

FOREIGN TRADE*

November 2005

This **Foreign Trade Report** is an executive summary of the main foreign trade reforms in Mexico published in the Federal Official Gazette during November 2005, which also contains general foreign trade news that will impact Mexican foreign trade. For further information on the topics addressed in this paper or for any questions arising from it, please write to **Adrián Vázquez Benitez**, adrian@vazqueztercero.com or to **Verónica Vázquez Bravo**, veronica@vazqueztercero.com

Customs and Trade Matters

1. Exhibits 21 and 22 to the Third Resolution on Amendments to the Foreign Trade Rules.

On November 1st, the Ministry of Finance and Public Credit (SHCP) published in the Federal Official Gazette the Third Resolution on Amendments to the Foreign Trade Rules, as published on October 27, 2005. The following is of importance:

- ✓ Exhibit 21 "Customs houses authorized to carry out customs processing for certain types of goods"
Includes goods, such as, undenatured alcohol, denatured alcohol, and ethyl alcohol, beer, cigarettes, matches, bicycle tires, shoes, the importation of which may be processed through certain authorized customs houses.
- ✓ Exhibit 22 "Filling-in of import entry application"
Amendments to Appendix 8, as regards identifiers contained in the import entry application, are provided.

2. Agreement on goods that are subject to prior permit by the SE.

On November 9th, the Ministry of Economy published in the Federal Official Gazette the Agreement that provides for the classification and codification of goods the importation and exportation of which is subject to a previous permit requirement, which goods include the following:

- ✓ Crude petroleum oils, airplane fuel, gasoline, gasoil, fueloil, kerosene, propane, butane, among others, when they are destined to definitive importation.
- ✓ Goods from the Sector-specific Promotion Program, when they are destined to definitive or temporary importations.
- ✓ Powdered milk, evaporated milk, fertile eggs, white and black beans, wheat, yellow and white corn, instant coffee, tobacco, cigarettes, among others, provided they are destined to definitive importation, and provided, further, they are from Argentina, Brazil, Cuba, Ecuador, Peru, Panama or Paraguay.
- ✓ Powdered milk; bulk, unpeeled, unroasted, white beans, solely when they are destined to definitive importations, and comply with the following: i) are imported pursuant to the FTA with Chile, or ii) pursuant to the FTA with Uruguay.
- ✓ Pure chemical fructose when it is destined to definitive or temporary importation from the USA.

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3. Amendment to criteria for prior permits for importations of fructose that originate from the USA

On November 11th, the SE published in the Federal Official Gazette the Agreement that amends another agreement that provides the criteria for granting prior permits for the definitive importation of fructose from the USA. This document provides that an application for the authorization of prior permits may be applied for by those importers that have a tariff quota certificate (*certificado de contingente arancelario*) issued by the Corn Refiners Association of the USA, which shall be attached to the original application. This Agreement entered into force on November 12th.

4. Final determination on the sunset review of antidumping duties on organic chemicals from China

On November 14th, the SE published in the Federal Official Gazette the final determination on the sunset review of antidumping duties on organic chemicals provided by tariff items 3808.10.99, 3823.12.02, 3824.90.55 and headings 2901 to 2941 of the TIGIE that are imported from China. The term of the antidumping duties in the amount of 208.81% is continued for an additional five years. On the other hand, it is worth mentioning that antidumping duties in the amount of 208.81% were eliminated for imports of organic chemical products provided by the following items 2901 to 2907, 2909 to 2912, 2914 to 2927, 2929 to 2937, 2939, 2941, 3823.12.02 and 3824.90.55.

5. Instructions and formats for authorization of the importation and exportation of pesticides, vegetable nutrients, hazardous substances and materials.

On November 15th, the Ministry for the Environment and Natural Resources (SEMARNAT) published in the Federal Official Gazette the instructions and formats for the authorization of the importation and exportation of pesticides, vegetable nutrients, and hazardous substances and materials, referred to in Articles 30, 32 to 36 and fourth transitory article of the Regulations on Registrations, Authorizations for Importation and Exportation, and Export Certificates (*Reglamento en Materia de Registros, Autorizaciones de Importación y Exportación y Certificados de Exportación*), thereof. The formats shall be available on the SEMARNAT webpage as of the date of publication of the Agreement. The foregoing entered into force on November 16th.

6. Final determination on the sunset review of antidumping duties and scope investigation of hand-tool products from China.

On November 16th, the SE published in the Federal Official Gazette the final determination on the sunset review of antidumping duties on hand-tools from the People's Republic of China, which goods are currently classified under several sub-items of tariff items 8201, 8203, 8204, 8205 and 8206 of the Tariff of the Law on General Import and Export Taxes (TIGIE). The SE determined continuation of the term of the dumping duties in the amount of 312% until November 11, 2008 for 24 tariff items and eliminated the order for another 24 items.

On the other hand, on November 18th and 23^d, the SE published in the Federal Official Gazette the final determinations on the scope investigation regarding the final determination of the antidumping investigation on the importation of hand-tools, which goods were classified in several sub-items of the tariff items 8201 to 8206 of the then-current TIGI, including hand-tools identified as: rattles, wrenches, hatchets, pliers, files, rasps, screwdrivers, hammers, clubs, scrapers, tube cutters, bench screws, adapters, sockets wrenches, braces, countersinking bits, spatulas, pulley extractors, bottle jacks, grease injectors, gouges, pots with fiberglass handles, spring oppressors, threading machines, scissors, torque meters, oil containers, all from the People's Republic of China, in order to confirm definitive dumping duties in the amount of 312%.

Our firm successfully represented national manufacturers during these cases.

7. Preliminary determination on antidumping investigation on mushrooms from Chile and China.

On November 18th, the SE published in the Federal Official Gazette the Preliminary determination on the antidumping investigation of the importation of mushrooms of the *agaricus* variety from the Republic of Chile and the People's Republic of China, which goods are currently classified under tariff heading 2003.10.01, in order to continue the antidumping investigation, and determined provisional antidumping duties in the amount of 1.20 dollars per kilogram to the importations from Chile by the company Bosques del Mauco, S.A., and in the amount of 1.32 dollars per kilogram, to the importations from China by the company Calkins & Burke Limited.

Our firm currently represents an exporter and an importer of Chinese product.

Legislative Matters

8. Tax Amendments for 2006

On November 14th, the Mexican Congress approved several amendments to the draft legislation submitted by the Executive Branch entitled Decree that amends and derogates several tax provisions. Additionally, several draft amendments to the Income Tax Law, the Value Added Tax Law, the Special Tax on Production and Services Law and the New Automobiles Tax Law were analyzed as submitted by the members of the various Legislative Groups that conform the Mexican Congress.

Although to this date they have not been published in the Federal Official Gazette, below we highlight some of the most important aspects of the draft legislation contained in such Decree that have an effect on imports.

✓ Tax havens and multinational companies.

Active income obtained from a tax haven (Refipre)

The amendment provides that a taxpayer who wishes to deem its income as obtained from a source other than a Refipre, must have its financial statements, as well as those of the legal entities or organs through which they obtain income, audited by an independent public accountant that is a part of a firm that has an office in Mexico.

Prior to entry into force of these amendments, in order to be able to deem income as obtained from a source other than a Refipre, it is necessary that the country where the income is generated must have entered into a broad agreement for the exchange of tax information or, in the alternative, that the taxpayer obtain written acceptance of the competent authorities of such country to exchange tax information with the Mexican authorities. This latter requirement is practically impossible to comply with since foreign legislation generally prohibits entering into this sort of agreements with private citizens. It is worth recalling that our country has only entered into this type of agreement with 17 countries.

In order to avoid triangulation of transactions carried out by residents in Mexico with affiliates that reside in any country that is deemed a Refipre where the price is undervalued, a provision exists that indicates that whoever conducts international trade transactions for the purchase and sale of goods through foreign legal entities or schemes where they participate directly or indirectly, must consider the income originated from the commercialization of goods the origin or destination of which is Mexico as subject to tax havens.

✓ **Multinational Companies.**

- a) Methods for price determination of related party transactions.

The possibility that the taxpayer apply the method it deems most convenient for the correct determination of market price is eliminated, and, thus, as of the year 2006 the “comparable uncontrolled price” method shall be applicable, and only when this method is not appropriate for determining that transactions did not occur at market prices in accordance with transfer pricing guidelines for multinational companies and the tax administrations approved by the OECD council, other permitted methods may be utilized.

Moreover, when application of the “comparable uncontrolled price” method is not feasible, the taxpayer shall preferably utilize the “resale price” or the “added cost” methods, and to that effect it shall demonstrate to the tax authorities that the method utilized is the most appropriate or the most reliable according to the information available. Also, in case either of these two latter methods or the “transactional margins of operation revenue” method is used, compliance with the relevant methodology shall be deemed to occur provided the cost and sale price are proven to be at market price.

- b) Shelter *Maquiladora* Industry

The benefit granted to this industry consistent in deeming that no permanent establishment in México exists for the maquila activities conducted pursuant to the program authorized by the SE when for the performance of such activities the assets of a foreign resident are utilized, is extended until the year 2011. The extension of this benefit (which was planned until 2007) shall apply provided the maquiladora company submits a report no later than February of each year the amount of its taxable income and the taxes paid by its related party for the previous fiscal year.

✓ **Special Tax on Production and Services**

- a) Sale and/or importation of beer.

Taxes payable by manufacturers, producer or bottlers of beer, as well as by importers are increased. However, they may deduct the amount paid based on the collection of containers they carry out, whether for their later reuse in the sale of beer, or for the exportation of such containers.

- b) Cigarette packs.

The obligation to attach tags to them is eliminated.

- c) Importations conducted at a rate that is less than the general rate.

Based on the resolutions that determine the unconstitutionality of the basis for IEPS, the provision that stated that in these cases a part of such basis should be the general importation tax that would have been paid at the general rate is eliminated.

✓ **New Automobiles Tax**

- a) This tax shall be paid by the person who sales the relevant automobile to the consumer; i.e., the authorized dealer, except when the definitive importation thereof was conducted by a person other than the manufacturer, the assembler, the authorized dealer o a person dedicated to commercialize vehicles, in which case the importer shall be subject to payment of this tax.

- b) Basis for the tax

The provision that ordered adding the general importation tax at the general rate to the basis for payment of ISAN is eliminated, even when such was paid at a preferential rate. This amendment shall apply solely to importations conducted by persons other than the manufacturer, the assembler, the authorized dealer or a person dedicated to commercialize vehicles, since the applicable tax in sales made by these persons shall be paid based on the sales price of the vehicle paid by the consumer. The foregoing applies in light of the fact that adding the importation tax to the basis for payment of ISAN was declared unconstitutional by the Second Chamber of the Supreme Court of Mexico.

Judicial Matters

9. Unconstitutionality of Customs Processing Fee and the Effect of its return

On November 15th, the full Supreme Court resumed the discussion that was adjourned on October 18th, and resolved *Amparo en Revisión*¹ 968/2005, submitted by Operadora Aeroboutiques, S.A. de C.V. Our nation's highest court confirmed the criteria that states that the customs processing fee (DTA) provided by Article 49, Section I, of the Federal Duties Law is actually unconstitutional, but by a majority vote (7) ordered that the effects of the granting of *Amparo* against the DTA shall consist of: "the return [of duties paid] to which the applicant for protection is entitled shall constitute solely the amount of the customs processing fees actually paid, deducted by the amount paid for the electronic data processing service and related services referred to in Article 16 of the Customs law, as well as the value added tax generated by the rendering of such services." (Emphasis added)

In that same regard, the Justices mandated that jurisprudence number 130/2005, issued by the First Chamber of the Supreme Court should prevail. The title of this jurisprudence is: "CUSTOMS PROCESSING FEES. EFFECTS OF THE GRANTING OF AMPARO DUE TO A DECLARATION OF THE UNCONSTITUTIONALITY OF SECTION I OF ARTICLE 49 OF THE LAW WHICH PROVIDES FOR THE CORRESPONDING DUTY (LEGISLATION IN FORCE AS OF 2005)"³.

Rule 1.3.5, Section A of the Foreign Trade Rules for 2005 provide for a distribution of the percentages to be paid for DTA (0.08%). Accordingly, pursuant to Article 16 of the Customs Law, persons who carry out customs operations shall pay the consideration provided therein, as well as the DTA generated for each operation, which shall be 92% and 8%, respectively.

Based on the foregoing, in accordance with the provisions of the jurisprudence issued by the Supreme Court, only 8% of payments made as a result of the application of DTA is subject to return. This is based on the fact that the remaining 92% corresponds to compensation paid for the electronic data service and related services rendered, as provided by Article 16 of the Customs Law. Thus, companies that have *Amparo* actions and annulment suits pending may only benefit from the return of 8% of 8 per one thousand (0.08%) of the value of the goods for the purposes of payment of the general importation duty.

¹ *Amparo* are constitutional proceedings provided by Mexican law, similar in effect to a common law writ of *mandamus* and/or *habeas corpus*, with a temporary/permanent injunction attached thereto. *Amparo en Revisión* refers to the second stage of review of the constitutionality of the relevant provision, which may be carried out either by a Collegiate Circuit Court, or by the Supreme Court, directly.

² By its initials in Spanish: DTA is *Derecho de Trámite Aduanero*.

³ Cfr. "DERECHOS DE TRAMITE ADUANERO. EFECTOS DE LA CONCESION DEL AMPARO POR LA DECLARATORIA DE INCONSTITUCIONALIDAD DE LA FRACCION I DEL ARTICULO 49 DE LA LEY DEL DERECHO RELATIVO (LEGISLACION VIGENTE A PARTIR DE 2005)".

International Matters

10. Report by the Appellate Body of the WTO regarding a dispute on antidumping measures on oil country tubular goods from México.

On November 2nd, the Appellate Body (AB) issued its report regarding the complaint filed by Mexico against the USA in connection with the dispute called "USA – Antidumping measures on Oil Country Tubular Goods from Mexico". The following are the salient issues covered by this report:

- ✓ The AB found that México did not explain nor provide details of its unqualified statement that Article 11.1 of the Antidumping Agreement and Article VI of GATT 1994 provide "inherent" provisions in connection with the existence of a causal link, which run parallel to those of Article 5.5, but are independent therefrom. Therefore, it confirmed the findings of the Special Panel (SP).
- ✓ *Accumulative evaluation of imports by the United States International Trade Commission (USITC) upon which it based its determination on the probability of injury during a sunset review.* In this regard, the AB found that it lacked any reason to depart from the conclusions reached by the SP as regards the fact that Mexico did not explain or provided detail of its statement that the purpose and end of the provisions applicable to reviews suggest that accumulation is prohibited.
- ✓ *Whether the determination on the probability of dumping was reached in a manner that is incompatible with the Antidumping Agreement.* The AB found that Mexico did not provide any evidence that the determination on confirmation of the antidumping measure shall be based on a calculation of the dumping margin, and, therefore, it agrees with the SP.
- ✓ *Whether Section II.A.3 of the SPB (Sunset Policy Bulletin) is per se incompatible with Article 11.3 of the Antidumping Agreement.* The AB revoked the determination of the SP regarding the incompatibility of the SPB per se with Article 11.3 of the Antidumping Agreement given that the SP did not reveal the volume of the sample, which were the determinations it examined, which factual assumption they pertained to, nor any other factors that should have been taken into consideration for any of the foregoing. Not even regarding the "sample" of cases it examined did the U.S. Department of Commerce (USDOC) exclude or reject evidence or factors the evidentiary value of which should have greater weight than the factual assumptions of the SPB.

11. México – Definitive Antidumping Measures on Beef and Rice – Complaint with respect to Rice.

On November 29th, the DSB (Dispute Settlement Body) distributed the report by the AB on the claim submitted by the USA against Mexico regarding the case called "Mexico – Definitive Antidumping Measures on Beef and Rice – Complaint with respect to Rice".

The AB confirmed the report by the SP, solely revoking the determination of the SP regarding whether the Ministry of Economy (SE) had acted in manner that is incompatible with Articles 12.1, 6.1 and 6.10. Likewise, it found that the SE was not obligated to notify all companies it was not aware of, and, therefore, to determine for them an individual dumping margin. The AB also confirmed the findings of the SP on certain amendments to the Foreign Trade Law of 2003 (*Ley de Comercio Exterior de 2003*) which are incompatible with the Antidumping Agreement.

12. Draft Text for the Sixth Ministerial Conference

On November 26th, the Director General of the WTO, Pascal Lamy submitted a draft text for the Hong Kong ministerial conference. The following issues are of importance:

- ✓ Doha Round Negotiations: agriculture (including cotton), non-agricultural products (NAMA); services, trade facilitation, standards and development.
- ✓ Environment
- ✓ Special and differentiated treatment
- ✓ Small economies
- ✓ Trade, debt and finance
- ✓ Trade and technology transfers
- ✓ Electronic commerce
- ✓ Technical cooperation

Some members of our firm have been admitted to attend the Sixth Ministerial Conference on behalf of Non-Governmental Organizations. ■