

The NIF - Introduction



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What is the NIF?

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

- **Involve developing countries and LDC in the conversation on the future of international tax law**
- **Increase international tax certainty**
- **improve MDS in international tax law** by addressing existing **concerns** (of **developing countries** and LDC)
- Increase **acceptance** and **spread** of MDS
- Provide the first truly **multilateral approach to MDS**

Issues with the Status Quo of tax dispute settlement

- ❖ **MDS is rare** (few tax treaties have MDS clauses)
- ❖ **Slow**
- ❖ **Inefficient** (not all cases resolved)
- ❖ **Not suited for multilateral application**
- ❖ **Intransparent**
- ❖ **Lack of experience** ⇔ **lack of trust**
- ❖ **Resource-intensive**
- ❖ **No means to enforce procedural safeguards and minimum standards**
- ❖ **Risk of partiality**
- ❖ **Fragmented** – multiple legal sources with subtle differences in access, procedure and effects within the same geographic area (MLI, EU-DRD, EU Arbitration Convention, DTC clauses (UN Model, OECD Model, US Model))
- ❖ Overlap with **other areas of law and fora**: commercial law, investment law, EU Treaty

Solutions (I)

- Gradual introduction of **MDS**: **speed** and **effectiveness** of dispute resolution increased
- **Single set of rules designed for multilateral application** – suitable for any type of implementation; decreases fragmentation
- Increase in **predictability (even-handedness)**
 - → Standing tribunal / roster of panel members, mediators and experts
- Increase in **independence**:
 - Stringent independence rules and vetting process;
 - relative permanence of appointment decreases risk of conflicts of interest
 - steady source of income → no other employment necessary
- Increase in **transparency**: rules of procedure available online; panel members made public; statistical details of cases published; more access for taxpayers and possibility of access for other stakeholders

Solutions (II)

- **Institutionalization** safeguards minimum standards, as well as predictability, independence and transparency
- Increase in **trust through** predictability, independence, **training** (training program to ensure more members from developing countries)
- **Cost-effectiveness and easing resource-constraints:**
 - economies of scale (salaries of panel members, secretarial costs)
 - Pre-agreed rules decrease resource investment
 - Refund of costs for LDC
 - Pro-bono legal representation
 - Fees for panel members capped
 - Use of communication technology to cut costs
 - Joinder of cases
 - De minimis rules

The Core Question – Establishing a Standing Panel



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The importance of the arbitral panel

- ❖ Trust in institution
- ❖ Even-handedness
- ❖ Independence
- ❖ Quality of decision
- ❖ Can help bridge the sovereignty issue
- ❖ COSTS



Issues to be resolved

1. Composition:

- a) **Number** of panel members
- b) **Who** can be a panel member? (**Pool**)

2. Selection Process

- a) **Who** makes the selection?
- b) **Mechanism:** deadlines, method etc.

3. Degree of permanence

4. Functioning:

- a) **Method of dispute resolution**
- b) **Nature of arbitral award**



NIF Proposal – is there a need for revision?

- Standing list (panel members, mediators or experts)
- Ad hoc selection
- Standard 3-person panel
- Standard selection procedure: States select panel members who then select chair
- Strict criteria of independence (based on IBA Guidelines)
- Both Baseball & independent opinion procedure, depending on time of case
- Mandatory & binding award, but possibility of deviation from award
- List monitored by institution
- Head of institution as fallback for selection process
- Standing Secretariat provided by institution

1.a. Composition – number of panel members (I)

Approach in existing instruments – tax law:

- **Art 25 OECD-MC (SMA):** 3; 1 per S, chair chosen by other 2
- **Art 25 UN-MC (SMA):** 3; 1 per S, chair chosen by other 2
- **2016 US-MC:** 3; 1 per S, chair chosen by other 2
- **MLI Part VI:** 3; 1 per S, chair chosen by other 2
- **EU AC:** Advisory commission: chair; representatives of MS, indep. persons – 5 or 7 persons in total
- **EU DRD:** Advisory commission: 5 persons as a rule

Reasoning: decision-making by simple majority; members nominated by States are less independent than chair ⇔ chair should have deciding vote

Multilateral disputes: What happens if 3 or more States are involved? 4 members → split panel or any 2 states can decide the vote; simple majority does not work any more; unanimity impossible to apply in practice; exploding panel size – **WHAT TO DO?**

1.a. Composition – number of panel members (II)

Lessons to be learned from other areas of law – panel selection in multilateral disputes:

- **Appointing authority needed** → **INSTITUTIONALIZATION**
- **Grouping:** forced or by consent; 2 „parties“: claimants and respondents – each nominates 1 panel member (e.g. Art 10 UNCITRAL, Art 12 & 1 ICC; Art 12 ICDR; LCIA)

Other possible Options:

- **Standing panel** (see permanence)
- **Automatic roster** (see permanence)
- Drawing of **lots** (EU AC)
- **Nomination from list** by **appointing authority**
- **Mix:** appointing authority ensures uneven number or selects Chair

1.b. Composition – pool of panel members (I)

- **Standard** approach: **independent** panel members (OECD-MC; UN-MC; US-MC; MLI etc.)
- **EU AC**: mix of dependent and independent panel members

Possible compositions:

- ❖ Uniform or mixed
- ❖ serving tax officials (of the same or a different country)
- ❖ retired/non-serving tax officials
- ❖ independent experts – lecturers, practitioners (?), judges, advisors (?)

1.b. Composition – pool of panel members (II)

Qualifications & other criteria:

- International tax law expertise
- TP expertise
- Database expertise, finance expertise etc.
- Procedural expertise (mediator, judge)
- Mix of practitioners, government experts and professors
- Mix of developing country perspectives and developed country perspectives
- Representative mix of gender, race, religion etc.

1.b. Composition – pool of panel members (III)

Independence criteria:

- **General rule** (e.g. MLI): flexible, covers all situations, cautionary effect BUT application unclear ⇔ disputes
- **Precise set of rules** (EU DRD, NIF proposal)
- **Permanent or ad hoc?** (EU AC, MLI, EU DRD permanent; OECD-MC, UN-MC, US-MC –ad hoc)
- **Mix?**

Effect of independence:

- On **list**
- On **panel composition** in particular case
- On **validity of award?**

2.a. Selection process – appointing authority

- **Standard:** parties (see problems with this for multilateral disputes)
- **Possibilities:**
 - Parties (including groups of parties)
 - Secretariat
 - Countries not involved in dispute
 - Head of organization or governing body
 - Taxpayer – would not be acceptable!
 - Automatic or pre-determined

2.b. Selection process – mechanism (I)

Automatic appointment:

- see supra – roster, standing panel, drawing of lots etc.
- **Establishing mechanism essential if more permanent than ad hoc!**
- Determination of appointment, duration, replacements, re-election etc.

Selection process:

- **Lessons learned from the EU AC:** importance of deadlines, clear rules, procedural details, **ESCALATION** (appointing power moves away from the parties) → see EU DRD
- **Different methods of escalation:** appointment by courts (EU DRD); appointment by Secretariat / presiding body of international organization (private international law), appointment by head of OECD / UN (OECD-MC, UN-MC, MLI), drawing of lots (EU AC), appointment by other party (NAFTA)

2.b. Selection process – mechanism (II)

- **To be considered:**
 - Method of escalation needs to be in line with participation & institutional set-up
 - appointing authority requires trust
 - appointment delays by parties and the arbitrators themselves must be considered
 - Who should have the ability to escalate? Taxpayer / the other party?
 - Appointment by court very slow; appointment by other party does not solve all types of escalation

3. Degree of permanence - institutionalization

- **Fiscalis Project Group (FPG)093 - Working Paper** on the Implementation of Article 10 of Directive (EU) 2017/1852 on Tax Dispute Resolution Mechanisms in the European Union
https://ec.europa.eu/taxation_customs/sites/taxation/files/2019-tax-dispute-resolution-fiscalis-project-group-report.pdf
- ❖ **Existing Court / organization:** ill-suited to questions of international tax law (competence and in the case of the CJEU – procedure)
- ❖ **Standing panel:**
 - ❖ Full-time
 - ❖ Part-time
- ❖ **Roster system** – list with pre-determined order of selection
- ❖ **List**
- ❖ **Completely ad hoc**

Permanence of panel to be separated from the question of permanence of organization: standing secretariat generally recommended. Existing bodies can serve as secretariat.

4.a. Method of dispute resolution

- **Independent opinion:** EU AC, EU DRD
- **Baseball arbitration:** OECD-MC (SMA); UN-MC; US-MC; MLI
- **Mix? Bounded independence** – suggested in theory but thus far not applied in practice

Independent Opinion Approach	Final Offer Arbitration
Main procedure OECD Sample Mutual Agreement + EU Arbitration Convention	Mainly US tax treaties + alternative in Sample Mutual Agreement (main procedure for UN-MC)
Reasoned decision; precedents can be created if published	No reasoned written decision; no precedents possible
Arbitrators decide on substance of the case	Arbitrators are restricted in their decision-making
Generally hearings, participation of taxpayer possible in theory	no hearings; no evaluation of evidence; „on record“ evidence
Parties have more opportunities to present their point of view	Parties have more incentive to compromise
More expensive; longer; possibly more arbitrators	Cheap; very quick; often only one arbitrator

4.b. Nature of arbitral award

- **Binding / non-binding / possibility of deviation** (EU AC, EU DRD, UN-MC)
- **Final / non-final:** possibility of review? Judicial review / higher level review in the same institution? Formal or in substance? (e.g. WTO, UNCITRAL)
- **Implementation & enforcement:** international instruments (New York Convention) / nature under domestic law; deadline?
- **Effect for other cases? (Precedence)**
- **Publication?**

The NIF - Implementation



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Different means of implementation

- **CAA**
- **MCAA**
- **Tax treaty**
- **EU DRD – Alternative Dispute Settlement Panel**
- **New Directive**
- **MLI**
- **Multilateral Convention**

- „quick & dirty“ – swift negotiation and implementation (generally no parliamentary procedure required)
- Can be easily amended
- Only applicable to two states
- No changes in substantive rules possible
- Questionable legal value – would courts apply?
- Questionable publicity – some countries (e.g. Austria, US) publish, others don't
- Fragmentation
- Institutionalization must be provided in more than one CAA to function

- Swift implementation
- Slow negotiations – all states involved must agree
- Slow amendment
- No changes in substantive rules possible
- Questionable legal value
- Public
- Uniform rules
- Allows for institutionalization
- Must be negotiated under the auspices of an international organization – OECD has the most experience but unlikely to be acceptable choice

- Slow negotiation, slow implementation, slow amendment
- Change of substantive rules possible
- Clear legal status
- Implementation of full NIF scope impossible (treaty would be virtually illegible and is generally unsuitable for detailed procedural rules)
- Public
- Fragmentation
- More than one treaty must foresee institutionalization for it to function

EU DRD – Alternative Panel

- Background: Art 10 EU DRD allows great flexibility of procedural rules
- **BUT** EU DRD limits design of substantive rules in certain important aspects (preliminary phase, panel independence, publicity, legal nature of decisions)
- Institutionalization only possible if enough Member States participate
- Additional legal basis required
 - among EU Members and all the more outside the EU
 - To extend scope to states outside the EU – Convention necessary
- Limited scope of application – preliminary questions excluded by DRD (Amending Directive necessary)

New Directive

- Slow negotiation, slow implementation, slow amendment
- Only applicable within the EU – added value questionable given EU DR
- EU tax law more harmonized than other areas but treaties still fragmented – agreement on substantive rules so far impossible
- Public
- Clear legal status
- Change of substantive rules possible
- Fragmentation
- Institutionalization facile

MLI – Amending Protocol

- Slow negotiation, slow amendment
- Extremely slow implementation (time frame 5-10 years)
- Very difficult to clarify relationship with other international instruments OR can be undermined easily
- Fragmentation feature, not a bug BUT higher acceptance
- Change of substantive rules possible – true multilateralization possible
- New rules cannot be added where tax treaty missing
- Complex rule design
- Likely additional instrument still required (see Art 19 (10))
- Very complex application and interpretation
- Unclear legal effect
- Institutionalization possible
- Publicly available

Multilateral Convention

- Very slow negotiation, very slow implementation (5-20 years), very slow amendment – external impetus needed
- Very difficult to clarify relationship with other international instruments OR can be undermined easily
- Clear legal status
- Publicity
- No fragmentation
- Change of substantive rules possible
- Can implement substantive rules even when DTA are missing – true multilateralization possible
- Perhaps no additional instrument necessary if focus only on dispute resolution
- Institutionalization possible (institution could be created with the same instrument)



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