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REGULATORY BRIEFING NEWSLETTER

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Editor's Note. Undervaluation of imported merchandise and antitrust law. By A. Noboa Pagán.

The General Customs Bureau (DGA in Spanish) is immersed in a process of reform, modernization, facilitation and control of the activities related to the fiscal control of imported merchandise. To this end the DGA has emphasized efforts to eliminate and avoid fraudulent practices in detriment of customs collections, like undervaluation.

Undervaluation occurs when a merchandise's value is reduced once declared at Customs. It is considered fraudulent when it is done with the purpose of reducing the taxable base and obtaining a minimum liquidation. According to customs regulations, the importer should turn in a merchandise statement, an act that follows the rigidities established in Law No. 3489 of February 25, 1953 and its modifications, by which he indicates the value of the imported merchandise and the customs regime that, in his consideration, should be applied. Also he should communicate the elements required by Customs for the application of the regime in question.

The DGA's new politics have put into practice the initiation of investigation processes, which will permit the authorities to, among other aspects, determine actual and appropriate reference values of the imported merchandise, thru valuation control systems that ensure the proper customs taxes collection by their importing and the fair competition among trade agents in the local market.

Customs tariffs are taxes based on merchandise value, as they are declared by the importer and revised by customs authorities, according to the mechanisms of valuation established in the law. This makes necessary that, from time to time, the DGA investigate and adopt valuation decisions to bring up to date the imported merchandise reference values under the indicated nomenclatures and if the DGA should find discrepancies, notify the interested parties and if necessary, impose administrative sanctions and collect unsettled charges, when verified the existence of undervaluated statements.

The World Customs Organization (WCO) Customs Valuation Control Handbook establishes that a first control exercised by the authorities should verify that the declared price is in accordance with the common price in that realm of industry or trade and with identical or similar merchandises. According to the recommendations established by the Technical Committee on Customs Valuation of the WCO, through the Guidelines related to the elaboration and utilization of a national valuation database that operates as a risk evaluation instrument, resulting appropriate to establish a database of values, criterion conceived as an instrument to evaluate the potential risks

with regard to the veracity or accuracy of the declared values, permitting thus to select determined Importing Destinations of for its subsequent exam.

In application of the valuation system in accordance with the article VII of the Valuation GATT-WTO Agreement, approved thru resolution No. 2-95 of Congress, the administration sets aside the application of the minimum value principle and abides by the new stipulations contained in the referred treaty, which within its provisions establishes a new valuation control pattern, since the minimum value principle has been considered as one of the main obstacles to trade.

The primary basis for merchandise valuation, for customs purposes, is the transaction value, this is the actually price paid or payable for the imported merchandise, adjusted according with the provision article 8 of GATT's Valuation Agreement. The value for customs purposes should not be based on arbitrary or fictitious values. Customs will be able to accept as the base value for transaction of the imported merchandise, a freely negotiated price by the involved parties, that is not subject to restrictions nor depends on some condition or consideration; or thru the value of any part of the proceeds of any subsequent resale, disposal or use of the imported goods that accrues directly or indirectly to the seller, provided that the duty adjustment according to said article can be performed.[1]

In the case of imported products that participate in highly competitive local markets, the DGA should verify that the values statement has been integral and properly filled and that has been accompanied with the required justification documents. In these cases the DGA should maximize their work of control, reviewing if the declared value concurs with that of identical or similar merchandise sold or offered for sale in the ordinary course of trade by other companies.

A verification of the value declared in this case, should include an investigation of the existence of proof of sale, such as invoice revision, contracts and orders; the commercial or possible corporate relations between the importer and its supplier abroad; weighing of the physical, technical and quality characteristics, with similar or identical products imported by other companies in the country; time in which said merchandise respect to other identical or similar imported merchandise, among others aspects regulated by the GATT.

The behaviour of the final prices to which the products in the local market are sold, constitute an important evidence that can orient Customs inspectors to suspect that some importers could also be incurring in a form of undervaluation, be it by declaring

[1] World Customs Organization (WCO), 1999 Customs Valuation Control Handbook, published by the DGA, Editorial Gente, Page 11, 2005.

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the merchandise under the actual product cost or intake in the international market of suppliers, or by other possible motives like a connection between the importing company and the foreign supplying company or other possible anticompetitive conducts that the DGA should take into account in its investigation.

The efforts carried out by the DGA, in execution of the previously described regulation, after their recently obtained autonomy, are the application of dispositions that govern our legal system since the signature and ratification of the GATT-WTO Agreement, those that in light of the renewed international trade relations resulting from the DR-CAFTA entering into force, are of great importance in overcoming obstacles to commerce originated in alterations to customs declarations. Therefore, all measures taken by the DGA which reflect the referred regulations are not but the necessary modernization of their fiscal control works, in benefit of the State, which parallelly restrain the opportunities of distorting practices on free and fair competition in the local market, objective promoted by said treaty.

Information Technology. The Dominican Republic joins the WTO's Information Technology Agreement. By Y. Martínez Oller

On July 7 2006, the Dominican Republic, after expressing an interest in becoming a participant in the WTO's Information Technology Agreement (ITA), became the 68th member of the ITA, when the Committee of Participants on the Expansion of Trade in Information Technology Products approved its participation.

The ITA is a tariff cutting mechanism concluded at the Singapore Ministerial Conference in December 1996, originally with 29 signatories. Participation in the ITA means abiding by the three basic principles: 1) all products listed in the Declaration must be covered; 2) all must be reduced to a zero tariff level; and 3) all other duties and charges (ODCs) must be bound at zero. The commitments undertaken under the ITA in the WTO are on a most favoured nation (MFN) basis, and therefore benefits accrue to all other WTO Members.

The Declaration stipulated that participants representing approximately 90 percent of world trade would have to notify their acceptance of the ITA by 1 April 1997. When the 90 percent criteria had been met the ITA entered into force with the first staged reduction in tariffs occurring on July 1st 1997.

The actual 68 signatories account for more than 97% of world trade in IT products, meaning that most of the world trade in information technology products became

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completely free of tariffs under ITA. "This WTO agreement is helping push the information technology revolution forward", as put in words by the WTO.

The other ITA participants are: Albania; Australia; Bahrain; Bulgaria; Canada; China; Costa Rica; Croatia; Egypt; El Salvador; European Communities (all 25 of EC member states.); Georgia; Hong Kong, China; Honduras; Iceland; India; Indonesia; Israel; Japan; Jordan; Korea; Kyrgyz Republic; Macao, China; Malaysia; Mauritius; Moldova; Morocco; New Zealand; Nicaragua; Norway; Oman; Panama; Philippines; Romania; Saudi Arabia; Chinese Taipei; Singapore; Switzerland (on behalf of the customs union Switzerland and Liechtenstein); Thailand; Turkey; and the United States.

Securities. Agreement on the first Securitization Company in the Dominican Republic. By Y. Martínez Oller

Recently, in a meeting with the Asociación La Nacional de Ahorros y Préstamos, the Asociación Popular de Ahorros y Préstamos, the Centro Financiero BHD, the Corporación Financiera Internacional (subsidiary of the World Bank), the Grupo Popular, the Titularizadora Colombiana and the Grupo Financiero León, with the presence of the Governor of the Banco Central, Hector Valdez Albizu, an agreement was signed by means of which will be constituted the first Securitization Company of the Dominican Republic.

Securitization Companies have been created by the Dominican Stock Market Law 19-00, of the year 2000, in its articles 107 and following. This law establishes that securitization is the process by which a patrimony is constituted with the exclusive purpose to guarantee payment of the rights conferred to holders of issued securities with debit to said patrimony; it also comprehends the transfer or pooling of assets to the referred patrimony and the issuance of the respective securities.

The Titularizadora Dominicana (or the Dominican Securitization Company), commercial name which will be given to the emerging company, will have as its main objective the acquisition of assets for the constitution of autonomous patrimonies or portfolios which will serve as guarantee to securitized bond emissions, to be negotiated in the market by public emissions; as well as broaden the offer of financial instruments.

The properties and assets capable of being securitized are: Banks and Associations of savings and loans mortgage portfolios (which constitute the means by excellence to motorize these procedures, as long as they have a reliable cash flow); trade receivables of the real economic sector; consumption and commercial accounts; properties built

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with cash flows; real estate projects; State infrastructure works and public utilities; security titles accounts; credit documents, among others.

Securitization processes help obtain long term financing, propelling the execution of investment projects; generate liquidity, through investors that attract capitals and resources of multiple uses; help give greater depth to the market, and invigorate the economy with new and alternate business options, that minimize risks and increase profit value; and, in the words of the Governor "represent a top of the line tool to take advantage of the attractive opportunities of the DR-CAFTA".

Banco Central has incurred in these mechanisms and, through the COPRA (Committee of Politics for the Realization of Assets), has summoned to the first real estate securitization, with the Playa Grande Project, whose property was sold through a 12 year payment plan.

The DR relies on the creation of the National Counsel of Securities, the Superintendence of Securities, the Stock Exchange, Stock Market Posts, the Securities Head Office, approved risks qualifiers, as well as most of the necessary laws and regulations. The initiative to endow the DR with a securitization company is presented in a context in which the DR has the entire operational and legal infrastructure required to help propel the Dominican stock market.

E-Commerce. INDOTEL Board of Directors Ruling number 113-06 that decides on the total of the bond or responsibility insurance that should hire the companies that request to be acknowledged as certifying entities, to cover the possible damages that can be caused to digital certificates subscribers. By Y. Martínez Oller.

Law No. 126-02 on E-Commerce, Documents, and Digital Signatures, institutes in its IV Title, the legal framework for the creation and constitution of a Certifying Entity. These entities will be able, once authorized, to issue certificates which endorse digital signatures, offer services to create digital signatures, among other things.

According to article 16 of the Application Regulation of Law 126-02, approved through Decree No. 335-03, dated April 8, 2003, the Certifying Entities, as a requirement to solicit authorization to offer Digital Certification services, have the obligation to hire an appropriate insurance to face the possible damages they could cause to digital certification subscribers, based on the responsibilities assumed as providers of digital certification services.

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Said guarantee and insurance will be able to consist of a commercial surety lent by a financial mediation company, as well as a responsibility insurance properly hired with an insurance company.

INDOTEL acting by virtue of the attributions conferred to it by article 56 of Law 126-02, as vigilant entity and attendant of the control of the activities developed by the certifying entities, emitted a ruling establishing the amount of the bond or guarantee that these companies should lend. The ruling ultimately establishes that the amount of bond should be the equivalent in Dominican Pesos, as a minimum, of the sum of Eighty Thousand Dollars of United States of North America with 00/100 (US$80,000.00).

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