THE LEGAL STATUS OF MEMORANDA OF UNDERSTANDING IN RELATION TO TREATIES FOR THE AVOIDANCE OF DOUBLE TAXATION AND INFORMATION EXCHANGE

Minor dissertation presented in partial fulfilment of the requirements for the degree

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DECLARATION

I, Phuthehi Masilo, hereby declare that the work on which this research paper is based is my original work (except where acknowledgements indicate otherwise) and that neither the whole work or any part of it has been, is being, or is to be submitted for another degree in this or any other university.

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ABSTRACT

It has been suggested by international lawyers that Memoranda of Understanding (MOUs) are instruments concluded between States which they do not intend to be governed by international law (or any other law) and, as a result, are not legally binding.

The question as to what legal status MOUs have in the context of international tax law, particularly in relation to treaties for the avoidance of double taxation and information exchange has, to a greater extent, not been asked or answered in academic literature. This minor dissertation seeks to address that.

Based on a review of the legal framework for treaties and MOUs, analyses of cases dealing with tax MOUs, and taking into consideration doctrinal work of various commentators, it is evident that the legal status of tax MOUs is determined by the role they play in the interpretation and application of tax treaties.

The key finding arising from the research presented in this minor dissertation is that the roles of tax MOUs are to complete the treaty or modify or clarify substantive provisions of the treaties they are based on. If they complete or modify the treaty, such MOUs have legal consequences. On the other hand, if they only clarify substantive treaty provision, they do not have direct legal consequences but can be considered for interpretation purposes.

Although MOUs have been viewed historically as non-legally binding agreements not governed by international law or any other law, evidence seem to suggest a contrary view in the context of international tax treaty law. If an MOU is concluded pursuant to a treaty article, through the powers given to Competent Authorities (CAs) under articles 25(1)-(3) of the OECD Model Tax Convention (MTC) to conclude, for example, an interpretive instrument, then arguably such an MOU is intended to be governed by international law as the treaty authorises its conclusion. MOUs of this kind concluded by CAs have binding effects.

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Acronyms and Abbreviations

AAR	Authority for Advance Rulings
AO	Assessing Officer
CAs	Competent Authorities
CBDT	Central Board of Direct Taxes
DTA	Double Tax Agreement
EOI	Exchange of Information
HMRC	Her Majesty's Revenue and Customs
IBFD	International Bureau of Fiscal Documentation
ICJ	International Court of Justice
ITA	Income Tax Act
ITAT	Income Tax Appellate Tribunal
MAP	Mutual Agreement Procedures
MTC	Model Tax Convention
MOU	Memoranda of Understanding / Memorandum of Understanding
OECD	Organisation for Economic Cooperation and Development
SA	South Africa
TIEA	Tax Information Exchange Agreement
UK	United Kingdom
USA	United States of America
WTO	World Trade Organization

CHAPTER 1: INTRODUCTION AND BACKGROUND

1.1 Overview history of treaties and Memoranda of Understanding

Bilateral tax treaties started to be concluded from the mid-nineteenth century with the first treaty between Prussia and Saxony concerning direct taxes with the conclusion date of 16th April 1869. Eight months later, a treaty between Austria and Hungary on taxation of business profits was concluded on the 18th of December 1869. This was followed by a treaty between Prussia and Austria regarding avoidance of double taxation several years later, on the 21st of June 1899. More treaties were concluded after the First World War and the extensive treaty network was developed in Central Europe.[1] Similar submission regarding this vital history was made by Vogel[2] in the 1986 journal article and Jogarajan[3] in 2011.

International treaties in general have been in existence for centuries and their origins can be traced from as early as 1648.[4] For many years, treaties have been used by several countries around the world to conclude international deals in international law. Due to increase in transactions overtime, not everything in those deals, whether important or not could be embodied in the treaties and that resulted in the rise of the use of Memoranda of Understanding (MOU).[5]

MOUs have been referred to by different names ranging from gentlemen's agreements, political agreements, *de facto* agreements, non-legal agreements, non-legally binding agreements, and non-binding agreements. Diplomats who are aware of the instrument on the other hand refer to it as Memorandum of Understanding, or MOU in short.[6] It has been the practice or political preference of international organisations or groups of States to come up with names of instruments in international law. This has for many years proven to be a challenging task which

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[1] Uckmar, Victor 'Double Tax Conventions', in Andrea Amatucci (ed) *International Tax Law* (2012) 1.
[2] Vogel, Klaus 'Double Tax Treaties and Their Interpretation' (1986) 4 (1) *Berkeley Journal of International Law* 10.
[3] Jogarajan, Sunita 'Prelude to the International Tax Treaty Network*:* 1815-1914 Early Tax Treaties and the Conditions for Action' (2011) 31 (4) *Oxford Journal of Legal Studies* 690.
[4] Sulyok, Gabor 'Treaty, Origins*'* *Oxford Public International Law* 2014, available at https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e2152, accessed on 2 August 2019.
[5] Aust, Anthony *Modern Treaty Law and Practice* 2ed (2007) 32.
[6] Aust ibid note 5 at *21.*

resulted in names that are confusing, changeable or inconsistent given to certain instruments. [7]

The term ‘understanding’ can mean something different from an ‘agreement’. The former is the description of how the parties unilaterally perceive or interpret something. The question would be, if the two parties have a common understanding of a certain thing, or understand something the same way, if that would constitute an agreement, and whether that agreement is equivalent to a treaty. There is no specific answer to this question hence the existence of confusing results when it comes to this subject matter.[8]

The practice of designating some treaties as MOUs started shortly after the Second World War.[9] This resulted in confusion as to what constituted a treaty and what constituted an MOU. In the context of international tax, the similar confusion as to whether the tax MOU is a treaty or not exists. It is also not clear what legal status MOUs have and whether they have binding effects or not.

1.2 Research problem and question

The problem with MOU was noticed explicitly in the case of *Ben Nevis (Holdings) Limited,*[10] which surfaced some of the difficulties associated with the use of tax MOUs in international tax matters. This is an enforcement case that dealt with exchange of information. There was an MOU between South Africa (SA) and the United Kingdom (UK) which the HMRC considered in the pleadings. After it was revealed that there was an MOU in place between the two competent authorities of the contracting States, the court referred to it but did not base the decision on it. It was held that the contents were not relevant to the issues at hand and the court also criticised the MOU for not being a public document that was accessible to the general tax-paying public.[11] Further details concerning this case and verdict are discussed in Chapter 4 Section 4.2.2.

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[7] Aust ibid note 5 at 33.
[8] Gardiner, Richard *Treaty interpretation* 2ed (2015) 87.
[9] Aust ibid note 5 at 25.
[10] *Ben Nevis (Holdings) Limited v. Commissioners for H M Revenue and Customs* 2013 (15) ITLR 1003 at 1036 paras 57-61.
[11] Supra note 10 at 1028-1029 para 41.

This case proved that there is clearly an issue regarding the use and application of MOUs. Not enough attention has been given to MOUs thus far in the field of international tax, which raises a serious problem for their legitimacy. This raises two important questions; firstly, what is the legal status of the tax MOUs in the context of international tax? And secondly, what is the role of tax MOUs in the interpretation and application of tax treaties?

1.3 Research objective

In light of the seeming confusion surrounding tax MOUs and the general minimal research on this topic, the primary objective of this research is to understand the tax MOUs, thereby bringing clarity on their legal status particularly in relation to treaties for the avoidance of double taxation and information exchange.

1.4 Research method

The research method used in this paper is desktop doctrinal research. The focus is on collecting primary research materials such as MOUs, treaties, case law and performing a desktop review of those materials. It is an empirical exercise where data regarding tax MOUs and court cases relating to tax MOUs is collected, described and analysed. The review is based on a normative understanding of the legal status of MOUs in international law by looking at secondary material such as the doctrinal works of academic commentators.

1.5 Limitation of scope

The scope of this research is limited to taxes on income or capital with specific focus on tax MOUs concluded between the competent authorities of the contracting States in respect of Comprehensive Bilateral Tax Treaties. As it was highlighted above, there are major difficulties associated with the accessibility of MOUs. This issue is further discussed in section 3.6 of chapter 3. The only MOUs that are reviewed in this minor dissertation are tax MOUs that are publicly accessible. This are consolidated in Table 1 under Appendix.

1.6 Overview structure of research

Chapter 1 introduces and sets out the background of the research. It consists of the aim of the research, questions giving rise to the study which direct and focus the research, how the research will be conducted and the limitation of scope. The actual MOUs are reviewed in chapter 2. This includes but not limited to, how these instruments are concluded, who concludes them, what they consist of and why they are important. In chapter 3, the normative understanding of MOUs is observed in order to have a deeper understanding of the law relating to MOUs and application thereof. Chapter 4 follows the same empirical approach as chapter 2 but focuses primarily on the review and analysis of case law. Court cases that have an element of tax MOU are the focal point in this chapter and the understanding of how the courts deal with tax MOUs is observed. Finally, chapter 5 concludes the study.

CHAPTER 2: THE SYNOPSIS OF TAX MEMORANDA OF UNDERSTANDING

2.1 Introduction

As highlighted in chapter one, confusion exists as to whether Memoranda of Understanding (MOUs) are treaties or not, thereby raising the need to distinguish between these two instruments. As a result, this chapter reviews the legal persona of MOUs, firstly as an attempt to distinguish them from treaties, and secondly to solidify the legal standing of MOUs in relation to treaties for the avoidance of double taxation and information exchange. All tax MOUs that were reviewed in this chapter are classified in Table 1 under Appendix A.

2.2 Defining Memorandum of Understanding and treaty

MOUs are used across different fields of international relations, including - but not limited to trade, defence, aid, diplomatic and commerce. Owing to this multi-functional attribute of MOUs, is the inherent challenge of defining them in ways that are applicable to all their functions.[12] With this in mind however, an MOU can generally be defined as:

> *'[a]n instrument concluded between States which they do not intend to be governed by international law (or any other law) and, consequently, is not legally binding.'*[13]

On the other hand, "Treaty" is defined under Article 2(1)(a) of the Vienna Convention on the Law of Treaties (VCLT) as:

> *'[a]n international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more instruments and whatever its particular designation.'*[14]

Based on the above definitions, it seems clear that MOUs, unlike treaties, are neither governed by international law nor are they legally binding. However, this distinction is

[12] Aust ibid note 5 at 42.
[13] Aust ibid note 5 at 32.
[14] *UN Vienna Convention on the Law of Treaties* (23 May 1969), Treaties IBFD.

not always valid in the context of tax treaties. This assertion is further discussed in the last paragraph of this section.

The intention of the parties involved in concluding these instruments is important because it adds substantive clarity as to whether the instrument is a treaty or an MOU. Determining the intention of parties involved necessitates a careful review of words used in the instruments. Treaties often contain language that can be seen to be mandatory, and thus binding provided domestic constitutional procedures are complied with, whereas MOUs often contain language that is less mandatory. This is evidenced by words such as '*shall', 'agree', 'undertake', 'rights', 'obligations', and 'enter into force'* which are found in treaties. Whereas MOUs contain terms like '*will', 'come into operation' or 'come into effect'*; terms such as '*agree' or 'undertake'* are avoided in this regard as they relate more to treaties.[15]

Sometimes treaty and MOU terminologies are used inter-changeably leaving the reader with confusion as to whether the instrument was meant to be a treaty or an MOU. Circumstances surrounding the drafting of an instrument and subsequent acts of the States may therefore be taken into consideration in this regard. Looking beyond the text of the instrument may be considered when the form, terminology or express terms of the instrument do not give enough evidence of the intention of the parties. [16]

The dichotomy between MOUs and treaties can often be blurred, arguably making both instruments subject to international law. For example, some jurisdictions such as the United States have had disputing views about intention of the parties concluding the instrument. They consider it not necessary to distinguish a treaty from MOU as they are of the view that some MOUs reflect the intention to be governed by international law, and therefore can be considered as treaties.[17]

Furthermore, Aust pointed out that commentators such as Klabbers argued that intention is not a decisive factor when it comes to distinguishing MOU from the treaty. His argument was that there is no difference between the treaty as defined in

[15] Aust ibid note 5 at 33.
[16] Aust ibid note 5 at 35-36.
[17] Duncan B *et al National Treaty Law and Practice* (2005) 16.

the convention and MOU because both of those instruments embody an agreement. He submitted that every agreement that can influence future behaviour and is not subject to domestic law is a treaty. As the MOU is of the similar nature, it qualifies as a treaty and therefore the distinction between the two is not legally valid. Aust however, criticized those views by stating that amongst other factors, Klabbers' assertion is not supported by extensive practices of the States. The argument also lies in tension with the fact that the States choose words carefully in order to reflect whether the instrument is intended to be legally binding or not and are deliberate in doing that. [18]

As mentioned earlier, the distinction between the treaty and MOU is not always valid in the context of tax treaties. If an MOU is concluded pursuant to the treaty Article, the powers given to Competent Authorities (CAs) under articles 25(1)-(3) of the OECD Model Tax Convention (MTC) to conclude, for example, an interpretive instrument, then arguably such an MOU is intended to be governed by international law as the treaty authorises its conclusion. Such an interpretative MOU concluded by CAs has binding effect. The change of article 3(2) of the 2017 OECD Model clarifies the situation that prevailed under the previous Model by making it explicit that the competent authorities have the power to conclude agreements.[19]

2.3 Who concludes tax Memoranda of Understanding?

2.3.1 Background and general observations

MOUs in respect of bilateral tax treaties are concluded in various ways. Some are concluded based on Double Tax Agreements (DTAs) between the contracting States, and others are concluded based on agreements between the Competent Authorities (CAs) of the contracting States. The former MOUs deal with specific distributive articles and administrative provisions of the comprehensive tax treaties. The latter MOUs on the other hand, aim to account on mutual interpretation and understanding of the contents of agreements. The agreements referred to here are actual agreements on Exchange of Information (EOI), or Tax Information Exchange Agreements (TIEA).

[18] Aust, Anthony *Modern Treaty Law and Practice* 3ed (2013) 47.
[19] *OECD Model Tax Convention on Income and on Capital* (21 November 2017), Treaties IBFD.

Tax MOUs are ordinarily concluded by Competent Authorities of the contracting States or their authorized representatives. The term “competent authority” is defined under article 3 of the vast majority of DTAs, the Article that covers general definitions. Some EOI or TIEAs indicate who the Competent Authorities are, and the signatures on actual MOUs give a clear indication of specific officers who act as authorised representatives of the two contracting States that are parties to the agreement and agree on the terms therein.

2.3.2 Competent Authorities

2.3.2.1 Ministers or Authorised Representatives

In most cases, officials from the Finance Department, usually Ministers are regarded as Competent Authorities (CAs). According to an MOU between Netherlands and Norway, the CAs are the Minister of Finance, or an authorized representative, for both contracting States[20]. That is the case for Iceland [21] and many other jurisdictions such as Turkey, Bermuda, Portugal, Poland, Spain, Malta, Indonesia, Korea, Kazakhstan, India, Rwanda and Belgium (See Table 1 under Appendix A). Minister of Finance and Public Credit is the CA for United Mexican State.[22]

For Jersey, the competent authority is Treasury and Resources Minister.[23] In terms of the MOU between Canada and New Zealand, the competent authorities are the Minister of National Revenue or the Minister’s authorised representative.[24]

2.3.2.2 Head of the tax administration

There are also several jurisdictions where CAs concluding MOUs are within the highest tax authorities of the contracting States. Examples of such jurisdictions

[20] Memorandum of Understanding between the Norwegian Directorate of Taxes and the Directorate General of the Tax and Customs Administration of the Netherlands, signed on 6 April 2016.
[21] Memorandum of Understanding between the Ministry of Finance and Economic Affairs in Iceland and the Ministry of Finance in the Netherlands, signed on 7 February 2017.
[22] Memorandum of Understanding between the Treasury and Resources Minister of Jersey and the Ministry of Finance and Public Credit of the United Mexican States, signed on 8 November 2010.
[23] Memorandum of Understanding between the Competent Authorities of the Portuguese Republic and the Government of Jersey, signed on 9 July 2010.
[24] Memorandum of Understanding between the Competent Authorities of Canada and New Zealand, signed on 25 January 2016.

include China[25] where the CA is the tax administration, sometimes referred to as State Administration of China,[26] and Guernsey where the CA is the director of income tax,[27] also known as the administrator of income tax.[28] The MOU between South Africa and Mauritius[29] indicates the CA for South Africa as the Chief Officer of Legal Policy from South African Revenue Service (SARS) representing SARS, and the CA for Mauritius as the Financial Secretary from the Ministry of Finance and Economic Development representing Mauritius Revenue Authority (MRA).

2.3.2.3 Negotiators of the treaty

In other MOUs, the parties that are involved in concluding the DTA may also conclude an MOU. This was the case with an MOU between India and the United States concerning article 12 of the treaty between those two contracting States. In that MOU, the negotiators of the treaty developed and agreed on an MOU when treaty negotiations were still in progress. This therefore means the same officials that oversaw treaty conclusion were the same officials that concluded an MOU. This was an interpretative MOU that appended the treaty between those two contracting States, which focused specifically on the interpretation of the term “fees for technical or included services”. The ambassador of the United States in India signed both the treaty and MOU (See MOU under Table 1 in Appendix).

2.4 The primary purpose of Memoranda of Understanding

2.4.1 Tax Administration

The purpose of concluding tax MOUs is multifaceted and mainly depends on the desires of the parties involved in the conclusion of these instruments.

Looking at the MOU between Netherlands and Norway, [30] the competent authorities had the desire to intensify mutual cooperation in tax matters as the primary purpose

[25] Memorandum of Understanding between the State Administration of Taxation of the People’s Republic of China and the Minister of Finance of Bermuda, signed on 2 December 2010.
[26] Memorandum of Understanding between the State Administration of Taxation of the People’s Republic of China and the Director of Income Tax for Guernsey, signed on 27 October 2010.
[27] Supra note 26.
[28] Memorandum of Understanding between the Competent Authorities of Netherlands and Guernsey, signed on 25 April 2008.
[29] Memorandum of Understanding between the Mauritius Revenue Authority and the South African Revenue Service, signed on 22 May 2015.
[30] Supra note 20; Supra note 21.

when they concluded an MOU. The same view is shared in the MOU between Netherlands and Iceland.

When the agreements are concluded, there is an expectation that they must be implemented, and the MOU's objective is to ensure that appropriate implementation of these agreements takes place.[31] This is the case with the MOU between Guernsey and Spain, and the similar view is shared in the MOU between Jersey and Portugal[32]. In the case of China and Guernsey, the tax MOU was issued in order to facilitate proper application of the TIEA between the two States[33].

In the case of the MOU between Guernsey and Netherlands, the MOU served as a platform that would enable the two contracting States to introduce agreements such as TIEA, Mutual Agreement Procedures (MAP) relating to the adjustment of profits of Associated Enterprises and Netherlands participation exemption as well as the Convention.

Furthermore, the other purpose of concluding tax MOUs is to strengthen economic and trade relationships between the contracting States and deepen those relationships through cooperation on greater transparency. This results in the enhancement of mutual benefit of the parties involved in the agreement.[34]

2.4.2 Interpretation of DTAs and TIEAs

Bilateral Tax Treaties as legal instruments and Tax Information Exchange Agreements contain substantive clauses that have various terms. Some of those terms require interpretation for the parties in agreement to have a shared understanding of what the terms mean. The purpose of MOUs is therefore to interpret the terms found therein.

The above assertion is evident in the MOU between the United States and India where the purpose was to guide both taxpayers and tax authorities when interpreting the provisions of article 12 of the Convention between the two contracting States,

[31] Memorandum of Understanding between the competent authorities of Guernsey and Spain, signed on 10 November 2015.
[32] Supra note 23.
[33] Supra note 26.
[34] Supra note 28.

which deals with Royalties and fees for included service.[35] This was the shared view between the two States which was confirmed in the Exchange Note III that formed part of the Convention between these two contracting States. In that exchange note, the competent authorities are given powers to develop and publish amendments to the MOU, and further understanding and interpretation of the Convention as they gain experience in administering the Convention, especially in relation to Article 12.

The vast majority of tax MOUs deal with the interpretation of substantive clauses of TIEAs and to some extent, the application of the agreement on Exchange of Information relating to tax matters. This is evident in the MOU between Bermuda and Poland.[36] Further discussion regarding interpretation in MOUs is covered under section 2.5.2 below.

2.5 Tax Information Exchange Agreement Memoranda of Understanding

2.5.1 The Conclusion, Amendments and Termination

After the MOU is concluded, it can only enter into effect the day the Tax Information Exchange Agreement (TIEA) it is based on enters into force. This is the general view shared by multiple jurisdictions such as China[37] and Bermuda, Guernsey and Jersey, Mexico and Jersey, Portugal and Turkey, as well as Ireland and Liechtenstein. Some MOUs give specific dates regarding when they would be effective. An example regarding this is found in the MOU between Netherlands and Norway[38] which states that the MOU is applicable for the first time to information regarding exchange in the calendar year 2014.

Amendments to MOUs can be made at any time but there is a requirement for both parties involved to make amendments jointly. These amendments are made in the form of exchange of letters.[39] Once the amendments are completed and ready to be implemented, the signed final letter confirming that there were some changes in the

[35] Convention between the Government of the United States of America and the Government of India for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income (12 September 1989), Treaties IBFD.
[36] Memorandum of Understanding Concerning the Interpretation and Application of the agreement between the Government of the Republic of Poland and the Government of Bermuda for the Exchange of Information relating to Tax Matters, signed on 25 November 2013.
[37] Supra note 25.
[38] Supra note 20.
[39] Supra note 26.

MOU should be issued.[40] This is the case in the MOU between Jersey and Portugal, Jersey and Turkey, as well as China and Jersey. Only after the letter confirming amendments has been issued could the amendments become effective.

The MOUs remain effective until terminated by either party in writing. In some cases, the MOU is concluded for the indefinite period and remain active for as long as the TIEA is still in force, or when the competent authorities of any of the contracting States decide to terminate it.[41] There is a requirement for the notice of termination to be made prior to the actual termination, and that could take place any time. Furthermore, the termination should be in writing and it takes effect sixty days, or two months after the date of notice. [42]

2.5.2 Interpretation in Memoranda of Understanding

Some MOUs deal with interpretation of different terms found in specific sections of the Exchange of Information Agreement (EOI) articles. The interpretation gives an overview of how the competent authorities of the contracting States understand the meaning of certain terms or phrases found in the EOI Agreement.

In 2010, the MOU between China and Bermuda[43] was concluded and the two terms; 'Persons or Authorities' and 'Foreseeable Relevant or Relevance' were defined in Section IIV and V of that MOU. These are the terms synonymous to terms found in the vast majority of DTAs. The former is understood by the two competent authorities to mean persons or authorities within the Jurisdiction of the contracting States. The meaning of 'Foreseeable relevant or relevance' is identical to the definition given in the 2002 OECD Commentary on Exchange of Information Treaty, article 1 paragraph 3 and 4.

The MOU between Guernsey and New Zealand[44] focused on the interpretation of articles 9 and 12 of the EOI agreement. Those articles are regarding salaries, wages

[40] Memorandum of Understanding between the Treasury and Resources Minister of Jersey and the Ministry of Finance and Public Credit of the United Mexican States, signed on 8 and 12 November 2010.
[41] Supra note 36.
[42] Memorandum of Understanding between the Government of the Principality of Liechtenstein and the Irish Revenue Commissioners, signed on 13 October 2009.
[43] Supra note 25.
[44] Memorandum of Understanding between the Competent Authorities of New Zealand and Guernsey, signed on 18 August 2015.

and other similar remuneration, as well as prejudices and restrictive measures respectively. The understanding is that pension was excluded in salaries. For the latter, the meaning is intended to be the same as the meaning in the OECD 1998 Project on Harmful Practices carried on by the Global Forum on Transparency and EOI.

The terms 'reasonable notice' and 'direct and indirect costs' are also interpreted in Jersey's MOU[45] with Mexico. Reasonable notice is understood to be the period not exceeding 14 days, that is, at least 14 days prior to the date of the meeting. The same view is articulated in the MOU between Guernsey and Mexico.[46] "Direct and indirect costs" will be covered in section (2.5.3) that follows.

2.5.3 Costs relating to Exchange of Information

Costs are dealt with in various MOUs relating to TIEAs. When tax information is exchanged, there are typical costs that are incurred to facilitate the exchange. These costs are broken down into direct and indirect costs. Indirect costs include administrative or overheads, specifically those incurred by the requested party in viewing and responding to the request of information. These may include internal administration costs and minor external costs.[47]

The costs are further categorized into ordinary and extra-ordinary costs. If the costs exceed a certain amount that is considered to be normal, they become extra-ordinary costs.[48] Typically, for non-extraordinary cost, the requested State has to bear the costs but in the case of extraordinary costs, the competent authority of the requested State has to contact the competent authority of the requesting State and confirm if they are still willing to pursue the case despite the high costs. Should they wish to pursue the case nonetheless, they would then be obliged to cover those extra-ordinary costs. [49]

[45] Supra note 22.
[46] Memorandum of Understanding between the Ministry of Finance and Public Credit of the United Mexican States and the Director of Income Tax of Guernsey, signed on 27 June 2011.
[47] Supra note 42.
[48] Supra note 31.
[49] Supra note 25.

The amount considered to be ordinary differs from one MOU to another. For example, section IV of the agreement between the competent authorities of China and Bermuda dealt with extra-ordinary costs. It stated that costs relating to exchange of information should be partly borne by the requested State unless they are more than $1000, in which case, the requested State should consult the requesting State and inform them about the costs and inquire if they are still willing to pursue the case. If they are, they would need to cover the extra-ordinary costs.[50]

The above therefore means any costs below $1000 in this case qualify as ordinary costs, which the requested State must cover. Anything that goes above and beyond that amount is extra-ordinary cost and consultation with the requesting State is required. The same view is shared in the MOU between China and Guernsey.[51] In some States, the costs in excess of £500 are extra-ordinary, and the same process as above regarding consultation and who should cover the costs applies.[52] In other instances, it is stated that the costs shall be borne by the requesting State and if they exceed $5000, the similar procedure in terms of which State should bear the cost is followed.[53]

If the requested State is unable to comply with the request due to lack of funds or limited staff, the competent authorities should consult each other, and the mutual agreement must be in place for the requesting authority to cover those costs. This applies to both single and multiple requests.[54]

Within twelve months period of the MOU agreement, the competent authorities must consult each other regarding the costs they have incurred, or how much they plan to spend and ways they could possibly minimize those costs.[55]

The idea behind exchange of information is that the State that is requested to provide information does so at own costs, unless costs are extraordinary. The costs

[50] Supra note 25.
[51] Supra note 26.
[52] Memorandum of Understanding between the Minister of Finance of the Republic of Turkey and the Treasury and Resources Minister of Jersey, signed on 24 November 2010.
[53] Supra note 36.
[54] Supra note 36.
[55] Memorandum of Understanding between the Treasury and Resources Minister of Jersey and the State Administration of Taxation of the People's Republic of China, signed on 29 October 2010.

must go above and beyond the threshold stated in the MOU for them to qualify as extraordinary costs, and those are different in various MOUs.

2.5.4 Specific requirements in Memoranda of Understanding

When tax information exchange request has been done, the requested State is obliged to respond promptly by confirming in writing that they have received the request from the other State. They also must notify the requesting State of the deficiencies in the request, if any. All the above should be done within 60 days upon receiving the request for tax information exchange.[56]

The requested competent authority is further required to provide the information within 90 days after receiving the request. In the event of non-compliance, that is, if the competent authorities of the requested State refuse to provide information within 90 days of request, they should give the requesting competent authorities reasons for their refusal. [57] If failure to furnish the information is due to some obstacles encountered, the competent authorities need to state those obstacles and their nature thereof.[58]

Any communication relating to the request of information must always be done in writing and addressed to the competent authorities of the other contracting State. The addresses are usually enclosed in the MOU. This applies mainly to the communication in terms of the initial request. Subsequent communication can either be in writing or verbal.[59] The details regarding the authorized representatives and changes of authorized representatives should also be communicated in writing by either of the contracting States.[60] The names of the authorized representatives are communicated via exchange letters.[61]

Six months after the MOU is signed, the two competent authorities would continue with negotiations regarding further measures to be taken in order to alleviate

[56] Supra note 26.
[57] Supra note 26.
[58] Supra note 22.
[59] Supra note 55.
[60] Supra note 20.
[61] Supra note 21.

undesired tax barriers and other obstacles of discriminatory nature that may form part of the domestic law of either State.[62]

It is a requirement for the competent authorities of the requested State to do all they can to provide the requested information. They must use all the information-gathering measures to collect the requested information.[63]

2.5.5 Other considerations

The MOU between Bermuda and Malta[64] relates to reaching the common understanding of interpretation of terms between the two contracting States. It was explicitly stated that the MOU is not intended to make legal rights, obligations or relations in either international or domestic laws of the contracting States.

It is interesting to notice that there was no DTA in place between Bermuda and Malta, yet the Exchange of Information (EOI) agreement was concluded. The competent authorities agreed that after the EOI agreement enters into force, they would consider the possibility of concluding the DTA. This therefore means an MOU facilitated the conclusion of the DTA.

The reason Bermuda entered into the information exchange agreement is two folded. Firstly, to be exempt from the legislation that has prohibitive measures on low or no-income tax Jurisdiction and secondly, not to be considered as the State participating in harmful practices and therefore, not regarded as a tax heaven.[65]

The other similar situation that relates to harmful tax practices exists in Jersey's MOU with Portugal. [66] When TIEA between these countries become effective, it is the expectation that Jersey will be removed or excluded by Portugal from the list of countries, territories, and regions with clearly more favourable tax regimes.

[62] Supra note 28.
[63] Supra note 36.
[64] Memorandum of Understanding between the Government of Bermuda and the Government of Malta, signed on 24 November 2011.
[65] Supra note 64.
[66] Supra note 23.

2.5.6 Exchange of Information (EOI)

2.5.6.1 Information Exchange by Request

The competent authorities of Rwanda and Belgium concluded the MOU[67] in June 2011. The MOU dealt with practical aspects relating to EOI that were found in Article 26 of the treaty between the contracting States. The terms 'Requesting and Requested States' were defined in article 2 of the MOU as the States making request and to whom the request is addressed respectively. When information is requested, the requested State must provide the information regardless of whether the matter being investigated constitutes a crime as per the laws of the State. However, under no circumstances would the requesting State be allowed to engage in 'fishing expedition' or request the information that is irrelevant to the given tax case as well as "creating extra burden of work to the requested State that is disproportionate regarding the utility of the requesting State's information".

The request for information exchange must be in writing and the requesting State needs to ensure that they include in the request identification of the person being investigated, the information being requested and the nature of that information. Moreover, the purpose of the request and the reasons for believing that the requested State has the information requested, or that the person holding that information resides in the requested State should also be included in the request. If the information is held by a person, their names and addresses must be given to the extend known, as well as a statement indicating how the request is in accordance with the provisions of article 26 of the Convention. Lastly the requesting State must indicate that it has taken all the necessary measures available in its territory to obtain information, except for all that give rise to disproportionate difficulties.[68]

The timing in terms of providing information by the requested State ranges between one month if information is available in the requesting State's tax files, to three months if the third party is to be involved, or six months if an investigation is

[67] Memorandum of Understanding between the Competent Authorities of Rwanda and Belgium concerning the Exchange of Information with respect to Taxes on Income and on Capital, signed on 22 June 2011.
[68] Supra note 67.

necessary. In case of urgency, tax information can be provided at any time upon agreement between the competent authorities.[69]

2.5.6.2 Automatic Exchange of Information

The competent authorities of Netherlands concluded MOUs with Norway[70] and Iceland[71] in 2016 and 2017 respectively. Both MOUs are similar with minor variations. The agreements were regarding Automatic Exchange of Information, which is dealt with in article 27 of the Convention between Netherlands and those two contracting States. For the MOU with Norway, the information to be exchanged was in relation to articles 6 to 21 of the treaty with exception of the following articles: 7, 8, 9, 12 and 13 which are Business Profits, Ships and Aircrafts, Associated Enterprises, Royalties, and Capital Gains respectively. The same applied in the MOU with Iceland except that article 7, which is on Business Profits was included in the exchange.

The other difference in relation to those two MOUs is that article 6 of the MOU with Iceland defines the term ‘Immovable Property’, which means ‘ownership and value’ of Immovable property in the Netherlands and “Income” from Immovable property in Iceland. When it comes to the MOU with Norway, the term is not defined.

In both MOUs, the exchange is expected to happen periodically, at least once per calendar year. If the information provided is incorrect or incomplete and there are technical problems or difficulties in translating it into data that can be used, the competent authorities are obliged to contact each other as soon as possible for those issues to be resolved. Although the focus in these MOUs is on Automatic Exchange of Information, the exchange is not only limited to that type of exchange. In situations where automatic exchange is not yet possible, the spontaneous exchange can take effect. Through exchange letters, the competent authorities can agree on the type of information exchange they would like to carry out despite the one that is already covered by the agreement.[72]

[69] Supra note 67.
[70] Supra note 20.
[71] Supra note 21.
[72] Supra note 20.

The information exchange should be provided electronically following the standard format of the OECD. The conclusion of the MOU is for the indefinite term and comes into effect immediately after the competent authorities of the contracting States sign it. For Netherlands and Iceland, the MOU is applicable from 2016 and can be terminated at any time by either party through notice. In the event of termination, it remains active for six months from the date the notice of termination is issued.[73]

2.5.6.3 Tax examination requirements

Should the competent authorities of any State wish to have presence through representatives or tax officials in the other State during tax examination, they need to make a request and the requested State may give them permission to do so. The request should however be done on special cases such as when there are cross-border irregularities or tax avoidance incidents, when tax officials desire in complex cases, as well as when limitation period threatens to expire, and the presence of a tax official may expedite the examination.[74]

The requesting State should make a written request about its desire to have presence in the other State during tax examination and substantiate with reasons, and the requested State must respond within two months upon receiving the request. The competent authorities of the requested State make decisions regarding the examination and should inform the requesting State about the final decision as to whether they can have presence during the tax examination. The requested State has the liberty to refuse the request from the requesting State if they so wish but must provide reasons for refusal.[75]

2.5.6.4 Protection of taxpayers' information

Although there is a requirement to exchange information, it is not fully absolute as the laws or administrative practices of the requested State to safeguard individuals involved in the investigation are still applicable, as long as they do not unduly prevent or delay the effective exchange of information to take place. This assertion is drawn from the 2011 MOU between Rwanda and Belgium concerning exchange of

[73] Supra note 21.
[74] Supra note 21.
[75] Supra note 29.

information. [76] This means that the secrecy provisions of the Convention are applicable in relation to exchange of information. The competent authorities of the requested State are not obliged to give information they do not hold or about the individuals that are not within their Jurisdiction and have no control over. The MOU becomes effective after signature and remains active until six months after the notice of termination by either party. In case of termination, secrecy provisions as per Article 26 of the Convention bind both parties so that information provided could remain confidential.[77]

2.5.7 Summary of findings

The types of MOUs that were reviewed under this section are multi-layered. They deal with both the interpretation of substantive clauses for Exchange of Information (EOI) in bilateral tax treaties and Tax Information Exchange Agreements (TIEAs), as well as purely administrative issues. These administrative issues include how the competent authorities would apply the instruments the MOUs are based on, what the cost implications of information exchange could be, as well as the requirements, roles and responsibilities of parties involved in the exchange of information agreement. Interpretation of substantive clauses of the instruments impacts taxpayers whilst administrative issues arguably do not.

2.6 Memoranda of Understanding that deal with Bilateral Tax Treaties

2.6.1 General overview

As stated in section 2.3.1 above, the MOUs that are based on DTAs focus mainly on specific articles of the treaties. They are either on attribution rules, which are articles 6 to 21, or those that deal with special administrative provisions, which are found under articles 25-27. Some MOUs deal with the concept of ‘residency’ which is found in article 4 of the Convention and fall under the category of ‘persons covered’. A review of those various MOUs is done under the sections below.

[76] Supra note 67.
[77] Supra note 67.

2.6.2 Residency of a person other than an individual

In an MOU concluded in 2015 between South Africa and Mauritius, Kosie Louw, the authorised representative of the South African Revenue Service (SARS) and Dharam Dev Mnraj, the Financial Secretary representing Mauritius Revenue Authority (MRA), who were identified as CAs, signed an MOU in relation to the 2013 DTA between their respective countries. [78] That MOU was based on article 4(3) of the DTA and the main purpose of that MOU was to facilitate the application of article 4(3) of the treaty between those two contracting States. Article 4(3) authorised CAs to determine dual residence on actual case by case basis. However, no authorisation for any upfront decision-making framework was given, and it was also not stated whether the MOU was made in terms of any sub-clause of the mutual agreement provisions or not. For those reasons, the MOU did not identify its legal basis.

2.6.3 Dividends

The MOU between the competent authorities of Canada and New Zealand was concluded in January 2016 and the focus was on article 10, paragraph 3 of the convection. This paragraph applied to exempt dividends from source base taxation where dividends have been paid to the contracting State approved by competent authorities, to the political sub-division or local authority that perform functions of the government. The condition was that the recipient together with the related entity should not own more than 10 per cent of the voting powers. This paragraph also provided specifications in terms of the qualifying institutions where the MOU provision could be applicable. In New Zealand, the institutions included the superannuation fund and its fully owned subsidiary, Guardians of Superannuation fund and their subsidiaries, Earthquake Commission and its fully owned subsidiary, and the Reserve Bank. In Canada, the qualifying institutions included the Bank of Canada, Pension Plans of Canada and Quebec, Canada Pension Plan, and Investment Board and its fully owned subsidiary. The Mode of application applied to dividends paid prior to August 2015.[79]

[78] Supra note 29.
[79] Supra note 24.

2.6.4 Interest

In 2015, the Governments of China and Indonesia concluded an MOU[80] which was expressly stated to be 'an agreement'. The agreement dealt with Interest under article 11 of the Convention between those two States. The MOU defined the term 'Financial Institution' and each party to that MOU set out what they considered to be a financial institution. In Indonesia, examples of the Financial Institution are the Exim bank, Investment Agency and Social Security Agency for Health or Social Security Agency for Manpower. In China, the Financial Institutions included the Development Bank Corporation, Agricultural Development Bank, Export-Import Bank, and National Council for Social Security fund and Investment Corporation. The MOU recorded that the above definitions applied from the date of entry into force of a Convention. Nothing before that date could be affected by that interpretation. This MOU replaced the previous MOU that was concluded in 1994.

The agreement of understanding between the Governments of China and Korea[81] that was based on the 1995 Convention also dealt with the similar article of the Convention, Interest. The focus was on paragraph 3 where "central bank and financial institution performing functions of a governmental nature" were defined. In the case of China, examples are identical to those listed above with a few additions such as organizations performing banking, insurance and securities supervisory functions and any other financial institutions that the competent authorities would agree upon by mutual agreement. For Korea, they were Bank of Korea, Development Bank, Export-Import Bank, Investment Corporation, Export Insurance Corporation, Financial Supervisory Service as well as other financial institutions that the competent authorities agreed upon by mutual agreement.

[80] Memorandum of Understanding on the Agreement between the Government of the Republic of Indonesia and the Government of the People's Republic of China for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income, signed on 28 March 2015.
[81] Memorandum of Understanding on the Agreement between the Government of the People's Republic of China and the Government of the Republic of Korea for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income, signed on 13 July 2007.

2.6.5 Royalties and Fees for Technical Services

The MOU between India and the United States[82] was concluded on the 15th of May 1989, the time during which the negotiations of the treaty it is based on were still in progress. The treaty conclusion was on the 12th of September 1989, but it only came into force on the 18th of December 1990 and effective from the 1st of January 1991 in the United States and the 1st of April 1991 in India[83]. This MOU dealt extensively with article 12 of the treaty between those two contracting States, which was Royalties and Fees for Technical or Included Services. It described in detail the categories of services defined in paragraph 4. Terms such as 'technical services' and 'consultancy services' were defined, as well as the 'make available' concept.

The MOU gave several examples of services that fell under paragraph 4 which were intended to be covered within the definition of included services, and those which fell under paragraph 5 that were not intended to be covered within the definition. Detailed analysis of those examples followed immediately after the facts highlighted in the examples. This MOU was a valuable tool for interpretation and gave clarity in terms of the true scope of article 12. It has also been the subject of much litigation in India where many court cases that deal with tax MOUs in that jurisdiction referred to it extensively. Those court cases will be dealt with in detail in chapter 4.

2.6.6 Government Services

The MOU between China and Korea[84] did not only deal with Interest but also Government Services from article 19 of the Convention. In terms of this article, the provisions of paragraph 1 and 2 apply in respect of remuneration paid by the financial institutions listed above in section 2.6.4, including the Trade Investment Promotion Agency and Tourism Organization in Korea, and the Council for the Promotion of International Trade in China.

[82] Memorandum of Understanding concerning Fees for Included Services in Article 12 between India and the United States of America, signed on 15 May 1989.
[83] Supra note 35.
[84] Supra note 81.

2.6.7 General Provisions

In August 1994, the governments of Kazakhstan and the United States concluded an MOU[85] that became effective from the year 1996. This MOU was based on the 1993 DTA between those two contracting States. It did not only deal with treaty provisions but a point in a Protocol as well. In terms of point 3(a), the phrase "both contracting States shall apply that lower rate" found in the protocol is understood by both parties to mean that both parties in agreement would have to establish a lower rate, incorporate it and amend the treaty accordingly. When it comes to the treaty provisions, the MOU started with article 6 of the Convention that dealt with business profits whereby reference was made to paragraph 5. That provision could only apply under exceptional cases.

The phrases '183 days in any consecutive twelve months period' and '183 days in any twelve months period' that were found in article 14(1)(c) and 15(2)(a), Independent Personal Services and Income from Employment respectively, were defined in that MOU as '183 days in any 12 months period beginning or ending in the taxable year concerned'.[86]

Furthermore, an understanding of the term 'officially recognized exchange' in article 21 paragraph 1(c) is that, it is an exchange that is officially recognized by the two contracting States and agreed upon by the competent authorities of both States. This article was on limitation of benefits. The domestic laws of both contracting States are disregarded when it comes to article 26 on EOI. Bank documents as well as those of the third party involved in a transaction form part of the information that could be made available in civil and criminal tax investigations.[87]

The evaluation of the MOUs should happen 5 years after the date of commencement, but if there are questions in relation to the MOU prior to that date, they can be taken up by any competent authority on request.[88]

[85] Memorandum of Understanding with respect to certain provisions of the Convention between the Government of the Republic of Kazakhstan and the Government of the United States of America for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and Capital, signed on 15 August 1994.
[86] Supra note 85.
[87] Supra note 85.
[88] Supra note 21.

2.6.8 Mutual Agreement Procedures

On the 25th of September 2002, the competent authorities of India and the United States concluded an MOU[89] concerning the deferment of assessment and or suspension of collection of taxes when matters were still pending under Mutual Agreement Procedure (MAP). This was due to the hardships faced by taxpayers during the pendency of MAP and efficient processing of MAP was to be facilitated by deferment of assessment and suspension in collection of taxes. Under this MOU, the tax authorities of both contracting States retained the right to demand security from taxpayers in appropriate cases. The taxpayers were obliged to provide security in the form of Irrevocable Bank Guarantee issued by any scheduled bank in India. In the United States, security is a letter of credit issued by the United States bank that is a member of Federal Reserve System, or by the United States branch or agency of a foreign bank that is on the national association of insurance commissioners list of banks from which a letter of credit may be accepted.

Not only was the collection of taxes to be suspended when matters were still pending under MAP, but also interest and penalties. Paragraph 7 stated that the competent authorities of the two contracting States shall endeavour to either resolve or close the case within the period of two years from the date on which one competent authority notifies the other that the application from the taxpayer(s) for assistance under the MAP has been resolved.[90]

This MOU was also subject to litigation in India and several court cases dealt with it. Its legal status will further be assessed and tested through case law in Chapter 4.

2.7 Conclusion

The MOUs that were reviewed in this chapter deal with various matters. They are concluded by Competent Authorities who differ from one type of MOU to another. These MOUs can be further grouped into two broad areas, one being Administrative and the other interpretative and, in some cases, a combination of both. The

[89] Memorandum of Understanding regarding Deferment of Assessment and or Suspension of Collection of Taxes during Mutual Agreement Procedure between India and United States, signed on 25 September 2002.
[90] Supra note 89.

administrative provisions in bilateral tax treaties are broadly categorized as Mutual Agreement Procedures (MAP), EOI and Assistance in collection of taxes.

Many aspects of the MOUs that were reviewed in this chapter have the potential to affect taxpayers in various ways. One way could be the amount of tax liability the taxpayers might suffer as a result of the interpretation of clauses affecting their tax liability. The other way could be the taxpayers' procedural rights in disputes and information exchange.

The above raise several questions, starting with whether taxpayers could rely, legally, on the types of provisions covered in MOUs. In the event where interpretation of tax treaty clause is contrary to what the two parties agreed on in an MOU, could taxpayers legally rely on the MOU as a document binding on the tax authority? Furthermore, if in the exchange of information, the tax authority has not complied with the requirements set in an MOU, could the taxpayer stop the exchange on the basis that it was legally irregular? These are difficult questions that cannot be answered with absolute certainty and may go beyond the scope of this research. The review of case law relating to tax MOUs would potentially address some of these questions in chapter 4.

What is clear thus far is that the aspects of MOUs that deal with administrative issues do not impact taxpayers, but on the other hand, the aspects that deal with interpretation of substantive clauses for EOI in bilateral tax treaties and TIEAs arguably have an impact on taxpayers. Furthermore, it is argued that interpretative MOUs that are concluded pursuant to treaty articles by the Competent Authorities through the powers given to them under article 25(1)-(3) of the OECD MTC to conclude such interpretative instruments have binding effects.

CHAPTER 3: THE LEGAL FRAMEWORK AND MEMORANDA OF UNDERSTANDING

3.1 Introduction

In order to determine the legal status of Memoranda of Understanding (MOUs), the review of law surrounding the subject matter is essential. The purpose of this chapter is to review the legal framework in relation to MOUs which would result in the normative understanding of the legal status of MOUs in international law and how that applies in the context of international tax. Secondary material such as doctrinal work of academic commentators and principles derived from international law will be used to gain the normative understanding of the legal status of tax MOUs.

3.2 The legal process of concluding agreements

One key factor to consider when dealing with bilateral agreements is to determine whether they go through the parliament and follow the constitutional procedure or not. If they do, they become legally binding to all the parties involved.

A Double Tax Agreement (DTA), also referred to as 'the treaty' is binding because it can generally be expected to comply with constitutional procedures. According to article 26 of the VCLT, every treaty is binding on the parties that enter into it provided it is in force. The parties are obliged to perform their obligations in good faith.[91]

The important question in this context is whether an MOU goes through the same process as treaties or if it is dealt with differently. If it does and is effective, it is contended that the status of an MOU would be equivalent to the status of the treaty. On the other hand, if it does not go through the same process, the status would be different.

In many cases, the MOU appends the treaty and thus, considered to be an instrument that completes the treaty. It has proven to be an essential instrument that could serve as the indispensable complement to the process of concluding a treaty.[92]

[91] Supra note 14.
[92] Aust ibid note 18 at 52.

If the treaty is binding, the interesting question would be whether the instrument that is based on it or rather, appends or supplements it is binding or not.

When dealing with the process of concluding an MOU, the same factors as above are to be considered. One important aspect that could help in this regard is to identify who signs the MOU as this plays a significant role in determining the legal status of this instrument. This question was dealt with in Chapter 2 under section 2.3 which deals with the conclusion of MOU.

There are tax authorities' procedures and government procedures for entering into the MOU agreement. For the former, the designated person in the tax authority signs the MOU as per the provisions of the article on Mutual Agreement Procedures (MAP). This kind of MOU is sometimes referred to as competent authorities' agreement. It is important to note that as much as 'MOUs' form part of competent authority agreements, there are many competent authority agreements that are MOUs but are referred to in different names other than "MOU". For government procedures, it is the Minister in the government, usually finance department, or approved representative who signs the MOU. An instrument can only bind the taxpayer if it goes through the parliament and follow the constitutional procedure or process.

3.3 Legal basis for binding effect

3.3.1 Interpretation of treaties

There are other ways through which bilateral agreements bind taxpayers. The VCLT provides legal basis for binding effects of legal instruments. The VCLT encompasses the core elements in terms of interpretation. It is the ultimate guide which is always constant and contains the theoretical purest interpretation. It has some principles that have always been part of customary international law which all nations ascribe to, whether a member or not.[93] Although not all the VCLT provisions are accepted as customary law, the general rules of interpretation are accepted as such.

[93] Arnold, Brian J *Introduction to tax treaties,* available at https://www.un.org/esa/ffd/wp-content/uploads/2015/10/TT_Introduction_Eng.pdf, accessed on 2 August 2019.

In many jurisdictions, the guidelines originate directly in international law. As pointed out by Klabbers, one among many curious things about interpretation of treaties is that the rules on interpretation of treaties are themselves laid down in a treaty, particularly in articles 31 to 33 of the 1969 VCLT and in line with the International Court of Justice (ICJ) and the Appellate Body of the World Trade Organization (WTO). A large majority of international legal scholars also support the customary character of the rules of interpretation. This means that they are applicable regardless of the ratification by a State of the VCLT.[94]

Articles 31 to 33 of the VCLT are all about interpretation of treaties. The articles deal with general rules of interpretation, supplementary means of interpretation and interpretation of treaties authenticated in two or more languages respectively. The first two articles are crucial and are dealt with further in the subsections below.

3.3.2 General rule of interpretation

Article 31 paragraph 1 of the VCLT states that:

> 'A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.'[95]

The word "to be given" signifies that the meaning will be discovered and come out of the process that will be followed. There is no single meaning for a specific word and meanings differ from time to time. Interpretation always have different results depending on the facts applied. Issues in wording always come out because of the facts that give rise to certain questions. This means the meaning can change depending on the circumstances. The 'ordinary meaning' is an important element in this paragraph as well. That means the usual customary meaning in the context, which is the situation in which one can apply it in. Thinking also about object and purpose of the provisions which can differ from one provision to another.

Paragraph 2 goes deeper into the context aspect of paragraph 1 and states that:

[94] Wouters, J. & Vidal, M. 'Non-tax treaties: Domestic courts and treaty interpretation in Courts and Tax Treaty Law' in G. Maisto (ed) *Courts and Tax Treaty Law* (2007) 4.
[95] Supra note 14.

> ‘The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes, any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty; any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.’[96]

The practice when concluding treaties is that, there are sometimes other documents that are concluded with them. As noted above, the context contemplated in article 31 is not only limited to the text, preamble and annexes of the treaty itself but also includes connected agreements. According to article 31(2) of the VCLT, only documents and agreements that were in place or conclude in connection with the treaty when the treaty was concluded form part of the context articulated in this article.[97]

Engelen was of the opinion that in addition to the text, that is, ‘words’ in the treaty, as well as preamble and annexes if any, the context as per article 31 (1) also include other contemporaneous agreements and instruments such as Protocols, Memorandum of Understanding and Exchange Notes contemplated in article 31 paragraph 2 sub-paragraph a) and b).[98]

Furthermore, as per Gardiner’s submission, there are examples of understandings that have interpretative effects and these can be found in the annex of the conventions and form integral part of the convention for interpretative understanding purposes. [99] This therefore means such instruments are taken as part of the context of the treaty contemplated in article 31(2)(b) of the VCLT. An MOU is considered as an example of the instrument made by one or more parties in connection to the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

The preceding submissions suggest that MOU forms the integral part of the treaty conclusion process and serves as the means of interpretation as per article 31(2)(a)

[96] Supra note 14.
[97] Supra note 14.
[98] Engelen, Frank *Interpretation of Tax Treaties under International Law* (2004) para 10.4.
[99] Gardiner ibid note 8 at 88.

and (b) of the VCLT. As an instrument made in connection with the conclusion of a treaty, an MOU should be taken as part of context of the treaty for interpretation purposes.[100]

In addition to the context, paragraph 3 articulates other factors that should be considered for interpretation purposes, and those are:

> 'Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; Any relevant rules of international law applicable in the relations between the parties.'[101]

'Parties' in this case refers to the 'States' that consented to be bound by a treaty which is in force. This is according to article 2(1)(g) of the VCLT. [102] Subsequent agreements are important in the context of international tax. These are the agreements that both parties conclude, provided the Parliament is a party to, or Competent Authorities if the Parliament delegates its authority to them via approving article 25 in tax treaties.

The application of these subsequent agreements is vital during the process of interpretation of tax treaties or when the treaty is applied. The MOU concluded after the treaty falls within the scope of this sub-paragraph because it is a subsequent agreement that is linked to the treaty. This therefore means subsequent agreements exist to change something that prevailed before they came into effect.

Aust believed an MOU 'might' serve as an example of subsequent or subsidiary agreement for the purposes of article 31(2)(a) or (3)(a). [103]

In addition to the above, Gardiner stated the following:

> '[w]here an instrument which is not intended to be binding as a treaty is relevant to an issue of interpretation of a treaty to which it is related, it may

[100] Gardiner ibid note 8 at 88.
[101] Supra note 14.
[102] Supra note 14.
[103] Aust ibid note 18 at 44

provide evidence of consent to the establishment of subsequent practice which will be admissible as an element of treaty interpretation under article 31(3)(b) of the Vienna Convention'.[104]

MOUs may not constitute treaties as defined in article 2(1)(a) of the VCLT but rather constitute 'consensual subsequent practice of the parties' which can be useful to the Tribunals to assist in the process of interpretation and to clarify the meaning to be attributed to expressions within treaty provisions and resolve any ambiguities that may exist.[105]

3.3.3 Supplementary means of interpretation

When dealing with interpretation, one is not prohibited from looking outside the text of the treaty. Article 32 regulates the process of using extra-textual sources. This article deals with the supplementary means of interpretation, not as an optional means of interpretation, but as forming part of the process of interpretation. It can be used to determine the meaning only if there is a mistake in a treaty or ambiguity as all it does is to confirm the meaning. The application of article 32 is necessary only if after applying article 31 of the VCLT or determining the meaning thereof when interpreting according to article 31, either the meaning of the word that is being interpreted is ambiguous or obscure or if the interpretation leads to a result that is manifestly absurd or unreasonable.

The supplementary means include preparatory work of the treaty as well as the circumstances of treaty conclusion in order to confirm the meaning already articulated by use of article 31. Preparatory work forms part of supplementary means of interpretation under article 32 of the VCLT and generally indicates all documents. The memoranda form part of such documents, including minutes of conferences and drafts of treaties during the negotiation process.[106] It follows therefore that supplementary means of interpretation support the meaning in Article 31 of the VCLT and provides clarity. An MOU may play that role of supporting the meaning and reducing ambiguity when it comes to treaty interpretation.

[104] Gardiner ibid note 8 at 91.
[105] Gardiner ibid note 8 at 90.
[106] Gardiner ibid note 8 at 25.

3.4 Legal consequences of Memoranda of Understanding

Aust grappled with the question as to whether an instrument that is considered non-legally binding could have legal consequences. He first highlighted the fact that the MOU is seen to have an effect mainly in politics hence the idea that it is seen to be 'politically binding'. However, no State can take the other to international court or tribunal if they fail to abide by the MOU agreement. What often happens is that the State that is not pleased with the breach breaks off the diplomatic relations.[107]

Additionally, Aust pointed out that the intention expressed by States in the MOU may have legal consequences, but that is dependent on the circumstances and precise terms of the MOU. He further stated that the unilateral declaration can be binding in international law but that also depends on the intention of the State as stated in the MOU, and the principle of good faith. Where terms recorded in the MOUs that are concluded as a result of disputes serve as settlement to those disputes, and the two States decide to use MOUs instead of treaties for confidentiality purposes, those terms are regarded to be legally binding. It follows therefore that it is the agreement to settle as expressed in the MOU that is binding in international law, not the MOU itself.[108]

As much as MOUs might be considered as non-binding agreements under international law, that does not necessarily mean they have no legal effects. An MOU as an instrument or tool that is used for interpretation records understandings of the terms found in particular treaty provisions.[109] It might have been designed as an instrument that is not binding in itself, however, it has the potential legal consequences when it comes to the interpretation of treaties.[110] Interpretative MOUs are intended to create independent legally enforceable obligations which go beyond just the record of understandings of parties.[111]

The term 'understanding' does not have the same status as a reservation modifying the treaty.[112] It follows therefore that if an instrument merely clarifies a treaty

[107] Aust ibid note 18 at 50.
[108] Aust ibid note 18 at 51.
[109] Gardiner ibid note 8 at 87.
[110] Gardiner ibid note 8 at 89.
[111] Gardiner ibid note 8 at 90-91.
[112] Gardiner ibid note 8 at 89.

provision, it cannot be said it is legally binding. On the other hand, if an instrument modifies the provision of the treaty, it becomes part of the treaty and as a result becomes legally binding.

Any bilateral agreement that is concluded between the contracting States and agreed upon is binding and should be respected by both States. The treaty is legally binding to the States to the extent that it is ratified. This is particularly the case in the dualist system. As seen under 3.2 above, a treaty is legally binding as per article 26 of the VCLT.[113] Therefore, any instrument that is treated as a treaty has binding effects. The question is whether an MOU could be regarded as a treaty.

The primary factor that draws the distinction between the treaty and MOU according to their definitions is that an MOU is not intended to be governed by international law while the treaty is intended to be governed by international law as per article 2 of the VCLT.[114] There are however conflicting views by different commentators regarding the distinction.

As it was highlighted in chapter 2, Klabbers believed the distinction between the two instruments was not necessary as they both have the potential to influence future behaviour and are not subject to domestic law. Aust had a counter argument regarding the distinction between the two instruments and indicated that Klabbers ignored the important factor which is the intention of parties concluding an agreement to create legal obligations and binding effects with the instrument they conclude, which is reflected by careful choice of words used in each instrument.[115]

Engelen's opinion was that an MOU is contemplated when a treaty is defined.

> '[t]he definition of a treaty for purposes of the Vienna Convention takes into account that in modern treaty practice international agreements are frequently concluded by less formal single or related instruments such as "exchanges of notes", "agreed minutes" and "memoranda of understanding..."' [116]

[113] Supra note 14.
[114] Supra note 14.
[115] Aust ibid note 18 at 47.
[116] Engelen ibid note 98 para 3.2.1.

Looking closely at the above quote, the assertion is that those less formal single or related instruments are considered when the 'treaty' is defined. This therefore suggests that those instruments are treaties and the inference is that they may have the similar status as treaties.

Vogel highlights the fact that there are other documents that are concluded with the treaty that have the binding effects equivalent to the principal treaty:

> '...in some cases, other completing documents are frequently attached to treaties. Such documents elaborate and complete the text of a treaty, sometimes even altering the text. Legally they are a part of the treaty and their binding force is equal to that of the principal treaty text. When applying a tax treaty, it is necessary to carefully examine these additional documents.' [117]

As contemplated in the above quote, other completing documents attached to the treaty form the integral part of the treaty. Just as the treaty is legally binding, these completing documents may also have the binding forces equivalent to the treaty they are based on. Without these documents, the treaty is incomplete. These documents supplement the treaty and are attached to it when it is published. There is, therefore, no doubt that any of those completing documents forms the integral part of the treaty and make it complete. MOUs that are concluded with the treaty form part of those completing documents, thus their binding force is equivalent to that of the treaties they are based on.

In the context of international tax, MOUs are concluded with the main instrument, generally based on DTAs, and form part of annex which completes the treaty. There are Competent Authorities (CAs) agreements relating to the provisions of the treaty. Article 25 of the OECD Model Tax Convention[118] states that CAs can agree on aspects of application or interpretation of the treaty in case there are some difficulties and ambiguities to be resolved. This only authorises the CAs to conclude arrangements, but the question is whether the agreements they conclude are legally binding or not.

[117] Vogel ibid note 2 at 29.
[118] Supra note 19.

Most MOUs in international tax are concluded based on a delegated framework provided by article 25 (3) of the OECD Model Tax Convention (OECD MTC). The article deals with Mutual Agreements. The important aspect of this provision is the intention to confer necessary powers to the CAs, which enables them to conclude the agreements. According to paragraph 36 of the commentary on article 25 (3), the mutual agreements concluded pursuant to the provision of article 25 (3) are binding on administration for as long as the CAs do not agree to modify or rescind mutual agreements.[119]

Mutual agreements are concluded pursuant to the treaty provisions. The generally accepted view is that mutual agreements that are validly concluded by CAs of the contracting States with a delegation framework are binding on the contracting States under international law. The implication is that those agreements are deemed to have been made by the contracting States themselves as it is the provision of the treaty that gives authority to the CAs to conclude those agreements. CAs in this case are regarded as authorised representatives of the two contracting States that are parties to the treaty.[120]

There are other factors that need to be taken into consideration before the assertion regarding binding effects could be made. First off, the purpose MOUs exist is equally important in determining the binding effects, as well as what they are used for. If they are used to modify the substantive clauses of the treaty, and both contracting States agree to that, then arguably, they would have binding effects. On the other hand, if MOUs are used as a method of clarification for interpretation purposes, it cannot be said they are legally binding.

3.5 Timing of Memoranda of Understanding

Time is important when it comes to determining the legal status of MOUs. One of the things to consider is whether an MOU was included when the treaty was signed, in other words, if it was concluded at the same time as the treaty. If the answer is in the affirmative, the MOU becomes part of the treaty as it appends or supplements the treaty.

[119] Supra note 20.
[120] Supra note 20.

Alternatively, there must be consideration as to whether an MOU came into effect before the treaty was concluded which makes it part of the circumstances that existed before treaty conclusion and prevailed at the time the treaty was concluded.

The last consideration to be made is whether an MOU was concluded after the treaty was concluded, which might be as a result of difficulties in interpretation or application of specific provisions of the treaty or when problems arise. If MOUs post-date the treaty, they generally are a source to establish concomitant "subsequent State practice" for the purposes of article 31(3)(b) of the VCLT.

It is worthwhile to review the MOUs that were collected and recorded in Table 1 under appendix A to identify the timing effect and where they fit in. The MOU between the United States and India on article 12 of the 1989 treaty, concerning Royalties and Fees for Technical Services already existed at the time the treaty was concluded. The MOU was concluded on the 15th of May 1989, four months prior to the conclusion of the treaty, and since this MOU was published with the treaty, it forms part of treaty annex, which makes it the integral part of the treaty.

On the other hand, the MOU relating to Mutual Agreement Procedures (MAP) between the United States and India regarding deferment of tax assessment and suspension of tax collection did not exist at the time the treaty was concluded. It was concluded at the later date, 25th of September 2002, which was about twelve years after the treaty entered into force.[121] Its main objective was to solve the difficulties that the taxpayers faced during the time MAP were still pending. This is considered a post-date MOU and could therefore be regarded as a source to establish concomitant subsequent State practice as indicated above.

Many MOUs are based on TIEAs and it is specifically stated in one of the paragraphs of those MOUs that they shall come into effect the moment the treaties they are based on enter into force. For example, the MOU between Jersey and Mexico has a conclusion date of 8 and 12 November 2010 while the TIEA it is based

[121] Supra note 89.

on has a conclusion date of 8 and 10 November 2010. The MOU however states that it will be effective when the TIEA enters into force.[122]

3.6 Issues of accessibility of Memoranda of Understanding

Aust highlighted the issue of MOUs being difficult to find as one of the dangers in using MOUs.[123] MOUs are often confidential documents, and thus not easily accessible. Although confidentiality is one of the many advantages of using MOUs, it gravely disadvantages taxpayers since they are denied access to MOUs, leading them to have incomplete information for making decisions. This, by law, should not be the case, especially if the MOU has an impact on taxpayers' tax liability.

The challenge of accessibility was also highlighted in the case of *Ben Nevis* as seen in section 1.2 of chapter 1 where the court admitted that the fact that an MOU was not publicly accessible was a problem and made a suggestion that the instruments should be published on the websites of respective competent authorities or highest tax authorities of the contracting States in agreement, which could help solve the problem of accessibility.

In this research, the same problem of accessibility of MOUs exist. To counter that problem, different databases were used to search for MOUs. As it can be seen from Table 1 in Appendix A, under "sources", some MOUs were sourced from google search. Those have however been compared with the MOUs sourced from the IBFD Tax Research Platform. The only difference between those is that, some of the MOUs that have been sourced via google led to the websites of relevant competent authorities and have the names and signatures of officials that are competent authorities or authorised representatives. Other than that, overall content is the same.

The other way the problem of accessibility is addressed in this research is by broadening the scope through the review of court cases that have an element of MOU in order to understand how the courts deal with those instruments. This is because anything that goes to court becomes public knowledge and therefore

[122] Supra note 22.
[123] Aust ibid note 5 at 46.

accessible by the general public. Chapter 4 of this research is dedicated to reviewing those court cases which serve as evidence in verifying how the law on MOUs is applied by the courts.

3.7 Conclusion

There are tax authorities' agreements and agreements concluded by the CAs of the contracting States. Each of these agreements have various purposes, including among others, interpretation and application of treaty provisions, solving difficulties encountered, and providing clarity on the scope and context of treaty provisions. The process of concluding those agreements is important as it has an impact on the legal status of those agreements. If the constitutional process is followed and agreements go through the parliament and are ratified, they become legally binding. Furthermore, if MOUs are concluded pursuant to the provisions of the treaty through a delegated framework for interpretation purposes, then arguably, they also become legally binding.

Timing of MOU conclusion in comparison with the treaty can help in determining the status of MOUs as that gives evidence as to why they were concluded in the first place and the purpose they serve. If they are concluded before the treaty conclusion, they become part of the circumstances that prevailed before the treaty existed, and if they are concluded with the treaty, they become the integral part of the treaty and may therefore have the similar status as the treaty. If they are concluded later on after the treaty is concluded, it is generally because of the difficulties faced when the treaty was applied, and they may be used as a tool to resolve those difficulties by modifying the treaty provision where problems arose and therefore would have binding effects.

MOUs are examples of instruments regarded as completing documents that are attached to the treaties. They form the integral part of the treaty and are included as part of annex when the treaty is published. As Vogel points out, they elaborate and complete the text of the treaty, sometimes even altering the text. They are legally part of the treaty and their binding force is equivalent to that of the principal treaty text. They should also be considered when tax treaties are applied.

Although MOUs may not have been designed to be legally binding agreements as per their definition, they may have legal consequences. In the field of international tax, the role the MOUs play in the interpretation of tax treaties can be described in two ways; one being modification of substantive treaty provision which is legally binding, and the other being clarification of substantive treaty provisions which in turn is not legally binding. The former could be considered as part of context contemplated in article 31 of the VCLT and the latter form part of supplementary means of interpretation as contemplated in article 32 of the VCLT.

In the next chapter, case law relating to tax MOUs will be reviewed in order to understand how the courts view those instruments, and to test the legal framework that has been reviewed in this chapter.

CHAPTER 4: ANALYSES OF CASES DEALING WITH TAX MEMORANDA OF UNDERSTANDING

4.1 Introduction

In the previous chapter, the legal framework surrounding Memoranda of Understanding (MOUs) was reviewed and the purpose of this chapter is to analyse selected cases and to consider the implications of the legal framework reviewed in the previous chapter. The emerging themes from the review of court cases will inform the classification categories which form part of the structure of this chapter.

Case Law provides a crucial component when determining the legal status of bilateral agreements. Whenever a matter arises, any of the aggrieved parties involved may take it to court for resolution. The courts have varied levels of power and the binding decisions differ depending on those levels and nature of cases. Countries around the world differ and therefore, in order to fully understand the application of law, it is important to understand the judicial systems of the countries in which cases take place and decisions are made.

The primary objective in this chapter is to investigate and understand how domestic courts view and deal with tax MOUs. As previously mentioned in chapter one and three, MOUs are often inaccessible. To mitigate against that limitation, the scope is broadened by looking at case law that deals with tax treaty related MOUs. Once the matter goes to court, it becomes public knowledge and the general public can access information relating to that specific case.[124] Case law is therefore the ideal area to review in order to have a better understanding of how the courts view and use MOUs, which will in turn highlight the legal status of MOUs in the context of international tax.

There are two areas of tax treaty law where tax MOUs have an impact. The first area deals with procedural types of MOU in connection with administrative provisions, and the second area deals with MOUs that are interpretative in nature and are connected to attribution rules of the treaty.

[124] Gandhi, Shri Vimal 'The India Judicial System and Tax Disputes' (2011) 65 (4/5) *Bull. Intl. Taxn.* 252.

4.2 Court decisions concerning Memoranda of Understanding relating to administrative provisions

There are three main articles within the Double Tax Agreement (DTA), or the 'treaty' in short that are part of the administrative provisions and those include article 25 that deals with Mutual Agreement Procedure (MAP), article 26 concerning Exchange of Information (EOI) and article 27 regarding Assistance in Collection of Taxes. The preceding articles are as per OECD MTC[125] structure. They may vary from one treaty to another. These are articles in which the tax authorities of contracting States are involved in as they are responsible for the administration of taxes.

There are at least three tax MOUs concerning administrative provisions that have case law associated with and those are the MOUs between India and United States; South Africa (SA) and the United Kingdom (UK); and lastly Netherlands and Germany. Out of all those MOUs, only the MOU between India and United States was publicly accessible. The rest of the MOUs were not in the public domain, but there are court cases that are connected to them.

4.2.1 Binding effects of the Memorandum of Understanding relating to Mutual Agreement Procedure

Mutual Agreement Procedure (MAP) is a method used to solve conflicts between the treaty and tax regime in one of the contracting States. The MOU relating to MAP between India and United States holds legally binding powers and therefore should not be ignored when decisions on matters that concern it are made. This is because it has an impact on taxpayers' tax liability and was concluded pursuant to the treaty provision which gives power to Competent Authorities (CAs) to conclude agreements.

A decision by India's High Court from 2010 in the case of *McKinsey*[126] deals with the above-mentioned MOU and the court was explicit about its binding effects. The MOU was concluded in 2002 due to hardships faced by taxpayers when matters were still pending under MAP. The primary reason it was concluded was to prevent

[125] Supra note 19.
[126] *McKinsey & Company Inc. v Union of India* (High Court India) No. 799/2010, 13 April 2010 para 12.

unnecessary harassment of taxpayers during the period the issues raised were under consideration of MAP. The CAs agreed that efficient processing of MAP cases would be facilitated by suspending collection of taxes and deferring assessments. The main issue that brought rise to this case was that the Petitioner (taxpayer) was denied the zero-withholding certificate by the Assessing Officer (tax authority) despite complying with all the requirements enclosed in the MOU.[127]

The court ruled in favour of the taxpayer and explicitly stated that the basis in which a certificate of zero-withholding tax under section 195 (3) was declined by the tax authority when the taxpayer submitted an application was ex facie, contrary to law and amounted to a patent disregard of the 'binding' provisions of the MOU between the Governments of India and the United States. The tax authority, however, did not apply their mind completely to the provisions of the 2002 Inter-Governmental MOU. Moreover, the challenged order ignored the provisions of the law and did not consider the legal implications of the MOU between the Governments of the above-mentioned contracting States. There was also a disregard of the issues which had already been settled in the past as a result of the Mutual Agreement Procedure between those two contracting States.[128]

In October 2013, three and half years after the above case was ruled, the High Court of India in the case of *UPS Worldwide Forwarding Inc*.[129] dealt with the same MOU between India and United States relating to MAP. This case had similar facts and issues as in *Mckinsey's* case above. In this case, the tax authority was under the impression that they had to 'admit' taxpayer's application for zero-withholding certificate before they could issue the certificate. The court concluded that the way the tax authority interpreted the words in the treaty and MOU was incorrect. There was nowhere in both the treaty and MOU where the tax authority had to admit taxpayer's application before issuing the zero-withholding tax certificate. This was a clear misconception and if it was allowed, the provision of article 27 of the treaty would be rendered redundant.

[127] Supra note 126 para 11.
[128] Supra note 126 paras 12-14.
[129] *UPS Worldwide Forwarding Inc. v DIT* (High Court India) Writ Petition No. 1455 of 2013, 25 October 2013 para 11.

Clause 6 of the MOU was highlighted in this case and it made it clear that withholding tax on income could be subject to MAP for the past, present and future tax years. If consideration is only given to the current tax year and not the prior nor future years, that will be contrary to Clause 6 (iii) of the MOU. The taxpayers qualify for the deferment of assessment and suspension in collection of taxes while MAP is pending for as long as they could fulfil the requirements of clause 2 of the MOU by providing security in a form of irrevocable bank guarantee. The court ruled in favour of the taxpayer. The reasons for that ruling were that the tax authority violated the provision of article 27 of the treaty between USA and India, as well as Clause 6 (iii) of the MOU that those two States agreed upon.[130]

Fourteen days prior to *UPS Worldwide Forwarding* case above, the High Court of India in Chandigarh dealt with the similar issues and reached the same decisions in the case of *Motorola Solutions India.*[131] It was noted that Article 27 of the tax treaty between the United States and India provided for MAP and allowed the aggrieved persons to present their case to the CAs of the countries in which they are residents and that was done accordingly. Just like in *UPS Worldwide Forwarding* case above, the tax authority was under the misconception that they had to "admit" the application submitted by the taxpayer for the deferment of assessment and suspension of tax collection while MAP was pending to take place. However, the court ruled against the tax authority and stated that the thought was not envisaged by either the DTA, MOU or Central Board of Direct Taxes (CBDT) instructions.[132]

Although in the two latter cases, *UPS Worldwide Forwarding* and *Motorola Solutions India,* the courts did not explicitly say that the provisions of the MOU were binding, it is implied that they are as the cases dealt with similar facts and identical issues as in McKinsey & Co. where the court relied to the same MOU to inform their decisions and made the same ruling where they are in favour of the taxpayer. The Indian court decisions imply that the MOU relating to MAP holds legally binding powers as the courts relied on it heavily when making their decisions and therefore cannot be ignored when decisions on matters that concern it are made.

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[130] Supra note 129 para 13.
[131] *Motorola Solutions India Pvt. Ltd. v CIT* (High Court India) Civil Writ Petition No. 7652 of 2013, 11 October 2013 at 4.
[132] Supra note 131 at 4.

It is important to note that the 2002 MOU between India and United States was concluded by CAs pursuant to MAP provision in the Convention between those two contracting States through a delegated framework. Because no article in the treaty had the provision that allowed suspension of tax assessment and deferment of tax collection before this MOU was concluded, the MOU played a significant role in introducing that. This means that the MOU modified the treaty by introducing that provision, and that makes the MOU to be legally binding. The decision of the court in this case that stated that the refusal by the tax authority to grant zero-withholding certificate to the taxpayer violated the binding provisions of the MOU was therefore correct and this assessment affirms that.

4.2.2 Use of Memoranda of Understanding that are not in the public domain during litigation

The issue of confidentiality regarding MOUs is critical. It was briefly highlighted in Chapter one under research problem and was one of the factors that brought rise to this research. The case of *Ben Nevis*[133] had an aspect that dealt with the issue of confidentiality where an MOU was not made available in the public domain. There was an MOU that was concluded by tax authorities in the UK and SA. This MOU was concerning assistance in collection of taxes under article 25A of the 2002 Convention between the afore-mentioned States. The applicant believed the use of MOU was not admissible as an aid to interpretation of the 2010 protocol as it was not an agreement between the States that are parties to a treaty but rather an agreement between the tax authorities. They supported their argument with reference to the case where the court refused to have regard to the joint agreement (MOU) between the tax authorities.

Contrary to the taxpayer's argument, the court considered the MOU to be admissible on the construction of the 2010 Protocol and the 2002 treaty between UK and SA pursuant to article 31 paragraphs 2 and 3 of the VCLT. Under article 31, the MOU may be used as an aid in interpreting the primary instrument it supplements. The court further stated that the MOU was concluded by appropriate organs of State for VCLT

[133] Supra note 10 at 1028 para 39.

purposes and pointed out the fact that the court in the case the taxpayer relied on was not addressing the status of the joint agreement in the context of VCLT.[134]

Article 25A (1) of the 2002 amended treaty between UK and SA stated that the CAs of both States may conclude one or more MOUs to settle the mode of application of the treaty.[135] Not only did article 25A of the treaty allow the MOUs to be concluded by CAs, but the 2010 OECD MTC also stated clearly that for the contracting States to settle the mode by which agreements on Mutual Assistance may be applied, they may conclude an MOU.

It was pointed out in the case that the MOUs of that kind that are concluded with the UK are not published and the only way the taxpayers could access them was if they made the Freedom of Information Act request. This was particularly surprising to the court as MOUs were starting to be used frequently in that context and may have had an important bearing on the taxpayer's position when it comes to taxes. It was therefore not fair to the taxpayers that those instruments were not published, which resulted in them not being publicly available. The court suggested that they should be published on the CAs' websites for taxpayers to access them.[136]

Although the focus of the case or the main issue therein was not on MOU, the court's comments regarding the subject matter were compelling. The court considered the application of the instrument admissible and viewed it as an important aid for interpretation and linked it to the provisions of article 31 of the VCLT. This clearly indicates that when it comes to taxpayers' rights, the courts are stricter and because of that, the legal status of the MOU is contended to be high.

4.2.3 Domestic courts disregarding Memoranda of Understanding

In some jurisdictions, MOUs between tax authorities are disregarded. This was the case in *State Secretary for Finance v X*[137]*,* the Dutch case, which was decided in 2017 by the Supreme Court of the Netherlands. The Dutch and German ministry, the highest tax authorities, published an agreement, which was essentially a tax treaty

[134] *S*upra note 10 at 1028 para 39.
[135] Supra note 10 at 1036 para 57.
[136] Supra note 10 at 1028 para 41.
[137] *State Secretary for Finance v X* 2017 (20) ITLR 84 at 91 para 2.1.7.

MOU. This agreement had new regulations concerning the taxation of termination compensation payments. This was supposedly pursuant to article 25(2) of the treaty between those two States. The Supreme Court disagreed with the MOU interpretation and its retrospective application and further indicated that if the MOU was to be effective in the amendment of the treaty, parliamentary procedures should have been followed and it should have been done in the form of a protocol.[138]

The scope of article 25(2) is that CAs can conclude agreements only when there are substantial difficulties and ambiguities when it comes to implementation of the treaty. The question of interpretation relating to this provision had previously been dealt with by the Supreme Court in 2004 and there were neither any difficulties nor ambiguities in the treaty. As a result, the MOU did not achieve its purpose and was considered invalid. It was stated that it went beyond the scope of article 25(2) of the treaty and that could not be allowed. The court also pointed out that article 25(2) does not give the power to make arrangements that put taxpayers in a disadvantaged position and derogates from what the parties to the treaty had agreed on and since the MOU did that, it was disregarded.[139]

As it was highlighted in section 3.2 of Chapter 3, for an instrument to be legally binding, it should go through Parliament and follow constitutional procedures. This assertion is reflected in this Dutch case where the Supreme Court highlights the fact that if the MOU was to be effective in amending the treaty, it should have gone through Parliament. Since it was not the case with this MOU and no parliamentary procedures were followed when the MOU in question was concluded, the amendments to the treaty could not be effective. This therefore means that MOU had no binding powers and the Supreme Court was right in disregarding it. Taxpayers should not be placed in the disadvantaged position.

In 2008, the German court in case *3 K 121/07*[140] dealt with a "former" MOU between Germany and Switzerland authorities. The taxpayer was a resident of Germany employed by a Swiss company and commuted daily from his home in Germany to Switzerland and sometimes deployed his employment services in relation to

[138] Editor's note in *State Secretary for Finance* supra note 137 at 86 para 1.
[139] *S*upra note 137 at 92 para 2.5.2.
[140] *Germany v Switzerland; France_undisclosed* Case 3 K 121/07, 5 June 2008 para 6. Relied on IBFD case summary because the full case is in German and the English translation of the decision is not available.

business project in France. The main issue in this case was whether one day business trip to a third State is regarded a ‘non-return’ day as per the meaning contemplated in article 15 of the treaty between Germany and Switzerland. The court decided to deviate from the findings of the MOU between Germany and Switzerland and stated that the MOU is part of administrative rules. The court stated that it is not bound by administrative rules but only by law and justice, and therefore deviated from its findings from a former MOU between those contracting states.

The fact that the court pointed out that it is only bound by law and justice and not administrative rules is significant. This therefore means in Germany, MOUs between tax authorities that deal with administrative rules do not have binding powers nor legal effects in matters that affect taxpayers’ tax liability.

4.3 Court decisions concerning Memorandum of Understanding relating to attribution rules

Attribution rules are articles within a treaty that deal with taxing rights and how income is allocated between the two contracting States that are parties to the treaty. They consist of articles 6 to 21. A common thread in all the court cases on attribution rules that were reviewed is that they all deal with an MOU between India and United States concerning article 12, Royalties and Fees for Technical Services of the treaty between the afore-mentioned States. This MOU was concluded on the 15th of May 1989 when treaty negotiations were still in progress. It deals predominantly with the interpretation of article 12, Royalties and Fees for Technical Services. As it was highlighted in chapter 2 under section 2.6.5, this MOU has been subject to much litigation in India.The proceedings in all the cases herein take place in India.

4.3.1 Courts treating Memorandum of Understanding as part of the treaty

Chapter 3 dealt extensively with the question as to whether an MOU forms part of the treaty and whether it is legally binding or not. There is evidence found in the review of court cases on MOU between India and United States that an MOU is considered to form part of the completing documents that form part of the treaty and therefore make the treaty complete.

The Authority for Advance Ruling (AAR) in India in *Case P. No. 28 of 1999*[141] dealt with an MOU that was defining the term 'make available' as well as making it clear what should and should not be considered as Technical services. The learned counsel for the applicant drew support of their submission from the MOU between India and USA that defined what fell within the scope of the term "Included Services" and the court indicated that the applicant was indeed fully entitled to take advantage of the MOU to support their case.

The court further referred to a quote by Vogel from his book on Double Tax Convention where reference was made to article 31 paragraph 1, 2, 3 and 6 of the VCLT and identified the instruments that fell within the scope of that article. The quote highlighted the fact that there are other documents that are concluded with a treaty that should be taken into consideration when the treaty is applied. These documents elaborate and complete the treaty and sometimes alter the text of the treaty and their binding powers are the same as those of the treaty text.[142]

Section 3.4 of Chapter 3 dealt with the legal consequences of the MOU and special attention to the above assertion was drawn. As it was highlighted in that section, other completing documents attached to the treaty form the integral part of the treaty and are legally binding just like the treaties they are based on. The MOU between India and the United States forms part of those completing documents as it was concluded with the treaty and was attached to it when it was published. There is no doubt that it forms the integral part of the treaty and completes it, as a result, its status in terms of the binding force is equivalent to that of the principal treaty it is based on.

4.3.2 Comparison of treaties

The comparison of treaties is allowed in international tax. In the 2004 case of *Preroy AG*[143] which involved India and Switzerland treaty, the Income Tax Appellate Tribunal (ITAT) in India relied on the MOU that appended the US and India DTA to define the term fees for technical services in article 12. In the court's opinion, the

[141] *P. No. 28 of 1999 v Unknown,* 2000 242 ITR 208 AAR, 19 August 1997 paras 31-37.
[142] Supra note 141 para 38; *Sandvik AB v DDIT* (ITAT India) ITA No. 47/PN/2013, 22 May 2015 para 11.3.
[143] *Preroy AG v DDIT* (ITAT India) ITA No. 5820/Mum/2004; 4256/Mum/2004; 4252/Mum/2004; 5821/Mum/2004; 6575/Mum/2004, 16 April 2010 para 18.

MOU is a tool with which the meaning intended in the treaties between contracting States is uncovered. Because the wording in article 12(4)(b) in the treaty between India and Switzerland was identical to the same article in the US and India treaty, the MOU appending the latter treaty could be used to arrive at the meaning contemplated in the former treaty. It was further stated that according to law, the treaty of one country can be compared with the treaty with another country in case of ambiguity in order to understand the true scope and meaning in the concerned treaty. This view was supported by reference to *A.E.G Telefunken* case where the court compared the treaty of Germany with Finland treaty.

The similar view of the above is found in *Raymond Limited*[144] that was decided in 2002 by the ITAT in India. The taxpayer relied on the MOU and example 4 and 5 therein to support their case and argued that since the treaty between India and USA had an MOU supplementing it and fully explaining the scope of article 12 and the meaning of the terms therein, that MOU had to be utilized in order to interpret the provisions of the article identical to that in the UK and India treaty. The taxpayer further pointed out that the language that is used in the India-UK treaty to define 'fees for technical services' is identical to the one employed in the India-US treaty and compared those two treaties as a result. The taxpayer emphasized the fact that in case of ambiguity and to understand the true scope and meaning of the treaty concerned, that treaty may be compared with the treaty with another country. Just like in the case of *Preroy AG* above, reference was made to *AEG Telefunken* where the court utilised the Germany treaty with Finland treaty to make comparisons.

In addition to the above, the taxpayer stated that the MOU explained the India and USA treaty and the meaning of words therein were expressly embedded or incorporated into the relevant provision of Singapore treaty by adding the necessary words. That indicated the process of evolution enriched by experience, as a result both Singapore and US treaties are 'aids to construction' when it comes to the principles applied to the interpretation of treaties and cannot be ignored. They can be used in order to understand the scope and intent of the UK treaty with India. The counter argument from the Assessing Officer's side was that when it comes to the

[144] *Raymond Limited v Deputy Commissioner of Income-tax* (ITAT India) ITA Nos. 1225 & 1226/Mum/2000, 24 April 2002 paras 68-73.

interpretation of treaties, MOU is only binding to the parties that sign it and as a result, the MOU between India and USA cannot be relied upon to help understand the provisions in the UK treaty with India.[145]

The court's ruling was in favour of the taxpayer and stated that the taxpayer's interpretation point of view was accurate:

> 'The MOU appended to the DTAA with USA and the Singapore DTAA can be looked into as aids to the construction of the UK DTAA. They deal with the same subject...it cannot be said that different meanings should be assigned to the US and UK agreements merely because of the MOU despite the fact that the subject-matter dealt with is the same and both have entered into by the same country on one side which is India. The MOU supports the contentions of the assessee regarding the interpretation of the words "make available". The portion of the MOU explaining para 4(b) of the relevant article, which we have extracted earlier in our order while adverting to the contentions of the assessee, fully support its interpretation. Example (4) given in the MOU also supports it'.[146]

The fact that the court agreed with the taxpayer and made use of the MOU between India and USA as a means of interpretation of the India and UK treaty is a clear evidence that when it comes to interpretation of treaties, the MOU is not only binding to the parties that conclude it but can also be used to aid interpretation of treaties of other States with India that have identical language with the provisions to the treaty between India and USA.

4.3.3 Common understanding of the scope of identical treaty provisions

Guy Carpenter & Co. Ltd.,[147] is the appeal case that was decided in 2012 by the Indian ITAT where the taxpayer was not satisfied with the decision taken by the previous court and believed that the decision had errors. The taxpayer was a company incorporated in London United Kingdom and provided reinsurance brokerage services to the Indian company. Employees of the taxpayer would visit the

[145] Supra note 144 para 86.
[146] Supra note 144 para 94.
[147] *Guy Carpenter & Co. Ltd. v ADIT* (ITAT India) ITA No. 5646/Del/2011, 24 February 2012 paras 1-3.

client's business in India for meetings but that was not enough days to make a permanent establishment in India. The issue was whether payment made for services rendered, commission in this case, qualified as fees for technical services taxable in India. Both the assessing officer and taxpayer referred to the definition of technical services to verify if the term "make available" was applicable in the case at hand.

After the court heard both sides and examined some documents and went through the orders of the authorities, the ruling took effect and reference was made to both the provisions of Income Tax Act (ITA) and the treaty to determine what fell in the scope of technical services. Inspiration was drawn from *Raymond* case that dealt to some extent with the issue of MOU as the facts of this case were similar. The focus was placed on the MOU between India and United States and the court stated that both parties that concluded an MOU understood the definitions contained therein in a particular way, and there was no way they could have intended the terms to mean something else when they were dealing with another treaty with identical provisions.[148]

It is not logical for the country to have an intention of giving different treatment to identical services rendered by entrepreneurs from different countries. Since the language that is used in the treaty between India and USA is similar in all material respect and substance to the language used in the treaty between India and UK, the understanding of the meaning and scope of articles should also be the same. In addition to reliance on the MOU that supplemented the treaty with India and USA, the treaty between India and Singapore was also referred to as aid to the construction of the UK treaty with India. Since all were dealing with the same subject, the meaning and treatment had to be the same. [149]

The view of the court in *Cray Research*[150] was identical to the above case. The Indian court observed the protocol that accompanied the treaty between USA and

[148] Supra note 147 para 23.
[149] Supra note 147 para 23.
[150] *Cray Research India Ltd v JCIT* (ITAT India) ITA No. 4889, 4893 & 4894/Del/2000, 29 October 2010 para 45; *CESC Ltd. v DCIT* (ITAT India) ITA No. 527 (Cal.) of 1998, 6 August 2003 paras 13 & 17.

India and in that protocol, the Government of India accepted interpretation by making the following statement:

> "This Memorandum of Understanding represents the current view of the United States Government with the aspects of article 12 and it is my Government's understanding that it also represents the current view of India Government."

This therefore means the view of the Government would be the same when dealing with identical provisions. There is no reason to believe that the Government had any other different view that lead to a different interpretation unless there was anything repugnant in the context.

4.3.4 Authoritative interpretation

The MOU appending the 1989 treaty between India and the United States was concluded by the treaty negotiators and consequently became part of the treaty text as the US Senate ratified it with the treaty. There was a formal exchange of letters between the US Ambassador and Indian Ministry regarding the MOU. In the 'Notes of Exchange 2'[151] attached to the treaty between these two States, the Ambassador of the United States stated that the MOU represents the current views of the United States Government in relation to the aspects of Article 12 of the treaty and understands that the Indian Government shares the same views. He further stated that the US Government's view is that, as both Governments gain experience in administering the treaty in terms of article 12, the competent authorities may develop and publish the amendments to the MOU. The Indian Government approved the position of the US Government by responding to the letter and confirming the understanding.

The US treasury department technical explanation document states that in the diplomatic notes which were exchanged during the time when the treaty between India and the US was signed, the two Governments confirmed their understanding in

[151] Notes of Exchange 2 between the embassy of the United States of America and the Government of India, signed on 12 September 1989.

terms of several points. One of these points was in relation to the MOU on article 12 which was developed and agreed upon by the treaty negotiators.[152]

The MOU was used to understand the scope of included services under article 12(4)(b) of the treaty. This MOU gives the ultimate understanding of article 12 and definitions therein. It follows therefore that this MOU has legal consequences in connection with interpretation as it highlights the understanding of the highest authority, which is the Government with the highest powers to conclude interpretative instrument regarding the scope of the abovementioned article. This therefore means, legally, the taxpayers and tax authorities must rely on this MOU for the purposes of interpretation and application of the treaty provision it relates to.

In *ICICI Bank Ltd*.,[153] the 2007 Indian ITAT case, the issue was whether payment for services provided fell in the scope of fees for technical services as contemplated in article 12(4)(b) or not. The Assessing Officer's interpretation of article 12(4)(b) of the India-US treaty was that the paragraph imagines an incident where there is a provision of service in which the person who provides that service uses the customary skills of his calling to execute the work for the other party. The court relied extensively on the same MOU and looked at the facts of the case in light with the definition of fees for included service in both the treaty and MOU with examples given therein to make the ruling. The ruling was that the payment made did not fall in the scope of fees for included services.

The court criticized the Assessing Office's view and pointed out that the interpretation was completely contrary to the understanding between the respective Governments who concluded the tax treaty. The court stated that:

> 'Once the expression has received an authoritative interpretation from the authorities no less than the representative Governments which have entered

[152] Treasury Department Technical Explanation of the Convention and Protocol between the United States of America and the Republic of India for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to the Taxes on Income, signed on 12 September 1989.
[153] *ICICI Bank Ltd. v Deputy Commissioner of Income Tax* (ITAT India) IT Appeal No. 486 (Mum.) of 2004, 9 October 2007 para 1-11.

into the tax treaty in which the said expression is used, there is no longer any scope of any other interpretation on any other basis.'[154]

The views of the court as well as the supporting evidence they outlined make it clear that the MOU between India and the United States is important as a tool for interpretation and can be used even when interpreting the vast majority of treaties India concluded with other countries that came into force later on. There is therefore an inference that this MOU holds highest powers when it comes to interpretation of treaties and consequently has the high legal status.

The above assertion on authoritative interpretation was also found in the 2005 case of *Boston Consulting Group Pte. Ltd.*[155]. The Indian court referred to the observation of Griffith C.J. In the case of *Webb v. Outrim* whose stronger argument was that when the specific treaty provision has received an authoritative interpretation from the highest authority such as the Government and the identical clause is adopted in framing the other later treaty, that adopted clause should have the same meaning contemplated in the prior treaty whose clause has received authoritative interpretation.

It was noted that the 1989 treaty between India and United States was the first Indian treaty where a paradigm shift in the scope of Fees for Technical Service was made. Compared to other treaties where the definition of fees for technical service was in line with section 9 (IV) of the Income Tax Act (ITA), there was clearly a departure from that definition in article 12(4)(b) of the treaty. It was clearly stated in the protocol attached to that treaty that the government had confirmed that the MOU between India and the United States concerning the interpretation of article 12 also represented the views of the Indian Government and those views must prevail. The court referenced Lord Mansfield who stated that where there are different statutes of the same matter or subject, though they are made at different times, or even expired, and not referring to each other, they shall be taken as one system, even explanatory to each other.[156]

[154] Supra note 153 para 16.
[155] *Boston Consulting Group Pte. Ltd. v Deputy Commissioner of Income Tax* (ITAT India) ITA No. 447/Mum/2001, 4 February 2005 para 27.
[156] Supra note 155 para 26-27.

After that observation, the court said that this principle of interpretation of statutes should also govern the interpretation of tax treaties, especially those treaties that deal with the same thing and are materially identical. There is no reason to believe that the Indian Government had different views for the provisions in the India and Singapore treaty that are identical with the provisions of the 1989 India and USA treaty. For as long as the provisions are of the same matter or subject, a different meaning cannot be assigned to the provisions unless there is something repugnant in the context. Because of that, there is nothing to support deviation from the interpretation canvased in the MOU supplementing and forming part of the treaty.[157]

4.3.5 Same interpretation for similar worded provisions

In the event where the two countries conclude a treaty but do not have the MOU that supplements it to elaborate the scope and application of certain provisions therein, the MOU appending the treaty with another country can be utilized, provided the wording in that treaty provision is identical to the wording in a treaty which the MOU supplements. This is particularly the case in India where the courts allow reliance on the MOU between India and the United States on article 12 for the meaning of the words therein to be borrowed to aid the interpretation of similar terms found in the treaty between India and other countries for as long as the application is correct.

The above practice is done pursuant to the rule of logic in language which can be used to help with interpretation issues. This rule is referred to as '*pari materia*' in Latin, which in essence means: 'Of the same matter; on the same subject; as, laws *pari materia* must be construed with reference to each other'.[158]

In the 2014 case of *The ITO (Intl. Taxn)-II*[159] before the Indian court, the respondent was a resident company of India and paid fees for services relating to navigation studies done by the United Kingdom company. When making payment, they did not withhold any tax arguing that the fees paid for the service did not amount to fees for technical service as there was no transfer of any technical knowledge or skill by the UK company. The UK company did the studies and provided a report. The

[157] Supra note 155 para 27.
[158] "In pari materia" Black's Law Dictionary: Legal Dictionary, available at *http://heimatundrecht.de/sites/default/files/dokumente/Black%27sLaw4th.pdf,* accessed on 23 October 2019.
[159] *The ITO (Intl. Taxn)-II v Adani Port* (ITAT India) ITA No.1405/Ahd/2009, 11 April 2014 para 3.3 & 5.2.

Respondent made reference to the MOU between India and United States to support their case stating that since the term 'make available' was not defined in the UK – India treaty, the definition in the MOU supplementing the India – US treaty could be used. The appellant, here referred to as 'Revenue' argued that a convention is entered into by two sovereign States relating to rights and duties of citizens or subjects, and is negotiated at a political level taking into consideration several conditions, therefore, the MOU with another country cannot be utilised to define terms of the MOU with a different country. The appellant further referred to the domestic law and said that the fees were in nature of technical service according to the Explanation 2 of section 9(1)(vii) of the Income Tax Act.

The Indian court ruled against the Revenue and stated that according to law, the provisions of the treaty override the provisions of the Income Tax Act, therefore resorted to use the treaty to determine the nature of payment made. The court ruled in favour of the Respondent and relied on the vast majority of court cases that made reference to the MOU and laid down the general principle that if the fruits of the service remained with the service provider, meaning they are not transferred to the recipient of the service to be able to perform similar activity without any help, the service falls out of the scope of technical service.[160] The court deemed it acceptable to rely on the MOU between India and United States as article 12(4)(b) of the treaty between those two States was of the same subject matter in all material respect with that of article 13 (4)(c) of the India and UK treaty. This therefore emphasizes the fact that the rule of logic is crucial in interpretation, thus the MOU with another country can be used to interpret the identical term in another treaty.

The case of *Intertek Testing Services (P.) Ltd.*[161] before the AAR in India involved the taxpayer that was the Indian resident company, a subsidiary of the UK based company called Intertek Holding U.K Ltd. The company was in the business of testing and inspecting services. A Global Management Service Agreement (GMSA) was entered into to allow a pool of skills from the vast majority of subsidiaries to be utilised and the services were provided through another subsidiary of Intertek Group

[160] Supra note 159 paras 4 & 6.4; *Bharat Petroleum Corporation Ltd. v Joint Director of Income-tax* (ITAT India) 2007 14 SOT 307, 1 March 2007 paras 11-12.
[161] *Intertek Testing Services (P.) Ltd. v The Tax Authority* (AAR India) AAR No. 751 of 2007, 7 November 2008 para 1.

Company named Intertek Testing Management (ITM) which was also incorporated in the UK. The taxpayer received those services and considered the payment they made to be “Management fees”. However, the taxpayer did not consider that amount to fall within the scope of Royalties and fees for technical services and the tax authority believed otherwise, which became an issue to be taken to court.

In the court ruling, the MOU between India and USA was utilised and the court explicitly said:

> ‘It is true that the MOU relating to the treaty between US-India does not apply to the UK-India treaty but if you have similar expression found in another treaty explained and interpreted in a particular manner consistent with one shade of meaning that can be attributed to it, there is no reason why that interpretation can be eschewed.’[162]

The court went further by stating that in their view, the explanatory memorandum is a valuable tool to aid interpretation of the phrase ‘make available’ that is found in article 13(4)(c) of the UK-India treaty, which is the similar provision to that of article 12(4)(b) of the US-India treaty. The MOU appending the latter treaty therefore explained the scope of the phrase make available in the context of technical services. The MOU reflected the Government of India’s viewpoint of the true connotation of the abovementioned expression and stood on the higher pedestal than the principle of *contemporania expositio* that is applied in many cases and therefore the interpretation given therein could be adopted when dealing with similarly worded provision as it is useful.[163]

This observation is very significant and sets precedence on the MOU subject and indicates the value of MOU. This therefore means when it comes to interpretation of similar worded provisions of tax treaties, the other MOU can be used.

[162] Supra note 161 para 11.2; *Wheels India Ltd. v ITO* (ITAT India) ITA No. 1793/ MDS/ 2006, 19 April 2011 para 13.
[163] Supra note 161 para 11.2.

The above assertion was further supported by *Bharati AXA General insurance Co. Ltd.,* [164] *case* where the court state that:

> 'The definition of FTS in the India-Singapore tax treaty is practically borrowed from the US treaty coupled with the clarification stated in the Memorandum of Understanding executed between India and USA'.

This case was dealing with the treaty between India and Singapore where the provisions on article 12 were defined in light with the treaty between India and USA using the MOU appending that treaty.

A year prior to the above case, the ruling of the Indian court in *Bovis Lend Lease (India) Pvt Ltd.,*[165] was similar. The court stated:

> 'We hold that the interpretation of the word "make available" as given in the MOU between India and US treaty can be applied in the instant case'.

Reliance was based on the Bangalore Bench decision from the case of ITO and ITA, which was that the meaning of the expression 'make available' in the MOU between India and USA supplementing the treaty of the aforementioned States could be considered and applied in the interpretation of the same words appearing in the India and UK treaty. [166]

Sometimes the parties to bilateral agreements make it explicit that specific documents can be utilised when it comes to interpretation. In the case of *De Beers India Minerals Pvt. Ltd.,*[167] the ITAT in India relied on the MOU between India and USA to bring to light the scope of article 12 (4) of the treaty between India and Netherlands. Although this MOU appended the treaty with the US, it was equally applied to help understand the provisions of article 12 in the treaty with Netherlands. The court noted that the protocol between India and Netherlands specifically stated

[164] *Bharati AXA General Insurance Co.Ltd v Director of Income Tax* (AAR India) AAR/845/2009, 6 August 2010 para 7.
[165] *Bovis Lend Lease (India) Pvt Ltd v Income Tax Officer* (ITAT India) ITA Nos. 636, 637 and 665/Bang/2008, 28 August 2009 para 100.
[166] Supra note 165 para 100.
[167] *De Beers India Minerals Pvt. Ltd. v ITO* (ITAT India) 2007-TIOL-423-ITAT-BANG, 2 February 2007 paras 4.1 & 4.9.

that the MOU signed between India and USA can be applied 'mutandis mutandis' to article 12 of the treaty between India and Netherlands.

Looking at the above, protocol is a legal instrument that forms part of India and Netherlands treaty and if it indicates that the MOU between India and USA can be applied to determine the scope of article 12 in the India and Netherlands treaty, then there is nothing that can hinder that from happening. Because of that, it can be said that this MOU has legal consequences. It holds the important status in international tax as the taxpayers, tax authorities, and Courts can legally rely on it for interpretation purposes.

Although it seems to be a common practice for the MOU to the treaty with one country to be used to interpret terms in the treaty with another country, the condition is that the provisions of both treaties should be materially similar or identical. In the event the treaty is missing some terms, importation of those terms from another treaty cannot be allowed.

In the case of *Steria (India) Ltd.,*[168] before the AAR in India, reference was made to *Perfetti* case of 2011 where the court disregarded the use of MOU appending the treaty between India and USA as an aid for interpretation of the treaty between India and Netherlands. However, in this case the focus was more on the protocol. It should be noted that in this case, the clause 'make available' did not exist in the treaty between India and France but the applicant contended that the definition should be borrowed from India and UK treaty by way of protocol and by borrowing that term, the service could not fall in that scope of Royalties and Fees for technical services, therefore, there would be no application of article 13 of the treaty between India and France.

The court decided against that and stated that where the word does not exist in the treaty with one country, it cannot be borrowed from another treaty with another country. It was further mentioned that treaties are concluded for a specific purpose and it depends on the relationship between the countries that conclude them. The court agreed with the judgement of various cases that use ordinary meaning given to treaties and liberal interpretation of the treaties but was against the importation of

[168] *Steria (India) Ltd. v CIT* (AAR India) AAR No. 1055 of 2014, 2 May 2014 para 11.

words that did not exist in the treaty. If the countries in agreement intended for the term to be included, they could have done so through the Protocol and make that effective by a way of notice but since they did not do so, it means they did not intend for that term to be included in the treaty, therefore importing it from another treaty was wrong.[169]

In the above case, compared to *Perfetti*, there was a slight difference in wording of the provision of Royalties article as there was no phrase 'make available' in the treaty between India and France but the phrase existed in the treaty between India and Netherlands. There is a difference between the question of interpretation of the terms and the question of importation of the term from one treaty to another. The former deals with clarifying the meaning of what already exist, and protocols and MOUs can be used for that. On the other hand, the latter is bringing what does not exist into being, which result in the changing of tax complexion of treaty provision, and that cannot be allowed. This therefore means importing terms that do not exist in a treaty from other treaty is unacceptable and cannot be allowed. What can be allowed is the interpretation of terms in one treaty in light with the MOU with another country if the provisions of both treaties are similar in all material respect.

4.3.6 Reliance on examples contained in Memorandum of Understanding

The courts sometimes refer to the MOU because the aggrieved parties have relied on it either in their submissions or to respond to the other party. The MOU between India and the US consisted of plenty of examples that explained in detail, gave clarity and provided the scope in terms of what would fall in the ambit of article 12 of the DTA. The courts relied on the examples to a certain extent when they made their decisions.

In the Indian case of *Sheraton International Inc.,*[170] before ITAT in 2006, both the counsel for the taxpayer and Revenue referred to the MOU to support their argument and the court looked extensively at the MOU and relied on several examples therein. The facts in this case were similar in all material respect to the facts in example 7 of

[169] Supra note 168 para 13.
[170] *Sheraton International Inc. v DDIT* (ITAT India) ITA Nos. 50/Del/2006 to 55/Del/2006, 4 October 2006 para 84.

the MOU and the court relied on the analysis given in that example and drew from that to make the decision:

> 'Since the facts of the present case are almost similar to the facts of this case given in Example 7 of the Memorandum of Understanding, it leaves no doubt that the payment in question received by the assesse company from the Indian hotel/ clients or any part thereof could not be treated as fees for "included services" within the meaning of paragraph 4(b) of article 12.'

The court also relied on example 4 in the MOU that clarifies in the analysis that although the services may clearly be technical services, if no technical knowledge, skill etc. is made available, the payment for that cannot fall within the scope of article 12 as fees for technical services. The court further indicated that services in the hotel industry were specifically excluded from technical services as per the examples in the MOU. The services in the present case were related to hotel industry and include advertisement, publicity and sales promotion that are not in nature of technical and consultancy services involving making of any technology available. [171]

The appeal of this case to the High Court was made in 2009 and the court looked carefully at the decisions of ITAT and the MOU that the decision was based on. After reviewing those, the court ruled that the previous court rightfully made the judgement and the case was dismissed.[172]

With the above facts and decisions, it is evident that MOU plays a significant role and serves as a great support to the courts to arrive at their decisions. The decision from the High court further puts emphasis on the fact that the MOU held important status in the interpretation of tax treaties.

Article 12 is to be understood in light with the MOU to the treaty and examples given therein. The courts are more concerned with the proper use of correct examples that relate to the facts surrounding court cases for interpretation purposes. [173] The fact

[171] Supra note 170 paras 83-84.
[172] *Sheraton International Inc. USA v Director of Income Tax* (High Court India) ITA Nos. 924/2007, 921/2007, 922/2007, 932/2007, 933/2007, 1033/2007, 1037/2007, 1044/2007, 1050/2007 and 1092/2007, 30 January 2009 paras 1 &14.
[173] *Deputy Commissioner of Income Tax v PanAm Sat International Systems Inc.* (ITAT India) Nos. 1796 of 2001, 2041 of 2004 and C.O. No. 274 of 2004, 11 August 2006 para 27; *Avion Systems Inc. v DDIT* (ITAT India) ITA No. 1745/Mum/2009, 30 May 2012 para 3 & 11.2.

that the courts refer to the MOU and rely on the examples given therein when making their decisions indicates the importance of MOUs in this context and more weight is given to it to resolve conflicts in relation to interpretation. This therefore implies that the legal status of MOU is high.

4.4 Binding decision of the High Court

A decision by India's AAR in *Perfetti*[174] case in 2011 dealt with the MOU on article 12 that appended the treaty between India and USA. The Applicant argued that the MOU could be used to interpret the meaning of the term 'make available' which was not defined in the treaty between India and Netherlands. Since the provisions of both treaties were identical, there should have been no problem using that MOU for interpretation purposes. The court declined to use the MOU to aid in understanding the scope of India and Netherlands treaty on Royalties article and said that a treaty is unique and concluded by two Sovereign States and therefore the MOU of the treaty with one State cannot be used to interpret the treaty with another State.

It was contended that the fact that there was no MOU that accompanied the India and Netherlands treaty, an inference could be that India did not want the situation arising out of the MOU that supplemented the treaty between India and USA to prevail when interpreting the provisions of the treaty with Netherlands. Furthermore, the court mentioned that article 12(5) of the India-Netherlands treaty should be interpreted in its own terms or by referring to a protocol that accompanied the treaty. The court believed no inference, conclusion or support could be drawn from the afore-mentioned MOU to interpret an expression in the treaty between India and Netherlands.[175]

In the 2014, the Applicant appealed to the High Court and stated that the AAR refused to use the MOU between India and USA to interpret what was not defined in the treaty between India and Netherlands and therefore erred in their judgement. In the decision, the High Court referred the case back to the AAR and gave an order for

[174] *Perfetti Van Melle Holding BV v DIT* (AAR India) AAR No. 869 of 2010, 9 December 2011 para 1.
[175] Supra note 174 para 1.

it to be looked at afresh because the MOU and treaty provisions were disregarded in the prior judgement.[176]

Although in the first instance it might appear that the legal status of MOU is non-existent because the court disregarded the use of it, the appeal to the High Court and the decision taken by the court shows a contrary view. This is a clear indication that MOU is an important tool to be used for interpretation and cannot be overlooked or disregarded when decisions are made. The decision of the higher court is binding to the lower court in this context, and therefore the MOU in this case held the higher legal status as the High Court supported its use.

4.5 Conclusion

After looking at how the courts view and make use of MOUs, this is what is found: There are a few areas of treaty law where tax related MOUs have an impact. The two broad categories are administrative provisions and attribution rules. Under the former, the MOUs are related to MAP and deal with different aspects of the treaty, ranging from assistance in collection of tax to deferment of tax assessment and suspension of tax collection. These are the MOUs between South Africa and United Kingdom, and India and United States respectively. Under attribution rules, there is one MOU which has court cases relating to it, and that is the MOU between India and United States on Royalties and Fees for Technical Services. The MOU between Netherlands and Germany deals with both administrative provisions and attribution rules as it was concluded pursuant to article 25(2) of the treaty between the two contracting States but dealt with the taxation of employment severance payments.

The way the courts perceive and treat MOUs differ from one jurisdiction to another. Starting with the United Kingdom, the use of MOU is allowed in the development of bilateral instruments. This assertion is drawn from *Ben Nevis,* the UK case involving HMRC relating to the MOU between the United Kingdom and South Africa on assistance in collection of taxes where the HMRC considered the MOU to be admissible on the construction of the 2010 Protocol and the 2002 treaty between UK and SA pursuant to article 31 paragraph 2 and 3 of the VCLT. Under article 31, the

[176] *Perfetti Van Melle Holding BV v Authority for Advance Ruling* (High Court India) W.P.(C) 1502/2012, 30 September 2014 paras 1-3.

MOU may be used as an aid in interpreting the primary instrument it supplements. The court further stated that for VCLT purposes, appropriate organs of State concluded the MOU. Additionally, article 25A (1) of the 2002 amended treaty between UK and SA stated that the CAs of both States could conclude one or more MOUs to settle the mode of application of the treaty. Not only did article 25A of the treaty allow the MOUs to be concluded by CAs, but the 2010 OECD MTC also stated clearly that for the contracting States to settle the mode by which agreements on Mutual Assistance may be applied, they may conclude an MOU. The court only criticised HMRC for relying on a 'secret' document that was not readily available to the public.

In the Netherlands, the MOUs between tax authorities that are intended to modify the treaty have no binding powers if they do not go through the parliament when they are concluded. This argument is supported by the decisions of the Supreme Court of the Netherlands in *State Secretary for Finance* where the court disregarded the competent authority agreement relating to taxation of employment severance payments. The Supreme Court highlighted the fact that if the amendments to the treaty done through that MOU were to be effective, they should have gone through the Parliament and followed parliamentary procedures.

In Germany there is clear evidence that administrative related MOUs that are concluded by tax authorities do not have legal effects. This assertion is drawn from case *3 K 121/0* where the court deviated from the findings of the former MOU between Germany and Switzerland and stated that the MOU is part of administrative rules. The court stated that it is not bound by the administrative rules but by law and justice only.

Lastly, in India, there are several cases in which MOUs feature although they were not the crux of the case but an element of the case. Even though in many cases the courts did not explicitly state the legal status of MOU, more evidence from case law that deals with the subject matter points to the fact that when dealing with taxing rights of taxpayers, the Indian courts turn to be stricter. They make use of MOUs to reach their decision or to support them.

Furthermore, MOUs are also used as a valuable tool to aid interpretation which the courts can rely on to support their decisions. Even in the instances of other countries that have concluded the treaty with India but did not have an MOU in place, the use of the MOU between India and the United States is useful to help parties to understand the scope of article 12 on Royalties and Fees for Technical Services for as long as the words in the treaty provision are identical. This MOU was concluded by the negotiators of the treaty during the time in which treaty negotiations were still in progress. It served as an authoritative interpretation that stood at the higher pedestal and therefore could be utilized by other Indian courts when dealing with other treaties with India without the MOU as it also reflects the view of the Indian Government. It follows therefore that in India, the MOU can be considered to have legal consequences and to a certain extent be a binding instrument in a sense that taxpayers can legally rely on them for interpretation purposes and take the party that violates it to court if the matter affects their tax liability.

Taking into consideration the MOU between India and United States relating to MAP, the Indian court in *McKinsey & Co. Inc*. was explicit by stating that the provisions of the MOU were legally binding. Same decisions were made in other cases with similar facts and issues, and reliance on the MOU was evident, therefore, the same assertion stays true that the kind of MOU used in that context was legally binding. This MAP related MOU modified the treaty provision as it introduced conditions that did not exist prior to its conclusion. It came into place to resolve difficulties faced by taxpayers during the period when matters were still pending under MAP. As it was highlighted, it introduced deferment and suspension of collection of taxes and related interests and penalties during MAP period. This in effect was alteration of the treaty provision, which is equivalent to modification of the treaty provision, which in effect is legally binding.

CHAPTER 5: CONCLUSION

Although the Memorandum of Understanding (MOU) has historically been viewed in general as non-legally binding agreement and not governed by international law or any other law, there is more evidence that gives a contrary view in the context of international tax. If an MOU is concluded pursuant to the treaty article, through the powers given to Competent Authorities (CAs) under articles 25(1)-(3) of the OECD Model Tax Convention (MTC) to conclude, for example, an interpretive instrument, then arguably such an MOU is intended to be governed by international law as the treaty authorises its conclusion. Such interpretative MOUs concluded by CAs have binding effects. The change of article 3(2) of the 2017 OECD Model clarifies the situation that prevailed under the previous Model by making it explicit that the CAs have the power to conclude agreements.

The normative framework on tax MOUs established in this research is that if an MOU is completing substantive clauses of bilateral treaty, it forms part of the treaty text and therefore has an impact on taxpayers. It has legal consequences. Moreover, if an MOU modifies the treaty, it becomes the integral part of the treaty and forms part of the treaty text. Just like the MOU that completes the substantive provisions of the treaty, the MOU that modifies the treaty has legal consequences. However, such an MOU must go through the parliament for ratification to obtain binding effect. On the other hand, if the MOU exists to clarify the substantive treaty clause, it has no binding effect but can be considered for treaty interpretation purposes. Therefore, the role of MOU in international tax can either be to complete, modify or clarify substantive treaty provisions. The MOUs that modify or clarify substantive provisions of the treaty are ordinarily concluded in subsequent stages after the treaty they are based on has been concluded. On the other hand, the MOUs that complete the treaty are concluded with the treaty.

The role an MOU plays to complete the treaty provisions stands at the higher pedestal and contributes in making the MOU legally binding. This assertion is supported by commentators such as Vogel[177] who stated that additional documents that are concluded with the treaty elaborate and complete the text of the treaty and

[177] Vogel ibid note 2 at 29.

sometimes alter it. Legally, their binding force is equivalent to that of the principal treaty they are based on. This therefore means whenever the treaty is to be applied, these instruments should also be considered as they form the integral part of the treaty. MOUs form part of the examples of those additional documents as they are concluded with the treaty. They elaborate as well as complete the treaty.

In addition to Vogel's views above, Engelen[178] noted that the definition of a treaty for the purposes of the Vienna Convention takes into consideration that in modern treaty practice, international agreements are frequently concluded by less formal single or related instruments. MOUs fall within examples of such instruments. Moreover, Gardiner[179] submitted that there are some examples of understanding that have interpretative effects and are found in the annex of the treaty. Such instruments form the integral part of the treaty for interpretative understanding purposes. He further stated that interpretative MOUs are intended to create independent legally enforceable obligations which go beyond just the record of understandings of parties. Furthermore, Aust[180] believed that in the event of disputes, if terms are recorded in the MOU instead of the treaty for confidentiality purpose to settle those disputes, those terms are regarded to be legally binding. This therefore means an agreement to settle disputes as expressed in the MOU has binding powers.

Taking into consideration the above views, it is evident that the MOU that has been concluded with the treaty for the sole purpose of elaborating or completing the treaty text has binding effects equivalent to the treaty it is based on. VCLT article 31 (1-3) provides the general rules of interpretation and context in terms of article 31(2) includes the text, preamble as well as annex. MOU forms part of annex when the treaty is concluded which essentially means it is attached to the treaty and supplements it. That makes it to form part of the treaty and as a result has the same legal status and binding effects as the treaty.

When it comes to clarification aspect, as stated before, the MOU is not legally binding but can be considered for interpretation purposes. It is in place to provide clarity when there is still ambiguities or difficulties in treaty interpretation after

[178] Engelen ibid note 110 para 3.2.1.
[179] Gardiner ibid note 8 at 88.
[180] Aust ibid note 18 at 51.

applying article 31 of the VCLT. It merely serves as secondary or supplementary means of interpretation which in effect is not legally binding as it is not changing anything but only confirming or clarifying what already exist. Article 32 of VCLT is all about secondary means of interpretation.

There are a few areas of tax treaty law where tax MOUs have an impact and those are attribution rules and administrative provisions. Case law that was reviewed focused on MOUs on four specific areas within those two broad categories namely, Royalties and Fees for Technical Services, employment severance payments, Mutual Agreement Procedures (MAP), and Assistance in collection of taxes. The first two are concerning attribution rules while the last two are administrative related.

The MOU on article 12, Royalties and fees for Included Services was concluded in May 1989 by negotiators of the treaty between India and United States during the period which treaty negotiations were still in progress. It was published with the treaty and is seen as part of the treaty text. Its role was to elaborate the scope of article 12, with the focus on fees for technical or included services. In all similar attribution rulings that took place in India, the courts relied on that MOU to inform their decisions. Therefore, in India, the tax MOU on Royalties and fees for Technical Services is legally binding as it completed the treaty and formed an integral part of the treaty. Its binding power is equivalent to the treaty it is based on.

The 2002 MOU relating to MAP between India and United States was concluded by the Competent Authorities with the sole purpose of protecting taxpayers and preventing unnecessary harassment. This is due to the hardships the taxpayers faced during the period matters were pending under MAP. This MOU modified the treaty provision by introducing new requirements for tax authorities to suspend tax collection and defer assessment for efficient processing of MAP. This provision did not exist prior to 2002, or in 1989 when the treaty was concluded. It therefore changed the treaty provision by introducing a new clause when it came into effect. The court decisions in *McKinsey & Co. Inc.* confirmed this view as the court explicitly stated that the tax authority violated the binding provisions of the MOU. This meant that the MOU was legally binding as it modified the treaty provision.

The other way that an MOU can be binding is if the constitutional process of concluding an agreement is followed. MOUs are concluded in various ways, and if they follow a parliamentary ratification process, they become legally binding. On the contrary, if their conclusion does not follow constitutional processes and do not go through parliament, they are not binding. Evidence of this assertion can be seen in the Dutch case of *State Secretary for Finance v. X* which dealt with the MOU concerning employment severance payments which was supposedly concluded pursuant to the provisions of article 25(2) of the treaty between Netherlands and Germany. The Supreme Court in the Netherlands stated that if the amendment of the treaty was to be effective, parliamentary procedures should have been followed in the process of concluding an instrument that modifies the treaty. Moreover, a Protocol should have been used to modify the treaty. Since no parliamentary procedures were followed in the process of concluding that MOU, the amendments were not effective and the court disregarded that MOU as a result. This therefore means that MOU had no binding effects in the Netherlands.

Accessibility of MOUs is crucial. Taxpayers can rely on MOUs as legal instruments but that depends on accessibility. This is because in order for taxpayers to make informed decisions and figure out how to attribute income or payments and calculate their tax liability effectively, they need to be well informed about the instruments that are used beyond the treaty which may have an impact on their tax liability. In the event where the MOUs are not publicly available, courts turn to be reluctant to use them or rely on them for their decisions. The mere fact that the taxpayers do not have access to those puts them in a disadvantaged position which is not legally acceptable. Taxpayers cannot make use of the MOUs if they cannot access them. This is usually the case with the MOUs relating to administrative provisions that are concluded by tax authorities. When MOUs are publicly available, taxpayers have an opportunity to access them. This means taxpayers and tax authorities can use them when applying the treaty and rely on them as a guide for interpretation when determining the tax liability due. Courts can also rely on MOUs to make or support their decisions when they deal with matters involving interpretation and treaty application.

In conclusion, following the review of actual MOUs, the legal framework relating to MOUs and case law that deals with the subject of MOU, more evidence indicates that MOUs are critically important in respect of international tax and have legal consequences. Consistent with the basis of methodology adopted in the above assessments, an MOU may be seen to complete both the interpretation and administrative provisions of tax treaties.

BIBLIOGRAPHY

Primary Sources

Table of Conventions

Convention between the Government of the United States of America and the Government of India for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income (12 September 1989), Treaties IBFD.

Notes of Exchange 2 between the embassy of the United States of America and the Government of India, signed on 12 September 1989.

Treasury department technical explanation of the Convention and Protocol between the United States of America and the Republic of India for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to the Taxes on Income, signed on 12 September 1989.

UN Vienna Convention on the Law of Treaties (23 May 1969), Treaties IBFD.

Memoranda of Understanding

Memorandum of Understanding between the Competent Authorities of Canada and New Zealand, signed on 25 January 2016, IBFD.

Memorandum of Understanding between the Competent Authorities of Guernsey and Spain, signed on 10 November 2015, IBFD.

Memorandum of Understanding between the Competent Authorities of Netherlands and Guernsey, signed on 25 April 2008, IBFD.

Memorandum of Understanding between the Competent Authorities of New Zealand and Guernsey, signed on 18 August 2015, IBFD.

Memorandum of Understanding between the Competent Authorities of Rwanda and Belgium concerning the Exchange of Information with respect to Taxes on Income and on Capital, signed on 22 June 2011, IBFD.

Memorandum of Understanding between the Competent Authorities of the Portuguese Republic and the Government of Jersey, signed on July 2010, IBFD.

Memorandum of Understanding between the Government of Bermuda and the Government of Malta, signed on 24 November 2011, IBFD.

Memorandum of Understanding between the Government of the Principality of Liechtenstein and the Irish Revenue Commissioners, signed on 13 October 2009, IBFD.

Memorandum of Understanding between the Mauritius Revenue Authority and the South African Revenue Service, signed on 22 May 2015, IBFD.

Memorandum of Understanding between the Ministry of Finance and Economic Affairs in Iceland and the Ministry of Finance in the Netherlands, signed on 7 February 2017, IBFD.

Memorandum of Understanding between the Ministry of Finance and Public Credit of the United Mexican States and the Director of Income Tax of Guernsey, signed on 27 June 2011, IBFD.

Memorandum of Understanding between the Minister of Finance of the Republic of Turkey and the Treasury and Resources Minister of Jersey, signed on 24 November 2010, IBFD.

Memorandum of Understanding between the Norwegian Directorate of Taxes and the Directorate General of the Tax and Customs Administration of the Netherlands, signed on 6 April 2016, IBFD.

Memorandum of Understanding between the State Administration of Taxation of the People's Republic of China and the Director of Income Tax for Guernsey, signed on 27 October 2010, IBFD.

Memorandum of Understanding between the State Administration of Taxation of the People's Republic of China and the Minister of Finance of Bermuda, signed on 2 December 2010.

Memorandum of Understanding between the Treasury and Resources Minister of Jersey and the Ministry of Finance and Public Credit of the United Mexican States, signed on 8 November 2010, IBFD.

Memorandum of Understanding between the Treasury and Resources Minister of Jersey and the State Administration of Taxation of the People's Republic of China, signed on 29 October 2010, IBFD.

Memorandum of Understanding concerning Fees for Included Services in article 12 between India and the United States of America, signed on 15 May 1989, IBFD.

Memorandum of Understanding Concerning the Interpretation and Application of the agreement between the Government of the Republic of Poland and the Government of Bermuda for the Exchange of Information relating to Tax Matters, signed on 25 November 2013, IBFD.

Memorandum of Understanding on the Agreement between the Government of the People's Republic of China and the Government of the Republic of Korea for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income, signed on 13 July 2007, IBFD.

Memorandum of Understanding on the Agreement between the Government of the Republic of Indonesia and the Government of the People's Republic of China for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income, signed on 28 March 2015, IBFD.

Memorandum of Understanding regarding Deferment of Assessment and, or Suspension of Collection of Taxes during Mutual Agreement Procedure between the Competent Authorities of India and the United States of America, signed on 25 September 2002, IBFD.

Memorandum of Understanding with respect to certain provisions of the Convention between the Government of the Republic of Kazakhstan and the Government of the United States of America for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and Capital, signed on 15 August 1994, IBFD.

Table of Cases

India

Avion Systems Inc. v DDIT (ITAT India) ITA No. 1745/Mum/2009, 30 May 2012.

Bovis Lend Lease (India) Pvt Ltd v Income Tax Officer (ITAT India) ITA Nos. 636, 637 and 665/Bang/2008, 28 August 2009.

Bharat Petroleum Corporation Ltd. v Joint Director of Income-tax (ITAT India) 2007 14 SOT 307, 1 March 2007.

Bharati AXA General Insurance Co.Ltd v Director of Income Tax (AAR India) AAR/845/2009, 6 August 2010.

Boston Consulting Group Pte. Ltd. v Deputy Commissioner of Income Tax (ITAT India) ITA No. 447/Mum/2001, 4 February 2005.

CESC Ltd. v DCIT (ITAT India) ITA No. 527 (Cal.) of 1998, 6 August 2003.

Cray Research India Ltd v JCIT (ITAT India) ITA No. 4889, 4893 & 4894/Del/2000, 29 October 2010.

De Beers India Minerals Pvt. Ltd. v ITO (ITAT India) 2007-TIOL-423-ITAT-BANG, 2 February 2007.

Deputy Commissioner of Income Tax v PanAm Sat International Systems Inc. (ITAT India) Nos. 1796 of 2001, 2041 of 2004 and C.O. No. 274 of 2004, 11 August 2006.

Guy Carpenter & Co. Ltd. v ADIT (ITAT India) ITA No. 5646/Del/2011, 24 February 2012.

ICICI Bank Ltd. v Deputy Commissioner of Income Tax (ITAT India) IT Appeal No. 486 (Mum.) of 2004, 9 October 2007.

Intertek Testing Services (P.) Ltd. v The Tax Authority (AAR India) AAR No. 751 of 2007, 7 November 2008.

McKinsey & Company Inc. v Union of India (High Court India) No. 799/2010, 13 April 2010.

Motorola Solutions India Pvt. Ltd. v CIT (High Court India) Civil Writ Petition No. 7652 of 2013, 11 October 2013.

Perfetti Van Melle Holding BV v DIT (AAR India) AAR No. 869 of 2010, 9 December 2011.

Perfetti Van Melle Holding BV v Authority for Advance Ruling (High Court India) W.P.(C) 1502/2012, 30 September 2014.

Preroy AG v DDIT (ITAT India) ITA No. 5820/Mum/2004; 4256/Mum/2004; 4252/Mum/2004; 5821/Mum/2004; 6575/Mum/2004, 16 April 2010.

P. No. 28 of 1999 v Unknown, 2000 242 ITR 208 AAR, 19 August 1997.

Raymond Limited v Deputy Commissioner of Income-tax (ITAT India) ITA Nos. 1225 & 1226/Mum/2000, 24 April 2002.

Sandvik AB v DDIT (ITAT India) ITA No. 47/PN/2013, 22 May 2015.

Sheraton International Inc. v DDIT (ITAT India) ITA Nos. 50/Del/2006 to 55/Del/2006, 4 October 2006.

Sheraton International Inc. USA v Director of Income Tax (High Court India) ITA Nos. 924/2007, 921/2007, 922/2007, 932/2007, 933/2007, 1033/2007, 1037/2007, 1044/2007, 1050/2007 and 1092/2007, 30 January 2009.

Steria (India) Ltd. v CIT (AAR India) AAR No. 1055 of 2014, 2 May 2014.

The ITO (Intl. Taxn)-II v Adani Port (ITAT India) ITA No.1405/Ahd/2009, 11 April 2014.

UPS Worldwide Forwarding Inc. v DIT (High Court India) Writ Petition No. 1455 of 2013, 25 October 2013.

Wheels India Ltd. v ITO (ITAT India) ITA No. 1793/ MDS/ 2006, 19 April 2011.

Germany

Germany v Switzerland; France_undisclosed Case 3 K 121/07, 5 June 2008.

Netherlands

State Secretary for Finance v X 2017 (20) ITLR 84.

United Kingdom

Ben Nevis (Holdings) Limited v. Commissioners for H M Revenue and Customs 2013 (15) ITLR 1003.

Secondary Sources

Books

Arnold, B.J., *Introduction to tax treaties*, available at https://www.un.org/esa/ffd/wp-content/uploads/2015/10/TT_Introduction_Eng.pdf, accessed on 2 August 2019.

Aust, A., *Modern Treaty Law and Practice* 2nd ed. (2007) Cambridge University Press, Cambridge.

Aust, A., *Modern Treaty Law and Practice* 3rd ed. (2013) Cambridge University Press, Cambridge.

Duncan B *et al, National Treaty Law and Practice* (2005).

Engelen, F.A., *Interpretation of Tax Treaties under International Law*, Online Books IBFD.

Gandhi, Shri Vimal 'The India Judicial System and Tax Disputes' (2011) 65 (4/5) *Bull. Intl. Taxn.*

Gardiner, R., *Treaty interpretation* 2nd ed. (2015) Oxford University Press, Oxford.

Wouters, J. & Vidal, M. 'Non-tax treaties: Domestic courts and treaty interpretation in Courts and Tax Treaty Law' in G. Maisto (ed) *Courts and Tax Treaty Law* (2007), Online Books IBFD.

Journals

Jogarajan, S., ‘Prelude to the International Tax Treaty Network*:* 1815-1914 Early Tax Treaties and the Conditions for Action’ (2011) 31 (4) *Oxford Journal of Legal Studies*.

Sulyok, G., ‘Treaty, Origins*’ Oxford Public International Law* 2014, available at https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e2152.

Sulyok, Gabor ‘Treaty, Origins*’ Oxford Public International Law* (2014), available at https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e2152, accessed on 2 August 2019.

Uckmar, V., ‘Double Tax Conventions’, in Andrea Amatucci (ed) *International Tax Law* (2012), available at http://www.uckmar.net/circolari/altro/trattato.pdf, accessed 7 November 2018.

Vogel, K., ‘Double Tax Treaties and Their Interpretation’ (1986) 4 (1) *Berkeley Journal of International.*

Other

Black’s Law Dictionary: http://heimatundrecht.de/sites/default/files/dokumente/Black%27sLaw4th.pdf, accessed on 23 October 2018.

APPENDIX

APPENDIX A: TABLE 1

COLLECTION OF TAX MEMORANDA OF UNDERSTANDING AND COMPARISON WITH DOUBLE TAX TREATIES IN INTERNATIONAL TAX

No	MOU	TYPE OF MOU	AREA OF TREATY LAW	CONCLUSION DATE			COUNTRIES INVOLVED	COMPETENT AUTHORITIES			NAMES AND DISIGNATION OF AUTHORITIES WHO SIGN THE INSTRUMENT			Source
				MOU	DTA	EOI/TIEA		MOU	DTA	EOI	MOU	DTA	EOI	
1.	MOU between the Norwegian Directorate of Taxes and the Directorate General of the Tax and Customs Administration of the Netherlands	Administrative	Article 27 - Exchange of Information of the convention on mutual administrative assistance in tax matters	6 Apr 2016	12 Jan 1990, amended in 2013	25 Jan 1988, amended in 2010 **(TIEA**) 10 Sep 2009 Aruba	Netherlands Norway	**Par. 2** Minister of Finance or his authorised representative Minister of Finance or the Minister's Authorised representative	**Art. 3(1)(j)**: Minister of Finance or his authorised representative Minister of Finance or the Minister's Authorised representative		H. Leijtens – Director General H.C Holte – Director General	F. M. L. van Geen Jan Flatla		Google Search
2.	MOU between the Ministry of Finance and Economic Affairs in Iceland and the Ministry of Finance in the Netherlands	Administrative	Article 28 - Exchange of Information of the convention on mutual administrative assistance in tax matters	7 Feb 2017	25 Sep 1997	25 Jan 1988, as amended in 2010 (TIEA)	Netherlands Iceland	Minister of Finance or his authorised representative Minister of Finance and Economic Affairs or his authorised representative	**Art. 3(1)(h)** Minister of Finance or his authorised representative Minister of Finance or his authorised representative		J. Uijlenbroek – Director General Reykjavik – Director General	Jan Herman R. D. van Roijen (DTA) Helgi Ágústsson (DTA)		Google Search
3.	MOU between the Treasury and Resources Minister of Jersey and the Ministry of Finance and Public Credit of the United Mexican States	Administrative and interpretative (TIEA)	Exchange of Information	8 and 12 Nov 2010 But effective when the TIEA entered into force	No DTA	8 and 10 Nov 2010	Jersey United Mexican States	Treasury and Resources Minister Ministry of Finance and Public Credit	No DTA		Philip Ozouf – Minister Ernesto Javier Cordero Arroyo – Minister	No DTA		Google Search
4.	MOU between the Minister of Finance of the Republic of Turkey and the Treasury and Resources Minister of Jersey	Administrative	Exchange of Information	24 Nov 2010	No DTA		Turkey Jersey	Ministry of Finance Treasury and Resources Minister	No DTA		Mehmet Simsek – Minister of Finance (MOU & EOI) Paul Routier – Assistant Chief Minister	No DTA		Google Search
5.	MOU between the State Administration of Taxation of the People's Republic of China and the Minister of Finance of Bermuda	Interpretation in the EOI Agreement	Exchange of Information. Part of EOI Agreement and no names. Google MOU with names of CAs	2 Dec 2010	No DTA		People's Republic of China Bermuda	The State Administration of Taxation Ministry of Finance	No DTA		WANG Li (MOU) Paula Cox (MOU)	No DTA		Google Search
6.	MOU between the State Administration of Taxation of the People's Republic of China and the Director of Income Tax for Guernsey	Administrative (Part of EOI Agreement)	Exchange of Information	27 Oct 2010	No DTA		People's Republic of China Guernsey	The State Administration of Taxation Director of Income Tax	No DTA		No Names of CAs recorded	No DTA		IBFD
7.	MOU between the Competent Authorities of Netherlands and Guernsey	Administrative (Part of EOI Agreement)	Exchange of Information	25 April 2008	No DTA		Netherlands Guernsey		No DTA	**As per EOI** Same as 1. Above Administrator of Income Tax	No Names of CAs recorded	No DTA		IBFD
8.	MOU between the Competent Authorities of the Portuguese Republic and the Government of Jersey	Administrative (Part of EOI Agreement)	Exchange of Information	9 July 2010	No DTA		Portugal Jersey		No DTA	**As per EOI – Art. 4(1)(d)** Minister of Finance, the Director General of Taxation or their authorized representative Same as 3. above	No Names of CAs recorded	No DTA		IBFD

9.	MOU Concerning the Interpretation and Application of the agreement between the Government of the Republic of Poland and the Government of Bermuda for the Exchange of Information relating to Tax Matters	Administrative and Interpretative (Purely EOI Agreement)	Exchange of Information (MOU part of the EOI Agreement)	25 Nov 2013	No DTA		Poland Bermuda		No DTA	**As per EOI – Art. 4(1)(d)** Minister of Finance or his authorised representative Minister of Finance or his authorised representative	No Names of CAs recorded	No DTA		IBFD
10.	MOU between the competent authorities of Guernsey and Spain	Administrative and Interpretative (EOI)	Exchange of Information (MOU part of EOI Agreement)	10 Nov 2015	No DTA		Guernsey Spain		No DTA	**As per EOI – Art. 4(1)(c)** Director of Income Tax Minister of Finance and Public Administrations or his authorised representative	No Names of CAs recorded	No DTA		IBFD
11.	MOU between the Government of the Principality of Liechtenstein and the Irish Revenue Commissioners	Administrative and Interpretative (EOI Agreement)	Exchange of Information (Part of EOI Agreement)	13 Oct 2009	No DTA		Ireland Liechtenstein		No DTA	**As per EOI – Art. 4(1)(c)** Revenue Commissioners or their authorised representative Government of the Principality of Liechtenstein	Brian Lenihan (EOI and Protocol) Klaus Tschütscher (EOI and Protocol)	No DTA		Google Search
12.	MOU between the Competent Authorities of New Zealand and Guernsey	Administrative and Interpretative	Exchange of Information (Part of EOI Agreement)	18 Aug 2015	No DTA		New Zealand Guernsey		No DTA	**As per EOI – Art. 2(1)** The commissioner of Inland Revenue or an authorised representative Director of Income Tax or Director's delegate	No Names of CAs recorded	No DTA		IBFD
13.	MOU between the Ministry of Finance and Public Credit of the United Mexican States and the Director of Income Tax of Guernsey	Administrative and Interpretative (EOI)	Exchange of Information (Part of EOI Agreement)	10 and 27 Jun 2011	No DTA		United Mexican States Guernsey	Ministry of Finance and Public Credit Director of Income Tax	No DTA		No Names of CAs recorded	No DTA		IBFD
14.	MOU between the Treasury and Resources Minister of Jersey and the State Administration of Taxation of the People's Republic of China	Administrative and Interpretative (EOI Agreement – Ordinary costs)	Exchange of Information	29 Oct 2010	No DTA		Jersey People's Republic of China	Treasury and Resources Minister The State Administration of Taxation	No DTA		Terry Le Sueur (MOU) XIAO Jie (MOU)	No DTA		Google Search
15.	MOU between the Government of Bermuda and the Government of Malta	Administrative and Interpretative (EOI - "Foreseeably relevant" and "Foreseeable relevance)	Exchange of Information	24 Nov 2011	No DTA		Bermuda Malta		No DTA	**As per EOI – Art. 4(1)(e)** Minister of Finance or his authorised representative The Minister responsible for finance or his authorised representative	Paula Cox (MOU-EOI) Joseph Zammit Tabona (MOU-EOI)	No DTA		Google Search
16.	MOU between the Mauritius Revenue Authority and the South African Revenue Service		Article 4	22 May 2015	17 May 2013		South Africa	The Chief Office: Legal and Policy	**As per Art. 3(1)(f)** The Commissioner for the SARS or an authorised representative		Mr Kosie Louw	H.E. Mr. Pravin Jamnadas Gordhan - Minister of Finance		Google Search

							Mauritius	Financial Secretary in Ministry of Finance and Economic Development	Director General of Mauritius Revenue Authority or an Authorised representative		Mr. Dharam Dev Manraj	H.E. Mr. Jean Harel Lamvohee - High Commissioner		
17.	MOU between the Competent Authorities of Canada and New Zealand,		Article 10(3)– Dividends	25 Jan 2016 (Canada) 16 Feb 2016 (New Zealand)	3 May 2012 (Ratified on 13 April 2015)		Canada New Zealand	Not indicated	**Art 3(1)(h)** Minister of National Revenue or the Minister's representative The Minister of National Revenue or the Minister's authorised representative		No Names of CAs recorded			IBFD
18.	MOU on the Agreement between the Government of the Republic of Indonesia and the Government of the People's Republic of China		Article 11(3) - Interest	28 Mar 2015	7 Nov 2001		Indonesia People's Republic of China	Not indicated	**As per Art. 3(1)(i)** Minister of Finance or his authorised representative The State Administration of Taxation or its authorised representative		No Names of CAs recorded			IBFD
19.	MOU on the Agreement between the Government of the People's Republic of China and the Government of the Republic of Korea		Art. 11(3) – Interest Art. 19(1)-(2)	13 Jul 2007	28 Mar 1994		Korea China	Not indicated	**As per Art. 3(1)(j)** Minister of Finance or his authorised representative The State Tax Bureau or its authorised		No Names of CAs recorded			IBFD
20.	MOU concerning Fees for Included Services in Article 12 between India and the United States of America	Interpretative	Article 12 - Royalties	15 May 1989	12 Sep 1989		United States of America India	Not indicated. However, the exchange notes 2 just states that the "Negotiators" of the DTA	**As per Art. 3(1)(h)** The Secretary of the Treasury or his delegate The central Government in the Ministry Finance (Department of Revenue) or their authorized representative		Negotiators of the Convention Negotiators of the Convention	John R. Hubbard – Ambassador N.K. Sengupta – Secretary to the Government of India		Google Search & IBFD
21.	MOU with respect to certain provisions of the Convention between the Government of the Republic of Kazakhstan and the Government of the United States of America	Interpretative	Art. 6, 14, 21, 26	15 Aug 1994	24 Oct 1993		Kazakhstan United States of America	Not indicated	**As per Art. 3(1)(h)** Minister of Finance or his authorised representative The Secretary of the Treasury or his authorized representative		No Names of CAs recorded			IBFD
22.	MOU regarding Deferment of Assessment and, or Suspension of Collection of Taxes during Mutual Agreement Procedure between the Competent Authorities of India and the United States of America	Administrative	Article 27 – Mutual Agreement Procedures	25 Sep 2002	12 Sep 1989		India United States	Same as Treaty: "The competent Authorities of India and United States under the Convention"	**As per Art. 3(1)(h)** The central Government in the Ministry Finance (Department of Revenue) or their authorized representative The Secretary of the Treasury or his delegate		No Names of CAs recorded			IBFD
23.	MOU between the Competent Authorities of			22 Jun 2011	16 April 2007		Rwanda		**As per Art. 3(1)(h)** The minister in charge for Finance or his authorised representative		No Names of CAs recorded			IBFD

	Rwanda and Belgium concerning the Exchange of Information with respect to Taxes on Income and on Capital						Belgium		Minister of Finance or his authorised representative					