

# Why the future Revised Kyoto Convention should contain comprehensive rules of customs debt

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## Abstract

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The Revised Kyoto Convention (RKC) is currently being reviewed as part of an ongoing review process. The aim of the comprehensive review is to enhance the current provisions and advance them in order to meet today's needs and challenges. It is the intention of the World Customs Organization (WCO) that the RKC remains the blueprint for modern and efficient customs procedures in the 21st century. This should also apply to customs debt issues since customs debt law constitutes a central aspect of all national customs legislation. The status quo of the RKC does not, however, correspond to the fundamental role of this decisive area in customs law.

Against this background, this article deals with the motivations, extent and intermediate results of the present review process. Moreover, it examines the advantages and challenges of a comprehensive and harmonised implementation of the Convention. In particular, it addresses the proposal of establishing a global standard, a model law, regarding customs debt issues for national customs legislation that would foster transparency, facilitation and predictability, while at the same time reducing randomness and complexity. The article provides an insight into the status quo of the current RKC provisions relating to customs debt and looks at some national legislation regarding these issues. It illustrates why it is necessary that a future RKC includes harmonised standards and/or recommended practices regarding the incurrence, payment and extinguishment of a customs debt and it also elaborates on the principles and concepts, such as the economic theory of customs, that should be reflected and included in a possible system of customs debt provisions.

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## 1. The comprehensive review of the Revised Kyoto Convention

### 1.1 Background, proceeding and intermediate results

In June 2018, the WCO Policy Commission and Council decided that it was time to review the RKC and approved the setting up of a Working Group with three subgroups working intersessionally. The review is supposed to be comprehensive, covering both the structure and content of all provisions of the RKC, including the Body of the Convention, the General Annex (GA), the Specific Annexes (SAs) and the Guidelines.

The motivation for such an extensive review is that the RKC, which entered into force in 2006, should be adapted to meet today's needs and challenges. The Convention is supposed to remain a blueprint for modern and efficient customs procedures in the 21st century. Consequently, it has to be progressive and flexible enough to meet these requirements and expectations. For this reason, all provisions (standards, recommended standards etc.) as well as the structural system of the current version are mooted.

Against this background, a review process was started in September 2018. After having agreed on a general way of proceeding, the WCO called for proposals for improving or changing the RKC. To ensure an inclusive approach to the review, external stakeholders—such as other international organisations, regional organisations, industry associations, the private sector, development partners and academia—were encouraged to participate and engage. So far, some 170 proposals relating to 37 concepts have been submitted by members and external stakeholders. Most of these have also been presented, discussed and debated in the several meetings of the RKC Working Group. Moreover, challenges and benefits of implementation of the RKC have been continuously discussed in seven extensive meetings of the Working Group so far.

For the purposes of classification, and in order to handle the high amount of proposals, a tracking system has been established that categorises and ranks the different suggestions according to their level of maturity. Track 'D' and 'C' category proposals are not convincing or lack the necessary substantial input that is needed to understand and progress the suggestions. Proposals are placed in the 'B' category where there is no agreement among the members of the RKC Working Group and are thus put on hold pending provision of further information by the proponent. Finally, a proposal is placed in the 'A' category if the members agree on it and it is elaborated sufficiently to move forward in the review process.

After these intermediate results, all proposals and concepts that have been classified in or upgraded to the 'A' category will move on to the next stage of the review process and will be subject to more concrete measures. These steps will include legal drafts of the provisions and more in-depth discussions on the details. It is the aim of the WCO to complete the review and to adopt the new Convention in 2021. Due to the global outbreak of the coronavirus, meetings of the RKC Working Group have had to be postponed, which may lead to a modified schedule for completion of its work.

### **1.2 Advantages of an appropriate and harmonised implementation**

The instrument of the RKC has laid down the global standard for all modern Customs legislations since 1999 (WCO, 2008) covering, *inter alia*, customs obligations and controls, customs declarations and customs procedures. It aims to simplify international trade. This aim can most effectively be reached by advancing its harmonised and comprehensive implementation.

First of all, one has to remember why a reasonable implementation of the RKC is important and necessary. The main reason is based on global trade challenges, such as the growing importance of global value chains, the burgeoning corpus of bilateral and regional free trade agreements, digitalisation and the other significant technological developments of the past years (for information on trade challenges see Wolfgang & Rogmann, 2019). Moreover, there are a number of other socio-economic developments with significant effects on Customs and international trade, such as increasing populations, shifts in economic and political centres of power, the lack of sustainable economic development, the need to protect the environment, risks associated with international supply chains, and nationalisation tendencies or misgivings about globalisation.

Against the background of all these global challenges, an appropriate and harmonised implementation of the RKC results in more predictability and certainty of the law, a better and comprehensive harmonisation of customs procedures and processes and, consequently, it would result in even more compatibility among the different national legislations. This alone will lead to more trade facilitation and thus support the goals of the RKC.

In addition to these aspects, a reasonable and harmonised implementation of the RKC would be extremely efficient and beneficial to all member countries. At the level of the World Trade Organization (WTO), the Trade Facilitation Agreement (TFA) regulates many trade simplifications, which are already contained in the RKC (Wolffgang & Kafeero, 2014). If the TFA is implemented worldwide, the WTO predicts an average additional annual economic growth of 0.9 per cent for developing countries and 0.25 per cent for industrial nations. It has to be admitted that there are no statistics for the RKC, but a comprehensive implementation of the RKC could considerably exceed the estimates of the WTO since the provisions of the TFA are rather vague, whereas those of the RKC are far more specific (Wolffgang & Rogmann, 2019).

### **1.3 Challenges and issues**

The comprehensive implementation of the Convention holds many advantages but at the same time it confronts the WCO and its members with the challenge to cope with a legal structure not designed for simple transformation into national legislation. The main reasons for the difficulties regarding an appropriate implementation process result from the legal structure of the RKC itself and the need to enhance cooperation in customs practice.

#### **Legal structure of the RKC**

The current nature of the provisions of the RKC and their binding character do not satisfy the requirements that a blueprint for modern and efficient customs procedures in the 21st century, a model for national legislation, should show. The provisions should be made more binding in order to guarantee a more harmonised implementation followed by gains and advantages that all WCO countries could benefit from. The status quo is that the provisions of the RKC show shades and differences in their degree of obligation. The binding force of the provisions is different.<sup>1</sup> Even the legal components of the RKC have an unequal legal character.<sup>2</sup>

For instance, the members' freedom in deciding their commitment regarding the Specific Annexes or just some of its chapters and the possibility to make various reservations against the contents result in a fragmentation of law. So, the possibility of picking the provisions a member wants to be committed to also leads to a fragmentation of implementation since the content of this implementation differs from state to state, depending on the number of accepted Specific Annexes and recommended practices. Of course, this is already an improvement compared to the previous version of the RKC in 1973 and it is, according to international law, more binding. However, the fact that the Specific Annexes lack a necessary degree of commitment might obstruct and delay a reasonable and efficient implementation of the RKC as a whole.

At least from an academic perspective, a future RKC should be more mandatory than its current version, coming closer to a global model law for national customs legislation. This would greatly increase its advantages and result in a more appropriate and harmonised implementation. At the same time, a future convention must permit a certain degree of flexibility in order to satisfy the different members' stages of development.

It should be taken into consideration that national legislation follows developments and has to manage situations which are—in many cases—unpredictable and cannot be planned in advance.

So there must be appropriate solutions in the provisions.

A more binding character of the RKC could be achieved by principles that are already known under international law but nevertheless guarantee a certain degree of flexibility:

- More provisions or all provisions in the Specific Annexes should be binding.
- Members should not have the option to pick the provisions they want to be committed to or a member's reservations should be limited or not accepted without the consent of other members.
- The principle of reciprocity or mutual administrative assistance should apply: a contracting party should be obliged to render assistance to another one only when both parties have accepted the same annex.<sup>3</sup>

A compromise approach could be that different transitional periods of implementation for the member states are determined according to their stage of development. The difference and advantage over the status quo is that there would be specific timelines that may act firstly as indicative and later as definitive dates of implementation. These timelines could also be combined with other instruments of flexibility.<sup>4</sup> Admittedly, this would again, even though just temporarily, lead to a fragmentation of law.

Nations could even go a step further and consider combining the RKC with other instruments, such as the SAFE Framework of Standards to Secure and Facilitate Global Trade or other WCO standards, into a single code that is legally binding. As WCO standards are currently fragmented, a comprehensive instrument could prove very helpful and powerful and not only with regard to its implementation.

### **Customs-related cooperation**

All the current global trade challenges demand greater cooperation when it comes to Customs. This customs-related cooperation itself is a challenge, too. It includes not only customs administrations, companies or other players in the international trade but also international organisations like the WCO and their instruments as well as public and private sector stakeholders in the area of international trade, logistics, safety and security.<sup>5</sup> The WCO should direct and further enhance the goal of such a global partnership.

A harmonised implementation of the RKC could help to enhance cooperation that is needed to face the current and future global challenges. The WCO itself should respond to the challenges as proactively as possible and issue regulations and standards in a more mandatory manner. Consequently, the challenge for Customs lies in implementing the available legislative framework as effectively as possible. However, there must also be a rethink when it comes to the implementation of future customs rules. It is possible to increase the effectiveness and efficiency of the limited resources available to customs administrations by increasing partnerships between them and economic operators (i.e. more 'trust' in trusted traders and less interference in the trade supply chain).

## **2. Proposal for a global standard of customs debt rules**

The RKC aims to simplify and harmonise customs procedures. The past has shown that this aim has already been performed and worked well for many areas that are regulated in the Convention. The importance and necessity of a comprehensive review of the RKC for modern and efficient customs procedures as well as its desired harmonised implementation are obvious and have already been illustrated above.<sup>6</sup> These aspects of harmonisation and simplification should also apply to customs debt issues since customs debt law constitutes a central aspect of every national customs legislation. The current RKC does not reflect the need to deliver a standard for customs debt provisions so far. For this reason, global standards regarding customs debt issues should ideally form part of the future Convention in order to achieve a sufficient degree of harmonisation of customs procedures and practices.

## 2.1 Importance for Customs, customs procedures and rulings

Customs debt law is a central and decisive element in every import and—if applicable—export process. In this regard, it makes a great difference whether goods arriving or leaving a country are immediately subject to the incurrance of a customs debt or whether the customs clearance is paused or pending. The latter option incurs more operating expense for both the customs authorities and the economic operators. Furthermore, an appropriate customs debt law will help and support a state to levy the relevant customs duties. All this means that a comprehensive system of customs debt rules is indispensable for the efficient processing of the flow of commodities while at the same time ensuring the correct levying of customs duties.

Moreover, all customs procedures are closely connected to issues of and around the incurrance of a customs debt. At the end of every customs procedure the question about a possible customs debt is normally raised. For instance, in relation to the warehouse procedure, no customs debt incurs as long as the goods are placed under this regime. If the goods are removed from the warehouse they have to be either released for free circulation, with the consequence that a customs debt arises, or they are removed from the customs territory of the respective country with the consequence that no customs debt arises. This principle also applies to other customs procedures (such as transit, inward processing or temporary admission) that avoid the incurrance of a customs debt and thus customs duties. This also shows that the question of customs debt and payment of customs duties is an important factor and outcome before and after all customs procedures. Consequently, the circumstances under which a customs debt on import or export is incurred and other relevant factors in this context (such as time, place, possible debtors or extinguishment)<sup>7</sup> should be clarified, defined and set out in harmonised provisions.

Besides their importance for customs procedures, issues of customs debt law directly or indirectly affect other customs rulings. For instance, the time at which a customs debt is incurred is important for determining the customs value of goods or the relevant tariff rate and thus for the amount of the customs duties that have to be paid by the economic operator. Moreover, in some national legislations not only the customs value but also the customs debt, if such rules exist, are dependent or interlinked with the incurrance and assessment of other domestic duties and taxes, such as VAT.

All these different aspects of customs processes and their interdependence to the field of customs debt show the global importance of and the need for customs debt rules that provide more concrete guidance to national legislation.

## 2.2 Advantages of comprehensive rules on customs debt

Having illustrated the relevance of customs debt provisions in general, the next step is to show what kind of advantages comprehensive rules would entail. Besides the fact that a global standard would achieve a sufficient degree of harmonisation of customs procedures and practices among the different national legislations and lead to a better interoperability, such provisions will also lead to greater legal certainty for customs authorities and economic operators. Moreover, a comprehensive and coherent customs debt law will help to better levy customs duties as public revenues that some countries are reliant on.

In practice, the rules will enhance and optimise the transparency and predictability of law for all involved parties. Furthermore, newly designed provisions on customs debt issues will contribute to the facilitation of international trade by minimising ambiguities and complexity of (different) import and export formalities. All in all, they will foster a better cooperation between customs and traders. For nations highly dependent on the revenue generated by import and export duties, it is of high importance to have resilient rules on how and when duties can be levied.

## 2.3 Status quo ...

In order to achieve globally standardised customs processes, it is essential to establish harmonised provisions on customs debt issues that would otherwise form obstacles to trade. Rules governing aspects of customs debt are essential in the application of customs provisions and play a fundamental role. However, this important role is not adequately mirrored in the current RKC provisions. Remarkably, the existence and handling of such rules and related questions are not at all, not extensively or not sufficiently addressed in most national customs legislations. Accordingly, there is a global lack of comprehensive and essential rules and associated details to satisfy the important needs of customs debt management. This is surprising, since customs debt law constitutes a central aspect and should form a core element of every national customs legislation.

### ... in the RKC

The determination of the status quo regarding customs debt rules in the RKC is sobering. The current version of the Convention does not specify rules governing customs debt so far. Chapter 4 of the RKC's General Annex merely contains standards, leaving the discretion to define the following aspects to national legislation:

- the circumstances when liability to duties and taxes is incurred (Standard 4.1)
- the time period within which the applicable duties and taxes are assessed (Standard 4.2)
- the factors on which the assessment of duties and taxes is based and the conditions under which they are determined (Standard 4.3)
- the point in time to be taken into consideration for the purpose of determining the rates of duties and taxes (Standard 4.5)
- the methods that may be used to pay the duties and taxes (Standard 4.6)
- the person(s) responsible for the payment of duties and taxes (Standard 4.7)
- the due date and the place where payment is to be made (Standard 4.8). When national legislation specifies that the due date may be after the release of the goods, that date shall be at least 10 days after the release. No interest shall be charged for the period between the date of release and the due date (Standard 4.9)
- the period within which Customs may take legal action to collect duties and taxes not paid by the due date (Standard 4.10)
- the rate of interest chargeable on amounts of duties and taxes that have not been paid by the due date and the conditions of application of such interest (Standard 4.11)
- the specification of conditions under which deferred payment is allowed where such facility is provided for (Standard 4.15).

After this inventory-taking, one has to conclude that the RKC does not adequately address aspects related to customs debt and that there is a lack of comprehensive and necessary specifications.

A future RKC can fulfil its objective to harmonise customs procedures and practice only if it delivers detailed standards for these aspects of customs debt provisions. In order to achieve this, the existing general standards in Chapter 4 of the RKC should be revised and enhanced to the next level. They should be extended and filled with more specific content elaborating a system of provisions regarding the incurrence, payment and extinguishment of a customs debt. In this context, the already existing nonbinding General Annex Guidelines to Chapter 4 could also be incorporated or considered. The extent of these Guidelines itself shows that there is a need for standardised provisions.

### ... in different national customs legislations

Coming from the status quo of the RKC, it is also of interest whether and to what extent customs debt rules are present in national or regional customs legislation. For this purpose (and to get an impression about the status quo at national level), we will briefly elaborate on some examples.<sup>8</sup>

The European Union provides in its Unions Customs Code (UCC)<sup>9</sup> in Title III ‘Customs Debt and Guarantees’ different chapters and detailed sections concerning customs debt issues.<sup>10</sup> General customs debt issues such as the incurrence of a customs debt, the guarantee for a potential or existing customs debt, recovery, payment, repayment and remission of the amount of import or export duty and the extinguishment of a customs debt are laid down. In Chapter 1 ‘Incurrence of a customs debt’ customs debts on import (Art. 77–79 UCC) and customs debts on export (Art. 81–82 UCC) are distinguished. Moreover, the UCC differentiates between regular customs debts (Art. 77, 81 UCC) and customs debts in irregular cases through noncompliance (Art. 79, 82 UCC). Every provision on incurrence also governs the time at which the customs debt is incurred and specifies the possible debtors. The places where the customs debt is incurred are specified in Art. 87 UCC. The system is completed by Art. 124 UCC, which lists several cases in which a customs debt is extinguished.<sup>11</sup> Art. 125 UCC finally ensures the application of penalties for failure to comply with customs rules even though a customs debt that was incurred due to noncompliance has been extinguished. From this it can be concluded that the incurrence of a customs debt is not seen as a punitive instrument. This approach is supported by Art. 42 UCC, which demonstrates that penalties must be imposed as a separate instrument.

While the first example shows a comparably detailed system of provisions, other national customs legislations do not have a coherent system concerning customs debt aspects or they lack any such rules. For instance, the Chinese customs law does not currently provide particular rules for customs debt issues. The Customs Law of the People’s Republic of China<sup>12</sup> gives, however, some indications regarding the time of incurrence of a customs debt in Chapter V under the heading ‘Customs Duties’. An explicit time of incurrence of a customs debt is not defined. Art. 29 regulates that imported or exported goods are not released by the customs authorities until taxes and duties or a security have been paid. Art. 53 states that duties shall be collected on goods permitted to enter or leave the country. From these provisions it can be concluded that a customs debt in China incurs even before the goods have entered into the economic cycle of a country and that a customs debt only incurs if goods are allowed for import or export. Art. 54 governs which persons are obliged to pay the customs duties.

For India, the Supreme Court held that the liability to pay customs duties is not a common law liability. It arises by virtue of the provisions of the Customs Act only.<sup>13</sup> Despite this clear assignment to the legislator, the Indian Customs Act<sup>14</sup> is silent on the term ‘customs debt’, even if Section 2 contains a wide range of definitions, including those for the terms ‘duty’ and ‘assessment’. Moreover, searching for the terms ‘customs debt’ or ‘liability to duties’ does not lead to a result in the whole Customs Act. A conjoint reading of Sections 12(1) with Sections 2(18), 2(23) and 2(27) of the Customs Act clarifies that customs duty can be levied only on goods imported or exported beyond the territorial waters of India (Mukherjee, 2019, p. 141), leaving the question relating to the time of duty occurrence. Section 15(c) clarifies that payment of the duty is not dependent upon lodgement of a bill of entry without providing an express rule on the taxable event (Mukherjee, 2019, p. 146). Gaps left in the comprehensive statute law have been filled by case law. In general, the person liable to pay duty in the case of imports is the importer.<sup>15</sup> However, the clearing agent can also be made liable. In the case of *Union of India v. Shri Harkishandas Narottam Hospital*<sup>16</sup> it was held for confiscated goods that the possessor of the goods shall bear the liability to pay duty and that this liability does not shift to the person who either imported the goods or to a person from whose possession the goods were seized. Without doubt, core elements of customs debt law cannot be gathered from the Customs Act itself. A less opaque legislation could increase the trade facilitating effect of transparent and well-structured rules on customs debt.

In the Statutes of the Republic of Singapore Customs Act (Singapore Government, 2004) a search for special customs debt provisions is in vain. However, Part III ‘Levy of duty and tax’ governs, in Art. 10 of the Customs Act, the general levying of duties. The incurrence and the time of the incurrence of a customs debt on export or import are not contained in the rulings. Art 28 of the Customs Act, however, defines the time of importation when duty is imposed. Part XV of the Act lists offences against customs rules and procedures and defines penalties for these offences.

Looking at the Common Customs Law of the Gulf Cooperation Council (GCC, 2002), some provisions can be found with regard to customs debt issues in Section II, among the principles of the application of the customs tariff. Art. 9 of the Code states that imported goods are subject to the customs taxes (i.e. ‘duties’) specified in the customs tariff. This governs the incurrence of a customs debt. Regarding the time of the incurrence Art. 13 of the Code provides that the customs debt normally incurs at the date of registering the customs declaration with the customs offices. This is, according to Art. 14 of the Code, similar for goods that have previously been deposited in a warehouse.

The national customs legislation of Australia does not contain a coherent system of customs debt rules at this stage either. But in comparison to other national legislation, Art. 132AA of the Customs Act of 1901<sup>17</sup>, Part VIII ‘The Duties’ defines when an import duty must be paid. Besides the description of goods, the time by which the duty on goods must be paid is also specified. As part of the common law and as a typical characteristic of its legal tradition, the Australian law is also defined by case law. In this context, there can be found some judicial decisions that examine some of the issues that are not covered by the provisions of the Customs Act, such as the question of possible customs debtors in case of noncompliance with customs rules<sup>18</sup> or the question of liability for unpaid customs duties.<sup>19</sup>

Summing up, the overview of some national legislation on customs law has shown that, to a large extent, an insufficient degree of regulation in the field of customs debt law exists. Provisions are not, or not sufficiently, provided for or they are not coherent, are too diverse or are not explicit enough. They are rather hidden between rules regarding other fields of customs law or in separate taxation Acts. A more precise rule on WCO level in a new RKC would overcome this, lead to more harmonisation and will finally enforce the advantages of comprehensive customs debt provisions on a national level.

## 2.4 Principles to be reflected

The previous discussion has shown the need for action and that the provisions of the RKC should be revised and enhanced to the next level, which will have a binding effect on national customs legislations. The authors believe that it is essential for a modern and comprehensively reviewed RKC to consider and address the subject of customs debt. This is why a proposal for a legal framework as global standard for customs debt rules has been put forward. In general, the following principles should be reflected in the development and redesign of the provisions of a future RKC.

### **Incurrence of a customs debt according to the ‘economic theory of customs’**

The core aspect of the first general principle is to base the incurrence of a customs debt in the RKC only on objective, transparent and predictable criteria, which means according to the ‘*economic theory of customs*’. Under this subject heading, the theory is understood as a general concept according to which a customs debt is supposed to arise. A customs debt should only arise according to objective, transparent and predictable criteria and should not depend on arbitrary or subjective factors.

What criteria define the ‘economic theory of customs’? It is labelling the concept or the fundamental idea that only goods that positively and factually participate in the economic cycle of a customs territory and thus step into competition with domestic products are subject to the incurrence of a customs debt and the assessment of customs duties.<sup>20</sup> For goods that just transit the customs territory or that are part of a special customs procedure avoiding duties, a customs debt shall not (yet) be incurred.<sup>21</sup> The same applies to pure noncompliance with customs provisions. Otherwise, the incurrence of a customs debt would

have the character of a penalty in such cases, a concept that would not comply with the economic reasons that form the basis of the economic theory. Consequently, it should be considered that the incurrence of a customs debt must not be a sanction but a means of economic reasons. Noncompliance with customs provisions might result in sanctions specified by national legislation that do not comprise the incurrence of a customs debt. In short, a customs debt should be a means of economic reasons related to the factual participation of goods in an economic cycle of a customs territory and not a sanction or an arbitrary or subjective means to levy duties.

Moreover, it must be stated that the economic theory of customs, although it might not be labelled as such, is not a new concept that would be introduced into the future RKC. The concept of the economic theory of customs is a historic one and integral to the provisions concerning the customs procedures of the RKC of 1999<sup>22</sup> and its previous version of 1973. The concept is even reflected in the provisions of the International Convention relating to the Simplification of Customs Formalities—established by the League of Nations in 1923 (League of Nations, 1924–1925). This Convention is the first international convention in the field of customs and is a legal predecessor of the Kyoto Convention of 1973 (Asakura, p. 272). The economic theory of customs corresponds to the spirit and purpose of these provisions. Consequently, the general principles of this concept that have been explained above are already intrinsic to other RKC provisions and thus are already indirectly established and well-known at the WCO level.

In general, it seems to be necessary and appropriate that this theory or concept, which already forms the basis of the customs provisions, should be the basis for possible future standards or recommended practices of harmonised customs debt provisions. Mirrored to the case of export duties, the economic theory leads to the consequence that a customs debt on export can only occur when goods are leaving the economic cycle of a customs territory.

### **Import vs export customs debts**

As a second principle and in order to provide clearly defined rules, future customs debt provisions should distinguish between the incurrence of a customs debt on import and customs debt on export. This would be in line with the definition of import and export duties and taxes in Chapter 2 of the General Annex.

The concept of ‘customs debt’ should refer and be restricted to those import or export duties and taxes that incur in terms of Art. II GATT. This does not include national duties that secure a non-discrimination of domestic and foreign goods and not fees and charges commensurate with the costs and services rendered.

### **Regular vs irregular customs debts**

In addition to the aforementioned characteristics, rules should also distinguish between ‘regular’ customs debts and customs debts in ‘irregular cases’ on import or export. A regular case means the release for free circulation or temporary admission with only partial relief of import duties. Customs debts in ‘irregular cases’ would be, for example, smuggling, the unauthorised removal of goods from a customs warehouse or other defined cases of noncompliance with customs provisions.

This distinction allows the customs authorities to identify cases in which duties might have to be levied due to noncompliance. In such cases, a customs debt initially incurs because the goods might have entered the economic cycle of a customs territory. However, under certain circumstances, mistakes, negligence or noncompliance that demonstrably do not lead to a final and factual entry of the goods into the economic cycle might be qualified for non-occurrence or a later extinguishment of the customs debt. This means that the incurrence of irregular customs debts temporarily secures a state’s claim to customs duties. It is not meant to be a sanction since the economic operator may prove that their noncompliance had no significant effect on the correct operation of the customs procedure. Nevertheless, such cases of noncompliance might entail sanctions on national level—apart from the incurrence of a customs debt—that must be defined.

### **Treatment of prohibited and restricted goods**

According to the fourth principle, the RKC should clarify that customs debts on import and export are incurred even where they relate to goods that are subject to measures of prohibitions or restrictions, except in cases specified by national legislation. It would be of advantage to clarify these principles of customs debts incurrence because the prohibition of goods as such shall not exempt them from the general obligation to be subject to customs duties. It should be clarified that customs debt provisions, in principle, do not distinguish between legal and illegal transactions. Consequently, illegally imported goods cannot be exempted from the incurrence of a customs debt. Relevant for the incurrence of a customs debt on import is the factual entry and participation of the goods in the economic cycle of a customs territory of a country or customs union.<sup>23</sup> This is surely the case if goods have entered a customs territory and are later (by chance) discovered, confiscated or secured by the enforcement authorities.

However, there could be defined exceptions, rules of extinguishment of such a customs debt or cases specified by national legislation that follow the approach to the non-incurrence of a customs debt and thus no assessment of customs duties for goods (such as, for example, counterfeit money or narcotic drugs and psychotropic substances as banned by international conventions) that, according to their nature, are not suitable to participate in the (legal) economic cycle of a customs territory of a country at all. This consequence shall not prevent members from applying sanctions related to the unlawful import of goods into the customs territory.

Hence, the reason to clarify the occurrence of customs debts especially for prohibited or restricted goods is basically to ensure the consistency and coherence of the system of the incurrence of customs debts.

### **Time and place of incurrence**

The time and place at which the customs debt is incurred should be established for regular and irregular cases as well. This will be, on the one hand, of use for the assessment of customs duties. It should be stipulated that the amount of import or export duty shall be determined on the basis of the rules determining the duty that was applicable to the goods concerned at the time the customs debt was incurred or in specific cases for a certain time. This applies to the rules of assessment like tariff rate or customs value of the goods in question. On the other hand, defining the place of the incurrence might also be important and relevant when it comes to questions regarding the competence of customs authorities and their capacity to act.

### **Customs debtor(s)**

Another aspect that should be considered and reflected in future provisions of customs debt under the RKC are rules on the identity and liability of the possible customs debtor(s). Such rules or guidelines would again lead to more legal certainty and predictability for both the customs authorities and the economic operators. Especially for the customs authorities, such rules would facilitate the identification of the possible customs debtor(s) and their liability and thus the process of levying the duties and taxes.

The accurate, transparent and predictable identification of possible customs debtors is important since in individual cases there is often more than one person who may be liable for a customs debt. Moreover, it is possible that the number of possible customs debtor(s) differs from case to case according to the characteristics and nature of the incurred customs debt.<sup>24</sup>

In the case that several persons are liable for the payment of import or export duties and taxes, they shall be liable jointly and severally. This implies that customs authorities have a certain discretionary power and may, where appropriate, choose between the possible customs debtors.<sup>25</sup>

### **Extinguishment of customs debts**

Another principle that should be integrated into the RKC refers to rules on the extinguishment of customs debts. Such rules should allow for the interests of the debtor(s) and reflect the principle that goods which have demonstrably not entered the economic cycle of a customs territory are no longer subject to a customs debt.

The need to establish rules on the extinguishment of customs debt results from determined situations in which a customs debt no longer exists due to certain circumstances. For instance, a customs debt might be extinguished by payment or remission of the amount of import or export duty or after expiry of the limitation period. At the same time, provisions on the extinguishment of a customs debt can be used as an instrument for correcting unreasonable and unfair outcomes for economic operators since the incurrence of a customs debt itself should not be a sanction. In practice, such cases that could be resolved by the extinguishment of the customs debt could be for example:<sup>26</sup>

- Goods liable to import or export duty are confiscated or seized and simultaneously or subsequently confiscated
- Goods liable to import or export duty are destroyed under customs supervision or abandoned to the state
- The disappearance of the goods or the non-fulfilment of obligations arising from the customs legislation results from the total destruction or irretrievable loss of those goods as a result of the actual nature of the goods or unforeseeable circumstances or force majeure, or as a consequence of instruction by the customs authorities; for the purpose of this point, goods shall be considered as irretrievably lost when they have been rendered unusable by any person
- The customs debt was incurred pursuant noncompliance with customs provisions but
  - (a) the failure which led to the incurrence of a customs debt had no significant effect on the correct operation of the customs procedure concerned and did not constitute an attempt at deception
  - (b) all of the formalities necessary to regularise the situation of the goods are subsequently carried out
- The customs debt was incurred pursuant to noncompliance with customs provisions and evidence is provided to the satisfaction of the customs authorities that the goods have not been used or consumed and have been taken out of the customs territory.

### **Factors and timeframe of assessment**

More detailed provisions governing factors on which the assessment of customs and duties is based and the conditions under which they are determined should be provided. Rules on customs valuation (for *ad valorem* duties) should refer to the provisions of the WTO Agreement on Customs Valuation (WTO, 1994) or stipulate alternative methods for determining the value of the goods.

It would also be useful for a timeframe to be defined under which duties and taxes are assessed after incurrence (regular customs debt) or after customs authorities are aware that a customs debt is incurred (irregular customs debt). Furthermore, procedural rules on notification of the customs debt should be provided.

### **Timeframe for payment and administrative measures**

A timeframe should be defined for the period within which Customs shall and may take administrative measures to collect duties and taxes not paid by the due date. This could include all administrative actions taken by Customs to collect import and export duties (and related taxes), depending on national provisions for enforcing customs debt provisions. This might include commencement of court procedures if national administrative procedure law requires. The timeframe should also define the period of limitation after which Customs is precluded from commencing procedural measures to collect unpaid duties.

### **2.5 Adherence to and consideration of standards of other agreements**

In addition to the principles that have been discussed above, the future RKC should not fall short beyond the rules of other agreements in this field, such as the rules governed by the TFA (WTO, 2014; Wolfgang & Kafeero, 2014). For example, Article 7:2 TFA requires that each member shall, to the extent practicable, adopt or maintain procedures allowing the option of electronic payment for duties, taxes, fees and charges collected by Customs incurred upon importation and exportation. This provision delivers a more precise condition compared to Standard 7.1 of the RKC.

Article 7:3 TFA provides for separating the release of goods from the final determination of duties, taxes, fees and charges, which may require the lodgement of a guarantee. The RKC should reflect this need for separation and also comprehensive provisions on guarantees (security) to cover customs debts based on the existing provisions of Chapter 5 GA RKC.

Furthermore, Article 7:7.3 (d) TFA establishes the option of deferred payment of duties, taxes, fees and charges as a potential measure to grant enhanced trade facilitation for Authorized Operators.

## **3. Outlook and perspectives**

It is the intention of the WCO that the RKC remains the blueprint for modern and efficient customs procedures in the 21st century. To cope with political, legal and technical developments and changes that will shape the future of trade and the future of Customs, it is necessary to adapt and adjust to these different challenges. This might also require instruments on trade facilitation and supply chain security developed outside the RKC to be integrated into the RKC, keeping in mind that any future instrument should serve as a model for legislation in individual states to a much greater extent than it has been the case so far. To this end, the degree of regulation and its effect must be significantly increased, ideally, towards a legally binding international agreement which might even function as a global model law. In this context, an appropriate and harmonised implementation of the RKC presents another challenge to the WCO and its members. However, this task is, compared to the various advantages that go along with such a comprehensive implementation process, worth tackling consistently.

A future RKC could even better meet its objective of harmonising customs procedures and practices by delivering more detailed standards or recommended practices regarding customs debt provisions. Customs debt law is a central element of any national customs legislation, although this is not mirrored yet on all national levels. The status quo of the RKC provisions does not correspond to the fundamental role of this decisive area in customs law. Accordingly, it is important to advance, extend and specify the rulings in Chapter 4 of the Convention so that a system of provisions regarding customs debt is formed. This would simply be the next consequential step in harmonising customs processes. In this context, the consideration of the principles elaborated on above will, among other things, contribute to a harmonised good practice in customs, ensure better cooperation with customs authorities and facilitate customs processes in general, and thus lead to a considerable improvement in the transparency of customs rules with predictable enforcement.

Consequently, it is desirable and necessary to develop and establish a global standard or a model law on all relevant customs debt issues for adoption in national customs legislation. Concluding and summing up, a future RKC should include harmonised and more detailed provisions (to the extent possible, binding standards or at least recommended practices) regarding customs debt issues, particularly rules governing the incurrence, payment and extinguishment of a customs debt. They should provide guidance and achieve a sufficient degree of harmonisation of customs procedures and practices, while at the same time fostering transparency, legal certainty, trade facilitation and predictability, and reducing ambiguity and complexity. Sound provisions on customs debt can contribute to a comprehensive and future-proof convention.

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## Notes

- 1 For example, standards, transitional standards and recommended standards.
- 2 Cf. the binding General Annex and the nonbinding Specific Annexes of the RKC.
- 3 Cf. for this the Nairobi Convention of 1977, which has adopted this principle in its wording of the convention (WCO, 1977, p. 53).
- 4 For example, extension in time because of implementing problems, certain categories of provisions follow different timelines, recommendations and help such as technical assistance or support if a state lacks capacity to implement a provision. Note: These flexibilities are already established in the TFA.
- 5 Cf. WCO's coordinated cross border management (CBM) concept, WCO Research Paper No. 2, June 2009.
- 6 Cf. A. 'The comprehensive review of the Revised Kyoto Convention' of this article.
- 7 Cf. B. IV. 'Principles to be reflected' of this article.
- 8 Note: The information and remarks only relate to exemplary national legislations and intend to give a broad overview of the different degrees of regulations. They do not claim to be comprehensive.
- 9 Cf. Unions Customs Code (UCC), Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 (European Union, 2013).
- 10 For more information about the customs debt system of the EU cf. for example, Lyons (2018, pp. 460 ff).
- 11 Cf. also Wolffgang and Harden (2016, pp. 6 ff.)
- 12 Customs Law of the People's Republic of China (General Administration of Customs, n.d.).
- 13 *Union of India v. A.V. Narasimhalu*, S.C.C. 658 (1 September 1969).
- 14 The Customs Act, 1962 (No. 52 of 1962) as amended up to Finance Act 2019-2020 (Act No. 23 of 2019).
- 15 *Collector of Customs Cochin v. Trivandrum Rubber Works Ltd.*, 1999 (106) E.L.T. 9 at p. 11.
- 16 W.P. No. 388 of 2005 (13 April 2005).
- 17 Australian Customs Act of 1901 (Australian Government, 2013).
- 18 *Zaps Transport (Aust) Pty Ltd*, Domenic Zappia & John Zappia (Taxation) [2017] AAT 202 (17 February 2017); File Number(s) 2016/1275, 2016/1276; 2015/5050.
- 19 *Studio Fashion (Aust) Pty Ltd* (General Administrative Decision) [2015] AATA 366 (28 May 2015); File Number 2014/2611.
- 20 Cf. Wolffgang (2007, p. 4); Witte and Wolffgang, (2018, p. 4 f); Michaelis (1981, p. 355); Lamp (1915, p. 530; 1917, p. 18).
- 21 Cf. the special procedures avoiding duties in the Specific Annexes (SA's) of the RKC such as customs warehouses and free zones (SA 'D'), transit (SA 'E'), processing (SA 'F'), temporary admission (SA 'G') or special procedures (SA 'J').
- 22 Cf. fn. 21.

- 23 Cf. B. IV. 1. 'Principles to be reflected' of this article regarding the thought and idea of the 'economic theory of customs'.
- 24 For instance, customs debt on import vs customs debt on export or customs debts in regular vs customs debts in irregular cases.
- 25 Relevant criteria in such cases could be for example the ability to pay of one customs debtor compared to another or the degree of default in case of an irregular customs debt.
- 26 The following examples refer to some of the elements and cases listed in of Art. 124 (1) UCC.

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