Chapter 4

Belgium

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4.0. Introduction

Belgium has always been involved in international organizations. In its recent history, it played an active role in the establishment of the European Union: even before the Treaty of Rome, it participated in the European Community of Coal and Steel. It is also a founding member of the OECD and NATO, as well as numerous other organizations.

Belgium also hosts the seat or headquarters of some of these organizations, as well as embassies and diplomatic missions of almost all countries of the world. This means that Belgium is bound by international conventions regulating the status of foreign states and international organizations on its territory – including the tax provisions contained in them: the latter provisions will be the topic of the present contribution.

Over a long period of time, Belgium has also concluded rail, maritime and aviation agreements. Most of these agreements contain tax provisions, the enforcement of which raises various issues, in particular concerning non-discrimination. However, these agreements will not be considered here.

4.1. Tax provisions of the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations (including bilateral agreements in this area)[1]

4.1.1. General rules under the Vienna Convention on Diplomatic Relations

Three guiding principles can be found in the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations (respectively, VCDR and VCCR; jointly, the Vienna Conventions): the receiving state grants (a) a tax exemption to the foreign state; (b) a tax exemption for the members of the mission – the extent of which depends upon the position of the agents within the mission; and (c) both under condition of reciprocity.

Under the VCDR, exemption of any national, regional or municipal dues and taxes is as a rule granted to the sending state and to the head of the mission; the exemption extends to taxes in respect of the premises of the mission.[2]

Diplomatic agents also benefit from a tax exemption, even if this exemption does not extend to, among other taxes, indirect taxes included in the prices of products, to inheritance taxes or to dues and taxes on "private" real estate.[3] These exemptions extend to the family of the diplomatic agent forming part of his/her household, on the condition that they are not nationals of the receiving state.[4] The exemptions also apply to administrative and technical staff of the mission (and their family) on the condition that they are not nationals of the receiving state and are not permanently resident in that state.[5] Members of the service staff, and private servants of the members of the missions, who are not nationals of the receiving state nor permanently resident of that state enjoy an exemption limited to taxes on their emoluments by reason of their employment.[6]

1. Most of the international agreements referred to in the following contribution are available on the web page of the Administration for the Tax Affairs at http://fiscus.fgov.be/interfafznl/fr/international/accords/siege.htm. In most cases, as only the Law approving the international agreement or convention is published in the Official Journal (*Moniteur Belge/Belgische Staatsblad*, (M.B.)), one must refer to the working documents of the Belgian parliament in order to find the full text of the convention itself.
2. *Vienna Convention on Diplomatic Relations* [unofficial translation] art. 23(1) [hereinafter VCDR].
3. Art. 34 VCDR.
4. Art. 37(1) VCDR.
5. Art. 37(2) VCDR.
6. Art. 37(3) and (4) VCDR.

Similar exemptions apply to consular agents and employees, and their family living in their household.[7]

As a rule, Belgium applies the Vienna Conventions in its diplomatic and consular relations. Belgium has concluded bilateral diplomatic or consular agreements with several states,[8] transposing – in most cases in more detail – the rules laid down by the Conventions. Some of these agreements are rather old (e.g. Italy, 1878;[9] Portugal, 1880[10]); nevertheless, they refer to the usual principles. In some others, the contracting state requests an extension of some privilege (e.g. to certain categories of employees), which Belgium may grant under the condition of reciprocity.[11]

4.1.1.1. Implementation in Belgium

As to Belgium, some fundamental principles must be kept in mind. First of all, in compliance with the constitutional principle of legality, the legislative work as regards taxation is the sole competence of the legislative assembly (at each of the political competent levels: federal; regions; communities; provinces and municipalities); furthermore, no tax exemption may be granted except by a law. Second, negotiation and conclusion of international treaties are the competence of the King (= federal government) or the regional and community governments (in their areas of competence). However, the entry into force of a treaty in the national legal order requires the approval of the (federal or regional) parliament.

As a consequence of the combination of these rules, most if not all the tax advantages granted at the international level, through treaties, are implemented into national law. Here, we shall only consider those national provisions relating to direct taxes. One should bear in mind, however, that similar

7. *Vienna Convention on Consular Relations* [unofficial translation] art. 49 [hereinafter VCCR].
8. Algeria, Azerbaijan, Bhutan, Bolivia, Bulgaria, ex-Czechoslovakia, Denmark, Federation of Russia, Germany, Greece, Hungary, Italy, Kyrgyzstan, Moldavia, Nicaragua, Peru, Poland, Portugal, Romania, United Kingdom, Slovenia, South Korea, Spain, Turkey, Ukraine, United States.
9. *Consular Agreement*, 22 July 1878, M.B. (22 Oct. 1878).
10. *Consular Agreement*, 10 Nov. 1880, M.B. (20 Apr. 1882).
11. See, e.g. the Agreement with the United States.

provisions also exist regarding indirect taxes, i.e. VAT,[12] registration duties[13] and customs and excises.

4.1.2. Foreign states and their Belgian income from Belgian sources

According to domestic law, under the condition of reciprocity, foreign states are expressly exempt from the non-resident income taxes on their real estate used for the fitting out of their diplomatic or consular missions, or of their cultural institutions which do not carry on any for-profit operations.[14] They are also exempt from the real estate tax.[15]

Similarly, also exempt under the condition of reciprocity are some categories of income which are earned in Belgium by foreign states or their political subdivisions, as well as by institutions, organs and other foreign non-profit legal persons, among which are occasional profits accrued in Belgium, income from real estate located in Belgium and capital gains on real estate located in Belgium.[16]

4.1.2.1. Tax treatment of diplomatic agents

The diplomatic agents and career consular agents from third countries who are accredited in Belgium as well as their family members living in their households are not subject to the Belgian individual income tax (*impôt des personnes physiques/inwoners inkomstenbelasting*). Under reciprocity, also exempt from the Belgian individual income taxes are other members of the foreign diplomatic missions and of foreign consular posts in Belgium, as well as their family members living in their households, in so far as they are not of the Belgian nationality or are not permanent residents in Belgium. The rules extend, under reciprocity, to the officials, agents, delegates or representatives of foreign states or of the political subdivisions or local authorities,

12. See art. 42(3)(1) and (2) of the VAT Code on the diplomatic and consular exemptions; circ. 78/001, 3 Jan. 1978, available at: http://ccff02.minfin.fgov.be/KMWeb/document.do?method=view&id=256461ff-7f32-44c5-a5a5-0e7670c4123e, accessed 30 Apr. 2012; Administrative Decision no. ET.111.417 of 1 Mar. 2007, available at: http://ccff02.minfin.fgov.be/KMWeb/document.do?method=view&id=184e4354-5fdc-47fb-a08d-4b473e5f2b61#findHighlighted (accessed 31 Oct. 2011).
13. Registration Duties Code, art. 161 [hereinafter RDC].
14. Income Tax Code, art. 231(1)(1) [hereinafter ITC].
15. Art. 253(1) ITC. Nowadays, the real estate tax, based on a lump-sum income generated by the estate, goes to the regions.
16. Art. 230(5) ITC.

as well as of foreign public-law institutions, in so far as those persons are not of the Belgian nationality or are not permanent Belgian residents and that they do not exercise their function in the framework of an industrial or commercial activity.[17]

The phrase "not being a permanent Belgian resident" means that the person must not already be a Belgian tax resident at the moment he/she takes up duties at the diplomatic or consular mission in Belgium.[18]

While not subject to the individual income tax on their worldwide income, all these persons, however, are as a rule subject to the Belgian non-resident individual income tax on their income from Belgian sources.[19]

By exception, however, Belgium exempts
– the remuneration received by foreign diplomatic agents and foreign career consular agents who are duly accredited in Belgium, as well as their family members living with them;[20] and
– under the condition of reciprocity, the remuneration paid by the diplomatic and consular missions accredited in Belgium, or the head of theses missions, to persons employed who are not Belgian nationals.[21]

A summary of the tax status for each category of diplomatic and consular agent accredited by foreign states in Belgium, as well as for agents and staff of these missions, is given at 230/19 of the Income Tax Code Commentary.[22]

Similarly, Belgian persons working abroad with Belgian diplomatic or consular missions are deemed to remain Belgian resident,[23] with the consequence that all the rules for determining the individual income tax burden do apply.[24]

17. Art. 4 ITC.
18. Administrative commentary to the ITC (Comm. ITC) 230/18, available at: www.fisconet.be (accessed 31 Oct. 2011).
19. Art. 227(1) ITC.
20. Art. 230(4) ITC.
21. Art. 231(1)(2) ITC.
22. www.fisconet.be (accessed 31 Oct. 2011).
23. Art. 2(1)(1) ITC, defining the term "Belgian inhabitants" (*habitants du Royaume/Belgische inwoners*), and art. 3 ITC.
24. Parliamentary Question no. 757, 7 May 1991, 48 Bull. Q&R. 167, available at: http://ccff02.minfin.fgov.be/KMWeb/document.do?method=view&id=7934251f-435e-4442-89e9-def5e6031507#findHighlighted (accessed 31 Oct. 2011).

4.1.3. Belgian case law

4.1.3.1. Exemption of foreign states

Foreign states are exempt from real estate taxes in Belgium with respect to their property used by their diplomatic or consular missions. In the Brussels-Capital Region, such exemption of the (regional) real estate tax does not extend to property owned by the other regions (Wallonia and Flanders). Therefore, foreign countries – as public authorities – are granted a more favourable treatment compared to the regions. This difference in treatment (in favour of foreign states and to the detriment of the other Belgian regions) was not held contrary to the constitutional principles of equality and non-discrimination by the Constitutional Court.[25]

Moreover, the Court of First Instance of Brussels decided that in the case of a change of ownership of a building, the exemption from the real estate tax is granted to the new owner which is a state benefiting from the diplomatic exemption, *pro rata temporis* in the year of acquisition.[26]

4.1.3.2. Exemption of foreign diplomatic/consular agents

A Belgian national working in the US Embassy in Belgium cannot benefit from the exemption of his/her remuneration under the VCDR. A "full" exemption is only granted to person qualifying as "diplomat"; other staff members are exempt only in so far as they are not nationals of the host country or are not residing in that country. This was confirmed by the Belgian Supreme Court, which also rejected, in its judgment of 11 March 2011, the argument of the taxpayer that, as the US Embassy is part of the US territory, he received a remuneration from abroad, which is tax exempt under the Belgium-US double tax convention (DTC); according to the Court, the fact that the Embassy is inviolable does not mean that this piece of land is outside the Belgian territory.[27] The judge of first instance in the case pointed out that, for the application of DTC, the meaning of "contracting state" is defined by reference to article 3 of the Belgium-US DTC and thus

25. Arbitration Court (now Constitutional Court) 28 Sept. 2005, no. 147/2005, available at: www.const-court.be.
26. Brussels Court of First Instance, 25 Apr. 2002, FJF 2002/221, available at: http://ccff02.minfin.fgov.be/KMWeb/document.do?method=view&id=1ab18dee-f30a-4255-a2a2-efc578f908b9#findHighlighted (accessed 31 Oct. 2011).
27. Belgian Supreme Court 11 Mar. 2011, *Larc. Cass.*, 2011, p. 159, available at: www.cass.be, confirming Court of Appeals of Antwerp, 28 Apr. 2009, available at: www.fiscalnet.be (accessed 31 Oct. 2011).

is limited to the national territory (including the continental shelf), thus not including the territory of embassies in foreign countries. The Court of First Instance raised the question of the place of activity as regards a chauffeur who would constantly travel from and to the Embassy, should the viewpoint of the taxpayer be accepted.[28]

As already mentioned, members of diplomatic missions, other than the diplomatic agents, are exempt in Belgium on the condition that they are not Belgian nationals and are not permanently residing in Belgium. This latter condition was added to the ITC in 1994.[29] A UK national was employed by the US embassy in Belgium and her remuneration was tax exempt in Belgium; however, following the change in the legislation in 1994, the tax authorities considered she was no longer entitled to the exemption as she was a Belgian resident before her work with the US embassy. According to the Brussels Court of First Instance, the change in the Belgian law aimed at better implementing article 37(2) of the VCDR; the conditions of nationality and residence had therefore to be seen not as cumulative but only alternative ones.[30]

A Japanese person worked in Belgium for a Japanese public-law organization. He claimed exemption from taxation in Belgium on the basis of article 19 of the Belgium-Japan DTC and on the basis of article 4 ITC granting tax exemption under reciprocity to the diplomatic agents and agents working for foreign public-law organizations in so far as they are not Belgian nationals and are not permanent Belgian residents. As regards this last provision, the Court of First Instance considered that the condition of reciprocity had not been fulfilled so that article 4 could not apply and it was not required to examine whether or not the taxpayer was employed with a public-law Japanese organization, in a non-commercial or industrial activity.[31]

4.1.4. The particular issue of the succession of states

Although not directly related to international tax privileges, we would like to mention recent Belgian case law that could be of significance for their applic-

28. Brussels Court of First Instance, 10 Mar. 2006, *Courr. Fisc.*, 2006/687, available at: www.fiscalnet.be (accessed 31 Oct. 2011).
29. Art. 3 of the Law of 6 July 1994 containing tax provisions, M.B., 16 July 1994.
30. Brussels Court of First Instance, 30 Nov. 2005, available at: www.fiscalnet.be (accessed 31 Oct. 2011).
31. Brussels Court of First Instance, 31 Aug. 2006, available at: www.fiscalnet.be (accessed 31 Oct. 2011).

ation. Numerous new states have declared their independence, especially in Europe. Those changes raise the question of the application of former treaties, including tax treaties and non-tax treaties with their tax clauses, to relations between a "new" state and the contracting states of the former state to which the new state belonged. As an example, in 1987, Belgium signed a DTC with the USSR (with entry into force in January 1991), a country which ceased to exist as such in December 1991.

Regarding the DTC with the USSR, the Belgian tax authorities stated that Belgium had concluded simplified agreements with most of the new states arising from the former USSR whereby it was agreed that bilateral treaties with the USSR would remain in force until their confirmation by the new state or the conclusion of new treaties.[32]

In March 1992, Belgium and Uzbekistan agreed that "old" treaties concluded with the USSR would remain applicable to the extent that those treaties are not contrary to their legislation and to their own interests. Strangely enough, this agreement was never officially published. A new DTC was signed in 1996. In August 1997, Uzbekistan decided that the 1991 DTC was not applicable as it was contrary to its legislation and own economic interest.

According to a Protocol to the DTC, signed in 1998, the contracting parties agreed to apply the tax convention with a retroactive effect as per 1 January 1997. In the Belgium parliament, it was said that this retroactive effect aimed at filing a legal *vacuum*.

In 1997, a Belgian company concluded a service agreement with a client in Uzbekistan, based on the information given by the Belgian tax authorities that the old USSR tax agreement remained applicable and thus that there should be no taxation in Uzbekistan. However, the Uzbek tax authorities withheld a 6% tax on the fees.

In application of the 1998 Protocol, the company was finally refunded this withholding tax. However, in the meantime, it had lost its client and quite a lot of money due to the devaluation of the foreign currency between the time of payment of the tax and its reimbursement. Thus, it decided to claim damages and interest against the Belgium state.

32. Circ. of 28 Oct. 1994, available at: http://ccff02.minfin.fgov.be/KMWeb/document.do?method=view&id=efa9f6ec-5c34-421e-b049-d792c901086b#findHighlighted (accessed 31 Oct. 2011).

The claim was ultimately dismissed by the Belgian Supreme Court.[33] The taxpayer's arguments were twofold: first, the 1992 agreement, as a framework, does not imply that Uzbekistan will apply the 1987 DTC; second, the Belgian authorities should have kept in mind a rule of international custom according to which international treaties are not automatically transferred to the new state in the case of succession of states, as well as the general principle of law on state sovereignty.

To deal with this question, the court adopted a "step-by-step" reasoning:

– First of all, the Court considered that there is no rule of international custom according to which, contrary to treaties creating objective situations, bilateral treaties are not automatically transferred to the new state in the case of succession of states.

– Then, according to the Court, it follows from the combination of article 3(1) of the tax convention with the former USSR, defining the territorial scope of the treaty, and the 1997 agreement on the establishment of diplomatic relations with Uzbekistan according to which the existing treaties with Belgium and the Belgian/Luxembourg Economic Union remained in force, that the 1987 DTC was applicable until a new treaty would be agreed.

– Thus, it can only be concluded from the Additional Protocol to the 1996 DTC that both governments had found a solution in order to solve the difficulties raised by Uzbekistan's 1997 Communication that the 1987 DTC was not applicable.

Furthermore, for the Court, there is no general principle of law according to which an international convention could not have effect in the internal sphere if it has no effect in the international legal order.

In conclusion, from a Belgian perspective, the Belgian tax authorities could validly consider that, following the 1992 agreement, the 1987 DTC had "survived" and had to be applied by Uzbekistan, despite the reservations in the agreement itself relating to the state's own interest.

33. Belgian Supreme Court, 10 Sept. 2010, *Courr. Fisc*. 2010/726; *TFR*, 2011, no. 394, decision 2011/N10, available at: www.cass.be.

4.2. Diplomatic privileges and immunities

4.2.1. International organizations and Belgian tax policies

As a rule, Belgium applies the following policy as regards persons employed by international organizations:

– they are exempt from Belgian income tax on the condition that an income tax is collected by the international organization;
– Belgium as a rule does not accept the exception of the tax residence (with the consequence that other Belgian-sourced income remains taxable in Belgium), unless a convention otherwise so provides, so that it can apply its exemption with progression to other income which is taxable in Belgium; and
– the exemption is limited to the income received for the services rendered by the employees; it does not extend to pensions.[34]

International organizations are usually exempt from income tax and indirect taxes (VAT, customs duties, etc.).

These rules are implemented in the ITC.

4.2.2. United Nations

The principles described at 4.2.1. above apply in the Convention on the Privileges and Immunities of the United Nations of 13 February 1946 (the UN Convention) and other related conventions. There does not seem to be any specific problems in the implementation of their international tax provisions. We have not come across any published case law raising particular issues as to these conventions and agreements.

As a Member of the UN, Belgium adheres to the UN Convention.[35] According to this Convention, several privileges and immunities are granted in order to ensure that both the Organization itself and its delegates can carry out their mission with complete independence.

The Organization as such is exempt from any direct taxes, except such fees for remuneration for public utilities services (section 7 of the UN Conven-

34. More information can be found on the website of the Belgian Ministry for Foreign Affairs: http://diplomatie.belgium.be/fr/Services/Protocole/Privileges_et_immunites/Organisations_internationales/Directives_generales (accessed 31 Oct. 2011).
35. Approved by a Belgian law, 23 Aug. 1948, M.B., 15-16-17 Nov. 1948.

tion). It is exempt from any customs duties and from any prohibitions and restrictions on the importation or exportation of any goods for its official use (section 7). As regards movable and immovable goods acquired for the official use of the Organization, Member States should provide, as far as possible, for the exemption or reimbursement of said paid taxes (section 8). Several exemptions are also granted to the persons working for the Organization, based on diplomatic immunities. The tax treatment depends upon the function of the persons within the Organization.[36]

In 1976, an Agreement was signed between the Organization and Belgium on the status of any Bureau within the Organization to be established on the Belgian territory.[37] The Head of the Office is granted the advantages applying to members of the diplomatic staff on diplomatic missions, unless he/she is a Belgian national; spouse and family are granted similar advantages as those of diplomatic staff's spouse and family.[38]

Under the UN agreements, several specialized agencies have been created, such as the United Nations Educational, Scientific and Cultural Organization (UNESCO), the International Monetary Fund (IMF), the International Labour Organization (ILO), the Food and Agriculture Organization (FAO), the World Health Organization (WHO), the International Bank for Reconstruction and Development (IBRD), the World Bank, the Universal Postal Union (UPU), the International Refugees Organization (IRO) and others. In order to harmonize the status of these specialized institutions, on 21 November 1947, the UN General Assembly agreed the Convention on the Privileges and Immunities of the Specialized Agencies (ratified by Belgium).[39] This Convention is in two parts: the first includes "standard clauses" applying as a rule to all the specialized agencies, while the second part consists in recommendations on derogating clauses accepted for each of the Specialized Agencies. Most of the "standard clauses" are similar to those contained in the UN Convention. One may refer to the derogating clauses applying to the IMF, specifically providing for exemption from any taxes on shares or bonds issued by the Fund (Annex V to the Convention on the Privileges

36. See secs. 18(b) and 19.
37. *Doc. Parl.*, Belgian Parliament, session 1977-1978, no. 117/1, available at: http://www3.dekamer.be/digidoc/DPS/K2022/K20224117/K20224117.pdf (accessed 31 Oct. 2011).
38. Art. 3 of the 1976 Agreement between the UN and Belgium on the status of any bureau established on the Belgian territory.
39. *Doc. Parl.*, Belgian Parliament, session 1950-1951, no. 158/1 available at: www3.dekamer.be/digidoc/DPS/k3142/k31410403/k31420403.PDF (accessed on 31 Oct. 2011).

and Immunities of the Specialized Institutions).[40] The Belgian Royal Decree implementing the ITC grants exemption from withholding taxes to international organizations or supranational public-law entities.[41]

As regards the Convention on the Privileges and Immunities of the Specialized Agencies, it is understood that pensions paid to Belgian residents who worked for these agencies are taxable in Belgium and do not benefit from the exemption granted by the Convention as this exemption only applies to remuneration and emoluments paid to persons in active employment.[42]

Belgium is also a member of the International Finance Corporation (*Société Financière Internationale*), which aims at completing the action of the IBRD[43] when this latter cannot intervene on basis of its statutory rules; thus the IFC can grant loans to private investors, without state guarantee, which is not allowed under the IBRD statutes. Article VI of the Agreement determining the status of the IFS reproduces article VI of the Status of the BIRD on Privileges and Immunities. Exemption is granted to the *Société* itself for any taxes, to its Directors and other agents employed by the *Société*, who are not nationals, with respect to their emoluments or remunerations. Some clauses restricting the competence of the contracting states are also included as regards bonds and other movable assets.[44]

4.3. Headquarters agreements between international organizations and their host states

Among the numerous international organizations which have their seat in Belgium, in addition to the European Union, it is worth mentioning the Benelux and the *Union Economique Belgo-Luxembourgeoise* (Economic Union with Luxembourg). The treaties establishing these unions contain specific tax clauses

40. Actually, the IMF was established by the Final Act of the Financial and Monetary Conference of the United Nations held in Bretton Woods from 1 to 22 July 1944. This specific exemption clause was already provided for in sec. 9(c) of the Final Act.
41. Art. 105(2)(c) of the Royal Decree implementing the Belgian Income Tax Code (RD/ITC), available at: www. fisconet.be; Art. 107 RD/ITC regarding bonds.
42. Parl. Question no. 198, 5 Jan. 2004, M.P. Viseur, *Bull. Q.&R.*, Belgian Parliament, session 2003-20047, no. 019, p. 2675, available at www.fiscalnet.be (accessed 31 Oct. 2011).
43. Originally, the IBRD aimed at financing reconstruction after WW II. Its current objective is to reduce poverty in the world.
44. *Parl. Doc.*, Belgian Parliament, session 1955-1956, no. 508/1.

4.3.1. The Economic Union between Luxembourg and Belgium

The Economic Union between Luxembourg and Belgium (BLEU), created in 1922, mainly consists in a union for customs, excises and assimilated taxes. The treaty establishing the BLEU also provides for equal treatment for nationals of one state on the territory of the other state as regards movement and sojourn, access and exercise of economic activities.[45] Article 23 provides for a non-discrimination clause in the field of taxation, whereby nationals of the other state are not to be treated less favourably.

The Union itself does not benefit from any tax privileges or immunities, and no such advantage is either granted to the persons working for the institutions of the Union (Council of Ministers, Administrative Committee, Customs Council).

The Union has concluded some international agreements mainly concerning the encouragement and protection of investments, among which the agreements signed in the 1990s with Latvia,[46] Estonia[47] and Lithuania.[48] These agreements do not provide for specific tax clauses; a specific provision, however, does state that special treatment and privileges granted by the agreement – which cannot be less favourable that those recognized under international law – do not extend to privileges granted by a contracting state to investors of third countries by virtue of its participation in or association with a free exchange zone, a customs union, a common market or any other form of regional economic organization.[49] Furthermore, the agreement does not extend to privileges granted by a contracting state by virtue of an agreement aiming at avoiding double taxation or any other tax agreement.[50]

45. Art. 17 et seq. of the Treaty establishing the BLEU.
46. *Doc. Parl.*, Belgian Senate, session 1997-1998, no. 1036/1.
47. *Doc. Parl.*, Belgian Senate, session 1997-1998, no. 1090/1.
48. *Doc. Parl.,* Belgian Senate, session 1998-1999, no. 1186/1.
49. See, e.g. Art. 3(4) of the Agreement between BLEU and Latvia, signed on 27 Mar. 1996.
50. See, e.g. Art. 3(5) of the Agreement between BLEU and Latvia.

4.3.2. The Benelux

4.3.2.1. Historical background

The Benelux was created in 1944 first as a customs union between the Netherlands, Luxembourg and Belgium. Its scope was rapidly expanded toward economic cooperation when the contracting states signed the Benelux Treaty in 1958. This treaty was initially concluded for a 50-year period. In 2008, the contracting parties signed a revised treaty on the "Benelux Union" whereby they focus more specifically on three key topics: internal and economic union; sustainable development and justice and internal affairs. The Benelux also has specific competencies in the field of intellectual property.

The functioning of the Benelux is insured by several institutions, among which a Secretary General and an ad hoc international court, the Benelux Court. Under the old treaty, there were no tax exemptions granted by the Treaty to the institutions or their members, except to the Secretary General who heads the Secretariat General and who is granted privileges and immunities similar to those granted to a head of diplomatic mission accredited in Belgium.[51] The members of the Secretariat General benefit from a specific status, including their remuneration, which is determined by the Ministry Council upon the proposal of the Secretary General.[52] The new 2008 treaty provides for a specific chapter on the legal personality, privileges and immunities.[53] The Union as such is an international legal person in order to be granted the usual privileges and immunities.[54] These privileges and immunities are determined in a specific protocol.[55] The Secretary General of the Union is granted the power to conclude seat agreements.[56] Under the protocol, the assets, goods and income of the Union, used for its purposes, are exempt from direct taxes; the exemption is limited to what is necessary for the Union to reach its objectives.[57] The Secretary General of the Union as well as the Deputy General Secretaries benefit from the privileges and immunities granted to a head of diplomatic mission and to agents of diplomatic missions, respectively, under the VCDR.[58] The protocol allows the

51. Art. 39 of the Benelux Union Treaty.
52. Art. 20(2) of the Benelux Union Treaty.
53. Part 4 – arts. 28 and 29 of the 2008 Benelux Union Treaty.
54. Art. 28 of the 2008 Benelux Union Treaty.
55. Art. 29(1) of the Benelux Union Treaty.
56. Art. 29(2) of the Benelux Union Treaty.
57. Art. 5 of the Protocol.
58. Art. 9 of the Protocol.

contracting states to exclude from these exemptions their own nationals and permanent residents.[59]

Both treaties recognize the freedom of movement for goods, services, persons and capital.[60] However, the detailed provisions regarding taxation and customs questions, free movement, among other ones, have been removed in the 2008 Treaty; indeed, the Benelux retains competence only in so far as its objectives are not achieved by application of the EU Treaties.[61] There were few cases from the Benelux Court of Justice applying the free movement principles in the tax field,[62] and it is now doubtful whether under the new Treaty new cases could be referred to the Benelux Court now that the detailed tax provisions have been abrogated.

An interesting case was decided by the Benelux Court on the taxes applicable to the remunerations of Benelux agents. As already mentioned, the status of the agents working for the Benelux Union Secretariat General is determined by the Secretary General. As a rule, their remuneration is determined by reference to the remuneration received by Belgian civil servants. In 1981, Belgium introduced a "solidarity contribution" (*cotisation de solidarité*) to be paid only by the civil servants, which the Secretary General decided was not to be required of the Benelux agents working for the Secretariat General. The revenue of that special contribution benefited a special fund within the Belgian social security. As the Benelux agents are not subject to Belgian social security, there is no reason why the contribution should be paid by them to that organ. According to the Benelux Court, such a contribution must be characterized as a "tax"; no provision under the Benelux treaty or any other legal instrument authorizes the collection of such a charge;[63] a differentiation must be made between a decrease of the remuneration which would also have been applied to the Benelux agents and a tax; in the case at hand, there was no decrease in the remuneration but rather a specific contribution. Later on, the Benelux decided to apply the contribution to its agents, the revenues of which would benefit to the Benelux budget.

59. Art. 12 of the Protocol.
60. Art. 2 of the Treaties, having, however, a different wording.
61. Art. 306 EC Treaty (now art. 350 TFEU).
62. See the Benelux Court 19 Mar. 2007, case no. A/2006/2/11, *Metabouw*, available on the Court's website.
63. Benelux Court, 24 Sept. 1984, case B 83/7, http://www.courbeneluxhof.be/fr/arresten.asp?RID=158 (accessed 31 Oct. 2011).

4.3.3. Other headquarters agreements

As host to some EU and other international institutions, Belgium also hosts the representative headquarters of some international organizations to the EU or other international institutions.

As an example, the West Africa Economic and Monetary Union (UEMOA) has its liaison permanent office to the European Union in Belgium. The seat agreement signed with Belgium in 2002[64] provides for classic privileges and immunities, amongst which, exemption from direct taxes[65] in favour of the Union. The Head officer and his/her deputy benefits from diplomatic privileges and immunities. The staff of the office is granted exemption from Belgian income tax on their emoluments or remuneration, with a progression provision as to the other taxable income from Belgian sources.[66]

A similar agreement was concluded in 1999[67] with the IBRD as regards its liaison office in Brussels. The Director of the IBRD office in Brussels is granted the status of a member of the diplomatic personnel (together with spouse and family).

Also in 1999 an agreement was signed with the Red Cross International Committee.[68] The RCIC is exempt from direct taxes in Belgium. The Head of the Office and his/her Deputy (together with spouse and family) benefit from privileges and immunities as members of the diplomatic personnel. However, the exemption does not extend to pensions and does not apply to Belgian nationals.[69]

64. http://www.senate.be/www/webdriver?MItabObj=pdf&MIcolObj=pdf&MInamObj=pdfid&MItypeObj=application/pdf&MIvalObj=50332909 (accessed 31 Oct. 2011).
65. Art. 7 of the Seat Agreement between Belgium and the West Africa Economic and Monetary Union.
66. Art. 17 of the Seat Agreement between Belgium and the West Africa Economic and Monetary Union.
67. http://www.senate.be/www/webdriver?MItabObj=pdf&MIcolObj=pdf&MInamObj=pdfid&MItypeObj=application/pdf&MIvalObj=33576802 (accessed 31 Oct. 2011).
68. http://www.senate.be/www/webdriver?MItabObj=pdf&MIcolObj=pdf&MInamObj=pdfid&MItypeObj=application/pdf&MIvalObj=33576744 (accessed 31 Oct. 2011).
69. Art. 16 of the Seat Agreement between Belgium and the International Committee of the Red Cross.

The Head of the World Health Organization in its Brussels' office[70] is also granted the diplomatic status, unless he/she is a Belgian national.[71] A similar regime also exists as to the Director of the Brussels liaison office of the Food and Agriculture Organization of the UN.[72]

Belgium also hosts the Agency for Cultural and Technical Cooperation which is recognized as a legal person and is granted exemption from any direct taxes unless as regards income from commercial or industrial activities;[73] the Director of the office in Brussels, together with his/her deputy, is granted diplomatic privileges and immunities; the staff is exempt from income taxes on their remuneration or emoluments in so far as these are subject to a tax for the account of the Agency; Belgium is allowed to apply a progression proviso.

Some other seat agreements exist.[74] One may conclude that they all are on the same pattern: diplomatic status in favour of the Head and his deputy and, regarding the staff, exemption from direct taxes on remuneration and emoluments with possibly a progression proviso and an exception as to Belgian nationals.

4.4. Tax provisions of status of forces agreements

We shall not consider the EU SOFA here, as there is no specific material relating to Belgium.

In contrast, some material is available on NATO, especially regarding its organization on the Belgian territory.

Under the Agreement signed on 20 September 1951 on the Status of NATO, the National Representatives and the International Staff, the legal personality

70. Seat Agreement signed in 1999, available at: http://www.senate.be/www/webdriver?MItabObj=pdf&MIcolObj=pdf&MInamObj=pdfid&MItypeObj=application/pdf&MIvalObj=33576566 (accessed 31 Oct. 2011).
71. Art. 1.
72. Agreement signed in 1997, available at: http://www.senate.be/www/webdriver?MItabObj=pdf&MIcolObj=pdf&MInamObj=pdfid&MItypeObj=application/pdf&MIvalObj=33575136 (accessed 31 Oct. 2011).
73. Agreement signed in 1995, arts. 1 and 6.
74. See the list published by the Belgian tax authorities, available at: http://fiscus.fgov.be/interfafznl/fr/international/accords/siege.htm (accessed 31 Oct. 2011).

of the Organization is recognized;[75] it is exempt from direct taxes, among others.[76]

Persons designated by a Member State as its principal permanent representatives to the Organization in the territory of another Member State and the members of its official staff resident in that territory enjoy the immunities and privileges as accorded to the diplomatic representatives and official staff of similar rank.[77] Other staff benefit from the "non-residents" clause.[78] Staffs who are not Belgian resident are also granted a tax privilege on their salaries and emoluments paid by the Organization.[79]

The Agreement between the Parties to the North Atlantic Treaty on the Status of their Forces, signed in London on 19 June 1951, contains several tax clauses:

(1) According to article X(1), the period of presence of a force or civilian component in the [Belgian] territory will not be considered periods of residence therein for the purposes of any form of taxation based on residence. This concerns individual income taxes as well as inheritance and gift taxes. This does not prevent the receiving state from applying its taxes to other kinds of income on income derived in its territory.

(2) Forces and civilian components in Belgium are exempt from taxation in Belgium on their salary and emoluments paid to them as such members by the sending state and on "any tangible movable property the presence of which in the receiving state is due solely to their temporary presence there."

(3) Articles XII and XIII more specifically focussed on import and export taxation.

(4) Article XII(1) reserves the right of the receiving state to submit exemptions or tax concessions to any condition deemed necessary to prevent abuse.

75. Art. 4 of the Agreement signed on 20 Sept. 1951 on the Status of the NATO.
76. Art. 9(a) of the Agreement signed on 20 Sept. 1951 on the Status of the NATO.
77. Art. 12 of the Agreement signed on 20 Sept. 1951 on the Status of the NATO.
78. Arts. 13(2) and 14 of the Agreement signed on 20 Sept. 1951 on the Status of the NATO.
79. Arts. 17 and 19 of the Agreement signed on 20 Sept. 1951 on the Status of the NATO.

In addition, the London Agreement of 19 June 1951 is completed by a Protocol on the Status of International Military Headquarters set up pursuant to the North Atlantic Treaty, signed in Paris on 28 August 1952, aiming mainly to extend to, and adapt for, these headquarters the rules laid down in the 1951 Agreement.[80] Specific tax clauses provide for exemption from taxation:

(a) in respect of salaries and emoluments if paid to force or civil components by the armed services to which they belong or by which they are employed (to the exclusion of nationals of the taxing state) (article VII(1)); the exemption extends to "dependant", meaning "the spouse of a member of a force or civilian component…, or a child of such member depending on him or her for support";[81]
(b) in favour of employees of the headquarters in respect of their salaries or emoluments paid by the Allied Headquarters (with some exceptions) (article VII(2)); and
(c) exemption from taxes on expenses relating to the establishment, construction, maintenance and operation of Allied Headquarters (article VIII(1)).

A reservation is made, however, for persons remaining members of their national forces.

It is worth noting the reservation made in 1953 to that Protocol by the governments of Belgium, Luxembourg and the Netherlands whereby nationals of these countries cannot receive on the territory of one of these countries a relief they would not benefit from if they were exercising their functions in their country, as regards taxes the unification of which is realized or is to be realized under the Benelux Conventions.[82]

A General Agreement was signed on 30 March 1953 between Belgium and Canada concerning the Transit through and Stationing in Belgium of Canadian forces.[83] Under this Agreement, the Belgium government agreed to place at the disposal of the Canadian forces the facilities and services which are necessary to carry out the mission of the Canadian Air Force. According to article 4 of this Agreement, the provisions of the Agreement between the

80. *Doc.Parl*. Belgian Senate, session 1952-1953, no. 483.
81. Art. III(1)(c) of the Protocol.
82. Draft Law on the approbation of the Protocol on the Status of International Military Headquarters set up pursuant to the North Atlantic Treaty signed at Paris on 28 Aug. 1952 and the Declaration between the governments of Belgium, Luxembourg and The Netherlands, signed in Brussels on 20 June 1953, Doc. Parl. Belgian Senate, session 1952-1953, no. 483, p. 17: http://www.senate.be/lexdocs/S0722/S07222106.pdf (accessed 31 Oct. 2011).
83. *Doc. Parl*., Belgian Senate, session 1952-1953, no. 289/1.

parties to the North Atlantic Treaty of 1951 on the status of their forces is to be applied, "whether or not that agreement has come into force, as regards the forces to which the present agreement relates, except and so far as these provisions may be modified by article 3". Article 3 provides for a most-favoured-nation clause as regards the fiscal regime applied to expenditures made in Belgium by the Canadian government for Canadian forces stationed in Belgium that "shall not be less favourable to Canada than that which may from time to time be in effect between Belgium and any other party to the North Atlantic Treaty for the forces of that State stationed in Belgium".

In 1968, some SHAPE forces were transferred from France to Belgium. Accordingly, an agreement was concluded between Belgium and the SHAPE:[84]

– the Supreme Allied Commander is treated as a head of diplomatic mission;[85] the status extends to spouse and family members, as usual;
– SHAPE itself is exempt from direct taxes, as well as from local taxes.[86]

As regards the International Military Staff (IMS), which is also located in Belgium, an agreement signed in 1968 with Belgium[87] provides for the non-application of articles 18 and 19 (direct tax exemption of remunerations and emoluments) to the members of the IMS[88] and for the assimilation of military and civil forces to the military and civil members under the 1951 London Agreement.[89] The IMS President is granted the status of a head of diplomatic

84. Draft Law on the approbation of the Agreement between Belgium and the Quartier General Supreme of the Allied Forces in Europe on the special conditions for their installation and functioning on the Belgian territory: http://www3.dekamer.be/digidoc/DPS/K2004/K20040215/K20040215.pdf (accessed 31 Oct. 2011).
85. Art. 8 of the Agreement between Belgium and the Quartier General Supreme of the Allied Forces in Europe on the special conditions for their installation and functioning on the Belgian territory.
86. Art. 9 of the Agreement between Belgium and the Quartier General Supreme of the Allied Forces in Europe on the special conditions for their installation and functioning on the Belgian territory.
87. Draft Law on the approbation of the Arrangement between the Kingdom of Belgium and the NATO concerning the status of the members of the international military staff of the Military Committed of the NATO set up on the Belgian territory: http://www3.dekamer.be/digidoc/DPS/K2007/K20073416/K20073416.pdf (accessed 31 Oct. 2011).
88. Art. 2(1) of the Arrangement between the Kingdom of Belgium and the NATO concerning the status of the members of the international military staff of the Military Committed of the NATO set up on the Belgian territory.
89. Art. 2(2)(1) of the Arrangement between the Kingdom of Belgium and the NATO concerning the status of the members of the international military staff of the Military Committed of the NATO set up on the Belgian territory.

mission with its privileges and immunities; however, tax privileges are not granted to a president who is a Belgian national.[90]

As regards the International School of the Allied Forces, the agreement concluded with Belgium on 19 March 1968[91] provides for the assimilation of the administrative staff with the SHAPE civil staff; the teaching staff is considered to be members of a national military representation according to article 1(5)(c) of the agreement between Belgium and SHAPE on the forces in Belgium. There is no exemption from direct taxes under this agreement.

4.4.1. Application in Belgium

Several cases have come before Belgian courts regarding the implementation of these tax exemptions.

For years, Belgian soldiers were quartered in Germany and they were considered to be Belgian residents according to the complementary Agreement of 3 August 1959. Their tax status raised several issues. First, the determination of their deductible professional expenses linked to their journeys between Belgium and Germany had to be clarified in administrative circulars.[92] As they remained Belgian residents, they were subject to the individual income tax in Belgium; for the computation of their professional expenses, as a rule, the tax authorities considered the real place of residence (in most cases Germany).

Second, the Brussels Court of Appeals decided that even if a Belgian soldier in Germany is treated as a rule as a Belgian resident, Belgium could not take

90. Arts. 3 and 4(1) of the Arrangement between the Kingdom of Belgium and the NATO concerning the status of the members of the international military staff of the Military Committed of the NATO set up on the Belgian territory.
91. Agreement between Belgium and the Quartier General Supreme of the Allied forces in Europe concerning the installation and functioning of the International School of the Quartier General, signed in Casteau on 19 March1968, available at: http://fiscus.fgov.be/interfafznl/fr/downloads/accords/Zetelakkoorden/Geallieerde_Strijdkrachten.pdf [translation] (accessed 31 Oct. 2011).
92. See on this point, the circulars of 30 March 1989, available at: http://ccff02.minfin.fgov.be/KMWeb/document.do?method=view&id=764eff02-ee91-481f-8f5e-59f193ff06ff#findHighlighted and 8 May 1990, available at: http://ccff02.minfin.fgov.be/KMWeb/document.do?method=view&id=60c97e1d-02ed-4d48-8e93-b9d938943b3a#findHighlighted . See also Court of Appeals of Liège, 4 Dec. 1991, available at: http://ccff02.minfin.fgov.be/KMWeb/document.do?method=view&id=e8685285-8fc2-4773-a2df-5aa976612335#findHighlighted, where the taxpayers could not prove a factual residence in another place than their house near the caserne in Germany (accessed 31 Oct. 2011).

into account, for the application of the progressive scale of income tax, the German-source salaries, taxable in Germany, received by a soldier's wife with German citizenship.[93]

The same court also decided, as regards the NATO Agreements, that a soldier who is seconded to NATO while remaining paid by the Belgian authorities and remaining a member of the Belgian Forces does not benefit from the tax privileges of NATO's forces. This was decided on the basis of the officer's actual situation.[94]

The Belgian courts had to rule on the case of alimony paid by an agent of NATO to his wife from whom he was separated. In 2010, the Brussels Court of Appeals[95] ruled that, despite their separate domiciles, the spouse was a "dependant" of her husband in the sense of article 18(b) of the 1951 Convention.

Regarding pensions for invalidity, Belgian courts are of the opinion that they are not covered by the immunities and therefore are taxable in Belgium. The case concerned a member of the General Headquarters who felt under an invalidity regime. The pension was paid by an insurance company whereby insurance had been contracted by NATO. According to the courts,[96] the exemption of the pension could not be granted because the pension was not paid by NATO, the pension did not qualify as remuneration or emolument, and the pension was paid to a person who was no longer a member of the NATO staff at the moment of the payment.

In Belgium, specific rules apply for the computation of the income tax to be paid by spouses (now extended to legal cohabitants). When one of the spouses has no professional income, a splitting of the professional income of the other spouse is available; thus, 30% of the income of the other spouse, with a maximum, is "granted" to the first spouse, in computing the income

93. Court of Appeals of Brussels, 4 Nov. 1994, available at: http://ccff02.minfin.fgov.be/KMWeb/document.do?method=view&id=fc348073-053d-4d99-a9df-28b44a4309be#findHighlighted (accessed 31 Oct. 2011).
94. Court of Appeals of Brussels, 8 June 2001, available at: http://ccff02.minfin.fgov.be/KMWeb/document.do?method=view&id=75838a63-8332-4aa3-a348-917ef69e7aa8#findHighlighted (accessed 31 Oct. 2011).
95. Brussels, 20 May 2010, available at: www.fiscalnet.be (accessed 31 Oct. 2011).
96. Court of first instance of Mons, 18 Oct. 2006, available at: http://ccff02.minfin.fgov.be/KMWeb/document.do?method=view&id=8b4270f3-66ee-40c6-9a99-4bc600f980f1#findHighlighted; Court of First Instance of Brussels, 19 Nov. 2004, available at: www.fiscalnet.be (accessed 31 Oct. 2011).

tax. When the professional income of a spouse is lower, then a part of the professional income of the other spouse is granted so as to reach the threshold.

Before the Belgian courts, taxpayers complained of not having benefited from the splitting, because one of the spouses was employed with NATO and thus exempt from taxation on his/her remuneration in Belgium. They argued that they were in a less favourable situation due to the fact that one of them was a NATO agent. Actually, the Belgian courts[97] denied the splitting because the remuneration of the NATO agent exceeded the maximum threshold applicable at that time (the equivalent of EUR 6,693); the fact that the spouse was a NATO agent was not decisive here.

4.5. Tax provisions of cultural exchange agreements

An agreement (Accord) was signed on 23 April 1955 between Belgium and Italy on reciprocal tax exemptions for cultural institutes.[98] Both countries agree to exempt from direct taxes, direct contributions of any kind for the profit of the state, its political and administrative subdivisions and any public-law legal persons, on the income of immovable assets which are the property of the other state government and which are allocated without any profit purpose to the fitting of cultural institutions as referred to in article 2 of the Cultural Convention between Belgium and Italy of 29 November 1948.

Other provisions concern the tax status of people working in EU educational institutions. As regards the European University Institute (in Florence), the president, secretary general, teaching staff and other members of the Institute are subject to an EU-specific tax and thus are exempt from national direct taxes on their remuneration; Member States, however, are allowed to apply a progression proviso to their other income. Pensions are not covered by the exemption.[99] Similarly, the Director and the teaching and administrative staff of the European School in Brussels enjoy exemption from direct taxes on their remuneration or emoluments.[100]

97. Supreme Court 26 Sept. 2002, FJF 2002/281; Court of Appeals of Gent, 17 June 2003, available at: http://ccff02.minfin.fgov.be/KMWeb/document.do?method=view&id=dd88f501-21c4-4150-b264-125af0c6877c#findHighlighted (accessed 31 Oct. 2011).
98. M.B. 28 Oct. 1967, p. 11.300.
99. See art. 12 of the Protocol on Privileges and Immunity, available at: http://www3.dekamer.be/digidoc/DPS/K2014/K20141115/K20141115.pdf (accessed 31 Oct. 2011).
100. Art. 9 of the Agreement between Belgium and the High Council of the European School, available at: http://www.senate.be/lexdocs/S0651/S06510066.pdf (accessed 31 Oct. 2011).

4.6. Tax provisions of development aid agreements and other agreements on technical and financial cooperation

Belgium is a signatory to the Agreement[101] establishing the Asian Development Bank, the purpose of which is to foster economic growth and cooperation in the region of Asia and the Far East. Article 56 of this Agreement provides for tax exemption of the Bank itself. Furthermore "no tax shall be levied on or in respect of salaries and emoluments paid by the Bank to Directors, alternates, officers or employees of the Bank, including experts performing missions for the Bank" except if a reservation is made by a state in order to tax its citizens or nationals. A clause prohibiting discriminatory taxation of obligations or securities issued by the Bank is included. A similar provision is included in the Agreement creating the African Development Bank.[102] As regards the African Fund for Development – which is administrated by the AD Bank and aims at contributing to the promotion of economic and social development through funding for projects and programmes, technical assistance for studies, etc. – it is provided with an exemption from direct taxes for the Fund itself and remunerations or emoluments paid to the President and the staff.[103] An exemption from any tax is granted to the International Association for Development; the remuneration and emoluments paid to the directors, deputies, staff who are not nationals of the host state are also tax exempt; the "non-discrimination clause" is also included as regards bonds and securities.[104] Article IX, section 9 of the Agreement on the Inter-American Development Bank follows a similar pattern.[105]

Another kind of cooperation exists as regards certain infrastructure work that requires cross-national cooperation. As an example, one can note the cooperation between France and Belgium relating to the Lys River,[106] which has its source in France and empties into the Scheldt. This river has an

101. http://www.senate.be/lexdocs/S0753/S07531448.pdf (accessed 31 Oct. 2011).
102. Art. 57 of the Agreement establishing the African Development Bank signed in Khartoem on 4 Aug. 1963 (as amended), available at: http://www.senate.be/lexdocs/S0613/S06130968.pdf (accessed 31 Oct. 2011).
103. Art. 49 of the Agreement establishing the African Development Fund signed in Abidjan on 29 Nov. 1972, available at: http://www3.dekamer.be/digidoc/DPS/K2014/K20141084/K20141084.pdf (accessed 31 Oct. 2011).
104. Art. VIII – sec. 9 of the Agreement for the International Association for Development, available at: http://www3.dekamer.be/digidoc/DPS/K2105/K21053584/K21053584.pdf (accessed 31 Oct. 2011).
105. http://www3.dekamer.be/digidoc/DPS/K2020/K20200610/K20200610.pdf (accessed 31 Oct. 2011).
106. *Parl. Doc.* of the Belgian Parliament, session 1982-1983, no. 447/1.

international status according to the Final Act of the Vienna Congress of 9 June 1815. Some work was necessary to clean up the river and to allow the navigation of more important tonnage ships on a 24 km-long section.

A Convention was concluded in 1982 relating to the organization of this infrastructure work and its cost sharing. Article 7 specifically deals with tax and customs questions. Hence, no tax is due on the temporary importation of equipment and spares originating in one country and which are in free circulation, on the condition that they are necessary for the construction or maintenance works of the infrastructure. Both tax and customs administrations must cooperate in the application of this tax exemption.

Furthermore, by derogation to the provisions of the 1964 DTC between France and Belgium:

– the part of the building site established by a resident entrepreneur of one of the contracting states which is situated on the territory of the other state will not be considered a permanent establishment in the sense of the aforementioned DTC; and
– salaries paid to the persons working on construction sites will be taxable only in the state where the beneficiary of which is resident in the sense of article 1 of the DTC.

4.7. Tax immunities in the Protocol on the Privileges and Immunities of the European Union

4.7.1. European institutions' privileges and immunities

According to case law of the European Court of Justice (ECJ), article 3 of the Protocol on the Privileges and Immunities of the European Union lays down two regimes for immunities, depending on whether the taxes are direct or indirect. While for direct taxes, the immunity is unconditional and general, for indirect taxes, the immunity is circumscribed and subject to several conditions.[107] Charges for public utility services are excluded from the scope of the immunity. According to Advocate-General Jacobs, in his Opinion in *AGF Belgium*, the crucial difference between a tax and a charge for a public utility service is that "a tax (is) a payment to the State out of which general public expenditure is intended to be financed". So that "the benefits that individual taxpayers receive as a result of such expenditure [is]

107. ECJ, 26 Oct. 2006, Case C-199/05, *European Community v. Belgium*, ECR I-10485, para. 31.

the price paid for a specific service. There is a direct link between the charge and the benefit received."[108]

4.7.1.1. The aims of the Protocol: Ensuring the neutrality of European institutions

Under article 3, in order to ensure the neutrality of European institutions towards Member States, the Member States where the institutions are located are not allowed to levy national taxes on their assets, revenues and other property. On this point, Advocate-General Stix-Hackl said, "(even if) the privileges and immunities afforded to the (Union) are not an end in themselves, they are intended to facilitate the tasks assigned to them by the treaties." This means ensuring that "the functioning and independence of [the European Union] are not jeopardized. This includes ensuring that Member States do not gain undue financial advantage by diverting funds that have been contributed to the community budget into their national treasuries."[109] Consequently, the provisions of the Protocol have to be interpreted accordingly. This is another example of a functional interpretation of European tax provisions.

4.7.1.2. Personal scope

Like many other international organizations, the European Union institutions enjoy tax immunity in Belgium, where most of them are physically located. The fact that the institutions themselves (and their civil servants) are not subject to the ordinary tax regime causes a loss of revenues not only to the Belgian federal state, but also to regions and municipalities, in particular the Region of Brussels-Capital. This region enjoys autonomous taxing powers, whose exercise gave rise to a very interesting decision of the ECJ.

In order to compensate this loss, the Region of Brussels-Capital, with an autonomous taxing power, had to be creative to get round the tax immunity and, thus, in the early 1990s, it created a regional tax[110] on occupiers of

108. Opinion of Advocate General Jacobs, 15 Feb. 1996, Case C-191/94, *AGF Belgium SA v. EEC* [1996], ECR I-1859, pt. 23.
109. Opinion of Advocate General Stix-Hackl, 27 Apr. 2006, Case C-199/05, *European Community v. Belgium* [2006], ECR I-10485.
110. On the autonomous taxing power of Belgian region, see E. Traversa & B. Vintras, *Tax Coordination between Regions in Belgium – Role of the Courts*, presented by Traversa for *European Science Foundation Exploratory Workshop*, Tax coordination between Regions and within Europe – Role of the Courts: Belgium Report, 9-11 Nov. 2010, Vienna.

buildings and owners of real property rights over certain buildings[111] with the – conscious and publicly admitted[112] – aim of circumventing the fiscal immunity of the EU institutions by taxing the owner of the buildings leased by the Commission, by taking into account the economic repercussions of the tax burden (as stipulated in a standard clause in commercial lease contracts).

Unfortunately, the interpretation given by the ECJ in *Commission v. Belgium* (Case C-437/04)[113] (which deals with the issue of switching the personal scope of the tax) seems to have weakened the very clear and protective wording of the Protocol. The ECJ held such tax mechanism to not be in conflict with EU law if it is imposed on the person or the institution that benefits from the immunity and not on its contractor, even if repercussions from the burden of the tax on the institution have been taken into account by the national legislator in designing the tax.[114] Furthermore, the Court noted that the functional aim of the immunity is not questioned since "the Commission has not adduced any conclusive evidence to show that the passing on of the tax to it could adversely affect the independence of the Communities or hinder their proper functioning". However, as Advocate-General Stix-Hackl said in her Opinion,[115] even if the tax autonomy of the Belgian region as an internal entity still can be freely exercised, this case brings up some questions about respect by the Member State of the obligation of loyal cooperation under article 4(3) of the TEU.

This decision is in line with the holdings of Belgian courts,[116] which concerned the same issue, but from another perspective. The Belgian Supreme Court (*Cour de Cassation*) came to the same conclusion in a case where the European Union, represented by the European Commission, was sued by its contractor because of its refusal to pay the amount of the regional tax as the rental contact expressly indicated.[117] The county Court of Ixelles (a borough belonging to the Brussels-Capital Region), in a judgment of 26 May 1998, held in favour of the company, which was renting buildings to the Union in

111. Art. 2 of the Order of 23 July 1992 of the Region of Brussels-Capital concerning a regional tax on occupiers of buildings and owners of real property rights over certain buildings, M.B., 1 Aug. 1992, p. 17334.
112. See the Project of the Order concerning the regional tax for 1992, *Doc. Conseil de la région Bruxelles-Capitale*, 1991-1992, A-183/2.
113. ECJ, 22 Mar. 2007, Case C-437/04, *Commission v. Belgium* [2007], ECR I-2513.
114. Id., pt. 58.
115. Opinion of Advocate General Stix-Hackl, 29 June 2006, Case C-437/04, *Commission v. Belgium* [2007], ECR I-2513, pt. 51.
116. For a comparison with the immunity of the regional institutions (Regional parliament) and the compatibility of the regional tax with the principle of equality, see Constitutional Court 28 Sept. 2005, no. 149/2005, M.B., 17 Nov. 2005.
117. Belgian Supreme Court, 1 Mar. 2002, *Pas.*, 2002, I, 618.

the Brussels-Capital Region. Since its appeal was dismissed by the Brussels Court of First Instance, the Commission appealed in *cassation* against that judgment, but its appeal was dismissed by a judgment of 1 March 2002. In those proceedings, the Supreme Court did not consider it necessary to refer to the ECJ for a preliminary ruling the question suggested by the Commission, which sought to ascertain the compatibility of the regional tax with article 3 of the Protocol.

4.7.1.3. Material scope

In several cases, the ECJ had to determine in practical terms which taxes are covered by article 3 of the Protocol. For instance, in *AGF* (Case C-191/94),[118] the Court, after recalling that the European institutions enjoy full tax immunity, which covers "all types of taxation, whether direct or indirect, and must therefore be regarded as extending to contributions or taxes of any type nature which constitute internal taxation under Community law",[119] concluded that the additional motor insurance premiums, intended by the Belgian state to contribute to the financing of public-interest institutions, fall within the scope of the immunity.

However, in *European Community v. Belgian State* (Case C-199/05),[120] the Court circumscribed this tax immunity, which does not cover "the collection of registration duties which must be paid following decisions of national courts and tribunals ordering payment of money or liquidation of securities (registration duties)." Indeed, the ECJ reaffirms the functional aim of the immunity by considering that even if "In any event,… it might be accepted that exemption from the registration duties in question in the main proceedings would confer a financial advantage on the Community, the Commission has not adduced any conclusive evidence to show that the payment of those duties may adversely affect the independence of the Community and hinder its proper working."

The tax immunity of the European Union concerns also indirect taxes like the VAT, on its implementation by Member States. Indeed, according to article 151 of the European Directive 2006/112/EC on the common system of value added tax, supplies of goods or services to the European Union institutions are assimilated to exports. This means that the suppliers do not charge for

118. ECJ, 28 Mar. 1996, Case C-191/94, *AGF Belgium SA v. EEC* [1996], ECR I-1859.
119. Id., para. 20.
120. ECJ, 26 Oct. 2006, Case C-199/05, *European Community v. Belgium* [2006], ECR I-10485.

VAT; however, they keep their right of deduction for these operations. This exemption with right of deduction has been also applied by Belgian courts.[121] Incidentally, the Council Directive 2009/162/EU of 22 December 2009[122] added a specific paragraph explicitly concerning the European Union institutions in article 151(1).

4.7.2. Tax privileges of the European Union's personnel

4.7.2.1. Personal scope

Only certain "officials and other servants of the Union" benefit from the exemption. According to article 15 of the Protocol, the European Parliament and the Council, after consulting the other institutions concerned, determine the categories of officials and other servants of the Union to whom the exemptions will apply. The Protocol even allows these exemptions to be granted "in whole or in part". These categories are listed in Reg. No 549/69 of the Council of 25 March 1969[123] and cover most of the persons working for the EU institutions, with the exception of local staff.

Furthermore, with respect to the non-application of reductions of the tax on income from immovable assets for officials of the European Union, the ECJ held in *Commission v. Belgium* (Case C-260/86)[124] that a measure which

121. See Brussels Court of Appeals, 21 Feb. 2007, *Journal de Droit Fiscal*, (2008), liv. 1-2, p. 42. According to the Court of Appeals, the supplies of services rendered by a day nursery to its partner the European Commission, and not to the parents of children (with whom the day nursery had no legal relationship), are exempt from VAT, by application of art. 42(3)(3) of the Belgian VAT Code (exemption of supplies and importations of goods and supplies of services to international organizations and their civil servants if a convention signed by Belgium provides for this exemption) and art. 3 of the Protocol of 8 Apr. 1965 on the Privileges and Immunities of the European Union. The Court added that this exemption does not prevent the company from deducting the VAT paid to its suppliers in accordance with art. 45(1)(2 of the Belgian VAT Code.
122. Council Directive 2009/162/EU of 22 December 2009 amending various provisions of Directive 2006/112/EC on the Common System of Value Added Tax, OJ, *L010 (15 Jan. 2010), pp. 0014-0018.*
123. Regulation (EAEC, ECSC, EEC) No 549/69 of the Council of 25 March 1969 determining the categories of officials and other servants of the European Communities to whom the provisions of Article 12, the second paragraph of Article 13 and Article 14 of the Protocol on the Privileges and Immunities of the Communities apply, *OJ L74 (27 Mar. 1969), pp. 1-2, last amended by* Council Regulation (EC) No 371/2009 of 27 November 2008 amending Regulation (EAEC, ECSC, EEC) No. 549/69 determining the categories of officials and other servants of the European Communities to whom the provisions of Article 12, the second paragraph of Article 13 and Article 14 of the Protocol on the Privileges and Immunities of the Communities apply, *OJ, L121 (15 May 2009), pp. 1-2.*
124. ECJ, 24 Feb. 1988, Case C-260/86, *Commission v. Belgium* [1988], ECR I-955.

removes several reductions in the tax on income from immovable assets for EU civil servants violated article 12 (ex-article 13) of the Protocol. According to the rule at stake, these reductions, linked to the number or to the condition of the persons who are dependent on the tenant, were not granted when the tenant or his wife "is exempt from personal income tax under international conventions".

Here, it seems interesting to note that the ECJ recognized the protection of the tax immunity, although the debtor of the tax was in fact the owner and not the tenant. Indeed, "nevertheless where the residence is let the financial burden of the tax is borne by the tenant of the property".[125] The repercussions were also taken into account by the Belgian legislator itself, indeed "Article 162(3) of the Belgian Income Tax Code provides that reductions in the tax may be deducted from the rent notwithstanding any agreement to the contrary."[126]

4.7.2.2. Material scope

The tax exemption applicable to persons working for the European institutions has a much smaller scope that the one applicable to the institutions themselves. It is indeed limited to "salaries, wages and emoluments paid by the Union". This seems coherent with the functional approach which lays at the basis of granting such privileges to the EU: the tax immunity of EU civil servants is not considered to be a personal privilege, but a mere extension of the tax immunity of the EU institutions. By inserting this clause in the Protocol, the European Union protects itself against the risk that some Member States manage to indirectly tax the revenues of EU institutions by taxing the beneficiaries of payments made by the Union. The hierarchy between these two immunities is confirmed by article 17 of the Protocol, which provides:

> Privileges, immunities and facilities shall be accorded to officials and other servants of the Union solely in the interests of the Union. Each institution of the Union shall be required to waive the immunity accorded to an official or other servant wherever that institution considers that the waiver of such *immunity is not* contrary to the interests of the Union. [emphasis added]

However, according to the ECJ in the early *Humblet* case, even if the privileges and immunities are accorded "solely in the interests of the Union", we have to keep in mind that they have been personally granted to the civil servants of the European Union. They may thus rely upon chapter V of the

125. Id., para. 11.
126. Id.

Protocol to directly claim their right to a tax immunity from a Member State and do not have to ask the European institution to initiate the proceedings in their own name.

The taxes covered by article 12(2) of the Protocol are not explicitly mentioned. They may be any national tax applicable on "salaries, wages and emoluments", which most of the time will be the personal income tax. However, Member States can levy taxes on civil servant incomes other than "salaries, wages and emoluments" paid by the European Union.[127]

The protocol also refers to other taxes than income taxes, such as death duties and wealth taxes, in the particular context of the establishment of a residence for tax purposes (also for purposes of DTCs). According to article 13 (ex-article 14), when a person transfers his/her actual residence from one Member State to another "solely by reason of the performance of their duties in the service of the Union", only the Member State of origin is considered the country of domicile for tax purposes. This fiction also applies to spouses[128] (provided that he or she is not "engaged in a gainful occupation") and children of the EU civil servant. This article, which does not grant a tax immunity, but avoids international double taxation, is therefore not applicable to persons who had transferred their residence before starting to work for the EU institutions or to persons who ceased their service (e.g. after their retirement).

If their residence for tax purposes remains the state where they had their residence at the moment of entering the service of the Union, these individuals cannot be entitled to the benefits of the tax treaty network of the host state (Belgium) whereas they can benefit of the treaties concluded by the home state.

Thus, this rule, which establishes the deemed residence for tax purposes in the state of original residence, seems to create problems of application of double taxation conventions signed by Belgium.

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127. ECJ, 25 May 1993, Case C-263/91, *Kristoffersen* [1993], ECR I-2755 (real property income tax).

128. This particular application was recently recalled by the ECJ in *Gistö*: "[T]he first paragraph of Article 14 … must be interpreted as meaning that the spouse of a person who, solely because that person enters the service of the European Union, establishes his residence in the territory of a Member State other than his Member State of domicile for tax purposes at the time when that person entered the service of the European Union is regarded as having maintained his domicile for tax purposes in the latter Member State if he is not separately engaged in a gainful occupation." (ECJ, 28 July 2011, Case C-270/10, *Lotta Gistö* [2011]).

First, the civil servant himself or his wife, also considered non-resident, may wish to take advantage of a treaty signed by Belgium, on the basis of the treaty non-discrimination rule (article 24 of the OECD Model) or based on *Saint Gobain* (Case C-307/97)[129] since they are in a similar situation to an individual who is Belgian resident for tax purposes.

Moreover, the question arises as to the enforceability of the Protocol, which certainly binds the EU Member States, with respect to third countries like the United States, which may have an interest in implementing their treaties with Belgium (and more specifically, the provisions for the exchange of information) in the absence or lack of efficiency of the tax agreement concluded with the state of residence for tax purposes.

Finally, according to article 155(2) of the ITC and its interpretation by the Belgian administration, income exempted by virtue of the Protocol on the Privileges and Immunities of the European Union could not be taken into account in determining the (progressive) tax rate applicable to the taxpayer's remaining income subject to Belgian income tax. This situation is a direct consequence of *Humblet*,[130] referred to above, where the ECJ precluded the tax administration of a Member State (in this case, the Belgian administration) from taking into account the emoluments of an ECSC (European Coal and Steel Community) civil servant in order to determine the rate applicable to the cumulated income of the civil servant and of his wife, which was subject to the Belgian personal taxation.

However, Member States can take into account the exempted income under the Protocol for determining the threshold for granting tax benefits, in order to respect non-discriminatory and objective conditions.[131]

4.8. Conclusion

The above analysis of the tax rules in non-tax agreements concluded by Belgium shows a great coherence in Belgian policy: usually, the organization itself is tax exempt from both direct and indirect taxes. The Head of the organization is assimilated to a Head of a diplomatic mission with the consequent immunities and privileges as provided for by the Vienna Conventions.

129. ECJ, 21 Sept. 1999, Case C-307/97, *Saint-Gobain v. Finanzamt Aachen-Innenstadt*, ECR I-6161.
130. ECJ, 16 Dec. 1960, Case C-6/60, *Humblet v. Belgium* [1960], ECR I-01125.
131. ECJ, 14 Oct. 1999, Case C-229/98, *Vanden Zwalmen et Massart* [1999], ECR I-7113.

As regards the staff of the organization, it benefits an exemption from income tax on its remunerations or emoluments in Belgium; in most cases, Belgium preserves its progression proviso to be applied to other income taxable in Belgium and denies the advantage of the exemption to Belgian nationals or Belgian residents. These principles are transposed in the Income Tax Code.

Furthermore, it is worth noting that international “patterns” occur which are used on a regular basis. This is the case with regard to seat agreements and financial agreements on the establishment of international banks or funds for development. The conventions under the aegis of the United Nations also show a great coherence in the tax principles applied.

Considering the high number of such conventions or agreements in relation to very little case law or even administrative comments, it seems that the implementation of such tax clauses does not raise important practical difficulties.

Most of these clauses are inspired by the Vienna Conventions, which already represent a model for the contracting parties. Further, one might consider that the “model” has materialized within the ITC; further international codification may not be required or even desirable considering the potential need or wish of the state to preserve the possibility to negotiate its international agreements.

However, even if Belgian case law does not show any specific difficulties as regards the implementation of such tax rules, we are of the opinion that the status of the spouse/cohabitant might be considered more carefully in the light of the most recent evolution in family structures. As an example, most of the agreements consider the “spouse” while the Belgian law extends to non-married legal “cohabitants”: should those cohabitants be assimilated to married persons despite the terms of the international agreement?