

Mexico City, January 16, 2015

Via e-mail

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**Ms. Marlies de Ruiter**

**Head of Tax Treaties, Transfer Pricing  
and Financial Transactions Division OECD/CTPA**

Dear Ms. De Ruiter,

On behalf of IFA Grupo Mexicano, A.C. (Mexican Branch of the International Fiscal Association), kindly find below the comments on the Public Discussion Draft “BEPS Action 14: *Make Dispute Resolution Mechanisms More Effective*” (the “Draft”).

***“1. ENSURING THAT TREATY OBLIGATIONS RELATED TO THE MUTUAL AGREEMENT  
PROCEDURE ARE FULLY IMPLEMENTED IN GOOD FAITH***

***[...]***

***A. Absence of an obligation to resolve MAP cases presented under  
Article 25(1)***

*Description of the obstacle*

*10. Paragraph 2 of Article 25 provides that competent authorities “shall endeavour” to resolve a MAP case by mutual agreement. It has been argued that the absence of an obligation to resolve an Article 25(1) MAP case is itself an obstacle to the resolution of treaty-related disputes through the MAP (although it is important to note that Article 25(2) entails an obligation to effectively attempt to resolve the case).”*

The previous transcription describes as an obstacle the absence of an obligation to resolve a MAP case, due to the fact that paragraph 2 of Article 25 of the OECD Model Convention establishes that competent authorities “shall endeavor” to resolve a MAP case by mutual agreement.

We consider that the absence of an obligation to resolve a MAP case translates into an issue for taxpayers because the competent authority, in order to avoid the resolution of cases could argue an explicit prohibition by domestic legislation (i.e. Cost sharing agreements or pro-rata expenses).

In addition, when the competent authorities do not reach a resolution by a mutual agreement procedure, the taxpayer may only be informed that “*it was not possible to reach a resolution with the competent authority of the other Contracting State*” excluding the reasons or circumstances why the agreement was not reached, leaving the taxpayer in a state of uncertainty and with a double taxation case unsolved.

Therefore, our recommendation is that the competent authorities should issue guidelines aimed at the taxpayers through which position of specific topics are expressed. This may provide taxpayers with an interpretation of the position that competent authorities along countries maintain regarding specific topics, and with that provide certainty to taxpayers about the effectiveness of this procedure.

Additionally to the previously mentioned, it is important to recall that for any country where foreign investment is a relevant topic, the existence of procedures that provide taxpayers (mainly Multinationals) with certainty about the resolution of MAP cases will promote the arrival of new investments to the country.

***“2. ENSURING THAT ADMINISTRATIVE PROCESSES PROMOTE THE PREVENTION AND RESOLUTION OF TREATY - RELATED DISPUTES***

*[...]*

***C. Lack of independence of the competent authority and inappropriate influence of considerations related to the negotiation of possible treaty changes***

*Description of the obstacle*

*14. In the context of the mutual agreement procedure, the role of the competent authority is to take an objective view of the provisions of the applicable treaty and apply it to the facts of the taxpayer’s case, with a view to eliminating taxation not in accordance with the terms of the treaty. Objectivity may be compromised where the competent authority function is not sufficiently independent from a tax administration’s audit or examination function (i.e. from the field personnel who were directly or indirectly involved in the initial adjustment).*

*[...]*

***D. Lack of resources of a competent authority***

*Description of the obstacle*

*16. The lack of sufficient resources (personnel, funding, training, etc.) allocated to a competent authority in order to deal with its inventory of MAP cases is likely to result in an increasing inventory of such cases and in increased delays in processing these cases. This will have a fundamental impact on a Contracting State’s ability to operate an effective MAP programme.*

*[...]*

### ***E. Performance indicators for the competent authority function and staff***

#### *Description of the obstacle*

*17. The evaluation of the competent authority function or staff based on criteria such as sustained audit adjustments or tax revenue may be expected to create disincentives to the competent authority's objective consideration of MAP cases and to present obstacles to good faith bilateral MAP negotiations."*

The previous transcriptions describe as obstacles the lack of independence of the competent authority in charge of resolving MAP cases from the administration with examination or audit functions, the lack of sufficient resources allocated to a competent authority in order to deal with its inventory of MAP cases, and the lack of proper performance indicators.

We do agree with these concerns, especially when the competent authority in charge of resolving MAP cases is the same competent authority with examination and audit functions. In this sense, by depending from the same department, only one budget of resources is given, thus, the competent authority has to obtain its resources from a budget where the inspection functions have priority.

Consequently, the lack of budgetary and administrative independence leaves the competent authority at the full disposal of the audit administration, whereby not enough MAP cases are resolved.

Additionally to the abovementioned, the lack of proper performance indicators represents another main obstacle that MAP cases resolution has to face, because the main functions of the department are the inspection powers; consequently, the competent authority in charge of resolving MAP cases may not be evaluated based on the functions it really performs but only based on the collected taxes according to the primary adjustment realized in the audits and not from solved MAP cases.

In order to overcome such obstacles, our recommendation is that Governments shall assure the autonomy of the competent authorities in charge of resolving MAP cases from the audit and inspection functions or similar, such as it is included in the OECD Manual on Effective Mutual Agreement Procedures ("MEMAP").

With the autonomy of the competent authorities, other obstacles mentioned in the Action Plan here commented should also be in part solved or at least minimized (i.e. Transparency and simplicity of procedures).

Also, by ensuring the independence of the competent authority, a better perspective of the resources needed and incentives alignment are possible. Such solutions will allow a better allocation of resources to the competent authority, establishment of proper performance indicators and consequently build confidence in the taxpayers regarding the effectiveness of these procedures.

### ***“F. Insufficient use of paragraph 3 of Article 25***

#### *Description of the obstacle*

*18. Paragraph 3 of Article 25 authorises competent authorities “to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of the Convention”. The question may arise, however, whether competent authorities make use of this authority. The second sentence of paragraph 3 provides in addition that competent authorities “may also consult together for the elimination of double taxation not provided for in the Convention”, although the competent authorities of some countries consider that they may lack the legal authority to resolve issues under that sentence.*

*[...]*

The previous transcription describes as an obstacle the scarce use of paragraph 3 of Article 25 of the OECD Model Convention, which is related to the resolution by mutual agreement of any difficulties or doubts arising as to the interpretation or application of the Convention and consultation for the elimination of double taxation not provided for in the Convention.

The lack of guidelines issued by the States related to the topics that could be solved according to paragraph 3 of Article 25 of the OECD Model Convention causes that taxpayers do not have access to these procedures, because the taxpayers do not have knowledge that they can access these procedures.

Our recommendation is that the Contracting States that have included paragraph 3 of Article 25 of the OECD Model Convention into the treaties they have executed, should issue guidelines that might help taxpayers to know the cases for which MAPs could also be entered according to this paragraph.

### ***“3. ENSURING THAT TAXPAYERS CAN ACCESS THE MUTUAL AGREEMENT PROCEDURE WHEN ELIGIBLE***

*[...]*

### ***J. Complexity and lack of transparency of the procedures to access and use the MAP***

#### *Description of the obstacle*

*25. Where procedures to access and use the MAP are not transparent or are unduly complex, taxpayers may not seek MAP assistance and, as a result, may face unrelieved double taxation or otherwise improperly be denied treaty benefits.*

*[...]*

### ***K. Excessive or unduly onerous documentation requirements***

#### *Description of the obstacle*

*26. Article 25(2) MAP cases are generally initiated by a taxpayer's request for competent authority assistance under Article 25(1). Through such a request, the taxpayer notifies the competent authority that it considers that the actions of one or both of the Contracting States have resulted or will result in taxation not in accordance with the provisions of a treaty. Such a request must be accompanied by complete and accurate information to enable the competent authority to understand and evaluate the taxpayer's objection. Excessive or unduly onerous documentation requirements may, however, discourage requests for MAP assistance and be an obstacle to an effective mutual agreement procedure.*

*[...]*"

The previous transcriptions describe obstacles related with the lack of transparency of procedures in order to access a MAP and the excessive or unduly onerous documentation required to the taxpayer in order to access a MAP.

In this respect, the practical experience is not away from such obstacles. Taxpayers trying to initiate a MAP face excessive and onerous documentation requirements. This is, the documentation or information requested might not be directly related with the case, which translates into a waste of resources (i.e. Translations from the original language (English) to the official language of the State).

Also, as it has been mentioned, the lack of transparency and complexity of the procedures followed may represent important obstacles that difficult the resolution of MAP cases. In this sense, based on the practical experience, the lack of transparency, the complexity of procedures followed, and the excessive and unduly onerous documentation requirements by the competent authorities leave the taxpayer in a state of uncertainty about the progress of the MAP case entered.

Regarding the aforementioned, our recommendation is that Contracting States participating into a MAP case simplify the documentation requirements and procedures by only requiring the documentation or information strictly necessary to reach a solution. An example of the previous is that if the MAP is started in a country where a different language is spoken, the other competent authority does not impose the taxpayer with the costs related with the translation of documentation if the documentation is not strictly necessary or if the documentation is in the English language (official language of most of the treaties executed). Also the Contracting States may consider if the MAP case derives from an extension or renovation of a previous solved case, the competent authority should not require all the historic documentation because it already has it in its files and it should only require the necessary documentation in order to renovate or extend the original resolution.

Regarding transparency and simplicity of the procedures to access MAPs a general recommendation that could be useful is that taxpayers participate, or at least be present, during the competent authorities' negotiations. Such mechanism will imply that the taxpayers have certainty of the progress that the MAP case has, as well as certainty that all the information provided during the MAP is properly taken into account.

Finally, in order to inform the taxpayers, the competent authorities should promote through their communication channels (programs, forums, professional associations, tax ombudsman) the access to MAPs as mechanisms to resolve double taxation cases. Nowadays, the access to MAPs is reduced due to the lack of knowledge from the taxpayers of this kind of procedures.

### ***“P. Time limits to access the MAP***

#### *Description of the obstacle*

*34. Time limits connected with the mutual agreement procedure present particular obstacles to an effective MAP. In some cases, uncertainty regarding the “first notification of the action resulting in taxation not in accordance with the provisions of the Convention” may present interpretive difficulties. More importantly, some countries may be reluctant to accept “late” cases – i.e. cases initiated by a taxpayer within the deadline provided by Article 25(1) but long after the taxable year at issue. Countries have adopted various mechanisms to protect their competent authorities against late objections, which include requirements to present a MAP case to the “other” competent authority within an agreed-upon period in order for MAP relief to be implemented and treaty provisions limiting the period during which transfer pricing adjustments may be made. In practice, competent authorities have found that the early discussion of MAP cases may contribute to a more effective and timely MAP process (recognising that competent authority consultation prior to the conclusion of the audit should respect the principle of the independence of the competent authority and audit functions).”*

The previous transcription describes as an obstacle the difference in time limits to access a MAP among different Contracting States. Specifically, the obstacle is related with the uncertainty regarding the first notification of the action resulting in taxation not in accordance with the provisions of the Convention.

In Mexico's experience, there are some practical issues derived of the absence of regulation in this matter. As an example, the transfer pricing audits in Mexico can be started by the tax authorities at the end of the period; this is, nearly 5 years after the filing of the annual tax return (statute of limitations). Therefore, in the case of the tax treaty between Mexico and the United States, the period established under Article 26 of said treaty is of 4.5 years after the filing of the annual tax return that could also end leaving the taxpayer without the possibility of requesting a MAP.

Notwithstanding there are different interpretations that could allow considering the period of time as restarted in order to request a MAP (filing an amended tax return) and also there is the flexible position assumed by the Mexican tax authorities, it is important that such authorities issue detailed guidelines regarding this type of procedure in order to prevent taxpayers from having access to the procedure, because of formal issues.

***“4. ENSURING THAT CASES ARE RESOLVED ONCE THEY ARE IN THE MUTUAL AGREEMENT PROCEDURE***

*[...]*

***R. Lack of a principled approach to the resolution of MAP cases***

*Description of the obstacle*

*37. As already noted, the role of the competent authority is to take an objective view of the provisions of the applicable treaty and apply it in good faith to the facts of the taxpayer’s case, with a view to eliminating taxation not in accordance with the terms of the treaty. Where one or both competent authorities do not follow that approach, the resolution of MAP cases becomes very difficult and there are risks of inappropriate results.*

*38. [...] A principled approach also requires that competent authorities take a consistent approach to the same or similar issues and not change positions from case to case, based, for example, on considerations such as revenue that are irrelevant to the legal or factual issues that the competent authorities are called upon to resolve.*

*[...]*

***S. Lack of co-operation, transparency or good competent authority working relationships***

*Description of the obstacle*

*39. A lack of co-operation, transparency or of a good working relationship between competent authorities also creates difficulties for the resolution of MAP cases. A good competent authority working relationship is a fundamental part of an effective mutual agreement procedure and is another strategic focus of the FTA MAP Forum. The FTA MAP Forum Strategic Plan notes that the success of mutual agreement procedures “critically depends on strong, collegial relationships, grounded in mutual trust, between and among competent authorities around the world. [...]”*

*[...]*

***T. Absence of a mechanism, such as MAP arbitration, to ensure the resolution of all MAP cases***

*Description of the obstacle*

*41. Mandatory binding MAP arbitration has been included in a number of bilateral treaties following its introduction in paragraph 5 of Article 25 of the OECD Model in 2008. Action 14 of the BEPS Action Plan recognises, however, that the adoption of MAP arbitration has not been as broad as expected and acknowledges that “the absence of arbitration provisions in most treaties and the fact that access to...arbitration may be denied in certain cases” are obstacles that prevent countries from resolving disputes through the MAP. [...]*

The previous transcriptions describe as obstacles the lack of a principled approach to resolve MAP cases, the lack of co-operation, transparency or good competent authority working relationships and the absence of an alternative mechanism, such as arbitration, that may ensure that even when competent authorities do not reach a solution, a third party (arbitrator) has the power to issue a resolution.

Regarding the lack of a principled approach to resolve MAP cases, Mexico has important issues that could be improved. In this sense, neither a domestic law nor any other regulations impose an approach that should be followed to resolve a MAP case.

The only reference to a MAP within the Mexican Income Tax Law is article 184, which establishes the mechanism through which taxpayers could perform the corresponding adjustment derived of a transfer pricing primary adjustment determined to a foreign-based related party. Such mechanism consists in filing an amended tax return that reflects the corresponding adjustment.

According to article 184 of the Mexican Income Tax Law, it is only possible to perform corresponding adjustments if they are derived of primary adjustments performed by tax authorities of countries with which Mexico has signed international tax treaties. In addition, said article establishes that the Mexican tax authorities must agree with the primary adjustment performed and it could be understood that said agreement should be obtained through a MAP.

As it can be observed, the Mexican Income Tax Law only recognizes the application of corresponding adjustments when such adjustments derived from a primary adjustment determined by a foreign-based tax authority. Notwithstanding, said provision does not limit the taxpayers' right to perform self-initiated adjustments, the competent authorities may or may not agree with the used criteria.



In addition, competent authorities may have assumed the commitments made by several countries in order to adopt the “MEMAP” guidelines which seek to improve the MAPs. Notwithstanding, the adoption of these measures is not reflected in the tax authorities practices, since time limits established by such guidelines are not followed, like to issue an answer to taxpayers no later than three months after the MAP request regarding the acceptance or rejection of the request, the time limit of 4 to 6 months to start the communication with the other competent authority and the resolution of the MAP within a deadline of two years.

Certainly, the lack of co-operation, transparency or good competent authority working relationship may also difficult the resolution by mutual agreement of a MAP case. A recurrent case that is closely related with this obstacle is the fact that the competent authority does not have regulations that establish guidelines for the competent authority to be followed for the mutual agreement negotiations. An example of this is that competent authorities hold communications with other competent authorities until they are contacted by such authorities when the MAP was initiated abroad.

Another important obstacle present in Mexico is the absence of arbitration clauses. It is important to mention that even if Mexico has permitted arbitration in several matters (international trade, environment, among others), the tax matters are out of reach for this dispute resolution mechanism. Recently in Mexico, an alternative resolution mechanism has been approved which consists in a conclusive settlement issued by a third party (tax ombudsman) having analyzed both positions (the taxpayer’s and the tax authority’s) creating a precedent of the use of this mechanism that, notwithstanding it is not equal to arbitration, could be used for tax purposes and incentive Mexican tax authorities to include an effective arbitration clause in tax treaties.

Therefore, based on the examples previously mentioned, our general recommendation is that approaches contained in guidelines, provisions or any other means should be issued in order to force competent authorities to resolve MAP cases based on the approaches provided and within the time limits established (for example, the “MEMAP” establishes a 2-year limit for competent authorities to resolve a MAP case).

Also, the acceptance of arbitration clauses as a dispute resolution mechanism in the treaties executed could be useful to provide taxpayers with certainty that a MAP case will be also resolved, even if the involved competent authorities do not reach a mutual agreement.

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The participation of IFA Grupo Mexicano, A.C. is made on its own behalf exclusively as an IFA Branch, and in no case in the name or on behalf of Central IFA or IFA as a whole.

IFA Grupo Mexicano, A.C.

We hope you find these comments interesting and useful. We remain yours for any questions or comments you may have.

Sincerely,

IFA Grupo Mexicano, A.C.