

The revised NIF – a modern approach to institutional dispute resolution



International Taxation Conference, Mumbai

Session on Tax Dispute Resolution

December 7, 2019 9.00-10.30

by

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What is the NIF?

1. an amended **MDS clause** patterned after Article 25 paragraph 5 of the UN Model Convention
2. **an alternative dispute resolution (ADR) mechanism** that could operate based on any of the different available mechanisms such as mediation, expert determination and others
3. **a set of detailed rules of procedure** for both the ADR mechanism and the MDS clause
4. **a proposal to institutionalize the dispute settlement** under both the ADR mechanism and the MDS clause

Why was the NIF developed?

1. Increasing number of disputes
2. Weak dispute resolution mechanisms
3. Complete lack of an institutional framework
4. Concerns of developing countries must be addressed:
 - Few developing countries have experience with MAP and even fewer with mandatory arbitration
 - Many are concerned that arbitration will raise constitutional issues and questions of fiscal sovereignty and feel unease at the current arbitration processes in place

Institutionalization should be further explored

Advantages of institutional arbitration	Disadvantages of institutional arbitration
Timeliness (due to pre-established rules of procedure)	Potentially high administrative fees
Administrative assistance (secretarial duties, translation, meeting rooms etc.), which reduces administrative costs	Bureaucracy within the institution may lead to delays and increased costs depending on how it is set up
A list of pre-vetted and qualified potential panel members to decide on the case	Less flexibility in procedure
Potentially greater ease in finding panel members, due to full-time nature of position	Unrealistic time frames built into the procedural rules
Assistance for reluctant or less experienced parties	Arbitration may become a more common option and less of a "last resort"
An established format with a proven record	

Institutionalization can address the concerns of developing countries

- 1. Sovereignty & selection of neutral third persons** → MAP supplemented by non-binding dispute resolution mechanisms to break stalemates
→ Strict rules on independence of mediators, conciliators, etc. and nomination by states with vetting process prior to starting procedures and list of accepted candidates
- 2. Costs and lack of resources** – capacity building and non-financial assistance for B & R countries (training program, pro bono legal assistance, financial assistance from a trust fund)
→ **cost-cutting measures:** cap on costs, de minimis rules, grouping of cases, new technologies, gather and provide statistics to assess inventories
- 3. Transparency** – candidates public, published model procedural rules (MOUs on NBDR), published statistics
- 4. Lack of confidence** – gradual approach starting with little impact measures, selection / creation of appropriate neutral institutional body that oversees the even-handedness of the process

The Proposal

1. Amended Model Text for Art 25 UN MC
2. A Minimum Standard – an MFN clause
3. Procedural rules for mandatory dispute resolution (MDR)
 - a) Default procedure
 - b) Streamlined approach
4. Procedural rules for Alternative Dispute Resolution (ADR)

A Gradual Approach Fitting the Needs of Competent Authorities



- 3 years as baseline
- May be shortened or extended (max 4 years)

- Mandatory, unless agreement not to pursue
- Approx. 100 days (max. 120 days) - may be shortened or extended

- **Two options** for procedural rules
- Depending on procedure – maximum duration:
 - Approx. 200 days for streamlined approach
 - Approx. 240 days for the default approach
 - May be shortened or extended

Modernizing the rules

The revised NIF will incorporate recent developments and insights into dispute resolution:

- new UN Model:
 - **Submission to residence state**
 - **Basic timeframe of 3 years**
 - **Possibility to deviate from opinion**
- **Request by taxpayer and Cas**
- **Deadline for request**
- **Taxpayer approval** for implementation
- **Detailed rules on interaction with court decisions**
- **Taxpayer confidentiality**
- **Rules on selection incorporated into the clause**
- **General rules on independence including cooling-off periods**

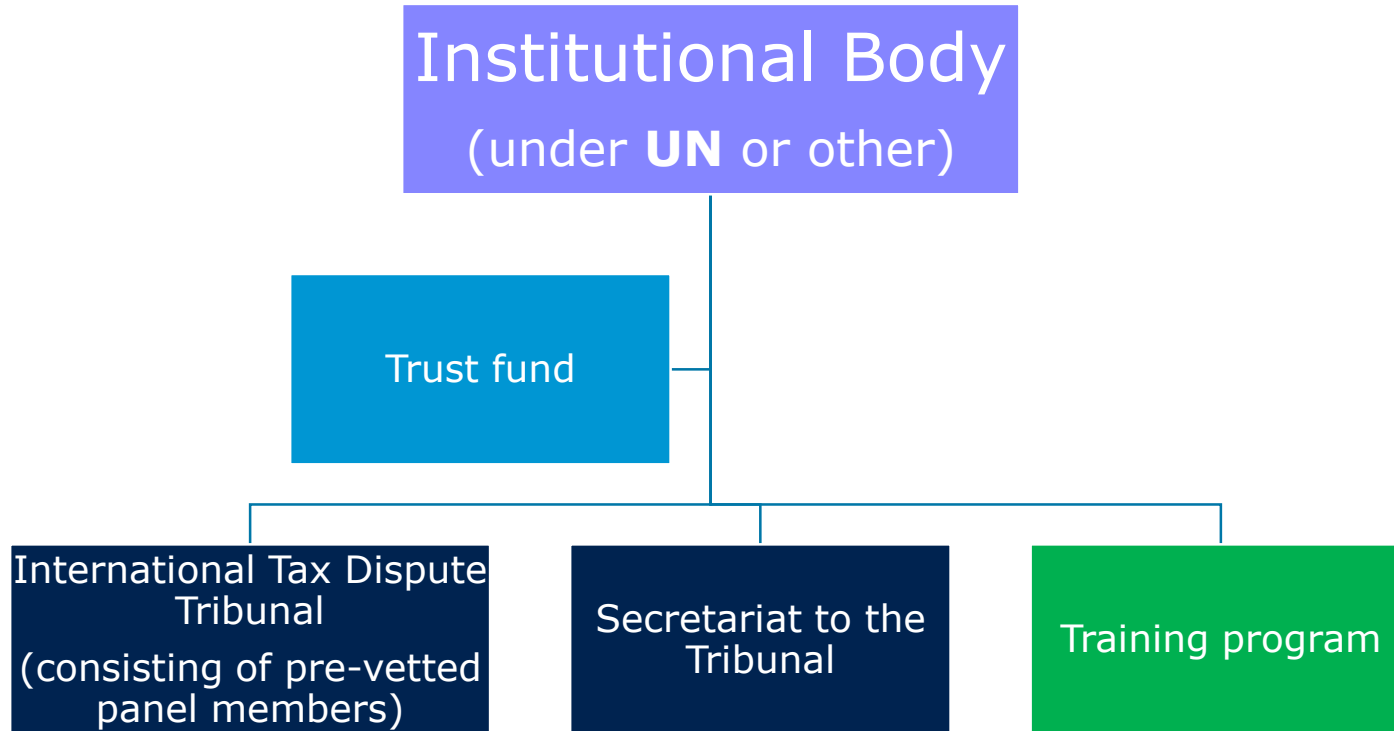
New Article 25 (5) & (6) – Overview and purpose of changes

1. Extension to general interpretation cases
2. Obligation to remove taxation not in accordance with the Convention – imported from EU Arbitration Convention; also for deviating decisions
3. Basic timeframe set at 3 years (possibility to extend, but only by max. 1 year)
4. Presentation to CA of residence state
5. Mandatory dispute settlement – terminology more appropriate than „arbitration“ given intended changes which lead to a more judicial proceeding
6. Any stakeholder can request arbitration; one requesting stakeholder sufficient
7. Deadline for request
8. Opt-out for Contracting States
9. Legal nature of implementing agreement established
10. Possibility of review of deviating decisions established
11. Obligation to agree and renounce other remedies

New Article 25 (7) & (8)

- Article 25 (6) introduces the possibility of non-binding dispute resolution mechanisms
- Last resort: towards the end of the timeframe for MAP
- **Institutionalized procedure** – efficiency gains & vetting of third persons
- Any type of procedure possible: mediation, expert determination (binding and non-binding), conciliation
- Opt-out if agreement
- Timeframe of 4 months or until MDS (**automatic escalation**)
- Resolved cases cannot be sent to MDS, but if only some issues are resolved → unresolved issues are submitted to mandatory dispute resolution
- Taxpayer veto

The Institution



Thank You for Your Attention!



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