



# Guidelines for Understanding, Drafting, and Negotiating a Memorandum of Understanding

**Canada**

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## **Guidelines for Understanding, Drafting, and Negotiating a Memorandum of Understanding**

*Prepared by Bahar & Partners*

Bahar & Partners is a law firm located in Jakarta focused on providing legal services in various fields of corporate and business law.

### **About the TPSA Project**

TPSA is a five-year C\$12-million project funded by the Government of Canada through Global Affairs Canada. The project is executed by The Conference Board of Canada, and the primary implementation partner is the Directorate General for National Export Development, Ministry of Trade.

TPSA is designed to provide training, research, and technical assistance to Indonesian government agencies, the private sector—particularly small and medium-sized enterprises (SMEs)—academics, and civil society organizations on trade-related information, trade policy analysis, regulatory reforms, and trade and investment promotion by Canadian, Indonesian, and other experts from public and private organizations.

The overall objective of TPSA is to support higher sustainable economic growth and reduce poverty in Indonesia through increased trade and trade-enabling investment between Indonesia and Canada. TPSA is intended to increase sustainable and gender-responsive trade and investment opportunities, particularly for Indonesian SMEs, and to increase the use of trade and investment analysis by Indonesian stakeholders for expanded trade and investment partnerships between Indonesia and Canada.

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# Understanding an MoU

A memorandum of understanding (MoU) in Bahasa Indonesia is called a *nota kesepahaman* or *nota kesepakatan*. According to *Black's Law Dictionary*, an MoU is a document that outlines the mutual agreement between two or more parties on a particular issue. The same source defines an MoU as follows:

A written statement detailing the preliminary understanding of parties who plan to enter into a contract or some other agreement; a noncommittal writing prior to a contract. A letter of intent is not meant to be binding and does not hinder the parties from bargaining with a third party. Business people typically mean not to be bound by a letter of intent, and courts ordinarily do not enforce one, but courts occasionally find that a commitment has been made.<sup>1</sup>

Munir Fuady defines an MoU as a preliminary agreement that covers general provisions, but requires another specific and detailed agreement to stipulate its content further.<sup>2</sup> Erman Radjagukguk defines an MoU as a document that reflects a meeting of minds or understanding from both parties before the formal and binding contract is drafted.<sup>3</sup> The MoU can subsequently be contained within the intended contract to bind both parties.

An MoU is used at the pre-contract stage and is usually drafted after two or more parties first come together to negotiate—it signals that the parties have achieved some level of mutual understanding. It is a basis on which to then negotiate a contract and it serves as an intention to establish a legal relationship in the future. An MoU also builds a working relationship by setting a commitment between or among the parties.

An MoU may be drawn up between a government and another government (G to G), between a business and another business (B to B), or between a government and a business (G to B). An example of a full MoU between a government and another government can be found in Appendix A.

In practice, an MoU is sometimes confused with a joint statement—in fact, they are different documents. An MoU is a legal document that contains an understanding between parties to realize mutual goals, while a joint statement is a preliminary communication between parties to express their business interests and expectations. An MoU is broader than a joint statement; for example, an MoU may cover dispute settlement, which makes it a stronger legal binding document than a joint statement.

Although there are no specific regulations that regulate the minimum length of an MoU, it is beneficial for the parties to have enough detail included in the MoU to clearly express each party's business interests, expectations, and implementations. In addition, an MoU should be able to lead parties to a further, more definitive agreement and cover matters such as dispute settlement and financial arrangements. In practice, a one-page MoU is not able to provide such detailed content and could possibly lead to a misunderstanding between the parties and hamper the implementation of a further agreement.

An MoU should be made in good faith by all parties and should not be used as a tool for suing another party. However, the terms of dispute settlement should be stated clearly in the MoU. For example, parties can decide that they will settle a dispute amicably or through international arbitration.

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<sup>1</sup> Black's Law Dictionary, 9th ed., s.v. "Memorandum of Understanding."

<sup>2</sup> Munir Fuady, *Hukum Bisnis* (Bandung: PT Citra Aditya Bakti, 2002), 90.

<sup>3</sup> Erman Radjagukguk, *Kontrak Dagang* (Jakarta: Universitas Indonesia, 1994), 4.



An MoU needs to be acted on by all parties in order to realize the goals outlined in the document. As such, all parties must ensure the following:

- keep the momentum going
  - Shortly after the signing of an MoU, it is critical to keep the momentum going. This means making sure the project begins and working to ensure that there is a commitment, both internally and externally, to achieving the goals expressed in the MoU.
- maintain communication
  - Communication is the key to realizing the goals of the MoU. Parties need to maintain good and frequent communication to ensure that everyone still has a commitment to the goals and that the project is on track.
- prepare and agree to an action plan
  - An action plan lets parties know what to expect and when certain milestones can be expected to happen. All parties should agree to follow the action plan.





# Drafting an MoU

## Identify Your Internal Objective

Before negotiating with a counterpart to draft an MoU, you must be prepared and clear about your internal objective. A helpful way to identify your objective is to ask yourself the following five W questions (what, why, who, where, and when) and one H question (how).

1. What?
  - What do you want to achieve (goal, purpose, or objective)?
  - What kind of cooperation would you like to have with your counterpart?
  - What could you offer to your counterpart and what do you expect in return?
2. Why?
  - Why would you cooperate with a particular counterpart? Are there other suitable counterparts you should consider?
3. Who?
  - Who is your counterpart? It is important to conduct a thorough background check to ensure that the counterpart's practices are in line with your objective.
  - Who will be on your team? It is most efficient and effective if the same team members are on the project from inception to completion.
  - Who will support you and who will support your counterpart? Knowing the associations, private sector organizations, or government departments that will support your project is critical.
4. Where?
  - Where would you like your project to have an impact?
  - Where will the project have an impact on your counterpart's market?
5. When?
  - When would you like the project to start?
  - Is there any time limit for your project?
6. How?
  - How are you and your counterpart going to make this project happen (implementation)?
  - How are you dealing with your counterpart on certain issues?
  - How are you going to arrange other aspects, such as financing, regulation, and market access?

## Use Clear and Understandable Language

The MoU should be well-written, clear, and unambiguous. Some helpful "do's and don'ts" in writing a clear and understandable MoU, which are also applicable to any contract or agreement, are presented in Table 1.





**Table 1**

**THE DO'S AND DON'TS OF WRITING AN MOU**

Do	Don't
Write in an easily readable format: A) font—the most commonly used fonts are (i) Times New Roman, (ii) Arial, and (iii) Tahoma B) size—at least 12-point font (consistently) C) line spacing—at least 1.15 (consistently) D) colour—black	Use a font that is difficult to read with inconsistent size and line spacing.
Use simple and appropriate wording (commonly used worldwide).	Use jargon (unless needed to point to and describe specific technical matters).
Use active rather than passive sentences (e.g., active: Company A will write the report; passive: The report will be written by Company A).	Use too many passive sentences.
If required to use a foreign-language word or term, make sure that it is typed correctly and italicized.	Use unnecessary foreign language.

Source: Bahar and Partners.

Simple and appropriate wording and sentences build a clear understanding between parties. Unclear, complicated, or fuzzy sentences can lead to misunderstandings that can result in future conflicts.

## Establish a Structure and Organize the Content

The contents of an MoU may vary depending on the specific situation. Some of the following elements may not be needed, other elements may be required, and the ordering of the elements may change. However, the general contents used worldwide in MoUs are as follows:

1. title
2. opening paragraph
3. substance
4. confidentiality
5. amendments
6. counterparts
7. dispute settlements
8. channel of communication and notices
9. period/timing
10. financial arrangements
11. exclusivity
12. intellectual property rights (IPR)
13. action plan/work program
14. signature







## 1. Title

Both parties will determine the title and include information regarding their identity and intentions. The logo of first party is placed on the left-hand side and that of the other party on the right-hand side.

### EXAMPLE A: GOVERNMENT TO GOVERNMENT (G TO G)

(Logo)  
Ministry of Trade  
of the Republic of Indonesia

(Logo)  
Ministry of Foreign Affairs  
of the Netherlands

Memorandum of Understanding  
Between  
The Directorate General of National Export Development of the Ministry of Trade of the  
Republic of Indonesia  
and  
The Centre for the Promotion of Imports From Developing Countries of the Netherlands Ministry of  
Foreign Affairs

### EXAMPLE B: GOVERNMENT TO BUSINESS (G TO B)

(Logo)  
Ministry of Trade  
of the Republic of Indonesia

(Logo)  
Company XYZ

Memorandum of Understanding  
Between  
The Directorate General of National Export Development of the Ministry of Trade of the  
Republic of Indonesia  
and  
Company XYZ  
on Textile Export Development

### EXAMPLE C: BUSINESS TO BUSINESS (B TO B)

(Logo)  
Company ABC

(Logo)  
Company XYZ

Memorandum of Understanding  
Between  
Company ABC  
and  
Company XYZ  
on Exchange of Professional Staff

## 2. Opening Paragraph

The opening paragraph consists of (i) date, month, year, and signing location of MoU, (ii) position or authority of both parties, which describes the authority to each on behalf of the represented entity or country, and (iii) a brief description of the background and reason for establishing the MoU.



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### EXAMPLE A: GOVERNMENT TO BUSINESS (G TO B)

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This Memorandum of Understanding dated July 19, 2012, sets forth the basic understandings between:

the **Government of Indonesia** (the **Government**), represented by the minister of trade, with offices at M. I. Ridwan Rais Road, No. 5, Jakarta Pusat 10110, Indonesia

and

**Company ABC** (the **Company**), an independent company located in Japan, with offices at (insert address), represented by (insert job title), (insert name).

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### EXAMPLE B: BUSINESS TO BUSINESS (B TO B)

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This Memorandum of Understanding, dated July 19, 2012, sets forth the basic understandings between:

**Company ABC (ABC)**, an independent company located in Japan, with offices at (insert address), represented by (insert job title), (insert name)

and

Company XYZ (**XYZ**), a public company located in Indonesia, with offices at (insert address), represented by (insert job title), (insert name).

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### 3. Substance

The main body of the MoU should include i) the goal, purpose, or objective, ii) scope and coverage details, and iii) implementation.

#### i) *Goal/purpose/objective*

Examples:

- This memorandum of understanding will serve as a framework to facilitate cooperation in the field of export development for Indonesia and establish the working arrangements necessary to implement this memorandum of understanding.
- Any cooperation established is aimed at enhancing Indonesian export competitiveness in a certain field with a priority target of small and medium-sized enterprises (SMEs) in order to be able to compete in other third-country markets.
- This memorandum of understanding aims to increase the value of trade and competitiveness in a certain field.

#### ii) *Scope and coverage*

Examples:

- support Indonesian export promotion activities.
- conduct market and product development activities intended to support export development, especially in the Canadian market for Indonesian exporters.
- Party A will provide information in the field of export development and other trade-related opportunities for Indonesian exporters.
- Party A will conduct capacity-building for DGNED's personnel and Indonesian exporters in the field of export development.
- Party B will conduct promotion through business-matching events and exhibitions by identifying potential products, buyers, and market trends.



### iii) Implementation

#### Examples:

- Party A will conduct capacity-building programs for Party B personnel and SMEs in the form of training courses, seminars, workshops, coaching, advice, and other activities based on the needs and capabilities of the parties.
- The parties will exchange information on business opportunities and investment that includes products and services inquiries, international government procurement, lists of importers and company profiles, the organization of international fairs and exhibitions, fair catalogues and other related materials for fairs and exhibitions, surveys, and other publications to the extent possible, to be carried out in a paperless method unless either party prefers regular mail or facsimile.
- Party A supports Party B's trade missions and trade fairs held in both countries, encourages potential buyers from Party A, and organizes buying missions to visit Party B for the purpose of sourcing Indonesian products and/or services."

In addition, the parties may opt to include one or more of the following elements in the implementation and/or action plan where applicable:

- product design information
- market intelligence for sellers, including target buyer and market aspects
- entry requirements
- market access information
- transfer of knowledge
- advertising channels (conventional and digital)
- exchange of databases
- trade fairs (in Indonesia and abroad)
- virtual trade fairs and trading houses
- technology in programs (apps)
- lead management (international and sub-national)
- connecting private sector associations
- identifying key sector contracts
- selling missions
- trade facilitation (visiting the Indonesian exporters)
- national branding for trade
- setting up a help desk for the domestic and Indonesian trade representative office
- setting up more trading houses
- ministerial responsibility (to declare each other's responsibility)

Example: "The Minister of Commerce of Country A and the Minister for Financial Services, Corporate Law, and Superannuation of the Commonwealth of Country B will have responsibility on behalf of their respective governments for the implementation of this memorandum of understanding."

- report back to ministers

Example: "Officials will report every six months to their respective ministers responsible for the memorandum on progress of the work highlighted for action in Annex I: Work Program."

- evaluation of the MoU

Example: "The governments will evaluate this MoU 6 (six) months from the date of its signature, and every 6 (six) months following that date."

## 4. Confidentiality

Example: "In order to undertake and carry out the matters set out in this MoU, the parties have requested and will request of each other, and have provided and will provide to each other, certain non-public, confidential, and/or proprietary information (the information), which will be





exchanged between them in good faith in so far as the material is available to or obtainable by the party concerned and not subject to confidentiality obligations toward third parties.

The parties agree that neither party will, without the prior written consent of the other party, disclose to any third party or the public any information or materials related to the other party or this MoU during its execution or performance."

## 5. Amendments

Example: "This memorandum of understanding may be amended as and when necessary by mutual written consent of the parties. Any amendment agreed to by the parties will form, without prejudice to any rights and obligations accruing or incurred under this memorandum of understanding, an integral part of this memorandum of understanding. Such amendment will come into force on such a date as may be determined by the parties."

## 6. Counterparts

Example: "This memorandum of understanding may be executed in one or more original copies, each of which will be deemed to be an original copy of this memorandum of understanding."

Parties may also include a language provision, particularly for counterparts that speak a non-English language. For example, if Indonesia would like to sign an MoU with Japan, then the MoU should be made in 3 (three) languages: (i) Bahasa Indonesia, (ii) Japanese, and (iii) English. Each party should have a copy of the MoU in those three languages. In case of divergence of interpretation in the MoU, unless otherwise agreed, the English text will prevail.

## 7. Dispute Settlement

Example: "Any difference or dispute between the parties concerning the interpretation, implementation, and/or application of this memorandum of understanding will be settled amicably (or through diplomatic channels)."

Example: "Any dispute arising in connection with this memorandum of understanding that cannot be amicably settled between the parties will, upon the request of any of them, be referred to and finally resolved by arbitration (to be decided by the parties)."

Parties may opt to settle a dispute through arbitration. The following are examples of dispute settlement through arbitration in Indonesia and foreign arbitration.





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## EXAMPLE A: BADAN ARBITRASE NASIONAL INDONESIA (BANI)

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**Arbitration forum:** Any and all disputes, controversies, or conflicts arising from or in relation to this agreement, including disputes on its validity, conclusion, binding effect, breach, amendment, expiration, and termination (collectively, **disputes**), will, as far as possible, be settled amicably by the parties. If such disputes cannot be settled amicably within 30 (thirty) days from the date that any party informs the other parties that any such dispute arises, then the parties agree that such disputes will be finally settled through arbitration. The arbitration will be conducted in Jakarta (**Jakarta Arbitration**), in Bahasa Indonesia, and in accordance with the rules and procedures of Badan Arbitrase Nasional Indonesia (**BANI Rules**), and each party unconditionally and irrevocably subjects itself to the non-exclusive jurisdiction of such arbitration forum. Both parties agree that any award ruled by the arbitrator will be final, binding, and conclusive of the disputes, and the parties agree to procure all efforts to ensure that such award is enforced.

**Arbitration tribunal:** The arbitration tribunal will consist of 3 (three) arbitrators. Both the claimant and the respondent will appoint one arbitrator within 30 (thirty) calendar days from the date Jakarta Arbitration notifies each party to do so. The two appointed arbitrators will have 30 (thirty) calendar days from the confirmation of their nomination to agree on the nomination of a third arbitrator who will serve as chairman of the arbitration tribunal.

**Arbitration award:** The award made and granted by the arbitration tribunal will be final, binding, and incontestable and may be used as a basis for judgment thereon in Indonesia or elsewhere. The arbitration tribunal will be entitled in its decision to determine the payment of costs and expenses of the arbitration tribunal, administrative costs of the arbitration, legal fees incurred by the parties, and all other costs and expenses necessarily incurred in order to properly settle the dispute.

**Appeal:** The parties agree that there will be no appeal to any court or other authority against the decision of the arbitration tribunal and the parties will not dispute nor question the validity of such award before any judicial or other authority, especially with regard to any enforcement action taken by the party in whose favour the award was rendered. The arbitration tribunal must state the reasons for its decision in writing and will be bound by strict rules of law in making its decision; it will not be entitled to render a decision *ex aequo et bono*.

**Court action:** No party will be entitled to commence any action in a court of law on any matter in dispute arising from or in relation to this agreement, except for the enforcement of an arbitral award granted pursuant to this Article 11 of the agreement.

**Waiver:** The parties hereby irrevocably waive the applicability of articles 48(1) and 73(b) of Law Number 30 of 1999 on Arbitration and Alternative Dispute Resolution so that the mandate of an arbitration tribunal, duly constituted in accordance with the terms of this agreement, will remain in effect until a final arbitration award has been issued by such arbitration tribunal.

**Procedures for arbitral proceedings:** To avoid any doubt, the parties acknowledge that any dispute regarding the procedures of an arbitral proceeding under this Article will be determined in accordance with the laws of the venue of the arbitral proceeding.

**Continued performance:** During arbitration, and thereafter until the granting of the arbitral award, the parties will, except in the event of expiration or termination of the agreement, continue to perform all their respective obligations under this agreement without prejudice to a final adjustment in accordance with such award.

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## EXAMPLE B: SINGAPORE INTERNATIONAL ARBITRATION CENTRE (SIAC)

Any dispute, controversy, or difference arising among the parties out of, or in relation to, this agreement or relating to the breach thereof (**dispute**) will be settled amicably by the parties within 30 (thirty) days after a party notifies another party of such a dispute. However, if the dispute cannot be settled amicably within such time period, it will be referred to and finally resolved by arbitration, conducted in the English language in Singapore under the SIAC.

The award rendered by the arbitrators under this clause will be final and binding on the parties and will be enforceable in any court of competent jurisdiction. Each party hereby renounces any right it may otherwise have to appeal or seek relief from the award or any decision of the arbitrators contained therein and agrees that, in accordance with Article 60 of the Arbitration Law, no party will appeal to any court from the award or decision of the arbitrators contained therein.

The parties agree that none of the parties will be allowed to commence or maintain any action in any court of law with respect to any dispute, except for the enforcement of arbitral award granted pursuant to this clause.

Subject to the award of the arbitrators, the costs and expenses incurred in connection with any dispute referred to arbitration under this agreement will be borne by the party against whom such an award is made.

Each of the parties waives the applicability of Article 48(1) of the Arbitration Law and agrees that an arbitration need not be completed within a specific time.

Each party unconditionally and irrevocably agrees to submit to the non-exclusive jurisdiction of the District Court of Central Jakarta for proceedings arising out of or relating to the enforcement of any award or decision of the arbitrators duly appointed under this agreement. Each party unconditionally and irrevocably waives any objections that they may have now or in the future to such jurisdiction including, without limitation, objections by reason of lack of personal jurisdiction, improper venue, or inconvenient forum.

## 8. Channel of Communication and Notices

Example:

All notices or communications to be given in accordance with this MoU will be written in Bahasa Indonesia (and/or English, as agreed by the parties) and unless otherwise stipulated, will be conducted through facsimile, letters, or e-mail.

All notices or communications given in accordance with this agreement will be addressed to:

For the Government of Indonesia, the focal point is The Ministry of Trade

[Address]

Phone: \_\_\_\_\_

Facsimile: \_\_\_\_\_

Attention: \_\_\_\_\_

For Company XYZ, the focal point is the Chief Executive Officer

[Address]

Phone: \_\_\_\_\_

Facsimile: \_\_\_\_\_





To change information in the MoU, the other party must be notified within 5 (five) business days.

Any notice or other communication given under this agreement will be deemed to have been received:

- A) in the case of a notice transmitted by facsimile, with a confirmed receipt of transmission from the sender's machine stating that it was sent in full and without error on the day that it was transmitted;
- B) in case of a notice delivered by hand, on the day of actual delivery;
- C) in case of a notice delivered by mail, on the second (2nd) business day or, in the case of airmail, the fifth (5th) business day following the day that it was dispatched by first-class mail, postage prepaid, or airmail, postage prepaid, as the case may be;
- D) in case of a notice transmitted by e-mail, with a returned confirmation report stating that the recipient received the e-mail on the day that it was transmitted.

Provided that a notice given in accordance with the above but received on a day that is not a business day, or received after normal business hours at the place of the recipient, will be deemed to have been received on the next business day, provided further that a change of address notice of a party will be effective only upon actual receipt.

### 9. Period/Timing

Example: "The actions by the parties will begin immediately following the signing of this MoU and will be pursued to substantial completion as soon as reasonably feasible.

The MoU will enter into force on the date of signing by both parties. Each party may, by giving no less than 3 (three) months prior written notice to the other party, terminate this MoU.

The termination of this memorandum of understanding will not affect the implementation of ongoing programs, or programs that have been agreed upon prior to the date of termination."

### 10. Financial Arrangements

Financial arrangement may vary for each party depending on their budgetary policy. However, in order to attain outcomes, all parties should provide as much financial support as possible in accordance with their budgetary policy.

Example: "The parties will, to the extent feasible and taking into account the budgetary, financial, and human resource constraints, make available the services of their staff for the programs and projects undertaken pursuant to this MoU.

Expenses relating to, or arising from, activities undertaken pursuant to this MoU will be borne by each party or parties with respect to their availability of resources and prevailing national laws and regulations with detailed arrangements as follows:

- Expenses arising from the implementation of activities will be borne by Party A;
- Transportation and per diem expenses of any relevant personnel arising from the implementation of activities will be borne by each party."

### 11. Exclusivity (Usually for B to B)

Example: "It is understood that Party A will continue to spend significant time and utilize significant resources, both internal and external, to complete a careful and full review of the feasibility of the project as a whole and other aspects of the project during the term of this MoU. In consideration of this and consistent with the aims and undertakings expressed in this MoU, the



parties agree that they will not initiate or engage in any similar discussions or cooperation on the project with any other party during the term of this MoU without the prior written consent of the other party."

## 12. Intellectual Property Rights (IPR)

Example: "The Parties agree that any IPR resulting from any research and development activities carried out by the parties pursuant to this memorandum of understanding will be protected by the parties in conformity with their respective national laws and regulations. Each party will consult each other on IPR issues that may arise in connection with those aforementioned activities."

## 13. Action Plan/Work Program

The action plan or work program is usually contained in an appendix and based on the mutually determined outcomes and other coordination initiatives that the parties are seeking to achieve and have jointly determined should be the focus of the business law coordination program. Parties may decide to place the action plan/work program in one of the clauses in the MoU or in the attachment.

Further, parties may determine the short- and medium-term period for project implementation with detailed activities.

### EXAMPLE: SHORT- AND MEDIUM-TERM ACTION PLAN/WORK PROGRAM

Short Term (2 years)	Medium Term (4 years)
<ul style="list-style-type: none"><li>• build a working group concentrating on implementing the MoU</li><li>• exchange information regarding market, customer, and others</li><li>• harmonize consumer product labelling</li></ul>	<ul style="list-style-type: none"><li>• dispatch necessary experts to support program development</li><li>• establish a database on exporters and importers for certain fields</li><li>• establish one application process for patents in both jurisdictions</li></ul>

## 14. Signature

As a closing section of the MoU, both parties must sign the document and their names must be written clearly. Commonly, the first party is placed on the left-hand side and the second party on the right-hand side. If available, a documentary stamp duty of IDR6,000 also needs to be provided. If not, you may need to have it stamped at the Indonesian post office as soon as possible after the MoU is signed.





# Negotiating an MoU

Negotiation is a dialogue between two or more people or parties intended to reach a beneficial outcome. Negotiation is also a bargaining process with its own aims, needs, and viewpoints. A negotiation seeks to discover a common ground, reach an agreement, settle a matter of mutual concern, or resolve a conflict.

Negotiation is important, as it enables you to understand your counterpart's viewpoints and needs, address each other's situations, understand how to settle a disagreement, set goals and outline a process on how to achieve those goals together, come to an agreement between parties, and come to a win-win solution for all parties.

In practice, the negotiation process is generally divided into three stages:

1. Before you get in the room to start the negotiation.
2. When you are in the room and starting the negotiation.
3. When you are out of the room (post-negotiation).

Communication is the key in any negotiation. Current advanced technology enables people around the world to communicate any time and anywhere through telephone, video conference, and e-mail. However, when it comes to negotiation, parties should communicate directly (face to face) to better understand each other and avoid misunderstandings. Hence, parties should try to avoid communicating through e-mail in order to mitigate misunderstanding and misinterpretation.

## Before Entering the Negotiating Room

*The best negotiator is the most prepared one.*

### 1. Develop Assumptions With Empowered Expectations

Before you start the negotiation, make sure you are well-prepared. Conduct research and a background check on your counterpart. Studying their culture may help you understand their point of view, since each country has its own behaviour in negotiating. It is also important to develop assumptions on how the negotiation will go. In case the negotiation does not go as planned, the assumptions can prepare you to act effectively in different situations. In addition, you should also be flexible in shifting your assumptions about your counterpart and how the negotiation will proceed.

### 2. Prepare the Substance (Term Sheet)

The next step is to prepare the substance (term sheet) to better understand your counterpart's interests, brainstorm options, research standards, and consider alternatives. Reserve time to prepare and brainstorm with your team so you will be able to identify shared interests between you and your counterpart and produce a list of options to further expand all parties' interests. Moreover, conduct background research on standards that might be relevant for your business. You could start from your country's standards first, then combine those with your counterpart's standards, or adopt new standards that all parties would apply in the MoU. In addition, preparing alternatives might be useful to avoid deadlock in the negotiation, as you would have options to overcome obstacles.





### 3. Prepare the Process

Preparing the process means you have to plan how to work and communicate with the other party. You should have a key person on the other party to contact and follow up with. Next, you have to identify milestones:

- On the first meeting, you are aiming to have an understanding and agreement on the core issues.
- On the second meeting, you are aiming to have a framework for the agreement.
- On the third meeting, you are aiming to have implementations and action plans set up.

### 4. Connect in Advance

The last preparatory task to do before you enter the negotiating room is to connect in advance with your counterpart. Your journey ahead will not be smooth if you cannot. Make sure you agree on the process (milestones) and who is involved in the business (e.g., identify key players, such as the Ministry of Trade, certain associations, or experts).

## In the Negotiating Room

*Power comes from negotiating with discipline.*

### 1. Begin the Negotiation

Start the negotiation carefully and make a good first impression. You should be able to establish effective communication and make your messages clear. Ask questions accordingly and listen carefully to the answers; make notes and try to identify your counterpart's concerns. Negotiation does not mean a war where you should always push yourself and try to defeat your counterpart. In fact, negotiation should be a process in which you build a good working relationship with your counterpart. It is crucial to be able to draw out your interests, as well as identify their interests. Use your prepared substance wisely to generate options and alternatives. Be effective and efficient, do not waste time on unworkable options and practices, and focus on workable solutions to select the right outcome that all parties can agree on. However, in some cases negotiations do not go as expected. In those cases, you need to be flexible and prepared to change course while continuously adapting your approach.

There are always challenges while negotiating. Tips for overcoming the most common challenges are discussed below.

**Align multiple parties:** With many parties, negotiations can seem to be complicated due to too many people involved. Be able to avoid inefficiency and chaos—make it clear who decides and assign each person a role for each decision.

**Tame the hard bargainer:** You may face a hard bargainer who does not want to share your interests. When this happens, stay calm and adopt a disciplined approach so you can systematically and strategically decide how to move forward. You might also want to shift the conversation to a more neutral one while staying flexible and adaptive to such situations.

**Build understanding when communication breaks down:** When communication breaks down, you need to position yourself carefully. Try to build understanding by asking your counterpart for their reasoning and attempt to share similar experiences. Try not to give up or leave the room; make every attempt to proceed with the negotiation. If necessary, take a day off to neutralize the situation.



Keep emotions in check: When the negotiation starts to heat up, do not let your emotions get in the way and put your business at risk. Try to stay calm, listen to what your counterpart is saying, find out more about their issues, understand the triggers, and try to provide a solution.

## Post-Negotiation

*Careful review drives learning and improvement.*

When the negotiation comes to an end, wrap it up effectively by communicating and stating the final decision on the matters that have been discussed and agreed to by all parties. Do not forget to always take notes and document your terms with your team. After that, review what happened during the negotiation—use “lessons learned” for improvement in the future. You and your team should determine what worked well and what could be improved. Do not forget to capture what you have learned and share it with other departments. Keep aiming for continuous improvement.





# Last Thoughts

An MoU is a written statement reflecting an understanding between parties with commitments and/or planning to enter into a contract or other agreement to realize certain goals/purposes/objectives as discussed and agreed in the negotiations. Further, parties have to keep the momentum and be active in following up on the MoU.

There is no certain law or regulation that regulates the making of an MoU; however, based on best practices, an MoU should be prepared with the appropriate format and contents. Such contents should at least include the goals/purposes/objectives, scope and coverage, implementation, action plans, period/timing, and other necessary aspects as agreed by all parties, with the aim of realizing those goals/purposes/objectives within a specific period.

Prior to drafting an MoU, parties should be well-prepared with their own expectations for negotiation. Such requirements should be communicated clearly to all parties. Hence, communication is the key to negotiation, as good communication will deliver clear messages, develop understanding between parties, and produce beneficial outcomes (win-win solutions) for all parties.



# Appendix A: MoU Example



(Logo)

Ministry of Trade  
of the Republic of Indonesia

(Logo)

The Trade Facilitation Office of Country X

## Memorandum of Understanding

Between

The Directorate General of National Export Development of the Ministry of  
Trade of the Republic of Indonesia

and

The Trade Facilitation Office of Country X  
on Textile and Textile Products Export Development

This Memorandum of Understanding ("**MoU**") dated November 3, 2016, sets forth the basic understandings between:

The Directorate General of National Export Development of the Ministry of Trade of the Republic of Indonesia ("**MoT Indonesia**"), represented by the Director General, with offices at M. I. Ridwan Rais Road, No. 5, Jakarta Pusat 10110, Indonesia

and

The Trade Facilitation Office of Country X ("**TFO Country X**"), represented by the Executive Director, with office at (insert address).

Hereinafter both referred to as the "parties."

### ARTICLE 1 OBJECTIVES

1. This MoU will serve as a framework to facilitate cooperation in the field of textile and textile products export development activities for Indonesia and establish a working arrangement necessary for the implementation of this MoU;
2. The parties are committed to encouraging more cooperation between Indonesia and Country X to develop policy in each country that ensures opportunities for deeper textile and textile products business integration and maximizes commercial benefits;
3. The parties are committed to maintaining alignment in areas where coordination, particularly in textile and textile products business, has already occurred;



4. The parties are committed to increasing the value of trade and competitiveness in the textile and textile products field.

## ARTICLE 2

### SCOPE AND COVERAGE

1. Support Indonesian textile and textile products export promotion activities;
2. Conduct market and product development activities to support export development;
3. Provide information on textile and textile products export development and other trade-related opportunities for Indonesian exporters;
4. Conduct capacity-building for the personnel of MoT Indonesia and Indonesian exporters in the field of textile and textile products export development;
5. Conduct promotion through business-matching events and exhibitions;
6. Identify potential products, buyers, and market trends of textile and textile products.

## ARTICLE 3

### IMPLEMENTATION

The parties will exchange information on textile and textile products business opportunities and investments that include products and services inquiries, lists of importers and company profiles, the organization of international fairs and exhibitions, fair catalogues and other related materials for fairs and exhibitions, surveys, and other publications to the extent possible, to be carried out in a paperless method unless either party prefers regular mail or facsimile.

## ARTICLE 4

### AMENDMENTS

This MoU may be amended as and when necessary by mutual written consent of the parties. Any amendment agreed to by the parties will form, without prejudice to any rights and obligations accruing or incurred under this MoU, and serve as an integral part of this MoU. Such amendment will come into force on a date as may be determined by the parties.

## ARTICLE 5

### COUNTERPARTS

This MoU may be executed in one or more original copies, each of which will be deemed to be an original copy.

This MoU will be made available in two (2) languages: Bahasa Indonesia and English. Each party will have a copy of the MoU in each language. In case of divergence of interpretation in the MoU, the English text will prevail.

## ARTICLE 6

### DISPUTE SETTLEMENT

Any difference or dispute between the parties concerning the interpretation, implementation, and/or application of this MoU will be settled amicably.

## ARTICLE 7

### COMMUNICATION AND NOTICES

All notices or communications to be given in accordance with this MoU will be written in English and, unless otherwise stipulated, will be conducted through facsimile, letters, or e-mail.

All notices or communications given in accordance with this MoU will be addressed to:

For the MoT Indonesia, the focal point will be Director General





Address: M. I. Ridwan Rais Road, No. 5, Jakarta Pusat 10110, Indonesia

Phone: \_\_\_\_\_

Facsimile: \_\_\_\_\_

Attention: \_\_\_\_\_

For the TFO Country X, the focal point will be Executive Director

Address: \_\_\_\_\_

Phone: \_\_\_\_\_

Facsimile: \_\_\_\_\_

Attention: \_\_\_\_\_

To change information in the MoU, the other party must be notified within five (5) business days.

Any notice or other communication given under this MoU will be deemed to have been received:

- a) in the case of a notice transmitted by facsimile, with a confirmed receipt of transmission from the sender's machine stating that it was sent in full and without error, on the day that it was transmitted;
- b) in the case of a notice delivered by hand, on the day of actual delivery;
- c) in the case of a notice delivered by mail, on the second (2nd) business day or, in the case of airmail, the fifth (5th) business day following the day that it was dispatched by first-class mail, postage prepaid, or as the case may be, airmail, postage prepaid;
- d) in the case of a notice transmitted by e-mail, with a returned confirmation report stating that the recipient received the e-mail, on the day that it was transmitted.

Provided that a notice given in accordance with the above but received on a day that is not a business day, or received after normal business hours at the place of the recipient, it will be deemed to have been received on the next business day, provided further that a change of address notice of a party will be effective only upon actual receipt.

## ARTICLE 8 PERIOD

The actions by the parties will begin immediately following the signing of this MoU and will be pursued to substantial completion as soon as reasonably feasible.

## ARTICLE 9 FINANCIAL ARRANGEMENTS

The parties will make available, to the extent feasible and taking into account the budgetary, financial, and human resource constraints, the services of their staff for the programs and projects undertaken pursuant to this MoU.

Expenses relating to, or arising from, activities undertaken pursuant to this MoU will be borne by each party.

## ARTICLE 10 WORK PROGRAM

Annex 1 of this MoU sets out the Work Program on the mutually determined outcomes and other coordination initiatives that the parties are seeking to achieve and have jointly determined should be the focus of the business law coordination program.



The parties may jointly determine any further outcomes to be added to, varied, or removed from the Work Program.

The parties recognize that there may be a range of options for achieving the coordination goals. These need not necessarily involve harmonization of law or the creation of joint institutions.

#### ARTICLE 11 CONSULTATION

The parties will each keep the other party informed of proposed reforms in the area of business law and will give the other party the opportunity to be involved in the reform process at an early stage. Both parties recognize that early consultation is particularly important where a policy proposal has extraterritorial application that impacts on the other country or would have the potential to result in the removal of any right or benefit that the other country currently enjoys.

#### ARTICLE 12 MINISTERIAL RESPONSIBILITY

The parties will have responsibility on behalf of their respective governments for the implementation of this MoU.

#### ARTICLE 13 REPORT BACK TO MINISTERS

Officials will report every six (6) months to their respective ministers responsible for the progress of the work highlighted in the Work Program.

#### ARTICLE 14 REVIEW OF THE MoU

The parties will review this MoU every year following the signing date of this MoU.

IN WITNESS WHEREOF, the undersigned have signed this Memorandum of Understanding. Done at Jakarta, September 13, 2016, in two (2) original copies in Bahasa Indonesia and English, all texts being equally authentic.

(Signature)

MoT Indonesia

(Signature)

TFO Country X

#### Annex 1: Work Program

##### 1. Short term (by end of 2017)

- Build a working group concentrating on the MoU implementation;
- Exchange information regarding market, customer, and other matters related to textile and textile products;
- Establish textile and textile products fairs and exhibitions;
- Harmonize or coordinate consumer product labelling regimes;
- Harmonize or coordinate approaches to enforce consumer law;
- Streamline arrangements for mutual recognition of product safety bans and standards.

##### 2. Medium term (by end of 2018)

- Dispatch necessary experts to support program development;
- Establish database of exporters and importers in textile and textile products field;





- Continuously establish textile fairs and exhibitions;
- Ensure competition and consumer law regulators in both jurisdictions are able to share confidential information for enforcement purposes;
- Enable cross membership between the associations of textile and textile products from Indonesia and Canada;
- Establish a single regulatory framework for patent attorneys;
- Establish an application process for patents in both jurisdictions.









**TPSA** | CANADA-INDONESIA TRADE AND  
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