



# The Principle of Equal Treatment and Non-Discriminatory Country of Origin in The Regulation of Strengthening Competitiveness for Micro, Small, Medium Enterprises in The Maritime and Fishery Sector

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**Abstract.** This research raises the issue of applying the principle of equal treatment and non-discrimination between countries of origin in various laws and regulations drafted with the aim of increasing business competitiveness in the marine and fisheries sector in Indonesia. Law No. 25 of 2007 concerning Investment is considered to be very in favor of the interests of global trade when compared to efforts to empower and protect micro, small and medium enterprises (MSMEs). The principle of equal treatment and non-discriminatory country of origin is in line with the Most Favored-Nation principle in the World Trade Organization (WTO) regime which, if implemented in Indonesia, is feared to weaken the competitiveness of business actors, especially in the marine and fisheries sector which is dominated by MSMEs-scale business actors. The research method used is doctrinal legal research using secondary data from various primary and secondary legal materials. The results of the research confirms that normatively understanding and applying the principle of equal treatment and non-discrimination between countries of origin must be in the context of prioritizing national interests. Government Regulation No. 27 of 2021 concerning the Implementation of the Marine and Fisheries Sector has an important role in supporting the strengthening of competitiveness for MSME-scale business in the marine and fisheries sector.

**Keywords:** investment, non-discrimination, fisheries.

## 1 Introduction

Globalization has become a topic widely discussed with enthusiasm and fervor; but it is often overshadowed by concerns and disappointments. One of the most noticeable impacts of globalization is the rapid flow of information reaching the public. Therefore, it is not surprising that various parties, especially among the business community, are eagerly pursuing information to quickly seize profitable opportunities. Similarly, the transportation of goods from one country to another has become so fast and easily accessible to the public. All of this is related to the continuous technological advancements made by experts. As the boundaries between countries draw closer, the opportunities for investors to invest in various countries are becoming increasingly

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open. Therefore, it is reasonable for each country, including Indonesia, to compete in attracting prospective investors, especially foreign investors (Sembiring, 2007).

Investment activities in Indonesia have a direct contribution to its development. Development projects require a substantial amount of capital that must be made available within a specific timeframe. This capital can be provided by the government and the domestic private sector. Ideally, from a nationalist perspective, the entire capital requirement should be met by domestic sources, whether from the government or domestic private enterprises. However, in practice, most developing countries face challenges in securing sufficient capital for comprehensive development due to various factors, including low levels of public savings, ineffective and inefficient capital accumulation, inadequate skills, and outdated technology. Developing nations generally attempt to address these constraints through cooperation with more developed countries to access international financial resources. International financial resources can take two forms. The first form is foreign direct investment (FDI) carried out by private entities, especially in the form of direct foreign investments, often undertaken by multinational corporations. These investments take the form of establishing factories, acquiring production facilities, purchasing machinery, and so on. In addition, similar capital flows come from international private banks. The second form is official government and private sector development assistance or foreign aid, which originates from the government of an individual country or from multiple parties collectively (multilateral). This assistance is channeled through independent or private organizations, such as non-governmental organizations (NGOs) (Todaro, 2000).

Law No. 6 of 2023 concerning the Enactment of Government Regulation in Lieu of Law No. 2 of 2022 on Job Creation, which encompasses several amendments to Law No. 25 of 2007 on Investment, is expected to address investors concerns by simplifying permit services, offering various incentives, and providing legal certainty for both domestic and foreign investors. The revolutionary changes introduced in Law No. 25 of 2007 on Investment have sparked controversy from various quarters. Some consider this law to be highly liberal because it promptly adopts several principles from the World Trade Organization (WTO) agreements, particularly those related to investment activities in the Agreement on Trade-Related Investment Measures (TRIMS), including the principles of National Treatment and Most-Favored-Nation (MFN). The National Treatment principle entails granting equal treatment to all investors without distinguishing between domestic and foreign investors in the management of their investments in Indonesia. Meanwhile, the MFN principle, or the principle of non-discrimination, is interpreted as a principle of not distinguishing or discriminating between investors from one country and investors from another country, except when the Indonesian government is bound by a specific investment agreement with a particular foreign government.

Many of the incentives provided by the government are perceived as infringing upon the economic, social, and cultural rights of the population and as overly opening the door to foreign investors. In the long term, there is a significant potential for eradicating opportunities for the local community to thrive due to the extended duration of the time frame during which foreign investors can inject their capital into Indonesia (Harjono, 2007). The conditions as criticized above indicate that the implementation

of the law will encounter numerous challenges. The most concerning aspect is its potential impact on the sustainability of micro, small, and medium-sized enterprises (MSMEs) owned by domestic investors (Fithriah, 2017). Foreign investors with substantial capital and various other advantages receive preferential treatment and various incentives from the government.

This can be understood in light of Indonesia being a country rich in natural resources, particularly in the fisheries and maritime sector. According to data from the Ministry of Maritime Affairs and Fisheries (2022), Indonesia has vast potential in capture fisheries, with approximately 12.04 million tons of fish distributed across 11 fisheries management areas throughout the country. Additionally, there are approximately 12 million hectares of aquaculture that have not been optimally utilized (cnbcindonesia.com; 2023). This area is managed by around 6.2 million businesses operating at the micro, small, and medium-sized enterprise (UMKM) scale. In 2022, the fisheries sector contributed Rp. 1.8 trillion to state revenue through Non-Tax State Revenue, marking the highest achievement since 2014 (economy.bisnis.com; 2023). The export value of Indonesian fishery products to various countries reached US\$ 6.24 billion with a volume of 1.22 million tons in 2022 (economy.bisnis.com; 2023). In the export and import sectors, the trade balance of fishery commodities in export activities during the 2016-2021 period showed a surplus of 5,216,398 with an average annual increase of 6.64% (Ministry of Marine Affairs and Fisheries of Indonesia, 2023).

Micro, small, and medium-sized firms (MSMEs) are widely recognized for their significant contribution to global economic development, primarily attributable to their substantial employment capacity and their role in fostering job creation and overall economic progress. According to the World Bank (2023), small and medium-sized enterprises (SMEs) constitute around 90% of firms globally and account for over 50% of total employment. Furthermore, in emerging economies, SMEs contribute up to 40% of the national revenue, as measured by the Gross Domestic Product (GDP). However, there are weaknesses from the perspective of Nusantara Report on 2021 states results in difficulties in competing with larger-scale enterprises, including foreign investment activities in the same sector in Indonesia (Bank of Indonesia, 2021) This situation necessitates government support in various aspects, including regulations that can facilitate the growth and development of MSMEs in the maritime and fisheries field.

It can be understood that one of the objectives of the formation of laws is to safeguard various interests, including economic interests, personal security, personal honor, political, religious, and others. Among these interests, economic interests are one of the factors that wield significant influence in the creation of laws (Chand, 1994). In connection with the influence of economic interests in the formation of laws, Hari Chand, in his book titled "Modern Jurisprudence," cites Max Weber's opinion that:

"It is evident that legal guarantees are significantly influenced by commercial interests. Even in situations where it may not appear to be the case, or where it is not explicitly acknowledged, economic interests play a significant role in shaping the development of legal frameworks. The establishment of a legitimate legal system is contingent upon the collective agreement and cooperation of the constituent social

groups. Furthermore, the formation of these social groups is heavily influenced by a combination of material interests”.

As a path of sociological perspectives, Max Weber's views cannot be separated from the perspectives of other sociologists, who consider law as a phenomenon existing within a society, the existence of which is influenced by other phenomena within that society. Regarding Max Weber's opinion on economic interests as the primary factor in law formation, Roscoe Pound believes that it is not an issue as long as the creation of law does not disregard the broader interests of the community or solely protect the interests of a specific group (Chand, 1994).

In the International Economic Law, the principles of National Treatment and Most-Favored Nation (MFN) are well-known. The National Treatment principle is one of the expressions of the non-discrimination principle. This principle can be found in international agreements like the General Agreement on Tariffs and Trade (GATT) and treaties related to friendship, trade, and navigation. In practice, it is applied by providing reciprocal (reciprocity) equal treatment in international economic relations. There is some scholarly debate about the extent to which this principle is applied. Some argue that it is applied concerning the state's responsibility in taking over (nationalizing) the property of foreign individuals or companies. Others contend that international law merely requires that the treatment of property rights of foreign individuals or companies must be the same as how the respective state treats its own citizens (Adolf, 2003). The MFN principle is known as a central principle explicitly stated in the Bretton Woods system and is also found in GATT/WTO. In essence, this principle is interpreted as a non-discrimination principle among states. It requires a state to grant rights to another state as it grants similar rights to a third state. Both of these principles are then used as fundamental principles in the mechanism of trade in goods and services, including investment activities within the WTO. In the field of International Economic Law, the principles of National Treatment and Most-Favored Nation (MFN) are well-known. The National Treatment principle is one of the expressions of the non-discrimination principle. This principle can be found in international agreements like the General Agreement on Tariffs and Trade (GATT) and treaties related to friendship, trade, and navigation. In practice, it is applied by providing reciprocal (reciprocity) equal treatment in international economic relations. There is some scholarly debate about the extent to which this principle is applied. Some argue that it is applied concerning the state's responsibility in taking over (nationalizing) the property of foreign individuals or companies. Others contend that international law merely requires that the treatment of property rights of foreign individuals or companies must be the same as how the respective state treats its own citizens (Adolf, 2003). The MFN principle is known as a central principle explicitly stated in the Bretton Woods system and is also found in GATT/WTO. In essence, this principle is interpreted as a non-discrimination principle among states. It requires a state to grant rights to another state as it grants similar rights to a third state. Both of these principles are then used as fundamental principles in the mechanism of trade in goods and services, including investment activities within the WTO.

Based on the data it shows that most of the business actors in the fisheries sector are mostly MSMEs business scale, however, Indonesia still needs the participation of foreign investors. Nevertheless, slight concern may arise if they shift as competitors and dominate the market. Indonesia needs regulations to protect and strengthen the position of Marine and Fisheries MSMEs, especially capture fisheries so that they remain competitive at the national and international levels. This study raises a problem: how is the principle of equal treatment and non-discriminatory country of origin in the regulation of strengthening competitiveness for Micro, Small, and Medium Enterprises in the maritime and fisheries sector implemented.

## **2 Method**

The research methodology employed in this study is qualitative research with a normative legal approach that focuses on the application of a legal principle within legislative regulations. In the field of legal research, this is commonly referred to as doctrinal research, which centers on legal principles originating from specific laws. This research is conducted by initially identifying the legal principles formulated within legislative regulations, and subsequently, extracting the underlying legal principles (Soekanto, 2010). Furthermore, an examination is carried out concerning the application of the principle of equal treatment for all investors, as mandated by the law, in policies related to strengthening the maritime and fisheries sector.

## **3 Results and Discussion**

### **3.1 Characteristics of the Principle of Equal Treatment and Non-Discriminatory Country of Origin**

#### **a. Definition and Characteristics of Legal Principles**

According to Bellefroid, a general legal principle is a fundamental norm derived from positive law and not regarded by legal science as originating from more general rules. This overarching legal theory embodies the accumulation of enacted laws within a society. In contrast, Van Eikema Hommes argues that legal principles should not be regarded as specific legal standards, but rather as overarching principles or guidance for the application of law. In the practical formation of law, such as the drafting of legislation, reference to these legal principles is necessary. Therefore, it can be said that legal principles are the foundations or guiding directions in the development of positive law (Mertokusumo, 2009).

According to van der Velden, a legal principle is a specific type of decision that can be used as a benchmark for assessing situations or as a guide for behavior. Legal principles are based on one or more values that determine valuable situations that need to be realized. In contrast, Scholten argues that legal principles are tendencies required by our ethical views on the law, representing general characteristics with all their limitations as a common trait that should exist. From the various explanations regarding the understanding of legal principles, it can be concluded that legal princi-

ples do not constitute concrete law; rather, they are fundamental and abstract ideas or the background behind specific regulations found within every legal system manifested in legislation and judicial decisions, which constitute positive law and can be discovered by seeking common characteristics or attributes in these specific legal provisions. This means that commonalities in concrete events can be translated into legal regulations, which then become general rules. Due to their general nature, these legal principles cannot be directly applied to specific events. These legal principles can be found in positive law in an implicit form within legal principles or specific regulations.

Legal principles are not limited to specific events but also allow for deviations or exceptions, giving general provisions a strong and justifiable legal standing. This flexibility makes the legal system adaptable and not rigid. Legal principles are generally dynamic, evolving in accordance with legal standards, while legal standards change with the development of society, which is bound by time and place. Legal principles are also universal, applicable at any time and in any place, unaffected by time and place. According to Scholten, there are at least five universal legal principles: the personality principle, the principle of community, the principle of equality, the principle of authority, and the principle of distinguishing between what is good and bad. These first four universal principles are present in every legal system, and each principle is interdependent, depending on the needs of society at the time. Furthermore, these first four universal principles are supported by the fifth universal principle, which is the distinction between what is good and bad. A legal standard is essentially a guide on what should and should not be done. Legal principles are not limited to specific events but also allow for deviations or exceptions, giving general provisions a strong and justifiable legal standing. This flexibility makes the legal system adaptable and not rigid. Legal principles are generally dynamic, evolving in accordance with legal standards, while legal standards change with the development of society, which is bound by time and place. Legal principles are also universal, applicable at any time and in any place, unaffected by time and place. According to Scholten, there are at least five universal legal principles: the personality principle, the principle of community, the principle of equality, the principle of authority, and the principle of distinguishing between what is good and bad. These first four universal principles are present in every legal system, and each principle is interdependent, depending on the needs of society at the time. Furthermore, these first four universal principles are supported by the fifth universal principle, which is the distinction between what is good and bad. A legal standard is essentially a guide on what should and should not be done.

#### **b. Definition of Principle of Equal Treatment and Non-Discriminatory Country of Origin**

International economic law experts have recognized the existence of fundamental standards or rules, but there is no consensus regarding these standards. These fundamental standards or rules primarily refer to two main principles: freedom of communication and freedom of trade (Adolf; 2005). Among these fundamental norms are: 1) National Treatment Principle; 2) Fundamental Principle or Most-Favored-Nation Clause (MFN).

The National Treatment Principle is one of the manifestations of the non-discrimination principle. This clause is found in various agreements, including the General Agreement on Tariffs and Trade (GATT) and treaties related to friendship, trade, and navigation. This principle or clause requires a country to treat foreign goods, services, or foreign capital that has entered its domestic market with the same legal provisions applied to domestically produced products or services (Adolf, 2005).

The Most-Favoured-Nation (MFN) Principle or Clause is often referred to as a central principle found in the Bretton Woods System. This clause is also present in the General Agreement on Tariffs and Trade (GATT), particularly regarding trade in goods, and in other international agreements of a general nature. In essence, the MFN clause embodies the principle of non-discrimination among nations. This principle requires that a country extends to another country the same rights it would grant to a third country. The MFN clause is not limited to trade in goods but also applies to trade in services, such as insurance and shipping, as well as the treatment of foreign investment and the flow of capital in various forms. In practice, the MFN principle is applied alongside various exceptions based on specific agreements in international economic law. Bilateral agreements between two countries, international economic organization agreements, and regional free trade agreements can be used as exceptions to the application of the MFN clause.

c. Scope of the Principle of Equal Treatment

In order to promote the creation of a conducive national business environment and enhance the interest of investors, especially foreign investors, in investing their capital in Indonesia, the government, based on Article 4, establishes the fundamental investment policy, which is subsequently materialized in the form of a General Investment Plan, consisting of: “a. Providing equal treatment to domestic and foreign investors while considering national interests

- b. Ensuring legal certainty, business certainty, and business security for investors from the licensing process to the conclusion of investment activities, in accordance with the provisions of the legislation; and
- c. Creating opportunities for development and offering protection to micro, small, medium-sized enterprises, and cooperatives”.

Regarding the provisions on equal treatment for all investors, in Chapter V of the Investment Law, there are specific regulations concerning the Treatment of Investors. Article 6 of the Law states that:

- (1) “The Government provides equal treatment to all investors from any country who engage in investment activities in Indonesia in accordance with the provisions of the legislation.
- (2) The treatment referred to in section (1) does not apply to investors from a country that has obtained special rights based on an agreement with Indonesia.”

According to Article 14.c, investors are entitled to certain rights, one of which is the right to obtain services. The implementation of the one-stop integrated service system is anticipated to streamline the process for investors to access a wide range of investment services. The provision of this comprehensive service is conducted by institutions or agencies that have been granted authority in the investment sector,

either by delegation or authorization from institutions or agencies possessing licensing and non-licensing powers at the provincial or district/city level.

#### d. Limitation of the Principle of Equal Treatment

The discussion of the limitations regarding the principle of equal treatment is to determine the boundaries in the application of this principle. This is important to demonstrate the government's commitment to investment policy while addressing public concerns about the potential negative impact of the application of this principle on the development of micro, small, medium-sized enterprises, and cooperatives in Indonesia. When we examine the contents of Article 6 as follows:

(1) "The Government provides equal treatment to all investors from any country who engage in investment activities in Indonesia in accordance with the provisions of the legislation. The treatment referred to in section (1) does not apply to investors from a country that has obtained special rights based on an agreement with Indonesia."

In Article 6 (1) above, it is stated that the Government will provide equal treatment to domestic and foreign investors conducting their businesses in the territory of Indonesia based on the provisions of the applicable legislation.

Based on the Explanation of Article 6 (2), what is meant by special rights includes privileges related to customs unions, free trade zones, common markets, monetary unions, similar institutions, and agreements between the Government of Indonesia and foreign governments that are bilateral, regional, or multilateral in nature, concerning specific privileges.

#### 2. Regulation for Strengthening Maritime and Fisheries MSMEs

In general, the natural resources of maritime and fisheries have great potential for various activities. There are at least 7 (seven) activities, such as fisheries, maritime industry, offshore sand mining, marine tourism, maritime transportation, underwater cable installation, and the salvage of sunken ship cargoes. Each field of activity is regulated by relevant legislation..

Strengthening the Competitiveness Mechanism of MSMEs of Marine and Fishery Sector:

##### 1. Simplification of business licensing

In Government Regulation No. 5 of 2021 concerning the Implementation of Risk-Based Licensing and Government Regulation No. 27 of 2021 concerning Business Processes in the Maritime and Fisheries Sector, there are provisions that facilitate Small and Medium Enterprises (SMEs) in the maritime and fisheries sector in managing their business legality. On a small and medium business scale, it is possible to establish individual limited liability companies, simply by having a business registration number or registering their business with the local government. The purpose of providing this convenience is to enable SMEs to easily operate their businesses without the burden of administrative issues related to business legality. BKPM guarantees that informal MSMEs can become formal simply by obtaining a Business Identification Number, so they can access banking facilities. Local governments are obliged to facilitate MSMEs as well as their business activities in partnering, obtaining capital, and marketing products (Ministry of Investment/BKPM, 2023)

##### 2. Ease of obtaining access to financing



The Law No. 10 of 1998 concerning Banking provides facilities for Small and Medium Enterprises (SMEs) in the maritime and fisheries sector to access financing in the banking sector. The banking sector is committed to providing capital facilitation in the form of People's Business Credit (Kredit Usaha Rakyat - KUR). This KUR is distributed directly through banks designated by the government. The issue of collateral sometimes remains a constraint for loans in a substantial amount.

### 3. Development of market access, both domestic and foreign markets

Government Regulation No. 7 of 2021 on Facilities, Protection and Empowerment for Cooperatives and Micro, Small and Medium Enterprises (MSMEs) provides facilitation in the form of market access, both in the domestic and international markets, for marketing the products of MSMEs in the maritime and fisheries sector. Business competition is expected to proceed fairly and justly, allowing MSME entrepreneurs to maintain their position in the domestic market. The government is obligated to make efforts to promote the products of MSMEs in the maritime and fisheries sector worldwide through established bilateral and multilateral cooperation. Participation in international trade exhibitions and sustained promotion by the trade attache offices of the Republic of Indonesia abroad.

### 4. Product innovation and Ease of obtaining raw materials

Law No. 45 of 2009 amending Law No. 31 of 2004 concerning Fisheries provides legal certainty related to government protection for business activities in the maritime and fisheries sector, specifically for small and medium-sized enterprises (MSMEs) scale entrepreneurs. This includes ease of business licensing, diverse investment types, and the availability of raw materials. Indonesia's vast marine territory and abundant fisheries potential serve as the primary source for various fish-based products. Continuous training with various innovations in fisheries products that can adapt to the needs of the international market is expected to boost Indonesia's fishery product exports.

### 5. Improvement of business management skills

Law No. 7 of 2016 concerning The Protection and Empowerment of Fishers, Fish Farmers, and Salt Farmers provides legal certainty related to legal protection and social guarantees for business actors in the fisheries and maritime sector, especially small-scale fishermen, traditional fishermen, and salt farmers in Indonesia. They make a significant contribution to ensuring food security, particularly the availability of various fish types for both domestic and international needs.

### 6. Institutional strengthening

Law No. 25 of 1992 concerning Cooperatives and Government Regulation No. 27 of 2021 concerning Business Process in the Maritime and Fisheries Sector provides in terms of facilitating the strengthening of institutional support for business actors in the fisheries and maritime sector. Cooperatives formed by fishermen or business operators in the fisheries and maritime sector are expected to become institutions that provide ease in obtaining business capital, operational support, and marketing.

With the existing regulations, it is expected that the government and business operators can synergize to provide ample opportunities for MSMEs in the fisheries and maritime sector to conduct their businesses in a global competitive environment.

MSME business operators must continue to grow and develop, making a significant contribution to the economic development of Indonesia.

## 4 Conclusion

Based on theoretical studies and research findings regarding the issues investigated in this study, the following conclusions can be drawn that the existence of “The Principle of Equal Treatment and Non-Discriminatory Country of Origin” in Law of The Republic of Indonesia No: 25 of 2007 concerning Investment is a legal consequence of Indonesia's participation as a member of the WTO. This principle is normatively a reference in regulating investment activities in all fields while still prioritizing the national interest. The implementation of “The Principle of Equal Treatment and Non-Discriminatory Country of Origin” in the laws and regulations governing the capture fisheries business, it must be balanced with the Government's support to provide protection, empowerment and convenience for MSMEs business actors, so that they are able to compete with large business actors, especially those from abroad.

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