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The Wassenaar Arrangement.
Carlos Sierra P. 01-03

Legal and Regulatory Aspects of the
Aeronautical Manufacturing Industry in Mexico.
Kendra Medina P. 04-07

FEBRUARY NEWS on
Mexican Aviation P. 08-09

Contributors P. 10

COELUM Pronunciation: 'che-l&m, is Latin for airspace or sky. The Romans began questioning the rights they had in the space above the land they owned and to how high above did that right extended to. Ad coelum et ad inferos, they discussed, meaning that their right of property would extend as high up to the heavens and down to hell.

The Wassenaar Arrangement.

The adherence by Mexico.

by Carlos Sierra.*

In accordance with the statement issued by the Plenary Chair of the Wassenaar Arrangement on Export Controls for Conventional Arms and Dual Use Goods and Technologies¹, issued by its Secretariat in Vienna, Austria on January 25th 2012, with effect as of such date Mexico completed the necessary procedures to become the 41st member state participating in such non-binding agreement.

The above was the result of efforts exercised by the Government of Mexico, through a formal delegation that on June 17, 2011 presented before the Secretariat of the Wassenaar Arrangement the formal request to participate in such arrangement and to become a member state thereof.

For the purpose of the foregoing, the Ministry of the Economy of Mexico published on June 16, 2011 on the Official Gazette of the Federation an agreement by which the requirement of prior approval on behalf of such Ministry for the exportation of conventional weapons, their parts and components, the dual use goods, software and technologies which could be subject of deviation for the manufacture and proliferation of conventional and mass destruction weapons is implemented, becoming with such agreement compliant with the requirements of the Wassenaar Arrangement and thus eligible to adhere to such international instrument.

History

The Wassenaar Arrangement, established formally in July 12, 1996 in the town of Wassenaar in the Netherlands, finds precedent in the Coordinating Committee for Multilateral Export Controls (COCOM) which was in effect during the Cold War and had the purpose of preventing the exportation of weapons to the Soviet bloc of nations. The Wassenaar Agreement is regarded as less restrictive than the COCOM was during the Cold War years and focuses primarily on the transparency of national regimes of control of exportations, without focusing on impeding the export of weapons to any specific region.

As the Cold War ended, the Wassenaar Arrangement was joined also by many former members of the Council for Mutual Economic Assistance (COMECON). The COMECON agreement had a military complement in The Warsaw Treaty Organization of Friendship, Cooperation and Mutual Assistance, which was also known as the Warsaw Pact and which was effective between the years of 1951 through 1991. This instrument which consisted in a mutual defense treaty signed

* IN COLLABORATION WITH SVEIN AZCUE.

1.- The Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies was established on the basis of the Initial Elements adopted in July 1996 (see website: www.wassenaar.org). Meetings are held in Vienna, Austria, where the Arrangement is based. Currently the Participating States of the Wassenaar Arrangement are: Argentina, Australia, Austria, Belgium, Bulgaria, Canada, Croatia, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Japan, Latvia, Lithuania, Luxembourg, Malta, Mexico, the Netherlands, New Zealand, Norway, Poland, Portugal, the Republic of Korea, Romania, the Russian Federation, Slovenia, Slovakia, South Africa, Spain, Sweden, Switzerland, Turkey, Ukraine, the United Kingdom, and the United States.

between eight former Eastern European states was the Soviet Cold War reaction to the adherence of West Germany to NATO² in 1955. The COMECON was the principal economic organization of the communist states of Eastern Europe.

The Wassenaar Arrangement is considered an understanding instrument between nations and not an international treaty as such for which it has no binding effect upon states and was not adhered to by Mexico as well as by other states through the otherwise necessary ratification by the Senate that applies to international treaties in order to become effective and binding as applicable law.

Scope

The Wassenaar Agreement is a voluntary regime that is adopted by each of its 41 member states to control exportations in relation to conventional weapons, dual use goods (i.e. goods that can have alternative civil and military uses) and technologies. By means of this agreement the member states exchange information in relation to the transfer of such items and technologies with the purpose of promoting “greater responsibility” among its members for the exportation of weapons and goods of dual use and to prevent “destabilizing accumulations” of such items. As referred above the Wassenaar Arrangement is not targeted at any specific group of nations but rather at states that can be considered as “states of Concern” by the member states of Wassenaar. This instrument as expressed above however lacks the binding nature that COCOM had for which no veto can be exercised by its members over the proposed exports of other member states. To provide information on the activities of the member states, the Wassenaar Agreement contemplates the continuing exchange of information between its members and the periodic notification of export activities involving weapons and items that appear in the specific control lists (i.e. dual use items and technologies list and the munitions list).

In summary, the Wassenaar Arrangement serves the purpose of improving regional and international security and stability through the encouragement of responsible practices and policies in the exportation of conventional weapons and of dual use goods and technologies to ensure that the items in question are not directed towards the enhancement of military capabilities that can result in destabilizing accumulations of these items.

Why did Mexico join the Wassenaar Arrangement.

Mexico is not a major manufacturer of conventional weapons and is not a manufacturer at all of weapons of mass destruction. Mexico is however an increasing participant in the manufacture of dual use goods and technologies which exportation is controlled by the Wassenaar Arrangement. Considering this, the adherence of Mexico to this international instrument will foster the participation and investment in these industries given that Mexico has joined the transparency and information policies to which the members of the Wassenaar Arrangement are committed.

2.- North Atlantic Treaty Organization, an alliance of 28 countries from North America and Europe committed to fulfilling the goals of the North Atlantic Treaty signed on 4 April 1949.

In the words on the Mexican Government, “Undersecretary of Industry and Trade, Lorenza Martinez Trigueros, said that joining this Arrangement will result in economic benefits for Mexico, among which is potentially attracting investments worth an estimated US\$9 billion over the next two years. This would come as the result of potential access to markets and technologies that are now inaccessible to Mexico.”³

The adherence of Mexico to this international instrument was encouraged by the aerospace, automotive, auto parts and electronics industries, which will benefit from the additional investment that the government expects that this arrangement will create.

In accordance with Mr. Flavio Díaz president of the Mexican Federation of the Aerospace Industry (FEMIA)⁴, for the aerospace industry the Wassenaar Arrangement represents the possibility to triple the 1.2 Billion of foreign direct investment that was received by this industry during 2011 within the following years accessing an export market worth approximately US\$11 Billion.

By adhering to the Wassenaar Arrangement Mexico expects to increase the manufacture of goods of dual use and technologies which can be now manufactured in Mexico and exported to the country’s commercial partners. In accordance with Mr. Diaz, this arrangement will benefit more than 230 companies that could scale their exportations to the United States alone with the exponential growth in employment and trade that could result from this agreement.

Through the adherence to this agreement Mexico will benefit from the dual use goods market which is substantially larger than the aerospace components market and which generates opportunities also for the chemical, automotive and software industries, for instance, in addition to aerospace.

The implementation of safe and efficient mechanisms for the exportation of high technology and dual use items will improve the manufacturing and export capacity of the country in the production of goods that will not necessarily be used with military purposes but rather in the manufacture of high technology items such as air bags, GPS systems, night vision technology, aircraft engines, etc.

In accordance with Undersecretary Martinez, México is one of the 15 countries with the largest growth in high technology exports with a higher growth rate nowadays than countries like Rusia, France, the United States, the United Kingdom and Japan.

3.- Extract from the Press Release: Ministry of Foreign Affairs (SRE), Jun. 17, 2011, Mexico City; translation Ministry of Foreign Affairs.

4.- The Mexican Federation of Aerospace Industries, A.C. (FEMIA®) is a non-profit association which integrates the majority of the of the aerospace companies in Mexico. The Federation was established in November 2007, to promote nationally and internationally the development of the Mexican Aerospace Industry. FEMIA® is the aerospace association recognized by the Federal Government given that it was established jointly as a mandate of the federal authorities to gather all national and international corporations within the sector.

Legal and Regulatory Aspects of the Aeronautical Manufacturing Industry in Mexico.

by Kendra Medina.

The aviation industry in Mexico does not only include air transport services and related providers such as airlines and airports. There is also an incipient industry developing that includes the manufacture of all kind of aircraft parts and components, from the manufacture of screws, locks or seats, to the assembly of avionics, landing gears and business jets or the provision of maintenance services for aircraft, helicopters and engines.

Original equipment manufacturers (OEM´s) have turned their attention to Mexico in recent years as a good option for the establishment of manufacturing and assembly facilities or to do business with local suppliers of aircraft parts and components for several reasons such as geographic location, labor costs, tax incentives, etc. It is likely that this tendency will continue in view of the global passenger aircraft demand forecast¹ and international agreements recently entered into by Mexico that impact the manufacture, import and export of dual-use goods and technologies such as military aircraft, flight simulators, etc.²

The purpose of this article is to briefly address the most relevant legal and regulatory aspects to be considered by the companies planning to enter this market (or those already participating in it), depending on the manufacturing target, which can vary from the simple assembly of tools and parts, to the design or assembly and manufacture of engines, fuselages or parts and components.

General Operation

Manufacturing or service plants can be established in Mexico by foreign companies, as subsidiaries or as a result of joint venture transactions. The form of operation would depend on the particularities of each situation, but in any case, a company should be incorporated under the laws of Mexico for purposes of having legal status and capital of its own. There is no limitation on foreign investment for these activities under Mexican law, or with respect to the acquisition or leasing of facilities for such purposes.³ Labor is not specifically regulated for the manufacture and assembly industry, although it is one of the most important areas due to its impact on the costs of operation of any industry. Mexican labor law tends to be more protective of the employee and also imposes several obligations on the employer (e.g. the employer's

1.- In accordance with the Airbus Global Market Forecast 2011-2030 the demand for passenger aircraft is expected to double.

2.- Mexico was admitted to the Wassenaar Agreement on January 20, 2012. Member states to this agreement is allowed to import and export controlled goods and technology (dual-use).

3.- Considering the Mexican company is the title holder. There are certain limitations for the purchase of real estate in Mexican territory by foreign companies and individuals within 100 kilometers of the borders and 50 kilometers of beaches (Article 27 of the Mexican Constitution).

mandatory contributions towards employees' welfare, such as housing, social security and retirement,⁴ and profit sharing).⁵ Because Mexican labor law provides for the existence of labor unions, collective labor agreements may be entered into with a union, if there is one.⁶

“There is no limitation on foreign investment for these activities under Mexican law”.

Local labor when hired requires adequate training and therefore, as the case may be, intercompany training agreements are required, or alternatively, training service agreements between the OEM or its subsidiary and a third party supplier. Usually non-disclosure agreements are entered into between the companies involved, however it is advisable to have confidentiality agreements or clauses at an individual level in place because, although Mexican law provides for the obligation of any individual to keep confidential the information obtained by virtue of their position, the scope of the information to be kept confidential must be expressly specified and communicated to each individual.⁷

Sector Specific Regulations

Prior to the commencement of manufacturing and assembly of aircraft, parts, engines and components, every establishment is required to be expressly authorized by the Ministry of Communications and Transport, through the aviation authority, the DGAC (*Dirección General de Aeronáutica Civil*).⁸ The authorization provided by the DGAC evidences that certain certifications are under acceptable standards in accordance with the Chicago Convention,⁹ as provided for by the International Civil Aviation Organization (ICAO), such as: (i) type of aircraft, engine or propeller, (ii) manufacturing approval, (iii) airworthiness of related aeronautic products, (iv) evaluation program for aircraft certification systems and (v) proceedings for the use of the certification of airworthiness of related aeronautic products. It is worth noting that Mexico has a bilateral agreement in place with the United States of America on Aviation Safety pursuant to which both countries reciprocally recognize each aviation authority's certifications of parts and components.¹⁰ One of the key obligations of the holder of this permit must comply with is to get the approval of its procedures manual by the DGAC.¹¹ Likewise, prior to the commencement of the provision of aircraft, aircraft parts, engines and components repair and maintenance

4.- With respect an employee's base salary, 5% for housing (INFONAVIT), around 29% for social security (IMSS) and and 2% for retirement (SAR).

5.- 10% of the total profit per year (Reparto de Utilidades).

6.- Provided it includes at least 20% of the employees

7.- Articles 84 and 85 of the Mexican Industrial Property Law.

8.- Policy AV 05/05 R2 (Carta Política) dated July 25, 2008.

9.- Convention on International Civil Aviation, Chicago 1944.

10.- Aviation Safety Bilateral Agreement signed in Montreal, Canada, in effect since February 23, 2010.

11.- In accordance with the Official Mexican Norm NOM-021/5-SCT3-2001.

services, any establishment must obtain a permit from the DGAC to operate as maintenance or repair shop. One of the key obligations a permit holder must comply with is to get the approval of its procedures manual by the DGAC.¹²

Taxes and Benefits

When evaluating tax strategies to maximize the benefits of establishing a Mexican company, it is important to keep in mind that under Mexican tax law transfer pricing between related parties is regulated and the corresponding OECD guidelines are applicable.¹³

“Special programs that may provide for tax benefits”.

When incorporating a Mexican company it is advisable to bear in mind that the corporate purpose must include the description of all the activities a company will perform within the import and export sectors (particularly the manufacture and transformation of goods). This is in order to be able to obtain the registration as an importer or exporter with the Ministry of Economics for purposes of being subject to special programs that may provide for tax benefits, such as the PROSEC¹⁴ and IMMEX¹⁵ programs. It is worth noting also that there is a specific customs code (*fracción arancelaria*) for the aerospace sector under which any goods necessary for the manufacture or assembly of aircraft or parts can be imported free of import taxes.¹⁶

The PROSEC program provides the manufacturer of sector specific goods (e.g. transport industry) the benefit of importing certain materials to be incorporated or used in the production process of such specific goods at preferential *ad-valorem* custom duties. This program has a one-year term, which is automatically renewed, provided the company beneficiary of the program submits an operations report on an annual basis with the Ministry of Economics. The goods and materials imported under these programs may be imported on a temporary or definitive basis. If imported on a temporary basis, such goods and materials can legally stay within the Mexican territory for up to the duration of the program, or if imported in conjunction with an IMMEX program, for the term provided for under the Mexican Customs Law.¹⁷

12.- In accordance with the Official Mexican Norm NOM145/1-SCT3-2001. This “NOM” is equivalent to Annex 6 part I chapter 8; part II chapter 8 y part III section II chapter 6 and section III chapter 6 of the Chicago Convention.

13.- Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations 1995.

14.- Programa de Promoción Sectorial (PROSEC). See the Decree that establishes several sector promoting programs, published on the Daily Gazette of the Federation on August 2, 2002.

15.- Programa para la Industria Mexicana Maquiladora de Exportación (IMMEX). See Decree Promoting the Industry of Manufacture, Maquila and Services to be Export published on the Daily Gazette of the Federation on November 1, 2006 (the “IMMEX Decree”).

16.- Such exemption applies only if the importing company is duly certified by the Ministry of Communications and Transport as authorized manufacturer.

17. Article 108 of the Mexican Customs Law provides for the maximum term a good imported on a temporary basis can legally stay within the Mexican territory, depending on its type

The IMMEX program incorporated both, the *maquila* program and the temporary importation program for producing goods for export (PITEX). This program permit the beneficiary of the program to import on a temporary basis, goods and materials that are necessary to manufacture, transform or repair other temporarily imported goods to be exported, and be exempted from the payment of the otherwise applicable general import tax,¹⁸ value added tax and compensatory fees, if any. The goods permitted to be imported under this program are classified in the following categories: (i) raw materials, parts and components to be totally incorporated into goods to be exported, fuels, lubricants and other materials to be consumed during the production process of the goods to be exported, packing, labels and brochures; (ii) containers and trailers and (iii) machinery, equipment, tools, spare parts, molds and instruments to be used in the production process, to control pollution, to be used for research, training, and safety, including telecommunication equipment, computers, lab equipment, quality control equipment. This program can be in effect indefinitely, as long as the beneficiary complies with all of its obligations under the IMMEX decree (which include annual sales of at least US \$500,000.00 to the United States of America or the exportation of at least 10% of its entire sales, among others), provided the company beneficiary of the program submits an sales and exports report on an annual basis to the Ministry of Economics, along with other statistical information. The goods and materials imported under this program can legally stay within the Mexican territory for the terms provided for under the Mexican Customs Law, except as otherwise provided for by the IMMEX Decree.

In conclusion, the establishment of manufacturing and assembly plants or maintenance and repair shops of aircraft parts and components, requires not only to have in place an extended collection of contracts and agreements among the OEM's and their related parties and/or investors, and between the OEM's subsidiaries and their suppliers and employees, but also, it is necessary to obtain several authorizations and certifications from the Mexican authorities in order to comply with the applicable legal requirements and then to obtain all available benefits granted to this industry under Mexican law.

18.- There are certain exceptions under the Free Trade Agreements entered into between Mexico and the United States of America, and Mexico and the European Union.

Ministry of Tourism performs air connectivity diagnostic.

In the coming weeks will be completed a study on the situation and the challenges of air connectivity to enable airlines, make decisions on new routes or frequencies, said the Ministry of Tourism, Gloria Guevara. She explained that the relevance of the document is that is not the same to negotiate with a country a bilateral agreement than to tell exactly what are the opportunities that exist between a pair of cities. *El Economista*. 02/February/12.

Southeast Airport Group lost the concession to operate airports in Brazil.

Southeast Airport Group (ASUR) announced that the consortium he formed with Advent International did not win the concession for the maintenance, operation and expansion of the three airports in Brazil. The company operator of Cancun Airport and eight others in the southeastern part of Mexico, state that the concessions were for the airports of Brasilia, Guarulhos and Campinas auctioned at a public tender held today in Sao Paulo. *Excelsior*. 02/February/12.

Nobody wants DGAC.

Nobody wants the General Management of the General Directorate of Civil Aviation (DGAC) that Hector Gonzales Weeks left two weeks ago. Also, the fact that there is no budget and that in ten months Mexico will have a change in its federal government makes the position not even remotely attractive. *Excelsior*. 07/February/12.

New cargo airport in Altamira, Tamaulipas.

The mayor of Tamaulipas Pedro Carrillo Estrada, announced that he will insist to the federal goernment and the local government to build a cargo airport in Altamira, which will benefit the industrial sector greatly. *Hoy Tamaulipas*. 09/February/12.

Ministry of Communications and Transport summons Mexicana's judge.

The Ministry of Communications and Transport summoned Felipe Consuelo Soto, judge in charge of Mexicana's insolvency proceeding, requesting to issue the insolvency agreement in order to begin the company's restructure. It is essential to have the insolvency agreement in order to Mexicana to have the legal capacity to obtain the Aircraft Operator Certificate. *El Economista. 28/February/12.*

Pacific Airport Group tries to fulfill Mexicana's left space.

Pacific Airport Group (GAP) informed that since Mexicana's shutdown, only 60.4% of the space has been covered. GAP is negotiating with national and international airlines in order to recover Mexicana's left space. As for now, national airlines are waiting to receive new aircraft to increase frequencies that have not been covered since Mexicana's shutdown, and international airlines are benefiting from this situation increasing the international flights. *El Economista. 28/February/12.*

Med Atlantica: New Conditions.

Med Atlantica refuses to deliver the 300 million dollars to rescue Mexicana if the Ministry of Communications and Transport does not deliver the Aircraft Operator Certificate. Med Atlantica's representative mentioned that evidence has been brought to the judge probing the availability of more than 300 million dollars. Med Atlantica insisted that in order to have a final agreement, three things must be completed. First, the corresponding shares, for which they have reached an agreement with Tenedora K, secondly, the creditors agreement, which is very advanced, and last but not least, the Aircraft Operator Certificate with slots and frequencies. *El Universal. 28/February/12.*

Stops the flight.

At least nine Mexican Airlines have debts for almost 800 million pesos to Airports and Auxiliary Services (ASA) caused by fuel that was delivered and never paid. ASA is following the legal procedure in order to recover these resources, problem is none of these airlines are still operating and six of them practically disappeared. *CNN Expansión. 29/February/12.*

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