What Is Tax on Capital for the Purposes of a Tax Treaty? An Analysis of Two Recent Belgian Supreme Court Decisions on the Belgian Net Asset Tax

This article discusses two decisions of the Belgian Supreme Court on the compatibility of the Belgian net asset tax with the Belgium-Luxembourg Income and Capital Tax Treaty (1970) and the Belgium-Netherlands Income and Capital Tax Treaty (2001), which raise questions regarding “tax on capital”, “taxes covered” and treaty interpretation.

1. Introduction

In principle, collective investment vehicles (“funds”) that are publicly marketed in Belgium are subject to an annual tax. That tax, which is generally referred to as the “net asset tax” (NAT), also applies to certain non-resident funds. However, there has long been discussion as to whether Belgium is entitled to apply the NAT to funds established in a state with which Belgium has concluded a tax treaty. The reason is that the NAT may qualify as a “tax on capital” for treaty purposes, and Belgium’s tax treaties generally provide that such a tax on capital can only be levied by a taxpayer’s home state. As a result, most of those tax treaties would preclude Belgium from applying the NAT to residents of the other contracting state.

Lower courts in Belgium have repeatedly held that the Belgium-Luxembourg Income and Capital Tax Treaty (1970) and the Belgium-Netherlands Income and Capital Tax Treaty (2001) apply to the NAT, and preclude Belgium from applying the NAT to funds established in those countries. In two recent judgments, however, the Belgian Cour de Cassation/Hof van Cassatie (Supreme Court) has taken the position that the NAT qualifies as a tax on capital for purposes of the Belgium-Netherlands Income and Capital Tax Treaty (2001) but not for purposes of the Belgium-Luxembourg Income and Capital Tax Treaty (1970). As discussed in section 4.2., the reason for that apparent contradiction is that the wording of the “taxes covered” provision is different in the two tax treaties.

With regard to the approach of this article, section 2. first provides a brief overview of the design and functioning of the NAT. Section 3. then discusses the two Supreme Court decisions as well as the lower court decisions that preceded those decisions. Section 4. next comments on the Supreme Court decisions. Finally, section 5. sets out the article’s conclusions.

2. The Belgian NAT

Under article 201/20 of the Wetboek diverse rechten en taken / Code des droits et taxes divers (Code on Miscellaneous Duties and Taxes, CMDT), the NAT applies to both Belgian and foreign funds covered by the Under-takings for Collective Investment in Transferable Securities Directive (the UCITS Directive) (2009/65) and the Alternative Investment Fund Managers Directive (the AIFM Directive) (2011/61), which are registered with the Autoriteit voor Financiële diensten en Markten / Autorité des services et marchés financiers (Belgian Financial Services and Markets Authority, FSMA). The standard tax rate is currently 0.0925%.

5. BE: Wetboek diverse rechten en taken / Code des droits et taxes divers (Code on Miscellaneous Duties and Taxes, CMDT), art. 201/20. At the time of the facts giving rise to the two Supreme Court decisions, the NAT was governed by BE: Wetboek des successierchten / Code des droits de succession (Inheritance Tax Code), art. 161-162. In 2019, the relevant provisions were moved to the CMDT (BE: Wet van 13 april 2019/Loi du 13 avril 2019 (Law of 13 April 2019), Official Gazette, 30 Apr. 2019).


Under article 201/21 of the CMDT, the NAT is calculated on the basis of the "total of the net outstanding amounts in Belgium" on 31 December of the previous year. The CMDT does not define the criterion "net outstanding amounts in Belgium". That criterion was introduced by a law of 22 December 2003, which also extended the scope of application of the NAT to foreign funds (when the NAT was first introduced in 1993, it was due on the asset value of (Belgian) funds). According to the explanatory memorandum accompanying the 2003 law, the criterion "net outstanding amounts in Belgium" refers to "the total capital of a fund, reduced by redemptions". The explanatory memorandum does not define the term "capital of a fund". In practice, a fund’s net asset value (NAV) is taken into account for these purposes (see section 4.1). The explanatory memorandum further states that the criterion "amounts outstanding in Belgium" refers to "transfers (subscriptions, sales) through the intervention of a financial intermediary in Belgium". With regard to the nexus to the Belgian territory, the explanatory memorandum, therefore, suggests that the distribution channel, rather than the investor’s place of residence, is the decisive criterion.

In practice, however, the NAT liability of funds is generally determined on the basis of the calculation method suggested by the Belgian Asset Managers Association (BEAMA), which is slightly different from the method proposed in the explanatory memorandum. The Belgian tax authorities have stated that they accept the calculation method proposed by the BEAMA. According to this method, the criterion "net outstanding amounts in Belgium" refers to the number of securities in Belgium multiplied by the NAV per share. The "number of securities in Belgium" should be understood as being the total number of securities of the fund reduced by the number of securities in respect of which the distributor can certify that they were purchased for the account of a non-resident. In other words, the BEAMA approach entails that the NAT should be calculated on the basis of the place of residence of the investors, irrespective of the distribution channel. That approach applies to both Belgian and foreign funds, but for the latter category of funds, the BEAMA recommendation adds that the distribution channel is decisive. In particular, if the distributor is a non-resident, the securities are not considered to be outstanding in Belgium (and, therefore, are excluded from the taxable basis). However, if the distributor is a resident, the securities are considered to be outstanding in Belgium.

In summary, the starting point for determining the tax base of the NAT due by foreign funds is the "total of the net outstanding amounts in Belgium". According to the explanatory memorandum, that criterion refers to "the total capital of a fund, reduced by redemptions" and the BEAMA recommendation clarifies that account should be taken of the number of securities in Belgium multiplied by the NAV per share. In a final step, the BEAMA recommendation excludes securities issued to non-residents through the intervention of a resident distributor and securities issued through the intervention of a non-resident distributor.

3. The Two Supreme Court Decisions


3.1.1. The facts

A Luxembourg Société d’investissement à capital variable (Investment company with variable capital, SICAV) challenged its NAT assessment before the Rechtbank van eerste aanleg (Brussels) / Cour de première instance (Bruxelles)/Court of First Instance (Brussels). According to the taxpayer, the NAT was wrongly imposed for several reasons, including an alleged violation of article 22(4) of the Belgium-Luxembourg Income and Capital Tax Treaty (1970). Article 22(4) of the Belgium-Luxembourg Income and Capital Tax Treaty (1970) allocates the taxing rights on certain types of “capital” belonging to a resident of a contracting state to the state of residence. According to the taxpayer, Belgium had violated the Belgium-Luxembourg Income and Capital Tax Treaty (1970) by imposing a tax on capital (i.e. the NAT) in its capacity of the source state.
The Belgian tax administration and the SICAV disagreed on whether the NAT falls within the material scope of the Belgium-Luxembourg Income and Capital Tax Treaty (1970), and, therefore, on whether Belgium would have to comply with the distributive rules of the tax treaty. Here, it is useful to recall the relevant provisions of the Belgium-Luxembourg Income and Capital Tax Treaty (1970):

- article 2(1), which follows the wording of the OECD Model (2017), stipulates that the tax treaty applies to taxes on income and on capital imposed on behalf of a contracting state, or of its political subdivisions or local authorities, irrespective of the manner in which they are levied;
- article 2(2) defines such taxes as "all taxes imposed on total income, on total capital, or on elements of income or of capital...";
- article 2(3) further lists which taxes are covered, being:

The existing taxes to which the Agreement applies are:

1. in the case of Belgium:
   (a) the individual income tax (l’impôt des personnes physiques);
   (b) the corporate income tax (l’impôt des sociétés);
   (c) the income tax on legal entities (l’impôt des personnes morales);
   (d) the income tax on nonresidents (l’impôt des non-résidents)

2. in the case of Luxembourg:
   (a) the income tax on individuals (l’impôt sur le revenu des personnes physiques);
   (b) the corporation tax (l’impôt sur le revenu des collectivités);
   (c) the capital tax (l’impôt sur la fortune);
   (d) the communal trade tax (l’impôt commercial communal);
   (e) the land tax (l’impôt foncier)

3. lastly, article 2(4) states that the tax treaty also applies to any identical or substantially similar taxes that are imposed in addition to, or in place of, the existing taxes after the date of signature of the tax treaty, and that the competent authorities of the contracting states should notify each other of changes that have been made in their taxation laws at the end of each year.

### 3.1.2. Court of First Instance (Brussels) decision of 2 August 2011

Before the Court of First Instance (Brussels), the tax administration argued that the NAT was not listed in article 2(3) of the Belgium-Luxembourg Income and Capital Tax Treaty (1970) (see section 3.1.1.), and, therefore, that it was not covered by the tax treaty. This argument was supported by the fact that article 2(3) of the Belgium-Luxembourg Income and Capital Tax Treaty (1970), which lists the covered taxes, was amended by a

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22. BE: Court of Appeal (Brussels), 29 Nov. 2018. Case No. 2011/AR/2950, **Company, name not disclosed (the taxpayer) and Federale Overheidsdiensten Financiën (the tax authorities)**, Case Law IBFD.

23. In addition, the taxpayer advanced several arguments to challenge the legality of the tax, including: (i) an alleged unlawful retroactive effect; (ii) a violation of Directive (69/335); (iii) a violation of the free movement of capital (Treaty on the Functioning of the European Union (TFEU)) (as amended through 2007), OJ C115 (2008), arts. 63-66 and 75, Primary Sources IBFD) and services (arts. 56-62 TFEU); (iv) a violation of the...
authorities, on the other hand, argued that the NAT does not fall within the material scope of the Belgium-Luxembourg Income and Capital Tax Treaty (1970), as it does not qualify as a “tax on capital”. In addition, it was submitted that the NAT should also not be viewed as a “subsequent” tax in the sense of article 2(4) of the Belgium-Luxembourg Income and Capital Tax Treaty (1970), given that the tax was not “identical or substantially similar” to the taxes already listed in article 2(3).

The Court of Appeal (Brussels) started by analysing the material scope of the Belgium-Luxembourg Income and Capital Tax Treaty (1970). It noted that the Belgium-Luxembourg Income and Capital Tax Treaty (1970) followed the OECD Draft Model (1963) and that according to the Belgian administrative commentaries, tax treaties should be interpreted in line with the rules on treaty interpretation as set out in the Vienna Convention (1969). The Court of Appeal (Brussels) adopted the reasoning of the taxpayer, stating that the notion “tax on capital” is in fact defined in article 2(1) and (2) of the Belgium-Luxembourg Income and Capital Tax Treaty (1970). The Court of Appeal (Brussels) also referred to the Belgian administrative commentaries on article 2 of the Belgium-Luxembourg Income and Capital Tax Treaty (1970), which defined a tax on capital as a tax on total capital or on elements thereof. The same commentaries clarify that it is indifferent whether such a tax is calculated in accordance with general or specific rules (for example, on the basis of a flat-rate basis).

The tax authorities further argued the NAT does not envisage any taxation of assets belonging to the taxpayer, but merely taxed the placement of securities. Moreover, the funds do not have a free right of disposal over the funds they manage, as they are under an obligation to invest these funds according to a strict framework and the investors can also request these funds at any time. Consequently, these assets should not be seen as “equity” of the fund, but rather as a “patrimoine d’affectation” (“special-purpose capital”). The Court of Appeal (Brussels) ruled that the tax is calculated on the basis of the NAV of the fund. As this value may increase when a component of the portfolio gives rise to a capital gain or an income or when new subscriptions result in a payment of new contributions and may decrease in the reverse scenarios, it is difficult to argue that the amount of the tax is determined by a placement of the securities in Belgium. Accordingly, the amount of NAT due depends on the evolution of the fund’s NAV. In addition, the Court of Appeal (Brussels) pointed out that the fund is the legal owner of the funds deposited by investors, as well as of the assets in which it subsequently invests those funds. The Court of Appeal (Brussels), therefore, concluded that the NAT, in view of its characteristics, is a tax on capital as referred to in article 2 of the Belgium-Luxembourg Income and Capital Tax Treaty (1970).

The Court of Appeal (Brussels) also dismissed the argument of the tax authorities to the effect that the Luxembourg NAT, which is similar to the Belgian NAT, is not regarded as a tax on capital either within the framework of tax treaties concluded by Luxembourg. According to the Court of Appeal (Brussels), the Luxembourg NAT only applies to Luxembourg funds, and, therefore, would not lead to any issues of double taxation. Furthermore, the Luxembourg NAT is regarded by the Luxembourg tax authorities as a tax on capital.

According to the tax authorities, the lists of taxes in article 2(3) of the Belgium-Luxembourg Income and Capital Tax Treaty (1970) is exhaustive, as, contrary to the OECD Model (2017), the list of taxes covered by it is not preceded by the expression “in particular”. Consequently, as the NAT is not listed, it falls outside the material scope of application of the Belgium-Luxembourg Income and Capital Tax Treaty (1970). The Court of Appeal (Brussels) rejected that argument, stating on the basis of OECD documents that the list in article 2(3) of the Belgium-Luxembourg Income and Capital Tax Treaty (1970) is illustrative only in nature. That list would only be exhaustive if a tax treaty did not include article 2(1) and (2) of the OECD Model (2017). As a result, the scope of a tax treaty is determined by article 2(1) and (2), while article 2(3) is purely illustrative in nature. According to the Court of Appeal (Brussels), the omission of the expression “in particular” in article 2(3) of the Belgium-Luxembourg Income and Capital Tax Treaty (1970) does not change that conclusion. The Court of Appeal (Brussels) reiterated the fact that the NAT could not have been included in the list of taxes, as it did not exist at the time of signature of the Belgium-Luxembourg Income and Capital Tax Treaty (1970) or the Belgium-Luxembourg Protocol (2002). It, therefore, decided in favour of the taxpayer, in concluding that the Belgium-Luxembourg Income and Capital Tax Treaty (1970) precluded the application of the NAT.

### 3.1.4. Supreme Court decision of 25 March 2022

The case was appealed by the tax authorities to the Supreme Court. The Supreme Court, following the Advocate

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**Notes:**

28. Id., m. no. 13.
29. The tax authorities argued that the Belgian NAT should be qualified as an indirect tax, as evidenced by its inclusion in BE: Wetboek der succes- sierechten / Code des droits de succession (Code of Inheritance Taxes). The Court of Appeal (Brussels) also dismissed this argument by stating that this is irrelevant as to its nature.
30. Case No. 2011/AR/2950 (2018), supra n. 22, m. no. 15.
31. Id., m. no. 17.
32. Id., m. no. 18.
General’s opinion, decided that the list of taxes in article 2(3) of the Belgium-Luxembourg Income and Capital Tax Treaty (1970) had an exhaustive nature and that:

the extension by article 2(4) to future taxes identical to or substantially similar to existing taxes requires that article 2(2) of the Convention should be interpreted in the light of the choice of States to include certain taxes in force in each of the two States in the list of existing taxes, as well as the characteristics of those taxes included.34

The Supreme Court observed that the only tax on capital included in article 2(3) of the Belgium-Luxembourg Income and Capital Tax Treaty (1970) is the Luxembourg capital tax. Neither the Belgian NAT nor its Luxembourg counterpart are mentioned. According to the Supreme Court:

It follows that, in order for a tax to be a tax on capital within the meaning of the Convention, it is not sufficient that the tax base refers to an element of a taxpayers’ property. It is also required that the tax object is the state of the taxpayer’s capital.35

At the time of the relevant facts, the NAT was governed by article 161-162 of the Belgian Inheritance Tax Code, which also provided for an annual tax on credit institutions (calculated on the basis of the total amount of exempt regulated savings deposits) and an annual tax on insurance companies (calculated on the basis of the amount of commissions relating to exempt branch 21 or branch 23 insurance contracts). According to the Supreme Court, the latter two taxes applied to banks and insurers because of their debts to customers that generated exempt income for those customers, while the NAT applied to funds that benefited from the favourable tax regime of the Wet van 4 december 1990 (Law of 4 December 1990).36 The Supreme Court also stated that, although the concept of “net amounts outstanding in Belgium” refers to a fund’s NAV, that calculation method does not alter “the tax object of the NAT”. Moreover, in the case of contractual funds, the tax is not payable by the fund but by the management company. Consequently:

the NAT, like the tax on banks and insurers, does not have as its tax object the state of funds’ capital, but the amount of savings that funds have been able to collect from year to year in Belgium and manage in Belgium in the exclusive interest of their investors.37

The Supreme Court disagrees with the judgment of the Court of Appeal (Brussels), which stated that the NAT affected part of the assets of the funds, and, therefore, in view of its characteristics, was a tax on capital within the meaning of the Belgium-Luxembourg Income and Capital Tax Treaty (1970). Accordingly, the Supreme Court quashes the judgment of the Court of Appeal (Brussels).

3.2. Supreme Court decision of 21 April 2022: Belgium-Netherlands Income and Capital Tax Treaty (2001) applicable

3.2.1. The facts


The existing taxes to which the Convention shall apply are in particular:

(a) in Belgium:
   (1) de personeelbelasting (the individual income tax);
   (2) de vennootschapsbelasting (the corporate income tax);
   (3) de rechtspersoneelbelasting (the income tax on legal entities);
   (4) de belasting van niet-inwoners (the income tax on non-residents);
   ... (hereinafter referred to as "Belgian tax")

(b) in the Netherlands:
   (1) de inkomstenbelasting (the income tax);
   (2) de loonbelasting (the wage tax);
   (3) de vennootschapsbelasting (the company tax) including the Government share in the net profits of the exploitation of natural resources, levied pursuant to the Mijnwet 1810 (the Mining Act of 1810) with respect to concessions issued from 1967, or pursuant to the Mijnwet Continental Plat 1965 (the Netherlands Continental Shelf Mining Act of 1965);
   (4) de dividendenbelasting (the dividend tax);
   (5) de vermogensbelasting (the capital tax)

(hereinafter referred to as "Netherlands tax").

In the list of taxes covered by article 2(3) of the Belgium-Netherlands Income and Capital Tax Treaty (2001), the wording “in particular” is included, in line with the OECD Model. As already noted in section 3.1.4., that wording is omitted from the Belgium-Luxembourg Income and Capital Tax Treaty (1970).

3.2.2. Court of First Instance (Brussels) decision

Before the Court of First Instance (Brussels),38 the funds took the position that the tax assessment violated article 22(4) of the Belgium-Netherlands Income and Capital Tax

34. Id., p. 5.
35. Id., at p. 6.
36. BE: Wet van 4 december 1990/Loi du 4 décembre 1990 (Law of 4 December 1990). In other words, the regime currently included in of the BE: Wet op de inkomstenbelastingen 1992/Codice dei imposti sul reddito 1992 (Income Tax Code 1992), art. 21, first para., No. 2., under which the liquidation proceeds and the redemption proceeds of certain taxes are exempt.
37. Case No. F 19.0047.F (25 Mar. 2022), supra n. 4, at pp. 7-8. The original text reads as follows: “S'il la détermination des montants nets placés en Belgique que, après remboursements et rachat, subsistent au sein de ces organismes au 31 décembre de chaque année supposé de se référer à la valeur nette d’inventaire des parts émises par ces organismes, ce mode de calcul n’a pas pour effet de modifier l’assiette de la taxe annuelle. … Il s’ensuit que, pas plus que celle qui est mise à charge des établissements de crédit et des entreprises d’assurances, la taxe annuelle à charge des organismes de placement collectif n’a pour assiette leur état de fortune, mais, d’année en année, l’encours de l’épargne publique qu’ils ont pu collecter en Belgique ensuite de leur inscription auprès de la Commission bancaire, financière et des assurances, peut être dans l’intérêt exclusif des participants.”
38. The decision in of the Court of First Instance [Brussels] was not published, and, therefore, is not discussed in detail in this article.
Treaty (2001) and the Belgium-Luxembourg Income and Capital Tax Treaty (1970) on the basis of similar reasons as those discussed in section 3.1.2. The Court of First Instance (Brussels), therefore, agreed with the funds that the Belgium-Netherlands Income and Capital Tax Treaty (2001) and the Belgium-Luxembourg Income and Capital Tax Treaty (1970) precluded Belgium from imposing the NAT.

3.2.3. Court of Appeal (Brussels) decision of 26 March 2019

The tax administration challenged the judgment of the Court of First Instance (Brussels) before the Court of Appeal (Brussels). Several arguments were advanced by both parties.40 The tax authorities argued that the Belgian NAT was not listed in the Belgium-Luxembourg Income and Capital Tax Treaty (1970) and the Belgium-Netherlands Income and Capital Tax Treaty (2001), as the assets of the funds are not relevant for the determination of the taxable base of the NAT. It was submitted that the NAT should be regarded as an indirect tax, and, therefore, fell outside the scope of both tax treaties. According to the funds, the Belgian NAT should be seen as a "tax on capital" for the application of the Belgium-Luxembourg Income and Capital Tax Treaty (1970) and the Belgium-Netherlands Income and Capital Tax Treaty (2001). The mere fact that the tax is not referred to in article 2(3) of the Belgium-Luxembourg Income and Capital Tax Treaty (1970) and the Belgium-Netherlands Income and Capital Tax Treaty (2001), nor is there a domestic qualification that is relevant for the application of the respective tax treaties.

The Court of Appeal (Brussels) acknowledged that the NAT is not listed in article 2(3) of either the Belgium-Luxembourg Income and Capital Tax Treaty (1970) or the Belgium-Netherlands Income and Capital Tax Treaty (2001). This situation could be explained because the tax was not applicable to foreign funds (see section 2.1) when the Belgium-Netherlands Income and Capital Tax Treaty (2001) was concluded, nor when the Belgium-Luxembourg Income and Capital Tax Treaty (1970) was (last) modified by the Belgium-Luxembourg Protocol (2002). The risk of double taxation only arose in 2003, when the scope of the NAT was enlarged to cover non-residents. The Court of Appeal (Brussels) referred to the Belgian administrative commentaries on tax treaties, which stated that a tax treaty should be interpreted in good faith and in accordance with the OECD Model and the Commentaries on the OECD Model.41 It also ruled that the concept "tax on capital" is defined in article 2(1) and (2) of the Belgium-Luxembourg Income and Capital Tax Treaty (1970) or the Belgium-Netherlands Income and Capital Tax Treaty (2001). Consequently, the NAT should be qualified as a covered tax on the basis of article 2(4) of the Belgium-Luxembourg Income and Capital Tax Treaty (1970) or the Belgium-Netherlands Income and Capital Tax Treaty (2001). According to this analysis, the national (Belgian) denomination of the tax as such was deemed to be irrelevant, as well as the question of whether Belgian legislation in general defines the concept "tax on capital". The Court of Appeal (Brussels) further decided that it is irrelevant whether article 2(3) of the Belgium-Luxembourg Income and Capital Tax Treaty (1970) contains an exhaustive or illustrative list of taxes covered. The NAT taxes an element of the capital of taxpayers, and should be qualified as a tax on capital. The Court of Appeal (Brussels), therefore, concluded that, under both the Belgium-Luxembourg Income and Capital Tax Treaty (1970) and the Belgium-Netherlands Income and Capital Tax Treaty (2001), Belgium could not impose the NAT.

3.2.4. Supreme Court decision of 21 April 2022

The tax administration appealed to the Supreme Court.42 The Supreme Court started its analysis by stating that article 2(3) of the Belgium-Luxembourg Income and Capital Tax Treaty (1970):

exhaustively lists the taxes to which the Convention applies in respect of Belgium, namely the individual income tax, the corporate income tax, the tax on legal entities and the non-resident income tax.

As the NAT is not included in "the taxes exhaustively listed in article 2(3)... nor is it identical or substantially similar to those taxes", the Supreme Court held that the tax was not covered by the Belgium-Luxembourg Income and Capital Tax Treaty (1970). As a result, the Supreme Court quashed a part of the judgment of the Court of Appeal (Brussels), insofar as it decided that the Belgium-Luxembourg Income and Capital Tax Treaty (1970) precluded the application of the Belgian NAT to the Luxembourg funds.

With regard to the Belgium-Netherlands Income and Capital Tax Treaty (2001), the Supreme Court ruled that:

Unlike the Belgium-Luxembourg DTC, the Belgium-Netherlands DTC, having regard to the use of the term "in particular", lists in a non-exhaustive manner the type of tax to which it applies.

40. Aside from the arguments discussed in secs. 3.2.2. and 3.2.3., the tax administration and the taxpayer disagreed on whether both funds qualified as "residents" under the Belg.-Lux. Income and Capital Tax Treaty (1970) and the Belg.-Neth. Income and Capital Tax Treaty (2001). According to the tax authorities, the Dutch funds were enjoying a subjective tax exemption under Dutch corporation tax, while the Luxembourg funds were not liable to any of the taxes covered by the Belg.-Lux. Income and Capital Tax Treaty (1970). The Court of Appeal (Brussels) ruled that the Dutch funds should qualify as a resident for the purposes of the Belg.-Neth. Income and Capital Tax Treaty (2001), given that, on the basis of the Inleiding tot de algemene commentaarbijdrage overeenkomsten tot het vermijden van dubbele belasting inzake belastingen naar het inkomen en naar het vermogen / Introduction au commentaire général des conventions préventives de la double imposition en matière d’impôts sur les revenus et sur la fortune / Introduction to the general commentaries on double taxation conventions on income and capital, at 83, it is sufficient that a person is "subject to tax", even though no tax is paid in practice. With regard to the Luxembourg funds, the Court of Appeal (Brussels) decided that the funds should also be qualified as residents under the Belg.-Lux. Income and Capital Tax Treaty (1970), as they were subject to the Luxembourg NAT. According to the Court of Appeal (Brussels), art. 4(1) Belg.-Lux. Income and Capital Tax Treaty (1970) solely requires that the taxpayer is subject to a tax, but it is not necessary that such tax is also covered as such by the tax treaty.

41. Administrative Commentaries on Double Taxation Conventions, supra n. 25 at Introduction, m. no. 59-60.

Consequently, the Belgium-Netherlands Income and Capital Tax Treaty (2001) applied to the NAT which, according to the Supreme Court, “should be considered as a tax on capital within the meaning of article 2.1 of that convention”. However, the Supreme Court did decide that the Court of Appeal (Brussels) had decided correctly that Belgium could not levy the NAT under the Belgium-Netherlands Income and Capital Tax Treaty (2001). Accordingly, the Supreme Court upheld that part of the judgment of the Court of Appeal (Brussels).

4. Comment

4.1. The meaning of the term “taxes on capital”

One of the core issues in the two Supreme Court decisions is establishing the meaning of the term “taxes on capital” as set out in article 2 of the OECD Model. As noted in section 3.1.4., the wording of article 2 of the Belgium-Luxembourg Income and Capital Tax Treaty (1970) differs from that of article 2 of the OECD Model. For that reason, this analysis first addresses the decision of 21 April 2022 concerning the Belgium-Netherlands Income and Capital Tax Treaty (2001), article 2 of which corresponds to article 2 of the OECD Model.

According to the definition of article 2(2) of the OECD Model, the term “taxes on capital” refers to all taxes imposed on total capital, or on elements of capital. Although that definition is not very illuminating, it clarifies that taxes on capital do not necessarily concern the entirety of a taxpayer’s capital. For instance, a tax on a taxpayer’s real estate or investment portfolio may also qualify as a tax on capital. The definition also clarifies that a tax should be “imposed on” capital for it to qualify as a tax on capital. Of course, that clarification raises the question of whether it is sufficient that the tax base consists of (elements of) capital, or whether the tax object also has to be (elements of) capital.

In a 2009 decision, a Dutch court took the position that a tax only qualifies as a tax on capital if its tax object is capital.43 That case concerned a municipal commuter tax that applied to individuals that did not have their main residence in the municipality in question, but had a furnished house available for their own use in that municipality for more than 90 days in a tax year. The tax was due at a rate of 0.569% of the fair market value of the house, with fixed minimum and maximum amounts. A Swiss resident took the position that the commuter tax constituted a tax on capital which, under the Netherlands-Switzerland Income and Capital Tax Treaty (1951),44 could only be levied in Switzerland. The Dutch court dismissed that argument and held that the tax could also apply to individuals that had a furnished house available in the municipality for more than 90 days, even though they did not own the house. The fact that the tax base referred to the value of the house did not affect that conclusion. The court held that the commuter tax was not covered by the Netherlands-Switzerland Income and Capital Tax Treaty (1951).45 The Dutch court, therefore, seems to suggests that a tax on capital necessarily has (elements of) capital as its tax object. Consequently, it is insufficient that the tax base of a tax consists of (elements of) capital for it to qualify as a tax on capital. That position has been criticized in legal literature on the basis that it introduces an intricate distinction that complicates treaty interpretation and application, especially where the residence state is asked to analyse a tax levied in the other state. For that reason, it has been argued that the requirement that a tax should be “imposed on” (elements of) capital should be considered to be satisfied if the tax base consists of (elements of) capital.46

While it is true that a distinction between tax object and tax base may complicate the analysis, it is important to emphasize an additional issue that may have influenced the Dutch court’s decision. As noted previously in this section, the applicable rules did not require that the taxpayer was the owner of the house for the commuter tax to apply. The only requirement was that the taxpayer had a furnished house available for their own use for a sufficient period of time. Based on the text of the decision, it appears that that element was decisive in the court’s line of reasoning. That is to say, the court acknowledges that the tax base refers to an element of capital, but it also stresses that it does not necessarily concern the taxpayer’s capital.

44. For the sake of completeness, the relevant paragraph of the original text of the decision in Dutch in Decision No. 07/1879 (2009), supra n. 44 reads as follows: “Gelet op artikel 1 heeft het Verdrag ten doel de belastingtobelegeringen van de beide Staten te beschermen tegen de dubbele belasting die zou kunnen voortvloeien uit de gelijkgestemde toepassing van de Nederlandse en Zwitserse wetten betreffende de directe belastingen op (bestanddelen van) het inkomen en op (bestanddelen van) het vermogen. Naar het oordeel van de rechtbank valt de forensenbelasting niet onder de reikwijdte van het Verdrag omdat de belasting kan worden geboekt in het vermogen van de natuurlijke persoon die op meer dan 90 dagen van het belastingjaar voor zich of zijn gezin een gemeldhuis woning beschikbaar houdt, terwijl deze woning niet tot diens vermogen behoort. Ook de gekozen hef- fingsmaatstaf, zijnde de WOZ-waarde van het object waarvan de woning deel uit maakt, maakt niet dat de forensenbelasting een directe belasting is op een bestanddeel van het vermogen. De rechtbank is van oordeel dat het Verdrag in deze toepassing mist.” (In view of Article 1, the aim of the Convention is to protect the taxpayers of both States against the double taxation that could result from the simultaneous application of the Dutch and Swiss laws on direct taxes on (elements of) income and on (elements of) capital. In the opinion of the court, the commuter tax does not fall within the scope of the treaty because the tax can be levied from the natural person who keeps a furnished home available for himself or his family on more than 90 days of the tax year, while this home is not part of his assets. Also, the chosen tax measure, being the WOZ value of the property of which the dwelling forms part, does not make the commuter tax a direct tax on a component of wealth. The court is of the opinion that the Treaty lacks application in this case.” (authors’ translation)).

45. R. Ismer & A. Blank, Article 2, in Klaus Vogel on Double Taxation Conventions, para. 31. (E. Reimer and A. Rust eds., 4th edn., 2015), who state that “such fine distinctions appear hardly appropriate since such understanding could have implications not only for the State levying such tax, but also, where different, for the State of residence, which would have to answer the difficult question of the tax object of a tax levied in the other State. Therefore, the requirement that the taxes must be ‘imposed on’ is satisfied where the tax base depends on these criteria.”

46. See the decision of the Dutch Rechtbank (District Court, Rb) Zutphen in NL. Rb Zatphen, 12 Aug. 2009, Decision No. 07/1879. Case Law IBFD. Convention between the Kingdom of the Netherlands and the Swiss Confederation for the Avoidance of Double Taxation with Respect to Taxes on Income and Capital (unofficial translation) (12 Nov. 1952), Treaties & Models IBFD.
In legal literature, attention has been drawn to the subtle distinction between capital and property in the OECD Model.\(^\text{47}\) In this view, property is to be understood as a sub-category of capital, in that property refers to capital that is owned by a taxpayer (it being understood that a broad interpretation should be given to ownership as referring to all rights on property, also including, for example, the right to use something). Given the structure of the OECD Model, the argument goes that ownership is a requirement for a tax to constitute a tax on capital (i.e. the tax should not only be imposed on capital, it should be imposed on the taxpayer’s capital).\(^\text{48}\)

At first sight, the Supreme Court does not appear to address the distinction between tax base and tax object or between capital and property in its decision of 21 April 2022. It simply states that “the DTT Belgium-Netherlands applies to the [NAT], which should be considered as a tax on capital within the meaning of article 2(1) of that treaty.”\(^\text{49}\) A comparison with the 22 March 2022 decision, however, suggests that the Supreme Court implicitly takes a position on both distinctions. As noted in section 3.1.4., the Supreme Court’s conclusion in the 25 March 2022 decision was determined by the specific wording of the Belgium-Luxembourg Income and Capital Tax Treaty (1970). On the basis of that wording, the Supreme Court took the position that article 2(3) of the Belgium-Luxembourg Income and Capital Tax Treaty (1970) contained an exhaustive list of “existing” taxes to which the tax treaty applied and that the future taxes referred to in article 2(4) had to be identical or substantially similar to one of those taxes. According to the Supreme Court, the only tax on capital mentioned in article 2(3) of the Belgium-Luxembourg Income and Capital Tax Treaty (1970) was the Luxembourg wealth tax. As a result, in order for a tax to constitute a tax on capital within the meaning of the Belgium-Luxembourg Income and Capital Tax Treaty (1970), it was not sufficient that its tax base refers to an element of a taxpayer’s property. It was also necessary that the tax has as its tax object the state of the taxpayer’s capital.\(^\text{50}\)

That statement seems to suggest that the Supreme Court took account of the distinction between capital and property referred to previously in this section. Not only did the Supreme Court refer to both “un élément du patrimoine d’un contribuable” (which in this context could be translated as “an element of a taxpayer’s property”) and “l’état de fortune d’un contribuable” (“fortune” being the French translation of “capital” in the Belgium-Luxembourg Income and Capital Tax Treaty (1970)), but it also stated that it concerns the property/capital of the taxpayer (“patrimoine d’un contribuable… fortune du contribuable”).\(^\text{51}\)

More importantly, a comparison between the two decisions suggests that the Supreme Court did not consider that a tax on capital within the meaning of article 2 of the OECD Model necessarily has the taxpayer’s capital as its tax object. In the 22 March 2022 decision, the Supreme Court held that, due to the exhaustive nature of article 2(3) of the Belgium-Luxembourg Income and Capital Tax Treaty (1970), a tax only qualifies as a tax on capital for purposes of that tax treaty if it is identical or substantially similar to the Luxembourg wealth tax. And, in order for that to be the case, it was insufficient that the tax base refers to an element of a taxpayer’s property. It was also necessary that the tax object is the state of the taxpayer’s capital. According to the Supreme Court, the NAT did not qualify as a tax on capital under that tax treaty because its tax object was not the state of a fund’s capital, but the amount of savings that it has been able to collect from year to year in Belgium.\(^\text{52}\) In its decision of 21 April 2022, in contrast, the Supreme Court accepted that the NAT qualified as a tax on capital within the meaning of the Belgium-Netherlands Income and Capital Tax Treaty (2001), article 2 of which corresponds to article 2 of the OECD Model.\(^\text{53}\) In the context of the Belgium-Netherlands Income and Capital Tax Treaty (2001), therefore, the Supreme Court did not consider it relevant that the tax object of the NAT is not (the state) of a fund’s capital. Instead, it appears to be sufficient that the tax base is determined by reference to (an element of) a fund’s capital.

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48. See Knotzer, supra n. 47, at sec. 3.4.3. p. 75, who criticizes the Dutch court on the basis that it gives an overly narrow interpretation to ownership as only referring to legal ownership. According to that author, the Dutch court’s reasoning included a requirement of ownership, as a house would only be available to a taxpayer if that taxpayer had some right to use it (i.e. ownership in the broad sense).

49. Case No. F.19.0102.N (21 Apr. 2022), supra n. 4, m. no. 6, where it is stated that: “Gelet op het voorgaande is het DBV Belgie-Nederland van toepassing als een belasting die naar het vermogen de in de zin van artikel 2.1 van dat verdrag.” (In view of the foregoing, the Belgium-Netherlands DTC applies to the annual tax within the meaning of the aforementioned Article 16d, which is to be regarded as a tax on capital within the meaning of Article 2.1 of that treaty (authors’ translation)).

50. Case No. F.19.0047 F (25 Mar. 2022), supra n. 4, at pp. 5-6, where it is stated that: “Le seul impôt sur la fortune cité par la convention après avenant est l’impôt sur la fortune luxembourgeoise… Il s’ensuit que, pour qu’une taxe constitue un impôt sur la fortune au sens de la convention, il ne suffit pas qu’elle ait pour base de calcul un élément du patrimoine d’un contribuable. Encore faut-il que cette taxe ait pour assiette l’état de fortune du contribuable.” (“The only tax on capital mentioned by the treaty after its amendment is the Luxembourg wealth tax. It follows that, for a tax to constitute a wealth tax within the meaning of the treaty, it is not sufficient that its tax base consists of an item of a taxpayer’s assets. It is also necessary that the tax object is the taxpayer’s wealth (authors’ translation).”) This statement appears to be based on the following paragraph in the Advocate-General’s opinion in the case: “Il s’ensuit que le simple fait qu’une taxe ait pour base de calcul un élément du patrimoine d’un contribuable ne suffit pas à faire de cette taxe un impôt sur la fortune au sens de la convention. Encore faut-il que cette taxe ait pour assiette l’état de fortune du contribuable.” (“It follows that the mere fact that a tax has as its basis of calculation an item of a taxpayers’ assets is not sufficient to make the tax a tax on wealth within the meaning of the convention. It is also necessary that the tax object is the situation or the fact that gives rise to the tax being due, is the state of the taxpayer’s capital.” (author’s translation)) (See BE: Opinion of Advocate-General Inghels, 25 Mar. 2022, Case No. ECLI:BE:CASS:2022:CONC.20220325.1F.5., m. no. 2.) Interestingly, the Advocate-General clarifies that the tax object (“assiette”) refers to the situation or the fact that gives rise to the tax being due (“la situation ou le fait qui donne lieu à la débition de l’impôt, l’état de fortune du contribuable.”). (It follows that the mere fact that a tax has as its basis of calculation an item of a taxpayers’ assets is not sufficient to make the tax a tax on wealth within the meaning of the convention. It is also necessary that the tax object is the situation or the fact that gives rise to the tax being due, is the state of the taxpayer’s capital.” (author’s translation)).


52. Id. at p. 8.

53. Case No. F.19.0102.N (21 Apr. 2222), supra n. 4, m. no. 5.
The position that the future taxes referred to in article 2(4) of the Belgium-Luxembourg Income and Capital Tax Treaty (1970) must be identical or substantially similar to one of the taxes listed in article 2(3) of that tax treaty is addressed in section 4.3. If that position is accepted, it could be argued that a tax only qualifies as a tax on capital for purposes of the Belgium-Luxembourg Income and Capital Tax Treaty (1970) if its tax object is (an element of) the taxpayer’s capital. That was also the case for the Luxembourg wealth tax as it applied when the Belgium-Luxembourg Income and Capital Tax Treaty (1970) was signed, and the majority opinion in legal literature appears to be that the assessment of “substantial similarity” under article 2(4) of the OECD Model should take account of both the tax base and the tax object.

A final issue to be addressed in this context is whether the preceding analysis is influenced by the object and purpose of the relevant tax treaty. Article 31 of the Vienna Convention (1969) provides that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

From the perspective of that provision, it may be interesting to consider sources that could shed light on the intentions of the contracting states when signing a tax treaty. The Belgian parliamentary records in relation to the Belgium-Netherlands Income and Capital Tax Treaty (2001) are of particular interest in this regard, as the NAT already applied when that tax treaty was signed. The explanatory memorandum to the Belgian law ratifying the Belgium-Netherlands Income and Capital Tax Treaty (2001) states that article 2(3)(b)(5) (which refers to the Dutch wealth tax) and article 22 of the tax treaty:

were included on the request of the Netherlands, even though Belgium does not have any capital taxes and the Dutch wealth tax has been abolished as from 1 January 2001. In practice, therefore, those provisions will only have relevance if at least one of both states introduces (or reintroduces) a tax on capital.

At first glance, that statement appears to suggest that the Belgian treaty negotiators considered that the NAT (as it applied at the time) did not constitute a tax on capital within the meaning of the Belgium-Netherlands Income and Capital Tax Treaty (2001). However, that interpretation would be difficult to reconcile with the Supreme Court’s position discussed previously in this section. If the current version of the NAT (which applies on the basis of a fund’s NAV per share) qualifies as a tax on capital, it is difficult to see why the conclusion would be different for the earlier version of the NAT (which applied on the basis of a fund’s asset value). From that perspective, it could be argued that the statement in the explanatory memorandum that “Belgium does not have any capital taxes” should be read as “Belgium does not have any capital taxes that are relevant from the perspective of the tax treaty”. In other words, even though the earlier version of the NAT could be regarded as a tax on capital within the meaning of the Belgium-Netherlands Income and Capital Tax Treaty (2001), there was no reason to take it into account when concluding that tax treaty, as it could not give rise to conflicting claims of taxing jurisdiction (given that it only applied to Belgian funds). That situation changed in 2003, when the scope of application of the NAT was extended to foreign funds, but arguably there was no reason to amend the tax treaty because that “new version” of the NAT was automatically covered by the Belgium-Netherlands Income and Capital Tax Treaty (2001) (either because it qualified as a future tax within the meaning of article 2(4), or because article 2(2) also applies to future taxes; on that issue, see sections 4.3. and 4.4.).

For the sake of completeness, it should be noted that the Supreme Court decision to the effect that the NAT qualifies as a tax on capital for purposes of the Belgium-Netherlands Income and Capital Tax Treaty (2001) confirms (albeit implicitly) that the classification of a tax for treaty purposes is not affected by the place of the tax in the domestic legal order (given that the NAT was governed by the Belgian Inheritance Tax Code applying at the relevant time), nor by the fact that the 2003 amendment of the NAT (whereby the NAT was extended to foreign funds) was not notified to the competent authorities of the Netherlands (even though article 2(4) of the Belgium-Netherlands Income and Capital Tax Treaty (2001) provides, in line with article 2(4) of the OECD Model, that the competent authorities “notify each other of any significant changes that have been made in their taxation laws”). This state of affairs is in line with the position in legal literature, where it is observed that the provision does not prescribe any specific consequences for breaching the obligation.

Another interesting point in this context is that the Belgium-Luxembourg Income and Capital Tax Treaty (1970) deviates from the current version OECD Model. The wording of article 2(4) of the OECD Model (2017) requires that the contracting states notify each other of significant changes that have been made in their taxation laws. Article 2(4) of the Belgium-Luxembourg Income and Capital Tax Treaty (1970) deviates from that wording by requiring that the competent authorities of the contracting states should

55. See, for example, P. Brandstetter, “Taxes Covered” (IBFD 2011), Books IBFD.
56. Although it did not apply to foreign funds at that time. As noted in sec. 2. the NAT was introduced in 1993 and extended to foreign funds in 2003.
58. That interpretation also explains why the Protocol amending the Convention between the Kingdom of Belgium and the Kingdom of the Netherlands for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital, and Its Protocols I and II, Signed at Luxembourg on 5 June 2001 (23 June 2009), Treaties and Models IBFD (also Protocol of 23 June 2009, Official Gazette, 11 June 2014) [hereinafter the Belg.-Neth. Protocol (2009)] does not affect the analysis. It is true that the Belg.-Neth. Protocol (2009) does not extend the scope of application of the Belg.-Neth. Income and Capital Tax Treaty (2001) to the NAT (which also applied to foreign funds when the Belg.-Neth. Protocol (2009) was concluded), but it should be noted that it concerned a Protocol that specifically dealt with the exchange of information. More importantly perhaps, there was no reason for the Belg.-Neth. Protocol (2009) to consider the NAT, as the Belg.-Neth. Income and Capital Tax Treaty (2001) automatically applied to the NAT because from the 2003 extension it also applied to foreign funds.
59. Ismer & Blank, supra n. 46, at para. 72.
not notify each other of changes that have been made in their taxation laws at the end of each year. This provision corresponds to article 2(4) of the OECD Draft Model (1963), and, as it omits the adjective “significant”, could be read as implying a broader duty to notify (i.e. any changes to the taxation laws should be reported). However, in one of the prior judgments of the Court of Appeal (Brussels) concerning the Belgium-Luxembourg Income and Capital Tax Treaty (1970), it was confirmed explicitly by the Court of Appeal (Brussels) (as the Supreme Court implicitly does in its two decisions of 2022[66]) that the absence of a notification does not affect the classification of a tax for treaty purposes.61

4.2. The illustrative and/or exhaustive nature of article 2(3) of the Belgium-Luxembourg Income and Capital Tax Treaty (1970) with regard to existing taxes?

In both its judgments of 2022, the Supreme Court came to the conclusion that article 2(3) of the Belgium-Luxembourg Income and Capital Tax Treaty (1970) has an exhaustive rather than an illustrative nature.62 On the basis of that position, the Supreme Court held that the Belgium-Luxembourg Income and Capital Tax Treaty (1970) only applied to the taxes that are nomination listed in that provision. According to this analysis, it is important to emphasize that the Belgium-Luxembourg Income and Capital Tax Treaty (1970) deviates from the wording used in the OECD Model. The (standard) wording of article 2(3) in the OECD Model is as follows: “the existing taxes to which the Convention shall apply are in particular…” (authors’ emphasis). In the opinion of the Supreme Court in its 21 April 2022 judgment, the exhaustive character of the provision in the Belgium-Luxembourg Income and Capital Tax Treaty (1970) results from the omission of the words “in particular.”63

The Commentary on Article 2(3) of the OECD Model explicitly states that in principle the list of taxes included in article 2(3) of the OECD Model is not exhaustive, and merely serves to illustrate the preceding provisions that provide for a general definition for taxes on income and capital.64 However, states can opt to take an exhaustive approach by using the following wording: “the taxes to which the Convention shall apply are...” (authors’ emphasis),65 as is the case in article 2(3) of the Belgium-Luxembourg Income and Capital Tax Treaty (1970). This approach was also recognized by the Belgian tax authorities in their commentaries on double taxation conventions: “Even though the lists of taxes are in principle complete, it follows from the wording “in particular” that they are not intended to be restrictive but rather explanatory.”66

One peculiar aspect of the Belgium-Luxembourg Income and Capital Tax Treaty (1970) is that it contains an exhaustive definition of taxes covered in article 2(3), while, at the same time, still providing for a general definition of taxes on income and capital in article 2(1) and (2). That position differs from the suggestion that is made in the Commentary on Article 2 of the OECD Model. The Commentary on Article 2 acknowledges that certain countries do not include the equivalent of article 2(1) and (2) of the OECD Model in the tax treaties that they conclude so as to list exhaustively the taxes to which the tax treaty applies and to clarify that the tax treaty will also apply to future taxes that are similar to the listed taxes. The Commentary on Article 2 of the OECD Model suggests a wording in respect of article 2 of the OECD Model that can be included in such a case, and that wording omits the term “in particular” (i.e. “1. The taxes to which the Convention shall apply are: (a) (in State A);...; (b) (in State B);...”).67 However, it is important to emphasize that this passage in the Commentary on Article 2 of the OECD Model concerns the situation in which the “general” definition of article 2(2) of the OECD Model is not included. In such a case, the list of existing taxes is exhaustive (which explains the omission of “in particular”) and the next paragraph on “subsequent taxes” also necessarily refers to that list of existing taxes (see section 4.3, for more on this issue). The Commentary on Article 2 of the OECD Model does not comment on tax treaties (such as the Belgium-Luxembourg Income and Capital Tax Treaty (1970)) in which the words “in particular” have been omitted, although the general definition in article 2(2) of the OECD Model is included.

For the sake of clarity, four types of tax treaty should be distinguished in the authors’ opinion, based on whether the tax treaty in question contains the general definitions of article 2(1) and 2(2) of the OECD Model and whether article 2(3) contains the wording of the OECD Model. These four types of tax treaty are as follows:

(1) Tax treaties that follow the OECD Model and, therefore, contain the standard formulations set out in article 2(1)-(3) of the OECD Model. In these cases, there can be no doubt that the list of taxes in article 2(3) is of a merely illustrative nature, which is indicated by including the wording “in particular.”68 Taxes, even though they are not referred to in the list of article 2(3), can be covered by the tax treaty provided that they qualify as “taxes on income or

61. BE: Court of Appeal (Brussels), 26 Mar. 2019, Case 2015/AF/148, companies, names not disclosed (the taxpayers) and De Belgische Staat (the tax authorities), Case Law IBFD. In an unrelated (but similar) case also dealing with the classification of the NAT under the Belg.-Lux. Income and Capital Tax Treaty (1970), the Belgian Court of First Instance indicated that this resulted from an interpretation in good faith of that tax treaty (see BE: Court of First Instance (Brussels), 5 Dec. 2016, 2015/6505/A, m. no. 6).
63. Case No. F.19.0082.N (21 Apr. 2022), supra n. 4, m. no. 5.
64. OECD Model Tax Convention on Income and on Capital: Commentary on Article 2(3) para. 6 (21 Nov. 2017), Treaties & Models IBFD [hereinafter OECD Model: Commentary (2017)].
65. Id., at para. 6.1.
66. Administrative Commentaries on Double Taxation Conventions, supra n. 25 at m. no. 2/31.
capital” as defined in article 2(1) and (2). Conversely, taxes that are not “taxes on income or capital” can be covered by the mere fact of being listed in article 2(3), given the “amplifying effect” of the latter article.70

2. Tax treaties that do not contain the equivalent of article 2(1)-(2) of the OECD Model (referring to the general definitions) and do not contain the words “in particular” that define clearly the taxes covered in an exhaustive manner. Accordingly, (existing) taxes that are not explicitly listed in article 2(3) do not fall within the material scope of the tax treaty in question, as confirmed in a report issued by OECD Working Party 30 (1969).71

3. At least in theory, it is possible that tax treaties omit article 2(1)-(2), but contain the standard (illustrative) wording of article 2(3) of the OECD Model (“in particular”). This category of tax treaties is more difficult to assess and is not discussed in the Commentary on Article 2 of the OECD Model nor in the report of Working Party 30.

4. Tax treaties, such as the Belgium-Luxembourg Income and Capital Tax Treaty (1970), that contain the exhaustive wording of article 2(3) of the OECD Model (by omitting the words “in particular”), but nevertheless also contain article 2(1) and (2) of the OECD Model, which provide for the general definitions. According to the report of Working Party 30, in this case, the list of existing taxes should indeed be considered to be exhaustive.72

The Commentary on Article 2 of the OECD Model does not refer explicitly to this fourth category of tax treaties, like the Belgium-Luxembourg Income and Capital Tax Treaty (1970). Other model conventions that use similar wording also suggest that the omission of “in particular” makes the list of existing taxes exhaustive. In this regard, reference can be made to article 2 of the US Model (2016),73 which is patterned in the same way, i.e. it contains a general definition of taxes covered while, at the same time, including an exhaustive enumeration of the taxes covered in article 2(3). According to the Technical Explanation to the 2006 US Model (which is on that point identical to the 2016 US Model, this article should be regarded as defining an exhaustive list of taxes covered by the Model, i.e. “Paragraph 3 lists the taxes in force at the time of signature of the Convention to which the Convention applies.”74 The same view held with regard to article 2 of the OECD Estate, Inheritance and Gift Model (1982), which also contains both a general definition75 in article 2(1) and (2) in combination with a limitative enumeration of inheritance taxes covered in article 2(3).76 The prevalent view is that the OECD Estate, Inheritance and Gift Model (1982) contains an exhaustive list of taxes covered,77 despite including a general definition and an exhaustive enumeration of the taxes covered (as indicated by referring to the words “in particular”).

The Supreme Court decided in line with these findings that solely omitting the wording “in particular” in article 2(3) of a tax treaty is sufficient to make article 2 an exhaustive list of the taxes covered by the tax treaty in question, even though the general descriptions contained within article 2(1) and (2) are kept in place. Accordingly, the Supreme Court attached great importance to the wording of the tax treaty.78 An aspect that also likely played a role in this respect is the fact that the Belgian Model Convention (2010), as well as most of the tax treaties concluded by Belgium, contain the standard wording of the OECD Model. As a result, deviating from that standard wording could be regarded as an indication of the intent of the treaty partners to define the scope of the tax treaty in a restrictive manner.

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71. OECD, Working Party No. 30 of the Fiscal Committee, supra n. 69, at para. 10. It should be remembered that OECD, Working Party No. 30 of the Fiscal Committee, supra n. 69 should be considered to be a mere preparatory document relating to the OECD Model Convention and, therefore, does not give an indication as to the intention of the contracting states when signing a tax treaty.
72. Id., at para. 38.
74. Article 2 of the US Model (2016) reads:
1. This Convention shall apply to taxes on income imposed on behalf of a Contracting State irrespective of the manner in which they are levied.
2. There shall be regarded as taxes on income all taxes imposed on total income, or on elements of income, including taxes on gains from the alienation of property.
3. The existing taxes to which this Convention shall apply are:

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75. Technical Explanation to the US Model: Article 2 (2006), Treaties & Models IBFD.
76. OECD Estate, Inheritance and Gift Model Convention, art. 2 (3 June 1982), Treaties & Models reads:
1. This Convention shall apply to taxes on estates and inheritances and on gifts imposed on behalf of a Contracting State or of its political subdivisions or local authorities, irrespective of the manner in which they are levied.
2. There shall be regarded as taxes on estates and inheritances taxes imposed by reason of death in the form of taxes on the corpus of the estate, of taxes on inheritances, of transfer duties, or of taxes on donations mortis causa. There shall be regarded as taxes on gifts taxes imposed on transfers inter vivos only because such transfers are made for no, or less than full, consideration.
77. Id., at art. 2 reads:
3. The existing taxes to which the Convention shall apply are
a) (in State A)...
(b) (in State B)...
78. OECD Estate, Inheritance and Gift Model Convention: Commentary on Article 2, para. 8 (3 June 1982), Treaties & Models. See also Kloksar, supra n. 68, at sec. 5: 3.3, p. 111 (and references cited there).
79. It has been questioned whether under this interpretation art. 2(1) and (2) of the tax treaty in question still have an “effet utile”. The Supreme Court appears to suggest, that in the tax treaty, these articles could still have a meaningful effect due to the specific wording used, and the list of taxes covered for Luxembourg (see sec. 4.4).
4.3. Article 2(4) on subsequent taxes and its interaction with article 2(3)

4.3.1. Opening comments

An aspect that was briefly covered in one of the Supreme Court judgments of 2022 was the potential qualification of the NAT as an identical or substantially similar tax that is imposed after the date of signature of the tax treaty in addition to, or in place of, the existing taxes, as provided for in article 2(4) of the Belgium-Luxembourg Income and Capital Tax Treaty (1970). In this context, it should be noted that several interesting aspects of the article 2(4) of the Belgium-Luxembourg Income and Capital Tax Treaty (1970) have been discussed in the Supreme Court decisions in question and in the prior procedures.

4.3.2. Does article 2(4) refer to the taxes listed in article 2(3)?

In literature, it has been submitted that article 2(4) ties in with the list of taxes enumerated in article 2(3), irrespective of whether the list in article 2(3) is exhaustive or illustrative. Accordingly, the “existing taxes” that should be the object of comparison are those enumerated in article 2(3). If it is accepted that the scope of a tax treaty such as the Belgium-Luxembourg Income and Capital Tax Treaty (1970) is not determined by article 2(1) and (2) but, rather, by article 2(3) (on this point, see section 4.4), the result would be that article 2(3) also has a restrictive effect on the scope of a tax treaty with regard to subsequently introduced taxes.

It should be noted that a different opinion can be found in the report by Working Party 30 from 1969. Specifically with regard to tax treaties so modelled, like the Belgium-Luxembourg Income and Capital Tax Treaty (1970), the report states that:

the OECD analysis of recent Conventions shows further that in 3 Conventions concluded by France... the list of taxes is exhaustive although those Conventions have adopted a general description of the taxes covered by the Convention. This implies obviously that the general description of taxes covered is of importance only with respect to “subsequent taxes”... but of no importance with respect to the “existing” taxes. [Emphasis added] 81

This passage should be read together with the discussion of the clause on “subsequent taxes” (article 2(4)) in the same report. There, it is argued there that the omission of article 2(1) and 2(2) also has an effect on that clause:

under the present OECD concept, taxes being introduced after the signature of the Convention are automatically subject to the Convention, provided they are taxes on income (capital) within the meaning of paragraphs 1 and 2. This is the result of an interpretation of the present paragraph 4 in the light of paragraphs 1 and 2: paragraph 4 states that the Convention applies also to any “identical or substantially similar” taxes that are subsequently imposed in addition to, or in place of, the existing taxes. At present, a subsequently introduced tax is considered to be “identical or substantially similar” if it is a tax on income (capital) in the meaning of paragraphs 1 and 2. If however, paragraphs 1 and 2 were omitted, the criterion “identical or substantially similar” could be interpreted only in respect of the taxes enumerated in the list of taxes. [Emphasis added] 85

These passages suggest that the precise effect of omitting the phrase “in particular” depend on whether article 2(1) and (2) are included in a tax treaty, rather than merely looking at whether article 2(3) is defined restrictively. In tax treaties such as the Belgium-Luxembourg Income and Capital Tax Treaty (1970), where articles 2(1) and (2) are not omitted, it could be derived from the report that “subsequent taxes” can be covered by the tax treaty in question, provided that these taxes are identical or substantially similar to those listed in the relevant articles. According to this interpretation, the NAT could fall within the scope of the tax treaty, provided that it qualifies as a “tax on capital” (see section 4.1.). According to the Supreme Court, in contrast, the comparison should be between the NAT and the (exhaustive) list of taxes as enumerated in article 2(3). 86

4.3.3. The object of comparison of article 2(4)

However, another potential argument, which was not discussed extensively in the Supreme Court judgments, is whether, when applying article 2(4), it is possible to rely on the list of taxes enumerated for Luxembourg in the Belgium-Luxembourg Income and Capital Tax Treaty (1970) to bring the Belgian NAT in scope of that tax treaty. As noted in section 3.1.1., article 2(3) of the Belgium-Luxembourg Income and Capital Tax Treaty (1970) states that, for Luxembourg, the wealth tax is covered by the tax treaty. This tax, which qualifies as a “tax on capital”, could serve as a proxy for other taxes on capital to enter the scope of the tax treaty. Indeed, article 2(4) does not require that when assessing the comparability of subsequent taxes, the taxes listed in respect of that state should only be taken into account. A combined reading of article 2(3) and (4) of the applicable tax treaty could lead to the conclusion that (future) Belgian taxes on capital (such as the NAT; see section 4.1.) could fall within scope of the Belgium-Luxembourg Income and Capital Tax Treaty (1970) due to the similarity with the Luxembourg tax on capital that is listed in that tax treaty.

In legal doctrine, diverging views are advanced as to whether this is a viable option. According to one group of authors, this interpretation of article 2(4) is permitted, given that the article does not precisely identify as to which state’s taxes the comparison should be made: 87 even a tax levied only in the other state may serve as a benchmark... one may assume that the similarity of a tax to a tax levied in the other contracting state would have been sufficient for the treaty negotiations to include the tax within the scope of the treaty if the tax had existed at that time. 88

80. Case No. F.19.0102.N (21 Apr. 2022), supra n. 4, m. no. 3.
81. Klokar, supra n. 68, at sec. 5.3.3, p. 111.
82. Brandstetter, supra n. 55, at sec. 2.4.
83. OECD, Working Party No. 30 of the Fiscal Committee, supra n. 69, at para. 38.
84. Id., at para. 12.
85. Id.
87. Ismer & Blank, supra n. 46, at para. 70.
88. Lang, supra n. 70.
This reasoning was applied in Undershaft (2009) before the Australian Federal Court (AFC). The case dealt with a UK taxpayer that realized a capital gain that was taxable in Australia. The tax was introduced in 1985, while the applicable treaty was the Australia-United Kingdom Income Tax Treaty (1967). The AFC decided that the Australian capital gains tax was covered by the Australia-United Kingdom Income Tax Treaty (1967), as article that tax treaty in article 1(1), which was similar to article 2(3) of the OECD Model, referred to the UK capital gains tax. Indeed, the AFC compared the new Australian tax to an existing tax mentioned by the other state.

Other authors disagree with this approach to article 2(4), given that this would be contrary to the intention of the contracting states. In a critical case note to Undershaft, the following example was provided:

The US wishes to cover only its federal income tax in its tax treaties, that is, it wants to exclude state income taxes from coverage. Suppose a treaty [partner’s] list in its treaty with the US covers such taxes on its side... On this line of reasoning, a US state income tax that did not exist at the time of the treaty but was introduced subsequently would be covered by the treaty, a result which would cause significant ructions in the US and is completely contrary to the well-known US treaty position.

It should be noted that the Australia-United Kingdom Income Tax Treaty (1967) contained an exhaustive list of taxes covered due to the omission of “in particular” in the article of taxes covered. Accordingly, applying a broad interpretation of article 2(4) with regard to the Belgian NAT in the cases in question could be subject to the same criticism.

The Supreme Court does not appear to be entirely consistent on this issue. In its decision of 21 April 2022, the Supreme Court observed that:

article 2(3) of the Belgium-Luxembourg [Income and Capital Tax] treaty ([1970]) exhaustively lists the Belgian taxes to which the treaty applies, namely the individual income tax, the corporate income tax, the tax on legal entities and the non-resident income tax. The NAT is not among the taxes exhaustively listed in article 2(3), nor is it identical or substantially similar to those taxes, as a result of which the Belgium-Luxembourg treaty does not apply.

In contrast, in its decision of 25 March 2022, the Supreme Court appeared to take account of the Luxembourg wealth tax in considering whether the NAT was “identical or substantially similar” to an existing tax. In particular, the Supreme Court held that:

the only tax on capital referred to in the convention is the Luxembourg impôt sur la fortune [wealth tax]. It follows that, in order for a tax to be a tax on capital within the meaning of the Convention, it is not sufficient that the tax base refers to an element of a taxpayers’ property. It is also required that the tax object is the state of the taxpayer’s capital.

4.4. The scope of article 2(1) and (2)

As noted in section 3.2.4., the Supreme Court considers that the absence of the term “in particular” in article 2(3) of the Belgium-Luxembourg Income and Capital Tax Treaty (1970) means that the list of taxes in that provision is exhaustive. However, as the NAT is not identical or substantially similar to one of the taxes listed, the Supreme Court concluded that it does not qualify as a subsequent tax for purposes of article 2(4) of the Belgium-Luxembourg Income and Capital Tax Treaty (1970). From that conclusion, the Supreme Court inferred that the NAT was not a tax on capital for purposes of the Belgium-Luxembourg Income and Capital Tax Treaty (1970).

Unfortunately, the Supreme Court did not address explicitly the relevance of article 2(1) and (2) of the Belgium-Luxembourg Income and Capital Tax Treaty (1970) for purposes of that discussion. As noted in section 4.2., the Commentary on Article 2 of the OECD Model states that countries may prefer to list exhaustively the taxes to which a tax treaty applies and to clarify that the tax treaty also applies to subsequent taxes that are similar to those listed. For that purpose, the Commentary on Article 2 of the OECD Model proposes a provision in which the list of existing taxes is preceded by the following clause: “The taxes to which the Convention shall apply are.” That statement suggests that the deletion of “in particular” has the effect that the provision exhaustively lists the existing taxes covered by the tax treaty in question. It is, however, important to note that the situation addressed by the Commentary on Article 2 of the OECD Model relates to tax treaties that do not include article 2(1) and (2) of the OECD Model. In other words, the Commentary on Article 2 refers to tax treaties in which article 2(3) of the OECD Model (without “in particular”) is included as article 2(1) and in which article 2(4) of the OECD Model is included as article 2(2). Such tax treaties do not contain a general statement to the effect that the tax treaties apply to taxes on income and on capital (as in article 2(1) of the OECD Model) nor a definition of taxes on income and on capital (as in article 2(2) of the OECD Model). On this point, the Commentary on Article 2 of the OECD Model does not address tax treaties, such as the Belgium-Luxembourg Income and Capital Tax Treaty (1970), in which the list of existing tax treaties is not preceded by the words “in particular” but, which, nevertheless, include provisions corresponding to article 2(1) and (2) of the OECD Model.

According to the Supreme Court, the exhaustive nature of the list of taxes in article 2(3) of the Belgium-Luxembourg Income and Capital Tax Treaty (1970) entails that taxes introduced or amended after the conclusion of the tax treaty can only be covered by the tax treaty if they are identical or substantially similar to the taxes included in the list. Under that interpretation, however, it is unclear as
to what the meaning and relevance of article 2(1) and (2) of the Belgium-Luxembourg Income and Capital Tax Treaty (1970) could be. If article 2(3) and (4) of the Belgium-Luxembourg Income and Capital Tax Treaty (1970) exhaustively and definitively determine which taxes are covered by the tax treaty, article 2(1) and (2) of that tax treaty do not seem to have any additional meaning. Worded differently, if the treaty negotiators intentionally deleted “in particular” from article 2(3) of the Belgium-Luxembourg Income and Capital Tax Treaty (1970), the decision to include article 2(1) and (2) in the tax treaty must have also been intentional.

In legal literature, it has been argued that article 2(1) and (2) of the OECD Model are not restricted to taxes that already apply at the moment when a tax treaty is signed. According to that interpretation, a tax treaty applies to all taxes on income and capital, irrespective of whether those taxes already exist at the time of signing the tax treaty or are introduced (or amended) at a later moment. Article 2(3) contains a list of existing taxes that are covered by the relevant tax treaty (a list that may or may not be exhaustive in nature, depending on the use of “in particular”, in respect of which see section 4.2.). The list may also contain taxes that do not meet the general definition in article 2(2), but, nevertheless, are covered by the tax treaty. In such cases, article 2(3) extends the scope of application beyond the definition of article 2(2), while article 2(4) entails that the tax treaty also applies to future taxes that are similar to the taxes listed in article 2(3), although they do not qualify as taxes on income or capital according to the definition of article 2(2). In contrast, article 2(4) does not have any relevance for taxes that are covered by article 2(1) and (2), as those provisions do not differentiate according to the time of introduction of the tax. Under this interpretation, therefore, future taxes on income and capital are automatically covered by article 2(1), without there being a need to resort to article 2(4). 88

If that interpretation were to be applied to the Belgium-Luxembourg Income and Capital Tax Treaty (1970), the result would be that the NAT qualifies as a tax on capital for purposes of that tax treaty. While it is true that the NAT is not a “subsequent tax” to which article 2(4) applies (as it is insufficiently comparable to the Luxembourg wealth tax, in respect of which see section 4.1.), that would not be decisive ultimately because the NAT qualifies as a tax on capital as referred to in article 2(1) and (2) of the Belgium-Luxembourg Income and Capital Tax Treaty (1970).

The Supreme Court did not address expressly the relevance of article 2(1) and (2) of the Belgium-Luxembourg Income and Capital Tax Treaty (1970) in its reasoning. In its decision of 25 March 2022, however, the Supreme Court briefly referred to article 2(2) of the Belgium-Luxembourg Income and Capital Tax Treaty (1970). Before observing that the only tax on capital listed in the Belgium-Luxembourg Income and Capital Tax Treaty (1970) is the Luxembourg wealth tax, the Supreme Court stated that:

the exhaustive nature of the list of existing taxes in article 2(3) and the extension by article 2(4) to future taxes that are identical or substantially similar to the existing taxes lead to an interpretation of article 2(2) in the light of both the choice made by the contracting states as to which of the taxes that existed in both states should be included in the list, and the characteristics of those taxes.

That statement is somewhat cryptic, but it appears to suggest that the definition of “taxes on capital” in article 2(2) of the Belgium-Luxembourg Income and Capital Tax Treaty (1970) should differ from the definition of that term in tax treaties (such as the Belgium-Netherlands Income and Capital Tax Treaty (2001)) that follow the OECD Model. As the list in article 2(3) is exhaustive in nature and because article 2(4) refers to article 2(3), the definition in article 2(2) should be interpreted in light of the taxes that were selected to be included by the contracting states and in light of the characteristics of those taxes. Presumably, the implication is that a tax would only

96. Ismer & Blank, supra n. 46, at para. 10, who state that: “The term ‘taxes on income and capital’ is explicated in Article 2(2) OECD and UN MC. . . . With respect to these taxes, it does not matter whether they have already been levied at the time of the signing of the Convention or whether they have been introduced or substantially modified later. Such timing issues matter only for Article 2(4) OECD and UN MC and Knotzer, supra n. 47, at sec. 3.2.1, p. 52, who says that: ‘a tax that is introduced in the domestic law of one of the contracting states after the respective convention was signed and is not identical or at least substantially similar to a tax already listed in article 2(3) of the OECD Model may still be covered by a treaty if it is a tax on income or capital according to article 2(1) and (2) of the OECD Model’. Similarly, see Lang, supra n. 70.

97. Ismer & Blank, supra n. 46, at para. 55, who state that: “If the Contracting States include a tax in the list of Article 2(3) OECD and UN MC, the tax is irrefutably deemed to be a tax on income or capital and thus covered by the Convention, whether or not it would fulfill the criteria in Article 2(1) and (2) OECD and UN MC. In such cases, Article 2(3) OECD and UN MC overrides Article 2(1) and (2) OECD MC and amplifies the substantive scope of the actual Convention”.

98. Id., at para. 60.

99. See, in French, Case No. F.19.0047.F (23 Mar 2022), supra n. 4, at p. 3: "Le caractère exhaustif de la liste des impôts actuels visés à l’article 2, § 3, et l’extension envisagée par l’article 2, § 4, à des impôts futurs de nature identique ou analogue aux impôts actuels conduisent à interpréter l’article 2, § 2, de la convention à la lumière tant du choix fait par les États, parmi les impôts en vigueur de part et d’autre, de ceux à inclure dans la liste des impôts actuels que des caractéristiques de ces derniers. (‘The exhaustive nature of the list of current taxes referred to in Article 2(3) and the extension envisaged by Article 2(4) to future taxes that are identical or similar in nature to the current taxes lead to an interpretation of article 2(2) in the light of both the choice made by the contracting states as to which of the taxes that existed in both states should be included in the list, and the characteristics of those taxes.’) [authors’ translation]. That statement appears to be based on the following paragraph in the Advocate-General’s Opinion in the case: ‘Des lors que, d’une part, la liste des impôts actuels visés à l’article 2, § 3, et l’extension envisagée par l’article 2, § 4, à des impôts futurs de nature identique ou analogue aux impôts actuels, l’article 2, § 2, de la convention doit être lu à la lumière du choix fait par les États de ceux en vigueur dans chacun d’eux à inclure dans la liste des impôts actuels ainsi que des caractéristiques de ces derniers.’ (‘Since, on the one hand, the list of current taxes referred to in Article 2(3) of the Convention of 17 September 1970 is exhaustive and, on the other hand, the extension provided for in Article 2(4) to future taxes presupposes that the latter are identical or similar in nature to the current taxes, Article 2(2) of the Convention must be read in the light of the choice made by the States as to which of the current taxes in force in each of the States are to be included in the list of current taxes, as well as in the light of the characteristics of the latter.’ [authors’ translation]). (See Opinion of Advocate-General Inghels, supra n. 50, at pp. 1-2.)
qualify as a tax on capital within the meaning of article 2(2) of the Belgium-Luxembourg Income and Capital Tax Treaty (1970) if it is either listed in article 2(3), or is identical or substantially similar to one of the taxes listed. If that is what the Supreme Court intended to say, it again raises the question as to what the meaning and relevance of article 2(1) and (2) of the Belgium-Luxembourg Income and Capital Tax Treaty (1970) could be. Indeed, it is difficult to see how the Supreme Court’s interpretation of the Belgium-Luxembourg Income and Capital Tax Treaty (1970) could differ from that in respect of a tax treaty in which article 2(1) and (2) of the OECD Model are omitted.

5. Conclusions

In two recent decisions, the Belgian Supreme Court has considered the compatibility of the Belgian net asset tax with the Belgium-Luxembourg Income and Capital Tax Treaty (1970) and the Belgium-Netherlands Income and Capital Tax Treaty (2001). The decisions touch upon interesting tax treaty interpretation issues, notably regarding the meaning of the term “taxes on capital” and the scope of application of tax treaties.

The Supreme Court ultimately concluded that the net asset tax qualifies as a tax on capital for purposes of the Belgium-Netherlands Income and Capital Tax Treaty (2001), but not for purposes of the Belgium-Luxembourg Income and Capital Tax Treaty (1970). As argued in the present article, the decisions leave a number of important questions unanswered and may give rise to further discussion. That being said, it can be expected that the Belgian tax authorities will rely on the decisions to dismiss pending refund claims submitted by Luxembourg funds. In contrast, pending claims submitted by funds established in the Netherlands are arguably more likely to be successful.