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Reconstructing the Legal Politics of Nominee Agreements in Direct Investment in Indonesia: Toward Beneficial Ownership Transparency and a Fair Investment Climate

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Abstract:
The practice of nominee agreements in direct investment in Indonesia reveals a discrepancy between foreign ownership restriction policies and the effectiveness of the legal oversight system. Although the Investment Law, the Companies Law, and the Agrarian Law normatively prohibit the use of nominees, the practice continues to thrive through various private contractual arrangements that place domestic parties as formal owners, while control and economic benefits remain with foreign investors as beneficial owners. This study aims to analyze the weaknesses of Indonesia's investment legal policy in addressing nominee practices and to formulate a model for reconstructing a more effective and equitable legal policy. The research method employed is normative legal research using legislative, conceptual, and legal-political approaches. The findings indicate that the primary failure lies in a legal framework that remains focused on legal ownership and administrative registration, rather than actual control over capital. Consequently, nominee practices lead to legal uncertainty, distortion of business competition, potential loss of state revenue, and weakened protection of strategic sectors. This study proposes a reconstruction of legal policy through four main instruments: integrated beneficial ownership disclosure requirements; risk-based sectoral investment restrictions; strengthening the professional responsibility of legal intermediaries; and a transition mechanism for existing nominee structures. This study emphasizes that a fair investment climate cannot be built solely through formal prohibitions but requires a legal system that is transparent, adaptive, and capable of balancing investment needs with national economic sovereignty.

Keywords:
investment; legal arbitrage; nominee agreements.

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Introduction

Investment plays a crucial role in driving a country's economic growth, including Indonesia's. To create a healthy, fair, and competitive investment environment, the Indonesian government has enacted various legal policies to regulate investment. Investment is the exchange of money for other forms of wealth, such as stocks or real estate, with the expectation of holding them for a certain period to generate income.[1] *Foreign direct investment* (*FDI*) is a key instrument in Indonesia's economic development, as it contributes to job creation, technology transfer, expansion of the tax base, and financing of national

[1] Tina Amelia and Harry Budi, *Dinamika Hukum Investasi Di Indonesia* (Jakarta: PT Karya Ilmu Bermanfaat, 2021).

strategic projects. In the context of infrastructure financing and industrialization needs, the country requires a competitive flow of capital. However, these needs cannot be separated from the state's obligation to maintain economic sovereignty, protect strategic sectors, and ensure that investment proceeds transparently and fairly. Therefore, the Investment Law establishes a dual model: opening the door to foreign capital while still limiting foreign ownership in certain business sectors through licensing mechanisms and sectoral regulations.[2]

The issue is that, in practice, these formal restrictions are often circumvented through nominee agreements, legal arrangements that designate Indonesian citizens or domestic legal entities as the formal owners of shares or assets, while economic control and the actual benefits remain with foreign parties acting as *beneficial owners*. This scheme is widely used in corporate share ownership, land control, and investment structures within restricted sectors. Thus, nominee agreements are not merely a matter of private contracts between parties but a mechanism for circumventing the state's legal policies in the investment sector. Normatively, the Indonesian legal system has actually imposed a prohibition. Article 33 of the Investment Law of 2007 states that any agreement declaring share ownership for or on behalf of another person is null and void. The Companies Law also requires clarity regarding the identity of shareholders, while the Agrarian Law restricts certain property rights exclusively to Indonesian citizens. However, the existence of these legal norms has not effectively curbed nominee practices. Investors can still establish substantive control through a series of private instruments such as general powers of attorney, loan agreements, *side agreements*, dividend pledges, or control over company management. The state ultimately only recognizes the formally registered owners, not the parties who actually control the capital and business decisions.[3]

This situation highlights a fundamental weakness in the country's legal system, namely, the dominance of a formal-administrative approach to interpreting ownership. Indonesia's legal regime still relies on the registration of names and legal titles, rather than on the concept of beneficial ownership or actual control. Consequently, there is a gap between the law on the books and the law in practice. The prohibition on nominees remains symbolic because it is not accompanied by a cross-agency verification system, oversight of beneficial ownership, or effective sanctions against the concealment of business control. In such a situation, the law actually incentivizes those who circumvent the rules and disadvantages compliant investors. This issue has implications that extend far beyond mere contractual disputes. First, the practice of using nominees creates an unequal business environment, as investors who adhere to ownership limits must share control or submit to certain restrictions, while investors using nominees can secretly enjoy full economic benefits through. Second, the state faces risks of tax evasion, money laundering, and the evasion of legal liability due to opaque ownership structures. Third, in strategic sectors such as land, natural resources, and infrastructure, nominees have the potential to undermine national policy objectives that were

[2] Siti Maryam and Andri Brawijaya, "Penyelundupan Hukum Investasi Asing Langsung Di Indonesia," *Jurnal Ilmiah Living Law* 15, no. 2 (July 31, 2023): 157–65, https://doi.org/10.30997/jill.v15i02.9712.
[3] Abdul Bari Alkatiri, Nur Hakim, and Achmad Fitrian, "Perlindungan Hukum Bagi Pemilik Saham Aslinya (WNA) Terhadap Wanprestasi Pemegang Saham Nominee: Dikaji Dari Aspek Perjanjian," *Journal of Innovation Research and Knowledge* 4, no. 2 (2024): 689–700, https://doi.org/https://doi.org/10.53625/jirk.v4i2.8062.

originally intended to protect the public interest. Thus, the practice of using nominees is fundamentally an issue of investment governance and the state's regulatory sovereignty.

The practice of nominee agreements, or loan agreements made in another person's name, has become commonplace in Indonesia. Typically, these agreements involve a power of attorney naming an Indonesian citizen and grants a foreign national the authority to enforce legal rights over the land they own.[4] In fact, the use of a nominee indicates the existence of a legal relationship. Such contracts are legally valid under applicable law pursuant to Articles 1233 and 1234 of the Civil Code, which state that "every legal relationship arises either by contract or by operation of law."[5] The theory of causality in contract law has become increasingly important because developments in civil law now conceptualize causality as a legal objective that is not merely a formal basis for a contract, but also an objective consistent with legal principles, public policy, and the public interest.[6]

The use of nominee agreements raises various issues. Under the Indonesian Law, nominee agreements intended to circumvent investment regulations may be deemed null and void as they violate the principles of transparency and legal certainty in investment. In national strategic projects *(Proyek Strategis Nasional - PSN)*, share ownership, asset management, or investment agreements between local and foreign parties are common issues in Indonesia's tourism sector. In this context, a nominee agreement is an arrangement where a nominee acts on behalf of another party (the beneficial owner) in the ownership or management of specific assets. Furthermore, the Companies Law 2007 and the Agrarian Law of 1960 stipulate that nominee agreements intended to conceal actual ownership are contrary to Indonesian law. Based on this gap, this study proceeds from the argument that the core issue regarding nominee arrangements does not lie in the absence of legal prohibitions, but rather in the failure of the legal design of investment policy to link foreign ownership restrictions with an effective transparency and enforcement system. Therefore, this study not only analyzes Indonesia's legal policies regarding nominee agreements but also evaluates why existing norms have failed to function and how to reconstruct a more rational legal policy. The intended reconstruction aims to integrate the concept *of beneficial ownership*, harmonize the Investment Law with corporate and the Agrarian Law, strengthen the professional responsibility of intermediaries, and create legal and competitive investment channels.

The novelty of this research lies in its comparison with previous studies, which tend to focus on contractual aspects of civil law. For example, the study by Pandin, Panjaitan, & Widiarty focuses solely on the validity of nominee agreements under the Civil Code, concluding that such agreements are often invalid because they do not meet the validity requirements as stipulated in Article 1320 of the Civil Code. Similarly, a study by Sari & Darmawan focuses more on a normative analysis of the validity of nominee shareholder agreements in the establishment of limited liability companies under the Companies Law and

[4] Indrasari Kresnadjaja and I Made Pria Dharsana, "Nominee Arrangement in the Practice of Land Sale and Purchase in Indonesia," *Protection: Journal Of Land And Environmental Law* 2, no. 2 (December 20, 2024): 66–72, https://doi.org/10.38142/pjlel.v2i2.1204.
[5] Indah Esti Cahyani and Aryani Witasari, "Juridical Review Of Nominee Agreement In Land Of Tenure Property Rights Under The Book Of Civil Law And Agraria," *Jurnal Akta* 5, no. 2 (May 2018): 441, https://doi.org/10.30659/akta.v5i2.3100.
[6]Isharyanto Isharyanto DeyosiFaza Shulkhantika, Luthfiyah Trini Hastuti, "The Legal Standing of Land Nominee Agreements from the Perspective of Lawful Cause," *Jurnal Ilmu Hukum Kyadiren* 7, no. 2 (2026): 1530–44, https://doi.org/10.46924/jihk.v7i2.423.

the Investment Law. In contrast to these studies, this article offers a more comprehensive approach by examining not only civil law aspects but also the public law implications of the nominee agreement practice. This analysis covers issues of transparency regarding beneficial ownership, potential tax avoidance, and the money laundering risks inherent in such practices. Thus, this study presents a unique approach by combining private and public law perspectives to assess nominee agreements more comprehensively, while emphasizing their relevance to legal certainty, investor protection, and national economic sovereignty. Uniqueness of this research is that nominee agreements are considered more than just problematic contracts; they are a structural symptom of the mismatch between the need for foreign capital, state protection, and the state's ability to monitor the market. It is hoped that, based on this perspective, this study provides a theoretical contribution to the study of investment law and politics and offers a model for regulatory reform relevant to other developing countries facing similar issues, i.e., how to allow foreign investment to enter without losing legal control over their economies

Method

This study is classified as normative legal research. According to Marzuki, normative legal research is the process of identifying legal rules, principles, and doctrines to address legal issues that arise.[7] This study does not examine law as social behavior in society, but rather as a system of norms. The choice of this research type is based on the primary object of study: legal policy, which, according to Moh. Mahfud MD, constitutes the official policy line (legal policy) regarding which laws enforced or not enforced to achieve the state's objectives.[8] The research focuses on analyzing the norms, principles, and legal policies governing the practice *of nominee agreements* in investment activities in Indonesia. The selection of this method is based on the research objective, namely, to examine the inconsistency between the formal prohibition of nominee practices and the need for legal certainty in the direct investment climate. Therefore, the research does not stop at repeating normative concepts but is directed toward testing the consistency of existing regulations (*ius constitutum*) and formulating future legal policies (*ius constituendum*) that are more adaptive, fair, and effective. To analyze the issue comprehensively, this study employs three approaches. First, the statutory approach. According to ~~Johnny~~ Ibrahim, this approach involves examining all laws and regulations related to the legal issue at hand.[9] Second, the conceptual approach, which is used to construct a theoretical framework regarding the principles of freedom of contract, good faith, legal certainty, justice, utility, and the theory of beneficial ownership relevant to assessing the legal construction of nominee agreements. Third, the political-legal approach, which is used to examine the direction of state policy in investment regulation, the rationality of restrictions on foreign ownership, and the objectives of establishing norms prohibiting nominee arrangements in relation to the protection of national interests and the creation of a healthy investment climate.

[7] Peter Mahmud Marzuki, *Legal Research* (Jakarta: Prenada Media Group, 2016).
[8] Moh. Mahfud MD, *Legal Politics in Indonesia* (Jakarta: Raja Grafindo Persada, 2020).
[9] Johny Ibrahim, *Theory and Methodology of Normative Legal Research* (Malang: Bayumeding Publishing, 2008).

The legal sources used consist of primary, secondary, and tertiary legal materials. This classification is based on the views of Soekanto, who holds that primary legal materials are legally binding, such as the 1945 Constitution, the Investment Law, and the Companies Law. The secondary legal materials used include textbooks, legal journals, and scholarly opinions that provide explanations regarding primary legal materials, while tertiary legal materials, such as the Legal Dictionary, are used as meaningful guides or explanations. Data collection was conducted through library research and document analysis.[10] A systematic search was conducted in legal literature, scientific publications, and official documents related to nominee agreements and investment law policy. The collected data are analyzed using descriptive-qualitative and prescriptive methods.[11] The analysis is conducted qualitatively and normatively through several stages. First, the identification of norms governing or related to nominee agreements. Second, legal interpretation using grammatical, systematic, and teleological methods is used to uncover the meaning of the norms and the purpose of their formulation. Third, an evaluation of the consistency of the norms with evolving legal practices is applied, including assessing the extent to which the weakness of law enforcement indicates flaws in regulatory design. Fourth, the formulation of prescriptive arguments in the form of a legal policy reconstruction model that balances legal certainty for investors, the protection of national interests, and the principle of economic justice. With such a design, the research method is not merely formalistic but demonstrates a tangible connection among normative analysis, implementation issues, and recommendations for legal reform.

Discussion

1. A Critical Evaluation of Existing Legal Policies: The Hegemony of Legal Loopholes Amid Investment Restrictions.

The Indonesian legal system governs obligations in Book III of the Civil Code (KUH Perdata). In Book III of the Civil Code, obligations are divided into two types: contractual and non-contractual. Contractual relationships arise from an agreement between the parties involved, based on the principle of consensualism. Non-contractual obligations, on the other hand, do not arise from an agreement between the parties, but rather from obligations of the parties that are regulated and established by law.[12] Indonesian legal policy has essentially established restrictions on foreign ownership as an instrument to protect national interests, particularly regarding strategic sectors deemed vital to economic sovereignty. These restrictions are implemented through the foreign investment regime, regulations on limited liability companies, and agrarian laws that limit direct ownership by foreign nationals. However, in practice, this restrictive regime has given rise to legal avoidance mechanisms through nominee agreements, a legal construct that designates an Indonesian citizen as the formal owner, while economic control, benefits, and substantive control remain with a foreign party

[10] Anisa Amalia, Umar Ma'ruf, and Umar Ma'ruf, "The Tenure of Land by Foreigners through Nominee Agreements & Waarmerking by Notaries," *Sultan Agung Notary Law Review* 3, no. 2 (August 10, 2021): 706, https://doi.org/10.30659/sanlar.3.2.586-596.
[11] Ali Masum, Sulistyandari Sulistyandari, and Tri Prihatinah, "The Responsibility of Notary in Making Nominee Agreements for Foreign Citizens in Indonesia," *Problems of Legality*, no. 161 (June 30, 2023): 287–303, https://doi.org/10.21564/2414-990X.161.278003.
[12] Hasim Purba, *Contract and Agreement Law* (Jakarta: Sinar Grafika, 2022).

acting as *the beneficial owner*. This phenomenon demonstrates that normative prohibitions do not automatically correlate with the effectiveness of regulatory measures.

Generally, contracts are divided into two categories: named contracts (nominaat) and unnamed contracts (innominaat). The law defines the names and types of these specific contracts. Book Three of the Civil Code covers these contracts, ranging from Chapter V on Sale and Purchase to Chapter XVII on Settlement. However, innominate contracts are not regulated in the Civil Code, yet they still exist in society.[13] Foreign direct investment (FDI) is a crucial factor in Indonesia's economic development. However, restrictions on foreign ownership in certain sectors often lead to the practice of nominee agreements. A nominee agreement is an arrangement in which one party (the nominee) is legally registered as a shareholder or asset owner, while another party, as the beneficial owner, retains economic rights and actual control.

In Indonesia, this practice is often used to circumvent regulatory restrictions, such as those regarding share ownership in limited liability companies, land ownership by foreign nationals, and the management of business assets. The legal status of nominee agreements remains a subject of debate, as on one hand such agreements meet the legal requirements of a contract as stipulated in Article 1320 of the Civil Code, yet on the other hand they often conflict with specific regulations such as the Investment Law and the Companies Law. Essentially, the practice of name lending between Indonesian citizens and foreign nationals to facilitate property ownership in Indonesia is an attempt to circumvent agrarian regulations and norms that explicitly prohibit foreign nationals, whether individuals or legal entities, from owning land.[14] Normatively, Article 33(1) and (2) of the Investment Law of 2007 explicitly prohibit any agreement or statement that share ownership is held for and on behalf of another person, and declare such agreements null and void. Similarly, Article 48(1) of the Companies Law of 2007 stipulates that shares are issued in the name of their owners. In the field of land affairs, the Agrarian Law also restricts land ownership rights exclusively to Indonesian citizens. Textually, these provisions appear sufficient to prevent the use of nominees as a means of legal evasion. However, at the implementation level, these regulations have not been able to address the reality of actual beneficial ownership. The state recognizes only the formally recorded owner, while the party controlling capital and business decisions is often hidden behind private contractual structures.

This is where structural criticism of legal circumvention (wetsontduiking) becomes relevant. Legal circumvention is a deliberate tactic designed to exploit discrepancies between business practices and the law. Although foreign investors do not directly violate ownership restrictions, they use private legal instruments that formally legitimize public policy objectives. Debt agreements, powers of attorney to sell, declarations of shareholding, irrevocable attorney-in-fact powers, and acknowledgments that funds originate from foreign

[13] Richi Al Mahfi and Teddy Anggoro, "Perjanjian Nominee Antara Warga Negara Asing Dengan Warga Negara Indonesia Dalam Praktik Jual Beli Satuan Rumah Susun," *Wajah Hukum* 9, no. 1 (April 28, 2025): 378, https://doi.org/10.33087/wjh.v9i1.1773.
[14] Indra Bayu Nugroho, Amiliya Amiliya, and Lucky Dafira Nugroho, "Perjanjian Pinjam Nama Oleh Warga Negara Asing Dalam Perspektif Hukum Perdata Internasional," *Journal Inicio Legis* 6, no. 1 (2025), https://doi.org/https://doi.org/10.21107/il.v6i1.29959.

sources are some examples of actions that appear to shield the candidate from foreign ownership restrictions. Viewed in isolation, each provision seems to possess civil legal force. However, taken as a whole, these legal instruments form a hidden power structure. Therefore, the law is used not to be enforced, but to be manipulated from within.

It should be noted that in practice, name-lending agreements are often wrapped in a series of agreements that appear formally valid, such as a name-lending agreement followed by a promissory note, a power of attorney to sell, and a trust declaration. Although the law and jurisprudence generally hold that nominee agreements lack a legal basis, there remains disagreement in practice. This is primarily due to the lack of clear regulations regarding the definition, form, and legal consequences of nominee agreements. Furthermore, there is no effective system to prevent and monitor the practice of nominee agreements. Consequently, there is a gap between the written law and the law in practice; the practice of appointing nominees continues despite being normatively contrary to Indonesian positive law.[15]

Nominee structures in Indonesia can be categorized into two types: direct nominee structures and indirect nominee structures. A direct nominee is established directly through a nominee agreement or a nominee declaration.[16] The beneficial owner then provides compensation in the form of nominee fees. Meanwhile, an indirect nominee structure is characterized by a series of layered agreements designed to make it difficult to identify the beneficial owner. In this case, the beneficial owner may direct the nominee to perform specific actions or business activities in accordance with their instructions and for their own benefit.[17] Regarding the concept of a Nominee Agreement concerning Share Ownership, a defect in its validity may arise from non-compliance with objective requirements, specifically the fourth element, namely the presence of a permissible cause. The provisions governing the determination of whether a reason is permissible can be found in Articles 1335 and 1336 of the Civil Code. Based on these Articles, a cause is considered valid if it (1) does not indicate fraud, (2) is not prohibited by the applicable laws and regulations of the Republic of Indonesia, (3) is expressly stated, and/or (4) does not conflict with public morality or public order (*goede zeden*).[18]

The establishment of a nominee is carried out directly by drafting and signing a nominee agreement between the beneficiary and the nominee in a single document. This agreement explicitly and clearly governs the delegation of trust and authority from the beneficiary to the nominee to carry out specific activities or business operations at the beneficiary's direction and in the beneficiary's best interests. The structure used in the nominee concept is an

[15] Anak Agung Istri Eka Krisna Yanti Made Angga Legawa, "The Legal Status of Nominee Agreements in the Indonesian Civil Law System," *Innovative Law: Journal of Social and Humanities Law* 2, no. 2 (2025): 304–14, https://doi.org/https://doi.org/10.62383/humif.v2i2.1579.

[16] Tri Handayani Fitri Riani Baharudin, Lastuti Abubakar, "Nominee Agreements in the Transfer of Limited Liability Company Share Ownership from the Perspectives of Contract Law and Limited Liability Company Law," *Hakim: Journal of Law and Social Sciences* 2, no. 2 (2024): 104–16, https://doi.org/https://doi.org/10.51903/hakim.v2i2.1735.

[17] Nabila Meiwindita, Lastuti Abubakar, and Ema Rahmawati, "Kedudukan Beneficial Owner Dalam Korporasi Ditinjau Dari Aspek Perjanjian Dan Hukum Perseroan Terbatas," *Jurnal Sains Sosio Humaniora* 6, no. 2 (December 24, 2022): 273–84, https://doi.org/10.22437/jssh.v6i2.22917.

[18] Yohanie Maretta Claudio Ricky, Fajar Sugianto, "Comparative Analysis on the Validity of Nominee Agreement on the Ownership of Shares Between Indonesia and Singapore," *International Journal of Law in Changing World* 3, no. 2 (2024): 53–76, https://doi.org/https://doi.org/10.54934/ijlcw.v3i2.104.

agreement made by and between the nominee and the beneficiary, known as a nominee agreement. The nominee and the beneficiary determine what included in the nominee agreement. This agreement, in addition to regulating the amount and procedure for payment of nominee fees, also regulates provisions that require and/or prohibit the nominee from doing anything related to the use of the nominee concept.[19]

Meanwhile, an indirect nominee is not established through a nominee agreement that explicitly and clearly grants trust and authority from the beneficiary to the nominee. An indirect nominee does not consist of a single agreement, but rather of several agreements which, when linked together, result in nominee shares. The beneficiary may direct the nominee to perform specific acts or business activities at the beneficiary's direction and in the beneficiary's interest. Book III of the Civil Code regulates the concept of a nominee in Indonesia. According to Article 1319 of the Civil Code, there are two categories of agreements: agreements designated by law as nominee agreements and agreements not designated by law as nominee agreements. Under the Civil Code, the principle of freedom of contract is closely tied to the binding force of an agreement. In this regard, the law grants each party the freedom to independently govern its legal relationship with the other. This includes determining the cause, object, terms, and conditions by creating an agreement that is legally binding on each party (pacta sunt servanda). Based on the principle of freedom of contract, there are limitations on two aspects of a contract: the validity of the contract. A contract is considered valid by the parties who enter into it if it meets the four requirements specified in Article 1320 of the Civil Code. Meanwhile, limitations on the content of the agreement are regulated in Article 1339 of the Civil Code. Therefore, it can be concluded that a nominee agreement is the result of freedom of contract and pacta sunt servanda. The provisions in a nominee agreement are binding on the parties, thereby making it akin to a law.[20]

In the context of foreign direct investment, the practice of nominee structures or nominee shareholders has emerged as a response to foreign ownership restrictions set forth in Indonesia's Domestic Investment Law. Nominee agreements are divided into two types: direct and indirect. Direct nominee arrangements involve an explicit nominee agreement or declaration between the foreign investor (Settlor) and the nominee, establishing the nominee's trust, authority, and responsibility to manage the business in accordance with the investor's instructions, for which the investor typically provides compensation. Meanwhile, an indirect nominee is established through a series of agreements that allow beneficial ownership to be held by a third party, who indirectly exercises control and receives benefits from the shareholding, collectively creating a nominee shareholding arrangement.[21]

Normatively, Indonesian law has established strict limitations on the practice of nominee agreements. This is reflected in Article 33(1) and (2) of the Investment Law of 2007,

[19] Achmad Hariyadi and Rusdianto Sesung, "Keabsahan Kepemilikan Tanah Yang Diperoleh Berdasarkan Perjanjian Nominee Antar Sesama Warga Negara Indonesia," *Jurnal Selat* 9, no. 1 (October 31, 2021): 44–57, https://doi.org/10.31629/selat.v9i1.4348.
[20] Hariyadi and Sesung.
[21] Kevin Darmawan, Enggarekso Diar, and Marcella Amanda Panjaitan, "Actual Ownership Practices with Nominee Structures in the Negative Investment List (DNI) in Foreign Investment Regarding the Business Climate and Legality of Company Operations as Viewed from Positive Law in Indonesia," *Padjadjaran Law Review* 12, no. 1 (June 28, 2024), https://doi.org/10.56895/plr.v12i1.1658.

which prohibits domestic and foreign investors from entering into agreements that establish share ownership for and on behalf of another person. The penalty for such a violation is that the agreement is deemed null and void. In line with this, Article 48(1) of the Companies Law of 2007 emphasizes the principle that a company's shares must be issued in the name of its owner. The primary weakness of Indonesia's legal policy lies in the dominance of a formalistic approach that focuses solely on legal title and administrative registration, rather than actual control. In corporate law, the recognized shareholder is the name listed in the shareholder register, not the party providing capital or enjoying economic benefits. In the Agrarian Law, certificates serve as the primary basis for recognizing rights, while financing relationships and actual control are difficult to trace. Consequently, there is a gap between *legal ownership* and *economic ownership*. This gap allows nominee ownership to flourish because the state lacks substantive verification mechanisms to identify the actual beneficial owners.

However, at the implementation level (das sein), this legal policy faces the phenomenon of "legal circumvention" (wetsontduiking). Foreign investors use nominee agreements as a tool to aggressively circumvent the restrictions on foreign capital ownership set forth in the Presidential Decree on the List of Investment Sectors (Negative Investment List). As mentioned in the background, this practice arises from ownership restrictions in the Investment Positive List, where Indonesian citizens are placed as formal shareholders, while full control remains with foreign investors as beneficial owners. The next issue is the weakness of the oversight and law enforcement system. There is no integrated mechanism among the Ministry of Investment, the Ministry of Law and Human Rights, tax authorities, the Financial Transaction Reports and Analysis Center *(Pusat Pelaporan dan Analisis Transaksi Kuangan - PPATK)*, the National Land Agency *(Badan Pertanahan Nasional - BPN)*, and notaries to detect nominee structures at an early stage. Each institution operates based on the formal documents submitted, without the authority or adequate systems to trace hidden relationships between parties. In practice, notaries often find themselves in the formal role of recording the parties' intentions, rather than as examiners of the substantive control of capital. Consequently, deeds that economically represent nominee arrangements can still be legally and formally produced.

This situation indicates that current legal policies remain largely symbolic and reactive. According to Juwana, Indonesian law is often effective on paper but hindered in its enforcement due to a lack of integrated oversight mechanisms.[22] The main weakness is that Indonesia's civil law system, which upholds the principle of freedom of contract, is often abused to conceal bad faith, even though Article 1320 of the Civil Code requires a "valid cause." In performing their duties, a notary in Indonesia must strictly adhere to the responsibilities and authorities set forth in the Notary Law of 2014 as amended by 2004. This law requires notaries not only to be responsible for the authenticity and validity of the documents they

[22] Hikmahanto Juwana, *Anthology of Economic and International Law* (Jakarta: Lentera Hati, 2005).

create but also to bear formal and material liability.[23] Nominee agreements clearly violate the law (invalid grounds), but they are difficult to prove because they are packaged within derivative notarial deeds, such as Powers of Attorney (Absolute Powers of Attorney) that appear valid. Consequently, there is a legal vacuum in which the state fails to detect who actually controls the corporation. Therefore, the nominee issue should not be understood merely as a violation of an individual contract, but rather as a structural symptom of the imperfections in the design of the Investment Law. As long as the law remains focused on the formality of names rather than the substance of control, nominee practices continue to proliferate in increasingly complex forms. In other words, the core issue is not merely the presence of foreign investors evading regulations, but the state's failure to establish a legal system capable of discerning the economic realities underlying formal documents.

2. The Concept of Political and Legal Reconstruction of Nominee Agreements to Improve a Fair Direct Investment Climate.

Legal policy was first introduced in Indonesia in 1947 by Soepomo, through his writing in the magazine *Hoekoem* in an article titled "Legal Policy Issues in the Development of the Indonesian State."[24] According to Moh. Mahfud MD, legal policy is the official policy or guideline regarding the law to be implemented, either through new legislation or by replacing old laws, in order to achieve the state's objectives.[25] The legal-political reconstruction regarding *nominee* agreements must be viewed not merely as an effort to tighten restrictions, but as a reform of investment regulatory design to align with the three primary objectives of a modern rule-of-law state: legal certainty, competitive justice, and economic efficiency. Until now, Indonesia's policies have tended to adopt a binary stance: on one hand, restricting foreign ownership in certain sectors, yet on the other hand, failing to provide adequate instruments for transparency and verification of beneficial *ownership*. Consequently, formal prohibitions have inadvertently fostered an informal market through nominee schemes. From a legal-political perspective, this situation indicates the state's failure to translate national protection objectives into operational and enforceable regulatory instruments. Currently, nominee agreements are often regarded as "legal circumvention" because they are unrecognized or even prohibited under Indonesia's contract law system, particularly in the context of land and share ownership.[26] While the Company Law states that shares are issued in the name of the owner, the Investment Law of 2007 normatively prohibits the use of nominees. However, this norm is ineffective because positive law focuses on registered ownership rather than actual control. Foreign investors who are not permitted to hold shares directly in a company can control the company through structured loans, general powers of attorney, side agreements, dividend lock-ups, or management control via service contracts.

[23] R. Imam Rahmat Sjafi'I Sekar Rizqi Triroosa Putri, Afifah Kusumadara, "The Notary's Responsibility in Drafting a Declaration Deed Related to a Deed of Sale and Purchase Containing a Nominee Element," *NEGREI: Academic Journal of Law and Governance* 4, no. 2 (2024): 163–84, https://doi.org/http://doi.org/10.29240/negrei.v4i2.11137.
[24] Eka Sihombing, *Legal Politics* (Medan: Enam Media, 2020).
[25] Moh. Mahfud MD, *Legal Politics in Indonesia*.
[26] N. Leni, L., Buana, M. S., & Hafidah, "Implications of Nominee Agreements between Foreign Nationals and Indonesian Citizens," *International Journal of Social Sciences and Human Research* 6, no. 8 (2023): 5288–52 98, https://doi.org/10.47191/ijsshr/v6-i8-91.

Therefore, the main issue is not merely a violation of the prohibition, but rather that the definition of ownership under Indonesian law remains highly administrative and limited. The state only considers who is registered, not who is in control.

Creating a fair investment climate is the primary objective of this restructuring. From the perspective of Rawls's Theory of Justice, particularly the principle of fair *equality of* opportunity, the practice of nominee agreements creates structural injustice within Indonesia's business ecosystem.[27] In the context of justice, Rawls's theory is relevant when applied substantively through the principle *of fair equality of opportunity*. This principle requires that all business actors compete under equal regulatory conditions. The nominee practice undermines these conditions by creating two classes of investors. Law-abiding investors must comply with ownership limits, partnership obligations, and specific business structures. Conversely, investors using nominees can enjoy full economic benefits without bearing the same restrictions. When violations yield competitive advantages, the legal system effectively punishes compliance and incentivizes legal evasion. Within a Rawlsian framework, such a situation constitutes a form of institutional injustice because the rules do not apply equally in practice. The nominee practice creates unfair competition in business . Law-abiding foreign investors (bona fide investors) must adhere to shareholding limits (e.g., a maximum of 49% or 67%) and must partner with local entrepreneurs. On the other hand, "unscrupulous" foreign investors using nominees can enjoy 100% market control without sharing risks and profits with local partners. This violates the principle of a level playing field, a key requirement for a healthy investment climate. Beyond competition concerns, nominee arrangements weaken legal protections for the state. Strategic assets (such as land or mining rights), which, under the Agrarian Law, are prohibited from being owned by foreigners (as property rights), are now de facto controlled by foreigners through Indonesian intermediaries. This results in the loss of state control over natural resources and the potential for leakage of state revenue (taxes), as dividends or profits are often transferred abroad (profit shifting) through schemes undetected by tax authorities. Therefore, maintaining the status quo of current regulations is tantamount to allowing injustice to continue, ultimately undermining the credibility of Indonesia's investment laws in the eyes of the international community.

Nominee agreements are a practice frequently used by foreign investors to circumvent ownership restrictions on direct investment in Indonesia. Under this arrangement, an Indonesian citizen serves as the formal holder of the assets or shares, while the foreign investor remains the beneficial owner. Although it provides a pragmatic solution to the investment restrictions set forth in the Positive Investment List, this practice raises several serious legal issues. This is primarily because nominee agreements conflict with the principles of legal certainty, transparency, and national economic sovereignty.

From a civil law perspective, nominee agreements are potentially void. Article 1320 of the Civil Code states that an agreement is valid only if it has a valid cause. If such an agreement is used to circumvent foreign ownership restrictions as stipulated in the Investment Law, the

[27] John Rawls, *A Theory of Justice* (Cambridge: Harvard University Press, 1999).

Companies Law, or the Public Companies Law, then the nominee agreement may be deemed void. Siska emphasized that share ownership through a nominee violates Article 48(1) of the Companies Law, which requires shares to be registered in the name of the actual owner. Supreme Court Decisions No. 3041K/Pdt/2020 and 765PK/Pdt/2020 also indicate that the courts do not recognize claims by foreign investors who use nominee schemes, as they are not legally registered as shareholders. Thus, legally, a nominee agreement cannot provide legal protection for investors.[28] In addition to being legally void, the use of nominee agreements also carries the risk of administrative and criminal sanctions. The government, through the Financial Services Authority (OJK) and the Financial Transaction Reports and Analysis Center (PPATK), is increasingly emphasizing transparency regarding beneficial ownership to prevent money laundering, tax evasion, and illegal smuggling. Supervision of beneficial ownership is becoming increasingly crucial to maintaining transparency in the investment climate. This indicates that nominee agreements are not only legally weak under civil law but also vulnerable to public law sanctions.

In terms of negative impacts, the use of nominee agreements is detrimental to various parties. For foreign investors, the most obvious risk is the loss of ownership and control over the assets they finance. Since formal ownership rests with the nominee, investors have no legal guarantees. Dispute cases show that nominees often abuse their position to unilaterally control assets.[29] Another impact is legal uncertainty, as when disputes arise, investors struggle to obtain legal protection. For the state, the practice of nominee arrangements poses serious issues regarding transparency and economic sovereignty. The use of these agreements reduces the clarity of foreign ownership, making it difficult for the government to monitor and properly collect taxes.

Meanwhile, for the nominee, the risks are no less significant. Because they are legally registered as the rightful owners, nominees can be held liable for all of the company's obligations, including debts and any legal matters that arise.[30] It has been found that in the villa business in Bali, nominees often face legal lawsuits even though they do not receive any financial benefits from the investment. This indicates that nominee agreements are actually more detrimental to the local parties involved. Normatively, a nominee agreement may be considered valid as a private contract if it complies with Article 1320 of the Civil Code. However, if their purpose conflicts with laws and regulations, and the public interest, their validity may be nullified on the grounds of public policy (ordre public). Therefore, the nominee practice is more appropriately viewed as a form of legal circumvention that is inconsistent with the principles of legal certainty and investment transparency.

[28] Siska Nadia, "The Validity of Stock Trading in Relation to Stock Ownership in Another Person's Name (Case Study of Decisions No. 3041K/PDT/2020 and 765PK/PDT/2020)," *Bina Mulia Law Journal* 8, no. 2 (March 31, 2024): 227–40, https://doi.org/10.23920/jbmh.v8i2.1487.
[29] Daniel Daniel and Ariawan Ariawan, "Juridical Review on Foreign Investment Conducted Using the Nominee Shareholders Method as Fulfillment of Foreign Investment Terms and Conditions in Conditional Open Business Sector in Indonesia," 2022, https://doi.org/10.2991/assehr.k.220404.098.
[30] Elvira Triana Putri, "A Legal Study of Nominee Agreements in Villa Business Management: A Perspective from Decision No. 129/Pdt.G/2021/PN. Amp."

A restructuring of legal policies regarding nominee agreements is necessary to create a fair environment for direct investment in Indonesia. This restructuring approach must be based on the principles of fairness, legal certainty, and economic efficiency, while prioritizing national interests. A crucial step is to strengthen regulations and law enforcement regarding nominee agreement practices. Existing prohibitions in the Investment Law and the Agrarian Law need to be reinforced with stricter sanctions and more effective oversight mechanisms.[31] This includes sanctions against notaries who draft nominee agreement deeds that violate the law, including civil, administrative, ethical, and criminal sanctions.[32] Nominee agreements drawn up by or in the presence of a notary to transfer control of ownership from Indonesian citizens to foreign nationals result in the creation, alteration, or termination of certain legal relationships.[33] This creates legal uncertainty for all parties involved, including investors, nominees, and even the notaries who draft them. The reconstruction should aim to reduce legal ambiguity and provide a clear framework regarding the boundaries and legality of this practice. Furthermore, the principle of fairness also plays a crucial role. Although the prohibition on nominee agreements is intended to protect national interests, this practice often arises due to strict investment restrictions on foreign investors in certain sectors. Fairness demands that existing regulations not only hinder investments that could potentially bring economic benefits but also ensure that such investments are conducted transparently and do not harm national interests.[34]

The restructuring must take into account the rights of beneficial owners, who are currently often not legally recognized, even though they substantially bear the risks and receive the benefits of the investment. The principle of transparency is also of paramount importance. The existence of nominee agreements often conceals the identities of beneficial owners, which can facilitate illegal practices such as money laundering or tax evasion. The restructuring should promote the establishment of regulations requiring the disclosure of an entity's beneficial owners, as initiated by the Presidential Regulation on Beneficial Ownership.[35] It is also important to clarify and strengthen the concept of "beneficial owner." By requiring the disclosure of actual beneficial owners, the government can identify foreign parties attempting to circumvent ownership restrictions.[36] Reform could lead to an approach in which nominee agreements are not entirely prohibited, but are strictly limited and transparent, ensuring that the actual beneficial owners meet all legal requirements. This would provide flexibility for legitimate foreign investors while still preventing legal

[31] G. Ridhogusti, R., & Kurniati, "Implications of Nominee Agreements on Land Ownership by Foreign Nationals in Bali," *Jurnal Risalah Hukum* 28, no. 2 (2024): 1–10, https://doi.org/https://doi.org/10.46257/jrh.v28i2.1024

[32] A. Trayama, Y., & Adhari, "Authentic Evidence in Civil Disputes Regarding Nominee Agreements on Land Title Certificate Ownership," *Jurisprudence: Journal of Sharia, Legislation, and Law* 17, no. 1 (2025): 1–10, https://doi.org/https://doi.org/10.32505/jurisprudensi.v17i1.10550.

[33] Ayu Sitha Radha Rani, "The Notary's Liability for Nominee Agreements Regarding Land Ownership by Foreign Nationals in Bali," *Journal of Law Enforcement* 11, no. 2 (2024): 140–46, https://doi.org/10.31289/jiph.v11i2.12763.

[34] Maulana Reyza Alfaris, "Validitas Penggunaan Nominee Agreement Dalam Kepemilikan Saham Di Indonesia," *Journal Economic & Business Law Review* 2, no. 1 (May 27, 2022): 63, https://doi.org/10.19184/jeblr.v2i1.31349.

[35] Muh. Afdal Yanuar, "Legal Review of Nominee Shareholders Agreement of Foreign Direct Investment In The Form of Joint Venture Company," *Majalah Hukum Nasional* 51, no. 1 (July 31, 2021): 107–25, https://doi.org/10.33331/mhn.v51i1.131.

[36] Yanuar.

circumvention practices. Additionally, regulatory harmonization is needed among civil , corporate , and agrarian laws.[37]

Inconsistencies between these provisions create loopholes that the parties exploit. The reconstruction of legal policy must ensure that all regulations are mutually supportive in creating legal certainty and preventing harmful nominee agreement practices. The ius constitutum (existing law) approach must be aligned with the ius constituendum (desired law) to achieve justice.[38] For example, some experts propose relaxing foreign ownership rules up to a certain limit with a divestment obligation at a later date. Such a policy is expected to reduce the motivation of foreign investors to use nominee agreements, as they have a legitimate channel to invest, while maintaining national control over strategic assets. Legal policy reconstruction needs to be directed toward four concrete policy designs. First, a shift in regulatory focus from legal ownership to beneficial ownership. Every corporation receiving foreign capital must periodically disclose its *ultimate beneficial owner* through an integrated system involving the Ministry of Law and Human Rights, the Investment Coordinating Board (BKPM), the Directorate General of Taxes, and the Financial Transaction Reports and Analysis Center (PPATK). Failure to disclose accurate data must result in the suspension of business licenses, progressive administrative fines, and the revocation of certain investment facilities. Under this model, the state no longer merely verifies the formal names of shareholders but also identifies the parties who economically receive the benefits and exercise control. Second, sectoral classification regarding investment restrictions. Not all sectors require an absolute prohibition approach. For non-strategic sectors, the government can transparently open up foreign ownership more broadly, thereby reducing the incentive to use nominees. Conversely, for strategic sectors, such as certain land sectors, defense, strategic media, and key natural resources, restrictions remain in place with stricter oversight. Thus, restrictions are no longer uniform but are based on national risk and economic needs. Third, reforming the professional accountability of legal intermediaries. Notaries, legal consultants, accountants, and *corporate service providers* who know or have reason to suspect the existence of covert nominee schemes must apply the principle *of enhanced due diligence*. If proven to have knowingly facilitated the concealment of beneficial owners, they may face not only ethical sanctions but also administrative and civil liability. This policy is crucial because nominee structures are typically established through professional services that design formal document structures. Fourth, a limited legalization mechanism via a declaratory process. For existing structures that have already used nominees, the state may establish a transition period in the form of *a voluntary disclosure scheme*. Investors are given the opportunity to declare beneficial ownership and adjust their business structures within a specified timeframe without the risk of criminal penalties, provided their business sector is not prohibited, and tax obligations are fulfilled. Once the transition period ends, law enforcement is carried out rigorously. This

[37] Ema Farida Iin Indriani, "Aligning the Legality of Nominee Agreements with Corporate Law in Indonesia," *Pena Justisia Media of Communication and Legal Studies* 24, no. 1 (2025): 4840–48, https://doi.org/https://doi.org/10.31941/pj.v24i2.6424.
[38] I Sumarsih, "The Impact of Nominee Agreements in Mining Enterprises on Public Welfare," *International Journal of Social Service and Research (IJSSR)* 4, no. 3 (2024): 971–84, https://doi.org/https://doi.org/10.46799/ijssr.v4i03.753.

approach is more realistic than an absolute ban, which would be difficult to enforce against thousands of existing nominee structures.

Conclusion

This study confirms that the practice of nominee arrangements in direct investment in Indonesia is not solely driven by the parties' desire to circumvent the law, but is fundamentally a consequence of regulatory design that remains inconsistent between policies restricting foreign ownership and effective oversight mechanisms. The state has indeed established various normative prohibitions against ownership through nominees, but has not yet built a legal system capable of identifying the parties who actually control the capital and receive the economic benefits. Therefore, the issue of nominees must be understood as a structural weakness in the governance of nvestment law, not merely as individual contractual violations. The findings of this study indicate that a legal approach focused on formal ownership (legal ownership) has proven inadequate to prevent legal evasion. As long as regulations focus solely on the identity of shareholders or owners recorded administratively, while beneficial owners remain undetected, nominee practices continue to proliferate through increasingly complex private contractual arrangements. This situation raises serious implications, including legal uncertainty, distortion of business competition, potential loss of state revenue, and reduced effectiveness of protection for strategic sectors.

The main contribution of this study lies in its proposal to reconstruct investment law through a paradigm shift from a formal prohibition model to a regulatory model based on transparency and substantive control. This reconstruction is realized through four policy instruments: integrated beneficial ownership disclosure requirements, sectoral classification of investment restrictions, strengthening the professional responsibilities of legal intermediaries, and a transition mechanism for existing nominee structures. This approach is considered more realistic and practical compared to absolute prohibition policies, which have long been difficult to enforce effectively. Thus, this study concludes that a fair direct investment climate cannot be built solely through normative restrictions but must be supported by a legal system that guarantees transparency, legal certainty, and competitive equality among business actors. In this context, the proposed reconstruction model is not only relevant for Indonesia but also has the potential to serve as a reference for other developing countries facing similar challenges in balancing the need to attract foreign investment with the need to safeguard national economic sovereignty.

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