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The Impact of Bilateral Investment Treaties on Taxation

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nd E. Lechner eds., Lindeverlag 1999).

Chapter 4

Belgium

Edoardo Traversa and Isabelle Richelle[1]

General framework

European economy with a central position, Belgium heavily cross-border trade to maintain its growth. As a consequence, a dynamic tax and investment treaty policy, characterized by and by the extent of its treaty network. The general objectives international economic policy are the need to increase the attractive- the country for foreign investors by eliminating tax obstacles to entrepreneurship and to guarantee the competitiveness of Bel- investing abroad. However, because of the size and federal the country, and the constraints deriving from membership of Union – and, to a lesser extent, of other international organi- – Belgian treaty policy is characterized by pragmatism and tends international trends.

Belgium entered into international economic and tax agree- early. Since its independence in 1830, Belgium started nego- concluding treaties on friendship, commerce and navigation, included tax provisions, such as national treatment (NT) and -nation (MFN) clauses, but also reductions or exemptions duties and other taxes;[2] it also entered into tax treaties in the

[1] The authors would like to thank Dr. Alice Pirlot for her valuable help in the of this report.

[2] See, for example, the Treaty of Friendship, Commerce and Navigation of 19 No- between Mexico and Belgium, Articles II and III (this treaty was rati- then replaced by a treaty of 24 August 1854, never ratified by Mexico, by a treaty of 20 July 1861, which included similar tax provisions) or of Commerce and Customs of 6 December 1891 between Germany and Article 9, *Moniteur Belge* (Belgian Official Journal) of 31 January 1892. A list of treaties of commerce concluded by Belgium before 1854 containing a of the most relevant (tax) advantages provided is available in D. De Garcia *Recueil des Traités et conventions signés par le royaume de Belgique*, vol. (C. J. A. Greuse 1854), p. 714 et seq. *See also* I. De Troyer, *Repertorium België gesloten verdragen 1830-1940*, (1973); and *Repertorium van de gesloten verdragen 1941-1986*, (1988). On tax provisions in early inter-

area of inheritance and registration duties and, since the 1930s, in the field of income taxes.[3]

During the 20th century, Belgium developed a rather wide – and still growing – income tax treaty network. To date, the country has a treaty network covering over 100 countries (including tax information exchange agreements, TIEAs). In recent years, it has signed double taxation conventions with a dozen countries and is negotiating either new treaties or revisions with eight countries.[4]

Although these tax treaties differ, most of them clearly follow the same pattern. Belgium is indeed a founding member country of the OECD and an active member of the OECD Committee on Fiscal Affairs. Thus, as a rule, Belgium follows the OECD Model Tax Convention on Income and Capital (OECD Model), as well as its Commentary (and the policy behind it), with some relatively minor reservations.[5] In their efforts towards more transparency and efficiency, the tax authorities published a first Belgian tax convention model (Belgian Model)[6] in June 2007,[7] which was updated in June 2010. The Belgian Model is proposed to negotiation partners as a starting point for discussion.[8] As a rule, Belgium follows the most recent version of the OECD Model; however, it has made some observations or

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national agreements, *see* A. Gildemeister, *L'arbitrage des différents fiscaux en droit international des investissements* (LGDJ 2013), p. 11 et seq.
3. On the history of international treaties concluded by Belgium, *see* I. Richelle/E. Traversa (with J. Gombeer), *The history of double taxation conventions in Belgium*, in *Alabaster 1938-2013, 75th Anniversary Book of the International Fiscal Association – Belgian Branch* (C. Docclo ed., Anthemis 2013), pp. 53-71.
4. The list and texts of DTCs signed by Belgium, as well as the calendar of negotiations, is available at http://fiscus.fgov.be/interfafznl/fr/international/conventions/index.htm.
5. *See* in particular reservations concerning Articles 1, 10, 11, 12, 13(4), 16, 21 and 26: *see* the OECD Model Tax Convention on Income and on Capital 2014 (full version). *See* the Draft Law for assenting to the new Belgium-United States tax treaty and modifying Belgian tax law to accommodate some of the provisions of the treaty, *Doc. Parl. Sénat*, 2006-2007, No. 3-2344/1, sp. *Exposé des Motifs* – C. Technical provisions. On the differences between the DTCs concluded by Belgium and the OECD and UN Model, *see* I. Richelle/E. Traversa, *Belgian Report*, in *The Impact of the OECD and the UN Model Conventions on Bilateral Tax Treaties*, (M. Lang, P. Pistone, J. Schuch and C. Staringer eds., Cambridge University Press 2012), pp. 142-170.
6. The Belgian Model is available at www.fiscus.fgov.be.
7. On the former 2007 Belgian Draft Model Convention, *see* B. Peeters/A. Lecocq, *New Belgian Standard Convention for Tax-Treaty Negotiations*, 18 *Steuer und Wirtschaft International (SWI)* 5/2008, p. 197.
8. Preamble to Belgian Model 2010, available at http:/fiscus.fgov.be/interfafznl/fr/international/conventions/preambule.htm.

reservations on specific matters. All of these positions are integrated in the Belgian Model. In itself, the Model has no binding value[9].

The latest developments in Belgian tax treaty policy concern the fight against tax fraud and tax abuse and the exchange of information. Many protocols to existing treaties and TIEAs have been concluded in order to adapt to international standards (in particular, as regards bank secrecy).[10] Moreover, Belgium is participating in the discussions at the OECD level in the framework of the BEPS initiative and, at the EU level, in the fight against aggressive tax planning.[11] Those initiatives are very likely to have an impact on future tax treaties signed by Belgium, in particular as regards the introduction of general anti-avoidance provisions or limitation on benefits clauses.[12]

Since the 1960s, Belgium has also concluded quite a large number of bilateral investment treaties[13] (BITs), which are the continuation of earlier

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9. On the value of the (OECD) Model Convention for the interpretation of Belgian double taxation conventions, *see* L. De Broe, *L'usage du commentaire OCDE et autres instruments extrinsèques pour l'interprétation des conventions de double imposition belges*, in *Liber Amicorum J. Autenne* (Bruylant 2010), pp. 460-473.
10. On bank secrecy, *see* C. Docclo/S. Knaepen, *Exchange of Information and the Cross-Border Cooperation Between Tax Authorities*, in *Cahiers de Droit Fiscal International – Studies on International Fiscal Law, 98b* (Kluwer 2013), pp. 133-153.
11. OECD, *Addressing Base Erosion and Profit Shifting*, OECD Publishing (2013).
12. *See* Action 6 of the BEPS project and relevant deliverable, OECD (2014), *Preventing the Granting of Treaty Benefits in Inappropriate Circumstances*, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris. *See also* E. Traversa/M. Possoz, *L'action de l'OCDE en matière de lutte contre l'évasion fiscale internationale et d'échange de renseignements: développements récents*, R.G.C.F. 1 (2015), pp. 5-24; P. Malherbe, *Quelques réflexions sur l'abus fiscal international*, in *Dialogues de la Fiscalité 2015* (E. Traversa ed., Larcier 2015), pp. 223-250. Within the European Union, *see* the Directive amending the Parent-Subsidiary Directive: Council Directive (EU) 2015/121 of 27 January 2015 amending Directive 2011/96/EU on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States, OJ L 21/2015, pp. 1-3; *see also* the ATAD Directive 2016/1164/EU laying down rules against tax avoidance practices that directly affect the functioning of the internal market, OJ L 193/2016, pp. 1-14.
13. On the practice concerning Belgian BITs, *see* P. Smets, *La pratique belge en matière de protection bilatérale des investissements privés étrangers*, Revue Belge de Droit International (1973), pp. 28-49; W. Van De Voorde, *Belgian bilateral investment treaties as a means for promoting and protecting foreign investment*, Studia diplomatica 44/1991, pp. 87-112; F. Dubuisson, *Les accords internationaux relatifs à la protection des investissements et le droit d'auteur*, Revue Belge de Droit International (1998), 2, pp. 451; Groupe de Recherche sur les acteurs internationaux et leurs discours, *Étude exploratoire: Les accords bilatéraux sur l'investissement dans l'UEBL, Rapport intérimaire, Mai 2002* (Direction: Prof. C. Gobin), Université Libre de Bruxelles – Institut de Sociologie; J. Schokkaert, *La pratique conventionnelle européenne en matière de protection juridique des investissements privés, effectués à l'étranger*, Revue de droit international et de droit comparé (2003), pp. 327-388; J. Schokkaert, *La pratique*

treaties on friendship and commerce mentioned above (some of which are still in force).[14] As of 1 January 2016, Belgium signed 96 BITs, 68 of which are in force.[15]

The main reason some treaties are not yet in force is related to the complex ratification procedure that applies in Belgium. The three Belgian regions (and three Communities) of Belgium have great autonomy within – and even outside – Belgium's federal structure. They have been granted significant powers in numerous areas, including economic policy and taxation.[16] When it comes to international agreements, the exercise of treaty-making power is shared between the federal and regional levels, according to the internal division of legislative powers.[17] This peculiarity of the Belgian system implies that regions have the power to negotiate, sign and ratify international treaties –within the purview of their competences. When agreements concern areas which, according to the constitutional division of powers, fall within the competences of both the federal state and the regions, those "mixed treaties" are subject to a specific negotiation and ratification procedure, laid down in a 1994 Cooperation Agreement between the federal state and the regions and communities.[18] In the present constitutional framework, both BITs and DTCs have the status of mixed treaties.[19] As a consequence, regions in Belgium may block the entire rati-

conventionnelle en matière de protection juridique des investissements internationaux (Bruxelles, Bruylant 2006); IISD, *Belgium's Model Bilateral Investment Treaty: A Review* (2011), available at www.iisd.org; E. Stein/X. Nyssen, *Investment Treaty Arbitration Belgium, Global Arbitration Review* Sept. 2014, at http://globalarbitrationreview.com; S. Cuendet, *Droit des investissements internationaux, Perspectives croisées* (Bruxelles, Bruylant 2017) and especially the contribution by W. Ben Hamida, *Droit fiscal et droit international des investissements*, pp. 119-134.

14. For example, the 1839 treaty with Tunisia, the 1876 treaty with South Africa or the 1998 treaty with Venezuela.

15. The updated list is available at http://investmentpolicyhub.unctad.org/IIA/CountryBits/19#iiaInnerMenu. *See also* http://www.kluwerarbitration.com/CommonUI/BITs.aspx?country=Belgium.

16. For more details, *see* M. Bourgeois, *Constitutional (see: general) framework of the different types of income*, in *The Concept of Tax* (B. Peeters, W.B. Barker, P. Herrera, & K. van Raad eds., IBFD 2008), No. 1.4.3.

17. Art. 167 Constitution belge [Belgian Constitution]. *See also* Special Law on the international relations of Communities and Regions of 5 May 1993, *Moniteur Belge* of 8 May 1993.

18. *See* Accord de coopération du 8 mars 1994 entre l'Etat fédéral, les Communautés et les Régions relatif aux modalités de conclusion des traités mixtes, *M.B.* 17 Dec. 1996.

19. While BITs have the status of mixed treaties since 1994, DTCs are considered mixed treaties by the Belgian intergovernmental conference on foreign policy since 2011, *see Commentaire général aux conventions préventives de la double imposition en matière d'impôts sur les revenus et sur la fortune*, "Introduction", Nos. 14 and 15, at http://fiscus.fgov.be/interfafznl/fr/downloads/comConvIntro.pdf.

fication process. A spectacular example of this is the one mentioned above, when the Flemish and Walloon regions, under pressure from a campaign launched by trade unions, announced that they would not approve the BIT signed by the federal government with Colombia because of the weakened labour provisions contained in it.[20] Due to the important role played by the regions in the international investment agreement (IIA) ratification process and in external trade policy in general, the Belgium-Luxembourg Economic Union (BLEU) Model is currently under revision and will likely be amended to take into account the regions' policy objectives.

As an EU Member State, Belgium is bound by the association, partnership and other trade agreements concluded by the European Union,[21] as well as by the Energy Charter Treaty.[22]

The large number of BITs in force seems to indicate, despite some criticism by scholars[23] and by non-governmental organizations,[24] that Belgian authorities considered BITs to be useful instruments of international (economic) policy.

Furthermore, Belgium's rather active BIT policy may have been influenced by the outcome of the *Barcelona Traction* case decided by the International Court of Justice in 1970 and concerning a triangular investment.[25] In this case, concerning a Canadian company owned mostly by two Belgian holding companies that went bankrupt due to currency transfer restrictions imposed

20. Reply by Minister President of the Walloon Region, R. Demotte, to an oral question by MP L. Thibergien on 22 March 2010, Committee of General Affairs, Administrative Simplification, European Funds and International Relations of the Walloon Parliament, *Compte Rendu Integral*, 2009-2010, p. 20, at http://nautilus.parlement-wallon.be/Archives/2009_2010/CRIC/cric96.pdf (last access: 20 August 2015). On this issue, *see Seattle to Brussels Network, EU Investments Agreements in the Lisbon Treaty Era: A Reader* (2010), p. 41, at: http://corporateeurope.org/. *See also* the opinion of the Flemish Foreign Affairs Council of 15 June 2009 concerning the BITs with Colombia, Qatar and Oman (only available in Dutch), *supra* n. 18.

21. As of 2015, the European Union has concluded 65 agreements, of which 54 are in force. *See* the list on: http://investmentpolicyhub.unctad.org/IIA/CountryOtherIias/19#iiaInnerMenu.

22. The Energy Charter Treaty entered into force in 1998 and 49 states have ratified it.

23. W. Van De Voorde (1991), *supra* n. 12, p. 110. Contra J. Schokkaert (2006), *supra* n. 12, p. 32.

24. *See* IISD Report *supra* n. 12 and the advice of the Flemish Foreign Affairs Council – gathering together local trade unions – on the opportunity to rethink the system: BLEU-investeringsakkoorden met Colombia, Qatar en Oman, Advies 2009/17 of 15 June 2009, at: http://www.sariv.be/web/images/uploads/public/6466155903_20090629_BLEU_web.pdf.

25. International Court of Justice, 5 February 1970, *Belgium v. Spain – Barcelona Traction, Light and Power Company, Limited*, Judgments [1970] ICJ 1.

by the Spanish government, Belgium filed a claim against Spain. The Court ruled that Belgium had no standing because the company whose rights had allegedly been violated was not a Belgian national. The International Court of Justice pointed out the role that "treaty stipulations or special agreements directly concluded between the private investor and the State in which the investment is place" could have played in protecting the foreign investor.[26]

All the Belgian BITs except two (Russia and Indonesia)[27] have been concluded through the BLEU. The BLEU is an international organization established between Belgium and Luxembourg by the Convention of 25 July 1921 (originally as a Customs Union),[28] replaced in 2002, with a broader scope.[29] The BLEU concluded its first BIT in 1964 with Tunisia and the last was signed with Montenegro in 2010. According to article 31 of the 2002 BLEU Treaty, BITs are concluded by Belgium in the name of the BLEU, subject to the right of Luxembourg to sign jointly with Belgium. Moreover, no BIT may be concluded, modified or terminated without Luxembourg being heard.

Like the Belgian DTCs, the BITs concluded by the BLEU are based on a Model,[30] inspired by the 1976 OECD draft.[31] The BLEU Model reflects the European approach; the protection enjoyed by the investors is broadly defined, with few exceptions, and far-reaching obligations are imposed on the host state.[32] It is relatively short (13 articles). The most relevant provisions of the "traditional" BLEU Model are the following: definitions of investors, investments, returns and territory (article 1); a general clause on the promotion of investments (article 2), a protection of investment clause, referring to the concepts of "fair and equitable treatment" and "continuous

26. *Barcelona Traction* (1970), para. 90. A direct consequence of the *Barcelona Traction* case was the inclusion of a clause on triangular investments in the 1984 Belgium-China BIT (*see* J. Schokkaert 2003 *supra* n. 12, p. 345).
27. The BIT with Indonesia was concluded by Belgium alone; the BIT with Russia was signed jointly by Luxembourg and Belgium, but not in the name of the BLEU.
28. The Netherlands later joined the Customs Union in 1948 in the framework of the Benelux Economic Union (now Benelux Union, according to the new treaty signed on 17 June 2008). On the BLEU, *see* S. Panayotis, *L'union Belgo-Luxembourgeoise au lendemain de sa reconduction*, 37 Studia Diplomatica (1984), pp. 591-635; on the Benelux Union, *see* F. Dopagne, *Le nouveau Benelux* (Bruylant 2011).
29. Convention Instituting the Belgian-Luxembourg Economic Union of 18 December 2002, *Moniteur Belge* of 6 Jan. 2005.
30. Belgium-Luxembourg Model BIT (older version not including social and environmental clauses) is available at: http://investmentpolicyhub.unctad.org/Download/TreatyFile/2831.
31. J. Schokkaert 2006, *supra* n. 12, p. 34.
32. IISD, *Belgium's Model Bilateral Investment Treaty: A Review* 2011, *supra* n. 12, p. 5.

protection and security"[33] (article 3), a national treatment and MFN clause (article 4), protection against expropriation (article 5), the free transfer of all payments relating to an investment (article 6), a subrogation clause (article 7), a provision allowing investors to avail themselves of the most favourable applicable provisions whether contained in international or domestic law (article 8), an umbrella clause (article 9) and a clause on the settlement of disputes before the competent jurisdiction of the state where the investment was made, or through international arbitration – at the investors' choice (article 10). Normally, investment treaties do not explicitly state whether their scope extends to tax matters. On the other hand, some treaties may explicitly exclude tax measures from their application.[34]

Since 2002, the BLEU Model also contains social and environmental clauses (new articles 5 and 6). According to these clauses, each contracting party "shall strive to ensure" that its legislation provides for internationally agreed levels of environmental and standards of labour protection (with reference to International Labor Organization principles) and "that it does not waive or otherwise derogate from, or offer to waive or otherwise derogate from [environment or labour] legislation as an encouragement for the establishment, maintenance or expansion in its territory of an investment".

These more recent provisions – apparently inspired by the 1994 NAFTA Treaty – have been included in some BITs, such as with Madagascar (2005), Korea (2006, replacing the 1976 BIT), the Democratic Republic of the Congo (2005, replacing the 1977 BIT) and Montenegro (2010). However, most of the Belgian BITs were concluded before 2002 and the inclusion of the new provisions is not automatic, but depends on the acceptance of such clauses by the partner country. Moreover, as was the case in the treaty signed with Colombia in 2009, their wording can be renegotiated, with the effect that their efficiency – already questionable due to the rather non-committal, almost soft law-like, wording used[35]– is lessened. For this reason, that very treaty was rejected by two of the three Belgian regions.

Democratic control of IIAs and of double taxation conventions (DTCs) is becoming a major issue, because there is more awareness among the European and Belgian public that these instruments are not purely technical (neutral) tools of economic policy but reflect specific policy choices, which may conflict with other policies, in particular at the social, environmental

33. Some BITs use the term "full protection" or "full legal protection".
34. A. Gildemeister, *Investment Law and Taxation* in *International Investment Law* p. 1682 (M. Bungenberg, J. Griebel, S. Hobe & A. Reinisch eds., Nomos/Hart 2015).
35. For a critical assessment, *see* J. Schokkaert 2006, *supra* n. 12, p. 102.

and human rights level.[36] Some discussions within the Belgian federal parliament have taken place on these issues. For example, in the discussion over the finalization of an investment agreement with China held by the Belgian Senate in 2006, several concerns over the low standards of protection of the environment and workers in that country were expressed.[37]

4.2. Relation to other tax and non-tax treaties

There seems to be a certain level of coordination in the internal procedures concerning tax and investment international policies. The conclusion of such agreements is supervised by the same department of Economic Agreements of the Federal Ministry of Foreign Affairs and a special coordination unit on foreign investment was set up in 1995 with representatives of the various federal and regional authorities concerned.[38] However, international developments are making this coordination more and more difficult to achieve at the domestic level. BITs are actually negotiated by the Ministry of Finance and tend to follow the OECD practice, while the competences in the area of investment policy – already largely split between the federal and the regional governments domestically – have been transferred to the European Union since the Lisbon Treaty.

Generally, with regard to conflicts between BIT provisions and other provisions in national or international law, the BLEU Model, in its article 10 on Applicable Regulations, provides as follows:

> If an issue relating to investments is covered both by this Agreement and by the national legislation of one Contracting Party or by obligations under international law, existing or to be subscribed to by that Party in the future, the

36. *See*, for example, the newspaper article of M. Cermak, "L'arbitrage investisseur-Etat, un reliquage du siècle passé" at http://www.cncd.be/L-arbitrage-investisseur-Etat-un (last accessed: 2 Sept. 2015) or P. Defraigne, "Affrainchir l'Europe du TTIP et du dollar", *Madariaga Paper* vol. 8 No. 1, 2015.
37. In the end, the agreement was approved, *see* document 3-1751 2005/2006 at: http://www.senate.be/www/?MIval=/index_senate&MENUID=22101&LANG=fr (last accessed: 3 Sept. 2015). A similar discussion occurred concerning the approval of an agreement with Oman: see document DOC 54 1647/002 of 25 Feb. 2016, available at http://www.lachambre.be/FLWB/pdf/54/1647/54K1647002.pdf (last accessed: 20 Mar. 2017). *See also* the proposal for a resolution on promotion of environment protection and social clauses in investment agreements of 27 Mar. 2014, Belgian House of Representatives, Doc 53 2513, 2012-2013 at https://www.lachambre.be/kvvcr/showpage.cfm?section=flwb&language=fr&cfm=/site/wwwcfm/flwb/flwbn.cfm?dossierID=2513&legislat=53&inst=K. This proposition has been rejected by the Chamber.
38. Belgian Ministry of Foreign Affairs, at: http://diplomatie.belgium.be/fr/politique/diplomatie_economique/accords_economiques.

investors of the other Contracting Party shall be entitled to avail themselves of the provisions that are the most favourable to them.[39]

Therefore, in the case of conflict between a BIT and national legislation, the investor has the choice, under article 10 of the BIT Model, to apply the rule he considers the most favourable to him. In some BITs, this rule of preference appears with another wording (e.g. Saudi Arabia and Yemen); in the BIT with Kuwait, the most favourable rule must apply but the clause does not refer to the choice of the investor. This raises the question of who would have to appreciate and decide which rule is the most favourable. As the rule is in favour of the investor, it would be defensible that he should make the choice.

More specifically, with regard to the relationship between Belgian BITs and non-tax treaties, the potential conflict with EU law is worth mentioning. Indeed, the European Union has exclusive competence in the area of investment agreements. Pursuant to EU Regulation 1219/2012,[40] Member States have to report all BITs they have signed with third countries to the European Union and whether they want "to maintain in force or permit to enter into force" those agreements. Every year, an updated list of the BITs in force is published pursuant to article 4 of the Regulation.[41] Interestingly enough, even if it has not reported any intra-EU BITs to the Commission, Belgium was one of the countries (together with the Netherlands, Germany, the United Kingdom and other Member States) that opposed a 2006 Commission proposal to terminate all intra-EU BITs, which was based on the assumption that they were incompatible with the single market and that they were discriminatory under EU law.[42] According to the EU Commission, these intra-EU BITs are not compatible with the EU single market since they "cover investment from the respective BIT partner country and not from all EU MS and provide for parallel jurisprudence through arbitration procedures", thus conflicting with the jurisdiction monopoly of the CJEU.[43]

39. *See* for example the BITs with Albania, Armenia, Benin, Burkina Faso, China, Madagascar, Peru and Sudan.
40. OJ L 351, 20.21.2012, pp. 40 – 45.
41. The most recent one is the May 2017 list of bilateral investment agreements referred to in art. 4(1) of Regulation (EU) No 1219/2012 of the European Parliament and of the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries, OJ C 147, 11.05.2017, pp. 1-105.
42. R. Pardo, "ISDS and TTIP – A miracle cure for a systemic challenge?", *European Policy Centre, Policy Brief* of 14 July 2014, p. 2.
43. http://ec.europa.eu/internal_market/capital/analysis/monitoring_activities_and_analysis/index_en.htm.

It is worth noting that, during a transitional period, EU Regulation 1219/2012 authorizes the Member States to "enter into negotiations with a third county to amend an existing or to conclude a new" BIT (article 8), subject to specific conditions – mainly a general "supervision" right by the Commission. Thus, Belgium might amend its BITs in order to include or increase standards in social and environmental areas. Belgium is also working on a new BIT Model.[44]

Finally, as far as the relationship between Belgian BITs and DTCs is concerned, most BITs – following the 2007 BLEU Model – only contain a direct reference to taxation in relation to the application of the MFN principles, excluding the application of these principles to tax matters (*infra*).[45] In other words, BITs do not contain an explicit provision preserving the rights and obligations under a tax convention.[46] The BIT with Bangladesh expressly rejects tax matters from the scope of investment disputes.[47] The same is also true of the BIT with the Republic of Colombia, though it is not yet in force, which broadly excludes "tax matters" from the scope of the BIT.[48]

4.3. Coverage of taxes and carve-out clause

The BLEU Model does not – as such – exclude taxation from its scope. Therefore, investments and investors are also protected through the BIT as regards taxation. However, as already mentioned, BITs, as a general rule, exclude taxation from the national treatment (NT) and MFN clauses.

A violation of the BIT provisions might thus result from the tax treatment applied to the investor by the host state. Protection under the BIT can thus

44. Oral question by MP Olga Zrihen to the Vice-First Minister and Minister of Foreign Affairs, of External Commerce and European Affairs, on "the negotiation of new bilateral agreements on the protection of investments" (no. 5-1059), Belgian Senate, 20 June 2013, *Annales* 5-108, at http://www.senate.be/www/webdriver?MIval=index_senate&M=1&LANG=fr . Some parliamentary members have suggested changes, notably as regards MFN and arbitration clauses.
45. *See* art. 4, para. 4 BLEU Model. *See also*, for example, art. 3, para. 6 of the BIT with Albania; art. 2 of the BIT with the Russian Federation; and art. 3, para. 3, b) of the BIT with the People's Republic of China.
46. As is the case in the 2012 US BIT Model, or the German BIT Model, for example.
47. Art. 6, para. 1 of the BIT with Bangladesh (1981): "Except matters relating to tax disputes, any investment dispute shall be notified by the investor of one Contracting Party, to the other Contracting Party, by a written notification, accompanied by a sufficiently detailed claim".
48. Art. 2 of the BIT with the Republic of Colombia (2009).

be requested. This was the claim of the investor in the *Goetz* case,[49] relating to the 1989 BLEU BIT with Burundi. In that case, the Burundi administration withdrew the investor's licence to operate in an economic free zone as a consequence of changes in the local regulations. The licence provided entitlement to tax and import duty rebates.[50] The Claimant requested, among other items, the refund of taxes he considered to be undue. The claim relied on a different legal basis, among which article 4 of the BIT between Belgium and Burundi, which concerns "deprivation and limitation of ownership".[51] Although the tribunal considered that, as such, there is no right to the maintaining of a regulation and the regulatory authority can at any moment modify or repeal a former regulatory provision,[52] regulatory modification should not violate the BIT's clause on "deprivation and limitation of ownership", without providing adequate and effective compensation to investors.[53]

4.4. Fair and equitable treatment and transparency

The fair and equitable treatment (FET) standard is a minimum standard required by international law and general principles of international law the content of which is often discussed by government officials, arbitrators and scholars.[54] There is no Belgian case law on the possible relations between the FET clause and tax provisions.

The FET appears to be the minimum protection to be granted to the investor in the host state in order to avoid arbitrariness. As a rule, in Belgium, foreign investors are granted protection under the internal legal system, if applicable, in a way that should protect against such arbitrariness.[55]

49. *Antoine Goetz & consorts v. République du Burundi*, CIRDI ARB/95/3 of 10 Feb. 1999 (available at http://www.italaw.com/sites/default/files/case-documents/ita0380.pdf).
50. Similar facts seems to be at stake in the recent *Eskosol v. Italy* case (ICSID No. ARB/15/50), which concerns a claim related to the removal of tariff incentives for solar panels. *See also Blusun v. Italy* (ICSID pending Case No. ARB/14/3).
51. *Goetz* case at para. 124.
52. Id., para. 112.
53. Id., para. 133.
54. *See* "Fair and Equitable Treatment Standard in International Investment Law", *OECD Working Papers on International Investment 2004/03*, available at http://www.oecd.org/daf/inv/investment-policy/WP-2004_3.pdf.
55. *See* art. 172 of the Belgian Constitution according to which "no privileges may be established in tax matters". *See also* art. 10 & 11 of the Belgian Constitution (the general non-discrimination provisions). Cass., 21 Dec. 1982, Pas. 1983, I, no. 243, p. 496; Cass., 26 Jan. 1989, Pas., 1989, I, no. 312, p. 565.

As regards taxation, it is worth noting that income tax imposed on non-resident taxpayers is very similar to that on residents, the taxation being limited to Belgian source income. Furthermore, the Belgian legal system offers a wide range of protection to foreigners.[56] Therefore, the FET clause in BITs will probably be useful only in situations where some specific anomalies occur. The FET clause could be invoked before an arbitral tribunal to contest abnormal treatment. We are not aware of any such case law regarding Belgium.

The FET standard is concerned with the action or inaction of all components of the host state.[57] Unfair treatment could be claimed as regards administrative audit procedures. In any case, the taxpayer has the right to go to court on the basis of national principles of good administration. The FET could then be breached in the case of denial of justice and a claim under the BIT's procedures and rules might appear more satisfactory. It could also be invoked in the case of use of power of the (tax) authorities for improper purposes, in the case of grievances about the quality of the administrative decision-making process, etc.

Belgium offers the possibility, for any operation conducted in Belgium, to request an advance ruling from the tax authorities on the tax consequences of the planned operation. This ruling, if granted, is binding for the tax authorities insofar as the operation conducted corresponds to the one that has been submitted to the Rulings Committee. Thus, it could be said that the FET standard should not apply in cases where the taxpayer complains concerning the tax regime applied to the operation, as he could have requested such an advance ruling.

As regards legislative action by the host state, the FET could protect investors against regulatory changes with retroactive effect.[58] In Belgium,

56. Id. *See also* art. 191 of the Belgian Constitution and the various conventions recognizing the same rights for domestic and foreign enterprises since the second half of the 19th century (E.-J. Navez, *Le transfert transfrontalier du siège social des sociétés à l'épreuve du principe de territorialité au sein de l'Union européenne: étude croisée de droit commercial, de droit international privé et de droit fiscal*, Doctoral thesis, UCLouvain, 2015, pp. 291-292). *See also* E. Traversa/D. Garabedian, *Note – Bases minimales d'imposition pour les non-résidents et interdiction des discrimination et entraves dans la jouissance des libertés de circulation garanties par l'ordre juridique de l'Union européenne* 3 Revue critique de jurisprudence belge (2008), pp. 306-328.

57. N. Angelet, "Fair and Equitable Treatment", in *The Max Planck Encyclopedia of Public International Law*, (Oxford University Press), Vol. III, pp. 1094-1103, 2011, no. 15.

58. Id., no. 28.

retroactivity in tax law is, as a rule, prohibited. However, in exceptional situations, retroactivity could be accepted. Indeed, the Constitutional Court considers that retroactivity is only justified for the realization of objectives of general interest.[59] For example, in tax matters, the Court has considered that a law validating local taxes retroactively was justified in light of its role in avoiding difficult financial situations for local entities and discrimination between taxpayers. According to the Court, the retroactive law was based on "exceptional circumstances" and "pursued an objective of public order".[60] Taking into account the possibility that a retroactive law is found to be compatible with Belgian constitutional principles, the FET could then offer more protection to the foreign investors than Belgian law. It would then be the responsibility of the tribunal to decide whether the justification for retroactivity is acceptable under the FET clause.

4.5. National treatment and most-favoured-nation clause

As mentioned above, the 2007 BLEU Model does not explicitly cover or exclude taxes except in its MFN clause.[61] In contrast to the 2002 BLEU Model, the 2007 BLEU Model does not contain any reference to taxes in the NT clause.[62] Neither in the 2002 nor in the 2007 Model is reference made to taxes in the Promotion and Protection of Investments clause.[63]

59. Constitutional Court, 26 Nov. 2009, case 126/2009, http://www.const-court.be/public/f/2009/2009-186f.pdf .

60. Id., points 9.2.3 and 9.4.

61. *See* art. 4.3: "This treatment shall not extend to the privileges granted by one Contracting Party to investors of a third State by virtue of its participation or association in a free trade area, customs union, common market or any other form of regional economic organization". Art. 4.4 of the Model provides that "the treatment granted by this article shall not be extended to the privileges granted by one Contracting State to investors of a third State as a consequence of an agreement to avoid double taxation or other international agreements concerning taxation".

62. In the 2002 Model, art. 4 concerned both NT and MFN principles. Para. 4 of this article stated: "The provisions of this article do not apply to tax matters".

63. The BLEU Model clause on Promotion and Protection of Investments ("PPI" – art. 2) reads as follows:

1. Each Contracting Party shall promote investments in its territory by investors of the other Contracting Party and shall admit such investments in accordance with its legislation; 2. Investments made by investors of one Contracting Party in the territory of the other Contracting Party shall at all times be accorded fair and equitable treatment and full protection and security; 3. Except for measures required to maintain public order, neither Contracting Party shall in its territory impair, either in law or in practice, by arbitrary or discriminatory measures the management, maintenance, sale, operation, use, possession, expansion, liquidation or other disposal of investments of investors of the other Contracting Party.

In the BLEU Model, the exclusion of custom unions, common market, DTC and national tax legislation is related to the MFN clause. Not all BITs concluded by the BLEU follow this model. For example, in the BIT with Algeria, no references to taxes are made at all, except a reference to customs unions in the protection of investments clause.[64] In a similar way, the BITs with Albania and Belarus only include a reference to DTCs and other tax agreements in the protection of investments clause.[65] The BITs with the Kingdoms of Bahrain, Benin and Botswana follow the 2002 Model, with a broad reference to "tax matters" in the provision that concerns both national treatment and MFN principles.[66] Summarizing, in many cases, the exclusions are included in the protection of investments clause together with the NT and/or MFN clauses; broadly speaking, these clauses may be classified as those excluding only customs unions and/or common markets[67] and those extending to DTCs, or even to national legislation.[68] The BIT with Kuwait (2000) extends the clause to "national legislation concerning principally or exclusively taxation".[69] The BIT with South Africa (1998 – terminated in 2012) covered both "customs" and "tax treaties" and was completed by a specific provision according to which "pour éviter les doutes, il est confirmé que les principes prévus dans les paragraphes (2) et (3) de cet Article s'appliqueront aux dispositions des Articles 1-11 mais ne seront pas applicables aux avantages spéciaux, par exemple dans le domaine de l'imposition accordés aux institutions financières de développement" (freely translated as: "in order to avoid doubts, it is confirmed that the principles provided for in paragraphs (2) and (3) [relating to MFN] of the article shall apply to the provisions of articles 1-11 but shall not apply to special advantages, for example in the field of taxation granted to financial institutions for development"). There is no explanation in the parliamentary documents as to the reasons and the exact meaning of

64. *See* art. 3, para. 5 of the BIT with Algeria (1991).
65. *See* art. 3, para. 6 of the BIT with Albania (1999) and art. 3, para. 4(b) of the BIT with Belarus (2002). The same is also true of the BIT with Brazil (1999).
66. *See* art. 4 of the BIT with Bahrain (2006); art. 11 of the BIT with Benin; and art. 4, para. 5 of the BIT with the Republic of Botswana (2006). The same is also true of the BIT with Bosnia and Herzegovina (2004), Qatar (2007), Togo (2009) and Montenegro (2010). *See also* the BIT with China (art. 3, which excludes from the NT and MFN principle "any international agreement or arrangement relating wholly or mainly to taxation".
67. For example, BITs with Algeria (1991), Azerbaijan (2004), Burkina Faso (2001), El Salvador (1999), Ivory Coast (1999), Egypt (1999), Kazakhstan (1998), Philippines (1998), Uzbekistan (1998), Tunisia (1998), Ukraine (1996), Venezuela (1998) and Zambia (2001).
68. For example, the BITs with Albania (1999) and Morocco (1999).
69. Art. 4.2.b.

that provision, especially the meaning of "*avantages spéciaux*" (special advantages).[70]

Given the absence of case law on the interpretation of these clauses, it is difficult to determine the different legal effects that these clauses excluding tax matters (in a more or less broad way) could have.

4.6. Taxation as expropriation

The BLEU Model expressly protects investors against direct as well as indirect expropriation in very broad terms.[71] Derogations are nevertheless possible for "reasons of public purpose, security or national interest" under the cumulative conditions that measures be taken under the due process of law and that the measures be neither discriminatory nor contrary to any specific commitments and be accompanied by the payment of an adequate, effective and prompt compensation.[72]

Generally, the BITs signed by Belgium based on the BLEU Model do not make any reference to dispossessing tax measures. The only counter-example is the BIT concluded with Kuwait, which lists "raising arbitrary or excessive taxes" as an example of indirect expropriation.[73]

70. Parl. Doc. Senat, extraordinary session 1999, Doc. 2-80.
71. According to the BLEU Model, "each Contracting Party undertakes not to adopt any measure of expropriation or nationalization or any other measure or series of measures having the effect of directly or indirectly dispossessing the investors of the other Contracting Party of their investments in its territory (...)". Interestingly enough, the BLEU Model states that "Expropriation shall include situations where one of the Contracting Parties expropriates the assets of a company or enterprise in its territory in which an investor of the other Contracting Party has an investment, including through the ownership of shares". On reflective losses, *see* D. Gaukrodger, "Investment treaties as corporate law: shareholder claims and issues of consistency. A preliminary framework for policy analysis", OECD Working Papers on International Investment, 2013/3, OECD Investment Division, at: www.oecd.org/investment/working-papers.htm; D. Gaukrodger, "Investment Treaties and Shareholder Claims for Reflective Loss: Insights from Advanced Systems of Corporate Law", OECD Working Papers on International Investment, 2014/02, OECD Publishing, at http://dx.doi.org/10.1787/5jz0xvgngmr3-en. *See also* Roundtable on Freedom of Investment 19, 15-16 Oct. 2013, Summary of Roundtable discussions by the OECD Secretariat, at http://www.oecd.org/daf/inv/investment-policy/19thFOIroundtableSummary.pdf.
72. Art. 7 of the BLEU Model.
73. Art. 6, para. 4 of the BIT with Kuwait (2000).

Yet, the *Antoine Goetz & consorts v. République du Burundi* case[74] illustrates that changes in preferential tax regimes may be found to result in indirect expropriation contrary to BITs. In this case, as explained above, the Burundi administration withdrew the investor's licence to operate in an economic free zone. The licence provided entitlement to tax and import duty rebates. The withdrawal was found by the Tribunal to result in an indirect expropriation under the Belgium-Luxembourg Burundi BIT.[75] The pending *Lone Star* case, based on the Korea BLEU BIT, also deserves particular attention. At stake is the determination of Lone Star subsidiaries' fiscal residence: the company claims that the Korean tax administration characterized the entity investing in the country differently (first as a US company, then a Korean one) according to the investment carried out, so as to maximize the tax due.[76]

Taxation is an area of tension between the taxpayers' right to property and the power of public authorities to impose levies of a fiscal nature.[77] In Belgian law, although there is no principle of ability to pay or prohibition of confiscatory taxes, in 2015, the Constitutional Court considered a 90% marginal tax rate in the area of succession duties adopted by the Walloon region as unconstitutional, mainly on the ground that it amounted to a deprivation of the right of the *de cuius* to freely dispose of its property.[78] Moreover, as Belgium is a party to the European Convention on Human Rights (ECHR), Belgian courts tend to follow the case law of the ECHR: recent cases on taxation and the right to property could help define the boundaries of the tax legislation as regards the concepts of excessive or confiscatory taxation.[79] According to Article 1 of

74. *Antoine Goetz & consorts v. République du Burundi* case, CIRDI ARB/95/3 of 10 Feb. 1999.
75. Th. Waelde/A. Kolo, *Investor-State Disputes: The Interface Between Treaty-Based International Investment Protection and Fiscal Sovereignty*, 35 Intertax, 8/9 (2007), p. 445. The text of the award is available in French, at the following address: www.italaw.com.
76. *See* S. Nathan Park "What's At Stake: South Korea vs Lone Star Funds", at: http://blogs.wsj.com/korearealtime/2015/06/29/whats-at-stake-south-korea-vs-lone-star-funds/.
77. *See*, for example, M. Bourgeois 2005, *supra* n. 16, 1.4.2.
78. Reference was also made in the case law to the ECHR. *See* Belgian Constitutional Court, case No. 107 of 22 June 2005; for a comment, *see* M. Bourgeois 2005, *supra* n. 16.
79. It seems that the European Court of Human Rights, in order to define a violation of the Convention by a tax measure, adds to quantitative aspects also a qualitative dimension, i.e. the fact that the tax measures were applied arbitrarily, discriminatorily, disproportionately or in violation of the principles of the due process of law. *See* ECHR cases *OAO Neftyanaya Kompaniya Yukos v. Russia*, No. 14902/04 of 20 Sept. 2011; *Shchokin v. Ukraine*, No. 23759/03 and 37943/06 of 14 Oct. 2010; *Gasus Dosier – Und*

Protocol No. 1 to the ECHR, any interference by a public authority with the peaceful enjoyment of possessions must be duly proved to be lawful to be accepted: in fact, the issue of whether a fair balance has been struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights becomes relevant only once it has been established that the interference in question satisfied the requirement of lawfulness and was not arbitrary.[80]

Confiscatory taxation should, however, not be assimilated to expropriation under investment law. Indeed, the application of high taxes to items of income or capital under the tax laws of the host state would not necessarily amount to an expropriation under BITs, in the absence of specific circumstances establishing the specific hindrance to the investment.[81]

Lastly, some authors warn of the fiscal drawbacks of compensation, as a company may obtain a considerable sum by way of compensation for expropriation and yet have it heavily taxed back in its home state.[82]

4.7. Taxation and free transfer of capital

The BLEU Model provides for the free transfer of payments in relation to investments.[83]

Fördertechnik Gmbh v. The Netherlands, No. 15375/89 of 23 Feb. 1995; *S.A. Dangeville v. France*, No. 36677/97 of 16 Apr. 2002; and *S.A. Cabinet Diot Et S.A. Gras Savoye v. France*, No. 49217/99 and 49218/99 of 22 July 2003.
80. *See Iatridis v. Greece*, No. 31107/96 of 25 Mar. 1999, para. 58.
81. A. Gildemeister 2013, *supra* n. 1, pp. 393-397.
82. P.H.M. Simonis, "BITs and Taxes", 42 *Intertax*, 4 (2014), p. 255.
83. Art. 8 of the 2007 BLEU Model states as follows:
Without prejudice to the measures adopted or to be adopted by the European Union, each Contracting Party shall grant to investors of the other Contracting Party the free transfer of all payments relating to an investment, including, though not exclusively:
a) amounts necessary for establishing, maintaining or expanding the investment;
b) amounts necessary for payments under a contract, including amounts necessary for repayment of loans, interests, royalties, management fees and other payments resulting from licences, franchises, concessions and other similar rights, as well as salaries of expatriate personnel;
c) returns;
d) proceeds from the total or partial liquidation of investments, including capital gains or increases in the invested capital;
e) compensation paid pursuant to Article 7;
2. The nationals of each Contracting Party who have been authorised to work in the territory of the other Contracting Party in connection with an investment shall also

Where Belgian BITs guarantee the free transfer of the proceeds of investments, they rarely make clear whether the proceeds may be transferred before tax has been paid in the country where the investment take place. The 2007 BLEU Model states that the "amounts yielded by an investment" shall include "profits, interests, capital gains, dividends, royalties and fees".[84] It is, however, not certain that "profits" are understood as "gross profits" and not "profits after tax". In the BIT with Bangladesh, however, "profits" seems to be understood as "profits after tax". From an exchange of letters between the Belgian and Bangladeshi Foreign Ministers, it appears that "returns and investments shall be subject to taxation in accordance with the tax laws of each Party".[85] A similar argument can be derived from the BIT with Benin, which defines the concept of "income" as the "amounts after tax from an investment".[86] In contrast, many other BITS, including the BITs with Bolivia, Bulgaria, Togo and China, define the concept of "income" by reference to the "amounts derived from an investment", without any reference to the fact that these amounts should be considered before or after tax.[87] There is no case law in Belgium on this question, so that we cannot conclude it is clear that income to be repatriated to the home state is after-tax income.

The reference to the measures adopted by the European Union is a recent addition to the traditional model. In order to ensure compatibility with the provisions of the Treaty on The Functioning of the European Union (TFEU) on the free movement of capital, which allow the European Union to adopt certain measures restricting the movement of capital, the BLEU Model has recently been slightly modified. Based on ECJ case law, it can be inferred that Member States have to incorporate the possibility for the European Union to introduce "exceptions to the principle of free movement of capital and payments between Member States and third countries, with a view to protecting the general Community interest

be permitted to transfer their earnings and other remunerations to their country of origin.
3. Transfers must be made in a freely convertible currency at the rate applicable on the day transfers are made to spot transactions in the currency used.
4. "Each Contracting Party shall issue the authorizations required to ensure that the transfers can be made without undue delay, with no other expenses than the usual banking costs.

84. Art. 1, para. 3 of the 2007 BLEU Model.
85. BIT with Bangladesh (1981), exchange of letters, p. 152, available at http://investmentpolicyhub.unctad.org/Download/TreatyFile/262.
86. Art.1, para. 3 of the BIT with Benin (2001).
87. Art. 1, para 3 of the BIT with the Plurinational State of Bolivia (1990); art. 1, para. 2 of the BIT with Bulgaria (1991); art. 1, para. 3 of the BIT with China (2005); and art. 1, para. 3 of the BIT with Togo (2009).

and enabling the Community to comply, as appropriate, with its international obligations and with those of the Member States" in the BITs they concluded with third countries.[88] However, most of the existing BITs concluded by the BLEU do not make reference to EU law exceptions. Some older BITs, such as the treaties with Bangladesh (1981), Malaysia (1979) and Sri Lanka (1982), make the freedom of transfer "subject to [the State's] rights, in the event of balance of payment difficulties to exercise temporarily, equitably, and in good faith powers conferred by its laws and regulations". A similar clause is contained in more recent BITs, for example the 2006 BIT with Korea or the 2005 BIT with Madagascar, but it is conditional (among other things) on its compatibility with the articles of agreements of (or within the framework of a plan of) the International Monetary Fund.

No reference is made to taxation and there has not been any case law as to the application of this provision to tax measures. To our knowledge, no discussion has taken place in the academic literature concerning the applicability of such a clause to measures such as withholding taxes or exit taxes. The EU's freedoms of movement seem indeed to offer sufficient protection to investors in this regard.

4.8. Dispute settlement and awards

Belgium was at the forefront of international (interstate) arbitration in the 19th century. The first arbitration clause can be found in the treaty signed with Mexico on 19 November 1939, and such a mechanism was provided for in the treaties signed with Switzerland, Austria-Hungary, Denmark, Italy, Portugal, Sweden and Norway.[89]

As for state-investor arbitration, the BLEU Model contains a settlement clause applicable to "any dispute relating to an investment between an investor of one Contracting Party and the other Contracting Party".[90] According to the Model, the investor has to submit, at his own choice, the dispute to either an ad hoc arbitral tribunal set up according to the arbitra-

88. ECJ, Case C-205/06 *Commission v. Austria* [2009] ECR I-0000; Case C-249/06 *Commission v. Sweden* [2009] ECR I-0000; and *Commission v. Finland*, Case C-118/07 [2009] ECR I-10889.
89. A. Gildemeister 2013, *supra* n. 1, p. 9.
90. D. Gaukrodger/K. Gordon, "Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community", *OECD Working Papers on International Investment*, 2012/03, OECD Publishing, at: http://dx.doi.org/10.1787/5k46b1r85j6f-en.

tion rules laid down by the United Nations Commission on International Trade Law (UNCITRAL), or to the International Centre for the Settlement of Investment Disputes (ICSID), or to an arbitral tribunal (composed of three arbitrators) established in accordance with the Rules of Arbitration of the International Chamber of Commerce. Almost all BITs concluded by the BLEU refer to the ICSID, to which Belgium is a party,[91] and with less frequency to UNCITRAL or ICC.[92] In some cases, BLEU BITs provide that the investor must first resort to local remedies for a certain period of time before having recourse to international arbitration.[93] Moreover, no reference to the transparency of the arbitration process is made.

The dispute settlement provision of the BLEU Model does not specifically mention tax-related claims. Like other countries such as Germany or France, BITs concluded by the BLEU generally state that the dispute settlement mechanism applies to any dispute relating to the investment covered by the BIT. Therefore, except when a BIT explicitly excludes taxation from the scope of dispute settlement,[94] nothing seems to prevent a priori the submission to international arbitration (or to other legal instruments protecting the investment) of alleged violations of the BITs caused by the (mis)application of tax measures.[95] Even in the presence of DTCs between the countries involved, one should bear in mind that the scope of DTCs is limited to income and capital taxes and they therefore offer no protection as regards customs duties, VAT/GST, excises or environmental taxes. Moreover, even within their material scope, DTCs mainly allocate taxing rights between contracting parties and offer no specific protection to taxpayers (except non-discrimination clauses).

91. Belgium approved the Convention of 18 March 1965 on the Settlement of Investment Disputes between States and Nationals of Other States by a law of 16 July 1970 (*Moniteur Belge*, 29 Sept. 1970).
92. E. Stein/X. Nyssen, "Investment Treaty Arbitration Belgium", *Global Arbitration Review* Sept. 2014, at http://globalarbitrationreview.com.
93. *See* BITs with Argentina, Romania and UAE. Other BITs establish a waiting period before international arbitration becomes available: for example, the BITs with Chile, Paraguay and Uruguay.
94. *See*, for example, the exchange of letters between the Belgian and Bangladeshi Foreign Ministers according to which taxation should be excluded from the scope of the BIT.
95. A. Gildemeister 2013, *supra* n. 1, p. 158.

Several cases have been decided before international arbitration courts,[96] while others are still pending.[97] Among recent cases was the *Ping An v. Belgium* case, where two Chinese insurance companies brought a claim against Belgium for the bailout, nationalization and sale of Fortis (a financial institution), which led to the expropriation of their investment.[98] The arbitration tribunal dismissed the claim of the Chinese companies considering that it lacked jurisdiction.

From the perspective of the application of BITs concluded by the BLEU to tax measures, the most interesting cases are *Antoine Goetz et consorts v. République du Burundi* (commented on above) and the pending *Lone Star* case.[99]

In the area of taxation, although the 2010 Belgian Model provides for an arbitration mechanism, most of the DTCs concluded by Belgium contain a

96. The available cases decided on BITs concluded by Belgium are the following:
- *Antoine Goetz et consorts v. République du Burundi*, ICSID Case No. ARB/95/3;
- *Antoine Goetz & Others and S.A. Affinage des Metaux v. Republic of Burundi*, ICSID Case No. ARB/01/2;
- *Camuzzi International S.A. v. Argentine Republic*, ICSID Case No. ARB/03/7;
- *Desarrollos en Salud S.A. s/Concurso Preventivo s/Incidente de Revisión (N.V. NISSHO IWAI S.A. (BENELUX))*, Juzgado Comercial No. 26 Secretaría No. 51, Argentina;
- *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. Argentine Republic*, ICSID Case No. ARB/03/23;
- *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13;
- *Philippe Gruslin v. Malaysia*, ICSID Case No. ARB/99/3;
- *Piero Foresti, Laura de Carli & Others v. The Republic of South Africa*, ICSID Case No. ARB(AF)/07/01;
- *Vladimir Berschader and Moïse Berschander v. The Russian Federation*, SCC Case No. 080/2004;
- *Ping An Life Insurance Company of China, Limited and Ping An Insurance (Group) Company of China, Limited v. Kingdom of Belgium*, ICSID Case No. ARB/12/29. (30 Apr. 2015). The *Ping An* case has been taken as an example by the opponents of an arbitration clause in the transatlantic agreement because of the serious consequences it could have had for Belgium should the arbitrators decide in favour of the Chinese businessman, which they did not: *see* M. Cermak 2015, *supra* n. 37.

97. *European Media Ventures SA v. The Czech Republic*, UNCITRAL; and *LSF-KEB Holdings SCA and others v. Republic of Korea*, ICSID Case No. ARB/12/37.
98. *Ping An Life Insurance Company of China, Limited and Ping An Insurance (Group) Company of China, Limited v. Kingdom of Belgium*, ICSID Case No. ARB/12/29. (30 Apr. 2015).
99. For a description, *see* Park 2015, *supra* n. 73.

mutual agreement procedure based on the OECD Model (without arbitration), with the notable exception of the DTC with the United States.[100]

The DTC with the United States provides for an arbitration procedure that differs from the arbitration provided for in BITs in several aspects. Even though the taxpayer has the right to request that the matter be subject to arbitration (or has to agree to an arbitration in the case of the DTC with the United States), his rights in the procedure are not guaranteed in the same way as those of the investors in BIT arbitration procedures, for example with regard to the right to choose the arbitrators or to be heard during the proceedings.[101]

However, giving the taxpayer all the procedural rights in the arbitration procedure involving the application of tax laws is likely to contradict the principle of legality (article 170 of the Belgian Constitution) and the *ordre public* character of tax laws, which prohibit administrations from entering into agreements with an individual taxpayer and which make these agreements not binding on the civil jurisdictions (competent in Belgium for tax disputes).[102] In the *Goetz v. Burundi* case, mentioned above, the limits of arbitration for tax matters are shown: the case could have had a different outcome if it had been decided according to Burundi national law instead of international law.[103]

Finally, concerning the risk of treaty shopping in international investment treaties, the most recent version of the BLEU Model provides in article 1 (definition of "investors") that "for the purposes of this Agreement, a company incorporated or constituted under the law of one Contracting Party but effectively controlled, directly or indirectly, by nationals or companies of the other Contracting Party, shall be treated as a company of the latter Contracting Party". This application of the control theory, which is unusual from a Belgian prospective because Belgium tends to adopt a rather formalistic approach towards the real seat theory,[104] may have been influenced by article 25(2)B of the 1965 Washington Convention on the ICSID and by Anglo-American practice.[105] However, most of the existing BITs do not contain such a clause. Therefore, there is in practice no treaty shopping mechanism that has been put in place by Belgium to limit the benefits of the application of investment treaties to "real" Belgian investors. DTCs concluded by Belgium also rarely contain provisions aiming at combating treaty shopping and abuse. Despite the introduction in the 2010 Model of a general anti-abuse clause, this clause is not to be found in most existing DTCs, with exceptions, such as the DTC with the United States, which contains detailed limitation-on-benefits provisions.[106]

In any event, arbitration clauses seem to be currently undergoing a process of revision also in investment treaties. On 8 July 2015, the European Parliament clearly expressed its concerns over the inclusion of an arbitration process in the transatlantic agreement with the United States. It called on the Commission "to ensure that foreign investors are treated in a non-discriminatory fashion while benefiting from no greater rights than domestic investors, and to replace the ISDS system with a new system for resolving disputes between investors and states which is subject to democratic principles and scrutiny, where potential cases are treated in a transparent manner by publicly appointed, independent professional judges in public hearings and which includes an appellate mechanism, where consistency of judicial decisions is ensured, the jurisdiction of courts of the EU and of the Member States is respected, and where private interests cannot undermine public policy objectives".[107]

Various stakeholders have also expressed concerns about the need to amend the BLEU Model. For example, the International Institute for Sustainable Development, a think tank that provided a review of the Bel-

100. Convention between the Government of the United States of America and the Government of the Kingdom of Belgium for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income of 2006, art. 25(7) and (8). On this treaty, *see* A. Van de Vijver, *The New US-Belgian Convention* (Larcier 2009); and I. Richelle/E. Traversa 2012, *supra* n. 5.
101. *See* A. Gildemeister, Germany, ch. 12.
102. F. Vanistendael, *Legal Framework for Taxation* in *Tax law design and drafting* (V. Thuronyi ed., IMF 1996-1998), pp. 18-19.
103. J. Schokkaert 2006, *supra* n. 12, p. 118.
104. On the concept of the corporate seat in Belgian law, *see* E.-J. Navez, *Le transfert transfrontalier du siège social des sociétés à l'épreuve du principe de territorialité au sein de l'Union européenne: Étude croisée de droit commercial, de droit international privé et de droit fiscal*, Doctoral thesis, UCLouvain, 2015.
105. J. Schokkaert 2006, *supra* n. 13, p. 62.
106. Id., *supra* n. 13, p. 69.
107. European Parliament, *Recommendations to the European Commission on the Negotiations for the Transatlantic Trade and Investment Partnership (TTIP)* of 8 July 2015, reference No. 2014/2228(INI). Recom. d(XV). The TTIP negotiations are generating a considerable movement of criticism over Europe concerning the drawbacks of arbitral dispute settlements, *see* P. Defraigne 2015, *supra* n. 37 and, by the same author, the speech held at the Belgian Federal Parliament over the TTIP on 26 May 2015: "Three objections and an alternative to the Transatlantic Treaty (TTIP)" at: http://www.madariaga.org/images/madariagaspeeches/three%20objections%20to%20ttipfinal.pdf.

gian BIT practice in 2010, points out the need for "provisions prescribing transparency in investor-state dispute settlement".[108] Moreover, there is no reference to human rights nor to human development objectives, as recommended by international organizations and discussed in the academic literature.[109]

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108. IISD, *Belgium's Model Bilateral Investment Treaty: A Review, supra* n. 12, p. 3.

109. *See* O. De Schutter, J. Swinnen & J. Wouters (eds.), *Foreign Direct Investment and Human Development: The Law and Economics of International Investment Agreements* (Routledge 2014), in particular the contributions of O. De Schutter, "Improving the monitoring of international investment agreement at the national level", pp. 157-188 and Ph. De Man/J. Wouters, "Improving the framework of negotiations on international investment agreements", pp. 233-291; *see also* P. Dumberry, "Corporate investors' international legal personality and their accountability for human rights violations under IIAs" in *Improving International Investment Agreements* (A. de Mestral & C. Lévesque eds., Routledge 2013), pp. 190-192.

5.1. General

Since the beginni
war, the policy o
focused on the cr
ronment so as to
Bilateral investm
ments, known as
prise the key pill
with measures at
facilitate and cont

Two decades later
activities, to under
reconsider what w
ture if changes wer

Although it cannot
in particular, result
(FDI),[1] there has be
ated by the investor
or international arbi
ground of investme
here.

Aiming to attract fo
ary, the competent
liberal investment p

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* The views expres
sarily reflect the views
1. *See*, for example,
ment: Bilateral Investm
European Journal of In
authors' knowledge, no
ment flows in Bosnia an