

DOMESTIC PREFERENCE PROVISIONS FOR INDONESIAN ELECTRICITY INFRASTRUCTURE PROJECTS FUNDED BY FOREIGN LOANS

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Received : 01 September 2025

Published : 26 October 2025

Revised : 15 September 2025

DOI : <https://doi.org/10.54443/ijerlas.v5i6.4296>

Accepted : 10 October 2025

Link Publish : <https://radjapublika.com/index.php/IJERLAS>

Abstract

The purpose of this study is to analyze the potential inconsistency of the domestic preference provisions in ESDM Ministerial Regulation No. 11 of 2024 with the principles of the Regulation for ADB Borrowers and its legal implications on electricity infrastructure projects funded by foreign loans. This research method is normative juridical with a legislative approach, an analytical approach, and a conceptual approach. The results show that the domestic preference provisions in ESDM Ministerial Regulation No. 11 of 2024 strengthen the use of domestic products in electricity projects funded by foreign loans, but have the potential to conflict with the principles of fairness and transparency in the Procurement Regulations for ADB Borrowers. Nationally, this policy is legitimate and supports economic independence, but internationally it can raise issues of inconsistency with the WTO principles of non-discrimination and national treatment and affect the credibility of the procurement process.

Keywords: Domestic Preference, Infrastructure Projects; Electricity; Foreign Loans.

INTRODUCTION

Infrastructure development plays a crucial role in enhancing a country's economic prosperity, and one of its most vital components is electricity infrastructure (Awainah, 2024). In Indonesia, the development of the electricity sector is becoming increasingly crucial in line with the national commitment to a clean energy transition (Esquivias, 2024). Therefore, the government has tasked state-owned electricity companies, particularly PLN, with accelerating the construction of power plants, purchasing electricity from geothermal power plants, acquiring land for electricity supply, and fulfilling public service obligations (Arifin & Hermawan, 2021). To support the clean energy transition, PT Perusahaan Listrik Negara (Persero) or PLN has established the Accelerated Renewable Energy Development (ARED) program with a target capacity of 61 GW by 2040. The implementation of this program must comply with the provisions on the use of domestic products as stipulated in Government Regulation Number 29 of 2018 concerning Industrial Empowerment and Ministerial Regulation of ESDM Number 11 of 2024 concerning the Use of Domestic Products in Electricity Infrastructure Development. Given the large funding needs, PLN cannot implement it independently and therefore requires sustainable financing support, including through foreign loans (Putria & Wisudanto, 2016). One potential funding source comes from Development Financial Institutions (DFIs) such as the Asian Development Bank (ADB) which offers lower interest rates than commercial loans. However, as a loan recipient, PLN is obliged to comply with the procurement provisions stipulated in the Regulation for ADB Borrowers.

The Regulation for ADB Borrowers also permits the application of domestic preference in the procurement of goods and services, as long as these provisions comply with the ADB's Core Procurement Principles. Based on provisions 80 and 81 of the Regulation for ADB Borrowers and 3.1 of the ADB Domestic Preference Guidance, domestic preference can be applied to encourage the growth of domestic industries through strategic contract packaging, appropriate procurement methods, or qualification criteria that provide greater opportunities for local businesses. This preference can be used as long as it does not pose a risk or hinder project implementation. Furthermore, ESDM Ministerial Regulation Number 11 of 2024 requires PLN to prioritize the use of domestic products by meeting the minimum Domestic Component Level (TKDN) in every electricity project (Ministry of Energy and Mineral Resources of the Republic of Indonesia, 2025).

The application of domestic preference provisions in ESDM Ministerial Regulation No. 11 of 2024 to electricity infrastructure projects funded by foreign loans is a crucial issue that requires in-depth study. This policy not only relates to efforts to strengthen the domestic industry but also poses challenges in aligning it with international procurement principles stipulated in the Regulation for ADB Borrowers. Furthermore, the implementation of these provisions has legal implications for project implementation and Indonesia's commitments within the global trade legal framework. Therefore, this research is expected to provide a more comprehensive understanding for formulating procurement policies that balance national interests, the principles of transparency and fairness, and compliance with international standards.

LITERATURE REVIEW

Various previous studies have addressed domestic preference policies and electricity issues from various perspectives. A study on the dilemma of electricity policy in Indonesia's electricity supply efforts highlighted the regulatory complexities and implementation challenges in managing the national energy sector (Arifin & Hermawan, 2021). Another study examined the application of the Domestic Component Level (TKDN) in government procurement of goods and services as an affirmative policy instrument to strengthen the competitiveness of local industries (Darmada, 2022). Furthermore, a study on the conflict between binding foreign loan policies and TKDN policies indicated a potential disharmony between national interests and donor requirements (Hardenta & Wibowo, 2023). Furthermore, research on the role of the Asian Development Bank (ADB) highlighted the institution's contribution to financing the energy and infrastructure sectors and its impact on Indonesia's economic growth (Nabila, Astuti, Halimah, & Lim, 2024). In an international context, an analysis of domestic procurement preference practices in Tanzania reveals potential discrimination against foreign suppliers due to the implementation of local preference policies (Ibrahim & Kyara, 2023).

Unlike previous studies, this study focuses on the legal analysis of the application of domestic preference as stipulated in the Regulation of the Minister of Energy and Mineral Resources (Permen ESDM) Number 11 of 2024, specifically for electricity infrastructure projects funded through foreign loans. This study examines the compliance of national provisions with the principles of the Procurement Regulations for ADB Borrowers, particularly the principles of fairness and transparency, and examines their legal implications for Indonesia's international obligations under the World Trade Organization (WTO) framework, including the principles of non-discrimination and national treatment. Thus, this study has originality in filling the literature gap regarding the harmonization between domestic industrial strengthening policies and compliance with international legal principles in the implementation of electricity projects sourced from foreign funding.

METHOD

This research uses a normative legal method with a focus on the analysis of secondary legal materials in the form of laws and regulations, official documents, and relevant literature (Sunggono, 2015). The approaches used include a statute approach to examine related legal provisions, an analytical approach to understand the meaning and application of legal terms, and a conceptual approach to examine the legal theories and principles underlying the research issues. The sources of legal materials consist of primary materials such as ESDM Regulation Number 11 of 2024 and the Regulation for ADB Borrowers, secondary materials in the form of scientific publications and legal literature, and tertiary materials such as legal dictionaries and encyclopedias. The collection technique is carried out through a literature study with the identification and classification of relevant legal documents (Marzuki, 2013), while the analysis of legal materials is carried out systematically and teleologically to interpret and construct legal norms according to the context and purpose of their formation.

RESULTS AND DISCUSSION

Potential Inconsistencies in the Application of Domestic Preference with the Principles of Fairness and Transparency in the Regulation for ADB Borrowers

Foreign Loans (PLN) are a source of financing obtained by the government through loans from foreign lenders under loan agreements, not in the form of government securities that require specific requirements (Ussa'diyah, Vidriza, & Sua'idy, 2022). These loans are expected to provide added value that supports development, strengthens economic capacity, and promotes sustainable economic growth. However, at the same time, debtors must also consider repayment capacity to avoid excessive debt burdens (Prasetyo & Kurnia, 2021). However, their utilization also requires adherence to international procurement principles, particularly those established by lending institutions such as the Asian Development Bank (ADB).

The application of domestic preference in the procurement of goods and services financed by ADB has the potential to challenge the principles of fairness and transparency, which are the basis of the Procurement Regulations for ADB Borrowers 2017. Articles 80 and 81 allow borrowing countries to implement this policy on the condition that its implementation continues to meet the core principles of ADB procurement, namely value for money, fairness, transparency, and integrity.

Non-conformity with the Principle of Fairness

The principle of fairness, one of ADB's core procurement principles, as stipulated in Article 1.4 of the Procurement Regulations for ADB Borrowers (2017), emphasizes that all procurement participants must be treated equally and have a fair opportunity to compete. This principle includes:

- (i) Equal opportunity and treatment for qualified bidders;
- (ii) Fair distribution of rights and obligations between borrowers and providers of goods, works and services;
- (iii) Credible mechanisms to address procurement-related complaints and provide redressal.

The fairness principle in the Procurement Regulations for ADB Borrowers emphasizes open competition as the primary procurement approach to ensure all participants have equal opportunities and a fair distribution of rights and obligations. However, the domestic preference provisions stipulated in ESDM Ministerial Regulation Number 11 of 2024 have the potential to create inconsistencies with the ADB's fairness principles. This is because Article 17 paragraphs (1) and (2) require the use of domestically produced goods and services for electricity infrastructure development projects funded by foreign loans or grants, with the provision that at least 50% of the funds come from multilateral or bilateral creditors. This provision can lead to differential treatment between local and foreign suppliers, thereby disrupting equal bidding opportunities and limiting the open competition emphasized by the ADB.

A more complete overview of the discrepancies between the ADB's fairness principles and domestic preferences in ESDM Regulation Number 11 of 2024 can be seen in the following table:

Table 1. Potential inconsistencies between the ADB Fairness Principle and domestic preferences in ESDM Regulation Number 11 of 2024

Aspect	ADB Fairness Principles	Domestic Preference (ESDM Regulation 11/2024)	Non-conformity / Impact
Equality of participants	All participants (local & international) get the same opportunity	Local providers are prioritized for electricity infrastructure projects	<ul style="list-style-type: none"> – Unequal treatment between local and international providers; – Limited bidding opportunities for international providers; – Potentially reducing the number of participants and the diversity of the competition;
Open competition	Encourage healthy competition for transparency and efficiency	Mandatory use of domestic products may limit international participation.	<ul style="list-style-type: none"> – Competition is limited; – The best providers are not always selected based on quality and price – Can reduce project efficiency and value – The risk of discrimination against foreign providers increases.
Distribution of rights & obligations	Rights and obligations are balanced between borrower & provider	Local providers benefit more, international providers lose project access	<ul style="list-style-type: none"> – Imbalance of rights and obligations between borrowers and providers; – International providers are disadvantaged in project opportunities – Gives rise to potential disputes and discrimination claims;
Complaint handling mechanism	A credible mechanism for handling disputes for all participants	International providers may have difficulty filing complaints due to local priorities.	<ul style="list-style-type: none"> – The credibility of dispute mechanisms is reduced; – International suppliers lack effective dispute resolution channels; – Reduced trust in the procurement system and project transparency;

Based on the table above, it can be seen that the inconsistency between the ADB's fairness principles and domestic preference in ESDM Ministerial Regulation No. 11 of 2024 is evident in the differential treatment between local and international providers, which limits bidding opportunities, narrows competition, and reduces project quality and efficiency. Domestic preference also creates an imbalance of rights and obligations between borrowers and providers, and limits the effectiveness of dispute resolution mechanisms for international providers, thereby reducing the credibility and transparency of the procurement system. Overall, these provisions have the potential to reduce global participation, create risks of discrimination, and contradict the ADB's fairness principles, which emphasize open competition, equal treatment, and credible dispute mechanisms.

Non-compliance with the Principle of Transparency

The principle of transparency as stipulated in Article 1.4 of the Procurement Regulations for ADB Borrowers (2017), is carried out through proper documentation and review of procurement process activities, ensuring that:

- (iv) Relevant procurement information is publicly available to all interested parties, consistently and in a timely manner, through readily accessible and widely available sources at no (or reasonable) cost;
- (v) There is proper reporting of procurement activities; and
- (vi) Confidentiality provisions in contracts are only used if justified.

Domestic preference in ESDM Regulation No. 11 of 2024 has the potential to undermine the implementation of ADB's transparency principles, as prioritizing local providers can limit access to information for international providers and the wider public. Selection decisions influenced by protectionist considerations can reduce the transparency of documentation, degrade the quality of procurement reporting, and increase the risk of disproportionate use of confidentiality provisions to protect local interests. As a result, the borrower's accountability to stakeholders, including ADB, is diminished, and the transparency principle, which underpins the credibility and fairness of international procurement, is not fully met. A more complete description of the discrepancies between the ADB transparency principles and domestic preferences in ESDM Regulation Number 11 of 2024 can be seen in the following table:

Table 2. Potential inconsistencies between the ADB's Transparency Principles and domestic preferences in ESDM Regulation Number 11 of 2024

Aspect	ADB Fairness Principles	Domestic Preference (ESDM Regulation 11/2024)	Non-conformity / Impact
Access procurement information	Relevant procurement information is publicly available in a consistent, timely and easily accessible manner	Priority on local providers may limit access to information for international providers.	<ul style="list-style-type: none"> - International and public providers have limited access to information; - Reduced transparency of the procurement process and the potential for global participation;
Procurement activity reporting	There is proper and transparent reporting of all procurement activities.	Selection decisions are influenced by protectionist considerations.	<ul style="list-style-type: none"> - Reporting quality declines - Information provided does not fully reflect the competitive process - Decreases borrower accountability;
Use of confidentiality provisions	Confidentiality provisions are only used when justified	Local preferences may encourage excessive use of secrecy	<ul style="list-style-type: none"> - Limited transparency - Important information is not available to stakeholders - Increases the risk of perceived discrimination or protectionism;
Accountability and credibility	The procurement system must be credible and accountable to all parties.	Local priorities influence transparency and reporting	<ul style="list-style-type: none"> - Procurement credibility is reduced; - ADB's transparency principles are not fully met - Reduced trust among international suppliers and stakeholders;

Based on Table 2, the domestic preference provisions in ESDM Regulation No. 11 of 2024 are inconsistent with ADB's transparency principles because the priority given to local providers limits access to procurement information for international and public providers, making the selection process less competitive and prone to

protectionist considerations. This reduces the quality of documentation and reporting of procurement activities, so that the available information does not fully reflect a fair process. The excessive use of confidentiality provisions to protect local interests further limits information disclosure, reduces borrower accountability, and undermines the credibility of the procurement system. The impacts of limited access to information, protectionist influences in selection, and disproportionate confidentiality controls have the potential to create perceptions of discrimination, reduce international provider participation, and undermine ADB's transparency principles, which are the foundation of fairness, accountability, and integrity in international procurement.

Legal Implications of the Implementation of Domestic Preference in ESDM Regulation 11/2024 on Electricity Infrastructure Projects Funded by Foreign Loans

Electricity infrastructure development is an effort to provide electricity facilities and infrastructure, including generation, transmission, distribution, and services to the public to ensure reliable, affordable, and sustainable electricity availability (Sansuadi, 2025). Through electricity infrastructure development projects, the government prioritizes the development of power generation infrastructure as the main foundation for ensuring reliable, sustainable, and equitable electricity availability (Hasid, Mire, Rochaida, & Wijaya, 2023). The implementation of the domestic preference principle as stipulated in ESDM Ministerial Regulation No. 11 of 2024 carries broad legal consequences for the implementation of electricity infrastructure projects, particularly those funded through foreign loans. This policy not only impacts regulations and practices at the national level but also requires an evaluation of compliance with agreed international obligations, including WTO agreements and procurement regulations from multilateral financing institutions such as the Asian Development Bank (ADB). Therefore, it is important to analyze the legal implications of domestic preference from these various perspectives to understand the potential challenges and legal compliance required in its implementation.

Implications from a National Legal Perspective

First, Article 17 of ESDM Regulation No. 11 of 2024 provides a valid legal basis for the application of domestic preference in electricity infrastructure development projects. This provision is based on Law No. 30 of 2009 concerning Electricity and domestic industrial development policies, thus legitimizing the government's prioritization of local products and services in project procurement is clear and accountable. Therefore, the legal implications of the application of domestic preference as regulated in ESDM Regulation No. 11 of 2024 can be seen from the following aspects:

Second, the government's legal legitimacy. Domestic preference, as stipulated in Article 17 of ESDM Ministerial Regulation No. 11 of 2024, has significant legal implications for the government in implementing electricity infrastructure projects. This provision provides a valid legal basis for mandating the use of local products and services, ensuring that any procurement policies and decisions that prioritize domestic suppliers are within the framework of national law. With this legitimacy, the government can officially prioritize local products without raising doubts about the legality of the policy.

Third, accountability and transparency. In addition to providing a legal basis, the implementation of domestic preference also has legal implications for accountability and transparency in procurement. The TKDN verification mechanism serves as a legal instrument to ensure that procurement decisions are accountable. With clear and documented procedures, the risk of national legal disputes can be minimized, and supplier compliance with domestic regulations can be effectively monitored, thereby strengthening legal certainty at every stage of procurement.

Fourth, protection and strengthening of local industry. The legal implications of domestic preference are also reflected in the protection and strengthening of local industry. Legally, this policy gives local suppliers the right to be prioritized in procurement projects, while simultaneously encouraging the development of national industrial capacity. Thus, domestic preference is not only an economic instrument but also a strategic legal instrument that affirms national sovereignty, strengthens the competitiveness of local suppliers, and provides legal certainty for all parties involved in project implementation.

Fifth, legal certainty in project implementation. The domestic preference provisions in ESDM Ministerial Regulation No. 11 of 2024 also have important legal implications regarding project implementation certainty. By establishing clear legal boundaries for the government and project managers, these provisions provide a firm legal framework for how the prioritization of local products and services can be implemented. This legal certainty allows for measured and accountable policy implementation, in accordance with national governance principles, thereby reducing the risk of legal disputes and potential policy abuse. Furthermore, clear legal boundaries strengthen the

legitimacy of the procurement process, ensuring that every procurement step and decision can be legally accounted for at the national level.

Implications from an International Law perspective

The application of domestic preference in electricity infrastructure projects financed by foreign loans not only has implications from a national legal perspective but also gives rise to legal consequences at the international level. These implications from an international legal perspective include:

Potential Violations of the Principles of National Treatment & Non-Discrimination in the Agreement on Government Procurement

The application of domestic preference in electricity infrastructure projects prioritizes local providers, potentially leading to unequal treatment of foreign providers. From an international legal perspective, this risks violating the principles of national treatment and non-discrimination as stipulated in Article III of the GATT 1945, entitled "Treatment on International Taxation and Regulation," which states that:((GPA), 1994)

1. *With respect to all laws, regulations, procedures and practices regarding government procurement covered by this Agreement, each Party shall provide immediately and unconditionally to the products, services and suppliers of other Parties offering products or services of the Parties, treatment no less favourable than:*
 - (a) *That accorded to domestic products, services and suppliers; and*
 - (b) *That accorded to products, services and suppliers of any other party.*
2. *With respect to all laws, regulations, procedures and practices regarding government procurement covered by this Agreement, each Party shall ensure:*
 - (a) *That its entities shall not treat a locally-established supplier less favourably than another locally-established supplier on the basis of degree of foreign affiliation or ownership; and*
 - (b) *That its entities shall not discriminate against locally-established suppliers on the basis of the country of production of the good or service being supplied, provided that the country of production is a Party to the Agreement in accordance with the provisions of Article IV.*

The principle of national treatment essentially emphasizes equal treatment between domestic and imported products. It is the obligation of member states not to differentiate or discriminate against foreign products in their internal treatment. This means that governments are obliged to ensure that imported products receive equal protection and opportunities with domestic products, so that no policies or practices intentionally favor local products for protectionist purposes. This principle is closely related to non-discrimination, which prohibits internal actions that place foreign products at a disadvantage compared to domestic products.

Risk of International Disputes

Violations of the principles of national treatment and non-discrimination in the application of domestic preferences to electricity infrastructure projects financed by foreign loans can lead to legal consequences in the form of claims or disputes from World Trade Organization (WTO) member countries, such as the United States, the European Union, Japan, and other member countries with interests in trade in goods and services. Such disputes typically arise through the WTO dispute settlement mechanism, where the applicant country can claim that Indonesia's domestic preferences harm their trade interests. This risk is not only legal in nature but can also affect bilateral diplomatic and trade relations. If a claim is filed, Indonesia could be asked to adjust its procurement policies or face sanctions under the WTO dispute settlement mechanism, including bilateral consultations, examination panels, and potential recommendations for compensation.

Implications of ADB's Procurement Perspective

In ADB-financed electricity infrastructure projects, the application of domestic preference must be understood within the framework of ADB's fundamental procurement principles of fairness, transparency, and fair competition. These principles emphasize that all participants, both local and foreign, must have an equal opportunity to participate in the procurement process. When domestic preference policies are applied without proportional arrangements, they can create barriers for international providers to compete fairly, thereby reducing competition and potentially reducing project efficiency. In other words, excessive local preference can distort the primary objective of ADB procurement, which is to achieve the best results with optimal use of public funds. Domestic preference can also pose a risk to the principle of transparency if access to information is not provided equally to all potential suppliers. In the context of multilateral financing, limited information that favors only local suppliers can

be perceived as a form of discrimination that undermines the integrity of the procurement process. This situation can weaken the credibility of the government as a loan recipient, as institutions like the ADB place a strong emphasis on compliance with accountable procurement governance and freedom from conflicts of interest. Therefore, transparency at every stage, from tender announcement and technical evaluation to awarding the award, must be maintained to ensure the principle of fair competition remains intact. However, strategically, the implementation of domestic preference does not necessarily conflict with ADB procurement regulations as long as the policy is implemented proportionally, objectively, and in accordance with the provisions agreed upon between ADB and the government. A balanced approach will enable this policy to support the development of national industry without creating inconsistencies with the ADB's principle of nondiscrimination. Therefore, the main challenge lies not in the existence of domestic preference itself, but rather in its implementation mechanism: the extent to which the government is able to integrate national interests with transparent, efficient, and competitive international procurement standards.

CONCLUSION

Based on the discussion above, it can be concluded that the implementation of domestic preference in ESDM Ministerial Regulation Number 11 of 2024 provides a strong legal basis for the use of domestic products in electricity infrastructure projects, including those funded by foreign loans, as a form of implementing the mandate of Law Number 30 of 2009. This policy plays an important role in strengthening national industry and economic independence, but has the potential to cause inconsistencies with the principles of fairness and transparency stipulated in the Procurement Regulations for ADB Borrowers and the WTO principle of national treatment. Thus, a balance is needed between protection of domestic products and compliance with international procurement principles so that the implementation of electricity projects remains efficient, accountable, and in line with Indonesia's global legal commitments.

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