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Análisis sobre el debido proceso en la actuación de la autoridad aduanera colombiana sobre mercancías importadas.

Analysis of due process in the proceedings of the Colombian customs authority on imported merchandise.

Yeny Paola Duque – Castaño[1], Claudia Elena Lukau – Quintero[2], Silvia Liliana Ceballos – Ramírez[3]

[1] Grupo de investigación FACEA, Universidad Católica de Oriente, Antioquia, Colombia, Orcid: https://orcid.org/0000-0001-9151-0599, Email: yduque@uco.edu.co

[2] Grupo de investigación FACEA, Universidad Católica de Oriente, Antioquia, Colombia, Orcid: https://orcid.org/0000-0001-9550-5439, Email: clukau@uco.edu.co

[3] Grupo de investigación FACEA, Universidad Católica de Oriente, Antioquia, Colombia, Orcid: https://orcid.org/0000-0001-8733-4967, Email: lceballos@uco.edu.co

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Resumen

Objetivo: Este artículo tiene como finalidad analizar el debido proceso en la actuación de la autoridad aduanera colombiana sobre las mercancías. Método: la investigación responde a un enfoque cualitativo, en la que se realiza una línea jurisprudencial mediante el análisis de sentencias emitidas por la Corte Constitucional y el Consejo de Estado. Resultados y discusión: Es claro que la autoridad aduanera colombiana, es competente para hacer control previo y posterior a la mercancía extranjera que ingresa al país, no obstante, el proceso y las condiciones para cada procedimiento no son claras, toda vez que, los importadores evidencian inconformidad frente a las actuaciones extemporáneas, dilación de procesos, actos administrativos emitidos por misma la entidad aduanera que vulnera el debido proceso, sobre todo en actuaciones de aprehensión y decomiso. Conclusiones: La Sentencia C 441 de 2021 emitida por la Corte Constitucional, determinó que el proceso que realiza la autoridad aduanera respecto al régimen sancionatorio no es acorde con el principio de reserva legal, toda vez que en materia sancionatoria quien tiene la potestad para regularla es el Congreso de la República, por lo tanto, otorgó como plazo máximo hasta el 20 de junio del año 2023 para expedir el régimen sancionatorio y de decomiso de mercancías en materia aduanera, así como el proceso administrativo aplicable.

Palabras claves: autoridad aduanera, debido proceso, importaciones, mercancías.

Abstract

Objective: The purpose of this article is to analyze the due process in the proceedings of the Colombian customs authority on imported merchandise. Method: the research responds to a qualitative approach, in which a jurisprudential line was carried out through the analysis of judgments issued by the Constitutional Court and the State Council. Results and discussion: It is clear that the Colombian customs authority is competent to carry out prior and subsequent control of the merchandise introduced into the national territory from abroad, however, the process and conditions for each procedure are not clear, since, importers show disagreement with extemporaneous actions, delay of processes, administrative acts issued by the customs entity that violates due process, especially in seizure and confiscation actions. Conclusions: Judgment C 441 of 2021 issued by the Constitutional Court, determined that the process carried out by the customs authority regarding the sanctioning regime

*Autor para correspondencia.
Correo electrónico: yduque@uco.edu.co

is not in accordance with the principle of legal reserve, since in sanctioning matters who has the power to regulate it is The Congreso of the República, therefore, granted a maximum period of until June 20, 2023 to issue the penalty and confiscation of merchandise regime in customs matters, as well as the applicable administrative process.
Key words: customs authority, due process, imports, merchandise.

1. Introduction

The present article looks to do a jurisprudential review in line with the due process performed by the Colombian customs authority regarding the merchandise brought into the country. To do so, the judgments issued by the Constitutional Court and State Council are interpreted in the framework of the customs processes; for this review; a conceptual analysis is conducted of the foundations provided by the World Trade Organization (WTO), World Customs Organization, as well as the Colombia's customs regulations.

In view of the new challenges of world trade which is permeated by the globalization phenomenon and the digital revolution, revealing less visible borders and more connected, the growing demand for products through digital platforms and ever more demanding consumers upon the offer as far as the quality and faster response time are concerned, the facilitation of the trade becomes a need from the international standards and guidelines established by the World Trade Organization (WTO), World Customs Organization as primary regulatory bodies in terms of the access to the customs administration and markets.

World Customs Organization (WCO) is an international body that was created in 1952 to encourage and increase the efficiency of customs by utilizing product classification tools, customs valuation, origin rules, and other modernization processes, to promote a customs environment that provides the legitimate international trade (WTO, 2021).

The customs administration is based on the rendering provided by states, through competent bodies to regulate international trade operations, whose aim is to inspect and have control over the goods coming into the country and which are traded, in terms of monitoring the due compliance with sanitary, customs, tax, foreign exchange and indeed other requirements that allow safeguarding economy against criminal activities such as money laundering, tax avoidance, product counterfeiting, smuggling, among others (Zamora, América, Navarro & Lenin, 2014).

As far as Colombia is concerned, the competent authority for the customs administration lies with the National Taxes and Customs Authority (DIAN). This entity falls under the Ministry of Finance and Public Credit, created in 1992 and laid down by Decree 2117. It aims to help to secure Colombian taxation when it comes to foreign trade, as well as to protect the nationwide economy, through the administration, monitoring, and control of customs, foreign exchange, and tax responsibilities by the authorized economic operators, in addition to guaranteeing the facilitation of the operations under conditions of equity, transparency, and legality. (DIAN, 2020).

It is key to note that import, is one of the customs procedures that is most controlled in Colombia, given that by the time the merchandise is introduced, the need for customs is presented to an authorized economic operator associated with some obligations and requirements among which they should present imported goods to the customs authority, pay taxes, as well as to submit the import declaration

and follow customs requirements to nationalize the products.

In this process, it may be proved how much power the Colombian state holds through DIAN in an attempt to have control over the merchandise that will be brought into the country, thus it is only after the recognition and inspection conducted of the goods, it may be seized, confiscated or else sanctioned due to extemporaneous declarations, tariff classification that does not correspond to the products or even those that do not have the required permits to enter the country, it may result in legal abandonment or even legally left to Nation as a final resort of the process.

Eventually, the intention of formulating a jurisprudential line on due process in the proceedings of the Colombian customs authority on imported merchandise is to revise various judgments issued by the Constitutional Court and State Council, who have made a decision and established a judicial precedent concerning the legal problem under consideration, in addition to demanding the issue of a new sanctioning regime in customs matters in such a way that the principle of legality in foreign trade operations is adhered to respect.

2. Theoretical Framework

To address the due process of foreign trade operations, and more specifically in imports, it is necessary to revise merchandising-related concepts, declared goods under customs control, undeclared merchandise, and indeed the role of DIAN regarding these operations.

2.1 Merchandise under customs control and import process.

When merchandise is brought into the national customs territory coming from overseas or duty-free zone, it must be subjected to national legislation by going through customs control by which the competent authority is to ensure compliance with the customs, foreign exchange, tax, and foreign trade provisions for goods. It will be conducted during the entry, stay, transport, traffic, warehousing, and output of goods, loading units, as well as means of transport, either arriving or departing from the national territory. (OEA, 2021).

To initiate the due process as far as this customs regime, the importer or declarant is under the obligation to declare merchandise on their behalf or a customs-mandated third-party, by submitting the required documents to certify a legitimate introduction of foreign-market originated goods into the national customs territory – NCT. Thus, the Import Declaration – as endorsed on the DIAN 500 form - is the document by which declared and issued formally the entry of merchandise into NCT, providing some importer data, supplier, amount, tariff classification, weight, volume, and any other details that allow customs officials to identify the nature and origin of goods for the accurate assessment of the customs duties.

Furthermore, the authorized customs operator is to entirely include in their import declaration the necessary information that allows the classification and characterization of merchandise, including goods' minimal descriptions as regulated by the -Ministry of Trade, Industry, and Tourism - MTIT and DIAN, through Resolution 057 of 2015, which provides critical information to the officials involved in foreign trade operations and enforces the compliance of customs regulations.

Through Concept 065 of 2011, the DIAN stated as part of its doctrine, that it needs to be considered that the detailed information of

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the goods in the import customs document looks to reveal the nature, tariff position, customs regime, and any other obligations required to obtain the release of the goods. Consequently, it is highly mandatory to declare every possible detail that allows both individualization and singularization of the goods, regardless of whether these data are included in the packaging materials or product labels.

The declarant must also obtain prior information supporting the import declaration, in terms of the type of merchandise, which must be kept for a minimum of five (5) years, starting when the declaration is accepted.

Some of the required documents are as follows: prior import registration or license, issued by the corresponding entity according to the type of merchandise, commercial invoice; transport document; proof of origin as specified in the respective trade treaty or free-trade agreement; public health certificates, or those required by regulations. Customs mandate, if the power of attorney is delegated to a customs agency or any other person as a proxy; packing list and other documents required by the foreign trade (Art 177 of Decree 1165 del 2019).

As far as the regular nationalization procedure, the authorized customs operator is provided with one month (1) to declare the goods to the customs authority and obtain their corresponding release, which starts to run as of the date of entry into the NCT. The established term may be extended for up to 30 more days, provided that the extension is requested and approved by the customs authority. In case the term is expired and the goods are not released or re-shipped, it may result in legal abandonment.

The authorized customs operator may utilize the cargo as provided that they carry out the customs claim procedure as established in Article 293 of Decree 1165, for this process they will be given 30 days to present the required legalization import declaration and make the corresponding payments, or otherwise the goods will become the property of the nation (Art 171 Decree 1165 del 2019).

2.2 Non-declared Merchandise.

This concept refers, in accordance with Article 295 of Decree 1165 of 2019, to those goods that were not presented or declared under a procedure to the customs authority when entered into the NCT, they may be either seized or confiscated when the goods are not listed on a shipping form or import declaration or if errors or omissions are identified in the import document in data such as references, models, serial numbers or any other incomplete descriptions that lead to classifying goods differently or else that lead to a lower payment of customs duties; when the quantity of the goods that is physically present does not match with the one declared.

An event which is opposed to Article 647 of the same Decree, that provides as follows:

Article 647. Some grounds for seizure and confiscation of goods are set forth: goods shall be seized and confiscated in any of the following circumstances:

1. Goods not presented as required by customs regulations.

Incoming merchandise through unauthorized places will result in the seizure and confiscation of the means of transport.

2. Goods arriving from abroad that are not included in the documents required by the customs regulations.

3. Goods that do not adhere to the procedure laid down in Article 295 of Decree 1165.

In regards to this and pursuant to Decree 1165, Article 3, defines seizure as a precautionary measure by which goods or means of transport are being held up so that the customs authority can verify whether or not the introduction, permanence, and circulation into NCT is legal; and confiscation, defined as the process through which those goods or means of transport that have not complied with legal rules and formalities for required introduction, permanence and circulation into NCT,

The State Council, in judgment dated back on July 9, 2021, and through an analysis case conducted by DIAN about the seizure and confiscation of merchandise, stated as follows:

[…] Concerning errors in the information provided, it should be kept in mind that the description of the goods must make possible an individualization thereof. Thus, not all these errors of omission point out a lack of description. In the present case, the goods were declared and the fact that the "weight" element was questioned by the DIAN, does not constitute an act justifying the imposition and application of the sanction envisaged.

The difference indicated, therefore, has no impact on the value of the customs duties, nor does it prevent the merchandise from being fully identified; furthermore, the tariff position does not change, and there is no evidence that the interests of the State or the Nation's assets are affected; therefore, the fact of finding errors in the description of the merchandise, as held by the Council of State, is not a serious failure that should lead to a sanction.

As required by State Council, the customs authority must provide sufficient evidence to carry out seizure and confiscation procedures, especially in the case of declared goods that do not correspond to those listed in the import declaration and other documents necessary for the operation, since the imposition of a sanction may violate the constitutional right to due process, as set forth in Article 29 of the Political Constitution, which reads as follows:

Due process applies to all administrative and judicial proceedings. No one can be judged except by rules that pre-date the conduct of which he is accused. Moreover, it is the competent judges or courts that decide on any proceedings under the legal system.

2.3 National Taxes and Customs Authority and Due Process.

The National Taxes and Customs Authority (DIAN), was created in 1992 and laid down by Decree 2117 as an entity that falls under the Ministry of Finance and Public Credit and is designated as the competent authority for the customs administration. It aims to help secure Colombian taxation when it comes to foreign trade, as well as to protect the nationwide economy, through the administration, monitoring, and control of customs, foreign exchange, and tax responsibilities, in addition to guaranteeing the facilitation of the operations under conditions of equity, transparency, and legality (DIAN, 2020).

However, ever since the DIAN was given full power as the customs authority, it has shown some evidence of inconsistencies within corporate union, given the fact that aside from regulating not only the activities and operations of the customs regimes, but also the investigation and prosecution of alleged acts resulting in customs sanctions, a process that is not reasonable and proportionate about the constitutional rights of due process, the right to contradict and the right to defense, and that puts

in peril the principle of legal reserve and legal certainty.

As per Toro (2017), due process in the framework of customs law is fundamentally based on procedures that exhaust government channels and actions established by the General Procedural Code - CGP. In this way, it guarantees the right of individuals, and especially the authorized customs operators, to claim, defend, and argue their actions regarding the alleged perpetration of a customs offense.

The Constitutional Court from the case law defined in judgment C-034 of 2014, the concept of due process, stating that they are those conditions that have been defined to initiate an administrative process, in the face of the principle of legality; protection of legal goods, including access to justice, defense, and contradiction; moreover, this principle is an inherent and characteristic mechanism of the Rule of Law, which aims to guarantee the freedom of citizens against the exercise of public power.

In turn, Orejuela (2016) in his book Responsabilidad del Estado y sus regimens (State Liability and its regimes) exposes a series of failures that take place within the customs entity, mentioning the improper behavior of some officials in the retention of goods and delay of procedures, in their proceedings, argue the lack of supporting documents to prove the origin of the goods, a situation that apart from causing economic damage, violates due process and principles of efficiency, justice and favorability laid down in article 3 of Decree 1165 of 2019, concerning the customs regime.

Given the foregoing, it is necessary to revise the decision of the Constitutional Court and other instances in jurisprudence matters regarding the proceedings of the DIAN, to determine whether or not there is a violation of due process with the proceedings and competence that this authority has over the goods that are under customs control, which is why in Table 1, a review is done of a jurisprudential line on this matter, which includes the 13 judgments thoroughly analyzed. Its tendency toward the extremes indicates whether the concept issued indicates that there is a violation or not of due process.

Table 1. *Jurisprudential Line in the proceedings and jurisdiction of DIAN on goods under customs control in Colombia.*

¿ Is there a violation of due process with the proceedings and jurisdiction held by DIAN over goods under customs control in Colombia?		
NO	✓ C 052 de 1997 ✓ C 194 de 1998 ✓ C 343 de 2006 ✓ C 140 de 2007 ✓ C191 de 2016 ✓ C 403 de 2016 ✓ C 674 de 1999 ✓ C1161 de 2000 ✓ C 616 de 2002 ✓ S 2010-00541de 2014 ✓ C 441 de 2021 ✓ S 2018-00299-01 de 2022	**Yes**
There is no violation of due process by DIAN.		There is indeed a violation of due process by DIAN.

Source: self-made. (2023).

2.4 Jurisprudential Analysis

The Constitutional Court has given way to different positions and clarifications on this particular issue, for which the following jurisprudence will be discussed.

- ✓ Judgment C-052 of 1997:

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The facts demand the action pursuant to Article 180, of Law 223 of 1995, which reads as follows:

Article 180. Extraordinary powers. This article establishes the extraordinary powers awarded by the Colombian Political Constitution to the president to issue the new sanctioning regime in foreign exchange matters as well as the procedure for its implementation.

According to the complainant, the foregoing is contrary to Articles 150 (numbers 11, 12 and 19-a), 158, and 169 of the Colombian Political Constitution; and Decree 1092 of June 21, 1996, as a whole, emphasizing that powers are granted to the President that should be regulated by a Framework Legislation rather than by an Ordinary Law.

In that regard, the Constitutional Court states that Congress may grant some powers to the executive to issue the sanctioning regime in foreign exchange matters, as well as the respective procedure for the implementation, without this violating the provisions laid down by the Constitution.

This is how the Court awarded endorsement to the proceeding of the DIAN, declaring the questioned articles constitutional, which is in line with Article 590 of Decree 1165 of 2019, which states the following:

Article 590: states that the Special Administrative Unit of the National Taxes and Customs Authority - DIAN is the only entity authorized to verify foreign trade operations and the implementation of customs obligations by authorized users.

To be on the same line with the aforementioned, it should be highlighted that the customs control process refers to all the controls necessary to ensure the implementation of the customs obligations both in foreign trade operations and by authorized economic operators.

When one refers to the audit process, one can speak of a comprehensive process, which allows the verification of tax, exchange, and customs obligations.

- ✓ Judgment C 194 of 1998:

The objective of the ruling is to request the unconstitutional declaration of articles 15, 16, 17, 18, 19, 20, 21, and 51 number 1 of Law 383 of 1997, "Whereby regulations tending to strengthen the fight against tax evasion and smuggling are enacted, along with other provisions ", and against article 7 (partial) of Law 56 of 1981, stating that when administrative expropriation is carried out, as mentioned in articles 20 and 21, which refers to the seizure of the merchandise, it is contrary to the property regime in the country. (partial) of Law 56 of 1981, indicating that when administrative expropriation is carried out, such as the one mentioned in articles 20 and 21, which refers to the seizure of the merchandise, it is contrary to the property regime in Colombia, given that the seizure operations on the merchandise must be ordered by the judge and must be the outcome of a judicial process.

In regard to the contested norm, the Court declared the unconstitutional status of the articles disputed against Law 383 of 1997 and stated that a distinction must be made between the imposition of sanctions, fines, and the process of seizure and confiscation of the merchandise conducted by the customs authority and the criminal process to determine evasion and smuggling

Therefore, the Court indicates that the proceedings of the DIAN concerning the seizure

and confiscation of the merchandise are not any violation of the constitutional order.

- ✓ Judgment C-674 of 1999

The judgment refers to the application of Article 77 of Law 488 of 1998, which referred to the seizure of goods acquired without an invoice and which gave the DIAN full authority to impose the penalty. In this regard, the Court questioned the proceedings by the customs authority about the seizure of goods for failure to comply with such tax duty, making it clear that it is an action contrary to the Political Constitution due to the lack of proportionality between the penalty and the value of the goods seized.

- ✓ Judgment C 1161 of 2000

In the judgment, the unconstitutional status of Articles 52, 209 partial, and 211 partial of Decree Law 663 of 1993 is demanded.

The claim aims to allege that these provisions should be issued by a framework law rather than by decree law; additionally, since it goes against due process, the nature of the crime, and the proportionality of the penalty, laid down by constitutional principles.

Concerning this, the Court states that: even though there is a nexus between the sanctioning regime in customs matters and the regime itself, it cannot be concluded that the Government is empowered by the Political Charter to regulate it so that sanctions through decrees infringe the principle of legality.

Consequently, it is quite clear that the proceedings of DIAN when it comes to imposing sanctions violate the right to due process.

- ✓ Judgment C 616 of 2002:

In this judgment, the Court states that the sanctioning procedure as far as administrative proceedings must follow: (i) creation, (ii) implementation, and (iii) enforcement or imposition of the sanction.

Hence, if an authority is to impose a sanction, it must adhere to due administrative process to allow for the right to defense and contradiction.

Furthermore, the Court concludes in the contested case that:

Penalties should be set for commercial establishments, offices, consulting rooms, and other places where the profession or trade is carried out, "If raw materials, assets or goods that form part of the inventory, or goods received on consignment or in deposit, are seized for violation of the customs legislation in force".

Moreover, it must be taken into consideration that, as mentioned in ruling C-194 of 1998, the administrative sanctioning power must be distinguished from the criminal punitive power.

In effect, the customs authority must demonstrate, prior to enforcing the penalty, that the obligor failed to comply with any of the rules laid down in the customs legislation.

- ✓ Judgment c 343 of 2006

In the referred paragraph, it alluded to the institutional demand of literal aa) of Article 3 of Decree Law 1092 of 1996, modified by Article 1 of Decree Law 1074 of 1999, "whereby is established that the DIAN is responsible for the establishment of the Sanctioning Regime applicable to exchange infringements.

The complainant states that the aforementioned regulation is contrary to the principle of legal reserve as the exchange regime

is contained in laws, decrees, and administrative acts issued by the Bank of the Republic and the DIAN rather than by the legislative authority, which has full power to do so.

By contrast, the Court states that the DIAN is fully empowered to conduct preventive and repressive activities in foreign exchange matters, as well as to issue rules with information on processes, guidelines, and regulations issued by the Bank of the Republic and the national government, thus reaffirming the competence of the customs authority for these procedures without this implying a violation of the principle of reservation of law and due process.

- ✓ Judgment C-140 of 2007

This ruling refers to the claim regarding Article 13 of Law 1066 of 2006, "whereby rules are issued for the normalization of the public portfolio and other provisions are issued", as per the complainant, this provision extends exchange and customs obligations in the field of taxation, disregarding the provisions of paragraph 9 of Article 150 and paragraph 25 of Article 189 of the Constitution, according to which the legislator is only competent to issue "framework laws", to set objectives and guidelines that the Government must accept.

In this regard, the Court mentions that the contested norm is constitutional, which assures that:

"The government may utilize the Framework Laws and the Decrees which are created in matters such as tariffs, rates and other provisions of the customs regime, as trade measures that seek to limit the entry of goods into the National Customs Territory that may compete directly with Colombian companies under unfair trade practices. It also mentions that when establishing rules on tariffs, regarding customs nomenclature, tariff splitting, customs valuation and others related to international trade, the Government aims to protect the national industry, streamline production, ensure price stability by increasing or reducing tariffs, limit imports that may alter the general level of prices and the movements of supply and demand; bolster economic growth; protect domestic industry, boost investment, control domestic prices, defend consumers and encourage the competitiveness of domestic products. (bold and underlined outside the text).

With regard to the statement of the Court, it is quite clear that the executive can influence the customs regime through the competence assigned to the DIAN, provided that the action is justified to promote economic stability, and promote national production, among others.

- ✓ Judgment 2010-00541 from July 31 2014

By which, a case of a company that imports vehicles is presented, and which observes all the respective processes for the nationalization of the merchandise. However, one year after the goods had been imported into the country, the customs authority mailed an official notice to the importing company with a list of vehicles declared with apparent fraudulent invoices that did not match the related number or the value; in addition, the entity issued the order to the seizure of this merchandise to the officials in charge. Nonetheless, the procedure was unable to be conducted as the vehicle was no longer in the possession of the authorized economic operator, which is why, the authority proceeded to impose a penalty equivalent to 200% of the customs value thereof, and pursuant to article 503 of Decree 2685 of 1999.

Following this situation, the company filed a lawsuit, claiming that the customs authority had violated due process and did not allow the defense of the importer. This was upheld by the State Council, which stated that the evidence

collected by the complainant was not sufficient to determine the seizure and subsequently impose the penalty, due to the lack of accuracy of documents on which the DIAN based its decision, more specifically, on its preparation and execution, which is why they cannot be considered as evidence.

In turn, the jurisprudence formulated by the same company was brought up, which emphasizes that the customs authority is competent to ensure compliance with state purposes through the sanctioning power, yet, this shall be done under the principles of proportionality, legality, and due process (judgment C- 089 of 2011), a principle that was infringed in the case at hand and there was no action under the framework thereof, an evident reason to declare the nullity of the resolution issued by the respondent authority.

- ✓ Judgment C 403 of 2016

In this instance, the claim of Article 23 of Law 1762 of 2015, "whereby instruments are adopted to prevent, control and punish smuggling, money laundering, and tax evasion" is examined because it contravenes Article 29 of the Political Constitution which refers to due process.

In view of the above, the Court specifies that in Colombia there is a customs law that sets forth the procedure for the execution of the sanction, which guarantees the right to defense, pleadings, and the right to contest the proceeding within established terms; therefore, in the analyzed case where the seizure record is made and the confiscation order is imposed, only the appeal for reconsideration is applicable and there is no evidence of violation of due process in the administrative sanctioning law.

- ✓ Judgment C-191 of 2016

The subject matter addressed in the judgment has to do with the request made on the unconstitutional declaration of some lines contained in Articles 4, 6, 8, 8, 11, 14, 15 and Article 51 of Law 1762 of 2015, "Whereby instruments are adopted to prevent, control and punish smuggling, money laundering and tax evasion".

When it comes to this rebuttal, the Court establishes that the seizure and confiscation of the merchandise are made on those that are subject to the crime of smuggling, according to the grounds provided in the Customs Law, Article 552 of Decree 390 of 2016, and in the line with due process. Additionally, it states that, although the seizure process is applied to provide celerity and the preventive purposes of the administration, the authorized economic operator may contest the decision and exercise its right of contradiction and defense.

- ✓ Judgment C441 of 2021

Claim of unconstitutional status against number 4 of Article 5 of Law 1609 of 2013, "which determines the rules under which the Government shall be governed to modify tariffs, rates and other provisions concerning the Customs Regime."

The complainant states that:

The reservation of law is laid down on the sanctioning regimes, as they correspond to a legitimate function of the Congress of the Republic (Art. 150 CP) and in this particular case, since they are not issued by the legislative power, one is facing a violation of the principle of reservation of law.

In this context, the Court states as follows:

Following the issue of Article 5, number 4 of Law 1609 of 2013, the legislator disregarded the principles of legality and typicality that make up due process (Art. 29 of the Constitution) as it transferred to the Government, openly and irregularly, a power that is its exclusive competence, with which the determination of the elements that constitute the sanctioning liability in customs matters and the seizure of goods, as well as the administrative process applicable in these matters, was left to the discretionary judgment of that as an administrative authority.

Owing to this reason, the issue of the sanctioning regime about the Colombian customs regime must be carried out under the principle of legal reserve which is awarded to the legislative bodies, as opposed to the way it has been operating up to date, which is done by the executive power through the competent customs authority by the current Decree 1165 of 2019 and Decree 360 of 2021.

Consequently, it is necessary that, no later than 20 June 2023, the Congress of the Republic issues a Law that contemplates the sanctioning regime and seizure of goods in customs matters, as well as the applicable administrative process.

- ✓ Judgment, from September 8 2022

In this particular case, the National Taxes and Customs Authority issued a customs demand to an importing company to propose the correction of 6 import declarations submitted in 2014, which had declared footwear products coming from Mexico. In this notification, the customs authority states that the imported goods do not qualify as originating in the exporting country, and therefore cannot benefit from the Free Trade Agreement established between the United States, Mexico, and Colombia. Thus, the correction of import declarations entails the adjustment of customs duties, in other words, paying an ad valorem tariff of 10% plus a specific tariff of $US5 for each pair of shoes, in addition to the respective penalty.

In response to this decision, the complainant company stated that the customs authority had never recognized either of the certificates of origin issued by the supplier and not to mention, did it state the falsity of the certificates of origin following the procedure in line with article 269 of the General Process Code (CGP), to determine their authenticity. Moreover, the State Council resolved that the DIAN did violate due process since the entity issued administrative acts without taking into consideration the provisions of the CGP.

3. Methodology

The methodology, as described, is qualitative and documentary, which entails a procedural approach, by which an analysis of judgments is conducted in addition to jurisprudential documents that have marked the history of regulations on a particular topic. A jurisprudential line allows the study of the decisions and precedents that have marked the Colombian Supreme Courts regarding major issues in the legal field, providing a reference for upcoming decisions. The following methodological approach was considered for this particular case:

i) Choice of the subject matter on which the line of jurisprudence was carried out.
ii) Determine the legal problem linked to the topic, identifying individuals, facts, and applicable regulations.
iii) Identification of judgments that correspond to the topic of study for the line of jurisprudence.
iv) Analysis of judgments and selection of the 13 most relevant and precedent-setting rulings.
v) Selection of the judgments according to the decisions made by the courts, whose placement is based on the effects of the decisions made.

vi) Finally, an overview analysis and conclusions are drawn up.

4. Outcomes

Judgment C441 of 2021 of the Constitutional Court marks a major milestone by emphasizing the need for the sanctioning process in customs matters must be enacted by the competent legislative body. This decision reflects a fundamental concern about the separation of powers and the importance of respecting the legal reserve in the regulation of customs sanctions.

This ruling sets a definite deadline, until June 20, 2023, for the Congress of the Republic to adopt the sanctioning system and confiscation of goods, as well as the related administrative procedure. This legal provision provides a specific timeframe as a countermeasure for the lack of clarity and adequate regulation in the customs field and gives stakeholders a clear expectation of the pending legislative changes.

This judicial development raises both challenges and opportunities for the customs community, and so does for the government. The necessity to bring regulations in line with the Constitutional Court's guidelines focuses on the importance of ensuring that customs practices are consistent with constitutional principles while opening the door to a broader discussion on the optimization of administrative and sanctioning processes in the Colombian customs context.

5. Conclusions

As can be seen in the analysis of the jurisprudential line, the Constitutional Court and the State Council have repeatedly ruled on the proceedings of the customs authority as far as the due process that the entity performs on imported goods, emphasizing that although the government has the full power to adjust the tariff regime, rates and other provisions of the customs regime, given that it is only possible to do so due to the trade policy with the sole goal of promoting national production, ensuring economic stability, and promoting economic growth, among others.

It remains clear that the Colombian customs authority is competent to make prior and after control of the goods brought into the national territory from abroad, yet, the process and conditions for each procedure are not clear, as the importers display dissatisfaction with the extemporaneous actions, delay of processes, administrative acts issued by the same customs entity that infringes the due process, especially in proceedings of seizure and confiscation; this type of reality is called into question with the ruling C 441 of 2021, where the Court states that the sanctioning process must be issued by the competent legislative body rather than by the customs authority, as it has been performed up to date.

As per judgment C 441 of 2021, the Constitutional Court ruled that the procedure implemented by the Customs Administration concerning the sanctioning regime failed to comply with the principle of legal reserve, as the Congress of the Republic is the one with full power to regulate sanctioning matters, and therefore granted a maximum deadline up to June 20, 2023, for adopting sanctioning and seizure regime for goods in customs matters, as well as the applicable administrative procedure.

Along the same line, Franco (2020) suggests that in the DIAN audit process, the intervention of a third party, such as a judge, is essential to oversee the precautionary measures carried out in the customs process, and thus ensure compliance with constitutional rights in the light of the principles of reasonableness, proportionality, and legality.

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Considering this scenario, different opinions have emerged, some in favor of the Court's decision and others against it, it is the violation of due process that is indisputable, not only in the proceedings of the DIAN in the cases analyzed above but also in the implementation of the regulation that contains the sanctioning regime in customs matters, since the principles of legality and typicality are infringed by transferring the exclusive competence of the legal reserve that corresponds to the legislator rather than to the executive, as in the case under study and that remains unchanged until now.

6. References

Corte Constitucional Colombiana, Sentencia C-052 /97, https://www.corteconstitucional.gov.co/relatoria/1997/c-052-97.html

Corte Constitucional Colombiana, Sentencia C-194/98, https://www.corteconstitucional.gov.co/relatoria/1998/C-194-98.htm#:~:text=C%2D194%2D98%20Corte%20Constitucional%20de%20Colombia&text=En%20relaci%C3%B3n%20con%20la%20determinaci%C3%B3n,los%20funcionarios%20de%20la%20DIAN.

Corte Constitucional Colombiana, Sentencia C-674 de 1999 https://www.corteconstitucional.gov.co/relatoria/1999/c-674-99.htm#:~:text=1.,apoyo%20de%20la%20fuerza%20p%C3%BAblica.

Corte Constitucional Colombiana, Sentencia C 1161 de 2000 https://www.corteconstitucional.gov.co/relatoria/2000/C-1161-00.html

Corte Constitucional Colombiana, Sentencia C-616 /02, https://www.corteconstitucional.gov.co/relatoria/2002/C-616-02.htm#:~:text=Se%C3%B1ala%20que%20la%20norma%20acusada,pueden%20ser%20objeto%20de%20clausura.

Corte Constitucional Colombiana, Sentencia C-798 de 2004, https://www.corteconstitucional.gov.co/relatoria/2004/C-798-04.htm#:~:text=Sentencia%20C%2D798%2F04&text=La%20Corte%20defini%C3%B3%20que%20dentro,privada%E2%80%9D%2C%20%E2%80%9Cotorgarle.

Corte Constitucional Colombiana, Sentencia C-343 de 2006, https://www.corteconstitucional.gov.co/relatoria/2006/c-343-06.html

Corte Constitucional Colombiana, Sentencia C-140 de 2007, https://www.corteconstitucional.gov.co/relatoria/2007/C-140-07.html

Corte Constitucional Colombiana, sentencia C-089 de 2011. https://www.corteconstitucional.gov.co/relatoria/2011/c-089-11.htm#:~:text=Sentencia%20C%2D089%2F11&text=La%20jurisprudencia%20constitucional%20ha%20diferenciado,debido%20proceso%20en%20materia%20administrativa.

Consejo de Estado. Sentencia 2010-00541 del 2014 Julio 31, http://www.consejodeestado.gov.co/documentos/boletines/153/S1/08001-23-31-000-2010-00541-01.pdf

Corte Constitucional Sentencia C 034, del 29 de enero de 2014. https://www.corteconstitucional.gov.co/relatoria/2014/C-034-14.html.

Corte Constitucional Colombiana, Sentencia C 403 del 2016 https://www.corteconstitucional.gov.co/relatoria/2016/C-403-16.html

Corte Constitucional Colombiana, Sentencia C 191 de 2016 https://www.corteconstitucional.gov.co/relatoria/2016/c-191-16.html

Corte Constitucional Colombiana, Sentencia C 441/21, https://www.corteconstitucional.gov.co/Relatoria/2021/C-441-21.html

Consejo de Estado. Sentencia del 8 de septiembre de 2022 https://www.legiscomexalinstante.com/BancoMedios/Documentos%20PDF/sent-080012333000201800299O1%2825456%29-22.pdf

Consejo de Estado, Sentencia 08001233100020080032101 del 9 de julio de 2021. https://www.consejodeestado.gov.co/wp-content/uploads/2021/08/FalloDIAN.pdf

Código General del Proceso [CGP]. Ley 1564 de 2012. 12 de julio de 2012 (Colombia). http://www.secretariasenado.gov.co/senado/basedoc/ley_1564_2012.html

Constitución Política de Colombia [Const]. Art. 29. 7 de julio de 1991 (Colombia). http://www.secretariasenado.gov.co/senado/basedoc/constitucion_politica_1991.html

Dirección de Impuestos y Aduanas Nacionales (1996). Decreto 1092 de 1996. Régimen sancionatorio y procedimiento administrativo cambiario. 21 de junio de 1996. (Colombia).

Dirección de Impuestos y Aduanas Nacionales. (2011). Subdirección de Gestión Normativa y Doctrina. https://www2.deloitte.com/content/dam/Deloitte/co/Documents/legal/comercioexterior/2021/Enero/Tercerasemana/(4)%20DIAN%20-%20Concepto%20No.%201430%20del%204%20de%20noviembre%20de%202020.pdf

Dirección de Impuestos y Aduanas Nacionales (2020). Decreto 2117 de 1992. Fusión de la dirección de impuestos nacionales y la dirección de aduanas nacionales (Colombia). https://www.funcionpublica.gov.co/eva/gestornormativo/norma.php?i=69793.

Dirección de Impuestos y aduanas nacionales. 2022. La Entidad. https://www.dian.gov.co/dian/entidad/Paginas/Presentacion.aspx

Franco, J. P. (2020). Repositorio UNAULA. http://52.170.20.67:8080/bitstream/123456789/1369/3/unaula_rep_pre_der_2020_necesidad_control_judicial_aprehension_mercancia.pdf

Ministerio de Hacienda y Crédito Público. Decreto 1165 de 2019. Estatuto aduanero. Bogotá. 2 de julio de 2019.

OEA. (2021). Sistema de Información de Comercio Exterior. http://www.sice.oas.org/trade/junac/decisiones/dec574s.asp

Orejuela, W. R. (2016). Responsabilidad del Estado y sus regímenes. ECOE. https://www.ecoeediciones.mx/wp-content/uploads/2016/03/Responsabilidad-del-Estado-y-sus-regi%CC%81menes-3ra-Edicio%CC%81n.pdf

Resolución 057 de 2015. Descripciones mínimas mercancía importada. 13 de abril de 2015. (Colombia.

Toro, A. A. (2017). ABCES sobre principios rectores del sistema aduanero colombiano. ABCES jurídico. http://hdl.handle.net/10946/3603

WTO. 2021. La OMC y la Organización Mundial de Aduanas (OMA). https://www.wto.org/spanish/thewto_s/coher_s/wto_wco_s.htm.

Zamora Torres, América Ivonne, & Navarro Chávez, José César Lenin. (2014). Eficiencia de la administración pública aduanera a través del modelo DEA. Con fines de relaciones internacionales y ciencia política, 10(20), 117-135. Recuperado en 14 de noviembre de 2022, de http://www.scielo.org.mx/scielo.php?script=sci_arttext&pid=S1870-35692014000200006&lng=es&tlng=es.