Taxation of cross-border inheritances and donations: suggestions for improvement

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CHAPTER 6

The suggested improvements to the OECD IHTMTC

In the previous chapter, I discussed the provisions of the OECD IHTMTC (and its Commentary) which, in my view, could be improved having regard to the objectives of the OECD IHTMTC and the proposed inheritance and gift tax. The discussion of these provisions took place in relation to each problem of cross-border inheritances and donations.

Furthermore, in chapter 4. I presented the benchmark of the update work, the proposed inheritance and gift tax. This benchmark, which consists of four elements, assists me in suggesting improvements to the provisions of the inheritance tax model I discussed in the previous chapter. Furthermore, I argued that the proposed inheritance and gift tax is closely related to the problems of cross-border inheritances and donations. More specifically, in chapter 5, I argued that the problems of cross-border inheritances and donations frustrate the application of the proposed inheritance and gift tax in a cross-border setting through an over-application or under-application of its elements in a cross-border setting. Finally, I noted in chapter 4 that the fact that a model does not meet (some of) the elements of the benchmark does not automatically mean that it becomes ineffective or a "bad model". However, in my view, a model that is in line with (some of) the elements of this benchmark seems to address the problems of cross-border inheritances and donations in a more comprehensible manner considering the objectives of the OECD IHTMTC, than a model that is not in line with (some of) these elements.

In the following section, I will suggest improvements to certain provisions of the OECD IHTMTC and its commentaries having regard to the objectives of the inheritance tax model and the elements of the proposed inheritance and gift tax.

6.1 Double or multiple taxation

6.1.1 Narrow scope and subsidiary taxing rights (Articles 1,4, 7, 9A and 9B)

6.1.1.1 Primary taxing rights

In section 5.1.1, I mentioned that the term "fiscal domicile" seems to be defined relatively narrowly. This is because those who drafted the OECD IHTMTC decided that the fiscal domicile shall be a) assessed at the level of the deceased or the donor (Article 1 of the OECD IHTMTC), and b) established based on criteria that are exclusively listed in Article 4(1) of the model to the exclusion of other personal nexus concepts that under the domestic laws of the Contracting States can result in worldwide tax liability of the deceased's or the donor's property. By doing so, one could argue that those who drafted the OECD IHTMTC

completely disregarded the inheritance and gift tax laws of some OECD member countries, which are not based on the above principles.

It should further be noted that in paragraph 5 of the Commentary on Article 1, those who drafted the model acknowledged that "[s]ome Member countries also impose a comprehensive tax liability where: a) the deceased or the donor, although not, in fact, living there, is a national thereof; b) the heir, legatee, beneficiary or donee is either a national thereof or is domiciled there (even if the deceased or the donor was not so domiciled); or c) the deceased or the donor, or the heir, legatee, beneficiary or donee, is deemed to retain his domicile there for a certain period after he has transferred his real domicile to another State (the so-called "extended domicile")." Nevertheless, they were not willing in the first instance to concede concerning this fact as evidenced, for example, in paragraph 5 of the Commentary on Article 7 of the OECD IHTMTC concerning taxation based on nationality as an independent personal nexus concept (see also section 3.1.1.1.3). In their view, "[t]he right to tax should belong, at least in the first instance, to the State with which the deceased's or the donor's personal and economic relations are closer, which is normally the State of domicile rather than the State of nationality […]. The balance would not be equal if provision had to be made for credit against the tax due to the State of domicile for part of the tax due to the State of nationality; from the point of view of those States whose law does not impose tax according to nationality, giving such a credit would amount to the unilateral relinquishment of their right to tax on the basis of domicile without receiving any quid pro quo."[1]

6.1.1.2 Subsidiary taxing right provision

Nevertheless, I mentioned in section 5.1.1 that the narrow scope of the model does not seem to counter the objective of the model of addressing double taxation and the proposed inheritance and gift tax *in situations involving only two states*.[2] This is because those who drafted the OECD IHTMTC suggested a "subsidiary taxing right" provision to compensate a possible narrow scope of the treaty in certain instances (paragraphs 70-72 of the Commentary on Articles 9A and 9B of the model). As a result, the OECD IHTMTC does not, in my view, entirely disregard the OECD member countries' inheritance and gift tax laws that are based on principles of paragraph 5 of the Commentary on Article 1. This is because taxation based on these principles can be agreed if it is *subsidiary* to taxation by the Contracting State of the fiscal domicile (subsidiary taxing right). The recognition of a subsidiary taxing right to the other Contracting State nuances, in my view, the narrow scope of the model.

More specifically, paragraphs 5-8 of the Commentary on Article 7 and 70-74 of the Commentary on Articles 9A and 9B refer to those rights exercised by the other Contracting State that establishes worldwide inheritance and gift tax jurisdiction based on either a) the deceased's or the donor's nationality, b) the heir's, legatee's, beneficiary's or donee's nationality or domicile, or c) the deceased's/donor's/heir's/legatee's/ beneficiary's/donee's

1 Commentary on Article 7 of the OECD IHTMTC, para. 5.

2 On the contrary, the narrow scope of the model may be considered as being counter to the objective of the model and the elements of the proposed inheritance and gift tax when the cross-border inheritance and donation may be taxed by more than two states (see section 5.1.2).

extended domicile.[3] In essence, under the subsidiary taxing right provision, the other Contracting State may still tax the worldwide property of the deceased or donor but it is required provide double tax relief for the taxes paid in the Contracting State of the fiscal domicile. In that regard, paragraph 73 provides for wording for the subsidiary taxing right provision when the other Contracting State undertakes to eliminate double taxation under the exemption or the credit method.

Nevertheless, I observed in section 5.1.1 that the ten-year limitation period (during which the other Contracting State can exercise its subsidiary taxing right) applies to all the cases for which the Contracting States can agree on a subsidiary taxing right. This follows from paragraph 71 of the Commentary on Articles 9A and 9B: "Where States retain a subsidiary right to impose tax for *any* of the reasons given in paragraph 5 of the Commentary on Article 1, that right should be retained for a limited period only, and in any event, not longer than ten years after the deceased or the donor has ceased to be domiciled in their territory." Furthermore, I observed that the subsidiary taxing right seems, in principle, to be linked to abusive changes of the fiscal domicile. This is based on paragraph 71 of the Commentary on Articles 9A and 9B which reads as follows: "[t]here may, however, be a compelling reason to deviate from these rules in the cases mentioned in paragraph 70 above[4] especially where the deceased, in contemplation of death, or the donor, in contemplation of making a gift, has moved his domicile to the other State *with the intention of escaping taxation* by his former State of domicile." (Italics, VD).

In my view, the ten-year limitation period and the underlying tax-abusive motive are two elements of the subsidiary taxing right provision that could be revisited given the objectives of the OECD IHTMTC and the proposed inheritance and gift tax. I will elaborate on this in the following sections in which I will discuss these two elements regarding the cases for which the Contracting States can agree on a subsidiary taxing right provision (taxation based on nationality, taxation based on the links with the beneficiary and extended domicile).

6.1.1.2.1 Taxation based on nationality

I am of the opinion that the ten-year limitation period should not apply if a state establishes worldwide inheritance and gift tax jurisdiction based on the deceased's or the donor's nationality as an independent personal nexus concept.[5] This is based mainly on two reasons. First, there may be no abusive change of domicile from the other Contracting State to the Contracting State of the fiscal domicile because nationality does not establish fiscal domicile for treaty purposes under Article 4 of the OECD IHTMTC. Second, the moment that should determine when the other Contracting State should cease to apply its subsidiary taxing right cannot be easily determined as the deceased or the donor was never fiscally domiciled in the other Contracting State (again, because nationality does not establish fiscal domicile for treaty purposes). On the contrary, if nationality establishes worldwide tax jurisdiction on an alternative/dependent basis, the application of the ten-year limitation period for the exercise of the subsidiary taxing right by the other Contracting State seems to be more in

3 I note, however, that the Contracting States have to agree on the inclusion of a subsidiary taxing right provision in their treaty.

4 This paragraph refers to paragraphs 5 to 7 of the Commentary on Article 7 of the OECD IHTMTC.

5 See also section 3.1.1.1.3 of this study.

line with the objectives of the OECD IHTMTC and the elements of the proposed inheritance and gift tax (section 6.1.1.2.3).[6]

Based on the above, the other Contracting State shall be allowed to tax the deceased's or the donor's worldwide property without any time limitation on condition that it provides for relief for the taxes levied in the Contracting State of the fiscal domicile. As a matter of example, a state, which taxes the entire estate of a national who died while fiscally domiciled abroad for tax treaty purposes (irrespective of the number of years of such a domicile),[7] may not be precluded from exercising its subsidiary taxing right, even if the national has never been fiscally domiciled in its territory.

6.1.1.2.2 Taxation based on links with beneficiaries

In the same vein, worldwide taxation based on the personal nexus of the beneficiary or the donee as the starting point of taxation[8] has nothing to do, in my view, with an abusive change of the deceased's or the donor's fiscal domicile contrary to what paragraph 71 of the Commentary on Articles 9A and 9B seems to suggest. Therefore, the ten-year limitation period should also not apply in such a case.[9] This suggestion also seems to be in line with the objectives of the model and the elements of the proposed inheritance and gift tax (under which both donor-based and donee-based taxes fall).

6.1.1.2.3 Extended domicile

Finally, a subsidiary taxing right can be agreed if one or both Contracting States levy inheritance and gift taxes based on extended domicile rules. I observe, however, that, contrary to taxation based on the deceased's/donor's nationality and taxation based on the beneficiaries' personal nexus, taxation based on extended domicile is always *subsidiary* to taxation based on another principle (e.g. the deceased's or the donor's domicile or residence).

Furthermore, states levying inheritance and gift taxes based on extended domicile seek to address the abusive transfer of a person's fiscal domicile from their territory to another. This is the case, for example, if the deceased in contemplation of his death, transfers his fiscal domicile to another state which, for instance, does not levy inheritance taxes. States levying inheritance and gift taxes based on extended domicile often provide a credit for taxes levied in the state of the deceased's or the donor's real domicile at the time of the death or the gift. As a result, those states apply their extended domicile rules up to a certain number of years following the abusive transfer of the domicile.

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6 This, in my view, does not seem to contradict the fact that those who drafted the OECD IHTMTC considered that residence and domicile indicate a degree of integration with the community of the state whereas nationality does not (or at least not in all cases), as mentioned in section 4.2.1 of this study. In that regard, I note that subsidiary taxation based on nationality falls under the scope of the benchmark (as being part of the subsidiary taxing right provision).

7 Wolfe D. Goodman, "The OECD Model Estate Tax Convention," *European Taxation* 34 (October/November 1994): 340.

8 See also section 3.1.1.2 of this study.

9 The treaty practice also shows that the ten-year limitation period does not easily apply to the subsidiary taxing right based on beneficiaries' or donee's domicile. See, for example, the Denmark-United States Inheritance and Gift Tax Treaty (1983), the Germany-United States Inheritance and Gift Tax Treaty (1980) and the United Kingdom-United States Inheritance and Gift Tax Treaty (1978).

Based on the above, the ten-year limitation period of the subsidiary taxing right provision seems to be in line with the inheritance and gift tax laws of states applying extended domicile rules. It is understood that, if the domestic extended domicile rules of the Contracting States apply for a shorter period (e.g. seven years from the abusive transfer of domicile), the other Contracting State cannot exercise its subsidiary taxing right for a longer period even if this period is provided in the subsidiary taxing right provision of the treaty. This is because tax treaties cannot create new taxing rights for the Contracting States. I also note that the anti-tax avoidance function of the subsidiary taxing right is already recognised in paragraph 12 of the Commentary on Article 4 of the OECD IHTMTC. This paragraph is entitled "extended domicile (nationality)" and confirms that the right of a state to tax based on extended domicile rule "is merely subsidiary to the right to tax of the State in which the deceased is deemed to have died domiciled according to Article 4." Nevertheless, I observe that states often tend to safeguard *primary* taxing rights when applying extended domicile rules by introducing a specific tiebreaker rule. This tax treaty practice will be discussed in section 6.1.3 of this chapter.

There is one more aspect of the extended domicile rules, which, in my view, warrants attention. As mentioned above, the subsidiary taxing right based on extended domicile follows the taxation based on the deceased's or the donor's fiscal domicile and can be exercised within the ten-year limitation period. After this period, the Contracting State applying extended domicile rules is precluded from doing so. Contrary to this "all or nothing approach", Rust suggested an apportionment approach/split mechanism following some innovative income tax treaty provisions which deviate from Article 13(5) of the ICTMTC. Article 13(5) refers to the taxation of capital gains deriving from the sale of shares (not connected to immovable property). Under Article 13(5) of the income and capital tax model, the state of the alienator's residence enjoys exclusive taxing rights on the capital gains from the alienation of the property other than that referred to in the other paragraphs of the Article. It follows that, even if the alienator has resided for years before the alienation in the other Contracting State which provided the public goods for the increase in his wealth, this state is precluded from taxing the capital gains from the alienation of the property at hand.

Nevertheless, some income and capital tax treaties deviate from this Article. Rust referred to the Germany – Denmark and the Germany – Slovenia income tax treaties.[10] More specifically, under Article 13(5) of the Germany – Denmark income and capital tax treaty (1995), the new residence state may levy a tax on the entire increase in the value of

10 Alexander Rust, "The Concept of Residence in Inheritance Tax Law," in *Residence of Individuals under Tax Treaties and EU Law*, ed. Guglielmo Maisto (Amsterdam: IBFD, 2010), 95-96.

the property but must credit the taxes levied by the former residence state.[11] Furthermore, under Article 13(5) of the Germany – Slovenia income and capital tax treaty (2006), the new residence state must grant a step-up and tax only the difference between the amount realised and value of the property at the time of the immigration.[12] The state of the previous residence may tax the increase in value up to the moment of emigration. In essence, Germany agreed with Denmark and Slovenia on apportionment of tax revenue under these tax treaties.

Rust proposed that a similar apportionment rule could also apply in the OECD IHTMTC: the state of the former fiscal domicile (the other Contracting State) should be allowed to tax the increase in wealth during the time the deceased or the donor was fiscally domiciled in its territory. The state of the new fiscal domicile (the Contracting State of fiscal domicile) should then be allowed to tax the increase in wealth during the time the deceased or the donor was fiscally domiciled in its territory.[13] In Rust's view, the apportionment rule seems to be a fair solution that recognises that each Contracting State has contributed to the increase of the deceased's or donor's wealth.

However, in my view, the application of such a rule does not seem to be in line with the Commentary on the OECD IHTMTC as it results in recognition of primary taxing rights to the Contracting State of the former fiscal domicile. This, however, does not seem to be in line with paragraph 12 of the Commentary on Article 4 of the OECD IHTMTC which states that only a subsidiary taxing right can be recognised regarding extended domicile rules. Furthermore, an apportionment rule would be difficult to administer as a) it requires effective exchange of information by each Contracting State, and b) the Contracting States do not apply common valuation rules on the property that they may seek to tax. Finally, Rust's suggestion "violates" the nature of inheritance taxes that tax values and not growth.

11 Article 13(5) of the Denmark - Germany Income, Capital, Inheritance and Gift Tax Treaty (1995): "In the case of an individual who was a resident of a Contracting State for a period of 5 years or more and has become a resident of the other Contracting State, paragraph 4 shall not affect the right of the first-mentioned State under its national laws to tax the individual on a capital appreciation up to the change of residence in respect of shares. Where the shares are subsequently alienated and the gains from such alienation are taxed in the other Contracting State in accordance with paragraph 4, that other State shall allow as a deduction from the tax on the income, an amount equal to the income tax which was paid in the first- mentioned State. Such deduction shall not, however, exceed that part of the income tax as computed before the deduction is given which is attributable to the income which may be taxed in the first-mentioned State in accordance with the first sentence of this paragraph."

12 Article 13(5) of the Germany - Slovenia Income and Capital Tax Treaty (2006): "Where an individual was a resident of a Contracting State for a period of 5 years or more and has become a resident of the other Contracting State, paragraph 4 shall not prevent the first-mentioned State from taxing under its domestic law the capital appreciation of shares in a company resident in the first-mentioned State for the period of residency of that individual in the first-mentioned State. In such case, the appreciation of capital taxed in the first-mentioned State shall not be included in the determination of the subsequent appreciation of capital by the other State."

13 Alexander Rust, "The Concept of Residence in Inheritance Tax Law," in *Residence of Individuals under Tax Treaties and EU Law*, ed. Guglielmo Maisto (Amsterdam: IBFD, 2010), 96.

6.1.2 Multiple taxation (Articles 1 and 4)

6.1.2.1 Introduction

In the previous section, I observed that the narrow scope of the OECD IHTMTC and the tax treaties has one more significant consequence: the elimination of double taxation of estates, inheritances and gifts is contingent on an extensive treaty network. This could be particularly understood in situations where three or more states may seek to tax the cross-border inheritance and donation.

The Commentary on Article 1 of the OECD IHTMTC mentions two examples (no. 3 and 4) where three states may seek to tax a cross-border inheritance.[14] It follows from the above two examples of the Commentary that due to the narrow scope of the OECD IHTMTC[15] (i.e. the application of the model/tax treaty only if the deceased is fiscally domiciled in a Contracting State and the definition of the term "fiscal domicile") cases of multiple taxation cannot always be addressed. However, I argued in the previous chapter that this does not seem to be in line with the primary objective of the OECD IHTMTC i.e. the allocation of taxing rights for the avoidance of double or multiple taxation and the proposed inheritance and gift tax; if double taxation frustrates the application of the ability-to-pay taxes and windfall justifications – two elements of the proposed inheritance and gift tax – in a two-country situation, multiple taxation should have the same effect in situations involving more than two states.

The suggestion of those who drafted the OECD IHTMTC with regard to the multiple taxation concern is stated in paragraph 12 of the Commentary on Article 1: "[t]he Committee on Fiscal Affairs decided not to include […] residual cases within the scope of the Model Convention since such forms of tax liability are found only in a few Member countries. Moreover, in the rare practical cases, double taxation will often be avoided by the unilateral reliefs provided in the countries concerned. Finally, where double taxation does occur, it will be prevented where Member countries adhere to the Council's recommendation and conclude double taxation conventions on the basis of this Model. Accordingly, as the network of double taxation conventions among Member countries becomes more widespread, unrelieved double taxation will become progressively rarer. *There seemed therefore to be no need to enlarge the Convention to cover such special cases*." (Italics, VD)[16]

Bearing in mind, however, a) that the narrow scope of the model seems to be sometimes the reason why states do not conclude inheritance and gift tax treaties,[17] and b) the failure of the states to agree on a subsidiary taxing right provision, one may consider whether the inclusion of residual cases can address or at least mitigate multiple taxation of cross-border inheritances and donations. Therefore, in the following section, I submit two suggestions that could arguably enhance the effectiveness of the OECD IHTMTC in addressing this problem. The first suggestion takes the form of the inclusion of nationality as a subsidiary

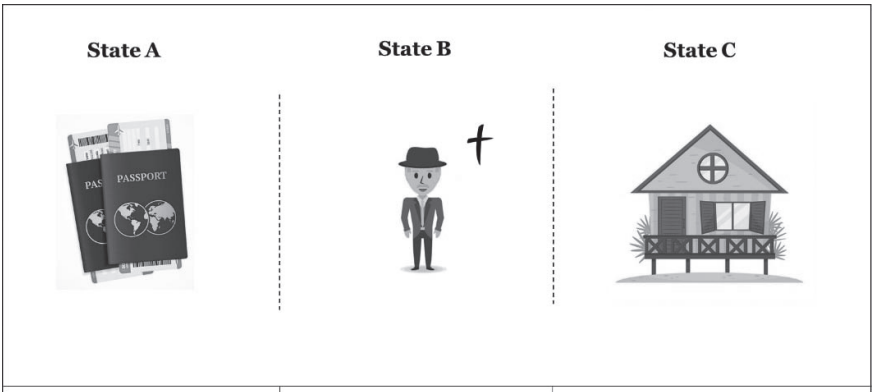
14 Commentary on Article 1 of the OECD IHTMTC, paras. 9 and 10.
15 That results in the non-application of the A-C tax treaty of the examples 3 and 4 of the OECD IHTMTC Commentary.
16 Commentary on Article 1 of the OECD IHTMTC, para. 11.
17 Especially states that levy inheritance and gift taxes based on principles different from those adopted in the model.

criterion establishing fiscal domicile (section 6.1.2.2.1). The second suggestion takes the form of a conclusion of a multilateral tax convention (section 6.1.2.2.2).

6.1.2.2 Enhancing the effectiveness of the model in multiple taxation situations

6.1.2.2.1 Nationality as a subsidiary criterion (Article 4)

The inclusion of residual cases can admittedly improve the effectiveness of the OECD IHTMTC in addressing multiple taxation. For instance, it could be suggested that the treaty between the state of the deceased's or donor's nationality and the state of the objective nexus can still be held applicable in the absence of a treaty concluded by either of these states with the state of the deceased's or donor's fiscal domicile. As a result, the "first double taxation" mentioned in example 3 of the Commentary on Article 1 of the OECD IHTMTC is addressed, with the state of the objective nexus being entitled to tax only the property mentioned in Articles 5 and 6 of the treaty which is actually the property which, in any case, it would have been allowed to tax if it had concluded a treaty with the deceased's or donor's fiscal domicile.



nationality	residence	situs
It cannot tax (A-C treaty)	It can tax (national law)	It can tax (A-C treaty)

The application of the treaty concluded by the state of the deceased's or donor's nationality and the state of the objective nexus (in the above example, the A-C treaty) can be achieved by the inclusion of the nationality as a *subsidiary criterion* for the establishment of the fiscal domicile under Article 4(1) of the OECD IHTMTC. This would mean that the establishment of the fiscal domicile based on nationality would prerequisite that *no treaty would be in force between the state of the deceased's or donor's fiscal domicile and either the state of the deceased's or donor's nationality or the state of the objective nexus*. Albeit innovative, the suggestion for the inclusion of the nationality as a subsidiary criterion for establishing fiscal domicile seems to achieve a balance between the narrow scope and the principles of the model and the need for efficient addressing of the multiple taxation problem.

I note that my suggestion differs from the approach taken in Article 4 of the 1966 version of the OECD IHTMTC. More specifically, under Article 4(1) of the 1966 OECD IHTMTC, fiscal domicile was established under the domestic laws of each Contracting State. This means that nationality could establish fiscal domicile in treaties concluded based on the 1966 OECD IHTMTC. This is the case, for example, of the France – US Inheritance and Gift Tax Treaty that was signed in 1978. As the US determines its worldwide estate tax jurisdiction also based on the deceased's citizenship, citizenship can establish fiscal domicile. On the contrary, Article 4(1) of the 1982 OECD IHTMTC does not list nationality as a criterion establishing fiscal domicile.[18] Nevertheless, nationality, under my suggestion, can only establish fiscal domicile *if no treaty is in force between the state of the deceased's or donor's fiscal domicile and either the state of the deceased's or donor's nationality or the state of the objective nexus*.

Furthermore, my suggestion differs from the subsidiary taxing right framework provided in paragraphs 70 to 74 of the Commentary on Article 9A and 9B of the OECD IHTMTC. The subsidiary taxing right provision does not amend the term "fiscal domicile" under Article 4 of the OECD IHTMTC.[19] On the contrary, the provision allows the other Contracting State (i.e. not the Contracting State of the fiscal domicile) to tax the whole deceased's property "as if it were the State of domicile of the deceased or the donor".[20] An agreement on a subsidiary taxing right provision, therefore, does not mean that the other Contracting State automatically becomes the Contracting State of the fiscal domicile (although, in essence, it may tax as if it were the Contracting State of the fiscal domicile).[21]

Finally, my suggestion differs from my suggestion for an inclusion of a specific tiebreaker rule (section 6.1.3.2.1). In that regard, a specific tiebreaker rule indicates a different Contracting State of the fiscal domicile than that indicated under the general tiebreaker rule. In such a case, the indicated Contracting State of the fiscal domicile (which could arguably have been the "other Contracting State" in the absence of a specific tiebreaker rule) exercises its taxing rights in its capacity as the Contracting State of the fiscal domicile and not "as if it were the State of domicile of the deceased or the donor".[22] Furthermore, both the subsidiary taxing right framework and the specific tiebreaker rule prerequisite that the deceased or the donor is fiscally domiciled in a Contracting State (based on Article 4(1) of the OECD IHTMTC). On the other hand, my suggestion amends the term "fiscal domicile" in that the State of the deceased's or donor's nationality can be considered the Contracting State of the fiscal domicile only in the case where there is no treaty in force between the

18 However, I observe that Article 4(1) of the Nordic inheritance and gift tax treaty, which was signed in 1989, explicitly lists nationality as a criterion establishing fiscal domicile.

19 Cf. Jan Szczepański, "The Impact of European bilateral tax treaties with respect to taxes on inheritances, estates and on gifts on family multinationals in the internal market," *British Tax Review*, no. 4 (2018): 453. In my view, Article 27 of the Denmark - Germany Income, Capital, Inheritance and Gift Tax Treaty (1995) should not be regarded as a subsidiary taxing right provision but a specific tie-breaker rule as it amends the term "fiscal domicile"/"residence" of the specific treaty.

20 See, in that regard, the wording of the subsidiary taxing right provision suggested in para. 73 of the Commentary on Article 9A and 9B of the OECD IHTMTC.

21 See, for instance, Article 11(1) of the Netherlands - United Kingdom Inheritance and Gift Tax Treaty (1979): "If the deceased or the donor was domiciled in one of the States at the time of the death or gift and was at that time a national of the other State and had been domiciled in that other State at any time within the ten years immediately preceding the death or gift, that other State *may impose tax according to its domestic law*." (Italics, VD).

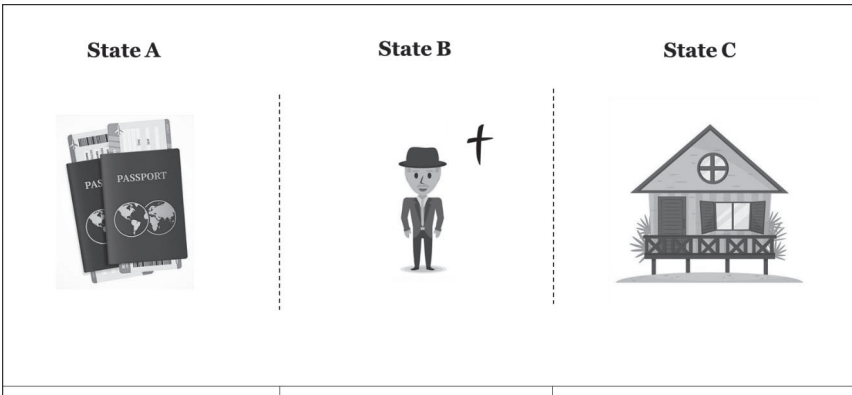
22 *Cf.* the suggested wording of the subsidiary taxing right provision suggested in para. 73 of the Commentary on Article 9A and 9B of the OECD IHTMTC.

state of the deceased's or donor's fiscal domicile and either the state of the deceased's or donor's nationality or the state of the objective nexus.

However, I note that the suggestion of the inclusion of the deceased's or donor's nationality as a subsidiary criterion for the establishment of fiscal domicile would not address, in most cases, the "first double taxation" that results from the non-application of the A-C treaty of the example 4 of the Commentary on Article 1 of the OECD IHTMTC. This is because, even following my suggestion, the deceased could not be considered to be fiscally domiciled in State A or C if he is not a national of either of these states.[23]

6.1.2.2.2 Conclusion of a multilateral tax convention (Article 1)

As previously noted, addressing multiple taxation is dependent on an extensive tax treaty network. In view, however, of the relatively small number of the inheritance and gift tax treaties, multiple taxation often becomes the rule and not the exception. Therefore, it is suggested that the conclusion of a multilateral tax convention would address the multiple taxation problem of cross-border inheritances and donations. By the conclusion of a multilateral convention, the multiple taxation of the deceased's property of my example in section 5.1.2 seems to be effectively addressed. State A is precluded from taxing the immovable property located in State C, State C may tax this property under Article 5 of the treaty and state B may also tax the property, but it must provide double taxation relief, as seen below.[24]



nationality	residence	situs
It cannot tax	It can tax but double taxation relief	It can tax

23 I recall that State A in the example 4 of the Commentary on Article 1 of the OECD IHTMTC is the state of the deceased's beneficiaries.

24 Therefore, the suggestion for a conclusion of a multilateral convention seems to be a more effective solution than the solution presented in the previous section. This is because all possible levels of double taxation are addressed by a multilateral convention and thus, not only one such as in the case of the inclusion of nationality as a subsidiary criterion for the determination of the term fiscal domicile (*cf.* example 3 of the Commentary on Article 1 of the OECD IHTMTC). Furthermore, a multilateral convention would address situations such as those in the example 4 of the Commentary on Article 1 of the OECD IHTMTC (to which my suggestion for the inclusion of nationality as a subsidiary tax criterion would not work in most instances, as previously noted).

In that regard, I noted that the introductory report by the Committee on Fiscal Affairs explicitly refers to the possibility of a conclusion of a multilateral tax treaty. Under paragraph 17 of the introductory report, "[t]he Committee on Fiscal Affairs has considered whether the elaboration and conclusion of a multilateral double taxation convention would be feasible. As in 1966, the Committee has come to a conclusion that, in the present situation, this would meet with great difficulties. It might, however, be possible for certain groups of Member countries to study the possibility of concluding such a convention among themselves on the basis of the Model Convention, subject to certain adaptations they may consider necessary to suit their particular purposes."

Although the conclusion of a multilateral tax treaty is a tough task according to the Committee, the Scandinavian states succeeded in concluding the Nordic inheritance and gift tax treaty in 1989. As noted in the previous section, fiscal domicile in this treaty is established also based on the deceased's nationality under Article 4(1) of the treaty. Furthermore, the three distributive rules of the treaty are open distributive rules ("may be taxed") which means that the Contracting State of the fiscal domicile is required to provide double tax relief. On the contrary, Article 7 of the OECD IHTMTC affords exclusive taxing rights to the Contracting State of the deceased's or donor's fiscal domicile, so the other Contracting State is not allowed to tax. Finally, I note that the Nordic inheritance and gift tax treaty includes a subsidiary taxing right provision for the avoidance of factual double non-taxation (Article 8 of the convention).

Within the EU, the conclusion of a multilateral tax convention had been already voiced by the EC in its 1994 Communication: "As double taxation in respect of inheritance tax and related taxes has become increasingly common, some Member States have negotiated specific agreements on this type of double taxation. Ten such agreements currently exist in the Community, most of them concerning inheritance tax. The question is, therefore, to find a general solution within the Community that (sic) will cover all Member States".[25] Moreover, the 2015 inheritance tax report states that "[t]he need to find a general solution which the European Commission correctly identified in 1994 is, even more, pressing in 2015. The possibility that a multilateral European convention may be concluded in respect of taxes on inheritance was raised as long ago as 1993 at a Symposium in Brussels organised by the Commission. Its proposals are published as an annexe to the communication of 1994. In the past, the suggestion that a multilateral convention may be the solution to the problem of [inheritance tax] double taxation may have appeared somewhat optimistic. Some may think it less so now". Bearing in mind that 22 out of the 37 OECD member countries are EU Member States, the EU Member States can be the group of Member countries to which the introductory report by the Committee on Fiscal Affairs refers (see also section 7.1.4).

6.1.3 The tiebreaker rule for individuals (Article 4(2))

6.1.3.1 The two aspects of the OECD IHTMTC's tiebreaker rule that can be improved

The term "person domiciled in a Contracting State" as defined in Article 4(1) of the OECD IHTMTC is one of the most critical terms of the model and the treaties. It determines the

25 Commission Communication to Member States on the transfer of businesses. Actions in favour of SMEs, 1994 OJ C 204/1 at point 10, p. 16.

estates, inheritances and gifts to which the treaty applies (Article 1), it solves cases where double taxation arises in consequence of the dual fiscal domicile of the same person (Article 4(2)) and solves cases where double taxation arises as a consequence of taxation in the Contracting State of the fiscal domicile and the other Contracting State (Articles 5-7).[26] This section is devoted to the second function of the term: the settlement of dual fiscal domicile conflicts through the tiebreaker rule for individuals of Article 4(2).

As noted in section 5.1.3, the tiebreaker rule of Article 4(2) of the OECD IHTMTC is similar to that of the OECD ICTMTC, thereby adopting the same connective criteria with the latter for the determination of the deceased's or the donor's fiscal domicile and affording the primary taxing right to the Contracting State which the connective criterion indicates. Through the application of these connective criteria, the Contracting States aim to identify the attachment of the person at hand with their territory and to afford primary taxing rights to the Contracting State with which this person is the most attached. It follows that the attachment of a person with a Contracting State is assessed under the same connective criteria for both dual fiscal domicile and residence conflicts. Nevertheless, I submitted in section 5.1.3 that although the tiebreaker rule seems to address dual domicile conflicts, Article 4(2) of the OECD IHTMTC seems to counter the manner in which certain states establish the lifelong attachment of a person with their territory and the third element of the proposed inheritance and gift tax due to the lack of an option for an intention test and for a minimum period of presence in a Contracting State.

More specifically, the nature and the imposition of inheritance taxes, estate taxes and gift taxes differ significantly from those of income and capital taxes. Income taxes are levied on an annual basis and thus, the person's attachment to a state needs to be determined on an annual basis, often through an easily administrable day-count rule. On the contrary, inheritance and estate taxes are levied only once (upon death) and, therefore, the deceased's *lifelong attachment to the state* needs to be determined.[27] The same seems to apply to gift taxes that are levied only in the event of a gift. On this basis, it should be noted that some inheritance and gift tax legislations regard the intention of the deceased/donor to reside in their territory as an important element for the assessment of his *lifelong* attachment with their territory (section 3.1.1.1.1).

The deceased's or the donor's lifelong attachment to a Contracting State can be demonstrated through, among others, the examination of his *intention* to reside in a Contracting State. However, such an intention does not seem to form part of any connective criterion of the OECD IHTMTC's tiebreaker rule, not even as an optional one. This, however, seems to counter the laws of some states that apply the civil law concept of residence or domicile for the application of their death tax laws and the third element of the proposed inheritance and gift tax. In these cases, the intention of the person to stay within the territory of the state (the "animus") plays an important role for the assessment of the deceased's or donor's lifelong attachment with their territory.

In the same vein, the requirement of a *minimum period of presence* of a person in a Contracting State – usually forming part of the assessment of his lifelong attachment to the state – does not seem to be reflected in the wording of the tiebreaker rule, not even as an

26 See also, Commentary on Article 4 of the OECD IHTMTC, preliminary remarks, para. 2.

27 Alexander Rust, "The Concept of Residence in Inheritance Tax Law," in *Residence of Individuals under Tax Treaties and EU Law*, ed. Guglielmo Maisto, (Amsterdam: IBFD, 2010), 86.

optional requirement. For example, the determination of the fiscal domicile based on the availability of a permanent home *without a minimum period of presence* in a Contracting State may not always result in an appropriate establishment of the deceased's or the donor's fiscal domicile for inheritance and gift tax treaty purposes, as it may not be in line with the inheritance and gift tax legislation of the Contracting States. In all events, it does not seem to be in line with the proposed inheritance and gift tax and its third element, i.e. the connection with civil law. As a result, the rule does not always seem to address dual domicile conflicts in a manner that is in line with the manner in which certain states establish the lifelong attachment of a person with their territory the proposed inheritance and gift tax. Therefore, one could argue that a minimum period of presence may need to be specified before the individual acquires a fiscal domicile in the Contracting State in which he is living.[28] The interpretation of the terms "permanent home" and "habitual abode" favours such an approach.[29]

Based on the above, I am of the view that the OECD IHTMTC tiebreaker rule for individuals may be considered in many cases to be inappropriate to effectively resolve dual fiscal domicile conflicts because it seems to counter the taxes to which dual domicile conflicts it aims to address and the proposed inheritance and gift tax. The tax treaty practice seems to confirm this finding. More specifically, some states have already negotiated and inserted a specific tiebreaker rule in their tax treaty that takes precedence over the general tiebreaker rule in accordance with the rule *lex specialis derogat legi generali* (section 6.1.3.2.1). This shows, in my view, that the current tiebreaker rule can be improved although the introduction of a specific tiebreaker rule seems to have been triggered by the desire of some OECD member countries to safeguard their primary taxing rights also for situations for which the model and the Commentary do not seem to allow (section 6.1.3.2.2). On the other hand, I observe that there are treaties that include a requirement for a minimum period of presence in a Contracting State in the existing tiebreaker rule for the assessment of whether the deceased or the donor has maintained a permanent home there (section 6.1.3.2.3).

6.1.3.2 Proposed amendments

6.1.3.2.1 Specific tiebreaker rule

Although the OECD IHTMTC's tiebreaker rule for individuals does not include an intention test, I observe that some OECD member countries have agreed in their treaties on a specific tiebreaker rule that includes, amongst others, an intention test.

For instance, the Netherlands – UK inheritance and gift tax treaty (1979) contains a specific tiebreaker rule, which takes precedence over the general tiebreaker rule of Article 4(2). This rule reads as follows: "3. Notwithstanding the provisions of paragraph 2 of this Article, where by reason of the provisions of paragraph 1 of this Article an individual was at the time his domicile falls to be determined domiciled in both States and (a) was at that time a national of one of the States but not of the other, and (b) was resident in that other State but had been so resident for less than seven years out of the ten years

28 Frans Sonneveldt, "General Report: Avoidance of Multiple Inheritance Taxation within Europe," *EC Tax Review* 10, no. 2 (2001): 95.

29 Commentary on Article 4 of the OECD IHTMTC, paras. 19 and 28.

immediately preceding that time, and (c) did not intend to remain indefinitely in that other State, then he shall be deemed to be domiciled at that time in the State of which he was a national." The France – Germany inheritance and gift tax treaty (2006) also contains a similar specific tiebreaker rule that applies, among others, if the deceased or the donor has a "clear intention not to maintain his domicile indefinitely in the other [Contracting] State". It is clear that these specific tiebreaker rules include three tests: an *intention test* ("did not intend to remain indefinitely in that other State"), a *minimum presence test* ("was resident in that other State but had been so resident for less than seven years out of the ten years immediately preceding that time") and *a nationality test* ("was at that time a national of one of the States but not of the other").

It is important, however, to note that the inclusion of such specific tiebreaker rules does not, in principle, seem to have been justified by the desire of some OECD member countries to include an intention test in their treaty to better assess dual fiscal domicile conflicts for tax treaty purposes. On the contrary, they arguably sought to safeguard *primary* taxing rights in cases of a) persons present in the other Contracting State for a temporary purpose[30], b) taxation based on nationality (as an independent personal nexus criterium), and c) taxation based on extended domicile rules. Nevertheless, I note that, under the Commentary of OECD IHTMTC, only a subsidiary taxing right can be retained with regard to extended domicile rules and taxation on the basis of nationality as an independent personal nexus concept.[31]

The inclusion of an optional specific tiebreaker rule incorporating elements consistent with the nature of some inheritance and gift legislations and the proposed inheritance and gift tax is necessary, in my view, for the enhancement of the effectiveness of the OECD IHTMTC's tiebreaker rule in certain situations. However, contrary to the current tax treaty practice, such a rule – which should take priority over the current one – should only address dual fiscal domicile conflicts of persons present in a Contracting State for a predefined temporary purpose, as suggested in paragraph 13 of the preliminary remarks of the Commentary on Article 4 of the OECD IHTMTC. On the contrary, the Contracting States cannot exercise primary taxing rights when they apply nationality as an independent personal nexus concept (Article 4(1)) and based on extended domicile rules (Commentary on Article 9A and 9B).

To this end, a specific optional tiebreaker rule could read as follows:

"Notwithstanding the provisions of paragraph 2, where an individual: (a) by reason of the provisions of paragraph 1, is fiscally domiciled in both these States on grounds other than extended domicile rules based on nationality; and (b) by reason of the provisions of paragraph 1, has been domiciled for business, professional, educational, training, tourism, or a similar purpose (or in his capacity as the spouse or a dependent member of the family of a person who was in that other State for such a purpose) in the State of which he is not a national, for less than (x) years in the aggregate (including periods of temporary absence) during the preceding (q)-year period and he did not intend to remain indefinitely in that other State, then he shall be deemed to be fiscally domiciled in the Contracting State of his nationality."[32]

30 Commentary on Article 4 of the OECD IHTMTC, preliminary remarks, para. 13.

31 Commentary on Article 4 of the OECD IHTMTC, para. 12.

32 At *x*, the maximum amount of years of presence in a Contracting State, at *q*, the total number of years for which the temporary presence will be tested.

In my view, the above optional provision provides for a determination of the deceased's fiscal domicile in a manner that seems to be more in line with the criteria that some states apply to levy death taxes and the elements of the proposed inheritance and gift tax. Furthermore, it seems reasonable that the Contracting State of the deceased's or the donor's "permanent fiscal domicile" maintains primary taxing rights also with regard to the increase in wealth during the period of the temporary presence in the other Contracting State. This is because it is expected that the main increase in the deceased's or donor's property will occur during the period of the "permanent fiscal domicile" in a Contracting State.

Furthermore, the definition of the type of presence in the other Contracting State has temporary purpose and the explicit exclusion of the extended domicile rules from the ambit of the suggested rule draw a dividing line between situations where the donor or the deceased is temporarily present in the other Contracting State with situations where the donor or the deceased aims to move his domicile to benefit from a more beneficial tax regime in the other Contracting State or to live there on a more permanent basis.

Finally, I note that the inclusion of a specific tiebreaker rule prerequisites an active exchange of information between the tax authorities of the Contracting States: the Contracting State of the deceased's/donor's "temporary fiscal domicile" may need to inform the Contracting State of the deceased's/donor's "permanent fiscal domicile" on the wealth that the deceased/donor owned during his temporary presence in its territory. In that regard, the exchange of information framework of article 12 of the OECD IHTMTC arguably makes the application of this rule easier for the Contracting States.

6.1.3.2.2 Specific tiebreaker rule and broadening of the scope the general tiebreaker rule

Under Article 4(1) of the OECD IHTMTC, primary taxing rights to the Contracting State taxing based on the deceased's or the donor's nationality cannot be afforded. This state may only maintain a subsidiary taxing right as noted in section 6.1.1.2.3. However, if the states deviate from Article 4(1) of the 1982 OECD IHTMTC and the term "person domiciled in a Contracting State" is defined under their domestic law (which may provide for taxation based on nationality), the question arises whether a specific tiebreaker rule is in line with the Commentary of the OECD IHTMTC, which, as said, only provides for a subsidiary taxing right by the Contracting State which taxes based on the deceased's or the donor's nationality.

More specifically, if both Contracting States define the term "fiscal domicile" under their national laws (and, thus, not based on Article 4(1) of the OECD IHTMTC), a specific tiebreaker rule clearly allows the Contracting State of the deceased's or the donor's nationality to tax the deceased's or donor's worldwide property. This is because under the general tiebreaker rule, this state would most probably be the loser state. This is probably the reason why the specific tiebreaker rule of the US Estate and Gift Model (1980)[33] was worded slightly differently from the specific tiebreaker rules of the inheritance and gift tax treaties, which were mentioned in the previous section. This rule reads as follows: "Where an individual was: (a) a citizen of one Contracting State but not the other Contracting State, (b) within the meaning of paragraph 1 domiciled in both Contracting States; (c) within the meaning

33 In 1980, the US Department of Treasury issued the US Estate and Gift Model and its related technical explanation. Although the model follows, in principle, the structure of the OECD IHTMTC, it contains a few different provisions, one of which is the specific tiebreaker rule of Article 4(3).

of paragraph 1 domiciled in the other Contracting State in the aggregate less than 7 years (including period of temporary absence) during the preceding ten-year period, then the domicile shall be deemed, notwithstanding the provisions of paragraph 2, to have been in the Contracting State of which he was a citizen." Of note is that this tiebreaker rule does not include an intention test (e.g. "did not intend to remain indefinitely in that other State"). This can be an argument to demonstrate that the rule was not introduced to cover situations of persons present in a State for a temporary purpose but merely to safeguard the US taxing rights when taxing on the basis of the deceased's or the donor's citizenship.

As noted, however, in section 5.1.1 and 6.1.2.2.1, taxation based on the deceased's or donor's nationality can take place only on a subsidiary basis. Furthermore, the establishment of the fiscal domicile based on nationality can take place, as per my suggestion in section 6.1.2.2.1, on a residual basis if no treaty is in force between the state of the deceased's or donor's fiscal domicile and either the state of nationality or the state of the objective nexus. Accordingly, primary taxation based on the deceased's or donor's nationality does not seem to be in line with what the OECD IHTMTC and its Commentary seem to suggest in Article 4(1) of the OECD IHTMTC. For the above reasons, a specific tiebreaker rule which safeguards primary taxing rights to the state which taxes based on the deceased's or donor's nationality is not, in my view, in line with the OECD IHTMTC and thus, should not be suggested.

6.1.3.2.3 Update of the general tiebreaker rule

As noted above, the current OECD IHTMTC's tiebreaker rule of Article 4(2) underestimates the deceased's or the donor's intention to live in the territory of a state. I submit, however, that the option for inclusion of a clear intention test and a minimum period of presence in a Contracting State before a person's death/gift can make the rule more easily applicable by some states as it would be more in line with their inheritance and gift tax laws. It would also be more in line with the proposed inheritance and gift tax and its third element.

A reference to a minimum period of presence is not a novelty in treaty practice. The general tiebreaker rule of the Netherlands – US inheritance tax treaty (1969) already does so. Furthermore, an explicit reference to the intention of a person to domicile in the place where he has a permanent residence can be found in the Netherlands – Sweden inheritance tax treaty (1956). To this end, I suggest the following optional wording for the current OECD IHTMTC's tiebreaker rule (additions indicated in brackets, VD):

2. Where by reason of the provisions of paragraph 1 an individual is [fiscally] domiciled in both Contracting States, then his status shall be determined as follows: a) he shall be deemed to be domiciled in the State in which he has a permanent home available to him [for X years or more immediately preceding his death or the donation with the clear intention to retain it]; if he has a permanent home available to him in both States, he shall be deemed to be domiciled in the State with which his personal and economic relations are closer (centre of vital interests); b) if the State in which he has his centre of vital interests cannot be determined, or if he has not a permanent home available to him in either State, he shall be deemed to be [fiscally] domiciled in the State in which he has an habitual abode; c) if he has an habitual abode in both States or neither of them, he shall be deemed to be domiciled in the State of which he is a national; d) if he is a national of

both States or of neither of them], the competent authorities of the Contracting States shall settle the question by mutual agreement.

In my view, the suggested optional wording of Article 4(2) (as well as that of Article 4(3)) of the OECD IHTMTC) seems to be in line with the benchmark of this study, the proposed inheritance and gift tax. The third element of this benchmark is the definition of critical terms under civil laws and these laws often consider the intention of a person, for example, when determining his residence/domicile. Furthermore, the suggested optional wording seems to respect the manner in which certain states aim to establish the lifelong attachment of a person with their territory.

6.1.4 Overlaps with the OECD ICTMTC (Article 2)

6.1.4.1 Introduction

Article 2 of the OECD IHTMTC sheds more light on the taxes to which an inheritance and gift tax treaty applies. Under the Commentary on this Article, Article 2 is intended: a) to make the terminology and nomenclature relating to the taxes covered by the Convention more acceptable and precise, b) to ensure identification of the Contracting States' taxes covered by the Convention, c) to widen as much as possible the field of application of the Convention by including as far as possible, and in harmony with the domestic laws of the Contracting States, the taxes imposed by their political subdivisions or local authorities, d) to avoid the necessity of concluding a new Convention whenever the Contracting States' domestic laws are modified, and e) to provide for the periodic exchange of information about changes which have been made in their respective taxation laws.[34] In my view, Article 2 should also safeguard that there would be no overlap between the OECD IHTMTC and the OECD ICTMTC.

In section 5.1.4, I noted that the overlaps between the two models and types of tax treaties can be addressed by improving the OECD IHTMTC and especially Article 2 of the model. In my view, more taxes than those mentioned in Article 2 of the OECD IHTMTC can be included in the scope of the model as this would be in line with the proposed inheritance and gift tax and the objective of the model of addressing double taxation.

6.1.4.2 Article 2(1)-(3): transition from an exhaustive to an indicative list

Under Article 2 of the OECD IHTMTC, "1. This Convention shall apply to taxes on estates and inheritances and on gifts imposed on behalf of a Contracting State or of its political subdivisions or local authorities, irrespective of the manner in which they are levied. 2. There shall be regarded as taxes on estates and inheritances taxes imposed by reason of death in the form of taxes on the corpus of the estate, of taxes on inheritances, of transfer duties, or of taxes on donationes *mortis causa*. There shall be regarded as taxes on gifts taxes imposed on transfers *inter vivos* only because such transfers are made for no, or less than full, consideration. 3. The existing taxes to which the Convention shall apply are a) (in State A)... b) (in State B)... 4. The Convention shall also apply to any identical or substantially similar taxes which are imposed after the date of signature of the Convention in addition

34 Commentary on Article 2 of the OECD IHTMTC (preliminary remarks), para. 1.

to, or in place of, the existing taxes. At the end of each year, the competent authorities of the Contracting States shall notify each other of changes which have been made in their respective taxation laws."

It becomes apparent that Article 2 of the OECD IHTMTC follows the logic and the structure of Article 2 of the OECD ICTMTC. This means that it should be afforded the same interpretation as Article 2 of the OECD ICTMTC unless its text suggests otherwise. The similarity of the commentaries on Article 2 of the income and capital tax model and the inheritance and gift tax model confirms the above observation. More specifically, paragraph 1 clarifies that the treaty applies to "taxes […] imposed on behalf of a Contracting State or of its political subdivisions or local authorities, irrespective of the manner in which they are levied". Paragraph 2 defines the term "taxes on estates and inheritances and on gifts", paragraph 3 contains an *exhaustive* list of taxes to which the treaty applies. Finally, paragraph 4 clarifies that the treaty also applies to any identical or substantially similar taxes that are imposed after the date of signature of the Convention in addition to, or in place of, the existing taxes. I observe, however, that very little has been written about the relationship between the four paragraphs of Article 2 of the OECD IHTMTC. In contrast, the relationship between the paragraphs of Article 2 of the OECD ICTMTC has been adequately discussed in the literature.[35]

In this section, I will focus on the relationship between Articles 2(2) and 2(3). More specifically, the term "taxes on estates and inheritances and on gifts" of Article 2(1) of the OECD IHTMTC is defined in Article 2(2) as follows: taxes on estates and inheritances are imposed by reason of death on the corpus of the estate, of taxes on inheritances, of transfer duties, or of taxes on donationes *mortis causa*. Consequently, the term includes the estate tax (which is levied on the corpus of the estate), the inheritance tax (which is levied on the share of the estate which each beneficiary inherits), the transfer duties and taxes on donationes *mortis causa*. Finally, taxes on gifts are termed as taxes on the *inter vivos* transfers only because such transfers are made for no, or less than full, consideration.

In Article 2(3) of the inheritance and gift tax treaty each Contracting State lists by means of an exhaustive list the existing taxes on estates and inheritances and on gifts to which it intends to apply the treaty. It follows that a treaty does not apply to an existing tax if it was not explicitly listed in Article 2(3) of the treaty. As a matter of comparison, the list of the income and capital tax model is indicative.[36] Therefore, an income and capital tax treaty may also apply to taxes even though they have not been explicitly listed in Article 2(3).

The exhaustive listing of taxes on estates and inheritances and on gifts seems to be a deliberate choice of those who drafted the inheritance and gift tax model given that the list of the income and capital tax model has always been indicative as early as 1963. The question arises, however, whether a transition from an exhaustive to an indicative list of the existing taxes in Article 2(3) of the OECD IHTMTC would be a step in the right direction as it guarantees a more systematic approach towards the scope of the model and the nature of the taxes to which it applies and the proposed inheritance and gift tax. In my view, the question should be answered in the affirmative on condition that a safety net can be provided on the degree of the amplifying power that such an indicative list would have.

35 See for example, Michael Lang, ""Taxes Covered" in What is a "Tax" According to Article 2 of the OECD Model?," *Bulletin for International Taxation* 59, no. 6 (2005).

36 On the contrary, the list of Article 2(3) of the OECD ICTMTC is not exhaustive. See in that regard, Commentary on Article 2 of the OECD ICHTMTC, para. 3.

The amplifying power of the indicative list of the income and capital tax model has already been discussed in the report of the Working Party no. 30 of the OECD Fiscal Committee.[37] Under this report, "[p]aragraph 3 has quite obviously the power (although being principally an illustration to paragraphs 1 and 2) to amplify the scope of the Convention even if they were not considered to be "taxes on income (capital)" within the meaning of paragraph 1 and 2".[38, 39] In other words, the OECD Fiscal Committee was of the opinion that the states are "quite obviously" allowed to agree that the income and capital tax treaty can also apply to inheritance and gift taxes albeit that these taxes are not classified as taxes on income or capital. In that regard, Article 13 (capital gains)[40] and 21 (other income) seem to be the only Articles which can apply to inheritance and gift taxes.[41] Considering, however, that these Articles grant exclusive taxing rights to the Contracting State of the taxpayer's residence, they may not be appropriate to deal with a proper allocation of taxing rights in the case of inheritance and gift taxes for which a separate OECD model had to be drafted. Most importantly, I believe that the inclusion of inheritance and gift taxes in the scope of an income and capital tax treaty would seem to run counter to the nature of the taxes to which the model applies and the proposed inheritance and gift tax.

On the other hand, the inclusion of *mortis causa* or *inter vivos* levied income taxes or capital gains taxes in the scope of an inheritance and gift tax treaty would not, at first sight, seem to run counter to the nature of the taxes to which the model should apply since this would be in line with the proposed inheritance and gift tax. Therefore, if these taxes are levied by reason of death or a donation on the *mortis causa* or *inter vivos* windfalls, which increase the recipient's ability-to-pay taxes, and some critical terms for their application are determined under civil laws, they should be covered by an inheritance and gift tax treaty.

For instance, an income tax on gifts should be included, in my view, in the scope of an inheritance and gift tax treaty if it is consistent with the above benchmark. For this reason, the application of the Nordic inheritance and gift tax treaty to "income taxes on the value of the gifts" levied in Denmark and Iceland seems to be in line with the proposed inheritance and gift tax. In the same vein, a capital gains tax should be included in the scope of the inheritance and gift tax treaty if is consistent with the proposed inheritance and gift tax. It should thus be levied on the whole amount of the *mortis causa* or *inter vivos* transferred gain. Finally, I note that the EC's recommendation adopts a broad definition of the term "inheritance tax". The term means any tax levied at national, federal, regional, or local level upon death, irrespective of the name of the tax, of the manner in which the tax is levied and of the person to whom the tax is applied, including in particular, estate tax, inheritance tax, transfer tax, transfer duty, stamp duty, income and capital gains tax.

37 Working Party no. 30 of the OECD Fiscal Committee (Austria–Switzerland), received on 12 June 1969. The report was prepared to examine some issues of interpretation concerning Article 2 of the OECD ICTMTC.

38 Working Party no. 30 of the OECD Fiscal Committee (Austria–Switzerland), marginal number 40.

39 See also, Michael Lang, ""Taxes Covered" in What is a "Tax" According to Article 2 of the OECD Model?," *Bulletin for International Taxation* 59, no. 6 (2005).

40 Paragraph 5 of the Commentary on Article 13 of the OECD ICTMTC states that the words "alienation of property" may also include the gift and even the passing of property on death.

41 On the contrary, under paragraph 1 of the Commentary on Article 22 (capital) of the ICTMTC states that this Article deals only with taxes on capital, to the exclusion of taxes on estates and inheritances and on gifts and of transfer duties.

It follows from the above that the amplifying power of an indicative list of the *existing* taxes in a tax treaty shall not undermine the importance of the general definitions of Article 2(2). Furthermore, the amplifying power of such an indicative list could be tested against the proposed inheritance and gift tax benchmark. In other words, a transition from an exhaustive to an indicative list should not result in the extension of the scope of the treaty beyond taxes that are not in line with the proposed inheritance and gift tax benchmark. On the other hand, if the Contracting States wish to explicitly exclude a tax from the scope of an inheritance and gift tax treaty, they should expressly do so.[42, 43]

Based on the above, I am of the view that the optimization of Article 2(3) of the OECD IHTMTC arguably guarantees that the states involved will not seek to apply two different types of tax treaties to the same *mortis causa* or *inter vivos* transfer of property.

Article 2(3) applies to the taxes that are levied at the time of the conclusion of the treaty by two Contracting States. What happens, however, if a Contracting State repeals its gift tax laws and introduces an income tax liability concerning the received gifts at the level of the donees? Would the inheritance and gift tax treaty still apply to the newly introduced income tax? Article 2(4) of the OECD IHTMTC is relevant in that regard.

6.1.4.3 Article 2(4): addressing the parallel application of an income tax and an inheritance and gift tax treaty

Under Article 2(4) of the OECD IHTMTC, "[t]he Convention shall also apply to any identical or substantially similar taxes which are imposed after the date of signature of the Convention in addition to, or in place of, the existing taxes. At the end of each year, the competent authorities of the Contracting States shall notify each other of changes which have been made in their respective taxation laws."

This paragraph contains a rule, which guarantees, under certain conditions, that the inheritance and gift tax treaty will automatically cover any identical or substantially similar new tax introduced in addition to, or in place of, existing taxes. Article 2(4) of the OECD IHTMTC is of major importance given the trends of inheritance and gift taxes. More specifically, some states have replaced their inheritance laws with *mortis causa* capital gains taxes on the gain accrued from the *mortis causa* transfer of property. The mere transfer of the property to the beneficiary thus, does not have immediate tax implications, but the subsequent sale of this property would lead to capital gains liability in the hands of the alienator. Some states determine the value of the gain accrued based on the difference between the market price and the value of the property at the time of the death. Other states determine this value as the difference between the market price and the acquisition cost of the property set at zero. Likewise, a state may abolish its gift tax laws and include an income or capital gains tax liability at the level of the beneficiaries.

Accordingly, the question arises whether these newly introduced taxes can still be regarded as identical or substantially similar to the existing taxes under Article 2(4) of the inheritance and gift tax treaty. Since the current list of Article 2(3) of the OECD IHTMTC is exhaustive, it seems at first sight that the new tax must be identical or substantially similar

42 Working Party no. 30 of the OECD Fiscal Committee (Austria –Switzerland), marginal number 11.

43 See for example, the France – Germany Inheritance and Gift Tax Treaty (2006) and, in particular, Article 2(4) concerning the exclusion of the German tax on the property of a foundation or an association.

to a tax listed in Article 2(3). This would mark, in most of the cases, the "end of story" of the possible application of an inheritance and gift tax treaty to taxes that are not identical or substantially similar to the listed existing taxes. On the contrary, an indicative listing of the existing taxes – as per my suggestion in section 6.1.4.2 – arguably broadens the benchmark of similarity of the new tax also to non-listed taxes that should be considered as "taxes on estates and inheritances and on gifts" under the definitions of Article 2(2) of the inheritance and gift tax treaty and the proposed inheritance and gift tax.[44, 45] However, even without an indicative list, Lang was of the opinion that "[t]his does not mean that a newly introduced tax may fall under the treaty only if a similar tax was already levied at the time the bilateral treaty was signed. The equivalent of Articles 2(1) and (2) is not limited to the taxes levied at the time of the treaty was signed. Thus, the new taxes covered by the general definitions may fall within the scope of [that] treaty even if they are not identical or substantially similar to the taxes listed in the equivalent to Article 2(3)."[46]

Unfortunately, the Commentary on Article 2(4) of the OECD IHTMTC does not discuss the criteria based on which a new tax shall be considered identical or substantially similar to an existing tax on estates and inheritances and on gifts. However, guidance on these criteria is crucial, given the possible application of two different types of treaties by each Contracting State to the same transfer of property. For example, a state may apply the income tax treaty as the newly introduced income tax on gifts is included in Article 2(3) of the treaty whereas the other state may continue to apply the inheritance and gift tax treaty. The parallel application of two different types of treaties may give rise to double taxation or double non-taxation, as seen from the example of the donation by an Austrian foundation to its non-resident beneficiaries.

As per Lang's observation, the model does not define the term "tax",[47] so the term "identical or substantially similar tax" is also left undefined. He is of the view, however, that the *substance* of the preceding and the introduced tax liability[48] should be taken into account in that regard. In my view, guidance can be again found on the proposed inheritance tax. More specifically, if the new tax is levied by reason of death or a donation on the *mortis causa* or *inter vivos* windfall, which increases the recipient's ability-to-pay taxes, and some critical terms for its application are determined under civil laws, then it should be considered substantially similar to an existing tax. As a matter of example, a capital gains tax that replaces an inheritance tax and applies to the accrued gain determined as the difference between the market price and the price of the property at the time of death does not seem to be in line with the proposed inheritance and gift tax benchmark.[49]

44 Besides, this applies to the function of Article 2(4) of the ICTMTC and its relationship with Article 2(2) and 2(3). As the list of Article 2(3) of the OECD ICTMTC cannot be exhaustive the term "identical or substantially similar" is used.

45 Arguably, an indicative list may create uncertainty. Nevertheless, I am of the opinion that the benchmark of the proposed inheritance and gift tax mitigates to a large extent such risk of uncertainty.

46 Michael Lang, ""Taxes Covered" in What is a "Tax" According to Article 2 of the OECD Model?," *Bulletin for International Taxation* 59, no. 6 (2005): 221.

47 Michael Lang, ""Taxes Covered" in What is a "Tax" According to Article 2 of the OECD Model?," *Bulletin for International Taxation* 59, no. 6 (2005): 216.

48 Michael Lang, ""Taxes Covered" in What is a "Tax" According to Article 2 of the OECD Model?," *Bulletin for International Taxation* 59, no. 6 (2005): 222.

49 The same analysis should apply to charges levied as compensation for the provision of public services, such as the probate fees.

The tax does not apply to the *mortis causa* windfall but only to the increase in the value of the property after death. As a result, the inheritance tax treaty should not apply to it. On the contrary, this tax should fall within the scope of the income and capital tax treaty.

6.1.5 Estate and inheritance taxes (Articles 2 and 9B)

In section 5.1.5, I mentioned that the Commentary on Article 9B of the OECD IHTMTC makes particular reference to the application of the credit method between States with different forms of death duties. Under paragraph 78 of the Commentary on Article 9B of the OECD IHTMTC, "[t]he application of the credit method may become difficult between the Contracting States where one of them imposes an estate tax […] whereas the other State imposes an inheritance tax […]". However, in section 5.1.5 I argued – quoting Maisto[50] – that the wording of the Commentary on Article 9B of the OECD IHTMTC on this issue can be improved having regard to the objective of the model of addressing double taxation and the elements of the proposed inheritance and gift tax (and particularly the first element of the benchmark).

According to Maisto, "[t]he OECD [IHTMTC] does not resolve the problem [VD: when the taxable person differs], and paragraph 80 of the Commentary on Article 9B leaves the issue for bilateral negotiation. This is at least doubtful as the wording of Article 9[B] restricts the credit to foreign taxes levied "in relation to the same event" without making restrictions in the domestic laws on whether the tax is borne by a different person by virtue of differences in the domestic laws of the two states."[51] Maisto's observation is correct. The wording of Article 9B only refers to the "same event" and not to any other element differentiating the taxes concerned. As a result, one could take the view that if the taxes concerned are levied "in relation to the same event", the Contracting State of the fiscal domicile shall credit the tax of the other Contracting State (even if this tax is levied at a different person and at a different rate). In that regard, it could be helpful if the term "same event" would be defined in both Article 9B of the OECD IHTMTC and its Commentary. In my view, the term could be broadly defined as required by the proposed inheritance and gift tax that is levied in the event of death or donation irrespective of the taxable person or the taxable event. As a result, the term "event" could not mean the *taxable* event for the imposition of a death tax (that, as mentioned in section 2.1.1 of this study, can differ between different types of death taxes[52]) but the mere event of the death or donation (as usually defined in civil law).

Finally, I note that the above interpretation of the term "taxable event" is not only relevant where a Contracting State levies an inheritance tax and the other an estate tax (to which the Commentary on Article 9B seems to focus). It should also apply to any type of death tax or tax on gifts, which shall be covered by an inheritance and gift tax treaty in line with the proposed inheritance tax as mentioned in section 6.1.4.2.

50 Guglielmo Maisto, "General Report: Death as a Taxable Event and its International Ramifications," in *Cahier de droit fiscal international 95b,* ed. IFA (The Hague: Sdu Uitgevers, 2010), 49.

51 Guglielmo Maisto, "General Report: Death as a Taxable Event and its International Ramifications," in *Cahier de droit fiscal international 95b,* ed. IFA (The Hague: Sdu Uitgevers, 2010), 49.

52 For example, as mentioned in section 2.1.1 of this study, the taxable event of the estate tax is the *mortis causa* transfer of property whereas the taxable event of the inheritance tax is the enrichment of the beneficiary.

6.1.6 Inheritance/estate/gift taxes and income/capital gains taxes (Articles 2 and 9B)

6.1.6.1 Introduction

As mentioned above, death is an event that can trigger a variety of taxes in the event of a cross-border inheritance. Although most of the OECD member countries levy either an estate tax or an inheritance tax, there are still some states which levy *mortis causa* income taxes on the beneficiaries or capital gains taxes upon the future alienation of the inherited assets. Some other states impose a capital gains tax liability assessed at the level of the deceased on the deemed distribution of his property as noted in chapter 2.

Different tax liability concerning the same *mortis causa* or *inter vivos* transfer of property by each state can often lead to double taxation or double non-taxation of the cross-border inheritance or donation. This is true if the states concerned a) have not concluded an income and capital tax treaty and an inheritance and gift tax treaty, or b) have concluded both an inheritance and gift tax treaty and an income and capital tax treaty.

If the states concerned have not concluded any tax treaty, they will apply their domestic laws. As a result, one state will apply its inheritance tax and the other state its income tax. The negotiation of an inheritance and gift tax treaty by these two states is undoubtedly a tough task due to the difference in the taxes levied by each of them. It is understood that, if the states fail to negotiate such a treaty, the double tax treaty relief is also not available. In addition, if they had concluded an inheritance and gift tax treaty, the double tax relief would not be available as the *mortis causa* income tax would not be covered by that treaty. On the other hand, the unilateral tax relief is often granted on the condition that the taxes levied in the other state are of the same nature with the taxes levied in the state of the personal nexus. Although one would argue that the imposition of different types of taxes on the cross-border inheritance or donation is not classified *per se* as juridical double taxation,[53] at least the mere reduction of the value of the *mortis causa* or *inter vivos* transferred property and the multiplication of the tax burden should not be neglected.

If both states have concluded both types of tax treaties, they may apply a different tax treaty concerning the same transfer of property, and in particular, Articles of these treaties that grant exclusive taxing rights to them. The parallel application of two different types of tax treaties between the Contracting States may easily give rise to double taxation as noted in section 5.1.4.

Finally, if only an income and capital tax treaty is in place, a state may repeal its income tax on inheritances, introduce an inheritance tax and still apply the income and capital tax treaty considering that the tax is substantially similar to the income tax, thereby compensating for the lack of an inheritance and gift tax treaty.

In the following sections, I will put forward suggestions to bridge the gap between inheritance/gift taxes and other types of death taxes and taxes on gifts. More specifically, I will discuss how Articles 2 and 9B of the model should be interpreted (section 6.1.6.2.1). Furthermore, I will present examples of "comprehensive" and "consolidated" treaties (section 6.1.6.2.2). Finally, I will present how the income tax treaty practice has safeguarded a degree of interaction between inheritance/gift taxes and income or capital gains taxes (section 6.1.6.2.3).

53 See in that regard, chapter 2, section 2.5 of this study.

6.1.6.2 Bridging the gap between inheritance/gift taxes and other types of death taxes and taxes on gifts

6.1.6.2.1 Taxes covered (Article 2) and "in relation to the same event" (Article 9B)

In section 6.1.4.2, I suggested a transition from an exhaustive to an indicative listing of taxes in Article 2(3) of the inheritance and gift tax treaty. This is because by doing so the scope of the tax treaty broadens significantly.

First, two states applying different types of taxes to the same transfer of property can more easily conclude an inheritance and gift tax treaty if both taxes can be classified as taxes on estates and inheritances and on gifts under the general definition of Article 2(2) of the inheritance and gift tax treaty *and* are consistent with the proposed inheritance and gift tax (albeit not listed in Article 2(3)). This is the case, for example, of an income tax on gifts which "is imposed on transfer *inter vivos* only because such transfer is made of no consideration".

Furthermore, the already concluded inheritance tax treaty can still apply to *existing* taxes that are not listed in Article 2(3) if, in essence, they are taxes on estates and inheritances and on gifts under Articles 2(1) and (2) of the inheritance and gift tax treaty and consistent with the proposed inheritance and gift tax. Therefore, even if a *mortis causa* capital gains tax was not listed in Article 2(3), the treaty could apply to it on condition that it is consistent with the proposed inheritance and gift tax.

Finally, the inheritance and gift tax treaty may also apply to substantially similar taxes introduced after its conclusion under Article 2(4). The benchmark of the similarity should again be based on the proposed inheritance and gift tax as presented in section 6.1.4.3.

It follows that a) the transition from an exhaustive to an indicative list of Article 2(3), and b) the interpretation of the phrase "identical or substantially similar taxes" based on the proposed inheritance and gift tax, widen the scope of the OECD IHTMTC and the treaties which can thus apply to any death tax and tax on gifts that is in line with the benchmark of the update work. In that regard, I refer to section 6.1.4 of this study. Subsequently, it does not take long to interpret the term "in relation to the same event" used broadly in Article 9B of the OECD IHTMTC, as suggested in section 6.1.5 of this study given that such interpretation would be in line with the wording of this Article and required by the proposed inheritance and gift tax.

6.1.6.2.2 A "comprehensive treaty" and a "consolidated treaty"

Under the Commentary on Article 1 of the OECD IHTMTC, "[m]ember countries desirous of concluding bilateral conventions applying to both taxes on income and capital, and taxes on estates and inheritances and on gifts, may combine the two Model Conventions."[54] A treaty that can apply to taxes on income and capital and taxes on estates and inheritances and on gifts may guarantee that the double taxation relief will be available for all types of taxes covered by this treaty. To the best of my knowledge, such a "comprehensive treaty" has not yet been concluded.

54 Commentary on the OECD IHTMTC (preliminary remarks), para. 14.

The term "comprehensive treaty" is contrasted to the term "consolidated treaty". The latter term refers to treaty that applies to taxes on income and capital, and taxes on estates and inheritances and on gifts. However, there are separate rules applicable to each type of taxes and the same applies to the elimination of double taxation Article. In other words, the Articles applicable to income and capital taxes do not interact with those applicable to inheritance and gift taxes. I observe that there are some treaties of this kind. More specifically, the Denmark – Germany Income, Capital, Inheritance and Gift Tax Treaty (1995) applies to both income and capital and taxes on estates and inheritances and on gifts. However, there are distinct rules applicable to taxes on income and capital (chapter II) and to estates, inheritances and gifts (chapter III). Chapters II and III do not therefore interact. Nevertheless, the general provisions of chapter I (including the tiebreaker rules) apply to all taxes covered by the treaty. Likewise, the Germany – Sweden Income, Capital, Inheritance and Gift Tax Treaty (1992) should also be considered a consolidated treaty.[55]

Furthermore, the Tax Regulation[56] for the Kingdom of the Netherlands (2010) covers, among others, income, capital, inheritance and gift taxes. Of note is that separate rules apply to income and capital and inheritance and gift taxes. However, as in the case of the Denmark – Germany Income, Capital, Inheritance and Gift Tax Treaty (1995), the general definitions of Tax Regulation apply to all kinds of taxes covered by the regulation.[57, 58, 59]

I note that, although the conclusion of a "comprehensive treaty" by the Contracting States would guarantee the availability of the double tax relief to any type of tax covered by the treaty, conflicts of qualification due to differences in domestic laws of each Contracting State are still possible. For example, a Contracting State may apply the equivalent of Article 13 of the OECD IHTMTC (capital gains taxation) and the other Contracting State the equivalent of Article 7 of the OECD ICTMTC (inheritance taxation). If this is the case, double taxation may arise due to a conflict of qualification resulting from the differences in the domestic laws of the Contracting States. The conflicts of qualification will be extensively discussed in section 6.1.7 of this study.

6.1.6.2.3 The income tax treaty practice

States have already recognised that the variety of taxes levied in the event of a cross-border inheritance/donation may result in double taxation, thereby safeguarding a degree of interaction between inheritance/gift taxes and income or capital gains taxes. Such interaction has already taken place within the framework of *income and capital* tax treaties

55 See also, Jan Szczepański, "The Dual System of OECD Model Tax Conventions from the Evolutionary Perspective," *Intertax* 46, no. 10 (2018): 789.

56 Please note that the Netherlands tax regulations are not considered tax treaties.

57 See also the Netherlands - St. Maarten Income, Inheritance and Gift Tax Arrangement (2014) and the Curaçao - Netherlands Income, Inheritance and Gift Tax Arrangement (2013).

58 Other examples of "comprehensive treaties" are the treaties that France has concluded with Gabon (1995), Guinea (1999) and Algeria (1999) as well as the West African Economic and Monetary Union Income, Capital and Inheritance Tax Treaty (2008). See also, Jan Szczepański, "The Dual System of OECD Model Tax Conventions from the Evolutionary Perspective," *Intertax* 46, no. 10 (2018): 789.

59 Szczepański is of the view that one of the reasons for existing differences in "consolidated treaties" is evidently the lack of guidance in the Commentary to the OECD IHTMTC. See Jan Szczepański, "The Dual System of OECD Model Tax Conventions from the Evolutionary Perspective," *Intertax* 46, no. 10 (2018): 791.

in the absence of an inheritance tax treaty concluded by the Contracting States. More specifically, Article XXXIX B of the Canada – US Income and Capital Tax Treaty (1980), as amended, provides for a credit against the Canadian income tax payable by Canadian residents and spousal trusts for US federal and state estate tax or inheritance tax paid on US situs property.[60] Double taxation, however, is not entirely relieved as the credit cannot be claimed against Canadian provincial income taxes.

A similar provision is included in the Canada – France income and capital tax treaty[61] (1975) (as amended through 2010). Under Article 2(4) of this tax treaty, "[n]otwithstanding the preceding provisions of this Article, the existing taxes to which the Convention shall apply also include, in the case of France, the inheritance tax, but only for the application of Articles 4, 23, 25 and 26." Article 4 of the treaty refers to the term "resident", Article 23 to the elimination of double taxation and Articles 25 and 26 to the mutual agreement procedure and the exchange of information respectively. More specifically, under Article 23 of the treaty, each Contracting State grants a credit with regard to the taxes paid on capital gains for assets located in Canada (in the case of France) or for the inherited property located in France (in the case of Canada).[62]

6.1.7 Conflicts of qualification (Articles 3 and 5-7)

In section 5.1.8, I mentioned that, although the three distributive rules of the OECD IHTMTC seem to be easily applicable, several conflicts of qualification might arise when the Contracting States apply their inheritance and gift tax treaty. This type of conflict, however, seems to counter the objective of the model of addressing double taxation and the proposed inheritance and gift tax. In that regard, the OECD IHTMTC does not provide an effective solution to these conflicts that can result, in some instances in double taxation.

As mentioned before, there are three types of conflicts of qualification. There are conflicts due to i) the differences in domestic law classifications, ii) the differences in treaty application to the facts at hand, and iii) the interpretation of the treaty rules. In section 5.1.8, I presented examples for each type of conflict. In the following sections, I will suggest solutions to address them.

6.1.7.1 Conflicts of qualification due to the interpretation of the treaty rules

I observe that the OECD IHTMTC defines very few terms (the "defined terms" – section 6.1.7.1.1). Furthermore, some terms are not sufficiently defined, for instance, the term "immovable property" (the "insufficiently defined terms" – section 6.1.7.1.2). Finally, there are many terms used in the model, which are left undefined (Article 3(2) – section 6.1.7.1.3).

60 See also Patricia Brandstetter, *"Taxes Covered": A Study of Article 2 of the OECD Model Tax Conventions* (Amsterdam: IBFD, 2011), 200.

61 Guglielmo Maisto, "General Report: Death as a Taxable Event and its International Ramifications," in *Cahier de droit fiscal international 95b,* ed. IFA (The Hague: Sdu Uitgevers, 2010), 50.

62 See also, Sanford H. Goldberg, "Estate tax conflicts resulting from a change in residence: double taxation resulting from the application of capital gains and death taxes," in *Inheritance and wealth tax aspects of emigration and immigration of individuals*, ed. IFA (The Hague, London, New York: Kluwer Law International, 2003), 37.

6.1.7.1.1 The defined terms – Article 3(1) of the OECD IHTMTC

I note that that Article 3(1) of the OECD IHTMTC defines only the terms "property which forms part of the estate of, or of a gift made by, a person domiciled in a Contracting State" and "competent authority". More specifically, the term "property which forms part of the estate of, or of a gift made by, a person domiciled in a Contracting State" includes any property the devolution or transfer of which, under the law of a Contracting State, is liable to a tax covered by the Convention". Moreover, the term "competent authority" means: (i) (in State A)... (ii) (in State B)...".

In addition, Article 10(2) defines the term "nationals" as follows: "The term "nationals" means: a) all individuals possessing the nationality of a Contracting State; b) all legal persons, partnerships and associations deriving their status as such from the law in force in a Contracting State." At last, Article 4 "defines" the term "person domiciled in a Contracting State". Nevertheless, as noted in section 5.1.1, although the criteria for establishing fiscal domicile are listed in Article 4(1), the term, in essence, is a national term. The criteria "residence", "domicile", "place of management" and "criterion of a similar nature" are left undefined and are thus defined under the law of each Contracting State.

Apart from the above terms, I observe that there are important terms for the application of the model and the inheritance and gift tax treaties that are left undefined. This applies, for instance, to the term "person" whose definition is not included in Article 3 of the OECD IHTMTC (general definitions) or in Article 4 (fiscal domicile). As a matter of comparison, Article 3 of the OECD ICTMTC defines the following terms: "person", "company", "enterprise", "enterprise of a Contracting State", "enterprise of the other Contracting State", "international traffic", "competent authority", "national" and "business". The definition of these terms in the income and capital tax model admittedly prevents many conflicts of qualifications due to the interpretation of the treaty rules.

Under paragraph 14 of the introductory report by the OECD's Committee on Fiscal Affairs, "[i]n revising the 1966 Estate Tax Draft, the Committee on Fiscal Affairs saw no reason to deviate from that approach. The natural consequence of this is that concepts which are expressed by the same words in both Model Conventions must each be taken to have the same application, due regard being had, wherever appropriate, to the different nature of the forms of taxation in question." Considering the above, I am of the opinion that the terms, which have been already defined in the OECD ICTMTC, can also apply to the OECD IHTMTC by analogy because their definition does not arguably change due to the different nature of the forms of taxation. Therefore, I propose the following wording of Article 3(1):

"1. For the purposes of this Convention, unless the context otherwise requires:
   a) the term "person" includes an individual, a company and any other body of persons, including the estate of a person[63];
   b) the term "company" means any corporate or any entity that is treated as a body corporate for tax purposes;
   c) the term "enterprise" applies to the carrying on of any business;

63 The fact that the term "person" also incorporates corporate entities derives also from Article 4(3) of the OECD IHTMTC, which states that "3. Where by reason of the provisions of paragraph 1 a person other than an individual is domiciled in both Contracting States, then it shall be deemed to be domiciled in the State in which its place of effective management is situated.".

d) the term "competent authority" means:
   (i) (in State A):.....
   (ii) (in State B):.....
e) the term "national", in relation to a Contracting State, means:
   (i) any individual possessing the nationality or citizenship of that Contracting State; and
   (ii) any legal person, partnership or association deriving its status as such from the laws in force in that Contracting State;
f) the term "business" includes the performance of professional services and of other activities of an independent character;
g) the term "property which forms part of the estate of, or of a gift made by, a person domiciled in a Contracting State" includes any property the devolution or transfer of which, under the law of a Contracting State, is liable to a tax covered by the Convention."

6.1.7.1.2 The insufficiently defined terms – the term "immovable property"

I observe that there are terms, which are insufficiently defined in the OECD IHTMTC, and their interpretation by each Contracting State can often give rise to a conflict of qualification. For example, the term "immovable property" of Article 5(2) of the OECD IHTMTC may give rise to different interpretations by each Contracting State. Under Article 5(2) of the OECD IHTMTC, "[t]he term "immovable property" shall have the meaning which it has under the law of the Contracting State in which the property in question is situated […]." As a result, the Contracting State of the fiscal domicile should follow the interpretation, which the other Contracting State applies to the term "immovable property". Nevertheless, the question arises as to whether the reference to the domestic law of the other Contracting State concerns only its tax law or its laws in general. This is an important issue because different interpretations of the same term can often give rise to double taxation or double non-taxation.

If, for example, the other Contracting State defines the term "immovable property" broadly based on its civil law while the Contracting State of the fiscal domicile defines the term under the tax law of the Contracting State of the objective nexus, which provides a narrow definition of the term.[64] Thus, under Article 5 of the OECD IHTMTC, the other Contracting State may levy an inheritance tax, for instance, on five assets whereas the Contracting State of the fiscal domicile will consider that the other Contracting State is allowed to levy inheritance tax on only three assets and, thus, will levy inheritance tax on the remaining two.

A suggestion for an amendment to the wording of Article 5(2) of the OECD IHTMTC would seem to resolve the above conflict of qualification. In my view, priority should be given to the *tax* law definition of the law of the other Contracting State. Both Contracting States will thus apply the same tax law definition of the term, so no conflict of qualification may arise. The fact that the tax laws of the other Contracting State may refer to the civil

64 Marc Walter, "Conflicts of Qualification and International Inheritance Cases," in *Conflicts of Qualification in Tax Treaty Law,* ed. Michael Lang (Vienna: Linde Verlag, 2007), 301–302.

law definition of the term "immovable property" is immaterial as both Contracting States will end up applying the same definition.

The priority of the tax law definitions is also supported by Article 3(2) of the income and capital tax model which reads as follow: "[a]s regards the application of the Convention at any time by a Contracting State, any term not defined there shall, unless the context otherwise requires, have the meaning that it has at that time under the law of that State for the purposes of the taxes to which the Convention applies, any meaning under the applicable *tax* laws of that State prevailing over a meaning given to the term under other laws of that State." As a matter of comparison, Article 3(2) of the OECD IHTMTC does not specify the body of laws of each Contracting State which are required to define a term unless the context of the treaty otherwise requires. I will come back to this point in section 6.1.7.1.3.

Furthermore, Walter noted that commercial considerations could be taken into account when defining the term "immovable property".[65] I agree with Walter's observation and observe that Article 5(3) of the OECD IHTMTC already takes commercial considerations into account. Under Article 5(3), "[t]he provisions of paragraph 1 shall also apply to immovable property of an enterprise and to immovable property used for the performance of professional services or other activities of an independent character." Likewise, commercial considerations were also considered in Article 13(4) of the OECD ICTMTC concerning the capital gains taxation of shares deriving more than 50% of their value directly or indirectly from immovable property. It follows that the term "transfer of immovable property" could also include indirect transfers, which would thus fall under Article 5 of the treaty and not Article 7.[66] Interestingly, the France – Sweden Inheritance and Gift Tax Treaty (1994) includes such indirect transfers within the ambit of Article 5. To this end, I suggest the following wording of Article 5 of the OECD IHTMTC (additions in brackets):

"1. Immovable property which forms part of the estate of, or of a gift made by, a person domiciled in a Contracting State and which is situated in the other Contracting State may be taxed in that other State. 2. The term "immovable property" shall have the meaning that it has under the [tax] law of the Contracting State in which the property in question is situated. The term shall, in all events, include property accessory to immovable property, livestock and equipment used in agriculture and forestry, rights to which the provisions of general law respecting landed property apply, usufruct of immovable property and rights to variable or fixed payments as consideration for the working of, or the right to work, mineral deposits, sources and other natural resources; ships, boats and aircraft shall not be regarded as immovable property. 3. The provisions of paragraph 1 shall also apply to immovable property of an enterprise and to immovable property used for the performance of professional services or other activities of an independent character. [4. The term "immovable property" shall also include shares, participations and other rights in a company or legal person the assets of which consist, directly or through one or more other companies or legal entities, mainly of immovable property situated in one of the Contracting States or of rights encumbering such property. These shares, participations and other rights shall be deemed to be situated in the Contracting State in which the immovable property is situated.]"

65 Marc Walter, "Conflicts of Qualification and International Inheritance Cases," in *Conflicts of Qualification in Tax Treaty Law,* ed. Michael Lang (Vienna: Linde Verlag, 2007), 301–302.

66 Marc Walter, "Conflicts of Qualification and International Inheritance Cases," in *Conflicts of Qualification in Tax Treaty Law,* ed. Michael Lang (Vienna: Linde Verlag, 2007), 301–302.

6.1.7.1.3 The undefined terms – update of Article 3(2) of the OECD IHTMTC

Article 3(2) of the model states that "[a]s regards the application of the Convention by a Contracting State, any term not defined there shall, unless the context otherwise requires, have the meaning which it has under the law of that State concerning the taxes to which the Convention applies." This is the case, for example, of the terms "person", "movable property", "debt", "company", "business" and "enterprise". Considering that the OECD member countries could not easily agree on commonly accepted definitions of the above terms due to the differences in their legal systems, the OECD IHTMTC intentionally left these terms undefined. Article 3(2) of the treaty comes thus into play.

Nevertheless, I noted that Article 3(2) refers, in general, to the laws of each Contracting State for the definition of an undefined term unless the context of the treaty otherwise requires. On the other hand, Article 3(2) of the OECD ICTMTC refers to the *tax* laws of each Contracting State for the definition of an undefined term. Walter argued that considering the aim and the purpose of the treaty, which is the avoidance of double taxation, and the similarity of the two model conventions, an implicit supremacy of the tax laws of a state can also be concluded for the [OECD IHTMTC].[67] Of note is that the priority of the tax laws over any other body of laws of each Contracting State was an amendment that was inserted in Article 3(2) of the income and capital tax model only in 1996.

To this end, Article 3(2) of the OECD IHTMTC could read as follows (additions in brackets):

"2. As regards the application of the Convention at any time by a Contracting State, any term not defined there shall, unless the context otherwise requires, have the meaning that it has at that time under the law of that [specific State for the purposes of the taxes to which the Convention applies, any meaning under the applicable tax laws of that State prevailing over a meaning given to the term under other laws of that State.]"

Finally, I note that the treaty practice seems to have already identified the insufficient wording of the current version of Article 3(2) of the OECD IHTMTC. For instance, Article 3(2) of the UK – US Inheritance and Gift Tax Treaty (1978), "[a]s regards the application of the Convention by a Contracting State, any term not otherwise defined shall, unless the context otherwise requires and subject to the provisions of Article 11 (Mutual Agreement Procedure), have the meaning which it has under the laws of that Contracting State relating to the taxes which are the subject of the Convention." Furthermore, under Article 3(2) of the France – US Inheritance and Gift Tax Treaty (1978) "2. […] if the meaning of such a term under the laws of one of the Contracting States is different from the meaning of the term under the laws of the other Contracting State, the Contracting States may, in order to prevent double taxation or to further any other purpose of this Convention, establish a common meaning of the term for purposes of this Convention."

6.1.7.2 Conflicts of qualification due to differences in treaty application to the facts

It was previously mentioned that conflicts of qualification might also arise if the Contracting States disagree on the facts of the case at hand. For example, a Contracting State may consider that there is no PE in the territory of the other Contracting State whereas the

67 Marc Walter, "Conflicts of Qualification and International Inheritance Cases," in *Conflicts of Qualification in Tax Treaty Law,* ed. Michael Lang (Vienna: Linde Verlag, 2007), 302.

other Contracting State may consider that there is. Alternatively, both Contracting States may claim that the deceased or the donor maintained a permanent home in their territory based on the facts of the case while the deceased had, in fact, only one permanent home.

Unfortunately, the Commentary on OECD IHTMTC gives no guidance for these conflicts. On the contrary, I note that the Commentary on Articles 23A and 23B of the OECD ICTMTC discusses this type of conflicts. Under paragraph 32.5 of the Commentary, the States should use the provisions of Article 25 (mutual agreement procedure), and in particular paragraph 3 thereof, to resolve this type of conflict in cases that would otherwise result in unrelieved double taxation.

It follows that the Commentary on Articles 9A and 9B of the OECD IHTMTC will be required to incorporate a section on the conflicts of qualification due to differences in treaty application to the facts. In that regard, I note that this section will follow the wording of paragraph 32.5 of the Commentary on Articles 23A and 23B of the income and capital tax model. It goes without saying that addressing those types of conflicts prerequisites an effective mutual agreement procedure (section 6.1.8).

6.1.7.3 Conflicts of qualification due to differences in domestic law classifications

The Commentary on Article 7 of the OECD IHTMTC mentions four examples of entities or rights for which conflicts of qualification may arise due to their different classification under the domestic law of each Contracting State: the interests in partnerships, the undistributed estates, and the property held in a trust, and the companies holding immovable property. I note that these conflicts are called "conflicts of treatment". Admittedly, these conflicts can give rise to double taxation as shown from paragraphs 17 to 23 of the Commentary on Article 7 of the OECD IHTMTC. As a result, the OECD IHTMTC Commentary suggests the Contracting States adopt specific language in their tax treaty to address the issue.

Under the suggested language of paragraph 24 of the Commentary on Article 7, "[i]f by the law of a Contracting State any right or interest is regarded as property not falling under Article 5 or 6, but by the law of the other Contracting State that right or interest is regarded as property falling under either of those Articles, then the nature of the right or interest shall be determined by the law of the State which is not the State of the deceased's or the donor's domicile". Consequently, if the Contracting State of the fiscal domicile applies Article 7 of the treaty and the other Contracting State Articles 5 and/or 6 and both states seek to tax the right or interest, the former Contracting State must recognise the classification which the latter Contracting State gives to this right or interest. It must also grant double tax relief for the tax paid in the other Contracting State.

It should be noted, however, that under paragraph 27 of the Commentary on Article 7 of the OECD IHTMTC, "[i]f Member countries consider that the solution proposed in paragraph 24 does not resolve all conflicts of treatment satisfactorily, they are free to adopt an alternative solution. For example, in the case of partnerships, they may resolve this problem in bilateral negotiations by determining the nature of the property by reference to the law of the State under which the partnership is established."

As mentioned in section 5.1.8, the proposed wording of paragraph 24 seems to effectively address double taxation arising from conflicts of qualification due to differences in domestic law classifications. Furthermore, it is in line with the so-called "new approach", which the 1999 OECD's report "The application of the OECD Model Tax Convention to partnerships"

("the partnership report") brought to the paragraphs 32.2 and 32.4 of the Commentary on Articles 23A and 23B. Under paragraph 32.3, "[w]here, due to differences in the domestic law between the state of source and the State of residence, the former applies, with respect to a particular item of income or capital, provisions of the Convention that are different from those that the State of residence would have applied to the same item of income, the income is still being taxed in accordance with the provisions of the Convention, as interpreted and applied by the State of source. In such case, the two Articles require that relief from double taxation be granted by the State of residence notwithstanding the conflict of qualification resulting from these differences in domestic law".

In line with the new approach,[68] the state of residence must follow the classification, which the state of source grants to the right or entity. This seems to be in line with the suggested language of paragraph 24 of the Commentary on Article 7 of the OECD IHTMTC.

6.1.8 Mutual agreement procedure (Article 11)

6.1.8.1 The importance of the procedure

The mutual agreement procedure is an important provision of the OECD IHTMTC for various reasons. First, the scope of this procedure is very broad. More specifically, the procedure can be first initiated if taxation in one or both the Contracting States is not imposed or will not be imposed in accordance with the provisions of the inheritance and gift tax treaty. For example, if the other Contracting State discriminates the non-national resident beneficiary on the grounds of his nationality, taxation in the other Contracting State is not levied in accordance with the provisions of the treaty. Furthermore, the mutual agreement procedure can be initiated if the tax authorities of each Contracting State need to agree on the interpretation or the application of the treaty (Article 11(3) first sentence) or in cases not provided for in the treaty (Article 11(3) second sentence).

Under paragraph 8 of the Commentary on Article 11 of the OECD IHTMTC, "[i]n practice, the procedure applies to cases, likely to be the most numerous, where the tax charges in question lead to double taxation which it is the specific purpose of the Convention to avoid. Among the most common cases mention must be made of the following: a) differences of interpretation by the two Contracting States as to the determination of domicile (paragraph 2 of Article 4) or the existence of a [PE] or a fixed base (Article 6); b) questions relating to the allocation of debts (Article 8); c) conflicts between the domestic laws of the Contracting States as to whether property falls under Articles 5 and 6 or Article 7."[69]

68 The "new approach" under the partnership report and the amendments to the OECD Commentary have been heavily criticized in the literature. See for example, Klaus Vogel, "Conflict of Qualification: The Discussion is not Finished," *Bulletin for International Taxation* 57, no. 2 (2003): 41-44; Alexander Rust, "The New approach to Qualification Conflicts has its Limits," *Bulletin for International Taxation* 57, no. 2 (2003): 45-50. Many scholars believe that the application of Article 23 A and B of the OECD ICTMTC cannot be justified if the state of residence applies a rule which affords it exclusive taxation rights. This also applies in the context of Articles 9A and 9B. If the Contracting State of the fiscal domicile applies Article 7 of the treaty (an exclusive distributive rule) and the other Contracting State applies Article 5 of the treaty (an open distributive rule), the Contracting State of the fiscal domicile has to apply double taxation relief even though it applies Article 7 of the treaty for which Articles 9A and 9B are not relevant.

69 Commentary on Article 11 of the OECD IHTMTC, para. 8.

Second, the mutual agreement procedure is important in light of the update work of the OECD IHTMTC regarding the elimination of double taxation of cross-border inheritances and donations. More specifically, the mutual agreement procedure is relevant when the Contracting States apply the updated general tiebreaker rule (section 6.1.3.2.3) or when they need to solve a conflict of qualification due to differences in treaty application to the facts (section 6.1.7.2). Furthermore, I put forward in section 5.1.7 that, although the property valuation rules fall outside the scope of the model, double taxation arising from the application of different valuation rules can be addressed in the framework of a mutual agreement procedure.

Nevertheless, I noted in section 5.1.10 that the OECD IHTMTC's mutual agreement procedure can be improved having regard to the objective of the model i.e. the allocation of taxing rights between the Contracting States for the avoidance of double or multiple taxation. This is because, if the competent authorities of each Contracting State cannot resolve the cases submitted to the mutual agreement procedure the issue remains unsettled and the cross-border inheritance and donation is possibly taxed twice. As a matter of comparison, the OECD ICTMTC's mutual agreement procedure includes an obligatory referral of the unresolved issues to arbitration upon person's request (Article 25(5) of the OECD ICTMTC).

6.1.8.2 Inclusion of arbitration clause

The uncertain outcome of the mutual agreement procedure seems, in my view, to be the reason why it could be argued that the application of the procedure may counter the objective of the model of addressing double taxation. It should be noted, however, that the OECD IHTMTC and the Commentary are products of their time (1982) and, therefore, are outdated also in terms of dispute resolution.

Furthermore, those who drafted the OECD IHTMTC had already acknowledged in 1982 that from the taxpayer's point of view, the mutual agreement provision is not entirely satisfactory, but it represented the maximum that the OECD member countries were willing to accept at that time: "Double taxation is still possible although contrary to the sense and purpose of a convention aimed at avoiding double taxation."[70] Therefore, according to the Commentary, if a convention is interpreted or applied differently in two Contracting States, and if the competent authorities are unable to agree on a joint solution within the framework of a mutual agreement procedure, it would be difficult to resolve the dispute within a mutual agreement procedure.[71] In that regard, one solution, under the Commentary, could be to seek an advisory opinion. The Contracting States would ask for an opinion of an impartial third party. However, the final decision would still be made by the states. It could also be possible to ask the Committee on Fiscal Affairs to give its opinion of the correct interpretation. To conclude, the Commentary raises the possibility to ask for the opinion of certain persons acting as arbitrators.[72] Based on the above, the Commentary does not take a stand on whether the resolution of arbitration would be binding and who would be entitled to request arbitration.

70 Commentary on Article 11 of the OECD IHTMTC, para. 42.
71 Commentary on Article 11 of the OECD IHTMTC, para. 41.
72 Commentary on Article 11 of the OECD IHTMTC, para. 44.

As a matter of comparison, the OECD ICTMTC's mutual agreement procedure was updated in 2008 and includes an obligatory referral of the unresolved issue to arbitration upon a person's request. More specifically, under Article 25(5) of the income and capital tax model, "[w]here, a) under paragraph 1, a person has presented a case to the competent authority of a Contracting State on the basis that the actions of one or both of the Contracting States have resulted for that person in taxation not in accordance with the provisions of this Convention, and b) the competent authorities are unable to reach an agreement to resolve that case pursuant to paragraph 2 within two years from the date when all the information required by the competent authorities in order to address the case has been provided to both competent authorities, any unresolved issues arising from the case shall be submitted to arbitration if the person so requests in writing.

These unresolved issues shall not, however, be submitted to arbitration if a decision on these issues has already been rendered by a court or administrative tribunal of either State. Unless a person directly affected by the case does not accept the mutual agreement that implements the arbitration decision, that decision shall be binding on both Contracting States and shall be implemented notwithstanding any time limits in the domestic laws of these States. The competent authorities of the Contracting States shall by mutual agreement settle the mode of application of this paragraph."

It goes without saying that the inclusion of this paragraph to Article 11 of the OECD IHTMTC makes the mutual agreement procedure more in line with the objective of the model of addressing double taxation. However, a mutual agreement procedure followed by arbitration can sometimes be lengthy and result in financial problems if the tax payment is not postponed during the procedure. For this reason, the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (hereinafter: "MLI") included provisions on the arbitration phase of the mutual agreement procedure of the income and capital covered tax agreements (Articles 19 – 26) which aim at addressing some of these issues. Arguably, these provisions can also apply to the suggested arbitration stage of the OECD IHTMTC's mutual agreement procedure. Therefore, I suggest that an update of Article 11 of the OECD IHTMTC should also take into account the changes, which the MLI brought to the mutual agreement procedure of the income and capital covered tax agreements.

Finally, I note that Article 14 of the France – Germany Inheritance and Gift Tax Treaty (2006) lays down an arbitration procedure that may be invoked if the competent authorities fail to reach an agreement within 24 months from the day the taxpayer has presented his case. More importantly, under paragraph 5 of Article 14 "[t]he decisions of the arbitration commission shall be made by the majority of votes of the members and they shall be binding. The absence of, or abstention from voting by, one of the members appointed by the Contracting States shall not prevent the commission from making a decision. In case of a tie, the chairman's vote is decisive."

6.2 Double or multiple non-taxation

6.2.1 Overlaps with the OECD ICTMTC (Article 2)

In my view, the overlaps between the two models that can lead to double non-taxation of the cross-border inheritance and donation provide the argument that Article 2 of the

OECD IHTMTC can be improved having regard to the objective of the model of addressing double non-taxation and the proposed inheritance and gift tax. Improvements to Article 2 of the OECD IHTMTC were presented in section 6.2.1 of this study through a) a transition from an exhaustive list of Article 2(3) of the OECD IHTMTC to an indicative list, and b) the definition of the term "identical or substantial similar tax" of Article 2(4) of the OECD IHTMTC in line with the proposed inheritance and gift tax. In that regard, I refer to section 6.1.4. of this study. In my view, the suggested amendments to the OECD IHTMTC that are proposed in this section also address double non-taxation issues due to overlaps between the two OECD models.

For example, based on section 6.1.4 of this study, a *mortis causa* income tax should be included in the scope of an inheritance and gift tax treaty if it is consistent with the proposed inheritance and gift tax. If this is the case, both Contracting States will apply the inheritance and gift tax treaty at hand. Therefore, the Contracting State of the fiscal domicile that, for instance, levies inheritance taxes based on the deceased's residence will apply the treaty and refrain from taxing the immovable property located in the other Contracting State if it eliminates double taxation through a tax exemption (Article 9A). On the other hand, the other Contracting State will apply Article 5 of the treaty and therefore apply a *mortis causa* income tax. Therefore, by optimizing Article 2 of the OECD IHTMTC, potential overlaps with the OECD ICTMTC that can lead to double non-taxation outcomes can arguably be addressed.

6.2.2 Conflicts of qualification (Articles 3 and 5-7)

In section 5.1.8, I mentioned that, although the three distributive rules of the OECD IHTMTC seem to be easily applicable, several conflicts of qualification might arise when the Contracting States apply their inheritance and gift tax treaty. This type of conflicts, however, seems to counter the objective of the OECD IHTMTC of addressing double taxation and the proposed inheritance and gift tax. In that regard, the OECD IHTMTC does not provide an effective solution to these conflicts, which can also result in double non-taxation.

As mentioned in section 5.1.8, there are three types of conflicts of qualification. There are conflicts due to i) the differences in domestic law classifications, ii) the differences in treaty application to the facts at hand, and iii) the interpretation of the treaty rules. In section 5.2.2, I presented examples of two of these conflicts and concluded that double non-taxation of the cross-border inheritance is likely due to these conflicts.

6.2.2.1 Conflicts of qualification due to the interpretation of the treaty rules

I refer to section 6.1.7.1 of this study concerning solutions to conflicts of qualification due to the interpretation of the treaty rules.

6.2.2.2 Conflicts of qualification due to differences in treaty application to the facts

I refer to section 6.1.7.2. of this study concerning solutions to conflicts of qualification due to differences in treaty application to the facts.

6.2.2.3 Conflicts of qualification due to differences in domestic law classifications

As mentioned in section 6.1.7.3, the question arises whether the suggested wording of paragraph 24 effectively addresses double non-taxation resulting from differences in domestic law classifications and especially in situations where the Contracting State of fiscal domicile provides an exemption based on Article 9A of the OECD IHTMTC to avoid double taxation of the cross-border inheritance. Paragraph 25 of the Commentary clearly states that double non-taxation is addressed through the suggested wording. Nevertheless, in my view, this is doubtful. In all the examples of the Commentary, the classification by the other Contracting State is decisive for the classification of the entity or the right at hand. This means, however, that double non-taxation may still arise if the other Contracting State applies Article 7 of the treaty and thus does not tax the right or interest, and the Contracting State of the fiscal domicile applies Article 5 or 6 of the treaty and therefore taxes but subsequently exempts the property under Article 9A of the treaty.

Of note is that the Commentary on Articles 23A and 23B OECD ICTMTC under the new approach distinguishes the situations where conflicts of qualification resulting from differences in domestic law classifications can result in double taxation and *double non-taxation*. In the first case, the right or the interest at hand is taxed in accordance with the provisions of the Convention, as interpreted and applied by the State of source. On the contrary, in the case of double non-taxation, the right or the interest at hand is not taxed in accordance with the provisions of the Convention. This follows from paragraph 32.6 of the Commentary on Articles 23A and 23B OECD ICTMTC which reads as follows: "where the state of source considers that the provisions of the Convention preclude it from taxing an item of income or capital which it would otherwise have had the right to tax, the State of residence should, for purposes of applying paragraph 1 of Article 23A, consider that the item of income may not be taxed by the State of source in accordance with the provisions of the Convention, even though the State of residence would have applied the Convention differently so as to have the right to tax that income if it had been in the position of the State of source. Therefore, the residence state is not required by paragraph 1 to exempt the item of income, a result which is consistent with the basic function of Article 23 which is to eliminate double taxation."

In line with the new approach, I am of the opinion that the Contracting State of the fiscal domicile will not exempt the property that was not taxed by the other Contracting State that applied Article 7 of the treaty. The property was not taxed in the former state in accordance with the provisions of the tax treaty at hand and thus, the Contracting State of the fiscal domicile will not exempt it. As a result, the Contracting State of the fiscal domicile will not follow the classification that the other Contracting State gives to the property at hand[73] and thus, it will tax it.

In that regard, I note that this solution is in line with paragraph 22 of the Commentary on Article 9B of the OECD IHTMTC that provides an optional wording that reads as follows: "If the domestic law of the State of situs does not entitle it to make full use of the right to tax

73 This approach is also in line with paragraph 23 of the Commentary on Article 9A of the OECD IHTMTC. Under this paragraph, "[i]f the domestic law of the State of situs does not entitle it to make full use of the right to tax reserved to it by the Convention, then in order to avoid double non-taxation, Contracting States may find it reasonable in certain circumstances to make an exception to the obligation on the State of domicile to give exemption."

reserved to it by the Convention, then in order to avoid double non-taxation, Contracting States may find it reasonable in certain circumstances to make an *exception to the obligation on the State of domicile to give exemption*. In such cases it is left to States, in their bilateral negotiations, to agree upon the necessary modifications to the Article." (Italics, VD)

6.2.3 Termination of the tax treaty (Article 16)

I mentioned in section 5.2.3 that the *verbatim* reproduction of Article 31 of the OECD ICTMTC, in my view, can be problematic in some cases. More specifically, I observed that, according to Article 16 of the model, an inheritance and gift tax treaty could not be terminated for some years following its entry into force. This is because, according to paragraph 5 of the Commentary on Article 16, "[i]t is of advantage that the Convention should remain in force at least for a certain period". In that regard, I noted that many inheritance and gift tax treaties provide for a five-year minimum application period. I observed, however, that the application of a minimum application period may not always be an advantage for the Contracting States but it can give rise to double non-taxation. Nevertheless, double non-taxation due to the compulsory application of the inheritance and gift tax treaty by each Contracting State even following the abolition of the inheritance and/or gift tax laws by a Contracting State seems to counter the objective of addressing double non-taxation. As per Maisto's observation, "[i]nheritance taxes may be unexpectedly repealed in one country so that the wording adopted by the OECD IHTMTC might be an impediment for the other Contracting State to promptly terminate the treaty".[74]

More specifically, if a Contracting State repeals its inheritance or gift tax laws within the five years, the other state is precluded from taxing the assets that it would have been entitled to do under its domestic law. This is true if double taxation is eliminated under the exemption method. Hence, the Contracting State of the fiscal domicile (which still levies inheritance and gift taxes) will exempt the property mentioned in Articles 5 and 6 of the treaty irrespective of whether or not this property is taxed in the other Contracting State.[75] Given, however, that this property is not taxed in the latter state (which has abolished its inheritance and gift tax laws), double non-taxation is possible. The Contracting State of the fiscal domicile can terminate the treaty only after the lapse of the minimum application period.

On the other hand, I note that if double taxation is eliminated under the credit method (Article 9B of the OECD IHTMTC), double non-taxation is not possible. Under this method, the Contracting State of the fiscal domicile must credit the taxes levied in the other Contracting State. If the latter state does not levy these taxes for whatever reason, no credit is granted. Consequently, the Contracting State of the fiscal domicile can tax the property covered in Articles 5 and 6 of the treaty given that these Articles are open distributive rules ("may be taxed"). For example, the Austria – the Netherlands inheritance and gift tax treaty (2001) is still in force despite the abolition of the inheritance tax legislation in Austria as per 1 August 2008. Although the Netherlands could have terminated the treaty

74 Guglielmo Maisto, "General Report: Death as a Taxable Event and its International Ramifications," in *Cahier de droit fiscal international 95b*, ed. IFA (The Hague: Sdu Uitgevers, 2010), 50-51.

75 Commentary on Article 9A of the OECD IHTMTC, para. 22.

as per 1 January 2009,[76] the credit mechanism under this treaty safeguards that double non-taxation is not possible before and after the lapse of the five-year minimum period.

6.2.3.1 Double non-taxation before the lapse of the minimum application period

It follows from the above that double non-taxation is possible before the lapse of the minimum application period of treaties in which double taxation is eliminated under the exemption method. As the Contracting States are precluded from terminating the treaty within this period, I suggest that a specific provision needs to be inserted which could allow the Contracting States, by exception, to terminate the treaty because of changes made in their tax laws.

To this end, I propose the following wording for Article 16 of the OECD IHTMTC (additions in brackets):

"1. This Convention shall remain in force until terminated by a Contracting State. Either Contracting State may terminate the Convention, through diplomatic channels, by giving notice of termination at least six months before the end of any calendar year after the year... In such event, the Convention shall cease to have effect: a) (in State A)... b) (in State B)... [2. Notwithstanding the provisions of paragraph 1, if the effects of this Convention are substantially altered as a result of changes made in the tax law of either Contracting State, either Contracting State may, through diplomatic channels, give a written notice of termination with effect not earlier than a period of six (6) months after such notice is given. In such an event, its provisions shall not apply to estates of persons who die or to gifts made on or after the effective date of the termination. 3. The Convention shall continue to apply in respect of the estate of any individual who has died before the end of that period and in respect of any event (other than death) occurring before the end of that period and giving rise to liability to tax under the laws of either Contracting State. 4. The termination of the present Convention shall not have the effect of reviving any treaty or arrangement abrogated by the present Convention or by treaties previously concluded by the Contracting States.]

Paragraph 2 of the suggested wording has been inspired by the France – US Inheritance and Gift Tax Treaty (1978). Under paragraph 2 of the suggested wording, the Contracting States can exceptionally terminate the treaty even before the lapse of the minimum application period in the case of changes in their tax laws. The term "changes of tax law" should be strictly interpreted. First, changes in tax law that do not affect the substance of the legislation should not give the right to the Contracting States to terminate their tax treaty. The proposed inheritance and gift tax benchmark can assist in that regard. As a result, if a Contracting State replaces its inheritance tax or estate tax laws with, for instance, *mortis causa* capital gains legislation that is substantially similar to the inheritance tax or estate tax laws based on the proposed inheritance and gift tax benchmark, such a change should not qualify as a change in tax laws. In addition, only changes in tax laws of either Contracting State should allow the exceptional termination of the tax treaty. Hence, any other change, for instance, in the applicable civil laws should not justify the termination of

76 Considering a) the agreed five-year minimum period of the termination Article of this treaty, and b) the entry into force of the treaty in 2003.

the treaty. Finally, I note that the suggested wording provides an option to the Contracting States to terminate their tax treaty. On the other hand, it does not oblige them to do so.

The suggested wording includes a third paragraph that clarifies that the termination of the treaty at hand shall not prevent the application of the present Convention to taxable events occurring before the termination date. This paragraph has been inspired by treaty practice. Maisto noted in that regard that several treaties clarify that their termination does not prevent the application of the treaty to taxable events occurring before the termination date. Avoiding undesired effects of termination requires specific language, for instance, when the terminated treaty contained provisions which abrogated an earlier treaty.[77] Article 15(1) of the UK – US Inheritance and Gift Tax Treaty (1978) serves as an excellent example in that regard.

Finally, under paragraph 4 of the suggested wording, the termination of the tax treaty shall not have the effect of reviving any treaty or arrangement abrogated by the tax treaty at hand or by treaties previously concluded by the Contracting States. This paragraph has been inspired by Article 15(2) of the UK – US Inheritance and Gift Tax Treaty (1978).

I note, however, that, although based on the suggested wording, the Contracting State that still levies death taxes and taxes on gifts has the right to terminate the tax treaty under certain conditions, double non-taxation cannot be addressed if the domestic law of this state does not include a subject-to-tax clause for the application of the exemption method for the elimination of double taxation.

6.2.3.2 Double non-taxation after the lapse of the minimum application period

Furthermore, it would be good if a provision is inserted in the OECD IHTMTC for situations giving rise to double non-taxation following changes in the tax laws of the Contracting States *after* the lapse of the minimum period. In that regard, I note that the Commentary already allows the Contracting States to modify Article 9A in order to address double non-taxation. More specifically, under this paragraph 22 of the Commentary on Article 9A, "[i]f the domestic law of the State of situs does not entitle it to make full use of the right to tax reserved to it by the Convention, then in order to avoid double non-taxation, Contracting States may find it reasonable in certain circumstances to make an exception to the obligation on the State of domicile to give exemption. In such cases, it is left to States, in their bilateral negotiations, to agree upon the necessary modifications to the Article. Conversely, an exception might also be possible in order to preserve the right of the State of situs to tax other property in addition to that falling under Articles 5 and 6 if the State of domicile is not entitled by its law to tax such other property."

The abovementioned section refers to situations where the domestic law of the State of the objective nexus does not entitle it to make full use of the right reserved by the tax treaty. The Commentary does not, however, refer to the reasons why the State of the objective nexus cannot tax. In my view, the reference to "domestic law" should be interpreted broadly. Therefore, this paragraph of the Commentary should not only apply to situations where, for instance, the State of the objective nexus does not tax because of an exemption/deduction/credit/allowance but also where this state has abolished its death and gift tax

77 Guglielmo Maisto, "General Report: Death as a Taxable Event and its International Ramifications," in *Cahier de droit fiscal international 95b,* ed. IFA (The Hague: Sdu Uitgevers, 2010), 51.

laws. In these situations, the Contracting State of the fiscal domicile shall not be obliged to provide double taxation relief and thus exempt the property listed in Articles 5 and 6 of the OECD IHTMTC (provided that its domestic law includes a subject-to-tax clause for the application of the exemption method).

6.3 Discriminatory treatment of cross-border inheritances and donations

6.3.1 Introduction

In section 3.1.3, I discussed the third problem of cross-border inheritances and donations, the discriminatory treatment of cross-border inheritances and donations. In a tax treaty context, the protection against discriminatory inheritance and gift tax provisions of either Contracting State takes place under Article 10 of the treaty, the so-called "non-discrimination provision". In section 5.3.2, I argued that the wording of the OECD IHTMTC's nationality non-discrimination provision needs to be revisited considering the objective of the OECD IHTMTC of addressing discrimination of cross-border inheritances and donations and the proposed inheritance and gift tax.

6.3.2 Suggested improvements to the OECD IHTMTC's nationality non-discrimination provision

It was previously mentioned that the OECD IHTMTC's nationality non-discrimination provision follows that of the OECD ICTMTC in its 1977 version. The similarities between the two provisions show that those who drafted the OECD IHTMTC sought to achieve an interaction between them. Such an interaction is achieved through the similar wording of the provisions, on the one hand, and the application of each provision to taxes of every kind and description, on the other.

Nevertheless, I noted in section 5.3.2 that, despite the desire for interaction between the two OECD's nationality non-discrimination provisions, the scope of the models differs. The OECD ICTMTC applies to *persons* that are residents of one or both Contracting States[78] whereas the OECD IHTMTC to *estates and inheritances and gifts* where the deceased or the donor was domiciled, at the time of his death or the donation, in one or both Contracting States.[79] One, therefore, can easily observe the inconsistency of the current wording of the OECD IHTMTC's nationality non-discrimination provision with the scope of the model. The wording of the provision is centred on the persons who can invoke the non-discrimination provision ("the nationals of each Contracting State") and not the property whose value is reduced due to the application of discriminatory legislation. Furthermore, the wording of the provision gives the impression that the discriminatory element of the legislation of a Contracting State shall only refer to the nationals of each Contracting State. It is therefore unclear whether the provision can be invoked in the case of discriminatory valuation and debt deduction rules.

In my view, the current wording of the provision unreasonably reduces the scope and the effectiveness of the provision in the endeavour of those who drafted the model

78 See, Article 1 of the ICTMTC and Commentary on Article 1 of the OECD IHTMTC, para. 13.
79 See, Article 1 of the OECD IHTMTC.

to achieve an interaction between the two types of the models. An alignment, however, of the wording of the OECD IHTMTC's nationality non-discrimination provision with the scope of the model arguably resolves the above issues. Furthermore, the wording of the provision seems to give the impression that the discriminatory element of the legislation of a Contracting State shall only refer to the nationals of each Contracting State. It is therefore unclear whether the provision can be invoked in the case of discriminatory valuation and debt deduction rules. To this end, I suggest the following wording (addition in brackets):

"[Estates of] nationals of a Contracting State, wherever they are domiciled, shall not be subjected in the other Contracting State to any taxation, or any requirement connected therewith, which is other or more burdensome than the taxation and connected requirements to which [estates of] nationals of that other State in the same circumstances are or may be subjected."

6.4 Administrative difficulties

As I mentioned in section 5.4, the OECD IHTMTC does not include provisions aimed at addressing the administrative difficulties of cross-border inheritances and donations that were presented in chapter 3 of this study. More specifically, the mutual agreement procedure of Article 11 of the OECD IHTMTC does not address the difficulties that the beneficiaries may encounter in the state of the objective nexus (section 3.1.4.2.1) or the state of the personal nexus (section 3.1.4.2.2). The same is true for the exchange of information framework of Article 12 of the OECD ITCMTC that refers to exchange of information between the competent authorities of each Contracting State for the application of the specific treaty.[80] As a result, this study does not cover the mutual agreement procedure and the exchange of information frameworks.

Nevertheless, I mentioned in section 5.4.2, that the nationality non-discrimination provision of the OECD IHTMTC and the treaties applies to both substantive and procedural tax provisions of the Contracting States. In other words, the OECD member countries agreed that the nationals of each Contracting State could invoke the non-discrimination provision of an inheritance and gift tax treaty also against discriminatory procedural tax provisions, the so-called "formalities connected with the taxation". Such formalities can be relevant to addressing some administrative difficulties presented in chapter 3 of this study in cases where they are discriminatory against cross-border inheritances and donations. Therefore, the suggested improvements to the wording of the nationality non-discrimination provision of the OECD IHTMTC that was presented in section 6.3.2 of this study are also relevant in situations where taxpayers may seek to invoke the provision against discriminatory procedural tax provisions of the Contracting States.

80 Please also note that exchange of information on taxes on inheritances and gifts is also available under the amended multilateral Convention on Mutual Administrative Assistance in Tax Matters (1988 as amended in 2010). See also Jan Szczepański, "Is the Polish Inheritance and Gift Tax Incompatible with the Free Movement of Capital in Relation to Third Countries?," *European Taxation* 56, no. 9 (2016): 389.

6.5 Conclusion of chapter 6

In this chapter, I suggested improvements to certain provisions of the OECD IHTMTC having regard to the objectives of the OECD IHTMTC and the elements of the proposed inheritance and gift tax.

Concerning the double or multiple taxation, I observed that the subsidiary taxing right provision seems to counterbalance the narrow scope of the model. However, the ten-year limitation period for the exercise of these rights and the underlying notion that these rights are exercised for anti-abuse reasons should not apply, in my view, to all the cases of paragraph 5 of the Commentary to Article 1. Furthermore, I suggested that the inclusion of the deceased's or donor's nationality as a subsidiary criterion for the establishment of fiscal domicile as well as the conclusion of a multilateral tax treaty seems to address the problem of multiple taxation of cross-border inheritances and donations. Moreover, I suggested the inclusion of a specific but optional tiebreaker rule and/or the update of the current one with elements that would be more in line with the manner in which certain states aim to establish the lifelong attachment of a person with their territory and the proposed inheritance and gift tax. Concerning the overlaps between the two OECD models, I addressed the issue of the parallel application of the two types of treaties to a single transfer or property by i) suggesting a transition from an exhaustive list of Article 2(3) of the OECD IHTMTC to an indicative list, and ii) underlining the need for a definition of the term "substantially similar" to an existing tax on estates and inheritances and on gifts. In addition, I suggested that the double taxation relief of Article 9B of the OECD IHTMTC (credit method) broadly apply and not be limited to taxes that are levied based on the same taxable event or paid by the same person. This is true for the connection between the estate and inheritance taxes as well as death/gift taxes with *mortis causa* and *inter vivos* income and capital gain taxes. Moreover, I discussed how the OECD IHTMTC could more effectively deal with conflicts of qualification that result in double taxation. Finally, yet importantly, I suggested the inclusion of an arbitration clause to the mutual agreement procedure of Article 11 of the OECD IHTMTC that is in line with the objective of the model.

Concerning the double or multiple non-taxation problem, I suggested that i) a transition from an exhaustive list of Article 2(3) of the OECD IHTMTC to an indicative list, and ii) the definition of the term "substantially similar" to an existing tax on estates and inheritances and on gifts can address cases of double non-taxation due to the application of two different types of treaties to a single transfer of property. Moreover, I discussed how the OECD IHTMTC could more effectively deal with conflicts of qualification that result in double non-taxation. Finally, I suggested updates to Article 16 of the OECD IHTMTC to address the double non-taxation issue arising from the termination of an inheritance and gift tax treaty before the minimum application period.

Concerning the discrimination problem, I suggested updated language for the OECD IHTMTC's nationality non-discrimination provision that arguably would broaden the scope of the provision. Finally, concerning the administrative difficulties of cross-border inheritances and donations, I argued that the proposed improvements to the wording of the scope of the nationality non-discrimination provision can arguably improve the application of the non-discrimination provision by offering treaty protection against discriminatory procedural tax provisions of the Contracting States.

A new version of the OECD IHTMTC is included in appendix I of this study. This version incorporates the suggested improvements to the provisions of the model having regard to the objectives of the model and the elements of the proposed inheritance and gift tax. Moreover, the suggested version of the OECD IHTMTC includes general updates to the provisions of the model that have been inspired by the 2017 version of the ICTMTC. These amendments were incorporated for the sake of completeness and therefore do not aim at improving a provision of the model or its Commentary having regard to the objectives of the model and the elements of the proposed inheritance and gift tax.

It goes without saying that the above suggestions provide separate solutions to the problems of the cross-border inheritances and donations. They only focus on a particular problem and do not interact with the solutions of another problem. Furthermore, I note that, although the model can be substantially improved if the above suggestions are followed, some aspects of the problems of the cross-border inheritances and donations may remain unaddressed. For example, the OECD IHTMTC's non-discrimination provision does not protect against indirectly discriminatory inheritance and gift tax legislation. In the same vein, the Articles of the model, which relate to the administration of the cross-border inheritances and donations, focus on the tax authorities' level and thus, do not consider the taxpayers' aspect. The example of Mr D's beneficiaries in section 3.1.4.2 shows, however, that many administrative difficulties arise at the taxpayers' level due to uncoordinated and unharmonized tax procedures. Admittedly, those problems cannot be resolved at the OECD level because the OECD is not competent to harmonise the OECD member countries' tax legislations.

For the above reasons, a holistic solution to the problems of the cross-border inheritances and donations is required. I observe that such a solution is conceivable only at the EU level. Before, however, discussing this solution in chapter 8, I will examine in the next chapter the progress made in the EU towards addressing each problem of cross-border inheritances and donations separately and, where appropriate, suggest separate solutions to them.