Mexico City, June 12, 2015

Via e-mail

taxtreaties@oecd.org

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 Revised Discussion Draft on Action 7 of the BEPS Action Plan –"*Preventing the Artificial Avoidance of the PE Status*" (the "Draft").

A. Artificial avoidance of PE status through *commissionaire* arrangements and similar strategies

A.1. Paragraph 5

- We concur with the election of Option B over Options A, C and D, in order to modify Art. 5(5) of the OECD Model Tax Convention because of the following reasons:
  - This option is the one that best resolves the confusion on the scope of the current wording of Art. 5(5) pertaining to having and habitually exercising authority to conclude contracts, which through the Commentaries of the OECD Model Tax Convention includes negotiation as well. The foregoing is achieved because Option B specifically provides that the person acting on behalf of the enterprise

should either “habitually conclude contracts” or “negotiate the material elements of contracts”.

- This option is the one that best resolves the misconceptions arising from the current wording of Art. 5(5) that generally provides for PE exposure pertaining to contracts entered into “in the name of the enterprise” which has created confusions for civil law countries where contracts can be entered into both “on behalf and in the name of the enterprise” and “on behalf of the enterprise but in the name of the person”. The foregoing is achieved because Option B clearly establishes through subparagraphs a), b) and c) that PE exposure could exist pertaining to contracts entered into “on behalf and in the name of the enterprise” or “on behalf of the enterprise but in the name of the person”.

- In our comments to the prior Public Discussion Draft, we had observed that subparagraph a) referring to “in the name of the enterprise” should be deleted because subparagraphs b) and c) already sufficed to address subparagraph a) concerns. The foregoing because Option B resolved the misconceptions arising from the scope of the phrase “in the name of” by focusing on the object of the contract entered into by the agent (i.e., property or services to be provided by the enterprise) regardless of whether the contract entered “on behalf of the enterprise” was entered “in the name of the enterprise” or “in the name of the person”. However, paragraphs 32.7 and 32.8 of the proposed Commentary on Article 5 clarify that subparagraph a) refers to the case where contracts are entered into “in the name and on behalf of the enterprise” while subparagraphs b) and c) address the case where contracts are entered into “in the name of the

person but on behalf of the enterprise". We do agree with this approach taken on the Commentaries, but consider that the text could be misleading and therefore consider appropriate to make a further clarification on the text of Art. 5(5) as follows:

"a) in the name of the enterprise, or

b) in its own name, for the transfer of the ownership of, or for the granting of the right to use, property owned by that enterprise or that the enterprise has the right to use, or

c) in its own name, for the provision of services by that enterprise,"

- Paragraph 32.9 of the proposed Commentary on Article 5 provides that the reference to contracts "in the name of" in subparagraph a) does not restrict the application of the subparagraph to contracts that are literally in the name of the enterprise, thereby potentially applying to "certain situations" where the name of the enterprise is undisclosed in the contracts. We consider that this paragraph might be confusing and, therefore, suggest including some examples for clarification purposes.

A.2. Paragraph 6

- We concur with the decision of deleting the phrase "acting on behalf of various persons" and with the inclusion of the phrase "one or more enterprises to which it is connected". The foregoing because these amendments clarify our concern that an independent agent having only one unrelated client would automatically trigger PE exposure for the enterprise. In this regard, we agree with paragraph 38.6 of the Commentaries on Article 5 clarifying that paragraph 6 will not automatically apply where a person acts for one or more enterprises to which that

person is not connected, but rather this paragraph 6 requires that the person must be carrying out business as an independent agent and be acting in the ordinary course of that business. Although we do not agree with an assessment that independent status is less likely if the activities of the person are performed wholly or almost wholly on behalf of only one enterprise, because in any case the tests of economic and legal dependence must be applied.

- Paragraph 38.7 of the proposed Commentaries on Article 5 establishes, as an example, an objective threshold (10% of concluded sales) to measure whether a person is acting "exclusively or almost exclusively" on behalf of connected enterprises. The proposed threshold could be difficult to apply because it does not refer to a timeframe during which the agent's sales to enterprises that are not connected should represent less than 10% of the sales that it concludes as an agent. In addition, we consider appropriate to include a clarification in the same paragraph that other objective tests could be sought as well and that failure of passing under this text should not automatically place the agent on second sentence of paragraph a).

- We also concur on the inclusion of a subparagraph b) to paragraph 6 for purposes of clarifying the concept of "connected enterprises".

B. Artificial avoidance of PE status through the specific activity exemptions

B.1. List of activities included in Art. 5(4)

- We concur with the election of Option E over Options F, G and H, in order to modify Art. 5(4) of the OECD Model Tax Convention so that each of the exceptions included in that paragraph are restricted to activities that are of a “preparatory” or “auxiliary” character.

- The last sentence of the existing paragraph 22 of the Commentary on Article 5, which refers to the collection of information as in the case of a newspaper bureau, is being deleted and is not included in other paragraphs of the referred Commentary.

  However, we consider important to include such sentence in paragraph 22.6 of the Commentary, which deals with examples of subparagraph b) of Article 5 (collect information for the enterprise), in order to clarify that the collection of information by a newspaper bureau is considered as a preparatory or auxiliary activity, since the deletion of said paragraph may be misleading.

- Paragraph 22.3 of the Commentary on Article 5, which refers to subparagraph b) (maintenance of a stock of goods or merchandise belonging to the enterprise), establishes a general example of a case in which an activity may fall or not under such paragraph, depending if the activities constitute a preparatory or auxiliary activity, however the activities are not described therein.

  For clarification purposes, we recommend to include a specific example, which would be considered as preparatory or auxiliary under subparagraph b), such as the example indicated in paragraph

29 of the Commentary (the display of merchandise during a trade fair or convention would be excepted under subparagraph b).

B.2. Fragmentation of activities between related parties

- The term "connected enterprise" is used instead of "associated enterprise". Although we understand that comments were received regarding the use of the original language, we consider the same to be correct as it is a more technical term than "connected". The term "connected" is too broad and not used in the International Taxation jargon with respect to an "enterprise". It is typically used regarding income i.e. effectively "connected" income. The term "associated" with respect to the term enterprise is commonly used and therefore easier to understand its scope i.e. Article 9 of the OECD Model Tax Convention, Commentaries on Article 7, etc.

- More complex examples to illustrate the application of paragraph 4.1. are welcomed.

C. Splitting-up of contracts

- We are still concerned about the “automatic” approach for the determination of splitting-up of contracts and we consider that the PPT rule would and should suffice in order to address abusive situations in which the split-up is made in order to circumvent the provisions of the Treaty pertaining the creation of a PE.

- Under paragraph 18.1 and in connection to the additional provision to address contract splitting-up, we consider that an exception to the application of the provision should be available, under which the

taxpayer may evidence that such split-up was made for valid business reasons; thus, the provision should not apply. This, in order to allow valid business arrangements to be exempted from the automatic application of the provision, leaving the burden of the evidence to the taxpayer and not to the tax authorities.

* * *

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.

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.