



The port of Valparaiso, Chile. Matyas Rehak / Shutterstock.com

Latin America, 2016

‘It’s true that, with only two Latin American countries currently signatories of the Wassenaar Arrangement, the continent has not traditionally been at the forefront of developments in export control regulation. But that’s changing – albeit not at uniform speed – as our correspondents in Mexico, Colombia, Chile, Argentina and Peru describe below.



The year in export controls

by Horacio A. López-Portillo

On 3 and 9 February 2016, two major amendments to Mexico’s export control regulations were published: respectively, the Directive that establishes the classification and codification of goods, the import and

export of which is subject to regulation by the Inter-Ministerial Commission for the Control of the Process and Use of Pesticides, Fertilisers and Toxic Substances (the ‘Chemicals Directive’); and the Directive that provides for the obtainment of a permit prior to the exportation of conventional weapons, their parts and components, dual-use goods, software and technologies that may be subject to deviation for the fabrication and proliferation of conventional and mass destruction weapons (the ‘Export Controls Directive’).

As per these amendments, the following controlled goods lists have been extended:

- Items Three and Five of the Chemicals Directive are amended to

include tariff item 3824.74.01, as it relates to items that contain hydro fluorocarbons (‘HCFC’), including perfluorocarbons (‘PFC’) or hydro fluorocarbons (‘HFC’), but that do not contain chlorofluorocarbons (‘CFC’).

- The Control List of Facilities and Equipment for the Manufacturing of Dual Use Chemicals and Technology and Associated Computer Systems provided in Annex VII of the Export Controls Directive is amended to include tariff items 8479.82.02 and 8479.82.04. They refer solely to stirrers used in reaction vessels or specified reactors; and impellers, blades or shafts designed for such agitators, all surfaces of the agitator or component that come in direct

contact with certain substances or chemicals.

- Group 1.A.3 and 1.A.4 of Annex I to the Export Controls Directive is amended to include tariff items 3921.90.09 (plastics manufactured with non-fungible aromatic polyimides or those that are coated with carbon, graphite, metals or magnetic substances), as well as 6401.92.05, 6401.92.06 and 6401.92.07 (protective shoes for men, women and children, utilised during war time).
- Group 1.B.4 of Annex VI to the Export Controls Directive is amended to include tariff item 8514.20.05 (residue and certain

waste incinerators, provided certain characteristics are met).

- Section I of the Control List of Facilities and Equipment for the Manufacturing of Dual Use Chemicals And Technology and Associated Computer Systems provided in Annex VII of the Export Controls Directive is amended to include tariff items 8417.80.04 (catalytic heaters and incinerators conceived for the elimination of contaminant toxic waste derived from chemical weapons), 8417.80.05 (waste incinerators for the elimination of chemical weapons residue) and 8479.82.05 (stirrers used in reaction vessels or

specified reactors; and impellers, blades or shafts designed for such agitators, where all surfaces of the agitator or component come in direct contact with certain substances or chemicals).

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Export controls, sanctions and trade – key developments

by César Camilo Cermeño

In the first quarter of this year, the Colombian government issued Decree 390 of 2016, 'The New Customs Regulation', which promises to substantially impact on the dynamics of Colombia's foreign trade relationships, especially given that it updates legislation which has remained unchanged since it came into force in 1999.

In the intervening period, the country's economy and outlook have changed both radically, with the government having executed numerous international agreements and treaties, particularly in the past seven years.

Under the new system, both importers and exporters assume greater responsibility for their activities.

The terms 'Permanent Customs Users' ('UAP') and 'Large Exporting Users' ('ALTEX') have been phased out in favour of the terms 'Importers', 'Export and Foreign Trade Operators of Confidence' and 'Authorised Economic Operators'. Early resolution mech-

anisms have also been established as well as changes to regulation concerning customs values, origin and duty classifications, among other things.

The penalty system has been redefined, as has tax management, by the administration. This aspect is structural since it transforms the preceding system into a risk administration system.

All parties involved with foreign trade will have a 'status' within the system and, accordingly, those parties will have more stringent treatment or benefits that will make operations more agile, depending on that status – and rewarding reliability and transparency.

Under the new system in Colombia, tax supervision is based on a series of measures applied to ensure compliance with the competency rules for the customs administration with respect to foreign trade operations and the parties that are involved. This supervision will be applied on a selective basis, using technology, inspection teams and advanced risk-management techniques both before goods are imported and during and after customs clearance.

Regarding the sanctions (penalties) framework, there are substantial changes, with the previous regime giving way to a scheme which provides for 'general', 'common' and 'special' offences.

'General' offences are related to formalities and lead to lighter sanctions such as admonition (which, while that might seem 'token', carries weight

where, as noted, the status and course of action is important).

'Common' breaches are likely to lead to fines or cancellation of permits and/or authorisations; and the 'special' offences are also penalised with fines.

The seizure and confiscation of the goods shall only apply to cases related to differences between declared goods, and not to formal errors.

It is very important to highlight the fact that the 1762 Act of 2015 (Anti-smuggling Act) also has authority to punish those seeking to avoid customs authority control and intervention related to the import and export of goods.

The New Customs Statute also establishes obligations for foreign trade operators regarding money laundering and the financing of terrorism. The regulation creates a complete catalogue of new competencies for the Customs Authority, and includes coordination with the military, customs police and border controls.

As a legal mandate, improvements in infrastructure have been ordered, which will provide for better surveillance teams (drones, forensic laboratories, monitoring facilities, alliances) and improved operations at borders, ports and airports.

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Peruvian regulations on the Authorised Economic Operator ('AEO')

by Julio Guadalupe

In keeping with a global trend toward the creation of supply chain security tools based on the Framework of Standards to Secure and Facilitate Global Trade ("SAFE") of the World Customs Organisation, and in alignment with Peru's obligations under its free trade agreements, the Peruvian customs authority, in 2016, approved Superintendence Resolution No. 35-2016-SUNAT/5F000 setting out the criteria by which importers, exporters, customs brokers and customs warehouses can acquire Authorised Economic Operator ('AEO') status.

According to the Peruvian customs authority, in order to obtain such status a company must:

1. have a positive record of regulatory compliance
2. be financially and equitably solvent
3. possess an appropriate accounting and logistics system
4. meet requisite levels of operational safety

Once a company has been able to prove that it meets those access criteria, it can take advantage of a number of benefits relating to the simplification of procedures and the easing of customs controls. These include:

1. reduced operating costs (through the use of affidavits instead of letter bank deposits)
2. decreased levels of risk (minimised need for physical examination at customs clearance)
3. enhanced simplicity of customs procedures
4. preferential treatment in all customs actions and procedures

The Peruvian customs authority says that it expects to sign and implement mutual recognition agreements with several major trading

partners that also recognise AEO certifications. This will allow, for example, the competent authority of the country of destination of the exported products to validate the AEO certification issued by the Peruvian authorities and, at the same time, to provide benefits to the importer in the country (such as an easing of controls and simplification of procedures), thus reducing its operating costs.

As AEO certification becomes more commonplace both within international and Peruvian supply chains, we believe there will be benefits in the business environment, as companies, local or foreign, will be naturally encouraged to contract with AEO operators so as to prove the transparency and reliability of their own operations. Therefore, we believe that, in the not too distant future, AEO certification will become a prerequisite to competing on an equal footing with comparable companies.

We believe that the 'guarantee' printed with the AEO certification will be very important – and create a new relationship between the customs authority and exporters, allowing them to recognise each other as strategic partners, instead of the classic, worn-out relationship of 'administration' and 'administered', where lack of trust was an all-too common theme.

The trust generated by an AEO certification should allow the customs authority to focus on high-risk control operations and ease pressure on low-

risk operations (where AEO operators are involved). This will allow the efficient management of the scarce resources available to the authority (personnel, infrastructure, technology and money).

Regarding Peruvian exports and the controls implemented at the point of goods leaving the country, we believe that AEO certification will be a valuable tool in the fight against drug trafficking. The higher international safety standards applied to AEO exporter's shipments (monitoring and tracking of cargo, infrastructure, control of own and supplier's workers, etc.) will significantly reduce the possibility of the load being 'contaminated' with drugs. Considering that those companies primarily required to be certified as AEO are exporters moving major volumes of cargo, we definitely see the benefits of providing these operations with a 'seal of guarantee'.

In addition, these requirements will not only apply to drug trafficking but in other areas such as the fight against terrorism, illegal arms trade, prohibited goods trafficking, etc.

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Chile takes first steps toward export controls

By Gaston Medina

This year, in Santiago on 28 June, the National Industrial Association ('SOFOFA') and the Ministry of Foreign Affairs hosted the first ever seminar to be held in Chile on Trade and International Security – a key theme of the event being to update delegates on the country's efforts to

date to join the Wassenaar Arrangement ('WA').

Chile has supported all international non-proliferation efforts, adhering to United Nations Security Council ('UNSC') resolutions and other initiatives such as the Chemical Weapons Convention and Biological Weapons Convention. In addition, Chile is a candidate for membership of the Nuclear Suppliers Group ('NSG').

Participant States in the Wassenaar Arrangement and Nuclear Suppliers Group must make commitments regarding the application of effective export controls at national level on dual-use goods and technologies and nuclear transfers to other participant states of those items identified in control lists.

The process of working toward accession to the regimes represents a unique opportunity to accelerate the

implementation of an export controls regulatory framework.

Chile has a good reputation for complying with international law and obligations derived from treaty commitments, and the implementation of strict export control regulations could significantly enhance the country's economic competitiveness in international trade. But while existing regulations have attempted to control the export of weapons, chemicals and other materials, their effectiveness has been questionable, given the complexity of many provisions and the difficulty of enforcing them.

To date, Chile is the only OECD

member economy that does not possess export control legislation. But to fill this legislative gap, the Ministry of Foreign Affairs is coordinating an inter-agency task force to draft and formulate an export control regulation.

In doing so, the government will need to consider implementing a framework that is capable of balancing current and future regulatory demands, and one that is rigorously enforced without losing sight of the need to facilitate trade.

In parallel, individual companies must proactively prepare for a changing regulatory environment, developing effective compliance

programmes to avoid and mitigate potential risks ensuring that their own supply chains are secure.

It is impossible to predict how long it will take to develop an export controls bill – or what further steps are required before such a bill becomes law, but it is certain that recent developments represent a significant step forward in this direction.

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Argentina – ahead of the curve

By L. Augusto Vechio

By way of introduction, it is important to point out that the Latin American region is, as regards sanctions and export control regimes, very much less developed than either the United States or the European Union. Nonetheless, since 1992 Argentina has developed its own regulation in order to comply with international commitments and non-proliferation treaties that the country has ratified.

In this context, it is worth mentioning that Argentina and Mexico are the only Latin American countries that have joined the Wassenaar Arrangement to date – Argentina having joined in 1996. In particular, it is worth mentioning that Argentina is subject to a range of multilateral non-proliferation and export control regulations.

The most relevant are the Treaty on the Non-Proliferation of Nuclear Weapons; the Treaty of Tlatelolco; the Memorandum of Understanding with the United States of America (12 February 1993); a series of atomic and nuclear energy agreements with Brazil; the chemical and biological weapons agreement signed with Brazil and Chile (Mendoza Commitment, dated 5

September 1991); and the entering into the Wassenaar Arrangement.

As a consequence of those international commitments, Argentine Decree No. 603/1992 (dated 9 April 1992) and its regulatory and complementary regulations, established a regime designed to control the export and import of military weapons, materials, devices, technology, know-how and services related to uranium conversion and enrichment; production of heavy water; plutonium manufacture; chemical precursors; among other items.

Further, in 2000, Argentina passed legislation to adopt dual-use export controls. This was an important development because despite entering into the Wassenaar Arrangement in 1996, Argentina lacked a dual-use export control regime.

Enforcement authorities

Decree No. 603/1992 provides that the National Commission for the Control of Sensitive Exports and Military Materials (in Spanish: *Comisión Nacional de Control de Exportaciones Sensitivas y de Material Bélico*), under the Ministry of Defence and the Ministry of Foreign Affairs, is the enforcement authority of Argentina's export control regime.

Additionally, the National Registry of Weapons (in Spanish: *Registro Nacional de Armas*, 'RENAR') under the Ministry of Justice and Human Rights and the Ministry of Defence; and the Customs Authorities (in Spanish: *Dirección General de Aduanas*) are national authorities in charge of enforcing and supervising the

compliance of the export control regime in their individual areas of competence. Thus, in order to export any of the listed items, the exporter – prior to performing the export – must submit an export licence request with the National Commission for the Control of Sensitive Exports and Military Materials. Further, the customs authorities have an obligation to supervise the application of the control regime when an export of a listed item is detected.

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temporary or definitive) of specific items such as self-defence, hunting or warfare weapons and ammunitions, among other particulars.

Overview of the export control procedure

In order to export sensitive or military materials, weapons, chemicals, raw materials, minerals, technology, know-how or dual-use goods, it is necessary to obtain an export licence that must be filed with the National Commission for the Control of Sensitive Exports and

Military Materials. The lists of the goods (including dual-use goods) that are subject to an export licence are listed in the annexes to Decree No. 603/1992.

As a general rule, the authorities will not grant the export licence if the materials to be exported are connected to: (i) terrorism; (ii) the production of weapons of mass destruction; (iii) the production of chemical weapons; or (iv) are going to be exported to countries subject to international sanctions or embargos.

Further, the applicant for an export licence must obtain and file with the licence application, an 'end-user certificate' legalised by the Argentine embassy at the country where the export is going to be delivered. Basically, this provides information about the identity of the importer, the uses and destination of the exported goods.

It should be pointed out that there are no specific requirements envisaged by the applicable regulation in order to apply for an export licence. Therefore, the authorities have a significant

degree of discretion that enables them to request information to the export licence's applicant so as to evaluate the request.

Transit and transshipment of dual-use goods

As mentioned, the general regime for export control is governed by Decree No. 603/1992 and its regulatory and complementary regulations.

There are no specific provisions governing the transit and transshipment of dual-use goods. However, the transit and transshipment of any cargo is under the control of the customs authority, which must inspect and control the cargo's content.

Accordingly, in the event that the customs authority detects the existence of goods or materials listed as dual-use in the annexes of Decree No. 603/1992, it should give notice to the national authorities who should decide whether to seize the goods or provide authorisation for transit or transshipment.

Thus, it makes sense to report in

advance to the customs authority any impending transit or transshipment of dual-use goods in order to be able to

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provide the information and documentation that the authorities might request so to authorise the logistic operation.

Penalties

In accordance with Section 17 of Decree N° 603/1992, exports that are in breach of the Export Control regulation, are subject to the sanctions established by the Customs Code (Act N° 22,415) and the Criminal Code.

Where this occurs, exporters could face charges of aggravated smuggling, punishable with a prison term of between four and 12 years (Section 867 of the Customs Code). Likewise, other offences could also be jointly charged (for example: if the exporter falsified documents in order to cover the nature of the exported items).

Conclusion

To conclude, we should point out that Argentina is one of the few Latin American countries to possess an export control regime and professional enforcement authorities. Nonetheless if it is to meet international standards it must continue to improve its legislation as there are a number of issues, such as the transit and transshipment of dual-use goods that lack a clear regulated procedure. Further work is required.

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