and Human Rights and Their Implementation in Germany and the Czech Republic' (2019) 24 *Białostockie Studia Prawnicze*. [14].

<sup>86</sup> *ibid.*

<sup>87</sup> *ibid.*

<sup>88</sup> Business and Human Rights, *National Action Plan Implementation of the UN Guiding Principles on Business and Human Rights* (The Interministerial Committee on Business and Human Rights 2017). [10].

<sup>89</sup> *ibid.*

of all German companies with more than 500 employees to have implemented due diligence criteria.<sup>90</sup>

When it comes to access to legal remedies, human rights due diligence can help determine the type and severity of sanctions and remedies that should be applied once liability has been proved.<sup>91</sup> For example, companies might receive a reduction in monetary punishment under Italian Legislative Decree 231 of 2001 if they fully recompense any damages and develop and execute an organisational model suited to evade similar misconduct from happening again before any trial begins.<sup>92</sup>

### **A Proposed Incorporation**

From an international perspective, incorporating the Guiding Principles can be started through Indonesia's international agreements. While incorporating all principles is somewhat unrealistic, including environmental concerns is crucial as a starting point. As the human rights NAPs have suggested, Indonesia should consider putting environmental concerns in trade agreements. As this paper has shown, other countries' practices have denoted how trade agreements may include provisions intended to ameliorate the environmental damage caused by FDI in tourism. This is also applied to Indonesia's IIAs. One of the most important concerns is the prohibition to relax environmental benchmarks as means of boosting international trade and investment.

FDI in tourism has resulted in environmental damage. Following the Guiding Principles, it will be the state's obligation to protect the environment and surrounding community from human rights violations. Furthermore, the right to a clean and healthy environment is a part of human rights. The inclusion of environmental concerns will enable the government to issue actions to protect the environment. This can be inserted either in the preambles or provisions of Indonesia's international agreements. The inclusion will also reflect the equality of

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<sup>90</sup> *ibid.*

<sup>91</sup> Italian Legislative Decree No 231/2001, Criminal Liability of Legal Entities art 12(2).

<sup>92</sup> *ibid.*

rights and obligations between investors and states. Regarding BITs, the fact that Indonesia is proposing many treaties after its termination would provide the perfect momentum to put environmental concerns in future Indonesia BITs.

While mandating due diligence for MNCs in tourism is still unrealistic for now, the Ministry of Tourism could develop a standard of conduct for tourism companies in Indonesia. This standard should be equal to the due diligence process stated in the second pillar of the Guiding Principles. They should be progressively developed as an internal environmental standard to minimise the likelihood of negative environmental impact. Large companies, such as 5-star hotels with more than 2,000 employees, should be the main priority due to their possible impact. These companies should submit an annual report to the government showing how they have performed due diligence.

In tourism, the Guiding Principles can work hand in hand with implementing the Global Code of Ethics for Tourism (GCET).<sup>93</sup> Article 3 of GCET expressly addresses the importance of sustainable development. It stipulates that tourism stakeholders protect the natural environment.<sup>94</sup> In 2011, the UNWTO formed a Private Sector Commitment to the GCET that private companies around the world can sign. Signatory companies agree to uphold, promote and apply the Code's values of sustainable tourism development.<sup>95</sup>

## Conclusion

The presence of FDI in tourism has created more jobs because tourism employs more semi-skilled and low-skilled workers than agriculture. Despite the benefits of FDI, several studies have shown its negative effects on tourism and the environment. The lack of environmental concern under Indonesian trade agreements and IIAs has deteriorated the situation. Indonesia's GATS schedule

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<sup>93</sup> UNWTO, 'Global Code of Ethics for Tourism' <[www.unwto.org/global-code-of-ethics-for-tourism](http://www.unwto.org/global-code-of-ethics-for-tourism)>. accessed on 31 October 2021.

<sup>94</sup> *ibid.*

<sup>95</sup> *ibid.*

does not mention environmental concerns. Moreover, existing laws and policies have not included this concern, causing the government to have limited options to avoid environmental damage by FDI in tourism.

The UN issued the Guiding Principles, explaining the government's role in protecting human rights and the companies' obligation to respect and access legal remedies. FDI in tourism has led to environmental damage, and international agreements that involve Indonesia do not include environmental concerns. Therefore, including the Guiding Principles should be a starting point for more robust legal frameworks for MNCs in tourism running their businesses within Indonesia. Moreover, this inclusion can work closely with GCET to emphasise sustainable development.

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