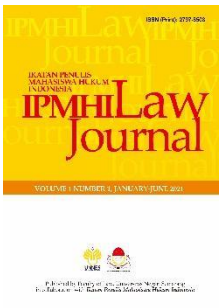
IKATAN PENULIS MAHASISWA HUKUM INDONESIA
LAW JOURNAL



ISSN 2797-8508 (Print)
ISSN 2807-8330 (Online)
VOL. 4 NO. 1, JANUARY (2024)

Article History
Riwayat Artikel
Submitted: June 21, 2023
Dikirimkan
Revised: November 11, 2023
Direvisi
Accepted: January 16, 2024
Diterima

How to cite
Saran Perujukan
Noviana Putri, S., Fazari, A., Ari Widodo, N., Fatahillah, F., & Dwinugraha, S. (2024). Dispute over the 1974 MoU Box between Indonesia and Australia: How MoU Legally Binding in Two Countries?. *Ikatan Penulis Mahasiswa Hukum Indonesia Law Journal*, *4*(1), 13-26. https://doi.org/10.15294/ipmhi.v4i1.76236

Dispute over the 1974 MoU Box between Indonesia and Australia: How MoU Legally Binding in Two Countries?

Sengketa MoU Box 1974 antara Indonesia dan Australia: Bagaimana MoU Mengikat Secara Hukum di Dua Negara?

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Abstract This study aims to delineate the legal authority of Memorandum of Understanding (MoUs) within the jurisdictions of Indonesia and Australia,

particularly concerning the resolution of international civil law disputes. The research employs a normative juridical approach, utilizing legal reviews and secondary data for support. The findings reveal that in civil law states, notably Indonesia, MoUs are regarded as binding agreements in accordance with the "*Agreement is Agreement*" perspective as per Article 1338 (1) of the Civil Code. Conversely, common law states, such as Australia, generally perceive MoUs as non-legally binding. However, an MoU may attain validity and binding status if it fulfills the six stipulated requirements outlined in Australian contract law. To address the dispute surrounding the 1974 MoU BOX between Indonesia and Australia, resolution options include examining international civil law rules based on primary and secondary links or resorting to an international arbitral tribunal.

Keywords *Mou Box 1974; Memorandum of Understanding; Agreement*

Abstrak Penelitian ini bertujuan untuk menguraikan kewenangan hukum Memorandum of Understanding (MoU) di yurisdiksi Indonesia dan Australia, khususnya terkait penyelesaian sengketa hukum perdata internasional. Penelitian ini menggunakan pendekatan yuridis normatif dengan memanfaatkan tinjauan hukum dan data sekunder sebagai dukungan. Temuan menunjukkan bahwa di negara hukum perdata, khususnya Indonesia, MoU dianggap sebagai perjanjian yang mengikat sesuai dengan perspektif " *Agreement is Agreement* " sebagaimana diatur dalam Pasal 1338 ayat (1) Kitab Undang-Undang Hukum Perdata. Sebaliknya, negara hukum umum, seperti Australia, umumnya memandang MoU sebagai tidak mengikat secara hukum. Namun, sebuah MoU dapat memperoleh validitas dan status yang mengikat jika memenuhi enam persyaratan yang ditetapkan dalam hukum kontrak Australia. Untuk mengatasi sengketa seputar MoU BOX 1974 antara Indonesia dan Australia, opsi penyelesaian melibatkan pemeriksaan aturan hukum perdata internasional berdasarkan keterkaitan primer dan sekunder atau melibatkan tribunal arbitrase internasional.

Kata Kunci *Mou Box 1974; Memorandum of Understanding; Perjanjian*

A. Introduction

Along with the progression of globalization, the evolution of international cooperation manifests through the exchange of ideas, goods, and multifaceted engagements. The augmentation of international cooperation is discernible through a notable surge in collaborations among nations, particularly in the realm of business involving companies from two or more countries. Furthermore, countries engage in cooperative endeavors, extending to political matters, with the potential

to yield benefits for various stakeholders. These collaborations culminate in the formation of legal bonds as formalized through written agreements.[1]

Crucially, the establishment of legal bonds through cooperative efforts is not confined to alliances between nations adhering to similar legal systems. On the contrary, it is a phenomenon observed frequently between countries with disparate legal frameworks. An exemplar of such collaboration is the agreement between Australia, characterized by its adherence to common law, and Indonesia, which follows a civil law system. This cross-legal system cooperation underscores the adaptability and efficacy of international collaboration in transcending legal divergences for mutually advantageous outcomes.[2]

Collaborative relationships between countries are not invariably formalized through permanent agreements; instead, they frequently take on a non-permanent or temporary nature. This approach stems from the recognition that crafting a lasting agreement entails extensive negotiations and meticulous preparation to ensure its effective implementation among the involved parties. Consequently, preliminary stage agreements are often articulated in the form of a Memorandum of Understanding (MoU). This practice serves to expedite the commencement of cooperation without impeding progress, acknowledging the complexities involved in the comprehensive negotiation and preparation required for a formalized, enduring agreement.[3]

Memorandum of Understanding (MoU) is commonly employed in confidential business collaborations or intergovernmental relationships, serving as an initial phase preceding the establishment of a permanent and binding agreement. This strategic use of MoUs allows for ongoing negotiations even after the initial agreement, facilitating flexibility in reaching a comprehensive and enduring consensus. Within Indonesia's civil law system, MoUs are perceived as possessing moral ties or equivalency to legally binding agreements. This perspective places paramount importance on the substance of the agreement rather than the nomenclature, provided it aligns with the principles outlined in Article 1320 of the Indonesian Civil Code. In the realm of civil law, MoUs are regarded as binding

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1 Danel Aditia Situngkir, "Terikatnya Negara dalam Perjanjian Internasional." *Refleksi Hukum: Jurnal Ilmu Hukum* 2, no. 2 (2018): 167-180; Harry Purwanto, "Keberadaan Asas Pacta Sunt Servanda dalam Perjanjian Internasional." *Mimbar Hukum* 21, no. 1 (2009): 155-170; Gita Nanda Pratama, "Kekuatan Hukum Memorandum of Understanding (MoU) Dalam Hukum Perjanjian Indonesia." *Veritas et Justitia* 2, no. 2 (2016): 424-440.

2 Gita Nanda Pratama, "Kekuatan Hukum Memorandum of Understanding (MoU) Dalam Hukum Perjanjian Indonesia," *Veritas et Justitia* 2, no. 2 (2016): 424, https://doi.org/10.25123/vej.2274.

3 *See* B. Maryati, "Aspek–Aspek Hukum Perjanjian Internasional dan Kaitannya dengan MoU Helsinki." *Jurnal Humaniora: Jurnal Ilmu Sosial, Ekonomi dan Hukum* 1, no. 1 (2017): 30-39; Sudaryati Sudaryati. "Aspek Hukum Memorandum of Understanding dari Segi Hukum Perikatan dalam Kitab Undang-Undang Hukum Perdata." *Jurnal Rechtens* 11, no. 1 (2022): 53-66; Fuad Luthfi, "Implemenetasi Yuridis tentang Kedudukan Memorandum of Understanding (MoU) dalam Sistem Hukum Perjanjian Indonesia." *Syariah: Jurnal Hukum dan Pemikiran* 17, no. 2 (2018): 179-202.

agreements, compelling the involved parties to promptly adhere to and fulfill their obligations as stipulated within the MoU.

In the further context, the divergence in perspectives on MoUs between common law and civil law systems is evident in their respective interpretations. Nations following the common law legal system perceive MoUs as lacking the requisite strength to compel parties to adhere to their terms, deeming them non-legally binding due to their designation as mere memoranda of understanding. This disparity in legal interpretation poses a potential international challenge for countries engaged in cooperation while operating under distinct legal systems, as exemplified by Indonesia and Australia. Private international law does not offer explicit guidance on whether MoUs between countries with divergent legal frameworks, such as Indonesia and Australia, possess legal force akin to general agreements. This lack of specificity raises complexities in determining the binding nature of MoUs in cross-jurisdictional collaborations.

An illustrative instance of a Memorandum of Understanding (MoU) between Indonesia and Australia is evident in the 1974 MoU Box.[4] This agreement aimed to delineate sea boundaries and address ownership concerns surrounding Pasir Island. This study delves into an in-depth examination of the legal implications of MoUs in both Indonesia and Australia. Additionally, it explores mechanisms for resolving disputes arising from MoUs between the two nations, drawing upon principles of private international law.

Furthermore, the dispute over the 1974 MoU Box between Indonesia and Australia raised questions about the legal binding nature of the agreement in both countries. To understand how the Memorandum of Understanding is legally binding in two countries, it is important to examine the elements and characteristics of an MoU, as well as the specific circumstances surrounding this particular agreement. An MoU is a formal agreement between two or more parties that outlines their

[4] The phrase "1974 MoU Box" refers to a Memorandum of Understanding (MoU) that was entered into between Indonesia and Australia in 1974. The specific details and context of this MoU, commonly known as the "1974 MoU Box," involve agreements related to the demarcation of sea boundaries and the resolution of disputes regarding the ownership of Pasir Island. The MoU was likely established to facilitate cooperation and address contentious issues between the two countries in the specified areas during that period. In the context of international treaty law, the 1974 MoU Box is an agreement that aims to regulate traditional fishing rights. This agreement may encompass provisions related to the use and utilization of fisheries resources in a specific area between the involved parties, in this case, Indonesia and Australia. As an international agreement, the 1974 MoU Box may address issues related to the sustainable use of fisheries resources, the allocation of rights and responsibilities, and the resolution of disputes concerning traditional fishing in the agreed-upon region. *See* Maria Sari Awida, "Efektifitas MoU Box 1974 Terhadap Hak Perikanan Tradisional Nelayan Tradisional Nusa Tenggara Timur." *Thesis* (Yogyakarta: Universitas Atma Jaya Yogyakarta, 2016); Akhmad Solihin, "Konflik Illegal Fishing di Wilayah Perbatasan Indonesia-Australia." *Marine Fisheries: Journal of Marine Fisheries Technology and Management* 1, no. 2 (2010): 29-36; Hatta Agus Kurniawan Nasution, "Kebijakan Traditional Fishing Rights dalam MoU BOX 1974 (Kasus Daerah Papeta, Kabupaten Rote Ndao, Propinsi Nusa Tenggara Timur." *Thesis* (Bogor: Institut Pertanian Bogor, 2008).

mutual understanding, intentions, and commitments towards a specific goal or objective. One of the key elements of an MoU is that it serves as a preliminary agreement, much like the main points set forth in a business contract.[5] While MoUs are usually made in the form of an underhand agreement without any stamp duty and there are no compulsory obligations for more detailed agreements, they serve as a guideline or temporary guide for the parties involved. In the case of the 1974 MoU Box between Indonesia and Australia, it is important to note that both countries went through a complex process of negotiating their interests and establishing a common understanding of the intentions of the agreement. Once the parties obtained the MoU, they proceeded with a feasibility study to assess the level of feasibility and prospects of the business contract.

B. Method

The assessment of problems in this research uses normative juridical methods which are basically by examining norms, rules, principles, principles, doctrines, theories and legal literature to find answers to research[6]. This research uses a case approach and then examines the subject matter based on the Law and secondary data or library materials. The source of this research is primary legal material consisting of laws and other regulations such as the Civil Code, Arbitration Law, Australian Contract Law, and others as well as secondary legal material consisting of books, journals, and articles related to legal literature in the civil field. Data analysis techniques using analytical descriptive methods are then interpreted so that solutions and answers to problems are found.

C. Results and Discussion

1. The Power of Legal Memorandum of Understanding in Indonesia and Australia

Memorandum of Understanding in Indonesia

MoU or Memorandum of Understanding in the Indonesian context is an agreement that is generally used in various situations. However, keep in mind that MoUs do not have a level of legal force equivalent to any other formal contract or agreement. Typically, MoUs have a lower legal status and are not legally binding, although they can sometimes have legal repercussions in certain situations[7].

The MoU is actually a response to agree to other agreements, whether formed or not, which can be stated in writing or only verbally. It can be concluded that the

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[5] Muhammad Sood, "Mechanism of Business Contract Drafting in Supporting Economic Activities." *Unram Law Review* 4.2 (2020): 193-204.

[6] Muhaimin, *Metode Penelitian Hukum*, ed. Fatia Hijrianti (Mataram: Mataram University Press, 2020).

[7] Revyza J Dien, "Kedudukan Dan Kekuatan Hukum Memorandum of Understanding Menurut Hukum Perdata," *Lex Privatum* IV, no. 4 (2016): 94–102.

MoU is mostly an engagement as Article 1233 of the Civil Code which essentially explains that every engagement is realized because of consent. In an *MoU,* involving two or more people, it is similar to an engagement where the parties have rights and obligations according to the agreed portion.

When drafting Article 1234 of the Civil Code, the article explains that every engagement can take the form of giving, doing, or not doing something. It emphasizes the importance of fulfilling obligations in engagement, which can take the form of assigning duties, actions, or obligations not to do something[8]. MoUs that are made legally will have full legal ties as the principles of *Pacta Sunt Servanda* so that its position is equivalent to binding laws and prioritizes the main matters agreed in the *MoU*[9].

There are 2 (two) understandings or opinions regarding the legal force of the MoU *because there are still differences of opinion regarding the position of the* MoU *as follows*:[10]

1) Gentlemen Agreement, namely the legal force of the MoU cannot be equated with an agreement in general even though it is agreed or made with the strongest supporting basis such as a notary deed though, although in practice the MoU is very rarely made notarially, and is still considered to have no power to bind the parties legally.
2) Agreement is Agreement, this opinion is of the view that the juridical basis of the MoU has legal force like other agreements, namely Article 1338 paragraph (1) of the Civil Code which in essence explains that every matter agreed by the parties is applicable law so as to give rise to a legal bond. In addition, if referring to the principle of freedom of contract and consensual, every matter that is considered lawful according to law and has been agreed by the parties can be applied as the contract agreement generally applies and if it is stated in written form, it can be said to be a contract. Theories that support this view:
    a. The Lost Profit Theory is that if there is an agreement that can cause loss of profit if one party defaults, the agreement can be said to be a contract.
    b. Loss Trust Theory, where an agreement can be expressed as a contract if there is a material loss to the contract if there is a default by the contracting parties.
    c. The theory of Promisory Estopel is that if there is a bargaining process in an agreement then it can also be said to be a contract.
    d. Quasi-contract theory is that if an agreement has fulfilled the general terms of the contract, it has been considered a legally binding contract.

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8 Kartini Mulyadi and Gunawan Widjaja, *Perikatan Pada Umumnya*, (Jakarta: PT Raja Grafindo Persada, 2004).

9 Gerry Lintang, "Kekuatan Hukum Memorandum of Understanding Ditinjau Dari Segi Hukum Perikatan" III, no. 8 (2015): 140–47.

10 Munir Fuady, *Hukum Kontrak (Dari Sudut Pandang Hukum Bisnis)*, (Bandung: PT Citra Aditya, 2001).

***Memorandum of Understanding* in Australia**

Australia is a country with an understanding of the legal system *common law* Where in this country *Mou* It is considered that it does not have binding legal force formed with the aim that there is a negotiation between the parties so that the negotiation cannot be used as evidence or as *Enforce* at the trial.

Australian Contract Law, considers *an MoU to meet six basic elements so that an MoU* has binding legal force like a formal agreement. The six basic elements include:

1) Offer, Australian courts give a different understanding of initial negotiation to offer in formal law. Negotiation at the initial stage is interpreted as having no intention in creating an agreement with the force of law binding on the parties.
2) Acceptance, is the stage of expression of both parties after agreeing or agreeing with the provisions at the offer stage.
3) Consideration, in the case of the formation of the agreement there must be something that makes the parties need to agree to the agreement. The exchange rate between the parties to the Act is also called consideration.
4) Mutuality of Obligation, in carrying out an agreement, there must be an obligation that must be fulfilled. This is to bind the parties to the content of the agreement so that there is no breach of obligation that results in the cancellation of the agreement.
5) Competency and Capacity, the parties concerned in the agreement must have qualified knowledge to account for the obligations in the agreed agreement.
6) A Written Instrument, Last and not least in an agreement there must be a written statement or instrument to prove the agreement of both parties.

The similarity between Indonesia, Australia, and international law regarding MoUs lies in the binding force declared by the court when the MoU has a written instrument consisting of sanctions, rights and obligations of the parties and the results of agreement between both parties regarding the binding or non-binding force of their MoU.

2. Memorandum of Understanding Dispute Settlement Between Indonesia and Australia Based on Private International Relations

There are basically several settlement principles that can be used under the Private International Code in determining the laws applicable to contracts with foreign elements or linking cooperation between two countries. It can be started with the traditional approach through determining the primary link point to determine the presence of foreign elements in a dispute such as determining nationality, flag of a sailing ship, aircraft, domicile, place of residence, seat of legal entity, and choice of law internationally and then secondary link point consisting of the doctrine of *lex loci contractus*, namely law based on the domicile of making a

contract, *Lex loci solutionis* the law by which the agreed contract is executed, the proper law of the contract is the *determination of law based on the most link points, and* the most characteristic performance is the law of the *party who has the most characteristic obligations according to the type of contract*. [11] *Lex rae sitae* is a dispute resolution based on the place where the goods or objects are located[12].

In fact, all contracts are not subject to national laws or regulations. The law that is the reference for the parties to the contract is the national law used in the contract made. Huala Adolf explained that in the choice of *law* the parties choose the rules of law of a particular country, not necessarily the country's court has the authority to adjudicate and vice versa. Parties involved in the contract have freedom in terms of determining the forum and laws in certain countries. Sudargo Gautama explained that choice of law is a freedom that gives related parties to determine or choose the law used in the contract. At least there is a solution in the issue of choice of law, *namely based on* the theory of *lex loci solutions*, this legal theory provides the basis that what applies to the contract is the law where the contract is executed. This provides an answer in finding a law that is used entirely for dispute resolution[13].

In international contract settlement carried out by people with people from different countries, people with a legal entity from different countries, legal entities with legal entities from different countries, or countries with other countries which certainly have different legal systems cause conflicts for the parties involved in resolving disputes due to differences in legal systems. Law No. 30 of 1999 concerning Arbitration and Alternative Dispute Resolution in article 6 paragraph (1) explains that in essence, civil dispute resolution has another way, namely alternative dispute resolution based on good faith.

Arbitration, categorized as Alternative Dispute Resolution (ADR), emerges as a viable option for addressing international Memorandum of Understanding (MoU) disputes, exemplified by the 1974 MoU Box involving Indonesia and Australia. The United Nations Convention on the Law of the Sea (UNCLOS) delineates the arbitration procedure for alternative dispute resolution, employing a self-determination approach by arbitrators. [14]

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[11] Afifah Kusumadara, "Pemakaian Hukum Asing Dalam Hukum Perdata Internasional: Kewajiban Dan Pelaksanaannya Di Pengadilan Indonesia," *Arena Hukum* 15, no. 3 (2022): 443–70, https://doi.org/10.21776/ub.arenahukum.2022.01503.1.

[12] H. Salim HS, H. Abdullah, and Wiwiek Wahyuningsih, *Perancangan Kontrak Dan Memorandum of Understanding (MoU)*, ed. Ade Hairul Rachman (Jakarta: Sinar Grafika, 2017).

[13] Risa Restiyanda, "Penyelesaian Sengketa Dagang Internasional Melalui Mediasi Sebagai Alternatif Penyelesaian Sengketa Pada Pemilihan Hukum Dan Forum Kontrak Dagang Internasional," *Aktualita (Jurnal Hukum)* 3, no. 1 (2020): 130–46, https://doi.org/10.29313/aktualita.v0i0.5689.

[14] Ana Fatmawati and Elsa Aprina, "Keabsahan Alasan Penolakan Republik Rakyat Tiongkok Terhadap Putusan Permanent Court Arbitration Atas Sengketa Klaim Wilayah Laut Cina Selatan Antara Philipina Dan Republik Rakyat Tiongkok Berdasarkan Hukum Internasional," *Veritas et Justitia* 5, no. 1 (2019): 105–29, https://doi.org/10.25123/vej.3289.

In the application of treaty dispute resolution through international arbitration, three fundamental principles necessitate consideration: the Principle of Nationality, the Principle of Reciprocity, and limitations on foreign arbitral awards. The Principle of Nationality underscores the importance of national legal considerations in determining the eligibility of a judgment to be classified as foreign. Reciprocity, as a guiding principle, dictates that not all international arbitration awards can be automatically recognized and executed. To achieve recognition and execution, the state must maintain a reciprocal relationship with the country where the award was granted. Furthermore, the limitation on foreign arbitral awards dictates that the acknowledgment and execution of an international arbitral award may be permitted only if the award originates from a country with bilateral ties to the enforcing state. These principles collectively shape the framework for utilizing international arbitration as a method for resolving MoU disputes on an international scale. [15]

Moreover, the protracted dispute concerning the ownership of Pasir Island could find resolution through recourse to the International Court of Justice. Previous negotiations between the two countries have failed to yield an agreement to address the persistent issues. This situation mirrors past disputes, such as the Sipadan and Ligitan Island disagreements between Malaysia and Indonesia, where Malaysia emerged victorious. The outcome was influenced by compelling evidence, including effective occupation demonstrated through administrative processes, conservation endeavors, and protective measures, underscoring the robust legal position of Malaysia.[16]

Concerning the dispute surrounding the 1974 MoU Box between Indonesia and Australia, it is noteworthy that the Australian government does not outright prohibit Indonesian fishermen from engaging in activities such as fishing, as long as they adhere to the terms agreed upon in the agreement. The formation of the 1974 MoU Box was mandated by Article 51 of the United Nations Convention on the Law of the Sea (UNCLOS), which addresses the recognition of traditional fishing rights for archipelagic countries sharing direct borders with others. However, these recognitions are contingent upon negotiations between the concerned countries. [17]

It is crucial to highlight that Indonesia has consistently maintained a stance of non-recognition of the ownership of Pulau Pasir/Ashmore Reef, considering it as part of Australian territory inherited from the United Kingdom, as affirmed in the

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[15] Didi Jubaidi, "Alternatif Penyelesaian Sengketa Internasional (Analisis Kasus Pertamina vs Karaha Bodas Company (KBC) Dan PT Newmont Nusa Tenggara," *Global Insight Journal* 8, no. 2 (2023): 82–103.

[16] Jaka Bangkit Sanjaya, "Analisis Mengenai Kesepakatan Negara Indonesia Dalam Memutusakan Penyelesaian Kasus Sipadan Dan Ligitan Melalui Mahkamah Internasional," *Jurnal Analisis Hukum (JAH)* 4, no. 1 (2021): 98–119.

[17] Ratna Indrawasih and Ary Wahyono, "Kerja Sama Bilateral Dalam Kerangka Penyelesaian Masalah Nelayan Pelintas Bat As Perairan Indonesia-Australia," *Jurnal Kependudukan Indonesia* V, no. 2 (2010): 53–72.

1957 Djuanda Declaration. Australian government arrests of Indonesian fishermen are based on clear reasons, primarily stemming from violations such as the use of inappropriate fishing gear like tiger trawls that can harm the marine ecosystem, and the operation of motorized vessels not in compliance with the terms outlined in the 1974 MoU Box. [18]

In this context, the lack of awareness among fishermen regarding the existence of the 1974 MoU Box and subsequent agreements, such as the 1989 Agreed Protocol, is attributed to inadequate government socialization of the boundary agreement. Additionally, the absence of clear sea boundaries for operational areas available to Indonesian fishermen further complicates the matter. [19]

D. Conclusion

Finally, this study highlighted and concluded that in Indonesia, there exist two contrasting perspectives regarding the legal standing of Memoranda of Understanding (MoUs). The first viewpoint, characterized as the Gentlemen Agreement, posits that the legal force of MoUs cannot be equated with general agreements, even when drafted in their most robust form. Conversely, the "*Agreement is Agreement*" stance asserts that the MoU holds equivalent legal force to any other agreement, citing Article 1338(1) of the Civil Code, which recognizes the automatic legal binding nature arising from the parties' mutual agreement. In addition, Australia, operating under the common law system, adopts a perspective that initially views MoUs as lacking inherent legal bindingness, considering them merely as a prelude to core agreements during negotiations. However, an MoU can acquire binding and coercive legal force akin to a standard agreement if it adheres to the six essential elements outlined in Australian Contract Law. To mitigate prolonged disputes, such as the 1974 MoU Box, it is imperative for both countries to incorporate legal settlements in the MoU formulation process. This approach ensures clarity and minimizes the likelihood of misunderstandings.

In the context of international treaty dispute resolution, employing Private International Law becomes crucial. Identifying primary and secondary link points, as stipulated by Article 6(1) of Law No. 30 of 1999 concerning Arbitration and Alternative Dispute Resolution, provides a mechanism to address disputes in good faith. Additionally, disputes may be resolved through international bodies like the International Court of Justice, as exemplified by cases such as Sipadan and Ligitan, should the 1974 MoU Box dispute persist. To manage the ongoing dispute

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[18] Kristoforus Emanuel Kake, Hendrik Saputra Doko, and Theresia Yovita Putri Lengari, "Upaya Pemerintahan Indonesia Dan Australia Dalam Penyelesaian Masalah Pemanfaatan Sumber Daya Laut Di Pulau Pasir Ditinjau Dari Hukum Laut Internasional," *Journal of Law and Nation* 2, no. 3 (2023): 232–41.

[19] Akhmad Fadli Rakhmat Ilahi and Safaruddin Harefa, "Case Study of the Timor Sea Sand Island Dispute between Australia and Indonesia" 2, no. 01 (2023): 49–57, https://doi.org/10.58812/shh.v2i01.

effectively, the Indonesian government can engage in proactive measures, such as socializing the terms of the 1974 MoU Box and subsequent agreements with local fishermen around Pasir Island. This proactive approach aims to prevent misunderstandings that could lead to the unwarranted arrest of Indonesian fishermen in the waters surrounding Pasir Island.

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