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MAQUILADORA AND PITEX PROGRAMS: TRYING TO IMPROVE THE OBSOLETE
ALEJANDRO GARCÍA SEIMANDI

A temporary importation implies the introduction of goods into Mexico for a limited period of time, without paying import duties, value-added tax, or anti-dumping fees coupled with paying a preferential customs processing fee. The status of temporary importation is used when goods are received into Mexico for a specific purpose set forth by the Mexican customs law. Mexican customs law allows two types of temporary imports. The first category includes goods that are not used in a manufacturing process in Mexico. Trucks, ships and airplanes used to transport passengers or cargo into Mexico, tourists' automobiles, and cinema equipment used for filming movies in the country are examples of imports entitled to temporary import status under this category. The second type of temporary imports consist of those goods made by companies in the maquiladora programs and companies in the Programa de Importación Temporal Para Producir Artículos de Exportación (PITEX). Those imported goods are used to produce export products under their specific industrial manufacturing process. The main benefit provided to maquiladora and PITEX companies by the temporary import status is the avoidance of import duties.

For the last ten years the maquiladora and PITEX companies have been evolving. The golden age of temporary importation lasted through the 1980s and early 1990s. During this period, maquiladora and PITEX companies imported virtually everything they wanted to without paying import duties, and their administrative burden was very reasonable. Maquiladora and PITEX programs were very efficient, allowing their beneficiaries to reach maximum levels of competitiveness.

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1. Mexican customs law regulates the importation and exportation of goods, sets the standards for temporary imports of machinery and equipment, establishes other programs such as the strategic bonded warehouse registration and certified companies registration related to the import and export of goods. Baker McKenzie, Amendments Related to Foreign Trade and Customs (Monday, March 14, 2003), at http://www.maquilaportal.com/bulletin/ (last visited April 7, 2004).

2. A maquiladora is a Mexican corporation that operates under a maquiladora program approved by the Mexican Secretary of Commerce and Industrial Development (Spanish acronym SECOFI). Mexican corporations operating under this program are entitled to foreign investment participation in capital and management. Additionally, these corporations are entitled to special customs preferences that allow duty-free importation of machinery, equipment, parts and materials, and administrative equipment such as computers and communications devices, which are subject only to posting a bond guaranteeing that such goods will not remain in Mexico permanently. Normally maquiladora products are exported either directly or indirectly through sale to another maquiladora or exporter. Aureliano González Baz, What is a Maquiladora?, at http://www.udel.edu/leipzig/texts2/volx128.htm (last visited April 7, 2004).

3. The Temporary Importation to Produce Goods for Export (PITEX) program allows temporary importation of equipment or materials for the production of goods in Mexico for export by companies that comply with all the Mexican taxation laws. Goods can be shifted to the domestic market by paying duties and taxes as in the maquiladora program. The Mexican Investment Board, Mexico's Export Industry, at http://www.mib.org.mx (last visited April 7, 2004).
But this golden age has ended. During the last few years we have witnessed the fall of the maquiladora and PITEX programs. Their benefits are disappearing and these programs are becoming more expensive to operate and more difficult to manage. The two key issues contributing to the decline of the maquiladora and PITEX programs are (i) the increasing administrative burden borne by the maquiladora and PITEX entities, and (ii) the decreasing import duty benefits accorded to such entities.

Administrative burdens have increased in response to political pressures. It is no secret that Mexican tax authorities have had many problems controlling smuggling and contraband after goods cross the border. Smuggled goods are commonly sold in the Mexican street market, and the tax authorities do not have the staff or the political will to combat smuggling. The first logical alternative to fighting the importation of contraband is to improve audit procedures by increasing audits, hiring more auditors, and training the auditors well to inspect imports for contraband. However, it is clear that the Mexican Government has not chosen this alternative. The number of audits has not increased, and the auditors' skills have not improved. Auditors continue to operate as they have in the past. Instead, the Ministry of Finance has turned its face towards the borders, and focuses on gatekeeping rather than housekeeping.

Gatekeeping seems to be the second logical solution. Closing the gates would raise obstacles for importation. This policy affects all import companies, not just maquiladora and PITEX companies. For instance, every importer should be registered in the Importers Registry of the Ministry of Finance in order to import goods into Mexico. Additionally, those who wish to import certain types of goods should also be required to be registered in the Sectorial Importers Registry of the Mexican Customs Service. Requiring registration in such programs may prevent the applicant from importing anything into the country for at least two months.

Another example of increased administrative burdens is the increasing liability of the customs broker. Each amendment to the Mexican customs law results in more liability for the customs broker. Custom brokers are held liable for any violations of the import requirements detected by the customs authority. Consequently, the customs broker, the importer's legal representative, has become a Mexican customs agent even though he is not on the government payroll.

But the above mentioned examples of increased administrative burdens are applicable to all importers, not only to maquiladora and PITEX companies. Maquiladora and PITEX companies have additional problems specific to their programs that have resulted in increased administrative burdens. One administrative burden specific to the maquiladora and PITEX programs is import penalties. Several years ago, Article 176 (11) of the Mexican customs law provided that it was an infraction to import illegal goods. However, that paragraph was amended in 2001 to provide in addition that it is an infraction to perform temporary imports under a maquiladora or PITEX program if the temporarily imported goods are not

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included within the scope of the program. At this point the amendment seems fair and logical since both types of imports are prohibited. The problem is that both imports deserve the same sanction. The sanction for importing forbidden goods is a fine of 70% to 100% of the goods’ value. Additionally the goods are seized and become property of the Mexican Treasury. However, other infractions, such as importing goods without filing customs summaries, are sanctioned with lesser fines.

The fairness of the sanctions may be considered as a subjective issue and left aside. However, the rigid, almost ritual, Mexican legal system does not indicate when a good should or should not be considered as included in the maquiladora or PITEX program under the fine. Due to recent amendments to the maquiladora and PITEX decrees, the programs’ authorization should include a description of the goods and their corresponding tariff items. Therefore, a maquiladora or PITEX authorization is not a simple list describing goods by their names. Rather, the maquiladora or PITEX authorization is a list of goods by name that classifies a good under its corresponding tariff item. The applicant designs his own tariff list to the best of his knowledge even though he is not an expert classifier. Moreover, the Ministry of the Economy is in charge of authorizing the programs, but is not an expert classifier either, and is not empowered to determine the applicable tariff item. It is the customs broker who is legally in charge of determining the applicable tariff items at the point of entry.

Imagine the following situation: a company establishes its maquiladora program after two months, then shows the corresponding authorization to the customs broker who determines that the pedimento is not correct and that the goods were misclassified. The importing company has several options at this point: it may lose several weeks filing for an extension of the program, it may try to convince the broker that the tariff classification is correct, or it may look for another customs broker who accepts the classification.

Even if the customs broker files the pedimento with customs, the customs authorities may challenge the tariff classification of the goods during the customs clearance. Moreover, tax authorities may challenge the tariff classification during a visit to the importer’s facilities. Tax court precedents provide that customs clearance does not imply that the authorities accept data stated in the import pedimento as valid. Thus, maquiladora and PITEX companies would be subject to review and penalties for five years, which is the general period prescribed by law for the tax authorities to review past operations.

Yet another example of increased administrative burdens for maquiladora and PITEX companies is the competing import procedures of the virtual pedimentos versus proof of export. Temporarily imported goods generally may not be handled or sold by the importer to a third party. The importer should not transfer title or relinquish possession of the temporarily imported goods. However, in the early 1990s, maquiladora and PITEX companies were allowed to make virtual transfers

of goods among themselves by filing the pertinent pedimentos. By means of a Mexican legal fiction, the deliverer files a virtual export pedimento with the Customs House without physically exporting the goods. At the same time, the recipient files the corresponding import pedimento without physically importing the goods and the temporary importation liabilities are shifted from one person to the other. This procedure allows maquiladora and PITEX companies to transfer temporarily imported goods without having to ship them out of the country and then re-import them.

Filing the virtual operations is burdensome. A customs broker must be hired to file the pedimentos, and customs processing fees must be paid at the Customs House. Therefore, in the mid-1990s, the Ministry of Finance issued a set of rules with an exciting new policy: the proof of export. The proof of export is a document issued by the maquiladora or PITEX company. The entity receiving temporarily imported goods in Mexico fills out an official document and gives it to the entity delivering such goods. Then, the issuer considers the goods as temporarily imported under its own program, and the seller considers the goods as exported; this happens as if it were a virtual operation.

However, the proof of export led to many frauds. For instance, proofs of export were issued and pre-dated to cover up expired temporary imports. In response, the tax authorities decided to return to virtual operations. But when they did so, they failed to delete the proof of export from the Mexican legislation, so reference to the proof of export may still be found in Mexican customs law, especially in the “Reglamento de la Ley Aduanera.” Therefore, proofs of export still exist and may be used. Tax authorities have discouraged the use of proofs of export and have encouraged the return to virtual pedimentos by conditioning certain benefits granted to maquiladora and PITEX companies on the use of virtual pedimentos. For example, the application of the 0% value-added tax on sales of temporarily imported goods under the maquiladora program was conditioned upon the filing of goods through virtual operations.

Complementary pedimentos are another example of the increasing administrative burden faced by maquiladora and PITEX companies. In some cases, maquiladora and PITEX companies have had to pay import duties on imported goods that are processed in Mexico and subsequently exported to another country if the receiving party is a party to NAFTA or European trade agreements. However, at the point of entry of temporarily imported goods, a company may not know for sure if all its products are going to be exported to another country with which Mexico has a free trade agreement, or if they are going to be sold in the domestic market. Therefore, the maquiladora and PITEX companies are allowed to continue importing without paying import duties.

Traditionally, each temporary importation was closed with two documents: an import pedimento and the corresponding export pedimento. Now the new complementary pedimentos are added to the cycle. First the import pedimento is filed, then the export pedimento, then these companies are obliged to pay duties at

the point of export under the same export summary used to export the goods, or within 60 days following the exportation, in which case a new complementary pedimento must be filed.\textsuperscript{12} This complicates the inventory control systems that the maquiladora and PITE\textsuperscript{X} companies are already required to manage.

Maquiladora and PITE\textsuperscript{X} companies also bear the administrative burden of keeping a special inventory control system. Even though every importer is obliged to keep an inventory control system that allows a split between domestic goods and imported goods, maquiladoras must have an additional inventory control system. The additional system must allow a maquiladora company to keep an accurate account of where their temporarily imported goods are currently located in the country or where the goods have gone.\textsuperscript{13} This sounds pretty reasonable. However, several years ago "Annex 24"\textsuperscript{14} of the Mexican trade resolution entered into force and established an extensive, detailed, and exhaustive list of requirements for the inventory control system. This list was so exhaustive that "Annex 24" required that the maquiladora or PITE\textsuperscript{X} company control the hydroscopic characteristics of the imported goods, keep track of how much waste was generated from the productive process, and control how many goods were exported. As a result of a recent amendment, maquiladora and PITE\textsuperscript{X} companies must still keep accurate control of the temporarily imported goods, but "Annex 24" is no longer mandatory.\textsuperscript{15}

Maquiladora and PITE\textsuperscript{X} companies must also meet new requirements to qualify for a program. In May of 2003, the Maquiladora and PITE\textsuperscript{X} decrees were amended to require that the Ministry of Economy obtain an opinion from the Ministry of Finance before adding the company to the registry. Before giving its opinion, the Ministry of Finance must determine whether the shareholders of the applicant company have criminal records including tax fraud or criminal tax evasion.\textsuperscript{16}

On the other hand, the May 2003 amendments modified the cancellation process.\textsuperscript{17} The cancellation process now begins by suspending the company's registry at the moment that the authorities give the company notice of cancellation. The later examples of increased administrative burden would not be a problem if the maquiladora and PITE\textsuperscript{X} companies were still able to avoid high import duties by operating under the programs.

The main benefit of these registry programs was to provide their beneficiaries an import duty waiver. When the import duty exemption granted by the programs is reduced or limited, the program is at stake. Machinery and equipment are no longer exempt from import duties under the maquiladora or PITE\textsuperscript{X} programs because of World Trade Organization commitments. This seems contradictory because the purpose of a temporary importation is to avoid paying duties.

\begin{enumerate}
\item[13.] Trafico, Inc., \textit{supra} note 6.
\item[14.] Annex 24 establishes the Foreign Trade Rules for 2002 for Maquiladoras and PITE\textsuperscript{X} entities in accordance with guidelines to be issued by the General Customs Administration. Chevez, Ruiz, Zamarripa and Cia, \textit{Informative Flash: Fourth Amendment to the Foreign Trade Rules for 2002} (October 2002), at http://www.natlaw.com/pubs/spmxcu11.htm (last visited April 7, 2004).
\item[17.] \textit{Id}.
\end{enumerate}
Even though the temporary importation of machinery and equipment has lost many of its benefits, the importer still has side benefits such as not having to pay value-added taxes or being able to avoid some non-tariff restrictions. However, the real benefit of temporary importation—duty avoidance—is no longer applicable to machinery and equipment. But this is not the only new restriction on temporary imports.

The benefits of temporary imports were also limited under NAFTA and under Mexico's agreement with the European Union.18 These treaties limit the benefits of duty deferral programs to prevent non-originating goods from entering the free trade region without paying import duties. For example, a Mexican company imports Japanese goods under its maquiladora program without paying import duties. Then the company uses the imported goods to manufacture a product that qualifies as a NAFTA-originating good. Afterwards, the Mexican company exports the product to the United States. As a result of the operation, a Japanese import would have been imported to the NAFTA region without paying import duties in Mexico or in the United States. Article 303 of NAFTA prohibits this practice.19

NAFTA was Mexico's first free trade agreement, and has served as a model for subsequent trade agreements. Article 303 does not explicitly provide that all the corresponding import duties should be paid. Article 303 only limits the parties from waiving, refunding, or deferring import duties for more than the lesser of two amounts: the import duties triggered upon importing the goods to Mexico, or upon exporting finished products to the United States. For example, suppose a non-NAFTA originating good is used in Mexico to manufacture products that are then exported to the United States. If import duties are paid in the United States, Mexico may waive its own import duties in the same amount. If no import duties are paid in the United States, Mexico may not waive import duties on the non-NAFTA originating good.

Considering that the United States is Mexico's main commercial partner and that almost every maquiladora is exporting its products to the United States, it is easy to imagine the impact of Article 303 on Mexican foreign trade operations. Article 303 went into force on January 1, 2001.20 The first set of rules enacted by Article 303 was implemented by the Mexican Government, which established the complementary pedimentos and obliged Mexican importers to pay import duties applying the "lesser of the two" rule.21

At this point, it is clear that the maquiladora and PITEX programs are now of questionable utility. These programs are difficult to manage and they do not allow the importation of goods without paying import duties. The average Mexican...

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19. NAFTA Article 303 requires parties to refund or exempt customs duties on imports of materials used for the manufacture of goods that will subsequently be exported to another NAFTA country by the lesser of the total amount of customs duties paid on the material when imported into Mexico, or the duty paid on the final product when exported to the United States or Canada. Adjustments in Mexico's Maquiladora Program to Incorporate NAFTA's Article 303, Newsletter Published by the Embassy of Mexico, vol. 51, 12 (February 7, 2004), at http://www.naftaworks.org (last visited April 7, 2004).


maquiladora that imports products from Asia and later exports those products to the United States no longer enjoys import duty benefits under the maquiladora program. So, when speaking of the maquiladora and PITEX programs, we are not fixing something that is broken. Rather, we are trying to improve the obsolete. It is fair to say that the maquiladora and PITEX companies would have been obliged to shut down their operations due to the enactment of NAFTA's Article 303 if they would not have received support from the Mexican Government through the Sectorial Promotion Programs referred below.

What is the Mexican Government doing now to support the Mexican import registries? It is starting to develop new preferential customs programs such as tariff relief. However, NAFTA's Article 303 and other free trade agreements prevent the Mexican Government from granting tariff relief for goods exported to countries that are parties to the agreements. Therefore, the Mexican Government is granting tariff relief to manufacturers and conditioning the relief on the use of the imported goods for production, regardless of the final destination of the product. The manufacturer is allowed to import components, machinery, and equipment under a preferential tariff rate, as long as the goods are used to manufacture a final product. The final destination of the products is not relevant for purposes of the tariff relief. The products may be consumed in Mexico or may be exported.

A recent program aimed at assisting the maquiladora and PITEX programs is the Sectorial Promotion Program. Sectorial Promotion Programs entered into force on November 1, 2000. All the maquiladora and PITEX companies applied for a Sectorial Promotion Program, under which they could apply for preferential or even 0% import duty rates if the imported goods were used in a finished product manufactured in Mexico. The Sectorial Promotion Program is divided into two parts. The first part lists those goods considered as products of the industrial sector by tariff item. So, if the company's product is on the list, it may apply to the Ministry of Economy for a program. The second part of the program lists components, machinery, and equipment, also by tariff item, that are subject to preferential treatment and the corresponding import duty rate. It is important to note that the programs do not include components that are being manufactured in Mexico so as not to harm Mexican producers.

There are Sectorial Promotion Programs for many industries. The first Sectorial Promotion Programs were for the electric and electronic industries. Many programs followed. Currently there are programs for industries such as coffee, pharmaceuticals, medical, steel, construction, automotive, and auto parts. The Sectorial Promotion Programs have yielded a great benefit to maquiladora and PITEX companies who are now exempt from import duties. Tariff relief is one of the ways in which the Mexican Government is helping Mexican manufacturers.

The other form of help is administrative relief. There are three main administrative programs that will be discussed in depth in 2004. The oldest is the Inspection at Origin Program. The aim of this program is to reduce the length of time for goods to pass through customs clearance. The program simply relies on the information provided by the importer's supplier. The average importer receives
the goods at the U.S. border. After the supplier unloads the truck, checks everything in the United States, and the goods are physically verified, they are shipped to Mexico. Then the importer must draft a pedimento and file it with the Customs House. Under this new program, the importer is allowed to file a pedimento based upon the documentation sent by the supplier, so the truck comes into Mexico without having to stop first in the United States. Of course, Mexican importers are required to make a physical verification of the imported goods at their own plant and to pay the corresponding import duties if they detect an irregularity or infraction in the pedimento. If an irregularity or infraction is spotted by the Mexican Customs House the importer will be required to pay import duties but he will be exempt from having to pay additional fines. However, in order for a company to qualify for this program the company must have an importation volume of roughly 50 million pesos a year.

A more innovative program is the Certified Company Registration, which provides a lot of administrative relief. First, even though the Mexican customs law forbids amending certain pedimento fields, certified companies will be able to amend them. Second, certified companies will benefit from reduced penalties. In some airports, certified companies will be allowed to clear goods out of the airport without stopping at the Customs House. Third, a minimum importation volume of about 530 million pesos a year is required to qualify for this registration. Maquiladora companies may qualify for registration by achieving a minimum importation volume of 200 million pesos a year. While this program provides some benefits, there is a newer measure that constitutes a real customs regime change.

The newer measure establishes strategic bonded yards, which have the potential to operate as real free-trade zones for Mexico. Moreover, they have the potential to operate electronically, so they may really help Mexican companies by reducing the administrative burden when importing goods into Mexico.

The fate of maquiladora and PITEX programs is extinction, not because they are bad programs, but because the environment is not favorable for them. The maquiladora and PITEX programs were created in a high-import-duty environment that no longer exists. Thus, their economic utility has decreased with the advent of other ways to avoid paying import duties, such as the free trade agreements and the Sectorial Promotion Programs. Therefore, Mexico should expand the new preferential customs programs by reducing the required import volumes so that more companies may qualify. Of course, such a reduction will depend on the comfort level achieved by the customs authorities during this early stage of experimenting with the new program, registration, and regime.

23. Id.
24. Id.
26. Id.