Settlement of Disputes in Greek Tax Treaty Law

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I. Introduction

The resolution of conflicts arising in the realm of double taxation conventions (DTCs) has always been of high importance. Both the States and the taxpayers are given a few options in order to achieve this goal.

First of all, the OECD Model Tax Convention (OECD Model) offers a quite effective means. In Art. 25 the mutual agreement procedure (MAP) is laid down as an instrument for the resolution of conflicts arising during the implementation or interpretation of DTCs. This article, in its proposed structure in most cases, is used by Greece in negotiating a DTC and it will be dealt with below in II.

Furthermore, in the field of European Community law recent developments have resulted in the adoption of the EU Arbitration Convention, in which an MAP is supplemented by an arbitration procedure. Even if the material scope of application of the EU Arbitration Convention is limited in comparison to the DTCs, it constitutes a progress to a more effective instrument. The relevant provisions are elaborated below in III.

Lately, certain states demonstrated their will to negotiate arbitration clauses within DTCs. Greece has not been one of them. No DTC Greece has concluded includes a so-called "arbitration clause". It is interesting though to examine whether such a possibility, to resolve tax disputes through arbitration, could be accepted under Greek constitutional law. This latter, along with other models for the resolution of conflicts stemming from other parts of law, are being dealt with below in IV.

Unfortunately, relevant literature dealing with the above mentioned topics is very poor in Greece. It seems that the rare use of those clauses by the administration and/or the taxpayers as well as the lack of publication of the respective data have resulted in a reduced interest for dealing with those matters. Very few books have been published that may incidentally contain a few lines about the MAP and a few articles have appeared in tax law reviews. Relevant courts decisions are also very rare. Nevertheless, that does not lessen the importance of MAPs and of other alternative means for the resolution of international tax law disputes, like arbitration, that still need to be further elaborated in Greece.

II. Mutual Agreement Procedure

1. Initiation of a Mutual Agreement Procedure

The MAP, as laid down in Art. 25 of the OECD Model Tax Convention, has been adopted in every DTC Greece has signed except the one with the United Kingdom.[1] The MAP is the way through which the implementation of the

1 It is recognised though that this law is very old. See also Anagnostopoulos, The Greece-U.K. DTC: interpretation and comparison with the OECD Model (in Greek) *DFN* 2000, p 724.

provisions of DTCs is secured, as it constitutes a special procedure concerning the interpretation and the application of the DTC and aims at eliminating any difficulties arising from the application of a DTC.[2]

1.1 Starting the Procedure

According to Art. 25 of the OECD Model, both the taxpayers and the tax authorities have the right to initiate an MAP. As far as the taxpayers are concerned, the right is granted to the residents of a Contracting State, but in some cases it is also granted to the nationals of a Contracting State. The taxpayer's legal form is not of importance: persons as well as enterprises, regardless of whether they have a legal personality or not, can initiate an MAP.[3] Although the dominant opinion does not grant the same right to permanent establishments,[4] recent developments in EC law may be used as a basis for an extension of the relevant DTC provision.[5]

The taxpayer can initiate the procedure in any case if he thinks that actions taken by one or by both Contracting States result or may result in a taxation which is not in accordance with the provisions of the DTC. The wording of the provision is very broad, aiming both to provide efficient protection for the taxpayer in as many cases as possible and to secure the implementation and practical efficiency of DTCs.

If this was not the case, it would be possible for the Contracting States to cancel the provisions of DTCs in practice, by following practices or establishing unilateral measures which would differ from the provisions contained in the DTC. Even in the case where both Contracting States followed a practice that would cancel the provisions of a DTC, this would not be justified, as it would constitute an unauthorised alteration of a DTC by the administration, not permitted in Greek law.[6]

If the taxpayer addresses to the competent tax authority of the State of his residence asking for initiation of an MAP, the latter has the duty to examine this request carefully. The tax authority has no right to deny this request, unless its decision is well founded. If this is not the case, the taxpayer will normally

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2 See Yannopoulos, The arbitration clause in DTCs (in Greek) *DFN* 1981, p 114 with international literature references.

3 Finokaliotis, *The harmonisation of income tax of associated enterprises in the common market* (hereafter 'The harmonisation') (1995) (in Greek) p 118.

4 See for example Karakitis, *The taxation of international enterprises in Germany and Greece under the light of the Greek-German agreement on the avoidance of double taxation* (hereafter 'The taxation of international enterprises') (1996) (in Greek) pp 148 et seq.

5 See below in II.1.1.1.

6 Art. 28 (1) of the Greek Constitution reserves special treatment for DTCs, which as international law are ranked high in the norm hierarchy and can not be altered, unless the same procedure is followed according to which they entered into force.

have the right of recourse to domestic courts under domestic state liability law and enforce the initiation of the MAP.[7]

The tax authority can also initiate an MAP in the cases of Art. 25 (3) of the OECD Model. In this case the tax authority will contact the other State's competent tax authority, even if the taxpayer that may be involved did not wish to use this procedure. The taxpayer in this case cannot influence the competent tax authorities in any manner whatsoever.

1.1.1 Permanent Establishments Can Start an MAP

A permanent establishment (PE) situated in a Contracting State is not considered a resident of this State and thus, as the dominant opinion holds, is not entitled to initiate an MAP by recourse to the competent authority of the State in which it is situated. Nevertheless, in the light of recent developments, especially in the case law of the European Court of Justice (ECJ) it seems that such a possibility can not only be justified but also enforced.[8]

In DTCs concluded between EU Member States:

Where the case involves two Contracting States that are also Member States of the European Union, a differentiation in the treatment between a PE of a company of another Member State and a company resident of the Member State in which the PE is situated will result in an infringement of the freedoms and principles established in the European Union, especially the freedom of establishment and the principle of equal treatment.

In its judgement on the *Saint Gobain case*[9], the ECJ ruled that the freedom of establishment includes among others the right of companies or firms that are considered residents of a Member State to pursue their activities in any other Member State through a branch or an agency. In other words, the freedom of establishment comprises the freedom that nationals of a Member State and companies assimilated to them have to choose the form under which they will pursue their activities in another Member State,[10] especially if it will be under the form of a subsidiary or a PE.

The combination of Articles 52 and 58 of the EC Treaty guarantees companies having their seat in a Member State which have exercised their freedom of establishment ("non-resident companies") the same treatment in the host Member State as that granted to companies having their seat in that Member State.[11]

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7 Similarly Züger, ICC proposes arbitration in international tax matters, *European Taxation* 2001, no. 6, pp 221 et seq.

8 See also Perrou, The Mutual Agreement Procedure in the DTCs (in Greek, *DFN* 2002, pp 581 et seq. For a detailed analysis on the application of the non-discrimination principle of the EC law as far as permanent establishments are concerned, see Karakitis, *The taxation of international enterprises,* pp 151 et seq.

9 Case C-307/97, *Compagnie de Saint-Gobain* (http://www.europa.eu.int/eur-lex/en/index).

10 See also Case C-311/97, *Royal Bank of Scotland plc.,* para. 23 (http://www.europa.eu.int/eur-lex/en/index).

11 Para. 34 of the judgement of the ECJ, where further case-law is cited as well.

Any different treatment between the two forms that would make one less favourable compared to the other would create an obstacle to the freedom of establishment, as it "restricts the freedom to choose the most appropriate legal form for the pursuit of activities in another Member State".[12] Moreover, such a different treatment is not tolerable since it is not justified, as there is no objective difference in the situation between the PE and the resident company.[13]

It can be supported that permanent establishments of companies having their corporate seat in another Member State ("non-resident companies") that are not granted the right to initiate an MAP are in a less favourable situation than resident companies.[14] The comparison which has to be made is between a PE of a non-resident company and a subsidiary of a non-resident company.[15] It is clear that since the subsidiary is qualified to initiate an MAP while a PE is not, we have a case of discrimination against the PE of a non-resident company.

From this point of view, a PE of a company having its seat in a Member State and situated in another Member State should be equally qualified to initiate an MAP under the same conditions as a resident company of the host Member State.

In DTCs concluded between a Member State and a non-Member State:

Objections arise as to whether the rights and advantages provided by DTCs, that are strictly bilateral treaties, can be extended to nationals of states that did not take part in the negotiations, in cases where non-EU Member States are involved. As it is pointed out "double-taxation treaties are based on the principle of reciprocity and the balance inherent in such treaties would be disturbed if the benefit of their provisions was extended to companies established in Member States which were not parties to them".[16]

Nevertheless, even in these cases Member States can not disregard community rules.[17] Following this course of thoughts, the ECJ concluded that even in the case of a DTC concluded between an EU Member State and a third country, the national treatment principle[18] requires the Member State which is party to

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12 Case C-307/97, para. 42.

13 Case C-311/97, paras. 31 and 34.

14 Case C-307/97, para. 38.

15 According to ECJ case law, a company having its seat in a Member State and a branch established in that Member State having its seat in another Member State are in an objectively comparable situation, one that does not permit differentiation in treatment of the two in the first Member State. See case C-311/97, para. 26.

16 See the Swedish Government's observation in Case C-307/97, para. 55.

17 In case C-311/97, para. 19 the ECJ states that, although direct taxation is a field that falls out of the competence of the European Union, Member States have always the obligation to exercise that competence consistently with Community law.

18 For an analysis of the "national treatment" principle see Theocharopoulos, DTCs and the "most favoured nation's" clause (in Greek) *DFN* 1989, pp 275 et seq.

the treaty to grant to PEs of non-resident companies the advantages provided for by that treaty on the same conditions as those which apply to resident companies.[19]

The balance and the reciprocity of the DTCs concluded with non-Member States would not be disturbed by a unilateral extension of the category of individuals qualified for certain advantages provided for in those treaties, under the condition that such unilateral extension would not impose any new obligations on the other Contracting State and would not affect the rights of the non-EU Member contracting countries in any manner whatsoever.[20]

It is still to be discussed whether granting the right to initiate an MAP in such cases where a non-Member State is involved would be a severe alteration of the scope of application of the respective DTC, not permissible by the other Contracting State. It is true that such a unilateral extension seems to be difficult to be accepted. In any case, if the non-member country agrees to such an extension of the categories of the covered persons to comprise PEs of non-resident companies that are situated in the other Contracting State that is an EU Member State, there would be no problem.

1.2 "Taxation Not in Accordance with the Provisions of the Convention"

The taxpayer has the right to initiate an MAP if he is threatened with a taxation that is not in accordance with the provisions of the convention. The matter when a taxation is not in accordance with the provisions of the DTC has to be assessed on a case-by-case basis.

The cases covered can be divided in two categories: a) double taxation and b) discriminatory taxation.[21] In the vast majority of the cases, a "taxation not in accordance" would involve a case of double taxation.[22] Normally, it would also cover only juridical double taxation,[23] leaving economic double taxation outside the scope of application of the MAP, while there is still controversy on whether double non-taxation is also covered. As far as discriminatory taxation is concerned, the relevant provision is that of Art. 24 of the OECD Model.

1.2.1 Economic Double Taxation

Usually the question whether economic double taxation is covered by a DTC, which means that the Contracting States wanted the avoidance of economic double taxation, will find an answer in Art. 9 (2) of the OECD Model.

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19 Case C-307/97, para. 58.

20 Case C-307/97, para. 59.

21 For the material scope of application of the MAP see also Perrou, *DFN* 2002, pp 581 et seq.

22 For the definition of the term and the distinction between juridical and economic double taxation see Anagnostopoulos, Introductory Remarks in Markou, *International Bilateral Conventions* (2001) (in Greek) p 7.

23 For an analysis of the term see Theocharopoulos, *DFN* 1989, pp 275 et seq.

In Art. 9 (2), and consequently in DTCs containing this clause, it is expressly stated that the Contracting States do not wish to impose on taxpayers the burden of economic double taxation, but they wish its avoidance. In these cases the taxpayer can ask for protection when economic double taxation is imposed, as this is expressly covered by the DTC.

The mere fact that the parties included paragraph (1) of Art. 9, but not paragraph (2) in a DTC cannot be interpreted as broadly as to arrive to the same conclusion in cases where the latter is missing, as it is proposed in the Commentary.[24] Of course for DTCs concluded before 1977 a question may arise and the above mentioned interpretation can be adopted, but this will be difficult for DTCs concluded after that date. Since the contracting parties have the option to include the clause of Art. 9 (2) and they did not, it means that they accept economic double taxation and leave it outside the protection of the DTC.

The provision of Art. 9 (2) is normally not included in DTCs Greece has concluded. Exceptions appear in only six cases, namely in the DTCs Greece has concluded with the Netherlands,[25] Denmark,[26] Luxembourg,[27] Korea,[28] Croatia[29] and Albania.[30] In these cases the states have agreed to avoid the economic double taxation that may occur during the adjustment of profits of associated enterprises. If the taxpayer thinks that economic double taxation is not avoided, he can ask for a solution to be given through the MAP. For the other DTCs Greece has signed it can not be accepted that economic double taxation is covered, as paragraph 2 is missing.

Even if the OECD Model suggests[31] that in cases where the clause of Art. 9 (2) is missing the economic double taxation is still covered by the convention, Greek tax authorities do not share this point of view. The tax authorities have the opinion that economic double taxation will be a "punishment" for the tax payer who tries to misuse the rights of the DTC, following a practice that is aiming to avoid tax. The threat of such a punishment may urge them to avoid transfer pricing methods, made not in accordance with the provisions of DTCs.

However, the lack of the clause of Art. 9 (2) does not mean that the taxpayer remains unprotected. Greek law,[32] in which the definition of associated enter-

24 OECD Model Commentary on Art. 25, para. 10.

25 Article 9 of Greece-Netherlands DTC (1984).

26 Article 9 of Greece-Denmark DTC (1991).

27 Article 9 of Greece-Luxembourg DTC (1995).

28 Article 9 of Greece-Korea DTC (1998).

29 Article 9 of Greece-Croatia DTC (1998).

30 Article 9 of Greece-Albania DTC (1999).

31 OECD Model Commentary on Art. 25, para. 10.

32 Article 39 of the Greek Income Tax Code (law no. 2238/1994) provides for such cases, when transfer pricing takes place between two Greek associated enterprises or a Greek and a foreign one. Under the same article the taxpayer enjoys certain rights, aiming to protect him against the tax authority. For the interaction between this domestic provision and the provisions contained in DTCs, see Mavraganis, Greece: Rules and practice on transfer pricing, *Intertax* 1995, pp 594 et seq.

prises is very broad, contains rules granting certain rights to the sincere taxpayers that may result even in the total avoidance of the economic double taxation.

1.2.2 Double Non-Taxation

Double non-taxation is not the objective of a DTC. The aim of DTCs is to overcome obstacles arising from double taxation and not to eliminate any taxation that is normally levied on a certain income. Nevertheless, in some cases double non-taxation might occur as a result of the application of the provisions contained in the DTC.

More precisely, whenever an income is to be taxed according to the rules laid down in the DTC but this income remains not taxed in both Contracting States, because there may be a gap in the relevant domestic legislation, this double non-taxation is also not in accordance with the provisions of the convention.[33] This could justify the competent authorities to initiate an MAP with a view to the avoidance of such a double non-taxation.

Such an opinion, though, is far too strict and directly against the taxpayer. In any case, it has to be born in mind that MAP is merely a means for the resolution of disputes and not a means for the tax authorities to raise taxes that otherwise would have not the right to demand. Therefore, any extension of the provision in this sense should be examined with much scepticism.

1.2.3 Discriminatory Taxation – "Taxation More Burdensome"

Double taxation (juridical and – where covered – economic) is not the only case of "taxation not in accordance with the provisions of the Convention". The OECD Model includes expressly the case of Art. 24 of the OECD Model as a taxation not in accordance with the provisions of the Convention. This clause is not always included in the DTCs Greece has concluded, but this does not mean that protection can not be granted in those cases either.

On the contrary: the wording of Art. 25 is so broad that it can be easily concluded that discrimination and more burdensome taxation have always been covered by the convention, even if no explicit reference was made in Art. 25. Furthermore, in cases where reference is made in Art. 25 that the right to initiate an MAP is also granted to nationals of a Contracting State, this implies the intention to grant protection in cases where Art. 24 is breached.

The State Law Council[34] (NSK), in interpreting Art. 26 of the Greece-France DTC, stated that the joint committee provided in that article tries to solve the

33 For an illustrative example of double non-taxation (namely: double tax relief) that is not in accordance with the provisions of the Convention regarding the Greece-Germany DTC, see Karakitis, *The taxation of international enterprises,* pp 98 et seq, in particular footnote no. 83.

34 See State Law Council (NSK) in plenary assembly, opinion no. 507/1980, *DFN* 1981, p 141.

matter with a view to the avoidance of "double taxation". Although Art. 26 of the DTC, that contains provisions similar to the ones in Art. 25 of the OECD Model, refers to "taxation not in accordance with the provisions of this Convention", the NSK in its interpretation restricted its scope of application to cover only "double taxation".

This interpretation is narrower than the wording of the relevant article and because it restricts the taxpayers' rights, it can not be accepted as such. Even if the article refers only to "residents" and not to nationals, this does not mean that it cannot cover the case of Art. 22 of the Greece-France DTC concerning "non-discrimination". The article covers any taxation that can be found not in accordance with any of the provisions contained in the DTC.

In the cases where the Contracting States wished to narrow the material scope of application of the MAP they did so expressly. For instance, this is the case in the DTCs concluded between Greece and the USA,[35] India,[36] Germany[37] and Belgium.[38] In these cases, the wording of the relevant articles refers only to "double taxation" which is not in accordance with the provisions of the conventions, leaving very little room for a broader interpretation. Consequently, taxpayers will not enjoy full protection as they do in comparison with other DTCs. But if the Contracting States decide to grant the taxpayers broader protection in practice, this would not be contrary to the principles and to the spirit of the convention, despite the narrow wording of those provisions.

In any case, it must be observed that since Art. 24 of the OECD Model is included in all DTCs Greece has concluded, the provisions it contains would remain *lex imperfecta* if there were no way or means to enforce its application. The MAP is exactly such an instrument of enforcement that can guarantee to an extent the application of the non-discrimination clause. Therefore, even in cases where the MAP article refers only to residents and not to nationals as well, or only to "double taxation" and not to "taxation" in general, a correcting interpretation resulting in the broadening of the wording of the provision would always be in line with the scope of the convention.

1.3 Evidence Required

The taxpayer can apply for the MAP if he considers that the actions of one or both of the Contracting States result or will result for him in a taxation not in accordance with the provisions of the convention. The article does not provide for the kind of evidence the taxpayer needs to present before the competent tax authority.

A broad interpretation of this clause in favour of the taxpayer that would require only elementary evidence could lead to the conclusion that the taxpayer

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35 Art. XVII of the Greece-USA DTC (1953).

36 Art. XIX of the Greece-India DTC (1966).

37 Art. XX of the Greece-Germany DTC (1967).

38 Art. 25 of the Greece-Belgium DTC (1969).

can present his case to the tax authority in practically any case he fears will impose upon him taxation contrary to the DTC. This broad interpretation can lead to the abuse of the MAP clause by the taxpayers and cause severe problems to the function of the tax authorities.

On the other hand, the requirement of excessively detailed evidence would be unfavourable for the taxpayer and could make the protection of the MAP almost impossible. So, it is not wise either to establish beforehand any minimum amount of proof to be presented by the taxpayer.

What is best for both parties, taxpayer and tax authority, is to determine in each case, according to its own special characteristics, the evidence required. The tax authority will only need a minimum of evidence that would be enough to prove that the case in question is well founded in order to proceed and examine it. And the taxpayer will need to present only the evidence that is required to support his allegation and not totally prove it, which would be too difficult in some cases.

1.4 Time Limits

In the OECD Model it is proposed that there should be a limit as to the time a taxpayer may challenge the action of a tax authority and ask for initiation of an MAP. This time limit is usually set to three years: the taxpayer has the right to present his case within three years from the first notification of the action resulting in taxation not in accordance with the provisions of the convention.

Even if the Commentary proposes[39] that this 3-year period should be a minimum, States remain free to agree on a longer or shorter time limit or even on no time limit at all. In the vast majority of DTCs concluded by Greece, there is a time limit which is usually, as proposed in the OECD Model, three years from the first notification.[40] However, there exist a few remarkable exceptions.[41]

In some DTCs there is no time limit for the initiation of the procedure.[42] This can signify, from the taxpayer's point of view, a greater protection, but not without problems. The later the taxpayer decides to present his case to the competent tax authority, the more difficult it will be to provide enough evidence in order to support the reasons of his claim. However, the absence of any time limit remains basically in favour of the taxpayer.

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39 OECD Model Commentary on Art. 25, para. 17.

40 This is the case in the DTCs with: Finland (1981), the Netherlands (1984), Hungary (1984), Switzerland (1984), the Czech Republic (1989), Slovakia (1989), Poland (1991), Norway (1991), Denmark (1991), Bulgaria (1994), Romania (1995), Luxembourg (1995), Croatia (1998), Israel (1998), Korea (1998) and Albania (1999).

41 See also Yannopoulos, *DFN* 1981, p 114.

42 This is the case in the DTCs Greece has concluded with: the USA (1953), France (1964), India (1966), Germany (1967), Cyprus (1968) and Austria (1971).

In two DTCs, namely the Greece-Belgium[43] and the Greece-Italy[44] DTCs, the time limit is shorter than usual and it is required that the case is presented before the competent tax authority within two years from the first notification. In the DTC concluded with Sweden[45] the wording is totally different. In this DTC, the taxpayer's right to present his case before the competent tax authority and to initiate an MAP is closely related to remedies provided by national law. The taxpayer can initiate an MAP only before he seeks protection under national law. This means that once the taxpayer has presented his case before a national court, he is no longer entitled to initiate the MAP. On the contrary, even if he has initiated an MAP, he can always appeal for the same case to a national court, according to national law.

The MAP is a special procedure based on international law. As it is part of a DTC ratified and entered into force according to Art. 28 (1) of the Greek Constitution, it enjoys a high ranking in the norm hierarchy.[46] Consequently, this procedure can not be subject to any other time limits provided by national law. In the cases where no time limit is provided, this is not a "gap" that can be filled unilaterally by national law provisions, as this would be unconstitutional. Neither can any other time limit provided in a DTC be shortened unilaterally. On the contrary, a more favourable national law provision establishing a longer time limit will always be valid as it will broaden the protection of the taxpayer.

1.5 Remedies Provided by National Law

The MAP is a special, additional, procedure provided by international law for the settlement of disputes arising from DTCs. It is a distinct and independent procedure in comparison with the rights and remedies provided by national law. This principle is set forth in Art. 25 (1) of the OECD Model and is repeated in all DTCs Greece has concluded: the taxpayer can present his case before the competent tax authority irrespective of the remedies provided by the domestic laws of the Contracting States.

The fact that the taxpayer has already made use of the remedies provided by domestic law does not mean that he can no longer exercise his rights under the DTC, provided that time limits, wherever such limits exist, are respected. On the other hand, the initiation of an MAP according to the provisions of a DTC cannot deprive the taxpayer of the protection domestic laws grant to him. Both systems function at the same time, on the same case, aiming at providing the broadest possible protection for the taxpayer.

In the case where the interested taxpayer presents his case before a Greek court without having used his right to initiate an MAP or if the time limit to do

43 Art. 25 of the Convention (1969).

44 Art. 26 of the (revised) Convention (1991).

45 Art. XXVIII of the Greece-Sweden DTC (1963).

46 For more details on the supremacy of the DTC provisions over the domestic law provisions see Perrou, Tax Treaty Interpretation in Greece, in: Lang (ed) Tax Treaty Interpretation (2001) pp 153 et seq.

so has expired, the Greek court will examine the case as if the special procedure provided in the DTC did not exist. On the other hand, if the taxpayer uses at the same time both possibilities, under international and under domestic law, it is supported that the Greek court will have to suspend the proceedings until the MAP reaches to a decision.[47]

This opinion cannot be easily accepted as such. The most important drawback is that it overlooks the essential core and handicap of the MAP. The competent tax authorities are not forced to reach to a decision in each case. They only need to try to solve the dispute. It is not certain that they will reach an agreement and if they do, it is not certain when they will do so, as there are no time limits within which they have to reach a decision.

If the Greek judge was to suspend the procedure of the Greek court till the mutual agreement reaches a decision, that could take forever and would result in practice in an unconstitutional denial of protection by the Greek court. Nor can a judge decide after a certain time has passed and no agreement has been reached within the MAP that he should at last proceed the trial. The Greek court, once the case is presented before it, has the duty to award justice and reach a decision without delay.

Where the taxpayer has used both possibilities, under international and under domestic law, it is possible that the two procedures will supplement each other. As far as the mutual agreement has reached a partial agreement, the Greek court will have no competency to judge on the same case for the part of the difference that has already been solved, or even if it did, its decision would have no force. The Greek court will still be competent and obliged to reach a decision for the part of the case that is presented before it and which has remained unsolved within the scope of the MAP.

What will happen if the Greek court reaches a decision concerning a different part of the same case which is contrary to the one the competent authorities reached within the scope of the MAP for another part of the same case is a matter that remains open. Such a case has not as yet been met in practice. Nevertheless, the avoidance of such a possibility is another argument in favour of the reinforcement of the MAP in order to become a complete procedure for solving disputes arising within DTCs.

1.6 The Greek Experience

Not many data is available regarding the implementation of an MAP in Greece.[48] Until today the MAP has only been initiated within three DTCs.[49] In all cases,

[47] See Yannopoulos/Yannopoulos, The Greek judge in interpreting DTCs (in Greek) *EDDD* 1995, p 183 (p 209).

[48] See Yannopoulos, *DFN* 1981, p 114 and Yannopoulos, Greek National Report in: IFA (ed) *Cahiers de droit fiscal international* 1981, vol. LXVIa, Mutual agreement-procedure and practice (hereafter 'Cahiers 1981') p 309.

[49] The Greece-France DTC in 1979, the Greece-Germany DTC in 1987 and the Greece-USA DTC in 1990.

the procedure was initiated by the foreign tax authority and in two of them[50] there was an agenda of several matters that were discussed. An agreement was reached for some of them, the rest remaining pending. For the matters for which an agreement was reached, the tax authorities signed the relevant documents.

From the data that are available,[51] it seems that in the MAP within the Greece-France DTC seven cases were discussed. In four of these cases a mutual agreement was reached while the last three remained pending, since there was need for supplementary information. From the total of the seven cases: four were dealing with the meaning of "permanent establishment", one was dealing with the tax on income from employment and the meaning of "residence", two of them were dealing with the allocation of general expenses between parent and subsidiary; the last two cases were dealing with the tax on interest.

2. The Procedure Itself

2.1 Competent Authority

According to Art. 25 (1) of the OECD Model, the taxpayer has to present his case before the competent authority of the State of residence or the State of nationality, where the case is relevant. In Greece such competent authority is the head of the Local Tax Authority (*DOY*) under which the taxpayer falls for the needs of income tax. The Local Tax Authority will then inform the competent Department of International Relations in the Ministry of Finance.

In all cases where the MAP has been initiated, the option of setting up a Joint Committee, as provided in Art. 25 (4) of the OECD Model, has been used.

The NSK in its opinion no. 507/1980[52] dealt with the legal character of this Joint Committee, within the provisions of Art. 26 of the Greece-France DTC. More precisely, it maintained that this is an "Arbitral Committee", that has the power to resolve the case presented before it and to reach a decision that has binding effect. But, as it will be pointed out later on, this is not really an "arbitral committee", since neither the procedure is an arbitral procedure nor the committee has qualities that could justify such a characterisation.

2.2 The Taxpayer's Involvement

The taxpayer has the right to initiate the MAP by presenting his case before the competent tax authority. But this is the only involvement the taxpayer has. He has no power to force the competent authority to deal with the case. It is the tax authority's duty, though, to deal with every case that appears well founded to it. After the taxpayer's action, the tax authority, either unilaterally

50 Those with France and with the USA.

51 Yannopoulos in: IFA (ed) *Cahiers* 1981, p 309.

52 See the full text, *DFN* 1981, p 141.

or in co-operation with the other tax authority, will try to reach to a solution, setting up a joint committee, where necessary.

It is recognised that the taxpayer does not become a party in the MAP.[53] Therefore, any rights that the taxpayer may have are very restricted. The MAP is carried on between the competent tax authorities of the two contracting states. The taxpayer has the right to be informed on the progress of the procedure, he has access to the documents that concern him but he has no access to the documents of the procedure, as it is a special procedure between the two States.

Furthermore, the taxpayer has the right and the obligation to provide the Joint Committee with the relevant information. This obligation is restricted by the laws for the protection of personal data. The taxpayer is in no case obliged to disclose any trade, business, industrial, commercial or professional secret or trade process he possesses. Public policy will as well be the limit of any disclosure he can make.[54]

Last but not least, the taxpayer has no right to challenge the decision to which the tax authorities will reach within the MAP. He cannot do so since no such right is expressly granted to him and since he never becomes a party in the procedure.

Although in some countries the taxpayer's consent is needed, in Greece it is supported that this cannot be accepted. It seems rather inconsistent for a taxpayer to initiate an MAP under the condition that the decision of the tax authorities will be favourable for him, otherwise he will not agree with its implementation.[55] Once the MAP has reached a decision, this decision is binding upon both the competent tax authorities and the interested taxpayer, its implementation not depending on its consent.

2.3 Time Limits

No time limit is provided as far as the conclusion of the MAP is concerned. After it has been initiated, it is in the hands of the competent authorities and the interested taxpayer cannot force them to act faster. This important drawback of the MAP underlines the necessity for a change. Such a procedure could last for a very long period of time, cancelling in practice any protection sought by the taxpayer, or even cause financial or other damage to the taxpayer.

As a compensation for this absence of certain time limits within which a decision should be issued within the MAP, it is provided that any decision that will be reached within the procedure will be binding, irrespective of the national law time limits.

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[53] Finokaliotis, *The harmonisation*, p 140 (footnote no. 258); Fortsakis, *Arbitration and administrative law disputes* (hereafter 'Arbitration') (1998) (in Greek) p 225.

[54] See the similar obligation the tax authorities have according to Art. 26 (2) (c) of the OECD Model.

[55] Finokaliotis, *The harmonisation*, p 121.

2.4 Publication of Mutual Agreements

Documents relevant to the MAP as well as the mutual agreement itself cannot be published and they are not published in Greece. As it is accepted,[56] not even the interested taxpayer can have access to those documents, since the MAP is a special procedure between the two Contracting States. All other documents or information concerning the taxpayer are also protected by the fiscal secrecy laws.[57] Very few exceptions are strictly referred to in the relevant domestic law as well as sanctions in case of violation.[58]

Next to the domestic law provisions, the protection of this information is supplemented by the provisions of Art. 26 of the OECD Model. This article expressly provides that one Contracting State has no obligation to supply information which is not obtainable under the laws of the normal course of the administration of that or of the other Contracting State. This reference to domestic law provisions shows clearly the reasonable intention and wish of the Contracting States to have a broad protection of the fiscal secrecy and other sensitive information, as laid down in their own legislation.

3. Effects of Mutual Agreements

3.1 The Binding Effect

The competent tax authorities of the two Contracting States have the obligation only to try to reach an agreement, not the obligation to reach one in any case presented before them. This sounds normal since tax authorities are always bound by domestic laws and therefore any agreement should always be in accordance with domestic law.[59] In the case where the Joint Committee reaches an agreement, this agreement will have a binding effect.

The agreement will be binding first of all upon the tax authorities of both Contracting States. After the agreement has been reached and the relevant documents have been signed by both competent authorities, the agreement has to be implemented. A tax authority cannot back off, as this would suggest non-compliance of the administration with obligations arising from international law and can result in the international liability of the State.

Secondly, the agreement will be binding upon the involved taxpayer. Given the fact that the Joint Committee is set up and decides once and for all regarding the case presented to it, the taxpayer has no right to challenge the decision in another committee or to initiate a new MAP for the same case. What is more, he

56 Finokaliotis, *The harmonisation*, p 140, footnote no. 258.

57 In Greek income tax law the relevant provisions are gathered under Art. 85 of the Greek Income Tax Code.

58 Anastopoulos, *Fiscal Law* 1992 (in Greek) p 188; Finokaliotis, *Fiscal Law* 1999 (in Greek) p 278.

59 Finokaliotis, *The harmonisation*, p 115.

cannot challenge this agreement before any court, especially before a domestic court. The MAP and the remedies provided by domestic law constitute a set of parallel systems, in general independent of each other, with the decision of the MAP prevailing over any opposite decision of a domestic court. In order to establish the supremacy of the mutual agreement over the domestic court decision, the NSK[60] used two arguments.

3.1.1 The "Arbitration" Argument

The first argument is the "arbitral character" of the Joint Committee. The NSK maintained that this Joint Committee is an arbitral committee, although such characterisation is not provided in Art. 26 of the Greece-France DTC, which is the article that the NSK interprets. This "arbitral committee" has the power to decide about the case that is presented before it with a view to the avoidance of the double taxation and this decision, as any decision of any arbitral court, is binding. This binding effect of the decision cannot be cancelled by another decision of another court, not an arbitral court this time but a regular domestic court, as it is the Greek administrative court before which the same case was presented.

For the characterisation of this Joint Committee as "arbitral" and of the solution it reaches as an "arbitral award" the NSK seems to grant great importance to the fact that the case was presented before the Committee voluntarily by both sides. Both the taxpayer and the tax authority have consented to bring the case under the competency of the Joint Committee, which will decide following the MAP.

It is true that one of the essential characteristics of arbitration is the mutual agreement of involved parties to voluntarily present their case before an arbitral court.[61] But this is not the only characteristic. Moreover, in this case, it is not sufficient to characterise the whole procedure as arbitral, and consequently the decision it reaches as an "arbitral award" which is binding.

The MAP, as laid down in Art. 25 of the OECD Model, is substantially different from arbitration procedure. Firstly, the taxpayer does not become a party in any stage of the MAP, even if he initiated the procedure. Secondly, the Joint Committee is not obliged to reach an agreement, as every court, arbitral or regular, has the obligation to reach a decision. The only obligation the Committee has is to try to reach an agreement.

The two afore mentioned substantial differences between the MAP and the arbitration procedure do not permit the qualification of the MAP as arbitration[62] and the qualification of the agreement reached within this procedure as an arbitral award, with the corresponding binding power.

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60 Opinion of the plenary assembly of the NSK no. 507/1980, *DFN* 1981, p 141.

61 See, instead of many, Fortsakis, *Arbitration*, pp 83 et seq.

62 Fortsakis, *Arbitration*, p 224.

3.1.2 The Constitutional Argument

The argument that NSK draws from the constitutional provisions is more convincing. DTCs are part of international law. According to the Greek Constitution, international conventions ratified and entered into force following the provisions of Art. 28 (1) of the Greek Constitution[63] take an important place in the Greek norm hierarchy. Those provisions prevail over any other domestic law provisions that may regulate the same matter differently.

The MAP is established by such a DTC as a special, international law procedure for the settlement of disputes arising within DTCs. Therefore, the Joint Committee has an increased power to decide on the case presented before it and any agreement that will be reached will also be of increased power.

As a result of this increased power, the mutual agreement will prevail over any other opposite court decision that may have been issued in the meantime. As a further result, this domestic court decision will remain unexecuted, since the will of the Contracting States, as expressed in the mutual agreement, was different.

3.2 The Final Assessment

After the Joint Committee reaches an agreement, this agreement has to be implemented. Implementation of the agreement, in case it has been agreed that no tax was due, means that the Greek authorities will have to pay back to the taxpayer any amount of tax that has been paid unrightfully.

For such amounts of taxes paid unrightfully interest is owed. The interest rate is the same as the rate applicable to the 3-month state bonds[64] that is valid during the respective periods for which the amount of interest is calculated.[65]

Domestic laws often provide time limits within which a taxpayer has the right to claim back taxes that have been paid while there was no obligation. But, as it is accepted, such time limits cannot impede the implementation of the mutual agreement.[66]

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63 Article 28 (1) provides as follows: "The generally recognised rules of international law and the international conventions after their ratification by law and their having been put into effect in accordance with their respective terms, shall constitute an integral part of Greek law and override any law provision to the contrary. The application of the rules of international law and international conventions in the case of aliens shall always be effected on condition of reciprocity."

64 Those bonds are regulated by legislative decree no. 3745/1957.

65 The Ministry of Finance issues circulars informing the Tax Authorities of the respective interest rate that is to be applied. According to latest data, for periods starting from 20 February 2001, the rate is 4.20% annually, for periods starting from 22 May 2001, the rate is 4.09% annually (circular no. 1166/26-6-2001), while for periods starting from 28 August 2001, the rate is 3.91% annually (circular no. 1216/11-9-2001).

66 Finokaliotis, *The harmonisation*, p 117.

This view increases the importance of the decisions reached by Joint Committees following the MAP established in DTCs and is in line with the increased constitutional power those decisions have. In case any different opinion was accepted that would deprive the MAP of any essence, as the agreement could risk remaining unexecuted.

3.3 Time Limits for the Reconstitution

The mutual agreement is binding and no domestic law time limit should impede its implementation. However, the need for security of law and security of tax revenues can pose a limit to this principle.

The OECD Model provides that any mutual agreement should be implemented regardless of any domestic law time limits. Greece has voiced a reservation with respect to this provision. Greece insists that time limits should be imposed for the taxpayer that may request a refund of taxes paid to the Greek tax authorities.[67]

In many of the DTCs Greece has concluded the last clause of Art. 25 (1) of OECD Model is missing. In those cases it means that the reconstitution is subject to the domestic law time limits.[68] Domestic law provides that a taxpayer can request the refund of a tax that was paid for a tax obligation that proved to be partially or totally invalid, within three years from the day on which the tax obligation became certain.

The NSK[69] accepted the need for a time limit for the reconstitution, maintaining that such a time limit is not in conflict with the provisions of the DTC. The taxpayer will lose the right to ask for a refund, if the time limit set by domestic law has expired.

This opinion is based on the argument that time limits have to do with each taxpayer separately and the amount of negligence or diligence he shows for his affairs. The loss of the right after the time limit provided for its exercise has expired is a sanction connected with the taxpayer's inactivity. Therefore, he should be subject to such time limit for reconstitution as any other taxpayer is, and no exception is tolerable.[70]

The only differentiation the NSK accepts is the starting point of the time limit. It is accepted that the three-year time limit that domestic law provides as a time limit within which the taxpayer can ask for reconstitution starts counting from the time the right for refund become effective. Since the legal basis for the reconstitution is the mutual agreement, the right becomes effective only upon conclusion of the agreement. Consequently, the date on which the

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67 See Commentary on Art. 25 of the OECD Model, para. 53. Also Yannopoulos, *DFN* 1981, p 114.

68 See Art. 75 (1) (2) of the Greek Income Tax Code.

69 Opinion no. 507/1980, *DFN* 1981, p 141.

70 Yannopoulos, *DFN* 1981, p 114.

agreement was signed will be the starting point for the time limit and not the earlier date domestic law requires for domestic law cases.

4. Interpretative and Consultative Procedures

The right to initiate an MAP is also granted to the competent tax authorities of the two Contracting States. According to Art. 25 (3) of the OECD Model, the competent tax authorities can start the procedure in any case one of them would consider that an agreement is needed on disputes that have arisen while interpreting or implementing the corresponding DTC.

In this case, as is the case with the MAP that has already been elaborated, the Joint Committee that may be set up has no obligation to reach an agreement. The only loose obligation the competent tax authorities have is to endeavour to reach an agreement.

In case they conclude an agreement concerning a certain interpretation of a provision contained in the DTC or a certain way of application of the DTC, this agreement will have the character of a subsequent agreement of Art. 31 (3) (a) of the VCLT.[71]

Such an agreement will also be of increased power compared to domestic law and will prevail not only over any opposite domestic law provision but also any opposite domestic court decision.[72]

5. Evaluation of the Mutual Agreement Procedure

The MAP appears to be a powerful means for the resolution of the disputes arising within DTCs. Its most important advantage is that, as part of international law, it has increased power in the Greek national norm hierarchy and permits any agreements reached within this procedure to be binding even upon domestic courts and implemented even beyond time limits provided in domestic law.

However the procedure does not lack any drawbacks.[73] On the contrary, in many cases it appears to be inefficient, as there is no guarantee that the Joint Committee will reach an agreement. The competent tax authorities are obliged only to try to reach an agreement, but not to reach an agreement in any case. It is very probable that no mutual agreement is concluded between the tax authorities of the two Contracting States, which means that the case will remain pending and the taxation not in accordance with the provisions of the convention will still be valid.

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71 The Vienna Convention on the Law of Treaties was signed on 23-5-1969 and became effective on 27-1-1980. Greece ratified the Convention with the legislative decree no. 402/1974. For more on the VCLT see Koufos, *The Vienna Convention on the Law of Treaties* (2001) (in Greek).

72 See *supra* the arguments presented in the "Binding effect of mutual agreements".

73 See also Züger, *European Taxation* 2001, pp 221et seq.

In some DTCs Greece has concluded, an effort was made to make this MAP a more effective and complete way of protection for the taxpayers. This is the case with Germany[74] and Cyprus,[75] where the wording of the articles providing for MAP is a little different. In both cases an obligation is established, according to which the competent tax authorities have to reach an agreement in each case that is presented within this special procedure.

The wording is pretty clear. In the case with Germany, the tax authority before which the taxpayer presents his case is obliged to come to an agreement with the competent tax authority of the other Contracting State. In the case with Cyprus, it is provided that the competent tax authority, if unable to solve the problem unilaterally, has to solve it with an agreement to be concluded with the tax authority of the other Contracting State. The case of Germany has already been implemented in practice.

The competent authorities are bound to reach an agreement that will result in the taxpayer's protection from "double taxation" in the case of Germany and from "taxation not in accordance with the provisions of the convention" in the case of Cyprus. That way, the procedure becomes more effective as there is a guarantee that there will be an agreement. The obligation established in the relevant provisions will make the competent authorities more willing to reach a compromise and solve the case with a view to the avoidance of the double taxation. The problem, of course, remains as far as there are no specific time limits within which the agreement must be concluded. So, there is always a possibility that, if a lot of time passes by and no agreement is reached, the procedure will remain ineffective. But at least it marks a sort of progress in comparison with the other DTCs. Unfortunately, those provisions remain only exceptions.

On the other hand, the drawbacks that are inherent in the MAP can show pretty clearly the need for establishment of another kind of procedure that would be more efficient and guarantee the taxpayer the protection needed in international tax cases.[76]

III. EU Arbitration Convention

The EU Arbitration Convention (hereafter 'the Convention') was concluded in 1990 between the EU Member States.[77] The form of a multilateral convention was preferred to the form of a regulation or directive and that makes the Convention an instrument of international, not strictly European law. That

74 See the Greece-Germany DTC (1967).

75 See the Greece-Cyprus DTC (1968).

76 Finokaliotis, *The harmonisation*, p 100.

77 "Convention on the elimination of double taxation in connection with the adjustment of profits of associated enterprises", 90/436/EEC, OJ L 225/10.

means that new Member States of the EU have to accede to the Convention.[78] It is accepted, though, that it is still part of European law in a broad sense, especially since its interpretation can be assigned, by special protocols, to the European Court of Justice.

Such a protocol, however, has not been adopted for the EU Arbitration Convention. Thus, the only relevant rules for its interpretation remain the rules for the interpretation of international treaties, as laid down in the VCLT. It is suggested, however, that the Convention should become part of the European Community law. In that way the Convention will have to be interpreted, under the light of the European Community principles, in the way that its purpose is assured.[79]

1. Scope of Application

Greece ratified the Convention in 1994[80] and the Convention entered into force on 1 January 1995. The ratification was made according to the provisions of Art. 28 (1) of the Greek Constitution,[81] which means that the provisions of the Convention are of increased power and prevail over any other domestic law provision that may regulate the same matters in a different way.[82]

Article 20 of the Convention provides that the Convention is concluded for a period of five years. Since the five-year period expired in 2000, the Contracting States decided to extend the Convention and, for that purpose, signed a protocol[83] that is amending Art. 20 of the Convention.

The amended article provides that the Convention will be automatically extended at the end of each five-year period for another five years. Member States have the right to object. The protocol needs to be ratified by all Member States in order to take effect. Greece has not ratified it yet but it is estimated and expected that the ratification will not take long. As a consequence, enterprises can not yet invoke the Convention for adjustments of profits made after 1 January 2000.

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78 When Austria, Finland and Sweden became members of the EU, the Convention was amended by the "Convention on the accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden to the Convention on the elimination of double taxation in connection with the adjustment of profits of associated enterprises", 96/C 26/01.

79 Finokaliotis, *The harmonisation*, p 103.

80 Law no. 2216/1994 (published in the Greek Official Journal 83A'/31-5-1994) in: *DFN* 1994, p 1580.

81 See above in footnote no. 63.

82 Similarly Mavraganis, Greece, The implementation of the mergers and the parent-subsidiary directives and the ratification of the Arbitration Convention, *Intertax* 1994, pp 129 et seq.

83 "Protocol amending the Convention of 23 July 1990 on the elimination of double taxation in connection with the adjustment of profits of associated enterprises", 1999/C 202/01.

As soon as the Protocol is ratified by all Member States and enters into force, it will take effect as from 1 January 2000,[84] allowing enterprises to invoke the Convention for that time too. Currently, an enterprise can only invoke the Convention for cases related to the adjustment of profits made during the years the Convention was in force, that is 1 January 1995 until 31 December 1999, if the time limit has not expired.[85]

1.1 Personal Scope of Application

The Convention is applicable in cases where an adjustment of profits between associated enterprises takes place that is likely to lead to the double taxation of part of the profits. The Convention refers to "enterprises" in general. It is evident that the legal form of the enterprise is irrelevant.

1.1.1 "Associated Enterprises"

Questions arise as far as the term "associated enterprises" is concerned. In the Convention it is provided that enterprises are considered to be associated in two cases:

First, when an enterprise of a Contracting State participates directly or indirectly in the management, control or capital of an enterprise of another Contracting State. Secondly, when the same persons participate directly or indirectly in the management, control or capital of two different enterprises of two different Contracting States.

The Convention avoided the exact determination of minimum participation requirements in order to classify the involved enterprises as "associated", as is the case in the Parent-Subsidiary Directive.[86] The fact that there is some sort of connection is enough for the Convention in order to qualify two enterprises as "associated".

The provision of the Convention is similar to the provision of Art. 9 of the OECD Model.[87] It is pointed out, though, that the provisions of the OECD Model on associated enterprises, and consequently those of the Convention, suffer a certain obscurity, since it is not provided which is the required necessary participation of an enterprise in the management, control or capital of another enterprise. Since such a limit is not specified in the Convention, the domestic law of enterprises is applicable.[88]

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84 Art. 3 (2) of the Protocol.

85 See Art. 6 (1) of the Convention.

86 Council Directive 90/435/EC of 23 July 1990, *OJ* 1990/L 225/6. For the transposition of the directive in Greece see Mavraganis, *Intertax* 1994, pp 129 et seq.

87 As it is pointed out by *Mavraganis*, such a reference confirms that the concept of transfer pricing is to be interpreted as proposed by the OECD guidelines. Furthermore, it shows a differentiation from the domestic rules contained in Art. 39 of the Greek Income Tax Code. See Mavraganis, *Intertax* 1995, p 595.

88 Finokaliotis, *The harmonisation*, p 106.

Both direct and indirect participation fall in any case under the scope of application of the Convention. Direct participation means the set of parent-subsidiary enterprises while indirect participation will cover the cases where an enterprise participates in another through a third enterprise (parent to subsidiary of the subsidiary).

It is supported that the provision of Art. 9 of the OECD Model covers not only "legal" association of enterprises but also "real" association, the occurrence of which is to be examined in every case separately. However, the establishment and proof of the existence of "real" association is not easy in practice and can cause a lot of problems in its application.[89]

Both the OECD Model and the Convention aimed at a broad definition of the "associated enterprises", with a view to cover as many cases as possible and in order to establish a broad right of the tax authorities to intervene.

1.1.2 Permanent Establishments

In the scope of application of the Convention special reference is made to permanent establishments (PE). It is expressly provided[90] that a PE, for the purposes of the Convention, will be deemed an enterprise of the State in which it is situated.

Although there is a unity between the enterprise situated in a Contracting State and its permanent establishment situated in another Contracting State, in the Convention the latter is considered as an independent enterprise of the State in which it is situated. It is considered, for the purposes of the Convention, as a subsidiary, even though the permanent establishment has no legal entity. Since a permanent establishment is very closely connected with the "parent" enterprise and directly dependent on it, there is a higher risk of circumvention of tax laws. It is therefore necessary that PEs get the same protection as if they were separate enterprises.

The term "permanent establishment" is not defined in the Convention. The definition must be sought in the DTCs states have concluded, as it is expressly provided in the Convention. According to the provision of Art. 3 (2) of the Convention, any term that is not defined in it will have the meaning it has in the corresponding DTC between the two interested States, unless of course the context of the Convention requires otherwise. However, in case there is no DTC between the involved Member States,[91] the definition of the permanent establishment will be sought in domestic law.[92]

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89 Finokaliotis, *The harmonisation*, p 107.

90 Art. 1 (2) of the Convention.

91 Greece has not yet concluded DTCs with three EU Member States: Spain, Portugal and Ireland. The DTCs with Spain and Portugal have been signed but they have not yet entered into force. The DTC with Ireland is still in an earlier stage.

92 The definition of the term "permanent establishment" is laid down in Art. 100 of the Greek Income Tax Code. This definition is broader compared to the one given in the OECD Model and adopted in DTCs.

2. Initiation of the Arbitration Procedure

2.1 Cases Covered

The material scope of application of the convention is very restricted. It is applicable only in cases where a part of the profits of an enterprise that are taxed in a Contracting State is included or likely to be included in the taxable profits of its associated enterprise that is situated in another Contracting State. In this case, the same amount of profits would be taxed twice.[93] The provisions of the Convention will also be applicable when, instead of profits, the enterprise (any of them) has made losses.[94]

2.2 Prerequisites for the Recourse to Arbitration

2.2.1 The Clause of Art. 7 (3)

The competent authorities will be able to apply for arbitration as a last solution. The rights the enterprise has according to domestic laws do not interfere with the provisions of the Convention. The two systems, the conventional one and the domestic law one, are parallel and the recourse to one of them does not impede the recourse to the other.

However, the Convention contains a clause, according to which the competent tax authorities cannot set up the advisory commission unless the enterprise waives its right for recourse to domestic courts or only after the time limit for such recourse has expired.[95] This clause is of no use under Greek law.

What has already been said that is valid in the MAP provided for in the DTCs, is also valid here. In case the enterprises use both possibilities, any decision of the domestic court opposite to the solution agreed within the arbitration procedure of the Convention will remain unexecuted. Nevertheless, there are still a few objections voiced.[96]

2.2.2 Failure of Other Options

Before the arbitration procedure can be initiated, two other procedures to find a solution have to fail. First of all, the enterprise concerned will have to present its case before the competent authority of the State it is situated in. The competent authority will then try to find a solution unilaterally.[97] If this is not possible, the competent authority will have to contact the competent authorities of the other Contracting State concerned and try to find a satisfactory solution through an MAP.[98]

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93 Art. 1 (1) of the Convention.
94 Art. 1 (2) of the Convention.
95 Art. 7 (3) of the Convention.
96 It is, however, proposed that it should be used. The relevant arguments are dealt with in the chapter for the binding effect of the opinion of the advisory commission.
97 Article 6 (2) of the Convention, in the beginning: "...if it is not itself able to arrive at a satisfactory solution...".
98 Art. 6 (2) of the Convention.

Only after the MAP fails to find a decision eliminating the double taxation, the competent authorities will have both the right and the obligation to set up an advisory commission to resolve the case. Setting up this advisory commission becomes compulsory for the competent authorities if two years after initiation of the MAP have passed and no agreement has been concluded.[99]

However, there is an exception provided in the Convention.[100] The obligation to start an MAP and to set up an advisory commission in case the first fails is suspended if an enterprise concerned is held liable to pay a serious penalty according to the domestic laws of the Contracting State in which it is situated, for matters relevant to the subject of the Convention.

2.2.3 No Liability to a "Serious Penalty"

The term "serious penalty" is defined in unilateral individual declarations the Contracting States have annexed to the Convention. Greece opted for a clear and exhaustive enumeration of the cases considered as "serious penalties".[101]

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99 Art. 7 (1) of the Convention.

100 Art. 8 (1).

101 Under Greek legislation governing taxation, an undertaking is liable to "severe penalties":

1. if it fails to make returns, or makes incorrect returns, in respect of taxes, charges or contributions which must be withheld and paid to the State under existing provisions, or in respect of value added tax, turnover tax or the special tax on luxury goods, in so far as the total amount of the above taxes, charges and contributions which should have been declared and paid to the State as a result of trade or other activities carried out over a period of six months exceeds an amount of 600,000 Greek Drachmas (note: equivalent to 1,761 Euro) or one million Greek Drachmas (note: equivalent to 2,935 Euro) over a period of a one calendar year;
2. if it fails to make a return of income tax, in so far as the tax due in respect of the income not declared is more than 300,000 Greek Drachmas (note: equivalent to 880 Euro);
3. if it fails to supply the taxation details laid down in the Code of Taxation Data;
4. if it supplies details as referred to under the previous case 3, which are incorrect as regards quantity or unit price or value, in so far as the inaccuracy results in a discrepancy which exceeds 10% of the total amount or of the total value of goods, the provision of services or the trade generally;
5. if it fails to keep accurately the books and records required by the Code on Taxation Data, in so far as that inaccuracy has been noted in the course of a regular check, the findings of which have been confirmed either by administrative resolution of the discrepancy or because the period allowed for an appeal has expired or as a result of a definitive decision by an administrative tribunal, provided that during the management period under consideration the discrepancy between gross income and the income declared is more than 20% and in any case not less than one million Greek Drachmas (note: equivalent to 2,935 Euro);
6. if it fails to observe the obligation to keep books and records as laid down in the relevant provision of the Code on Taxation Data;
7. if it issues false or fictitious-or itself falsifies-invoices for the sale of goods or the supply of services or any other taxation details as referred to in case 3 above. A taxation document is regarded as false if it has been perforated or stamped in any

Some of them are described in a general way while some others are extremely detailed. It is not useful to repeat the relevant provisions here, as it would constitute a mere repetition of them. Instead a few points of the provisions will be enlightened.

It is true that the cases in which an enterprise is held liable to pay a serious penalty must be defined as clearly as possible, since this liability has as a consequence that the rights of the Convention that the enterprise is enjoying are restricted. Liable enterprises seem to be deprived of the opportunity to avoid double taxation by recourse to MAP and to arbitration procedure. Of course this is justified, since the enterprise has been found to have breached the law and could use the procedures provided in the Convention for reasons not in accordance with their ratio.

However, even when this is the case a vague reference to "serious penalties" could leave the tax authority free to abuse this clause and exclude a great number of enterprises from the protection they would normally enjoy under the Convention. To avoid this risk, Greece preferred the strict enumeration system.

Nevertheless, this option has its drawbacks. The main problem is that in some cases the grade of severity is connected with certain amounts, defined in Greek currency. The relevant provisions were annexed to the Convention as they were in force in 1994. If those amounts, above which a penalty is considered to be serious, change in domestic law, this change can not affect the provision incorporated into the Convention. Consequently, as the limits above which a penalty is considered "serious" in domestic law rise, in the Convention they will remain frozen to the lower levels that were in force in 1994. In the future, this can lead to the restriction of the scope of application of the Convention. It would be better if a clause was added to the Greek declaration, providing that the provisions will apply as amended as are in force in any given time.[102]

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way without the proper authentication having been entered in the relevant books of the competent tax authority, in so far as failure to make such an entry has occurred in the knowledge that such authentication is required for the taxation document. A taxation document is also regarded as false if the content and other details of the original or the copy differ from those, which are recorded on the counterfoil of that document. A taxation document is regarded as fictitious if it has been issued for a transaction or part of a transaction, transfer or any other reason not recorded in the total or for a transaction carried out by persons different from those recorded on the taxation document;

8. if it is aware of the intention of the action taken and collaborates in any way in the production of false taxation documents or is aware that the documents are false or fictitious and collaborates in any way in their issue or accepts the false, fictitious or falsified taxation documents with the intention of concealing material relevant to taxation.

[102] The Irish declaration has followed this practice. See also Finokaliotis, *The harmonisation*, p 129.

The reference to certain amounts is also unsuccessful for another reason. The threshold is the same for all enterprises, with no connection made to their size. The same amount of tax not returned or income not declared that seems huge for a small enterprise and constitutes a proportionally serious offence if that enterprise manages to exceed it will often be almost negligible for a large size enterprise and proportionally too strict and discriminatory against the latter. Those thresholds should have been set as fragments proportional to the gross income of the enterprise or the tax paid by the enterprise and not as flat amounts.

3. Procedure before the Arbitration Board

3.1 Setting Up the Commission

The advisory commission consists of a chairman, two representatives of each competent authority concerned and of an even number of independent persons of standing that are to be appointed by mutual agreement from a list of such persons, set up according to provisions of Art. 9 (4) of the Convention. The advisory commission is appointed *ad hoc* for each case.

The enterprises concerned may not interfere with the setting up of the commission. They cannot choose the persons that will constitute the commission, they cannot object to the appointment of a certain person in the commission. Such a right is granted only to the competent authorities of the relevant Contracting States. This is not strange, since the Contracting States are the only parties in this arbitration procedure. Nevertheless, this fact does not suffice to justify the denial of the same right to the enterprises concerned.

On the contrary, since the enterprise cannot choose the members of the commission, it should at least be able to object to the appointment of a certain person. This seems even more justifiable when taking into account that the list of the independent persons of standing is fully set up by the states, the enterprises having no right to nominate anyone.[103]

3.2 The Case Brought before the Commission

There is a possibility that an arbitration procedure is initiated after the MAP has failed to reach a satisfactory agreement, having resolved the case only partially. The question arises whether the case will be transferred as a whole to the arbitration procedure or only as to the part that was not resolved within the MAP. It seems reasonable that, since the arbitration procedure is the next step of the MAP, any resolutions of the first one could be binding upon the latter, which would have to decide only for the part of the case on which the double taxation remained.[104]

[103] Finokaliotis, *The harmonisation*, p 136.

[104] Such a provision was included in the draft of the Convention but later it was eliminated from the text that was finally adopted. See Finokaliotis, *The harmonisation*, p 136.

However, this is not the case in the Convention. The two procedures provided in the Convention constitute two separate and independent procedures. Chronologically, the arbitration procedure follows the mutual agreement, but the only characteristic that remains the same in the two procedures is the objective: the elimination of double taxation. Both the procedure that is followed and the board that conducts it are different.

Apart from the representatives of the competent authorities, independent persons of standing, usually high rank judges or university professors or other recognised experts, participate in the advisory commission. If the resolutions of the committee that conducted the MAP were binding upon the advisory commission that conducts the arbitration procedure, that would cause problems to the latter procedure.

Accordingly, it seems preferable to accept that the case is transferred as a whole to the advisory commission, that has the option to adopt any decisions reached within the previous MAP, as far as this is considered necessary and useful by the commission.[105]

3.3 Rights of the Enterprises

Contrary to the DTCs' MAP and to the Convention MAP, enterprises do have substantially important rights within the arbitration procedure. A form of participation of the enterprises in this procedure is provided and secured by the Convention.

Namely, the associated enterprises have the right to support their case by providing any information, evidence or documents that they think would be useful and help the commission take a decision.[106] A similar obligation is constituted for provision of any information or evidence or document, if the commission considers it necessary and requests that material. The same obligation exists also for the tax authorities of the relevant Contracting States. However, it is provided that domestic law secrecy provisions shall always be respected. It is accepted that enterprises are also subject to the same restrictions concerning the protection of secrecy.[107]

The enterprises have also the right, upon their request, to appear or be represented before the commission in order to support their case.[108] At the same time, it is provided that the commission can also ask each associated enterprise to appear or be represented before it, and in this case the involved enterprises cannot refuse.

These provisions upgrade the role of the associated enterprises in the arbitration procedure in comparison to the other MAPs. They are important not

[105] Finokaliotis, *The harmonisation*, p 137.
[106] Art. 10 (1) of the Convention.
[107] Finokaliotis, *The harmonisation*, p 141.
[108] Art. 10 (2) of the Convention.

only because they grant the interested enterprises access to a procedure that is directly affecting them but also because they mark a change to what has been established up to now.

4. Transposition of the Arbitral Decision

4.1 General Remarks

The mandate to the advisory commission is to deliver an opinion on the elimination of the double taxation in question.[109] This advice is not binding as such. Within six months from the delivery of the opinion, the competent authorities of the relevant Contracting States that are parties of the procedure will have to reach an agreement that eliminates the double taxation. It is in their discretion to adopt the opinion of the advisory commission and they can always derogate from it, as long as they both agree to do so. This decision may be published if both the competent authorities of the concerned Contracting States and the involved enterprises consent to the publication.[110] The opinion becomes automatically binding only after the six-month time limit has expired and no decision has been agreed by the competent authorities of the concerned Contracting States.[111]

4.2 Binding Effect

4.2.1 The Convention Provisions

It is provided that the agreement reached within the MAP of Art. 6 of the Convention will be implemented irrespective of any time limits provided in domestic laws of the concerned Contracting States. This provision must be valid as far as the arbitration procedure is concerned as well.

Moreover, Art. 12 (1) of the Convention provides that the opinion of the advisory commission becomes compulsory for the competent authorities of the concerned Contracting States, under the condition of course that within six months of the delivery of this opinion there has been no opposite agreement concluded between those authorities. Competent authorities reserve the right to deviate from the opinion delivered within the arbitration procedure, but they have to do so within the time limit specified, otherwise the opinion becomes binding.

Contracting States, by signing the Convention have undertaken an international law conventional obligation to implement the opinion of the advisory commission. In case a State does not conform with this obligation, this will constitute international law state liability for the breaching of undertaken obligation.[112]

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[109] Art. 7 (1) of the Convention.
[110] Art. 12 (2) of the Convention.
[111] Art. 12 (1) of the Convention.
[112] See Ioannou-Oikonomidis-Rozakis-Fatouros, *International Public Law* 1988, p 272.

4.2.2 The Dominant Opinion

In Greece it has been supported that the predominance of this "opinion", that has to be implemented by the competent tax authorities by means of administrative acts to be issued,[113] is based on the constitutional provision of Art. 28 (1).

According to this opinion, the advisory commission's opinion, as delivered by a body and within a procedure that are both provided in an international convention ratified and effective in Greece under the afore mentioned constitutional provision of Art. 28 (1), does not only prevail over any opposite legal provision of domestic law but also over any opposite domestic court decision.[114] This latter decision will have to remain unexecuted.

The relevant arguments have already been dealt with in the chapter on MAP. Because of the great similarities the two procedures have (provision in international convention, ratification under the same constitutional clause, procedures irrelevant of remedies provided by domestic law) what is accepted for the DTCs' MAP is valid *mutatis mutandis* for the Convention arbitration procedure.

4.2.3 The Proposed Use of Art. 7 (3) of the Convention

Along with the above mentioned opinions a new approach is proposed, according to which the clause of Art. 7 (3) of the Convention should be used. This opinion is based on the judgement the Special Supreme Court[115] (hereafter 'AED') delivered in the early 90s, on a case where arbitration on tax matters was disputed before Greek courts. The dispute was solved by decision no. 24/1993,[116] that ruled that arbitration on tax matters is not prohibited under Greek Constitution.[117] The decision of the AED maintained though that the jurisdiction of the arbitration court does not comprise the power to cancel any administrative act for the imposition of the tax, since this power is granted by the Constitution only to normal administrative courts.

The question that arises is whether tax authorities can proceed to the implementation of the opinion of the advisory commission provided in the Convention,

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113 Finokaliotis, *The harmonisation*, p 148.

114 See advisory opinion of the NSK 507/1980, in: *DFN* 1981, p 141, Yannopoulos, *DFN* 1981, p 114; Yannopoulos in: IFA (ed) *Cahiers* 1981, p 309; Yannopoulos/Yannopoulos, *EDDD* 1995, p 209.

115 This court is provided in Art. 100 of the Greek Constitution and, *inter alia*, is the only competent to resolve cases concerning the interpretation of the Constitution, for which conflicting judgments have been pronounced by the two Supreme Courts, the Council of State (Supreme Administrative Court) and the Supreme Civil and Criminal Court. The judgment of this court is irrevocable. Provisions of domestic law that are declared unconstitutional are invalid as of the date of publication of the respective judgment, or as of the date specified by the ruling.

116 *DFN* 1994, p 138.

117 The dissenting opinion, though, presented some remarkable arguments.

irrespective of the precedence of the Greek courts' decision. In tax disputes the judicial precedence is binding upon the parties that were represented during the trial, upon their successors and upon those against which the decision may be executed.[118] Tax authorities are a party of those trials and therefore are bound by the decisions.

As far as the opinion of the advisory commission leads to a result different from the one the domestic administrative court decision ruled, the competent tax authority will have to amend or cancel the act it issued or kept in force according to the court's decision. This means that the administration will not comply with the obligations arising from the courts decision.

Tax authorities are exposed to the dilemma of either complying with the domestic courts' decision and violating the international laws obligation, or complying with the latter and ignoring domestic law. In order to avoid this situation it is proposed that Greece should also use the clause provided in Art. 7 (3) of the Convention. That would mean that the arbitration procedure will only be initiated after the time limits for recourse to the domestic courts have expired or the enterprise has waived its right to recourse.[119]

Moreover, such a regulation would not be conflicting with the constitutional provision for the right to recourse to courts, as laid down in Art. 20 (1) of the Greek Constitution, since these provisions do not forbid the *ad hoc* waiver of the relevant right.

It seems, though, that this is not a real dilemma. The provision was intended to be an escape clause for the states that have constitutional problems in adopting the supremacy of international law over domestic law. In Greece this problem has been solved in favour of the international law. Therefore, the use of this clause is not really necessary, as it adds nothing to the effectiveness of the Convention. It would only narrow the protection possibilities the enterprises have.

4.3 Final Tax Assessment

After the opinion of the advisory commission has become binding, it has to be implemented by the competent tax authorities. Implementation of the opinion means that the competent authorities will have to take all measures they find necessary and appropriate in order to eliminate the double taxation. As a result, if any taxes have been paid in the meantime, the enterprise has the right to ask for a refund and the tax authority has to pay back the respective amounts for which an interest is due.[120]

As far as time limits are concerned, it is accepted that the same rules are applicable as those analysed in the chapter for the MAP in DTCs. The three-

118 Art. 197 (3) of the Administrative Procedure Code, law no. 2717/1999, *DFN* 1999, p 953.

119 See Finokaliotis, *The harmonisation*, p 151.

120 See above in footnote no. 65.

year domestic law time limit will start counting as from the date on which the opinion became binding.

5. Evaluation of the Arbitration Procedure of the Convention

It has to be admitted that the two-step approach that is introduced by the Convention is a step forward compared to the MAP used in DTCs. Nevertheless, this procedure that has been adopted in the Convention still has both advantages and disadvantages.[121]

It is evident that the procedure is conducted between the concerned Contracting States, with no substantial participation of the interested associated enterprises, even though some rights are granted to them. The associated enterprises do not become party in this arbitration procedure.

The advisory commission is not a truly arbitral court and consequently the advice it provides is not an arbitral decision. The fact that the Contracting States have to comply with the advice, which was delivered following the arbitration procedure, makes this procedure similar to arbitration, judging from the effect of the decision.

It has to be pointed out, though, that Contracting States have always the right to derogate from the advice the advisory commission presented, if they both agree that it is not satisfactory. The procedure provided in the Convention is quite similar to arbitration, but in the end it is not a pure form of arbitration.[122]

It is important that the Convention does not refer to a "decision" but to an "opinion" that the advisory commission must deliver, the binding effect of which depends on the consent, express or implied, of the states. It is not a court's decision as it is not delivered by a court. This commission is at no point a super-national court. The commission has no right to decide on legal subjects, but only to assess the facts on which the opinion will be based. It only has to assess the amount of profits that will be taxed in each State, based on the arm's length principle.[123]

In general, the arbitration procedure, as it is accepted for MAPs too, constitutes a *sui generis* procedure for the settlement of tax disputes that seems to be closer to the procedures for the settlement of disputes provided in international law.[124]

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[121] For a thorough presentation of the advantages, the disadvantages and the problems connected with the Convention, see Mavraganis, *Harmonization of corporate tax in the EU,* PhD Thesis submitted and approved by the University of London (1992) pp 274 et seq.

[122] See Fortsakis, *Arbitration*, p 228.

[123] See Finokaliotis, *The harmonisation*, p 146.

[124] This view is supported by Finokaliotis, *The harmonisation*, p 145, with further references.

IV. Other Possibilities

1. International Courts

It seems that granting jurisdiction to an international court for the resolution of disputes on tax matters is difficult to be accepted. Even if it is supported that such a solution is desirable, as it would ensure the protection of the taxpayers from any groundless imposition of double taxation, it is at the same time also accepted that states are very reluctant to adopt such a solution. Furthermore, it seems that such a proposition has no chance to be accepted by the states in the near future.[125]

It is characteristic that even in the case of the European Union and despite the steps towards harmonisation that have been taken, Member States are still not ready to accept the European Court of Justice as competent court for the settlement of tax disputes. The most eminent example is that of the Arbitration Convention.

The EU Member States decided that it would take the form of an international convention rather than that of a directive or a regulation. The difference is important. The ECJ has jurisdiction when regulations and directives are concerned[126] but the interpretation of multilateral conventions falls outside of its jurisdiction. Only if the Contracting States wish so, they can grant jurisdiction to the ECJ that may become competent for the interpretation of the Convention provisions only if the Contracting States sign a special protocol. It is obvious that EU Member States had no such intention.

Since the EU Member States are not ready to accept ECJ's jurisdiction, it is obvious how much more difficult it is for third states of the international community to accept the jurisdiction of an international court, given the considerable difference between domestic legislations ruling tax matters.[127]

2. Preliminary Proceedings

Since European Community law is applicable by domestic administrations of member states, it is probable that doubts or disputes may arise concerning its interpretation. To secure a uniform interpretation and application of the EC law in all Member States the EC Treaty provides that domestic courts can address preliminary questions to the ECJ concerning the interpretation of an EC law provision related to the case brought before them.

Citizens cannot present their case before the ECJ and ask for a preliminary ruling. Only the domestic court before which the case is pending has the right to do so. However, the domestic court is not bound to address a request for a

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125 Pro: Finokaliotis, *The harmonisation*, p 117.

126 Art. 227 of the EC Treaty.

127 Pro: Finokaliotis, *The harmonisation*, p 117.

preliminary ruling to the ECJ. It is in its discretion to do so. The reference to the ECJ is compulsory only when the case is being examined by the highest court in a final stage. Parties of the trial cannot force the court to form a request for a preliminary ruling concerning their case, if the court finds it unnecessary.[128] The preliminary ruling of the ECJ is binding upon the domestic court that has to take a decision following the interpretation given by the ECJ.

The ruling will be binding only with respect to the case for which it was requested and only upon the parties of that trial. Nevertheless, in cases that appear to be substantially similar to the one for which the preliminary ruling was delivered, this latter will often be binding too.[129] In case the preliminary ruling accepted the cancellation of a certain act, this decision will have an indirect *erga omnes* binding effect.[130]

The problem with tax matters covered by DTCs is that they do not fall within the scope of EC law and therefore domestic courts cannot ask the ECJ to interpret an international convention. Even if they did, the ECJ would declare itself incompetent in absence of an agreement under Art. 239 of the EC Treaty. Of course the compatibility of a provision of a DTC with the EC law falls always within the jurisdiction of the Court, whether the DTC has been concluded prior to or after accession to the EU.

3. The Investment Legislation Practice

3.1 ICSID Convention

Greece signed the ICSID Convention on 16 March 1966 and ratified it by law no. 608 of 11 November 1968.[131] The arbitration procedure for the settlement of investment disputes established through that Convention became very popular among States.[132] This broad recognition of the ICSID Convention is not unjustifiable.

The ICSID Convention established an International Center for the Settlement of Investment Disputes (ICSID, hereafter 'Center'), based in Washington DC. The Center has undertaken the mission to provide the means for the reconciliation and arbitration of disputes arising from investment conventions between a State and a foreign investor.[133] Arbitration trials are not conducted

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[128] Dagtoglou, *European Community Law I* (1985) (in Greek) (hereafter 'EC Law') p 428.

[129] Dagtoglou, *EC Law*, p 454.

[130] Dagtoglou, *EC Law*, p 455.

[131] Greek Official Journal A' 263 /1968.

[132] Till April 1998 the ICSID Convention had been signed by 143 States and ratified by 128 of them. States that are not members of the World Bank can also accede to the Convention under certain conditions. See Theodorou, The importance of arbitration in international investment conventions, *Dike* 2000 (hereafter 'The importance of arbitration') p 240.

[133] See Fortsakis, *Arbitration*, pp 209 et seq.

by the Center, but by courts that are set up according to the provisions of the ICSID Convention and that have their own procedural rules that are issued by the Center.

The fact that a State has ratified the ICSID Convention is not enough to establish the jurisdiction of the Center. It is required that both the State and the foreign investor make a declaration that they accept this jurisdiction. This declaration will more than often mean that no recourse to remedies provided by domestic law is permitted.

The arbitral awards are first of all binding upon the parties involved, especially upon the authorities and courts of the State involved in the procedure that has to comply without delay. What is more, the award is also binding upon all member states.[134] Domestic courts have no power to re-examine the arbitral award.

Investment conventions often include arbitration clauses establishing the jurisdiction of the Arbitration Courts of the Center. However, in practice, comparatively little use has been made of those clauses.[135]

3.2 Bilateral Investment Treaties

3.2.1 The Constitutionality of an Arbitration Clause

The Greek Constitution does not provide anything on arbitration. This constitutional silence was interpreted both as meaning total prohibition of arbitration as means for disputes' resolution and as total approval of it,[136] the dominant opinion being that of constitutionality. A dispute was raised as to what kind of disputes can be solved by recourse to arbitration.

The traditional theory accepted that only private law disputes, where the individual can use his right freely, could be solved by arbitration, leaving the resolution of public law disputes out of arbitration. This is not the case any more. It is accepted that public law disputes, and consequently tax law disputes, can also be presented before an arbitration court, if the parties have agreed on that.[137]

The matter was solved after a decision of the AED, issued on a case concerning the arbitration clause included in an investment law granting tax benefits to foreign investors.[138] The AED ruled that it is in conformity with the Constitu-

134 Art. 54 (1) of the ICSID Convention.

135 It is assumed that one of the reasons may be the high cost of the procedures before an Arbitration Court of the Centre, see Theodorou, The importance of arbitration, pp 246 et seq. See also an exhaustive presentation of the cases in pp 246 et seq, in particular the footnotes. Nevertheless, it seems that the Centre has lately played an increasingly important role. For more recent data concerning the activity of the Centre, see in www.worldbank.org/icsid/.

136 See analysis in: Fortsakis, *Arbitration*, pp 48 et seq.

137 See Fortsakis, *Arbitration*, p 56 (pp 64 et seq).

138 Decision AED no. 24/1993, *DFN* 1994, p 138.

tional provisions that legal provisions may grant the right to the tax authority and to the taxpayer to agree that certain disputes will be solved by arbitration.[139] Although this decision had a strong dissenting opinion and some criticism was expressed,[140] it still remains the dominant opinion.

3.2.2 The Greek Practice

It is common practice in Greece to include arbitration clauses in bilateral investment conventions and in development incentive laws.[141] Nevertheless, there are hardly any data about how many times these provisions have been used.[142] It is characteristic that in the 33 years of effectiveness of legislative decree no. 2687/1953 (from 1953 to 1987), which is the first and most important investment law on which the vast majority of foreign investments in Greece are based, only 19 arbitration decisions were found. But, as it is pointed out, the lack of publication should not be interpreted as meaning that the arbitration option has not been used in practice.[143]

4. Conclusions

Among the afore mentioned possibilities it seems that the model used in bilateral investment treaties is the most efficient for the resolution of international tax disputes through arbitration. First of all because as it is long time practice in Greece, it is easy to be implemented and in other bilateral tax conventions, such as DTCs.

Secondly, as the matter of constitutionality has been solved once and for all by the AED, the submission of tax disputes to arbitration will cause no problems

139 See Finokaliotis, *Tax Law*, pp 326 et seq and in particular, for a thorough presentation of the case, Fortsakis, *Arbitration*, p 140 et seq, where it is supported that the decision is fair and successful as far as the result is concerned but the arguments used leave much room for discussion.

140 See Karakostas, Arbitration and administrative law, especially tax law, disputes (in Greek) *DFN* 1994, p 1539 and Karakostas, Comments on decision no. 2132/2000 of the State Council (in Greek) *DFN* 2001, p 678. This criticism is of no practical importance though, since the AED decision is irrevocable.

141 See Fortsakis, *Arbitration*, pp 91 et seq for the nature of those arbitration clauses and pp 198 et seq for a complete presentation of those investment statutes providing for arbitration.

142 See Yannopoulos, Tax courts and "arbitral" courts *de lege lata et de lege ferenda* (in Greek) *DFN* 1977, p 310. It is pointed out that although there is a broad use of the arbitration clauses and a rich jurisprudence of those arbitration courts, very few decisions have been published in legal reviews. Some of them are mentioned in the article cited above.

143 See Kalyva, Questions on the arbitration decisions of legislative decree no. 2687/1953 "on investments and protection of foreign funds" (in Greek) *NoB* 1987, p 10. The author mentions that the arbitration decisions were located in the Archives of the Ministry of National Economy.

in theory. The fact that the function of DTCs is merely to allocate the right for taxation between the two Contracting States, and since no tax or tax exemptions or tax benefits are provided in them, there should be no theoretical problem to accept such a clause in DTCs.