International and European Tax Moot Court Competition 2024-2025

International European Tax
Moot Court 2024-2025
The Influential Case, Memorandum of the Applicant

MEMORANDUM OF THE APPLICANT

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F

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Remerciements

Avant de commencer, nous souhaiterions profiter de ces quelques lignes pour remercier les personnes qui ont contribué à l'aboutissement de ce mémoire.

Tout d'abord, nous souhaitons mettre à l'honneur notre coach, Fabrizio Pascucci pour ses conseils avisés tout au long de l'aventure, tant en ce qui concerne la rédaction que la plaidoirie.

Ensuite, nous souhaitons remercie notre promoteur, Edoardo Traversa, ainsi que l'UCL pour nous avoir permis de vivre cette expérience unique gravée à tout jamais dans nos mémoires.

Enfin, nous remercions toutes les personnes qui, de près ou de loin, ont rendu ceci possible et nous ont encouragé, soutenu tout au long de cette expérience.

Avant-propos

Cette aventure a été enrichissante sur de nombreux aspects.

Tout d'abord, intellectuellement, ce Moot court nous aura permis d'approfondir la matière du Droit fiscal international. A partir d'un casus soulevant de nombreuses questions complexes en la matière, nous avons pu effectuer des recherches et creuser des aspects théoriques jamais rencontrés auparavant dans notre cursus universitaire.

Ensuite, une autre réelle plus-value du Moot court a été pour nous de travailler en équipe. Ceci en fait une réelle particularité dans des études universitaires et d'autant plus pour un mémoire où le travail individuel est bien souvent la norme. Acquérir cette dynamique de travail quelque peu différente nous aura non seulement permis de donner le meilleur de nous-mêmes mais également de développer une soft skill indispensable dans notre vie professionnelle future, tant celle-ci est valorisée sur le marché de l'emploi.

Enfin, le Moot court a la vertu de nous permettre de combiner l'écrit à l'oral, en nous permettant d'endosser, le temps de quelques de instants, le rôle d'avocat. Quoiqu'ayant été une des raisons de notre participation, cette mise en pratique du Droit, unique dans le cursus juridique universitaire, nous a donné une meilleure appréhension de la profession d'avocat et a renforcé notre désir de poursuivre l'avocature.

Nous espérons que vous prendrez autant de plaisir à lire ce mémorandum que nous en avons eu à le rédiger.

Jeanne et Amani

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INTERNATIONAL AND EUROPEAN TAX MOOT COURT COMPETITION – KU Leuven and IBFD

Academic Year 2024/25 – First Round and Second Round: The UTech Cases

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1 The Universal Tech Group and its subsidiaries

The UniversalTech Group (UTech group) is a group of companies providing a wide range of advisory services to business clients on all aspects of communication and navigation technology. The parent company is UpTech, which is incorporated and managed in Galaxia. The group includes the following wholly-owned subsidiaries of UpTech:

- NaviTech, which provides highly specialized advice to clients about communications and navigation networks;
- BergTech, which carries out in topographical and climatological surveys, especially in inaccessible regions; and
- DataTech, which specializes in collating and tabulating large quantities of data.

1.1 NaviTech

Navitech is a relatively small company, with approx. 30 employees. Its business model relies heavily on the expertise of its highly educated engineers. Engineers with these qualifications and expertise are scarce and therefore the UTech group wants NaviTech to be an attractive employer for these specialists. Following this philosophy, the company is managed rather informally by a group of five senior engineers who act as directors and who, essentially, decide among themselves how to carry on the business. In order to comply with company law, however, they have been instructed to hold formal board meetings every quarter to take the formal decisions necessary about the substantive side of the business, such as which projects to accept, the development of new technology and policy regarding the recruitment of personnel. At these meetings, the directors receive advice from senior executives of the UpTech management on financial, legal and non-technical regulatory issues. The directors usually follow this advice, as they are simply not interested in anything other than their technical work, although they are too smart to accept it all without question.

NaviTech was incorporated in 2010 in the State of Galaxia, which is where it held its board meetings for many years. Until 2020 that was also where the senior engineers/directors worked and where they held weekly informal discussions (coffee meetings) about the company's business projects. At the end of 2019, however, one of them moved to the neighbouring state of Constellatia, where she started doing much of her work at home. The other senior engineers sometimes visited her at home to discuss work projects and in 2020 and 2021 two more senior engineers/directors moved to Constellatia, as they were impressed by the relaxed lifestyle and social facilities there.

As a result, the discussion about the company's business at the directors' level is now often carried on in Constellatia, especially as the two senior engineers remaining in Galaxia rather like going to Constellatia for the day to meet their colleagues. Three coffee meetings were held in Constellatia in the fourth quarter of 2020; in 2021 the coffee meetings were held roughly once per month in Constellatia, with the remaining meetings in Galaxia; and from 2022 onwards the coffee meetings roughly 60% of these meetings were held in Constellatia and the other 40% in Galaxia. The directors find it important to meet in person and very rarely join these discussions online.

Since 2021, the formal board meetings have also sometimes been held in Constellatia, as follows:

- January, April and July 2022 – in Galaxia, with attendance by one or more UpTech advisors;
- October 2022 – in Constellatia, with two Uptech advisors joining online for part of the meeting;
- January 2023 – in Constellatia, with physical attendance by one UpTech advisor;
- April 2023 – online only, with all the directors joining the meeting from their home, and online attendance by two UpTech advisors, also joining online from their home in Galaxia;
- July 2023 – in Galaxia, with physical attendance by one UpTech advisor;
- October 2023 – in Constellatia, with two Uptech advisors joining online for part of the meeting;
- January 2024 – online only, with all the directors joining the meeting from their home, and online attendance by two UpTech advisors, also joining online from their home in Galaxia;
- April 2024 – in Galaxia, with physical attendance by two UpTech advisors;
- July and October 2024 – in Constellatia, with two Uptech advisors joining online for part of the meeting.

1.2 BergTech and DataTech

BergTech and DataTech were both incorporated in Lunarland in 2000. They also employ highly skilled engineers, but they are larger than NaviTech and are managed along traditional lines, with a separate management structure. They have always held their board meetings in their head office Lunarland, which is also where their employees work unless they are sent to another country for a work project.

2 The NaviTech case

At the end of 2021, NaviTech won a large contract to advise a client in Solaria about a new navigation system for adventure sports throughout the country. NaviTech's task under this contract is to advise the client on the optimal positioning of communication stations for the navigation network, to monitor the performance of the communication stations for their first three years of operation and to conclude with a final report with recommendations for the future.

An important part of this project is to reconnoitre the terrain and the weather conditions in Solaria, especially in the large remote mountainous region that covers much of Solaria. NaviTech engages BergTech to carry out this reconnaissance work. In January 2022 Navitech sends a small team of engineers to Solaria to investigate the local facilities and travel possibilities, draw up a plan for the reconnaissance work and make agreements with local companies and universities, for example about the use of their laboratories for some initial analysis. The NaviTech team spends a total of 20 days in Solaria, during which time they travel all over the country.

In March 2022, BergTech sent its team of engineers to Solaria to carry out the reconnaissance work. The BergTech engineers spent a total of 160 days in the country. On five occasions during that period NaviTech sent an engineer to Solaria for two days to talk to the BergTech team and carry out some spot checks on their work. Finally, NaviTech sent its team of engineers back to Solaria to carry out some final checks after the BergTech team had finished; this took 10 days.

In October 2022, BergTech sent an extensive report to NaviTech in which all of the collected data was tabulated and some general observations were made about the results. NaviTech did not forward this report to the client but used it in drafting its recommendations, which were sent to the client in December 2022.

The contract allows the client to pay for this project in instalments. The first instalment (40% of the contract price of USD 20 million) became payable in 2021, when the contract was signed. The remaining portion is payable in three instalments of 20% each, which became due on 1 January in 2022, 2023 and 2024. NaviTech draws up its annual accounts to 31 December each year.

NaviTech's contract with its client and the contract between NaviTech and BergTech are both on arm's-length terms and at arm's-length prices.

NaviTech had no other engagement in Solaria in 2022 or the preceding or following five years.

3 The BergTech case

During the 160 days that the BergTech engineers spent in Solaria, they did a great deal of travelling around the country and spent a maximum of five days in any one place. They stayed in local hotels or hostels, often trekking into the mountains to carry out their measuring and data collection activity.

However, they did rent space in an "office hotel" three times, for five days each time, in order to make some analyses that informed their subsequent work. The spaces they rented were in three different buildings owned by the same chain of office hotels, but they were all located in the business district of Solartown, the capital city and the only large urban agglomeration in the country.

The same office hotels had also been used previously by BergTech employees working on other projects in Solaria, for unrelated clients. One project, carried out in 2021, required BergTech employees to carry out geological surveys in Solaria as part of a large project to map the connections between rock formations and weather conditions. For this project, BergTech sent a team of employees to Solaria for a continuous period of 60 days. During this period, they used one of the office hotels two times, in July and August, for five days each time.

BergTech also carried out a project for the Solar government, mapping the growth of slum areas around the outskirts of Solartown, from 2017 to 2021. For this project, BergTech sent a team of employees to Solaria for the month of January in each of those five years, renting one of the office hotels for four days each time.

The work carried out by BergTech for the NaviTech project requires more data processing capacity than BergTech can handle with its current staff. It therefore outsourced a substantial portion of the data processing work to DataTech; this work was carried out by DataTech at its head office in Lunarland.

NaviTech paid BergTech a fee of USD 10 million for its part in this project. An invoice for this work was issued by BergTech in December 2022 and was paid in the same month.

BergTech paid a fee of USD 4 million to DataTech for the processing work it carried out. The contract for this work was signed in July 2022. The invoice was issued by DataTech in September 2022 and was paid in the same month.

Both contracts are on arm's-length terms and at arm's-length prices.

BergTech draws up its annual accounts to 30 June each year.

4 Current Litigation

4.1 The facts leading to the litigation

In 2023 the Solarian tax authority requested information from the UTech group about the activities of NaviTech and BergTech, as it suspected that both companies had a PE in Solaria and should have been paying tax on their PE profit and, in the case of BergTech, digital expenditure tax (explained in Section 5.1.3. below). The requested information was duly provided and, at the end of 2024, the tax inspector raised the following assessments:

- On Navitech, for the 2022 tax year in respect of corporate profit tax on the profit of USD 2 million derived through a PE;
- On BergTech, for the 2023 tax year in respect of corporate profit tax on the profit of USD 1 million derived through a PE, on the basis of BergTech's accounts drawn up to 30 June 2023;
- On BergTech, for the 2023 tax year in respect of digital expenditure (DET) tax on the digital expenditure incurred by the PE, on the basis of BergTech's accounts drawn up to 30 June 2023. The only payment covered by this assessment is the fee paid to DataTech in September 2022.

BergTech then submitted a revised tax return in Lunarland for the tax year from 1 July 2022 to 30 June 2023, claiming a foreign tax credit for the Solarian profit tax and DET. The Lunar tax inspector refused to grant the credit, however, arguing that the treaty between Solaria and Lunarland prohibits these charges and therefore no credit was due.

4.2 The current litigation

The UniversalTech group has started litigation in two cases:

- The NaviTech case, in the court in Solaria (to be argued in the first oral round). NaviTech has appealed against its assessment to corporate profit tax, arguing that Solaria is prohibited by its treaty network from taxing NaviTech's profit; and
- The BergTech case, in the court in Lunarland (to be argued in the second oral round). BergTech has appealed against the determination of the tax inspector that no foreign tax credit is due in respect of the Solarian profit tax and DET, arguing that the double tax treaty between Solaria and Lunarland obliges Lunarland to grant a credit for both.

The courts in which you are filing the petitions (and before which you will later plead orally) assess both the facts and the law. Assume that they are rule-of-law countries where rules, as well as general principles of law, may be invoked. These courts assess only the amount of tax due (not any sanctions due, regardless of their administrative or criminal nature, and regardless of their connection with the tax assessment).

5 Legal Framework

5.1 Domestic law

All countries have a mixed legal regime between common law and civil law.

All states adhere to the dynamic interpretation of tax treaties.

5.1.1 Domestic law of Galaxia.

- Companies are resident if they are incorporated in Galaxia and/or they have their place of effective management in Galaxia. Court decisions have indicated that the term "place of effective management" should be interpreted in the same way as the same term in the most recent version of the OECD Model Convention.
- Corporate profit tax is levied at the rate of 20% on the worldwide profit of resident companies and the profit attributable to Galaxian PEs of non-resident companies.
- Unilateral relief for juridical double taxation is provided through the credit method.
- Payments for a single project are taken into account for tax purposes when the contract is signed, even if the contract allows payment of the price in instalments.
- The tax year follows the calendar year.

5.1.2 Domestic law of Constellatia

- Companies are resident if they are incorporated in Constellatia and/or they have their place of effective management in Constellatia. Court decisions have indicated that the term "place of effective management" should be interpreted in the same way as the same term in the most recent version of the OECD Model Convention.
- Corporate profit tax is levied at the rate of 20% on the worldwide profit of resident companies and the profit attributable to Constellatian PEs of non-resident companies.
- Unilateral relief for juridical double taxation is provided through the credit method.
- Instalment payments are taken into account for tax purposes as each instalment becomes due.
- The tax year follows the calendar year.

5.1.3 Domestic law of Solaria

- Companies are resident if they are incorporated in Solaria and/or they have their place of effective management in Solaria.
- Corporate profit tax is levied at the rate of 20% on the worldwide profit of resident companies and the profit attributable to Solarian PEs of non-resident companies.
- The domestic PE concept includes:
    - any person who carries on business through any place of business in Solaria; and
    - any person who carries on any business activity in Solaria for 30 days or more in any 12-month period.
- Unilateral relief for juridical double taxation is provided through the exemption method.
- Payments for a single project are taken into account for tax purposes when the contract is signed, even if the contract allows payment of the price in instalments.
- The tax year follows the calendar year. Companies may use a different year for accounting purposes and may report their profit for a tax year based on their accounting period that ends in the tax year.
- The Solarian courts have not decided many cases dealing with the interpretation of tax treaties. In the few cases that have been decided, the tax authority has relied on the commentaries to both the OECD and the UN Models, arguing that Solarian treaty policy prefers the UN Model, as stated in a policy memorandum of the Ministry of Finance published in 2005, and therefore the commentaries to the UN Model are relevant to the interpretation of tax treaties, even if the negotiating result of the treaty in question largely follows the provisions of the OECD Model. The courts have not made any explicit pronouncement on this issue, but they have referred to both commentaries in their decisions.

In 2021, Solaria adopted a new tax, called the digital expenditure tax. The memorandum that accompanied the bill for this tax when it was presented to Parliament, which was written by the Solarian Ministry of Finance, explained that the tax was designed to prevent undesirable base erosion. The tax was levied for the first time in respect of the 2022 tax year.

The digital expenditure tax has the following characteristics:

- It applies to payments for digital services made between related parties if the services are provided by non-residents with no taxable presence in Solaria and the payments are made by: resident companies; or non-resident companies and the payments are attributable to a PE in Solaria of the paying company;
- It is levied at the rate of 15% on all such payments made during a tax year, subject to a de minimis exemption of 100,000 per payment;
- It is reportable and payable at the same time as the regular tax on business profit;
- Half of the tax is creditable against the regular corporate profit tax payable in the same year, but no carry-forward or carry-back is allowed if there is not enough corporate profit tax to absorb the credit in the year in question.

5.1.4 Domestic law of Lunarland

- Corporate profit tax is levied at the rate of 25% on the worldwide profit of resident companies and the profit attributable to Lunar PEs of non-resident companies.
- Unilateral relief for juridical double taxation is provided through the credit method. Domestic law allows tax credits only for foreign taxes that are imposed on net profit, as strictly defined in domestic law.
- The tax year runs from 1 July to 30 June and companies are required to draw up their tax accounts accordingly.
- Payments for a single project are taken into account for tax purposes when the contract is signed, even if the contract allows payment of the price in instalments.

5.2 Tax Treaties

All the treaties in the case have English as their only official language.

5.2.1 Galaxia – Constellatia

The tax treaty between Galaxia and Constellatia follows the 2017 OECD Model in all material respects, except that Art. 4(3) is drawn from the 2014 OECD Model.

5.2.2 Solaria – Galaxia

The tax treaty between Solaria and Galaxia follows the 2017 UN Model in all material respects, except that Art. 29 (entitlement to benefits) is restricted to Art. 29(9) of this model.

5.2.3 Solaria – Constellatia

The tax treaty between Solaria and Constellatia follows the 2017 OECD Model in all material respects.

5.2.4 Solaria – Lunarland

The tax treaty between Solaria and Lunarland was concluded in 2011 and took effect in 2011/2012. It follows the 2010 OECD Model in all material respects, subject to the following deviations:

- Art. 2(2) does not include the words "taxes on the total amount of wages or salaries paid by enterprises";
- Art. 2(4) does not include the second sentence in the OECD Model;
- Art. 23 includes the following paragraph in respect of double tax relief in Lunarland:

  "Subject to the existing provisions of Lunar law regarding the deduction from tax payable in Lunarland of tax paid in a territory outside Lunarland and to any subsequent modification of those provisions (which shall not affect the general principle hereof), tax payable in Solaria in respect of profits, income or gains arising in Solaria shall be deducted from any Lunar tax payable in respect of such profits, income or gains. For the purposes of this paragraph, the taxes referred to in paragraph 3 and paragraph 4 of Article 2 (Taxes Covered) shall be considered tax in respect of profits, income or gains."

A protocol was concluded at the beginning of 2023, which made the following changes to the treaty;

- adding paras. 2 and 3 of Art. 1 of the 2017 OECD Model and making the corresponding changes to Art. 23;
- adding the Solarian digital expenditure tax to the list of covered taxes in Art. 2(3);
- replacing Art. 4(3) with the 2017 version of this provision;
- adding para. 4.1 of the 2017 OECD Model to Art. 5;
- adding a paragraph to Art. 5 following Art. 5(6) of the UN Model 2017 (and re-numbering the subsequent paragraphs accordingly);
- adding a minimum holding period to Art. 10(2)(a);
- adapting Art. 13 to follow the 2017 UN Model; and
- adding a provision corresponding to Art. 29(9) of the 2017 OECD Model.

The Ministry of Finance of Solaria drafted an explanatory note accompanying the proposal to parliament to ratify the protocol, explaining that the protocol updated the treaty to some of the most important standards of the 2017 OECD and UN Models and made a modest shift towards the provisions of the UN Model. It also stated that the change to Art. 2(3) clarified the position in respect of the Solarian digital expenditure tax by adding it to the list of covered taxes in Art. 2(3), although this was not strictly speaking necessary as it would be covered by the treaty by virtue of Art. 2(2).

For taxes other than withholding taxes, the protocol took effect on different dates in the two states, due to their different tax years. This led to the following timetable of events relating to the assessments issued to BergTech:

July 2022: the contract between BergTech and DataTech was signed;

1 August 2022: the protocol took effect in both states for withholding taxes on passive income;

September 2022: the fee was invoiced by DataTech and paid by BergTech;

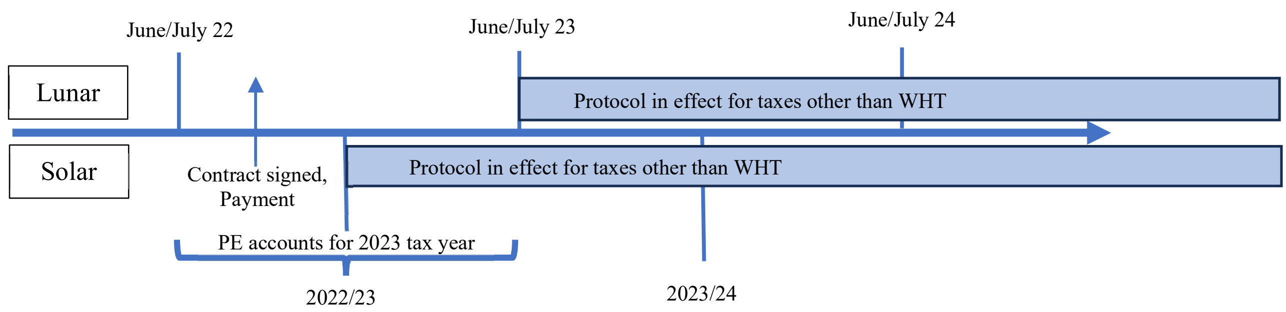
1 January 2023: the protocol took effect in Solaria for taxes other than withholding taxes;

30 June 2023: BergTech and DataTech closed their accounting year; these accounts formed the basis for the computation of their taxable profit for 2022/23 in Lunarland;

1 July 2023: the protocol took effect in Lunarland for taxes other than withholding taxes;

31 December 2023: the tax year closed in Solaria;

2024: The Solarian tax inspector asserted that BergTech should have filed accounts in Solaria for the 2023 tax year, reporting the profit and digital expenditure of its PE in its accounting period ending on 30 June 2023.



6 Further information

- None of the states is an EU Member State or an EEA/EFTA state.
- All states have ratified the Vienna Convention on the Law of Treaties.
- The currency used in all states is the dollar (USD).
- The statute of limitation rules in all states allow the country's tax administration to audit and assess the periods at issue in this case.
- None of the states is a signatory to the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (MLI). However, all states are members of the OECD BEPS Inclusive Framework.

7 Final Instructions

The written memoranda should be written as if you were filing the appeal on 10 January 2025 on behalf of both applicants. You may elaborate more on known arguments presented by the parties or consider other (tax) arguments, even if they are not mentioned in this document, but you may not add facts to the case study. Even if you conclude that the case may be solved on the basis of a specific set of grounds, you should explore, at least secondarily, any other arguments that might be considered by the parties.

Your written memoranda should consider all the arguments that could support your client's claim. Pursuant to article 18.2 of the regulations, your memoranda will be assessed on the soundness of the arguments you put forward to support the claims of the applicant or defendant, whether the arguments are presented in a clear and logical way, and whether you have been thorough and considered all possible lines of reasoning.

In the oral rounds, counsel for the taxpayers will open the pleadings. In their pleadings, counsel for the tax authority should take account of the arguments of the taxpayers, but they may also draw the court's attention to aspects of the case that were not explored by counsel for the taxpayers. If you wish to make use of any illustration during your oral pleading, you must include the illustration in your written memorandum and, before the pleadings start, indicate to the arbitrator of your court that you wish to use the illustration and provide the page number.

Some of the source materials that you wish to use in support of your client's case may have been written by one of the judges in his/her academic capacity. In this case, you should treat the judge and the academic author as two different persons. You are completely at liberty to disagree with the author and there will be no negative consequences in the grading simply because you do disagree.

A different case on similar subject matter will be argued in the final round.

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India

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The Netherlands

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III. STATEMENT OF FACTS

A. Parties involved

1) Applicant

1. The applicant is Navitech, a company that specializes in providing highly tailored advice regarding communication and navigation networks to its clients.

2. Navitech is a wholly-owned subsidiary, along with the companies BergTech and DataTech, of its parent company, UpTech.

2) *Defendant*

3. The defendant is the State of Solaria.

B. Relationships and economic activities

4. In January 2022, Navitech secured a significant contract to provide advisory services in the state of Solaria. The contract involved assisting with the deployment of a navigation system for adventure sports by advising on the optimal placement of communication stations and monitoring their performance over a three-year period.

5. For the preparation of the monitoring activity, a reconnaissance of the terrain and weather conditions in Solaria was needed.

6. NaviTech engaged BergTech to carry out the reconnaissance work in Solaria. BergTech engineers spent a total of 160 days in Solaria during which NaviTech came to carry out some spot checks on five occasions. NaviTech also spent 20 days prior to the start of the

reconnaissance work to investigate the local facilities and travel possibilities and 10 days afterwards to carry out some final checks. This reconnaissance work was carried out throughout the country and did not involve any tangible facilities.

7. Following the primary reconnaissance, NaviTech monitored the performance of the communication stations, and will continue to do so until 2025. This work is carried out by employees of the company in Galaxia because the necessary information can be extracted from the records kept automatically by the navigation system transferred in a digital file.

8. NaviTech is expected to conclude with a final report to the client in 2026.

9. The contract allows the client to pay for this project in instalments. The first instalment (50% of the contract price of USD 20 million) became payable in January 2022, when the contract was signed. The remaining portion is payable in three equal instalments, which become respectively due on 1 January in 2023, 2024 and 2025.

10. NaviTech had no other engagements in Solaria in 2022 nor in the preceding or following five years.

11. In 2023 the defendant requested information from the UTech group about the activities of NaviTech and BergTech, as it suspected that both companies had a Permanent Establishment (hereafter "PE") in Solaria and should have been paying tax on their PE profit. The requested information was duly provided.

12. At the end of 2024, the tax inspector raised the following assessments: on Navitech, for the 2022 tax year in respect of corporate profit tax on the profit of USD 2 million derived through an alleged PE in Solaria.

C. Legal framework

a. International law and tax treaties

13. The States of Constellatia, Galaxia and Solaria are members of the OECD Base Erosion Profit Shifting (hereafter "BEPS) Inclusive Framework and have ratified the Vienna Convention on the Law of Treaties. years.

14. None of those States are a European Union nor a European Free Trade Association Member State.

i. <u>The DTC between Galaxia and Constellatia</u>

15. The DTC between Galaxia and Constellatia follow the 2017 OECD Model in all material respects, except that Article 4(3) is drawn from the 2014 OECD Model.

16. The deviation is as follows:

DTC Galaxia-Constellatia	MC OECD 2017
1. For the purposes of this Convention, the term "resident of a Contracting State" means any person who, under the laws of that State, is liable to tax therein by reason of his domicile, residence, place of management or any other criterion of a similar nature, and also includes that State and any political subdivision or local authority thereof as well as a recognised pension fund of that State. This term, however, does not include any person who is liable to tax	1. For the purposes of this Convention, the term "resident of a Contracting State" means any person who, under the laws of that State, is liable to tax therein by reason of his domicile, residence, place of management or any other criterion of a similar nature, and also includes that State and any political subdivision or local authority thereof as well as a recognised pension fund of that State. This term, however, does not include any person who is liable to tax

in that State in respect only of income from sources in that State or capital situated therein. 2. Whereby reason of the provisions of paragraph 1 an individual is a resident of both Contracting States, then his status shall be determined as follows: a) he shall be deemed to be a resident only of the State in which he has a permanent home available to him; if he has a permanent home available to him in both States, he shall be deemed to be a resident only of the State with which his personal and economic relations are closer (centre of vital interests); b) if the State in which he has his centre of vital interests cannot be determined, or if he has not a permanent home available to him in either State, he shall be deemed to be a resident only of the State in which he has an habitual abode; c) if he has an habitual abode in both States or in neither of them, he shall be deemed to be a	in that State in respect only of income from sources in that State or capital situated therein. 2. Whereby reason of the provisions of paragraph 1 an individual is a resident of both Contracting States, then his status shall be determined as follows: a) he shall be deemed to be a resident only of the State in which he has a permanent home available to him; if he has a permanent home available to him in both States, he shall be deemed to be a resident only of the State with which his personal and economic relations are closer (centre of vital interests); b) if the State in which he has his centre of vital interests cannot be determined, or if he has not a permanent home available to him in either State, he shall be deemed to be a resident only of the State in which he has an habitual abode; c) if he has an habitual abode in both States or in neither of them, he shall be deemed to be a

resident only of the State of which he is a national; d) if he is a national of both States or of neither of them, the competent authorities of the Contracting States shall settle the question by mutual agreement. **3. Whereby reason of the provisions of paragraph 1 a person other than an individual is a resident of both Contracting States, then it shall be deemed a resident only of the State in which its place of effective management is situated.**	resident only of the State of which he is a national; d) if he is a national of both States or of neither of them, the competent authorities of the Contracting States shall settle the question by mutual agreement. **3. Whereby reason of the provisions of paragraph 1 a person other than an individual is a resident of both Contracting States, the competent authorities of the Contracting States shall endeavor to determine by mutual agreement the Contracting State of which such person shall be deemed to be a resident for the purposes of the Convention, having regard to its place of effective management, the place where it is incorporated or otherwise constituted and any other relevant factors. In the absence of such agreement, such person shall not be entitled to any relief or exemption from tax provided by this Convention except to the extent and in such**

	manner as may be agreed upon by the competent authorities of the Contracting States.

ii. The DTC between Solaria and Constellatia

17. The DTC between Solaria and Constellatia follows the 2017 OECD Model Convention in all material respects.

ii. The DTC between Solaria and Galaxia

18. The DTC between Solaria and Galaxia follows the 2017 UN Model in all material respects, except that Article 29 is restricted to Article 29(9) of this model.

b. *Domestic Application of Treaties*

19. Solaria and Constellatia adhere to the dynamic interpretation of tax treaties.

20. The Court has addressed only a limited number of cases concerning the interpretation of tax treaties. In these instances, the Solarian tax authority has consistently referenced the commentaries to both the OECD and UN Model Conventions, supporting the position that Solaria's treaty policy, as outlined in a 2005 memorandum by the Ministry of Finance, aligns more closely with the UN Model. This position, as expressed by the tax authority, suggests that the commentaries to the UN Model are relevant in interpreting Solarian tax treaties, even where the specific provisions may predominantly reflect the OECD Model.

While the Court has not explicitly ruled on the issue, it has nonetheless referenced both sets of commentaries in its decisions.

c. Other Treaties

21. All states have ratified the Vienna Convention on the Law of Treaties.

d. Relevant aspects of domestic laws

Solaria

22. Corporate profit tax is levied at the rate of 20% on the worldwide profit of resident companies and the profit attributable to Solarian PE's of non-resident companies.

23. Payments for a single project are taken into account for tax purposes when the contract is signed, even if the contract allows payment of the price in installments.

24. The tax year follows the calendar year. Companies may use a different year for accounting purposes and may report their profit for a tax year based on their accounting period that ends in the tax year.

Constellatia

25. Companies are resident if they are incorporated in Constellatia and/or if they have their place of effective management in Constellatia. Court decisions have indicated that the term "place of effective management" should be interpreted in the same way as it is in the most recent version of the OECD Model Convention.

26. Corporate profit tax is levied at the rate of 20% on the worldwide profit of resident companies and the profit attributable to Constellatian PEs of non-resident companies.

27. Instalment payments are taken into account for tax purposes as each instalment becomes due.

28. The tax year follows the calendar year.

Galaxia

29. Companies are resident if they are incorporated in Galaxia and/or if they have their place of effective management in Galaxia. Court decisions have indicated that the term “place of effective management” should be interpreted in the same way as it is in the most recent version of the OECD Model Convention.

30. Corporate profit tax is levied at the rate of 20% on the worldwide profit of resident companies and the profit attributable to Galaxian Pes of non-resident companies.

31. Payment for a single project are taken into account for tax purposes when the contract is signed, even if the contract allows payment of the price in installments.

32. The tax year follows the calendar year.

I. ISSUES

33. In 2023, the defendant conducted an inquiry into the activities of NaviTech. The Tax Authorities suspected that NaviTech operated PE in Solaria and should have been liable for tax on the profits derived through this PE. The requested information was duly submitted. Subsequently, in late 2024, the defendant issued an assessment against NaviTech for the 2022 tax year, claiming corporate profit tax on a declared profit of USD 2 million attributed to the alleged PE.

34. The applicant contests this assessment for the following reasons:

(a) Under Article 4 of the DTC concluded between Constellatia and Galaxia, NaviTech is deemed a resident of Constellatia, as its place of effective management is located therein.

(b) The DTC concluded between Solaria and Constellatia is applicable to the present case.

(c) The disputed income constitutes business profits as defined under Article 7 of the DTC concluded between Solaria and Constellatia. As prescribed by Article 7, business profits of an enterprise of a Contracting State cannot be taxed by the other State unless the enterprise has a PE in that State.

(d) NaviTech doesn't have a PE in Solaria as it lacks a fixed place of business within the territory.

(e) Hypothetically, even if NaviTech was considered a resident of Galaxia, it still would not have a PE in Solaria, as the activities conducted in Solaria—primarily reconnaissance and data collection—are preparatory in nature and therefore fall outside the scope of taxable operations under the DTC.

(f) As a result, the State of Solaria is not entitled to tax the disputed income.

II. ARGUMENTS

A. Theoretical framework

a. Applicability of the DTC between Solaria and Constellatia

35. The DTC between Solaria and Constellatia follows the 2017 OECD Model Convention in all material respects.

36. The DTC is applicable to the case, as the temporal scope, the territorial scope, the personal scope as well as the material scope are covered.

1) *Temporal scope*

37. In principle, tax treaties only apply to sets of facts posterior to their entry into force.

38. The DTC entered into force before the facts leading to the case.

2) *Territorial scope*

39. Subject to a provision in this regard, the DTC applies to the entire territory of the Contracting States.

40. In this case, the income subject to the assessment was paid by a client in Solaria to NaviTech, a tax resident of Constellatia (*infra* n°70).

41. Thus, the territorial scope is fulfilled.

3) *Personal scope*

42. According to its Article 1(1), the treaty applies to any person, provided that they are a resident of at least one of the Contracting States.

43. NaviTech is a resident of Constellatia (*infra* n°70).

44. The personal condition for the application of the DTC is met.

4) *Material scope*

45. According to its Article 2 the DTC applies, the treaty applies to taxes on income and on capital imposed on behalf of a Contracting State

46. The disputed sum is qualified as business profits (*infra* n°71) and is therefore considered as income for the application of the DTC.

47. The material condition for the application of the DTC is met.

b. Applicability of the OECD and UN Commentary

48. The authority of the OECD and UN Commentaries is generally unquestioned and recognized[1].

49. Regarding this, some national courts acknowledge expressly the binding character of the Commentaries. For example, under Dutch case law, the Commentary is authoritative for

[1] X., "Chapter VII. The Power of Persuasion: The Legal Effects of the OECD Commentary as a Non-Binding Recommandation", *Intertax,* 2009, p. 229

the interpretation of existing tax treaties[2]. Moreover, the interpretation should be in line with the last version of the Commentary"[3].

50. The OECD Commentary holds significant importance in the development and interpretation of international tax law[4]. Its legal status is recognized by most tax law scholars who regard it as a vital tool for interpreting DTCs[5]. The OECD Commentary is prepared and approved by experts of the Committee on Fiscal Affairs, who are appointed by the governments of various OECD member states, which gives it great authority[6]. Tax administrations and taxpayers alike often rely on the Commentary as a practical aid in applying and interpreting tax treaties, as well as in resolving disputes[7].

51. Additionally, the interpretation of double tax treaties is guided by international legal principles, notably the Vienna Convention on the Law of Treaties, which has been ratified by all parties to the present case and is recognized as customary international law. Article 31(1) VCLT 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*." When a DTC is based on the OECD MC, this principle requires

[2] Supreme Court, 2 September 1992, No. 27,252, conclusion by Verburg and note by P.J. Wattel.
[3] Commentary, Introduction, Paras. 33-37. Dutch case law on this point varies. The most recent Commentary was followed in two decisions of the Netherlands Supreme Court (Supreme Court, 12 June 1991, No. 27,310, BNB 1991/312, note by Hoogendoorn; and Supreme Court, 4 July 1989, No. 25,660, BNB 1989/274, conclusion by van Soest and note by G.J. van Leijenhorst), while the Introduction was explicitly acknowledged in both cases, although this is not standard practice (see e.g. Supreme Court, 28 June 1995, No. 29,435, BNB 1996/108, conclusion by van Soest and note by C. van Raad; and Supreme Court, 11 October 1978, No. 18,759, BNB 1978/300, conclusion by van Soest). In the latter case, the 1963 Commentary was followed since the case was governed by a treaty based on the 1963 Draft Convention and Commentary.
[4] C., GARBARINO, *Judicial interpretation of tax treaties*", Edward Elgar Publishing Limited, Cheltenham, 2016, p. 3.
[5] K. CEJIE, "The Commentaries on the OECD Model as a Mechanism for Interpretation with Reference to the Swedish Perspective", *Bulletin for International Taxation*, vol. 71, n°12, 2017, p. 633 and 634.
[6] BAMMENS, N., DEBELVA, F., PEETERS, B., REYPENS, N., *Internationaal fiscaal recht*, Wolters Kluwer Belgium, Mechelen, 2023, p. 5.
[7] L. BROSENS and J. BOSSUYT, "Legitimacy in International Tax Law-Making: Can the OECD Remain the Guardian of Open Tax Norms?", World Tax Journal, vol. 12, n°2, 2020, p. 336.

that both the Model and its Commentary be consulted to determine the intended meaning of treaty provisions[8]. This ensures an accurate understanding of the treaty's context and intent. The general rule of interpretation in Article 31 (1) VCLT thus establishes the relevance of the OECD Commentary in the interpretation process[9]. The exact same can be said for the UN Commentary.

52. Furthermore, since Solaria and Constellatia have adopted the wording of the OECD MC when drafting their DTC, it is reasonable to assume that they intended for the provisions to carry the meaning attributed to them in the OECD, as clarified in the Commentary[10]. This practice aligns with the general rule of interpretation in Article 31(1) VCLT. The same conclusion can be drawn for the DTC concluded between Constellatia and Galaxia, considering it is also based on the OECD MC.

53. The UN Commentary also plays a crucial role in the interpretation of DTCs, particularly those modeled after the UN Model Convention. The UN Model is designed to address the specific needs of developing countries, and its Commentary provides important insights into the provisions tailored for this purpose. Bearing a lot of similarities to, and often referencing, the OECD Commentary, the UN Commentary is also recognized as an important interpretative tool, given that it is drafted by international experts under the auspices of the United Nations. It offers guidance that reflects the objectives and practical considerations of developing countries in treaty negotiations and application. In cases where a DTC incorporates provisions influenced by the UN MC, consulting its Commentary ensures an accurate understanding of the treaty's context and intent.

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[8] H. AULT, "The Role of the OECD Commentaries in the Interpretation of Tax Treaties", *Intertax*, 1994, p. 147.
[9] M. LANG and F. BRUGGER, "The role of OECDCommentary in tax treaty interpretation", *Australian Tax Forum*, 2008, p. 99.
[10] See the OECD Commentary

54. It must also be noted that in the present case, all parties adhere to a dynamic approach to treaty interpretation. This approach allows for the consideration of subsequent developments, including versions of the OECD and UN Commentaries adopted after the treaties were concluded. Such an approach reflects the evolving nature of international tax law and acknowledges the Commentaries' capacity to provide valuable insights into the intended application of treaty provisions over time.

B. On NaviTech's residence

a. NaviTech is incorporated in Galaxia

55. NaviTech is incorporated in Galaxia.

b. NaviTech is effectively managed in Constellatia

56. NaviTech is effectively managed in Constellatia.

57. The place of effective management (hereafter "POEM") can be defined as the place where key management and commercial decisions necessary for the conduct of a company's business are made[11]. Many States interpret this concept by emphasizing the place of day-to-day operations[12] as is the case in Germany, for example[13].

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[11] United Nations Model Double Taxation Convention between Developed and Developing Countries 2001, "Article 4 Commentary", p. 67; OECD, Model Tax Convention on Income and Capital 2017, « Commentary on Article 4 », p. 112.
[12] M. HEMDAN and K. TETLAK, "The Influence of Remote Work on the Place of Effective Management under Article 4(3) of the OECD Model: Remote Work, Remote POEM?", 79 Bull. Intl. Taxn. 1 (2025), Journal Articles & Opinion Pieces IBFD, https://doi-org.proxy.bib.uclouvain.be:2443/10.59403/xa16xt.
[13] V. METZLER & A. STIEGLITZ, "Der de Beers Fall: A Role Model for the Determination of Corporate Residence in Tax Treaties? (SWI 2004)", p. 461.

58. While the POEM criterion is more ambiguous than the place of incorporation, it is less prone to abuses[14].

59. According to the 2001 UN Commentary and the 2014 OECD Commentary, a company can only have one POEM. The POEM criterion is a factual test[15] that requires an examination of all relevant facts and circumstances[16]. The Commentary provides several, non-exhaustive, factors for identifying the POEM, which are applied below to the present case.

60. The first factor mentioned is the location where the meetings of the company's board of directors are usually held. NaviTech's management is comprised of five senior engineers who meet weekly for informal coffee meetings and quarterly for formal board meetings, totaling fifty-six meetings annually. In 2022, sixty percent of the informal coffee meetings and one of the four formal board meetings were held in Constellatia. This amounts to a total of thirty-two out of the fifty-six meetings in total held in Constellatia. It can therefore be concluded that in 2022, the directors usually met in Constellatia.

61. More Importantly, the formal nature of some meetings does not inherently give them greater weight in determining POEM. The purpose of the POEM criterion is to identify where the company is substantively managed and where key initiatives are taken, not where procedural formalities occur[17]. NaviTech's quarterly formal meetings are formalities, procedural in nature, held to meet statutory obligations rather than to engage in real-time decision making. The weekly coffee meetings serve as primary forum for deliberation and strategic discussions about projects, business development and personnel. They shape the

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[14] B., PEETERS, « Artikel 4. Inwoner », *Internationaal Fiscaal Recht*, BAMMENS, N. et al., Wolters Kluwer Belgium, Malines, 2023, p. 110.
[15] Wassermeyer et al. in Wassermeyer, 2015 Art. 4 m. no. 100; Belgium, Cour d'Appel (Court of Appeals) Bruxelles, 29 June 1982, *Fiscale Jurisprudentie*, 1982, 1, 6 and 119.
[16] B., PEETERS, *op. Cit.*, p. 110
[17] EL JILALI, A., PEETERS, B., SMET, R., MASSARO, S., WILLEMS, S., [Droit fiscal international] Conventions fiscales internationales

substance of the formal decisions made during formal board meetings. The fact that the coffee meetings are held informally does not diminish the substantive nature of the discussion that occur during those meeting but is rather a reflection of the director's management style which prioritize technical expertise over bureaucracy.

62. The physical or virtual presence of UpTech advisors at formal board meetings does not alter this conclusion. The directors remain independent in their decision-making and have not always followed UpTech's advice. UpTech executives hold no formal management positions within NaviTech and have no voting rights in the meetings. Their role is purely advisory, focusing on financial, legal, and regulatory matters, which are secondary to the core strategic and operational decisions typically made during the coffee meetings. Consequently, the presence of UpTech advisors does not lend additional weight to the formal meetings, and their location in Galaxia has no bearing on the determination of NaviTech's place of effective management.

63. The second factor mentioned by the Commentary is the location where the chief executive officer and other senior executives usually carry on their activities. In NaviTech's case, by 2022, three of the five directors resided in Constellatia, and the directors primarily worked from home. With most directors based in Constellatia, the primary location of their activities can be regarded as carried on in Constellatia. This factor played a key role in a recent case in Belgium, where the court had to establish whether a company incorporated in Hong Kong by two Belgians — the sole shareholders, both living in Belgium — fell under Belgian corporate tax. The court determined that the place of effective management was in Belgium precisely because the shareholders, who exercised control over the

company, were residents there[18]. This case emphasizes the importance of the directors' place of residence.

64. The third factor is the location where the senior day-to-day management of the company is carried on. Indeed, the establishment of the POEM shouldn't be based solely on where the board of directors meet, but rather, where executive management involving senior executive functions of the entity is located[19]. In NaviTech's case, senior day-to-day management occurs primarily during the weekly coffee meetings, where directors discuss current projects, new business opportunities, company development, and personnel matters. This is especially relevant considering that NaviTech was previously managed exclusively through informal arrangements before the directors were instructed to hold formal meetings to comply with company law. Moreover, given that formal meetings are held only four times a year, it can be deduced that substantive decisions are made during the much more frequent coffee meetings and merely formalized at the board meetings. With 60% of the coffee meetings held in Constellatia, it follows that most day-to-day management activities occur there.

65. In conclusion, all relevant factors point to Constellatia as the place where NaviTech is effectively managed and support the conclusion that NaviTech's POEM in 2022 was in Constellatia. This conclusion is further reinforced by the increasing number of formal and informal meetings held in Constellatia in 2023 and 2024, as well as the preference of the two senior engineers residing in Solaria to travel to Constellatia for meetings.

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[18] Belgium, Court of Appeal in Gent, 29 March 2022, 2021/AR/46.
[19] Sharma, S. & Cardozo, J., 18 *APTB* 42 et seq. (2012); United Kingdom, UK First-Tier Tribunal (Tax Chamber), *Laerstate BV v. Commissioners for Her Majesty Revenue and Customs,* 11 August 2009, SFTD 551.

c. Solving the dual-residency problem

66. Both Galaxia and Constellatia consider that companies are resident if they are incorporated and/or have their place of effective management in their State.

67. While NaviTech is incorporated in Galaxia, its place of effective management is in Constellatia. As a result, NaviTech qualifies as a resident of both States.

68. This dual-residency issue is resolved by the DTC between Galaxia and Constellatia, which addresses such situations in its Article 4.3. According to this provision: "*Whereby reason of the provisions of paragraph 1 a person other than an individual is a resident of both Contracting States, then it shall be deemed a resident only of the State in which its place of effective management is situated*."

69. The place of effective management is used as tiebreaker. Since NaviTech's place of effective management is in Constellatia, it is deemed a resident of Constellatia under the terms of the DTC.

C. <u>Classification of the income</u>

70. The income that NaviTech has made in Solaria falls into the scope of Article 7 of the DTC between Solaria and Galaxia.

71. Article 7 of the DTC between Constellatia and Solaria governs the taxation of business profits. The term "business profits" is broad in scope and encompasses all income earned while carrying on an enterprise. In this case, the disputed income undoubtedly falls within this definition, as it arises directly from NaviTech's contractual activities.

72. The fundamental rule under Article 7 is that the business profits of an enterprise of a Contracting State cannot be taxed by the other State unless the enterprise has a PE in that State. This ensures that taxation rights are linked to the presence of a substantial and ongoing economic nexus within the taxing State.

73. The Solarian tax authorities are therefore only entitled to tax NaviTech's business profits insofar as it can be established that NaviTech has a PE within the Solarian territory. This issue will be debated in the following section of our reasoning.

D. <u>NaviTech doesn't have a Permanent Establishment in Solaria</u>

74. As established above the notion of PE is of primary importance for the application of Article 7 of the DTC between Solaria and Constellatia. This is because the business profits of an enterprise of a Contracting State cannot be taxed by the other State unless the enterprise has a PE in that State.

75. The following points establish that NaviTech doesn't have a PE in Solaria. Consequently, the State of Solaria isn't entitled to tax the disputed revenue.

a. The Solarian domestic definition of a PE isn't relevant

76. The domestic law of Solaria provides for a domestic definition of PE. However, this definition isn't relevant for the present case. This is because international conventions have primacy over domestic law. Indeed, the definition of PE in Solarian domestic law is very narrow, and in direct contradiction to the thresholds established in the DTC. In cases of conflict, international treaties prevail over domestic legislation[20].

[20] B. ARNOLD, *An introduction to tax treaties*, 2018, available online, p. 8.

77. Tax treaties are international agreements under public international law and thus subject to interpretation according to international law principles. Rules for the interpretation of international agreements are laid down in the Vienna Convention on the Law of Treaties[21], that is ratified by all parties to the present case. Article 31(3) VCLT requires that treaties be interpreted in good faith. Interpreting the concept of PE using a domestic definition, rather than the thresholds established in the DTC and the generally accepted meaning of the term within the context of tax treaties, would not align with the requirement of good faith interpretation.

b. NaviTech, as a resident of Constellatia, doesn't have a Permanent Establishment in Solaria

78. The term PE is defined in Article 5.1 of the DTC between Solaria and Constellatia as a "*fixed place of business through which the business of an enterprise is wholly or partly carried on*". This article spells out three conditions for the existence of a PE: (i) there must be a place of business, (ii) the place of business must be fixed and (iii) the business of the enterprise must be partly or wholly carried through the fixed place of business[22].

79. The wording of 'place of business' refers to a three-dimensional zone that includes tangible assets or tangible facility, generally immovable and distinct form the soil, used for carrying

[21] M. LANG and F. BRUGGER, "The role of OECDCommentary in tax treaty interpretation", *Australian Tax Forum*, 2008, p. 97.

[22] India, High Court of Delhi, GE Energy Parts Inc. v. Commissioner of Income Tax (International Taxation), 21 December 2018, 39, available online on IBFD website; C., GARBARINO, *Judicial interpretation of tax treaties*, Edward Elgar Publishing Limited, Cheltenham, 2016, p. 120; H., AIGNER and M., ZÜGER, *Permanent Establishment in International Tax Law*, Linde, Vienna, 2003, p. 45 and 46.

on the business[23]. Both the UN Commentary, preferred by the Court, and the Commentary on the OECD Model, upon which the DTC is based, define it as covering any premises, facilities or installations used for carrying on the business of the enterprise whether they are used exclusively for that purpose or not[24]. In the present case, the reconnaissance work carried out by BergTech and NaviTech in Solaria occurred throughout the country and did not involve any tangible facility. No centralized location for the operations can be pinpointed. As such, the criterion for the place of business under the DTC are not satisfied.

80. The term 'fixed' refers, in its turn, to a geographical fixation as well as temporal permanence[25]. A place is fixed when it shows a firm link to a specific, distinct geographical point. Both the UN Commentary and the Commentary on the OECD Model on which the DTC is based describe that a place of business is fixed when it is established at a distinct place with a certain degree of permanence[26]. This concept is interpreted strictly and cannot apply when the company roams[27] through the State, as was the case with NaviTech and BergTech, which traveled across the entirety of Solaria without staying in one place for more than five days.

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[23] J., BECKER, A., BLANK, M., BLANK, et. al., *Klaus Vogel on Double Taxation Conventions*, Vol. 1, 4th ed., 2015, Wolters Kluwer, p. 336 to 338.

[24] The Netherlands, Hoge Raad (Supreme Court), Case 14/03647, 15 January 2016, available online on IBFD; United Nations Model Double Taxation Convention between Developed and Developing Countries 2017, "Article 5 Commentary", p. 145; OECD, Model Tax Convention on Income and Capital 2017, « Commentary on Article 5 », p. 117.

[25] J., BECKER, A., BLANK, M., BLANK, et. al., *Klaus Vogel on Double Taxation Conventions*, Vol. 1, 4th ed., 2015, Wolters Kluwer, p. 342 and 343.

[26] United Nations Model Double Taxation Convention between Developed and Developing Countries 2017, "Article 5 Commentary", p. 145; OECD, Model Tax Convention on Income and Capital 2017, « Commentary on Article 5 », p. 117

[27] J., BECKER, A., BLANK, M., BLANK, et. al., *Klaus Vogel on Double Taxation Conventions*, Vol. 1, 4th ed., 2015, Wolters Kluwer, p. 344, 56.

81. The office hotels rented by BergTech three times for five days each time doesn't alter this conclusion, since it lacks the degree of temporal permanence required to qualify as a fixed place of business.

82. The agreements concluded by NaviTech with local companies to use their laboratory for some initial analysis cannot be held to qualify as a fixed place of business either. Indeed, as established in the OECD Commentary, the use by an enterprise of another location belonging to another enterprise will only constitute a PE if it is used on a continuous basis during an extended period[28]. This condition isn't fulfilled in the present case. NaviTech's presence in those laboratories was intermittent at best, and not constituent of a PE.

83. In conclusion, NaviTech and BergTech's activities in Solaria fail to satisfy the criterion for a PE under Article 5.1 of the DTC between Solaria and Constellatia, as they neither involved a place of business nor demonstrated the requisite degree of fixation.

84. The examples listed in the second and third paragraphs of Article 5 doesn't fit the present case and therefore, do not alter the conclusion.

c. Alternatively, NaviTech, as a resident of Galaxia, doesn't have a Permanent Establishment in Solaria

85. Even if NaviTech were considered a resident of Galaxia, rather than of Constellatia as previously established, it still would not have a PE in Solaria because the activities carried out in Solaria were of a preparatory character. Indeed, these only concerned steps made at an early stage of the process of the business deal.

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[28] OECD, Model Tax Convention on Income and Capital 2017, « Commentary on Article 5 », p. 119.

86. The primary distinction between the DTC between Solaria and Constellatia and the DTC between Solaria and Galaxia lies in Article 5.3 of the latter. This article expands the definition of PE to include the furnishing of consultancy services, a provision missing from the former. Under this provision, a "fixed place of business" isn't required. However, under Article 5.4, this inclusion does not apply when the activities in question are of a preparatory or auxiliary nature.

87. The Commentary on the United Nations Double Tax Convention Model, which forms the basis of the DTC between Solaria and Galaxia, defines a preparatory activity as one "*carried on in contemplation of the carrying on of what constitutes the essential and significant part of the activity of the enterprise. Since a preparatory activity precedes another activity, it will often be carried on during a relatively short period, the duration of that period being determined by the nature of the core activities of the enterprise*" [29].

88. In the present case, NaviTech was engaged by its client to (i) advise on the optimal positioning of communication stations for a navigation network, (ii) monitor the performance of these stations during their first three years of operation, and (iii) deliver a final report with recommendations for future improvements. The NaviTech and BergTech teams collectively spent 200 days in various regions of Solaria gathering data on terrain and weather conditions. Once collected, all subsequent processing and monitoring were carried out by NaviTech employees in Galaxia, as the necessary data could be extracted from records automatically maintained by the navigation system and transmitted digitally. Per the contract, NaviTech is obligated to continue monitoring this data for 2023, 2024, and 2025, culminating in a final report in 2026.

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[29] United Nations Model Double Taxation Convention between Developed and Developing Countries 2017, "Article 5 Commentary", p. 174.

89. The qualification of an activity as preparatory requires the identification of a point of reference[30], which is here the contract in its entirety. Given that the essential part of the contract is the monitoring of communication station performance from 2023 to 2025, and that the reconnaissance of the terrain isn't one of the three main contract tasks listed above, the reconnaissance activities conducted in Solaria in 2022 must be classified as preparatory work. Those activities were undertaken in contemplation of the monitoring tasks and spanned a relatively short period (200 days) compared to the overall contract duration of the project (2021 to 2026, 6 years in total). The relatively minor significance of the reconnaissance activities is further evidenced by the fact that BergTech's final comprehensive report to NaviTech was not forwarded to the client but used solely by NaviTech for drafting its recommendations.

90. As far as the days' counting is concerned, let it not be forgotten that we must take account of the time spent by Berg Tech as well. Indeed, Berg Tech's employees are undoubtedly and unavoidably in a subordinate relationship with regards to NaviTech. The fact that Berg Tech's employees do not work totally independently from NaviTech has therefore an impact on the way we need to comprehend the issue.

91. Furthermore, the reconnaissance efforts represent the sole instance of work performed in Solaria during the contract's entirety, as all subsequent activities take place at NaviTech's offices in Galaxia.

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[30] J., BECKER, A., BLANK, M., BLANK, et. al., *Klaus Vogel on Double Taxation Conventions*, Vol. 1, 4th ed., 2015, Wolters Kluwer, p. 380 and 381.

92. Finally, Article 5.4 (d) as well as consistent case law and doctrine supports the conclusion that the collection of information constitutes a preparatory activity[31] that does not create a PE when the information is processed elsewhere[32]. For instance, in 2023, the Supreme Court of Ukraine resolved a dispute regarding the alleged PE of a German company in Ukraine by ruling that the company's activities—the collection and transmission of field data—did not give rise to a PE but were to be treated as preparatory vis-à-vis the activities of the enterprise[33].

93. In our present case, BergTech's activity in Solaria, supervised by NaviTech, was limited to the collection of data which was then compiled, sent to NaviTech and wholly processed by NaviTech's employees in Galaxia.

94. The very last argument the tax administration might put forward is the one about the existence of a "digital PE" in Solaria. Indeed, recently, legislation passed in Solaria on the matter and consequently extended, on the national level, the traditional concept of PE. However, putting up with such an extension would be putting the cart before the horse given that the international community has not yet incorporated it until now. The uncertainty surrounding a so-called "digital PE" on the international scale allows us to call into question the lawfulness of the domestic legislation which brought it to life, and which might be invoked by the defendant. The latter should therefore be dismissed.

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[31] India, Income Tax Appellate Tribunal, Bellsea ltd. v. ADIT, 6 July 20168, available online on IBFD; Belgium, Hof van Beroep Gent (Court of Appeals Gent), 2005/AR/477, 16 January 2007, *De Fiscale Koerier*, 2007, 48; C., GARBARINO, *Judicial Interpretation of Tax Treaties,* Edward Elgar Publishing Limited, Cheltenham, 2016, p. 145.

[32] Germany, Bundesfinanzhof (Federal Tax Court), IR 292/81, 23 January 1985, *Bunderssteuerblatt*, 1985, II, 13, 417; J., BECKER, A., BLANK, M., BLANK, et. al., *Klaus Vogel on Double Taxation Conventions*, Vol. 1, 4th ed., 2015, Wolters Kluwer, p. 379.

[33] Ukraine, Verkhovniy Sud (Supreme Court), Ferrostaal Equipment Solutions GmbH v. Derzhavna Podatkova Inspekciya u Solomjanskomu rajoni GU DFS u misti Kyiv, 2 May 2023, available online on IBFD.

E. Overall conclusions

95. NaviTech is a resident of Constellatia. Consequently, the DTC concluded between Solaria and Constellatia is applicable to the present case.

96. As duly explained above, the disputed income must be qualified as business profits under Article 7 of the DTC.

97. Under this DTC, NaviTech doesn't have a PE in Solaria, because it doesn't maintain a fixed place of business in Solaria and consequently Article 5's conditions for the existence of PE aren't fulfilled.

98. Even if your Court rules NaviTech as a resident of Galaxia, making the DTC concluded between Solaria and Galaxia applicable to the present case, NaviTech still wouldn't have a PE in Solaria. This is because the activities conducted by NaviTech and BergTech in Solaria were of a preparatory nature and fall therefore outside the scope of Article 5.

99. Due to the lack of existence of a PE for NaviTech in Solaria, Solarian Tax Authority aren't entitled to the disputed business profits.

F. Requests

100. Firstly, the Court is requested to rule that the Double Tax Convention between Constellatia and Solaria is applicable to the present case.

101. Secondly, the Court is requested to rule that NaviTech is a resident of Constellatia according to the Article 4 of the DTC concluded between them.

102. Thirdly, the Court is requested to rule that NaviTech has no Permanent Establishment in Solaria and therefore business profits are not taxable under Article 7 of the Double Tax Convention between Constellatia and Solaria in Solaria.

103. Finally, in the alternative where the Court does not rule that NaviTech is a resident of Constellatia but of Galaxia, the Court is requested to rule that the activities conducted by NaviTech in Solaria are of a preparatory nature and therefore aren't taxable under Article 5 of the DTC concluded between Solaria and Galaxia.

IV. TABLE OF ABBREVIATIONS

BEPS = Base erosion and profit shifting

DTC = Double tax Convention

DTT = Double tax Treaty

MC = Model Convention

OECD= Organization for Economic Co-operation and Development

OECD MC = OECD Model Tax Convention on Income and on Capital

OECD Commentary = OECD Commentary on the Model Tax Convention on Income and on Capital

PE = Permanent Establishment

POEM = Place of effective management

UN = United Nations

VCLT = Vienna Convention on the law of treaties