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LEGISLATION OF MEXICO[1]

Mexican Responses to Questions Submitted by Australia, Canada and the United States

The following communication dated 15 November 1993 has been received from the Permanent Mission of Mexico.

QUESTIONS FROM AUSTRALIA

1. Article 49, Part IV: could more information be provided on the means by which the transaction value of the goods will be determined and the objective and quantifiable data to be used?

Usually the documents where information relating to the amounts that accrue to the seller as a result of the subsequent resale, disposal or use of the imported goods, are based on contracts or commercial agreements between the seller and the buyer.

Under the first criterion of interpretation of provisions regarding the customs value of imported goods, any addition that needs to be made to the price actually paid or payable for the goods under Article 49, Part III and IV of the Customs Act, if at the time of importation, the amount of such additions cannot be determined, the importer may use the transaction value method, provided that he estimates the amount of such additions and determines the value on a provisional basis.

If at the moment such amounts can be determined, there is any difference with the estimated amounts, the importer shall present a rectification to the entry, correcting the dutiable basis and paying the corrected duties, as well as any charge that may be due since the date the duties were paid until the date of payment of the differences. If the dutiable basis and the duties due are lower than the duties covered on entry, the importer may request the refund of the difference or may COMPENSATE such amount.

If after one year to count from the date of entry, the additions to be made under Article 49, Part III and IV of the Customs Act cannot be determined, the importer shall rectify the customs value declared on a provisional basis, under the appropriate method of valuation, in accordance with Article 54 of the Customs Act.

This criterion may be applied provided that the importer has an inventory control and valuation method which identifies the imported goods.

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[1]VAL/1/Add.25/Suppl.1/Rev.1

2. Article 52, Part VIII: What are the relationships that define people as being members of the same family?

So far, no provision has been made to define the members of the same family for purposes of Article 52, Part VIII. Although this provision may be included as a General Ruling, at this moment a member of the same family, would have to be determined under the Civil Code, which includes blood relationship.

QUESTIONS FROM CANADA

1. Article 48: There appears to be a significant departure from the Code. The price for the goods must be paid, by the importer, in respect of a sale for export to Mexico to the importer. The Code makes no mention of the importer in this respect, only a buyer in a sale for export to the country of importation.

Although the Customs Act does not define who is considered to be an importer, this is usually interpreted as being the consignee of the imported goods, which leaves out the broker, any agent or the carrier. The intention of this change in wording was made in order to make it clear the need for a sale for export to Mexico and not just any sale.

The Mexican authorities do not consider this to be a departure from the Code. Furthermore, at this point no problem has arisen due to this provision.

2. Article 49.II(d): Mexico has not included "sketches" in the engineering/design type "assists" to be added to the price of the goods.

It is important to point out that this word had been omitted, due to the meaning in Spanish for the word "croquis" which includes any drawing made at good eye, such as any map type drawing made on sand, for military or sports purposes. Under these considerations, the Mexican authorities did not consider any addition would ever be made under this concept.

However, in order to comply with the wording of the Code, the word "croquis" has been added to the wording of this provision, on the last amendments that were made to the Customs Act, published on 26 July 1993.

3. Article 49.III: Payments for the right to reproduce the imported goods in Mexico have not been excluded from the addition to the price paid for the goods in respect of royalties and licence fees. This appears to be a significant departure from the Code royalty provisions.

No mention has been made to this exclusion in the Customs Act, due to the fact that our system provides for three different types of provisions: Statutes, Regulations and General Rulings. Each of them contains different types of provisions and in this case, the corresponding body where this provision could be included is not a Statute, but a Regulation or the General Rulings. Several general rulings have already been issued, but so far this provision has not yet been included. However, at this point the authorities have been working on a text for the general rulings containing several provisions from the interpretative notes, which will likely contain this provision.

However, even though this provision has not been included in the Customs Act, under the Mexican legal system any international agreement is binding for the authorities, and has the same legal authority as any federal law passed by Congress. Therefore, there is not a real need for this or any

other provision of the Customs Valuation Act under domestic legislation. Therefore, in order to interpret and apply any of the provisions of the Customs Act regarding valuation issues, due reference will have to be made to the Customs Valuation Code.

4. Article 50.III: **This provision is obviously meant to exclude "dividends" from being included in the customs value, but the wording, if translated correctly, may well cause the customs administration headaches because the addition of the phrase "or other payments which are not directly related to the imported goods" is much narrower than the Article 49.IV phrase, "directly or indirectly" in referring to subsequent proceeds.**

So far, no interpretative problems have arisen due to this provision and the Mexican authorities do not consider this to be a departure from the Code. Any payment not related to the goods will never be considered to be part of the price. A relationship between a payment and the goods is necessary in order to consider such payment as part of the price. The term "payments which are not directly related to the imported goods" does not change this fact but makes it very clear.

With respect to the wording in Article 49.IV which refers to the addition for any part of the proceeds ... that accrues "directly or indirectly" to the seller, this provision has no relationship with the provision regarding dividends and other payments; the first one refers to the price actually paid or payable and the second one refers to an addition to the price; the first one requires that the payment is made in connection with the goods and the second one includes any amount accruing directly or indirectly to the seller in connection with the subsequent resale, disposal or use of the goods.

5. Article 51.I(c): **In the "restrictions" area for accepting or rejecting the use of transaction value, "substantially" has been omitted in the exclusion reading "do not substantially affect the value of the goods".**

Under the Mexican legal system, authorities are never allowed a high degree of discretion. Therefore, subjective terms are never incorporated into a statute; otherwise, a clear definition of any such term would be incorporated into the regulations. Therefore, since the term "substantial" is a very subjective one that does not allow any general and objective definition, this word has been omitted from the wording.

Nevertheless, the comment made on No. 3 of the questions made by Canada regarding the legal authority of international agreements, is also applicable in this case.

6. Article 51: **It is probably alright, but the closing sentence of this Article refers to the provisions of Article 51 as being the Article in accordance with which value must be determined. The opening of Article 51 does refer to "the customs value shall be the transaction value" but we would have thought that transaction value was determined under Articles 48 to 53.**

Article 1 of the Customs Valuation Code states the conditions that need to be met in order to be able to determine the customs value for an imported good under the method set out in Article 1 of the CVC (transaction value of the imported goods), which under this Article, is the price actually paid or payable for the goods adjusted in accordance with the provisions of Article 8.

Article 51 contains the conditions that need to be met in order to determine the customs value for an imported good under the method set out in Article 48 (reference is made to Article 48 and not to Article 51) of the Customs Act. Article 48 states that except as provided in Article 54 and so long as conditions stated in Article 51 are met, the customs value for the imported goods shall be the

transaction value of the imported goods, which is the price actually paid or payable for the goods adjusted in accordance with the provisions of Article 49.

Mexican authorities consider that Article 51 is in accordance with Article 1 of the CVC and that no further reference is necessary, since each Article in the Customs Act contains the appropriate references.

7. Article 53: **In referring to the test values for accepting transaction value method in related party transactions, the GATT Code refers to a value that "closely approximates" a test value. The Mexican legislation has quantified "close" as being not more than 7 per cent. This may not be in the strict spirit of the Code and might have unintended consequences.**

There is no provision that requires the Mexican administration to notify an importer of the grounds for rejecting the use of transaction value because of price influence in related party transactions. This may be provided for by rights granted generally under some other provisions or law, but if not, it is a substantial omission.

It is important to point out that this word had been omitted, due to the fact that, as stated above, under the Mexican legal system, authorities are never allowed a high degree of discretion. Therefore,subjective terms are never incorporated into a statute; otherwise, a clear definition of any such term would be incorporated into the regulations. Therefore, since the term "closely" is a very subjective one that does not allow any general and objective definition, this word had been omitted from the wording.

Notwithstanding that, in order to comply with the wording of the Code, the word "closely" has been added to the wording of this provision, on the last amendments that were made to the Customs Act, published on 26 July 1993. However, guidelines that will have to be followed by the authorities when determining whether a value closely approximates to another value, will have to be defined and incorporated into the General Regulations.

In order to define these guidelines certain factors will have to be considered. This grants any individual the right to have a certainty as to the limitation of any possibility of discretional or arbitrary interpretation of the law by the authorities, and forces the authorities to include any findings of fact and legal basis for any determination.

The Mexican legal system, which is a very formal one, grants as a constitutional right, the right for any individual to be notified and given the opportunity to make any declaration or statement as he deems necessary before the authority, and it shall take into consideration any declarations and means of proof offered by the individual in any judicial or administrative procedure prior to being affected by any determination made by an authority. This means that if under a federal or local law, or by an act of any authority a person is affected with any determination without having been previously notified and given the opportunity to make any declaration as he deems necessary before the authority, and/or if the authority did not take into consideration any such declarations, statements or means of proof offered by the individual, such act will be invalidated.

8. Articles 55 and 55-A: In both the identical goods and similar goods Articles, no adjustment is provided for differences in distance and mode of transportation of the different goods to the place of exportation.

No provision has been made to exclude consideration of sales of identical goods or similar goods for which the buyer has provided engineering-type assists which have been produced in the country of importation.

We are not sure what the final paragraph in these two Articles means. It may well have a perfectly satisfactory purpose but there is no way of knowing, from the Articles we have, what that purpose is.

It is important to point out that the adjustment for the costs and charges arising from differences in distance and mode of transportation had been omitted, due to the fact that under the CVC, this adjustment is provided for, where the additions under Article 8.2 of the CVC are made under domestic legislation. Since Mexico provides for an f.o.b. basis, Mexican authorities considered this adjustment to be unnecessary.

However, in order to prevent any misinterpretation of the CVC, the corresponding adjustments have been provided to both Articles 55 and 55-A, on the last amendments that were made to the Customs Act, published on 26 July 1993, by adding a fourth paragraph as stated below.

Also, a sixth paragraph has been added to both Articles 55 and 55-A, to exclude consideration of sales of identical goods or similar goods for which the buyer has provided engineering-type assists which have been produced in the country of importation.

Article 55 has been added with the following paragraphs:

> Article 55. "...When applying the transaction value of identical goods as the goods being valued, an adjustment shall be made to such value, to take account of significant differences in costs and charges referred to in letter (d) of Article 49 of this Act, between the imported goods and the identical goods in question, arising from differences in distance and mode of transport.
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> ...Goods which incorporate or reflect any of the elements mentioned on letter (d) of number II of Article 49, for which no adjustment has been made because such elements were undertaken in national territory, will not be considered to be identical goods..."

Article 55-A has been added in the same terms as Article 55, replacing the word "identical" for "similar".

With regard to your last comment on these Articles, the last paragraph of both Articles 55 and 55-A is intended to preclude the use of a transaction value that has not been accepted, such as in the case where the importer has determined the transaction value based on insufficient information, or without having objective and quantifiable data, and such value is later on modified by the importer (through a complementary declaration) or by the authorities.

9. Article 55-B.I: In determining the unit price for the deductive value method, a problem is caused by having, in Article 48, the "importer" as the person necessary to have bought the goods in the sale for export. Article 55-B.I is confusing, and possibly wrong in that the Code provides that the sale subsequent to importation (the one used to determine the unit price) shall not be to a person who is related to the seller, that is the person from whom the subsequent buyer buys the goods. Mexico has it that the Mexican buyers whose purchases are being used to determine the unit price, cannot be related to the persons from whom they import the goods.

This does not seem to make sense and may well be a translation problem. However, in Article 55-B.II, which deals with the same issue but in respect of goods which have been further processed, the same problem does not arise as the unit price is derived from sales to persons who are not related to the person who is selling the processed goods.

There is no provision which requires the sales to be to the first trade level after importation.

This Article employs the phrase "about the time" whereas the phrase defined in Article 55-C is "about the same time". This is probably a translation problem because other Articles all use the correct phrase as defined.

It is important to point out that in order to be very clear on the statement that first commercial level sales after importation are required, this Article has been amended as follows:

"Article 55-B

...

I. if the imported goods being valued, or other imported goods, identical or similar to them, are sold in the national territory in the condition as imported, the value as determined under this Article, shall be based on the unit price at which the imported goods, or other imported goods, identical or similar to them, are so sold in the greatest aggregate quantity, at or about the time of the importation of the goods being valued, to persons who are not related to the sellers of the goods, subject to deductions under Article 55-D of this Act.

[ ] ...

For the purposes of this Article, the unit price of sale will be considered to be the unit price at which the greatest number of units is sold in sales to persons who are not related to the sellers of the goods, at the first commercial level after importation, at which such sales take place.

With regard to the comment on the use of the phrase: about the time, the CVC uses the term about the time in English, 5(1)(a) "... are so sold ... at or about the time of the importation ...", while in the Spanish version, as in the wording of the Customs Act, the expression remains the same as defined under Article 55-C of the Customs Act.

10. Article 55-B.II: It may not be important, but the Code says that this provision is used where the importer so requests. The Mexican legislation says that the value shall be ...".

The Mexican Customs Act does not contain such a provision, since it is based on a self-declared value determined by the importer, where the importer does not need to ask the authorities for any option, but he may make the option himself. If the value determined by the importer is later on revised and

rejected by the authorities, he shall be notified and he will be given the opportunity to make any declaration or statement, and to offer any means of proof as he deems necessary before the authority, and it shall take into consideration any such declarations, statements and means of proof offered by the importer.

11. Article 55-E: In writing the "residual" method provision, Mexico has said that the other methods are to be applied sequentially with considerable flexibility. Again, this may be the choice of wording of the translator, but "considerable" could be regarded as somewhat too much "flexibility".

It is important to point out that the exact wording in Spanish does not read as "considerable flexibility", but as "more flexibility".

Except for provisions containing obligations, exemptions, penalties, taxable basis, tax rates, taxpayers, and the object of a tax which are subject to a strict and literal interpretation, under the Mexican legal system any provision may be subject to interpretation under the interpretation principles such as analogy, a contrario sensu, majority of reason or similarity of reason, which allow a flexible interpretation.

That was the main reason why more flexibility was mentioned, since the flexibility under the Code allows to accept, for instance, longer terms than those that are provided for. Since Mexican authorities are limited in this respect when applying or interpreting the law, this mention had to be made in order to make them aware of the type of interpretation that can be made under this provision.

Also, Article 55-E clearly states "with more flexibility, in accordance with the legal principles and provisions ...".

Mexican authorities do not consider this to be a departure from the Code, or to allow too much flexibility, which under our system simply does not exist. Consideration must be taken also, to the fact that under the Constitution, the legal status of the CVC as being as binding as a federal law, grants that no departure from the Code may be based on any other domestic law and that any other provision of the CVC not yet enacted under domestic law, is still binding.

12. Article 59: There is obviously a translation problem here as the sentence is incomplete and incomprehensible in the present form.

Article 59 of the Customs Act does not deal with the methods of determining the customs value of an imported good, but with the information that will be included on an entry document. This Article has also been amended, and the text for these purposes, is as follows:

> Article 59. "The customs brokers or customs agents, on behalf of the importers and exporters of goods, will determine the customs duties and where appropriate, the anti-dumping or countervailing duties, for which purpose, they shall declare, in the entry document, under statement of declaring the truth: ...
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> II. The customs value of the goods, as well as the valuation method used and, where appropriate, the existence of the relationship referred to in Article 52 of this Act in the case of importation, or the commercial value in the case of exportation. ..."

QUESTIONS FROM UNITED STATES

1. Article 48 of the Mexican legislation states that "transaction value shall be the price paid for the goods, provided that the conditions referred to in Article 51 of this Law have been met and that the goods have been sold to the importer for export to the national territory". The language of Article 1 of the Agreement provides that transaction value is the price actually paid or payable for the goods when sold for export to the country of importation. There is no requirement that this sale had to have been to the importer.

This change was made in order to clearly express the need for an export sale to Mexico, and not any sale whatsoever. The Mexican authorities do not consider that this change departs from the intention of the Code. Moreover, after a number of months of application of the GATT Valuation Code principles in our country, no problem has arisen so far as a result of this wording, and it has not been interpreted or applied as being more restrictive than the Code.

2. In Article 49, Part I, Section (d), we would appreciate confirmation that the charges for loading and unloading the goods are only charges for loading and unloading that occur prior to the exportation of the goods.

As you say, only loading and unloading expenses prior to export of the goods are taken into account. Article 49 establishes that the transaction value includes "charges for loading, unloading, freight or insurance paid abroad up to the place of exportation".

3. In Article 49, Part II, the word "importer" is used but the Agreement refers to "buyer", who may not be the importer in all cases. In addition, the Mexican legislation does not contain any of the Interpretative Notes to Article 8.1(b)(ii) of the Agreement. This part of the Code is necessary to ensure uniform interpretation of these provisions on issues such as the apportionment of the elements in Article 8.1(b)(ii).

With regard to the first part of your question, please refer to the reply to your first question.

With regard to the second point, that provisions contained in interpretative notes of the Agreement have not been incorporated into Mexican legislation, we should like to point out that while some of the provisions of the Code have been incorporated into the Law, under the Mexican legal system any international treaty signed in accordance with the provisions of the Mexican Constitution has the same legal force as any federal law. Consequently, from the legal standpoint, it is not necessary to incorporate the content of an international agreement into domestic law as the provisions of the agreement have legal force in Mexico, and, in case of doubt as to its interpretation or application, it is necessary to adhere to what is provided for in the agreement, or in this case the Code.

4. In Article 49, Part III, the Mexican legislation again lacks the Interpretative Notes to Article 8.1(c). These Notes contain reference to the fact that charges for the right to reproduce the imported goods in the country of importation are not dutiable.

Please refer to the previous reply.

5. Article 53 states that in testing whether a price is acceptable for purposes of transaction value, the importer must show that the said value varied by a maximum 3 per cent in respect of any of the test values. This is clearly contrary to the Agreement. Article 1 of the Agreement simply requires that the importer demonstrates that the value closely approximates one of the test-values. In fact, in the Interpretative Note to Article 1.2(b), it is clearly stated that the factors for determining whether one value closely approximates another value vary from case to case, therefore, "it would be impossible to apply a uniform standard such as a fixed percentage, in each case".

Article 53, in accordance with the amendments published in the Diario Oficial of 26 July 1993, establishes that:

> "In a sale between related persons the transaction value shall be accepted whenever the importer demonstrates that such value closely approximates to one of the following test values occurring at or about the same time and it has been stated in the declaration referred to in Article 59 of this Law that a relationship with the seller of the goods exists and that such relationship has not influenced the price.
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> ...
>
> The Ministry of Finance and Public Credit shall establish, through general rules, the test criteria by which it shall be determined that a value closely approximates to some other value."

It is important to note that the Mexican legal system is a formal one, which means that when a resolution is issued, in this case concerning customs valuation, it must be duly founded and must state on which it is based the grounds. This requirement of a statement of the grounds for the resolution makes it impossible for a determination of value to be based on such subjective concepts as that a value does not "closely approximate" another, because if the determination is challenged the decision handed down will invariably be that the constitutional requirement of stating the basis and reasons for the resolution was not observed. Accordingly, the law must lay down sufficient objective parameters - such as percentages or some other more specific criterion - on which the authority may base its resolution.

Consequently, although the text of Article 53 of the Law has been amended, the Ministry of Finance will establish, through general rules, the parameters on which the authority must base its judgement that a value closely approximates another.

6. Article 53 also does not contain the alternative test for related party transactions, the "circumstances of the sale" test in Article 1 and the Interpretative Notes to Article 1. This is a fundamental part of the Agreement that cannot be deleted.

By an amendment published in the Diario Oficial on 26 July 1993, the following Article 52-A was added:

> "In a sale between related persons, the circumstances of the sale shall be examined and the transaction value shall be accepted when the relationship did not influence the price.

For the purposes of this Article, the relationship shall not be considered to have influenced the price whenever it is shown that:

I. The price was fixed in conformity with the normal price-setting practices followed in the industry concerned or with the manner in which the seller fixes selling prices for purchasers not related to him;

II. With the price the seller is able to recover all his costs and obtain a profit that is in keeping with the global profits obtained by the enterprise in a representative period in sales of goods of the same class or kind."

7. The final paragraph of Article 55 and Article 55A contains a statement that the value of identical/similar imported goods whose value has been modified by the importer or the authorities shall not be taken into account except where such modifications are not also included. This concept is not contained in the Agreement. We would appreciate clarification as to what types of modifications would be involved when this provision is used.

The purpose of this paragraph is to prevent the use of a transaction value that has not been accepted by the authority, as in the case where the importer has made a mistake in determining the transaction value, or where the declared value is determined on the basis of insufficient information, or without taking into account objective and quantifiable data, and subsequently the value thus declared is modified, either by a determination of value made by the authority or by a supplementary declaration made by the importer.

8. In Article 55-B, the Interpretative Notes to Article 5 have not been incorporated. In addition, Part I contains the following clause "to persons who are not related to the persons from whom they import such goods". Article 5 of the Agreement involves determining a deductive value based on sales or in many cases resales "to persons who are not related to the persons from whom they buy such goods". Thus, the importer/original purchaser could purchase from a related party and perhaps this is why their price was unacceptable for purposes of transaction value. But, under deductive value, we are now looking at sales from the importer/original purchaser. It is not relevant whether the importer/original purchaser was related to the original seller.

In this connection, we wish to point out that by an amendment published in the Diario Oficial on 26 July 1993, the text of Section I of Article 55-B was amended and a final paragraph was added, so that it reads as follows:

Article 55-B

"...

I. If the imported goods to be valued or identical or similar imported goods are sold on the national territory in the condition as imported, the value determined under the provisions of this Article shall be based on the unit price at which the imported goods or identical or similar imported goods are so sold in the greatest aggregate quantity, at or about the time of the importation of the goods being valued, to persons who are not related to the sellers of the goods, subject to the deductions provided for in Article 55-D of this Law.

II. ...

For the purposes of this Article, the unit selling price means the price at which the greatest number of units are sold in sales to persons not related to the sellers of the goods, at the first commercial level after importation of the goods at which such sales are made."

..."

9. Article 55-E does not contain the list of prohibited values under Article 7 of the Agreement.

It was not considered necessary to incorporate this list, firstly because of the legal force of the Agreement within our legal system, and secondly because Articles 48 to 55-E explicitly set out each and every one of the methods that may be used to determine the customs value of an imported good, as well as the order of application of each method. Consequently, under our system, it is clear that no method may be used that is not included among those explicitly mentioned.

10. In Article 59, is there a Part I?

Article 59 does not refer to customs valuation methods for imported goods but rather to the information that must be provided in the import declaration. This Article has also been modified by an amendment published in the Diario Oficial of 26 July 1993, reading as follows:

Article 59:

"The customs brokers or customs agents, on behalf of the importers and exporters of goods, will determine the customs duties and, where appropriate, the anti-dumping or countervailing duties, for which purpose they shall state in the customs declaration, under affirmation of declaring the truth:

...

II. The customs value of the goods, as well as the valuation method used and, where appropriate, the existence of the relationship referred to in Article 52 of this Law in the case of importation, or the commercial value in the case of exportation."

..."

11. Is Mexico delaying the implementation of Article 6?

In accordance with Articles 4 and 5 of the Protocol to the Agreement, the Mexican Government did reserve the right to delay the application of Article 6 of the Agreement for a period of three years beginning from the date on which all the other provisions of the Agreement are applied in Mexico.

12. Is Mexico going to incorporate the Committee on Customs Valuation Decision 3.1 on the treatment of interest charges into the Mexican legislation?

Rules of interpretation concerning valuation are currently being drawn up. The possibility of including this Decision in the rules, or by an amendment to the Law, has not been studied so far. We do not know whether such a measure may be adopted in future.

13. Is Mexico going to incorporate the Committee on Customs Valuation Decision 4.1 concerning the valuation of carrier media bearing software for data processing equipment into the Mexican legislation?

So far the practice established in paragraph 2 of the Decision has not been adopted. We do not know whether this practice will be adopted in future, but if so, as mentioned in paragraph 3 of the Decision, we would proceed to notify it to the Committee prior to the date of its application.