Siyasah Dusturiyah: State Law Review
Published by Yayasan Cerdas Pedia Indonesia
Volume 2 Issue 1, 2026 ISSN (Online) ***3109-9726***
Journal Homepage: **https://jurnal.smartpedia.co.id/index.php/sdlr**

Unregulated Foreign Investment Screening in Indonesia: State Sovereignty and Legal Certainty Implications

Implikasi Kekosongan Regulasi Penyaringan Investasi Asing Terhadap Kedaulatan Negara dan Kepastian Hukum

Rolis Barson Sembiring
Faculty of Law, University of Indonesia, Indonesia

Article Info

Corresponding Author:
Rolis Barson Sembiring
✉rolisbarsonsembiring@gmail.com

History:
Submitted: 11-04-2026
Revised: 25-05-2026
Accepted: 30-05-2026

Keyword:
Foreign Direct Investment; Investment Screening; Legal Certainty; National Security; State Sovereignty.

Kata Kunci:
Investasi Langsung Asing; Penyaringan Investasi; Kepastian Hukum; Keamanan Nasional; Kedaulatan Negara.

https://doi.org/10.65101/r0p3tp31

Abstract

This article examines the regulatory vacuum in Indonesia regarding foreign direct investment screening mechanisms and its implications for state sovereignty and legal certainty. Despite the global paradigm shift towards national security screening, the current licensing system prioritizes economic facilitation, lacking an ex ante review procedure for strategic sectors. Utilizing doctrinal legal research with statute, conceptual, and comparative approaches, this study systematically analyzes the risks of this legislative void. The findings demonstrate that the absence of structured screening compromises national interests and degrades legal certainty. Arbitrary revocations of investments without established procedural frameworks expose Indonesia to international arbitration disputes under international investment agreements, risking fatal violations of the fair and equitable treatment standard. Consequently, this study concludes that Indonesia must urgently institutionalize a comprehensive investment screening system. This mechanism is absolutely imperative to proportionally balance open investment policies with essential security safeguards, thereby mitigating international litigation risks and protecting territorial sovereignty.

Abstrak

Artikel ini mengkaji kekosongan regulasi dalam mekanisme penyaringan investasi asing di Indonesia dan implikasinya terhadap kedaulatan negara serta kepastian hukum. Meskipun paradigma global beralih kepada penyaringan berbasis keamanan nasional, sistem perizinan saat ini justru memprioritaskan fasilitasi ekonomi dengan mengabaikan prosedur tinjauan preventif pada sektor strategis. Menggunakan penelitian hukum normatif dengan pendekatan perundang-undangan, konseptual, dan perbandingan, studi ini menganalisis secara sistematis risiko kekosongan hukum tersebut. Temuan penelitian membuktikan bahwa ketiadaan penyaringan terstruktur membahayakan kepentingan nasional serta mendegradasi kepastian hukum. Pencabutan investasi secara sewenang-wenang tanpa kerangka prosedural yang jelas akan mengekspos Indonesia pada sengketa arbitrase berdasarkan perjanjian investasi internasional, sehingga berisiko fatal melanggar standar perlakuan adil dan seimbang. Oleh karena itu, studi ini menyimpulkan bahwa Indonesia harus segera melembagakan sistem penyaringan investasi yang komprehensif. Mekanisme hukum ini sangat mutlak diperlukan untuk secara proporsional menyeimbangkan kebijakan investasi terbuka dengan pelindungan keamanan esensial, sekaligus memitigasi berbagai risiko litigasi internasional demi melindungi kedaulatan wilayah negara.

A. INTRODUCTION

1. Background

Historically and empirically, Foreign Direct Investment (FDI) flows have been construed as a pivotal economic mechanism for catalyzing national development, facilitating technology transfer, and integrating domestic markets into global supply chain architectures. Within the international political economy paradigm shaped by the tenets of the Washington Consensus, investment liberalization was broadly posited as a fundamental prerequisite for economic growth. Over the past decade, however, the landscape of global investment governance has undergone a structural paradigm shift. The dynamics of contemporary geopolitical tensions, the competition for dominance over strategic technologies, and post-pandemic supply chain vulnerabilities have compelled sovereign states to recalibrate the threshold between liberal economic policies and national security imperatives.[1] This phenomenon has precipitated sweeping regulatory reforms across various jurisdictions, wherein foreign investment screening mechanisms predicated on national security are progressively evolving into a core structural element within the governance architecture of international economic law.[2]

Within the contemporary global order, advanced economies that have traditionally championed free-market orthodoxy are paradoxically adopting and fortifying investment screening frameworks to mitigate vulnerabilities arising from foreign acquisitions of critical infrastructure, sensitive personal data, and strategic technologies.[3] This phenomenon underscores a profound normative tension—a clash of norms—between an international investment protection regime anchored in the freedom of enterprise, and the inherent sovereign prerogative of states to safeguard their national security interests.

Amidst the prevailing global trend toward the securitization of economic instruments, Indonesia's investment law discourse presents a striking policy anomaly, pivoting instead toward wholesale deregulation. Through the enactment of Law No. 6 of 2023 on Job Creation (the Job Creation Law) and its implementing regulations, the

---

1 Jostein Hauge, Bruno Houtzager, and Alessandro Julian Hörmann, "The New Economic Nationalism: Industrial Policy and National Security in the United States, China, and the European Union," *Geoforum* 166 (November 2025): 104382, https://doi.org/10.1016/j.geoforum.2025.104382.

2 Ilias Alami, "Foreign Investment Screening Mechanisms and Emergent Geographies of (Post)Globalization," *Dialogues in Human Geography* 16, no. 1 (March 7, 2026): 52–75, https://doi.org/10.1177/20438206241278733.

3 Zenobia T. Chan and Sophie Meunier, "Behind the Screen: Understanding National Support for a Foreign Investment Screening Mechanism in the European Union," *The Review of International Organizations* 17, no. 3 (July 13, 2022): 513–41, https://doi.org/10.1007/s11558-021-09436-y.

Government of Indonesia has adopted a Risk-Based Approach (RBA) to business licensing, a framework expressly engineered to elevate the nation's Ease of Doing Business ranking.[4] This policy architecture substantially curtails capitalization requirements, institutes sweeping relaxations in licensing regimes, and structurally transforms the previously restrictive Negative Investment List (DNI) into a more facilitative Positive Investment List (DPI).[5] Notwithstanding this facilitative policy posture, Indonesia's positive legal architecture—codified in both the Investment Law and the Job Creation Law—suffers from a profound normative inconsistency, manifesting as a fundamental normative deficiency (an "incomplete norm").[6]

This normative deficiency is evidenced by the conspicuous absence of explicit statutory provisions delineating both the substantive review parameters and the institutional architecture vested with the authority to screen FDI predicated on national security risk analysis. Consequently, the extant administrative law regime relies exclusively upon administrative-economic regulatory instruments that are calibrated primarily toward health and environmental risks.[7] Crucially, Indonesia's investment framework remains devoid of an *ex-ante* legal review mechanism designed to scrutinize proposed transactions that are commercially advantageous yet pose geopolitical risks to critical infrastructure and data sovereignty. Strategic interventions by non-market actors or foreign state-backed entities targeting the energy and telecommunications sectors constitute material threats that remain structurally unaccounted for within the ambit of the domestic legal screening apparatus.[8]

The absence of such procedural norms undermines legal certainty while concurrently engendering regulatory vulnerabilities. Consequently, this exposes the host

---

4 Petra Mahy, "Indonesia's Omnibus Law on Job Creation: Legal Hierarchy and Responses to Judicial Review in the Labour Cluster of Amendments," *Asian Journal of Comparative Law* 17, no. 1 (July 12, 2022): 51–75, https://doi.org/10.1017/asjcl.2022.7.

5 Aurora Meliala, Adinda Prakasa, and Jonathan Woods, "Narrating The Effective Law for Foreign Direct Investment," *Indonesian Journal of International Law* 21, no. 5 (June 9, 2024): 1–34, https://doi.org/10.17304/ijil.vol21.5.1876.

6 Iriansyah Iriansyah and Yalid Yalid, "Normative Inconsistencies in Indonesian Investment Law: Implications for Legal Certainty and the Investment Climate," *Corporate Law & Governance Review* 8, no. 1 (January 22, 2026): 88, https://doi.org/10.22495/clgrv8i1p7.

7 Ali Arva Prabangkara and M. Rizki Yudha Prawira, "Balancing National Security And Open Investment: Comparative Study On America's Foreign Investment Screening Regulation For Indonesia's Potential Adaptation," *Jurnal Locus Penelitian Dan Pengabdian* 4, no. 7 (July 5, 2025): 4115–27, https://doi.org/10.58344/locus.v4i7.4460.

8 Lis Julianti and Artit Pinpak, "The Digitalization of Investment Impact on Developing Tourism Industry," *Journal of Human Rights, Culture and Legal System* 4, no. 3 (December 3, 2024): 655–81, https://doi.org/10.53955/jhcls.v4i3.289.

State to the risk of international arbitral claims under the Investor-State Dispute Settlement (ISDS) regime, should the government prospectively attempt to annul or unwind an investment transaction absent a well-settled statutory foundation.[9]

Scholarly discourse concerning the nexus of national security and investment law has engendered robust theoretical debate. The proliferation of foreign investment screening frameworks across Europe and the United States is increasingly conceptualized as an indispensable *de-risking* measure, deployed to safeguard strategic autonomy and preserve control over critical technologies.[10] Nevertheless, the formulation of essential security exception clauses within International Investment Agreements (IIAs) demands rigorous delimitation to preclude their exploitation as a pretext for disguised protectionism. This imperative is particularly acute given that the invocation of such clauses no longer enjoys absolute immunity from justiciability and substantive scrutiny by arbitral tribunals.[11,12]

Within Indonesia's domestic legal order, the recognized absence of an overarching statutory framework for investment screening is characterized as a profound regulatory blind spot that acutely compromises the nation's economic sovereignty.[13] Accordingly, there exists a compelling imperative to institute a preemptive screening paradigm calibrated to asymmetric risks within strategic sectors, serving as an essential regulatory adaptation.[14] Furthermore, the overlapping statutory mandates across the Investment Law, the Job Creation Law, and various sectoral regulations not only engender operational ambiguity, but also fundamentally distort the principle of legal certainty within the broader investment climate.[15]

---

[9] Tito Bramantyo, "The Indonesian Government Participation in International Investment Law and Its Reform," *Indonesian Journal of International Law* 19, no. 1 (November 22, 2021): 83–112, https://doi.org/10.17304/ijil.vol19.1.4.
[10] Chan and Meunier, "Behind the Screen: Understanding National Support for a Foreign Investment Screening Mechanism in the European Union."
[11] Caroline Henckels, "Justifying the Protection of Legitimate Expectations in International Investment Law: Legal Certainty and Arbitrary Conduct," *ICSID Review - Foreign Investment Law Journal* 38, no. 2 (September 23, 2023): 347–58, https://doi.org/10.1093/icsidreview/siac027.
[12] Caroline Henckels, "Whither Security? The Concept of 'Essential Security Interests' in Investment Treaties' Security Exceptions," *Journal of International Economic Law* 27, no. 1 (March 14, 2024): 114–29, https://doi.org/10.1093/jiel/jgae011.
[13] Sherina Azkia Rahmah, Sihabudin Sihabudin, and Reka Dewantara, "Legal Politics of Investment Screening in Indonesia's Foreign Investment Reform," *Legal Horizons* 3, no. 26 (August 29, 2025): 50, https://doi.org/10.54477/LH.25192353.2025.3.pp.50-59.
[14] Prabangkara and Yudha Prawira, "Balancing National Security And Open Investment: Comparative Study On America's Foreign Investment Screening Regulation For Indonesia's Potential Adaptation."
[15] Iriansyah and Yalid, "Normative Inconsistencies in Indonesian Investment Law: Implications for Legal Certainty and the Investment Climate."

Although extant literature has broadly delineated security risks at a macro level, a conspicuous scholarly gap remains regarding how the normative deficiency in domestic screening mechanisms directly intersects with the doctrine of state responsibility before the jurisdiction of the International Centre for Settlement of Investment Disputes (ICSID). Diverging from prior scholarship that has predominantly focused on the administrative contours or the political polemics of the Job Creation Law, this article advances a novel analytical framework by dissecting the present statutory lacuna through a synthesized lens of constitutional law and international arbitration. Specifically, this study constructs a dialectic between the doctrine of state sovereignty—as enshrined in Article 33 of the 1945 Constitution of the Republic of Indonesia—and the imperative to mitigate the risk of Fair and Equitable Treatment (FET) violation claims, which invariably arise when state intervention measures are deemed to lack a rigorous procedural foundation and due process of law.

This article substantiates the thesis that the absence of codified procedural standards for national security screening constitutes a multidimensional risk to sovereign governance. Such an omission not only exposes the state to strategic penetration by high-risk foreign entities, but also fundamentally erodes legal certainty, thereby exposing the sovereign to substantial financial liabilities through arbitral litigation. The exigency of this discourse is further amplified by the reality that contemporary economic partnership agreements, such as the RCEP and IA-CEPA, mandate stringent investment protection standards that preclude discriminatory state measures absent an explicit and codified statutory foundation.

Ultimately, this article posits that the contemporary Indonesian legal order is afflicted by an acute statutory lacuna concerning procedural norms for FDI screening within strategic sectors. Absent a comprehensive and transparent national security screening framework, prospective affirmative state actions deployed to secure critical infrastructure risk being adjudicated as substantive breaches of international investment treatment standards. As a normative prescription, this study proposes an institutional design for an Investment Screening System that proportionately reconciles a liberalized investment posture with national security imperatives, operationalized through the codification of objective, quantifiable, and transparent *ex-ante* review mechanisms.

2. Research Questions

Predicated upon the identification of this procedural legal vacuum, this article systematically examines two central legal inquiries.

First, how can the jurisprudential rationale for instituting a national security-predicated *ex-ante* review mechanism within the foreign investment regime be harmonized with the doctrine of state sovereignty and Indonesia's constitutional mandates?

Second, what are the structural implications of the absence of a procedural investment screening mechanism in Indonesia upon the principle of legal certainty, and how does this attendant regulatory vulnerability precipitate the host State's exposure to Investor-State Dispute Settlement (ISDS) claims?

3. Research Methodology

This study employs a normative legal research methodology (doctrinal legal research), focused on the systematic exegesis of statutory rules, normative frameworks, legislative intent (*ratio legis*), and foundational jurisprudential principles embedded within domestic positive law and international treaties. The deployment of this doctrinal approach is necessitated by the fact that the core legal inquiry emanates from a structural normative deficiency (a legal vacuum) within Indonesia's statutory investment architecture, a condition that categorically demands rigorous dogmatic and conceptual analysis.[16]

To execute this inquiry, this study simultaneously operationalizes a tripartite methodological framework. First, a statutory analysis (the *statute approach*) is deployed to dissect the vertical and horizontal normative inconsistencies among the 1945 Constitution of the Republic of Indonesia (UUD NRI 1945), Law No. 25 of 2007 on Investment, Law No. 6 of 2023 on Job Creation, and their subordinate implementing regulations. Second, a conceptual framework (the *conceptual approach*) is applied to rigorously analyze the doctrines of State Sovereignty, Legal Certainty, and the National Interest within the broader matrix of the contemporary global economic order. Third, a comparative methodology (the *comparative approach*) is utilized to evaluate the institutional architectures of the investment screening regimes in the United States

[16] Nasir Majeed, Amjad Hilal, and Arshad Nawaz Khan, "Doctrinal Research in Law: Meaning, Scope and Methodology," *Bulletin of Business and Economics (BBE)* 12, no. 4 (December 25, 2023): 559–63, https://doi.org/10.61506/01.00167.

(CFIUS) and Australia (FIRB), serving as an empirical benchmark to inform the formulation of an optimal regulatory framework for Indonesia.[17]

The normative data collection in this study is grounded in primary legal materials, encompassing the 1945 Constitution, the authoritative texts of domestic investment statutes, binding regional and bilateral international investment agreements to which Indonesia is a contracting party (such as the RCEP and IA-CEPA), and landmark awards from ICSID arbitral tribunals that establish relevant legal precedent. Concurrently, secondary legal sources are derived from contemporary scholarly literature published within the trailing five-year period (2020–2026). The compilation of this entire corpus of legal materials is executed through a rigorous and systematic documentary research methodology.

The curated legal materials are subsequently analyzed utilizing a framework of deductive syllogism. The major premise—constituted by the doctrinal postulates of state sovereignty and international investment protection standards—is synthesized with a minor premise, which manifests as the contemporary procedural vacuum and regulatory overlaps within Indonesia's domestic legal architecture. The dialectical interplay between these premises is then examined employing systematic and teleological interpretation. This hermeneutic process is utilized to construct a prescriptive conclusion regarding the optimal regulatory design for an investment screening mechanism, one that proportionately balances the safeguarding of state sovereignty with strict adherence to international investment standards.

B. DISCUSSION

1. The Jurisprudential Rationale for Instituting National Security Screening in Foreign Direct Investment within Strategic Sectors, Anchored in the Doctrine of State Sovereignty

The exclusive authority of a sovereign state to regulate, restrict, screen, or deny the admission of foreign corporate entities into its territorial jurisdiction constitutes a fundamental manifestation of the Doctrine of State Sovereignty. Within contemporary international investment law discourse, this doctrine is articulated not merely as a sovereign prerogative, but as a mandatory obligation of the State to promulgate regulatory policies that safeguard the national interest. Furthermore, the norms of

[17] Prabangkara and Yudha Prawira, "Balancing National Security And Open Investment: Comparative Study On America's Foreign Investment Screening Regulation For Indonesia's Potential Adaptation."

customary international law acknowledge that even when developing host States bind themselves through International Investment Agreements (IIAs), they do not *a priori* cede their inherent *police powers* to counter national security threats emanating from external actors.[18]

The jurisprudential rationale underpinning the imperative for a National Security Screening mechanism is conceptually predicated upon a fundamental shift in the contemporary geoeconomic paradigm: cross-border investments can no longer be reductively characterized as purely neutral aggregate capital flows. Rather, the transformation of the modern geoeconomic landscape has positioned Foreign Direct Investment (FDI) as a conduit highly susceptible to the "geopolitical weaponization of capital." Foreign capital flows possess the latent potential to be operationalized as strategic proxies by state-affiliated entities—such as State-Owned Enterprises (SOEs) or Sovereign Wealth Funds (SWFs)—operating at the behest of their home States. The strategic teleology of such investments frequently targets the acquisition of structural control over critical infrastructure, the exploitation of sensitive population data, and the dominance of high-technology supply chains, most notably in semiconductor manufacturing and critical mineral production.[19] Within this risk mitigation paradigm, the operationalization of screening procedures does not constitute an arbitrary restriction on trade; rather, it manifests as an *existential safeguard* expressly authorized by the doctrine of constitutional sovereignty.[20]

Within the framework of Indonesian constitutional jurisprudence, the constitutional foundation for state control over vital sectors is expressly codified in the provisions of Article 33, paragraphs (2) and (3), of the 1945 Constitution of the Republic of Indonesia. Doctrinally, this domestic constitutional framework directly intersects with the *police powers* doctrine and the right to regulate—principles that are universally recognized under customary international law. The invocation of a security exception to

---

[18] Penelope Milsom et al., "International Investment Liberalization, Transnational Corporations and NCD Prevention Policy Non-Decisions: A Realist Review on the Political Economy of Tobacco, Alcohol and Ultra-Processed Food," *Globalization and Health* 17, no. 1 (December 24, 2021): 134, https://doi.org/10.1186/s12992-021-00784-3.
[19] Hogan Lovells, "FDI Outlook 2026: National Security Review in the Transition to a Multipolar World," Hogan Lovells, 2026, https://www.hoganlovells.com/en/publications/fdi-outlook-2026-national-security-review-in-the-transition-to-a-multipolar-world.
[20] Helene Schramm, Reet Sodhi, and Aditi Singh, "CELIS Update on Investment Screening and Economic Security – March 2026," CELIS Institute, 2026, https://www.celis.institute/celis-institute/celis-update-on-investment-screening-and-economic-security-march-2026/.

safeguard "branches of production essential to the state" constitutes a sovereign regulatory prerogative that is insulated from the intervention of any arbitral tribunal. Consequently, the implementation of screening mechanisms for strategic sectors in Indonesia cannot be legally characterized as a trade barrier; rather, it serves as an essential protective standard that reconciles global investment commitments with the mitigation of domestic vulnerabilities.

Viewed through the lens of National Interest Theory, the definitional scope of "branches of production essential to the state" has expanded to encompass the cyber domain, digital infrastructure architecture (including 5G base transceiver station networks and data centers), artificial intelligence copyright regimes, and the regulatory control over the trade of strategic critical minerals (notably nickel and rare earth elements)—commodities that constitute the bedrock of the global energy transition.[21] Premised upon this theoretical foundation, the scope of "strategic sectors" encompasses both upstream and downstream industries that—should they be subjected to foreign ownership interference, cyberattacks, or data exploitation—would incapacitate essential governmental functions and undermine the stability of the state.[22]

Consequently, the deregulation of licensing regimes in critical sectors—such as telecommunications infrastructure, banking, maritime ports, and data centers—through Foreign Direct Investment (FDI), absent *ex-ante* review mechanisms to assess investment intent, ensure transparency in ultimate beneficial ownership (UBO) structures, and scrutinize investor affiliations, fundamentally constitutes regulatory negligence that delegitimizes the constitutional mandate enshrined in Article 33 of the 1945 Constitution of the Republic of Indonesia.[23]

To contextualize the imperative of national security screening within the architecture of global economic law, a comparative legal approach examining jurisdictions that have institutionalized *ex-ante* investment oversight mechanisms is indispensable. The United States and Australia represent empirical precedents regarding

---

[21] Eve Warburton, "Nationalist Enclaves: Industrialising the Critical Mineral Boom in Indonesia," *The Extractive Industries and Society* 20 (December 2024): 101564, https://doi.org/10.1016/j.exis.2024.101564.
[22] Azkia Rahmah, Sihabudin, and Dewantara, "Legal Politics of Investment Screening in Indonesia's Foreign Investment Reform."
[23] Muhammad Reza Syariffudin Zaki et al., "Safeguarding Sovereignty: Indonesia's Solution to the Raw Materials Case in WTO," *Indonesian Journal of International Law* 20, no. 4 (2023): 725–52, https://doi.org/10.17304/ijil.vol20.4.5.

the structural design of contemporary regulatory defense mechanisms.[24] A comparative analysis of the legal architectures across these three jurisdictional models is taxonomically synthesized within the following structural matrix:

Table 1. Structural Comparative Matrix of Investment Screening Mechanisms

Normative Evaluation Parameters	United States Jurisdiction (CFIUS)	Australian Jurisdiction (FIRB)	Indonesian Jurisdiction (OSS-RBA)
Statutory Framework Foundation	Foreign Investment Risk Review Modernization Act (FIRRMA) of 2018	Foreign Acquisitions and Takeovers Act 1975 (2021 Amendment)	Law No. 25 of 2007 (Investment Law), Law No. 6 of 2023 (Job Creation Law), and Government Regulation No. 28 of 2025
Institutional Authority Architecture	Inter-agency committee chaired by the Department of the Treasury.	Independent advisory board (FIRB) furnishing recommendations to the Treasurer.	Fragmented authority divided between the Ministry of Investment/BKPM and sector-specific technical ministries.
Legal Standard of Review	National Security Threat analysis, focusing predominantly on the Technology, Infrastructure, and Data (TID) domains.	National Interest Test encompassing national security, market competition, tax compliance, and investor track record.	Risk mitigation-based framework addressing Health, Safety, Security, and Environmental (HSSE) standards, coupled with spatial planning validation via the Standard Classification of Indonesian Economic Activities (KBLI).
Spectrum of Remedial Authority	Imposition of mitigation agreements, transaction suspensions, and mandatory divestment of asset ownership.	Conditional approvals, investment prohibitions, and retrospective nullification (*call-in* power).	*Ex-post* administrative sanctions (reprimands, suspensions, and license revocations) triggered by normative administrative violations.

The preceding matrix demonstrates that sovereign defense mechanisms, effectuated through foreign direct investment (FDI) screening, are inherently reconcilable with a liberalized economic environment, provided they are anchored in rigorous

[24] Prabangkara and Yudha Prawira, "Balancing National Security And Open Investment: Comparative Study On America's Foreign Investment Screening Regulation For Indonesia's Potential Adaptation."

procedural frameworks. In the United States, the Committee on Foreign Investment in the United States (CFIUS) has evolved from a framework singularly focused on the oversight of controlling interests into a comprehensive regulatory regime endowed with the jurisdictional purview to scrutinize non-controlling (minority) investments, particularly within the Technology, Infrastructure, and Data (TID) sectors. Rather than stifling the influx of FDI, the implementation of CFIUS mandates engenders legal certainty through the deployment of mitigation agreements; this mechanism permits foreign investors to sustain operations subject to strictly tailored conditionalities designed to neutralize identified national security risks.[25,26]

In Australia, the Foreign Investment Review Board (FIRB) operationalizes the *national interest test*, which vests broad regulatory authority in the Treasurer to scrutinize or prohibit foreign investments that imperil supply chain resilience or facilitate monopolistic control by foreign state-affiliated entities. This securitized paradigm is similarly mirrored within the European Union through the Foreign Direct Investment (FDI) Screening Regulation (Regulation (EU) 2019/452), which mandates that member states operationalize domestic screening mechanisms with a distinct focus on the semiconductor industry, financial payment infrastructures, and artificial intelligence.[27] This global comparative analysis confirms that a sovereign state's right to regulate remains uncompromised by its international investment facilitation commitments. Within the Indonesian context, the formulation of a robust investment screening mechanism constitutes a constitutional imperative designed to forestall the creeping erosion of state sovereignty—a systemic vulnerability precipitated by the current lacuna of regulatory oversight instruments in strategic sectors.[28]

[25] Chan and Meunier, "Behind the Screen: Understanding National Support for a Foreign Investment Screening Mechanism in the European Union."
[26] Prabangkara and Yudha Prawira, "Balancing National Security And Open Investment: Comparative Study On America's Foreign Investment Screening Regulation For Indonesia's Potential Adaptation."
[27] Lorenzo Bencivelli et al., "Mapping FDI Screening Practices in Advanced Economies," CELIS Institute, 2024, https://www.celis.institute/celis-blog/mapping-fdi-screening-practices-in-advanced-economies/.
[28] Christina L. Beharry and Elisa Méndez Bräutigam, "Damages and Valuation in International Investment Arbitration," in *Handbook of International Investment Law and Policy* (Singapore: Springer Singapore, 2021), 1423–54, https://doi.org/10.1007/978-981-13-3615-7_58.

2. The Implications of Regulatory Lacunae in Investment Screening Mechanisms for Legal Certainty and the Protection of National Interests in Indonesia

A doctrinal analysis of the contemporary Indonesian investment law regime, utilizing a Regulatory Framework Analysis approach, reveals a stark regulatory asymmetry that risks engineering systemic vulnerabilities for the state. Law No. 25 of 2007 on Investment, as amended by Law No. 6 of 2023 on Job Creation, is, by way of teleological interpretation, structurally oriented toward fostering a business-facilitating climate to maximize the absorption of Foreign Direct Investment (FDI). This regulatory transformation is manifested in Presidential Regulation No. 10 of 2021 *juncto* Presidential Regulation No. 49 of 2021, which dismantled the traditional Negative Investment List (DNI) framework, transposing it into an affirmative paradigm known as the Investment Priority List (DPI). This trajectory was further extended by the promulgation of Government Regulation No. 28 of 2025, which relaxed minimum capital requirements and institutionalized an automated licensing architecture via the Risk-Based Online Single Submission (OSS-RBA) system.

However, this sweeping, ease-of-doing-business-oriented deregulation has precipitated a regulatory failure in the form of incomplete legal norms. Risk parameters within the OSS-RBA framework are narrowly circumscribed, limited to a superficial evaluation of Health, Safety, Security, and Environmental (HSSE) criteria predicated strictly upon a literal construction of the Standard Classification of Indonesian Economic Activities (KBLI) codes. The architecture conspicuously lacks institutional *ex-ante* review mechanisms, independent verification bodies, and a proportional standard of review required to evaluate national security risks. This omission remains perilous, given that subversive national security threats are frequently obscured behind the capital provenance profiles, geopolitical histories, and ultimate beneficial ownership structures undergirding foreign capital inflows.[29]

The fundamental implications of this procedural lacuna are analyzed through the lens of Legal Certainty Theory. An ideal legal order must be inherently definitive, exhibit objective predictability in its rational application, and fundamentally serve to shield the

[29] Iriansyah and Yalid, "Normative Inconsistencies in Indonesian Investment Law: Implications for Legal Certainty and the Investment Climate."

state and its governmental instrumentalities from arbitrary discretionary overreach.[30] Absent a formalized statutory framework to institutionalize national security screening, the regulatory mechanisms for rejecting or invalidating foreign investments by domestic authorities hinge exclusively upon administrative discretion—a paradigm that remains acutely vulnerable to inter-ministerial jurisdictional overlaps and sectoral fragmentation.

As an analytical construct: Should a Foreign Direct Investment (FDI) corporate entity—having already secured a Business Registration Number (NIB) to deploy transcontinental submarine cable infrastructure or satellite data centers—subsequently be identified as affiliated with a foreign intelligence apparatus targeting strategic state data, the Indonesian government lacks the requisite administrative law mechanisms to intervene effectively. There exists a conspicuous absence of standardized statutory evaluation procedures necessary to execute asset freezes, compel mandatory divestitures, or effectuate proportionate license revocations.[31] The coercive revocation of licenses—effectuated without established mitigation protocols and within a regulatory vacuum—would inevitably be construed by international arbitral tribunals as unlawful and arbitrary state conduct. Such a determination would be predicated on the fact that the sovereign intervention was executed in contravention of the fundamental guarantees of fair and transparent due process of law.[32] The absence of this *ex-ante* mechanism directly undermines legal certainty, thereby rendering state interventions highly susceptible to becoming reactive, discriminatory, and devoid of an empirical, evidence-based foundation.[33]

The downstream ramifications of this regulatory failure intersect directly with the state liability frameworks established under International Investment Agreements (IIAs). The legal architecture of cross-border investment instruments, exemplified by the Regional Comprehensive Economic Partnership (RCEP) and the Indonesia-Australia Comprehensive Economic Partnership Agreement (IA-CEPA), enshrines comprehensive

[30] Bun Joi Phiau, Amzulian Rifai, and Abdul Latif, "Legal Certainty In The Implementation of Judicial Review Decisions By The Constitutional Court In Indonesia," *Asian Journal of Social and Humanities* 3, no. 5 (February 22, 2025): 913–21, https://doi.org/10.59888/ajosh.v3i5.497.
[31] Azkia Rahmah, Sihabudin, and Dewantara, "Legal Politics of Investment Screening in Indonesia's Foreign Investment Reform."
[32] Cheng Bian, "Foreign Direct Investment Screening and National Security: Reducing Regulatory Hurdles to Investors Through Induced Reciprocity," *The Journal of World Investment & Trade* 22, no. 4 (August 16, 2021): 561–95, https://doi.org/10.1163/22119000-12340218.
[33] Ahmad Heidari, "The Regulations Concerning the Protection of the National Security of the Host Country and the Legitimate Expectations of the Foreign Investments," *Journal of International Trade Law and Policy* 21, no. 2 (May 3, 2022): 122–39, https://doi.org/10.1108/JITLP-07-2021-0037.

protections for investors' financial rights. These contemporary treaties mandate unyielding adherence to the Fair and Equitable Treatment (FET) standard, provide robust protection against expropriation absent just compensation, and demand strict compliance with non-discrimination clauses.[34]

To mitigate allegations of treaty breach when implementing protectionist measures, sovereign states routinely rely upon the invocation of Essential Security Exception clauses. For instance, Article 17.13 of the RCEP and Article 17.3 of the IA-CEPA codify provisions that confer broad jurisdictional latitude upon contracting states to enact emergency policies designed to safeguard their "essential security interests".[35] Nevertheless, the legal validity undergirding the invocation of this clause will face fundamental scrutiny within Investor-State Dispute Settlement (ISDS) forums, such as arbitral tribunals constituted under the International Centre for Settlement of Investment Disputes (ICSID).

Drawing upon a jurisprudential analysis of international arbitral awards, ICSID tribunals have consistently demonstrated a restrictive doctrinal posture, holding that the interpretation of essential security exception clauses is not inherently self-judging and remains subject to an objective standard of review. This precedent was empirically affirmed in *CMS Gas Transmission Co. v. Argentine Republic* and subsequently reinforced in the decision dismissing the preliminary objections in *Seda v. Republic of Colombia*. The arbitral tribunals flatly rejected the postulate that a sovereign state's unilateral invocation of a national security justification could automatically absolve it from liability for reparations arising from international treaty violations.[36,37]

Tribunals routinely impose a heightened evidentiary burden upon the host state. The sovereign is required to transparently and empirically demonstrate that its restrictive measures bear an absolute, substantial, and causal nexus to the mitigation of a national emergency, rather than manifesting as mere economic protectionism.

[34] Nathapornpan Piyaareekul Uttama, "International Investment Agreements Provisions and Foreign Direct Investment Flows in the Regional Comprehensive Economic Partnership Region," *Economies* 9, no. 1 (March 2, 2021): 28, https://doi.org/10.3390/economies9010028.

[35] Julien Chaisse et al., "Drafting Investment Law: Patterns of Influence in the Regional Comprehensive Economic Partnership (RCEP)," *Journal of International Economic Law* 25, no. 1 (March 17, 2022): 110–28, https://doi.org/10.1093/jiel/jgac006.

[36] J. R. Crook, "CMS Gas Transmission Company v. Argentine Republic (ICSID Case No. ARB/01/8) (Annulment Decision, September 25, 2007)," *ICSID Review* 22, no. 2 (September 1, 2007): 455–65, https://doi.org/10.1093/icsidreview/22.2.455.

[37] Fabian Eichberger, "Angel Samuel Seda and Others v. The Republic of Colombia, Award," *American Journal of International Law* 120, no. 2 (April 23, 2026): 365–71, https://doi.org/10.1017/ajil.2025.10149.

Consequently, should Indonesian authorities be compelled to revoke the operational license of a satellite data-management entity based on geopolitical suspicions, the complete absence of a formalized *ex-ante* screening framework—which ought to have been promulgated *a priori*—would render the state's defense incapable of satisfying the requisite evidentiary standards before an international tribunal.

Amidst this procedural vacuum, foreign investors can robustly assert reliance upon the doctrine of legitimate expectations, given that the OSS-RBA regime normatively guarantees a streamlined investment climate devoid of security encumbrances. Consequently, the unilateral revocation of investment rights without adhering to essential due process requirements would inevitably be adjudicated as a manifest breach of the Fair and Equitable Treatment (FET) standard.[38] This institutional and legal failure, in turn, subjects the sovereign to profound fiscal exposure resulting from massive arbitral damages awards—financial liabilities that far eclipse the valuation ratio of the initial investment capital inflows.[39]

To remedy this regulatory lacuna, the ensuing policy prescriptions mandate the construction of a complementary regulatory architecture through the institutionalization of an Investment Screening System (ISS). This system is designed to forge a functional equilibrium between an open investment facilitation policy and the preservation of robust security safeguards at the upstream phase of investment registration.[40]

Accordingly, it is recommended that the government establish an authoritative, cross-sectoral entity—designated as the "National Investment Security Monitoring Committee"—operating via a formalized interagency review mechanism. This committee should structurally integrate key institutional stakeholders, namely the Ministry of Defense, the State Intelligence Agency (BIN), the National Cyber and Crypto Agency (BSSN), and the Ministry of Finance, under the administrative coordination of the Ministry of Investment. Furthermore, this review mechanism must be technically embedded within the *ex-ante* screening interface of the automated OSS-RBA system. The underlying vulnerability thresholds and risk assessment parameters must be explicitly codified into

[38] Anselmo Reyes and Till Haechler, "Anti-Corruption Laws and Investment Treaty Arbitration: An Asian Perspective," in *Corruption and Illegality in Asian Investment Arbitration*, 2024, 89–117, https://doi.org/10.1007/978-981-99-9303-1_4.
[39] M Reza Saputra and Imaduddin Zikky, "Campaign Promises as Political Contracts: Legal Analysis of Public Officials' Accountability in Governance," *Legtimacy: Journal of Law and Islamic Law* 1, no. 1 (August 13, 2025): 43–52, https://doi.org/10.59066/jolil.v1i1.1519.
[40] Prabangkara and Yudha Prawira, "Balancing National Security And Open Investment: Comparative Study On America's Foreign Investment Screening Regulation For Indonesia's Potential Adaptation."

statutory legislation based on the following metrics:

a. Essential Sectors: Circumscribing specific regulatory oversight to national backbone infrastructure, encompassing satellite telecommunications, aggregated population databases, primary energy generation facilities, and maritime port and aviation navigation systems

b. Ultimate Beneficial Ownership (UBO) Tracing: Mandating multi-layered disclosure and verification protocols to trace multi-tiered financial proxies, covert financing structures, and the political-military affiliations of foreign investors with their home-state jurisdictions.

c. Operational Stress Testing: Calculating projected logistical disruptions and the potential incapacitation of strategic utilities should the physical infrastructure (hardware) or algorithmic frameworks of the foreign enterprise be systematically manipulated, boycotted, or sabotaged.

To guarantee the principle of legal certainty (*Rechtssicherheit*), the ISS framework must facilitate a flexible regulatory resolution mechanism through the formulation of mitigation agreements or commercial conditional approval requirements—such as restricting the physical access of foreign technicians to strategic server hubs. Furthermore, a pre-appeal administrative adjudication mechanism must be incorporated to provide a transparent forum for investors to present technical rebuttals prior to the formal issuance of a final investment prohibition order. This comprehensive procedural architecture engenders rational predictability within the global investment climate. In the long term, the promulgation of this *lex specialis* will remedy the domestic problem of incomplete legal norms, while simultaneously constructing a resilient jurisprudential shield before ICSID tribunals. Armed with this architecture, the state establishes a legitimate doctrinal foundation to invoke the essential security exception clause as a vital *lex defensio* instrument, thereby mitigating the overreach of foreign corporate hegemony during periods of national emergency.

C. CONCLUSION

The legal rationale underlying the establishment of a national security screening mechanism in Indonesia is deeply anchored in the doctrine of state sovereignty and the constitutional mandate of Article 33 of the 1945 Constitution of the Republic of Indonesia. This constitutional imperative necessitates robust, essential protective instruments to preclude foreign dominance over strategic assets that jeopardize national resilience. The contemporary omission of an *ex-ante* review mechanism within the licensing architecture not only erodes legal certainty by fostering an ambiguous zone of administrative discretion, but also engineers systemic regulatory vulnerabilities that imperil the state. This statutory vacuum directly exposes the sovereign to the acute risks of Investor-State Dispute Settlement (ISDS) arbitration, wherein reactive state interventions—such as the revocation of operational licenses absent a well-settled legal framework—risk being adjudicated as a manifest violation of the Fair and Equitable Treatment (FET) standard. As a conceptual resolution, it is imperative for Indonesia to institutionalize a cross-sectoral Investment Screening System (ISS) capable of harmonizing an open investment facilitation paradigm with proportional, calibrated national security safeguards.

REFERENCES

Alami, Ilias. "Foreign Investment Screening Mechanisms and Emergent Geographies of (Post)Globalization." *Dialogues in Human Geography* 16, no. 1 (March 7, 2026): 52–75. https://doi.org/10.1177/20438206241278733.

Azkia Rahmah, Sherina, Sihabudin Sihabudin, and Reka Dewantara. "Legal Politics of Investment Screening in Indonesia's Foreign Investment Reform." *Legal Horizons* 3, no. 26 (August 29, 2025): 50. https://doi.org/10.54477/LH.25192353.2025.3.pp.50-59.

Beharry, Christina L., and Elisa Méndez Bräutigam. "Damages and Valuation in International Investment Arbitration." In *Handbook of International Investment Law and Policy*, 1423–54. Singapore: Springer Singapore, 2021. https://doi.org/10.1007/978-981-13-3615-7_58.

Bencivelli, Lorenzo, Violaine Faubert, Florian Le Gallo, and Pauline Négrin. "Mapping FDI Screening Practices in Advanced Economies." CELIS Institute, 2024. https://www.celis.institute/celis-blog/mapping-fdi-screening-practices-in-advanced-economies/.

Bian, Cheng. "Foreign Direct Investment Screening and National Security: Reducing Regulatory Hurdles to Investors Through Induced Reciprocity." *The Journal of World Investment & Trade* 22, no. 4 (August 16, 2021): 561–95. https://doi.org/10.1163/22119000-12340218.

Bramantyo, Tito. "The Indonesian Government Participation in International Investment Law and Its Reform." *Indonesian Journal of International Law* 19, no. 1 (November 22, 2021): 83–112. https://doi.org/10.17304/ijil.vol19.1.4.

Chaisse, Julien, Manfred Elsig, Sufian Jusoh, and Andrew Lugg. "Drafting Investment Law: Patterns of Influence in the Regional Comprehensive Economic Partnership (RCEP)." *Journal of International Economic Law* 25, no. 1 (March 17, 2022): 110–28. https://doi.org/10.1093/jiel/jgac006.

Chan, Zenobia T., and Sophie Meunier. "Behind the Screen: Understanding National Support for a Foreign Investment Screening Mechanism in the European Union." *The Review of International Organizations* 17, no. 3 (July 13, 2022): 513–41. https://doi.org/10.1007/s11558-021-09436-y.

Crook, J. R. "CMS Gas Transmission Company v. Argentine Republic (ICSID Case No. ARB/01/8) (Annulment Decision, September 25, 2007)." *ICSID Review* 22, no. 2 (September 1, 2007): 455–65. https://doi.org/10.1093/icsidreview/22.2.455.

Eichberger, Fabian. "Angel Samuel Seda and Others v. The Republic of Colombia, Award." *American Journal of International Law* 120, no. 2 (April 23, 2026): 365–71. https://doi.org/10.1017/ajil.2025.10149.

Hauge, Jostein, Bruno Houtzager, and Alessandro Julian Hörmann. "The New Economic Nationalism: Industrial Policy and National Security in the United States, China, and the European Union." *Geoforum* 166 (November 2025): 104382. https://doi.org/10.1016/j.geoforum.2025.104382.

Heidari, Ahmad. "The Regulations Concerning the Protection of the National Security of the Host Country and the Legitimate Expectations of the Foreign Investments." *Journal of International Trade Law and Policy* 21, no. 2 (May 3, 2022): 122–39. https://doi.org/10.1108/JITLP-07-2021-0037.

Henckels, Caroline. "Justifying the Protection of Legitimate Expectations in International Investment Law: Legal Certainty and Arbitrary Conduct." *ICSID Review - Foreign Investment Law Journal* 38, no. 2 (September 23, 2023): 347–58. https://doi.org/10.1093/icsidreview/siac027.

———. "Whither Security? The Concept of 'Essential Security Interests' in Investment Treaties' Security Exceptions." *Journal of International Economic Law* 27, no. 1 (March 14, 2024): 114–29. https://doi.org/10.1093/jiel/jgae011.

Hogan Lovells. "FDI Outlook 2026: National Security Review in the Transition to a Multipolar World." Hogan Lovells, 2026. https://www.hoganlovells.com/en/publications/fdi-outlook-2026-national-security-review-in-the-transition-to-a-multipolar-world.

Iriansyah, Iriansyah, and Yalid Yalid. "Normative Inconsistencies in Indonesian Investment Law: Implications for Legal Certainty and the Investment Climate." *Corporate Law & Governance Review* 8, no. 1 (January 22, 2026): 88. https://doi.org/10.22495/clgrv8i1p7.

Joi Phiau, Bun, Amzulian Rifai, and Abdul Latif. "Legal Certainty In The Implementation of Judicial Review Decisions By The Constitutional Court In Indonesia." *Asian Journal of Social and Humanities* 3, no. 5 (February 22, 2025): 913–21. https://doi.org/10.59888/ajosh.v3i5.497.

Julianti, Lis, and Artit Pinpak. "The Digitalization of Investment Impact on Developing Tourism Industry." *Journal of Human Rights, Culture and Legal System* 4, no. 3 (December 3, 2024): 655–81. https://doi.org/10.53955/jhcls.v4i3.289.

Mahy, Petra. "Indonesia's Omnibus Law on Job Creation: Legal Hierarchy and Responses to Judicial Review in the Labour Cluster of Amendments." *Asian Journal of Comparative Law* 17, no. 1 (July 12, 2022): 51–75.

https://doi.org/10.1017/asjcl.2022.7.

Majeed, Nasir, Amjad Hilal, and Arshad Nawaz Khan. "Doctrinal Research in Law: Meaning, Scope and Methodology." *Bulletin of Business and Economics (BBE)* 12, no. 4 (December 25, 2023): 559–63. https://doi.org/10.61506/01.00167.

Meliala, Aurora, Adinda Prakasa, and Jonathan Woods. "Narrating The Effective Law for Foreign Direct Investment." *Indonesian Journal of International Law* 21, no. 5 (June 9, 2024): 1–34. https://doi.org/10.17304/ijil.vol21.5.1876.

Milsom, Penelope, Richard Smith, Phillip Baker, and Helen Walls. "International Investment Liberalization, Transnational Corporations and NCD Prevention Policy Non-Decisions: A Realist Review on the Political Economy of Tobacco, Alcohol and Ultra-Processed Food." *Globalization and Health* 17, no. 1 (December 24, 2021): 134. https://doi.org/10.1186/s12992-021-00784-3.

Prabangkara, Ali Arva, and M. Rizki Yudha Prawira. "Balancing National Security And Open Investment: Comparative Study On America's Foreign Investment Screening Regulation For Indonesia's Potential Adaptation." *Jurnal Locus Penelitian Dan Pengabdian* 4, no. 7 (July 5, 2025): 4115–27. https://doi.org/10.58344/locus.v4i7.4460.

Reyes, Anselmo, and Till Haechler. "Anti-Corruption Laws and Investment Treaty Arbitration: An Asian Perspective." In *Corruption and Illegality in Asian Investment Arbitration*, 89–117, 2024. https://doi.org/10.1007/978-981-99-9303-1_4.

Saputra, M Reza, and Imaduddin Zikky. "Campaign Promises as Political Contracts: Legal Analysis of Public Officials' Accountability in Governance." *Legtimacy: Journal of Law and Islamic Law* 1, no. 1 (August 13, 2025): 43–52. https://doi.org/10.59066/jolil.v1i1.1519.

Schramm, Helene, Reet Sodhi, and Aditi Singh. "CELIS Update on Investment Screening and Economic Security – March 2026." CELIS Institute, 2026. https://www.celis.institute/celis-institute/celis-update-on-investment-screening-and-economic-security-march-2026/.

Uttama, Nathapornpan Piyaareekul. "International Investment Agreements Provisions and Foreign Direct Investment Flows in the Regional Comprehensive Economic Partnership Region." *Economies* 9, no. 1 (March 2, 2021): 28. https://doi.org/10.3390/economies9010028.

Warburton, Eve. "Nationalist Enclaves: Industrialising the Critical Mineral Boom in Indonesia." *The Extractive Industries and Society* 20 (December 2024): 101564. https://doi.org/10.1016/j.exis.2024.101564.

Zaki, Muhammad Reza Syariffudin, Muhammad Haykal Armanto, Rafsi Azzam Hibatullah Albar, and Stefan Koos. "Safeguarding Sovereignty: Indonesia's Solution to the Raw Materials Case in WTO." *Indonesian Journal of International Law* 20, no. 4 (2023): 725–52. https://doi.org/10.17304/ijil.vol20.4.5.