Global Trade Advisory Alert: Latin America Customs Update

Several regulatory and policy developments have occurred in the Latin American region over the past few months that may impact the customs and global trade activities of many multinational companies. These include:

- Amendments to foreign exchange ("FX") regulations related to the payment of imported goods and services into Argentina;
- Use of transfer pricing studies as supporting documentation for customs valuation of imported goods in Brazil;
- Elimination of certain benefits for Free Trade Zone operators in Colombia;
- Ongoing enforcement activities of North American Free Trade Agreement ("NAFTA") and US-Mexico-Canada Free Trade Agreement ("USMCA") rules of origin by Mexican customs authorities; and
- Recent modifications to the legal framework governing intercompany payments made for goods imported into Peru.

Argentina: Amendments by the Argentine Central Bank tighten FX regulations related to the payment of imported goods and services

Due to the complex economic environment in Argentina, the current federal administration enacted regulations regarding FX controls that include strict requirements on the mandatory repatriation and exchange for Argentine Pesos applicable to exports of goods and services, as well as restrictions on the payment for imported goods and services at the official FX rate.

In accordance with the new regulations, the payment for imported goods or services, as well as any royalties or profit distributions made to related companies abroad, require a specific authorization from the Argentine Central Bank to access the official FX market.

In addition, the Argentine Central Bank established an allowance cap for certain categories of imported products that can be paid at the time of importation under the official FX rates. If the imported products exceed the allowance cap, they will have to be mandatorily financed. Previously, only imports of so-called "luxury goods" were subject to mandatory financing, where the Argentine Central Bank granted the importer access to the FX market 180 or 365 days after the date of import of such goods, depending on their tariff classification. There are several exceptions to this new categorization regime, including imports of fuels, mineral coal, and capital goods, which will not be subject to the allowance caps.

Recent amendments to FX regulations also set a special allowance cap on payments for imports of services that is equal to the aggregate payments for services rendered by foreign providers during 2021. After that allowance cap is consumed, access to the FX market to pay for imports of services would be granted starting 180 days after the service was effectively rendered.

Brazil: Use of transfer pricing studies as supporting documentation for customs valuation of imported goods in Brazil

In Brazil, transfer pricing and customs valuation are regarded as separate areas, regulated under different legislation. However, recent regulatory efforts are attempting to merge them, in alignment with international standards and OECD guidelines.

In June 2022, the Brazilian Tax Authority published Normative Instruction No. 2090/2022, which provides for standards and definitions applied to customs valuation in Brazil. The Normative Instruction consolidates and updates rules that were previously in force, seeking to enhance transparency and simplify procedures related to customs valuation.

The Normative Instructions impacts transfer pricing since it establishes that the Brazilian Customs Authority may challenge the validity or accuracy of the declared customs value based on the benchmark price of the valued goods, determined as per the domestic transfer pricing legislation.

Under the Normative Instruction, it will now be possible for companies to utilize transfer pricing studies to support the selection of the applicable customs valuation methodology. The Normative Instruction provides that companies can use statements on the calculation of the taxable income for purposes of transfer pricing rules as an input to demonstrate that there was no influence on the price paid between related companies for imported goods.

This is particularly relevant since it is quite common for the Brazilian Customs Authority to automatically reject the use of transaction value methodology for customs valuation when the transaction is an intercompany transaction. Now, companies will be able to use transfer pricing studies as supporting documentation to demonstrate that their related party pricing meets local requirements.

The trend towards merging customs valuation and transfer pricing is also highlighted by a 2022 decision by the Administrative Council of Tax Appeals, which ruled – following guidelines from the Technical Committee of the World Customs Organization – that it is possible to use transfer pricing analysis, based on cost-plus profit methodology, as a legal parameter and documentation to support a fallback customs valuation methodology.

Colombia: Elimination of certain benefits for Free Trade Zone operators

In Colombia, Free Trade Zones are defined as geographic areas within the national territory that provide special tax and customs treatment for companies that conduct industrial activities of goods and services or other commercial activities.

Free Trade Zones are a key tool for Colombia's development, job creation, and new capital investments, providing the following benefits to companies that operate within a Free Trade Zone:

- No import duty or Value Added Tax (VAT) will be due upon the introduction of goods from abroad into the Free Trade Zone;
- The income tax rate for certain Free Trade Zone users is 20 percent, compared to the income tax rate for other companies, which can be up to 35 percent;
- Goods may remain in the Free Trade Zone for an unlimited period, without any import duty or VAT due, unless they are withdrawn from the Free Trade Zone and entered into Colombia's national territory;
- Allows for the use of multimodal transport to ports and border zones;
- The goods may be withdrawn from the Free Trade Zone and entered into Colombia's national territory applying the import duty rate of the raw materials or the import duty rate of the finished goods;
- Goods may be transferred between Free Trade Zones and other ports; and
- Provides for customs and trade facilitation, including simplified customs filings.

The Government of Colombia has expressed its intention to eliminate income tax benefits for Free Trade Zone users. While the final provisions and details of such changes are not yet

known, the Government has also noted that export requirements, establishing minimum export operations from the Free Trade Zone operators, may now be required as a pre-requisite to apply income tax benefits.

Mexico: Ongoing enforcement activities of NAFTA and USMCA rules of origin by Mexican customs authorities

Mexico has a wide network of Free Trade Agreements (FTAs) signed with various countries around the globe. These FTAs have strengthened the capability of Mexican companies to acquire necessary materials and components for their production processes at prices that are not impacted by customs duties. FTAs have also allowed Mexican companies to export finished products to many countries with prices and logistical benefits that generate a competitive advantage over producers in other countries.

Due to the significance of these trade flows and the potential for gathering revenue, the Mexican customs authority has increased its focus on conducting origin verifications on foreign exporters of goods.

Most FTAs entered into by Mexico allow the customs authority of the importing country to carry out origin verifications in the exporting country. Such verifications aim to verify that the foreign exporter that issued a certificate of origin in support of preferential duty treatment maintains the documentation supporting the originating status of the goods. In essence, the customs authority will validate that the imported goods meet the applicable rules of origin and other requirements established in the FTA.

Mexican customs authorities may conduct these origin verifications through (i) a questionnaire sent by the Mexican customs authority to the foreign exporter, or (ii) through an on-site origin verification conducted by Mexican customs officials at the facilities of the foreign exporter.

Although the various FTAs entered into by Mexico clearly establish the differences in the origin verification conducted via a questionnaire or through an on-site verification, the customs authority has been requesting information and documentation from foreign exporters using a methodology that does not correspond to the methodology applicable to the type of verification of origin that is being carried out. Specifically, the customs authority has conducted origin verifications through written questionnaires where they require the foreign exporter to provide very detailed information, and extensive documentation, to support the originating status of its products, including accounting records and documentation related to the production process of the goods. Foreign exporters have also been required to provide documentation that supports the purchase of materials and components used in the production of the goods that were exported to Mexico, including copies of purchase orders, commercial invoices, proof of payment, and other documents, *for each and every component* that was purchased for use in the production of the finished goods. These significant documentation requirements are more aligned to the information and documentation that the customs authority would request during an on-site verification.

In the event that the exporter or foreign producer does not provide responses to the questionnaire in sufficient detail, the Mexican customs authority will determine that the imported goods do not meet the rules of origin and issue a resolution denying the originating status to the goods. This typically leads to an audit of the Mexican importer that imported the goods under preferential duty treatment, which may then subject the Mexican importer to the payment of duties and taxes previously relieved under the FTA, as well as significant penalties and other business consequences.

Peru: Recent modifications to the legal framework related to payments made by Peruvian importers to related party entities for the import of goods

In recent years, it has become more common for multinational companies to centralize in a single entity all payables and receivables regarding transactions made by entities of the group.

According to Peruvian regulations, all payments made by importers, as a result of the purchase of foreign trade goods from foreign suppliers, have to be made: (i) using the approved means of payment; and (ii) through approved banks and financial entities. Local regulations indicate that payments must be made through local banks or financial entities; however, it is also acceptable for payments to be made through non-Peru domiciled entities given that foreign suppliers usually do not have bank accounts in Peru.

Under recent changes to the local regulations, in order to consider that the importer complied with the requirement to use an approved means of payment, the payment must be made *directly to the seller or supplier of the goods*. While it is possible to make the payment to a designated third-party, other than the seller or supplier of the goods, certain conditions will now have to be met, including:

- Prior to any payment, the Peruvian Customs and Tax Administration (Superintendencia Nacional de Aduanas y de Administracion Tributaria or "SUNAT") must be informed of the designated third-party that will receive the payment; and
- The SUNAT will indicate how this designation must be made and the information to be included.

The SUNAT has not yet issued specific regulations on how importers should communicate when a third-party will receive payment for the purchase of imported goods. However, temporary regulations establish that, until the SUNAT issues the final regulations, importers must comply with this designation by communicating through the virtual filing system (Mesa de Partes Virtual de SUNAT).

If this communication is not made to the SUNAT before the payment is made, then the SUNAT may consider that the importer did not comply with using the approved means of payment and impose a fine on the importer. This could also have a potential impact on the deductibility of the payment for income tax purposes. The amount of the fine is equivalent to 30 percent of the value declared upon importation to the customs authority, per each transaction or import declaration.

Deloitte's Global Trade Advisory specialists are part of a global network of professionals who can provide specialized assistance to companies in global trade matters. Our professionals can help companies seeking to manage the impacts and potential impacts of the developments described above, as follows:

- Our professionals in Argentina can assist companies with navigating the complex, new FX requirements by providing regulatory updates and recommendations on different business strategies to manage the impact of the new restrictions and assess how to finance the purchase of imported goods and services;
- Our professionals in Brazil can help companies that have intercompany transactions in Brazil consider the use of transfer pricing studies as useful tools to support the customs valuation of imported intercompany goods, as well as with preparing a defense file before the customs authorities in the event of a customs valuation audit;
- Our professionals in Colombia can assist companies operating in Free Trade Zones with assessing their current operations to determine if they will align with the government's new requirements or if any strategic changes may need to be considered;
- Our professionals in Mexico and in our global network can help foreign exporters consider revisiting previous FTA certifications made for goods exported to Mexico to confirm that they have an origin verification audit defense file to support the originating status of their exports in case they are subject to an origin verification by the Mexican customs authorities; and
- Our professionals in Peru can assist Peruvian importers with confirming whether the government authorities have already been informed of any third party that will receive payment for the purchase of imported goods in those cases when the seller or supplier of the goods is not receiving the payment of the purchase price, for example, where a group netting system is used.

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