Mexico City, June 30, 2016

Via email
multilateralinstrument@oecd.org

Dear Secretariat,

On behalf of IFA Grupo Mexicano, A.C. (Mexican branch of the International Fiscal Association), below you will find our comments on the Public Discussion Draft on the Development of a Multilateral Instrument to Implement the Tax Treaty related BEPS Measures. Comments appear in *italics*.

- **Technical issues that should be taken into account in adapting the BEPS measures to modify or supersede existing provisions of bilateral tax treaties that may vary from the OECD model, including:**

a) Existing provision or types of provisions that serve the same purpose as the BEPS measures and that would need to be replaced

b) Existing provisions or types of provisions that are similar to BEPS measures but that would need to be retained

One of the fundamental characteristics of a multilateral instrument is the need to cover a substantial breadth of topics, a situation that makes fragmentation an issue to consider during the implementation of such instrument.

The improbability of contriving a homogenous document because of the plurality of criteria that derives from the number of parties involved, generates an atmosphere of uncertainty to the Contracting States when internally adopting the provisions convened therein, given the ambiguity of the effects that the corresponding modifications will have on the bilateral negotiations already established between countries.

The alterations, adjustments and modifications of existing provisions contained in bilateral tax treaties previously negotiated by Mexico, as a consequence of the internal adoption of BEPS measures incorporated in the multilateral instrument, would not bear major technical issues in its implementation, since Mexican law

follows the general principle's maxim of lex posterior derogat priori*, or, in other words, that recent law prevails over an inconsistent, earlier law.*

Notwithstanding, we believe a particular method or system should be enforced in order to distinctly specify which provisions are to be superseded by more recent BEPS measures and which are to be overruled, abrogated or derogated.

Contracting States must have detailed agendas or templates of the agreed multilateral and bilateral provisions of similar nature, in order to address the complexity involved in the process of internally approving vaguely-defined clauses compared to those previously negotiated with different countries through the bilateral tax treaties; i.e.*, Mexico's Senate may have an arduous task in determining which provisions are to be superseded, overlapped or derogated,* e.g.*, which concept of "permanent establishment" to adopt between the multilateral instrument agreed notion and the extent of interpretations previously convened in bilateral negotiations in that aspect.*

The problem increases with the fragmentation of the content of said multilateral instrument, wherein its content will be in constant confrontation with the multiplicity of concepts and clauses that have been previously and bilaterally convened.

Another issue that arises with fragmentation is that of gathering signatures of plenipotentiaries for treaty purposes. Should the Senate gather an overall signature of the plenipotentiaries for the Contracting States for the totality of the multilateral instrument although some of them would not agree on certain provisions? Hence, should the Senate collect signatures depending on the fragments of the multilateral instrument that the parties agree upon?

- **The approach to be taken in developing the optional provision on mandatory binding MAP arbitration, taking into account that it would need to serve the needs of the countries that have already committed to implement mandatory binding arbitration, as well as countries that are considering committing in the future.**

An important problematic that may arise at the moment of implementing the MAP arbitration provisions of the multilateral instrument is that several Contracting States, which had already executed a bilateral tax treaty between each other and

did not agree, at the moment, on a criterion regarding MAP arbitration, may decide that they do not want to include MAP arbitration provisions with interested signatories with whom they do not share the same criteria over such subject matter.

The abovementioned issue aggravates for those Contracting States that are not already involved in the development of the multilateral instrument and decide to adopt it afterwards, since some of these Contracting States may have never discussed or negotiated with each other their specific standpoints on MAP arbitration, a problem that would provoke even further fragmentation.

Likewise, as previously mentioned, the variety of criteria derived from the number of parties involved creates uncertainty to the Contracting States; specifically, this will take place at the moment that the Contracting States internally adopt the multilateral instrument and the MAP arbitration provisions agreed upon.

This uncertainty could be avoided by establishing in the multilateral instrument, specific clauses to provide the scope of the MAP arbitration provisions and to confer the possibility for the Contracting States to decide with which signatories (jurisdictions) they would agree to implement such provisions and with which they would prefer not to, based on the criteria that each has regarding MAP arbitration. As an example, Section 8 of the Multilateral Competent Authority Agreement on the Exchange of Country-by-Country Reports establishes that the Competent Authorities must provide notification to the Co-ordinating Body Secretariat, at the time of signature of the Agreement, that includes, among others, a list of the jurisdictions of the Competent Authorities with respect to which it intends to have the Agreement in effect.

- **The types of guidance and practical tools that would be most useful to taxpayers in understanding the application of the multilateral instrument to existing tax treaties.**

We believe that the addition of a practical guide or manual to the full-length version of the OECD Model Tax Convention on Income and on Capital would be extremely convenient so as to provide means to resolve, on a systematic basis, the most common problems faced by the international community when approaching

confrontations with previously-agreed bilateral tax treaties caused by the application and interpretation of the content of the multilateral instrument.

Likewise, an effective mechanism in order to guide the taxpayers in implementing the multilateral instrument would be periodical online publications—previously discussed and agreed by its members—on the OECD webpage, along with specific explanations on case to case analysis of a public, non-monetary nature, to be shared among its users.

- **Mechanisms that could be used to ensure consistent application and interpretation of the provisions of the multilateral instrument.**

We believe that one mechanism that would be feasible and desirable to ensure the application and interpretation of the provisions of the multilateral instrument would be that a specific Group integrated by different members of the OECD as it is the Working Party 1, or even the same Ad Hoc Group that is already developing the multilateral, should have the empowerment and faculties to observe and resolve doubts and problems of interpretation that may rise during the implementation of the provisions of the multilateral and that may be raised by a taxpayer from one of the Contracting States.

These questions could be resolved through the same website of the OECD, or else, through a specific website that the Ad Hoc Group establishes, in order to resolve such problems. As an example, the Working Party 10 in charge of the Global Forum for Automatic Exchange of Information already has this kind of mechanism through which it resolves several problems related with the standard of exchange of information, and issues several documents related with this subject matter, but always consulting first with Working Party 1 in order to avoid contradictions.

- ***Other Considerations***

i) Entry into force

Another major concern regarding the implementation of the multilateral instrument is the "timing" to enforce its application. Once again, because of the plurality of subjects (Contracting States) involved in its genesis and consequent application,

the dates of commencement will be inevitably stretched and delayed as a consequence of the internal process of authorization and adoption of the multilateral that according to its sovereignty the Contracting States have to attend.

The stalling of its entry into force could be aggravated by Contracting States, whose internal procedures of adoption are characteristically stagnant and complex, which may take between five and seven years to approve the tax treaties entered into by their administrations.

Also, as a consequence of the abovementioned factors, a myriad of interpretations and negotiations between Contracting States of highly country-populated continents, such as Europe, would give way to tax spheres of restricted benefits created by the atomized negotiations of bilateral tax treaties and, therefore, to strategic planning by the tax administrations involved, consisting in conveniently delaying the entry into force of the multilateral instruments with the simple objective to restrict the benefits contained therein.

In other words, tax administrations would hope to delay the commencement of the multilateral instrument so as to grant lesser benefits because of the constricted conception of limitation of benefits foreseen in their bilateral treaties, as opposed to the extensive conception that could be included when signing such multilateral instrument.

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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 whole.

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.