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Customs Duties and Indirect Taxation

This article outlines the main findings of the author's doctoral thesis on the fiscal nature of customs duties, which was awarded the International Fiscal Association's 2026 Mitchell B. Carroll Prize. It examines the qualification and legal regime of these levies and argues that customs duties were progressively detached from tax policy, explaining the current lack of policy coherence and limitations.

1. Introduction

The boundaries of taxation are discussed in both the academic literature and legislation,[1] encompassing legal issues related to the competence of the prescriber of the norm and to the legal regime but also related to the coherence of the tax architecture and tax policy.

Such questioning echoes a recent trend in international taxation law regarding the confrontation between taxes and customs duties. When several jurisdictions introduced, or contemplated introducing, a tax on digital services, the United States initiated several Section 301 investigations under the Trade Act of 1974, followed by a proposal to impose additional customs duties on products originating in these jurisdictions.[2] Later, a Memorandum of the US President aimed at determining the equivalent of a reciprocal tariff with respect to each foreign trading partner imposing "unfair, discriminatory, or extraterritorial taxes", including a VAT.[3] This confrontation brings into contact two legal systems that should not have come into conflict: an expression of national sovereignty on one side and a negotiated multilateral system on the other. It reflects a scholarly divide between levies regarded as part of taxation, in terms of both legal regime and tax policy, and customs duties, whose peculiarities have justified their exclusion from the general field of taxation.

As such, scholars do not share a position when it comes to the nature and classification of customs duties amongst compulsory levies. Yet, the first types of customs duties were of an undisputed fiscal nature.[4] Despite their economic purpose, customs duties remained part of the tax system and represented a substantial fraction of public revenues. In the United States, the creation of the federal income tax in 1909 emerged from criticism of high late-19th-century tariff policies, concerns over wealth inequality and the regressive concentration of taxation on consumption, and the need to reconcile free trade with the financing of federal programmes.[5]

In Europe, a shift occurred with the conjunction of the tariff negotiations, whose first round was achieved in 1947 and which led to an erosion of customs duties, replaced by internal taxes, and the creation of a customs union, involving an exclusive competence of the union over customs duties. Identity of nature does not correspond to identity of regime or policy. The research concludes that the isolation of customs duties as part of the field of taxation is the result of the detachment of customs duties from tax policy in favour of trade policy. This lack of unity results from customs duty policy, which is detached from tax policy, as is apparent, at least, from the national and European frameworks.

2. Customs Duties and Taxation: A Contested Unity

2.1. Introductory remarks

The existence of peculiar elements in the legal regime governing customs duties reflects the distinct nature of these duties as compared with taxation. Their integration into trade policy explains the international aspect of their regime, particularly clear when it comes to the tax base.

2.2. Customs duties: A peculiar indirect tax

In order to reconcile different doctrinal positions, it is important to qualify and classify customs duties within the tax system. It can be concluded that customs duties are taxes of a peculiar nature.

2.2.1. A fiscal qualification under national law

In France, scholars do not share a common position on the nature of customs duties. As such, the Constitutional Court decision no. 90-286 DC was not sufficiently interpreted as affirming the fiscal nature of customs duties.

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1. *See*, in France, Paul Amselek in *Mélanges offerts à Marcel Waline : Le juge et le droit public latin* T.1 (LGDJ 1974), 89; Paul Amselek in *Gouverner, administrer, juger, Liber amicorum Jean Waline* (Dalloz 2002), 111 ; Xavier Prétot, *La notion d'imposition de toutes natures*, *RFFP* (2007): 145; Jean-Luc Albert in *Mélanges Paul Amselek* (Bruylant 2005), 1; Michel Bouvier, Marie-Christine Esclassan, Jean-Pierre Lassale, *Finances publiques,* 16th ed. (LGDJ 2017), 696 et seq.; Martin Collet, *Le conseil constitutionnel et la distinction des impôts et des cotisations sociales*, *Revue de droit fiscal 40* (2014); Yasmina Moubachir, *Impositions et régime fiscal: vers de nouvelles catégories d'impositions* (L.G.D.J. 2007); Loïc Philip in *Mélanges Paul Amselek*, (Bruylant 2005), 677.
2. Office of the US Trade Representative, *Termination of Actions in the Section 301 Digital Services Tax Investigations of Austria, France, Italy, Spain, and the United Kingdom and Further Monitoring*, Federal Register, vol. 86, no 22, 18 Nov. 2021, 64590.
3. Memorandum of the President of the United States, *Reciprocal Trade and Tariffs*, 13 Feb. 2025.
4. *See* Siegfried. J. de Laet, *Portorium: étude sur l'organisation douanière chez les romains, surtout à l'époque du Haut-Empire* (de Tempel 1949), 52-53.
5. Sheldon. D. Pollack, *Origins of the Modern Income Tax*, 1894-1913, *Tax Lawyer* (2013), p. 295 et seq.

The study of the preparatory work and the case law of the court resolves that disagreement.

2.2.1.1. Doctrinal and positive law qualifications

Positive law is reflected by a French Constitutional Court decision no. 90-286 DC stating, in the context of the challenge to anti-fraud provisions that were inserted into a budget bill, that customs duties have a fiscal nature.[6] However, the decision did not align doctrinal positions.[7]

The doctrinal and legal approach to customs duties reveals a lack of unity. The doctrinal discussion takes place in a context where the notion of tax was defined after successive steps, integrating notably the definition given by German public finance scholars in the 19th century.[8] A tax is a pecuniary contribution required from individuals by authority, on a definitive basis and without direct consideration, for the purpose of financing public expenditure.[9]

Before the 1958 Constitutional regime, only one author was found to refuse a fiscal nature to customs duties, classifying them as resources reserved to the state, allocated to the state by virtue of rights inherent to it, irrespective of the requirements of any specific public service, and without any obligation to apply such resources to the exclusive benefit of particular persons or groups.[10] This position should be criticized, as, under the Third Republic, customs duties contributed to the national budget.

Following the establishment of the Fifth Republic, one scholar clearly opposed the fiscal nature of customs duties,[11] arguing that the nature of customs duties changed over the course of history when they no longer served a budgetary purpose and became economic instruments. Such criticism has two dimensions, one related to the object of taxes and a second to its effect as a source of revenue. However, taxes arguably are not limited to a budgetary object. Similarly, the role in public revenues is to be compared with other taxes – for instance, for 2025, in France, the expected revenues from the real estate wealth tax are lower than the revenues raised by customs duties.

The qualification in domestic law reveals another dispute. The 1958 Constitution includes a notion of "tax of any kind", to which a legal regime is attached. Professors L. Philip and L. Favoreu argued that the court opted for a restrictive view of the fiscal nature of customs duties.[12]

Such an interpretation, based on the competence of the regulatory power, should be rejected. Indeed, not only does the preparatory work of the 1958 Constitution and of the 1959 Statute on Finance Laws confirm that view,[13] but the argument based on an emanation from regulatory authority must be rejected. The powers attributed to the regulatory authority derive from article 8 of the Customs Code, but it can be concluded that such attribution emerged from a legislative provision, notably because the Customs Code was annexed to the 1949 Budget bill.[14] However, under constitutional law, the situation is of a peculiar nature, involving a legislative authorization that took shape under the Fourth Republic and remained valid after 1958, despite its incompatibility with the provisions of the new Constitution.

Positive elements of the qualification support this analysis: customs duties are part of the "tax of any kind" pursuant to article 34 of the 1958 Constitution.[15] In its decision no. 90-286 DC, the French Constitutional Court did not directly qualify customs duties. Instead, it stated that "Customs duties are of a fiscal nature; consequently, legislative provisions intended to prevent fraud in this field fall within the category of measures that may be included in a finance law."

In the absence of positive qualification, the recourse to a negative approach[16] consists in excluding elements specific to certain categories of levies: customs duties are not levied in return for any specific consideration and must be differentiated from the social contributions and user fees which are the costs of services rendered during customs operations, and their amount must be limited to the approximate costs of these services.[17] Revenues arising from customs duties are not allocated, in contrast with parafiscal charges and compulsory voluntary contributions.[18] For these charges, the consequence of the exclusion of a tax qualification is that it allows the government to levy them for the benefit of certain entities and sectorial industries. On the contrary, EU Member States shall make available to the European Union the amounts corresponding to traditional own resources. Such making available produces a mandatory and automatic effect, financing the EU budget while collection fees apply, and this remaining part is directed towards the general budget in France. In conclusion, customs duties can, under domestic law, be qualified as taxes of any kind in the meaning of article 34 of the 1958 Constitution.

6. French Constitutional Court, no 90-286, 28 Dec. 1990, *Loi de finances rectificative pour 1990*, OJFR 303, p. 16613 (30 Dec. 1990).
7. As illustrates the commentary of the case by Professors Loïc Philip and Louis Favoreu in *Revue française de droit constitutionnel* 5 (1991).
8. K.H. Rau defined taxes as "all payments made by citizens to the Government". Karl Heinrich Rau, *Lehrbuch der politischen Ökonomie* vol. 3 (C.F. Winter 1843), 369. Later, a social aspect was given to the definition (*see* A. Wagner).
9. Wrongly attributed to Gaston Jèze. Pr. Olivier Negrin revealed that this definition emerged from a revisiting of dean Vedel in his *Lecture of financial legislation*. Olivier Négrin, *Une légende fiscale: la définition de l'impôt de Gaston Jèze, RD publ.* 1 (2008).
10. René Gandillot, *Essai sur la science des finances* (Joubert 1840).
11. Pr. Ch. de la Mardière wrote: "the purpose of taxation is an essential element of its definition; it therefore excludes customs duties, whose object in developed countries is no longer to finance public needs but rather to regulate the flow of goods originating from abroad." Christophe de la Mardière, *Recours pour excès de pouvoir et contentieux administratif de l'impôt* (LGDJ 2002).
12. Loïc Philip and Louis Favoreu, *commentary of decision no 90-286 DC*, *Revue française de droit constitutionnel* 5 (1991).
13. Commission des archives constitutionnelles de la Ve République, *Archives constitutionnelles de la Ve République*, vol. II., 584 (*La Documentation française* 2008).
14. Law 48-1973 of 31 Dec. 1948, p. 2, OJFR (1 Jan. 1949).
15. Art. 34 1958 Constitution states: "Statutes shall lay down the rules governing […] the tax base, the rate and the procedures for the collection of taxes of any kind; the regime governing the issuance of currency."
16. French Constitutional Court, 30 Dec. 1991, no 91-302 DC, *Loi de finances pour 1992*, p.17434, OJFR (31 Dec. 1991).
17. GATT, *United States Customs User Fee*, L/6264-35S/24S, 2 Feb. 1988.
18. *See* French Supreme Administrative Court, 26 Oct. 1990, no 61172, no 63861, no 63862, *Union fédérale des consommateurs*, *Lebon*: 291.

2.2.1.2. Classification within the tax system

In order to understand the tax system, taxes are to be classified under categories, and these categories may have legal consequences. Thus, article L. 199 of the Tax Procedural Code organizes the distribution of disputes before the administrative courts or before the civil courts according to a classification of the taxes.

The question that arises is the following: may customs duties be classified as "indirect contributions"? Indirect contributions may be defined as analytical taxes – they relate to a single transaction – real taxes – a fiscal debt is incurred on a specific product without regard to the taxpayer's person –[19] and imposed on the consumption, use, production or importation of goods and services.[20]

Throughout history, classifications of taxes have been proposed, and, first and foremost, a division between indirect and direct taxes was elaborated.[21] The economic criterion of tax incidence helps to identify the indirect nature of a levy, as it requires attention to the shifting of the tax burden, but it is imperfect, being subject to the economic circumstances.

Customs duties are indirect taxes (*contributions indirectes*). A comparative analysis reveals that, in most jurisdictions, customs duties are classified as excise taxes or indirect consumption taxes. This approach is reflected in Japanese law,[22] US federal tax doctrine, where customs duties are treated as federal excise taxes,[23] and early German public finance theory, which integrated customs duties into indirect consumption or *Aufwandsteuern*.[24]

International organizations use statistical classifications that do not correspond to the doctrinal category of indirect contributions but instead place customs duties within broader groupings akin to indirect taxation. For comparative purposes, the OECD classifies customs duties under "taxes on goods and services", alongside VAT, excises and other transaction-based taxes, thereby allowing analysis of customs duties as part of indirect taxation.[25] Similarly, the International Monetary Fund and the World Bank, relying on the UN System of National Accounts, define taxes as compulsory, non-reciprocal payments to government and classify customs duties as "taxes on imports", which explains why fiscal policy studies produced by these organizations consistently integrate customs duties, while distinguishing them from other consumption taxes.

However, a different legal regime applies to customs duties and indirect contributions as a consequence of their different legal qualification. These differences can already be observed at the beginning of the 19th century.[26] Different rules regulating the control, sanctions and litigation apply.

The reason for the existence of a distinct classification of customs duties is of interest: it is the consequence of a policy choice. This assertion stems from the coincidence – hardly accidental – between the conclusion of the multilateral GATT tariff negotiations in Geneva and the detachment of customs matters from taxation in 1948. This detachment, therefore, originates before the Fifth Republic and is the consequence of a policy choice, since prior to that time the regimes governing indirect contributions and customs duties were already distinct.[27]

It is therefore crucial to identify the elements that define customs duties in order to qualify them in contrast to other indirect taxes: the economic objective that drives their adoption and the taxable event constituted by the crossing of a border.

These two elements are interrelated. The economic object that drives their adoption is not to be mistaken for an economic object assigned to these charges. First, customs duties have been levied with the objective of economic development. Professor J. F. Due demonstrated that customs duties continue to play an important role in the development of least advanced economies.[28] They are less likely to hinder incentives for national production and the allocation of factors of production. They also reduce imports of consumer goods, notably those of a luxury nature, as well as capital goods that are not conducive to economic development. Lastly, by reducing demand for foreign goods, customs duties lower the likelihood of balance-of-payments crises and their consequences in terms of import controls or forced devaluation.

In the context of the European Union, customs duties played a far more important role. As such, the creation of a customs union was central to the proposal of the Benelux Foreign Affairs ministers after 1954. Following the failure of the European Defence Community project, they proposed the establishment of an economic and customs union as a means of revitalizing European integration, leading to the Messina Resolution in 1955 and the 1956 Spaak Report.[29] Thus, the pursuit of economic development and prosperity underpinned the proposal for a European single market, conceived as a large area of common economic policy forming a powerful unit of production capable of sustaining continuous growth, greater stability, rising living standards and harmonious relations among member states. Achieving these objectives required merging fragmented national markets on economic grounds such as more efficient resource allocation through a deeper division of labour and the develop-

19. Louis Foyot, Armand Lanjalley, Léon Say (eds.), *Dictionnaire des finances*, 367 (Berger-Levrault 1889).
20. While turnover taxes are intended to tax expenditure in general. Lucien Mehl, Pierre Beltrame, *Science et technique fiscales* (PUF 1984), 198.
21. Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations*, trad. M. Roucher, vol 4 (Buisson, 1791).
22. Hiromitsu Ishi, *The Japanese Tax System*, 3rd ed. (Oxford University Press 2004), 252.
23. Adams Henry Carter, *The Science of Finance: an Investigation of Public Expenditures and Public Revenues* (Henry Holt and Company 1898), 383.
24. Karl Theodor von Eheberg, *Finanswisnschaft* (Deichert 1909), 405.
25. OECD, *Revenue Statistics – interpretative guide* (OECD 2021).
26. Finance Act, 28 Apr. 1816 (French Royal Printing Office 1816).
27. Louis Trotabas, *Les finances publiques et les impôts de la France* (Armand Colin 1953), 168-169.
28. John F. Due, *Indirect Taxation in Developing Economies: The Role and Structure of Customs Duties, Excises, and Sales Taxes* (Johns Hopkins Press 1970), 179.
29. Geoffrey Grandjean, *Histoire de la construction européenne* (Bruylant 2020), 360.

ment of modern capital-intensive techniques beyond the capacity of national markets.[30] The common market was thus presented as a response to market fragmentation that hindered competitiveness with the United States and was to be realized through a customs union. In conclusion, customs duties have been, and are still, used as a tool of economic development, which should be distinguished from the economic dimension common to all taxes.

Second, customs duties have been levied to protect industries. Historically, protectionism was implemented in two different cases: when industrial sectors were affected by a crisis and to protect emerging industries. Friedrich List elaborated a theory of economic education of nations, relying on customs legislation as a means of industrial education.[31] On the premise that economies do not develop simultaneously everywhere, he proposed levels of protection varying over time. This theory served the policy of the United States in the 19th century, when protectionist tariffs aimed at promoting industry following the Civil War.

Often, policies do not merely reflect one or the other case. The "America First" trade policy is aimed at raising revenues, reducing trade deficits and fostering American production.

The second element distinguishing customs duties from other indirect contributions is their taxable event, which takes the form of a border crossing. Both the Supreme Administrative Court and the Court of Cassation have qualified levies as customs duties in the presence of a "differential and protective" element.[32] This element is the consequence of the legal regime applicable in the colonial context, when only the central government had the authority to levy customs duties. Qualifying a levy as a customs duty determines the competent authority. Moreover, this element also results from the peculiar tax base of customs duties: imported goods.

Thus, the border constitutes a central element in identifying customs duties. However, it is not an exclusive criterion for distinguishing them within the category of indirect taxes. Not only does the crossing of a border constitute the taxable event for other levies, but a levy may also be classified as a customs duty in the absence of a customs border. This explains why neither the denomination of a levy nor its placement within a customs tariff constitutes a sufficient definitional criterion. Rather, attention must be paid to the tax base of customs duties, which is exclusively composed of imported or introduced goods and does not concern products circulating within the territory in question. The two criteria must therefore be read together, namely, the crossing of a border and a specific objective, in order to identify a customs duty.

2.2.2. A fiscal qualification under European and international law

International economic law and European law share qualification criteria. Pursuant to European law, another qualification exists for charges of a customs nature that are levied while crossing internal borders and are prohibited.

2.2.2.1. Unified criteria for qualifying customs duties under European and international law

Both the EU legal order and international economic law contain provisions qualifying customs duties. The effect of such a qualification is to assign a certain legal regime to charges that have been subject to multilateral negotiation: on the one hand, binding concessions must be respected; on the other, only that type of levy is authorized. The exclusive nature of customs duties as protective measures went hand in hand with the prohibition of quantitative restrictions, and, for states consenting to tariff dismantling, customs duties are levied at the border. As such, customs duties must be identified in a clear and transparent way.

However, as noted by the panel in *Chile – Price band system*, "neither Article II:1(b) of GATT 1994 nor Article 4.2 of the Agreement on Agriculture, however, defines explicitly what should be understood by 'ordinary' customs duties".[33] The World Trade Organization (WTO) Appellate Body was thus required to clarify the qualification criteria of customs duties. The defining elements have sometimes been identified positively and sometimes by excluding other elements. It has been established, for example, that the form of a measure does not determine whether it qualifies as a customs duty.[34] Likewise, the fact that a measure is based on exogenous factors, such as consumer or domestic producer interests or world prices, does not in itself make it a customs duty.

Positively, customs duties are generally ad valorem or specific duties, though they are not always strictly linked to the value or volume of imported goods. Their rates may be modified at any time, for instance through legislative or executive action by a member, provided that the revised rates remain below the bound tariff rates. A further key feature is their systematic character. In *India – Additional and Additional Extra Duties on Imports from the United States*, the panel clarified that "ordinary customs duties" are not imposed on a case-by-case basis or in response to exceptional circumstances.[35] Rather, they apply automatically upon importation into the customs territory. As a result, they are typically more transparent and predictable than other border measures.

Accordingly, an "ordinary customs duty" is a charge, whether ad valorem, specific or a combination of both,

30. Intergovernmental Committee of the Messina. Conference, *Report by the Heads of Delegation to the Foreign Ministers* (1956).
31. Friedrich List, *Système d'économie politique*, trad. H. Richelot (Gallimard 1998), 437.
32. French Supreme Court, 11 Mar. 1885 and 21 Jan. 1907. French Supreme Administrative Court, 8 July 1938, *Syndicat général des fabricants de semoule de France et Société anonyme des Grands moulins de Strasbourg, Lebon*: 95.
33. WTO, Report of the Panel, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, 3 May 2002, WT/DS207/R, para. 7.50.
34. WTO, AB, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, 23 Oct. 2002, WT/DS207/AB/R, 216.
35. WTO, Panel, O.M.C., *India – Additional and Additional Extra Duties on Imports from the United States*, WT/DS360/R, 9 June 2008, 4.11.

calculated on the basis of the quantity or value of the goods at the time of importation and applied automatically upon their entry.

Such a definition aligns with the one articulated in the literature. In *World Trade and the Law of GATT* (1968), Professor John H. Jackson explained that the expression "ordinary customs duties" was intended to cover regular tariffs, as distinct from the phrase "other duties or charges of any kind" in article II of the GATT, which refers to various additional taxes or charges. Goods must not be subject to such "ordinary customs duties" imposed "in connection with" importation beyond the bound rates. Internal taxes, although applicable to imports, are not imposed "in connection with" importation and therefore fall under article III rather than article II of the GATT.[36]

In European law, identifying customs duties is required in the context of a customs union. One difficulty emerges when it comes to the notion of the European border since the customs territory is not equivalent to the aggregated political territory of all Member States. Instead, some parts are excluded while others are included – for instance Monaco.

According to the European Court of Justice (ECJ), a customs duty is a duty incorporated into a customs tariff. Customs duties on trade between the customs union and third countries are identified as such insofar as they are duties laid down in the Common Customs Tariff. Moreover, the expression "customs duties set out in the Common Customs Tariff" appears in the judgment of 27 September 1988, *Commission of the European Communities v. Council of the European Communities*.[37]

Pursuant to European law, the qualification of a customs duty is based on the notion of importation, which includes the crossing of a border as well as an element linked to the exclusivity of that importation: a customs duty is a charge payable "by reason of" importation. When the external border is crossed, there is an importation within the meaning of the provisions of the Union Customs Code (UCC), and the legal regime governing customs duties applies. The criterion of an importation is not sufficient by itself, as this would also lead to qualifying other taxes charged at the border – import VAT and excises – as customs duties.

The absence of a single qualification for VAT and excise duties is explained by the second element of the notion of importation: importation refers not only to the crossing of a border but also to the absence of an internal event. While customs duties, excises and VAT apply to products placed on the market and integrated into the economic circuit, their different legal qualifications are based on the existence of an internal factor. Thus, the ECJ has excluded import VAT from import taxes pursuant to article 4 (10) of the Community Customs Code – now article 5 (20) of the UCC.[38] Accordingly, where a legal issue concerns customs duties, import VAT or excise duties, the European judge must base the reasoning on each of the relevant legal regimes, even though the outcome may be identical, for example, in cases involving smuggled imports. The chargeable event may be shared, but there is no automaticity. The reasoning is the following: unlike customs duties, which accrue to the European Union regardless of the Member State that collects them, revenue from import VAT belongs, in accordance with that principle, to the Member State in which final consumption takes place.

Importation is a notion given autonomy and, pursuant to European law, a customs duty is not a charge having equivalent effect.

2.2.2.2. *Charges having equivalent effect*

Just as GATT law qualifies customs duties by contrast with an internal tax or charge pursuant to GATT article III:2, EU law distinguishes between customs duties pursuant to articles 28 and 30 of the Treaty on the Functioning of the European Union (TFEU) and the internal tax of article 110.

However, charges having equivalent effect have a customs nature, as revealed by their identification in European law. In 1969, in *Sociaal Fonds voor de Diamantarbeiders,* the ECJ stated that any pecuniary charge, however small and whatever its designation and mode of application, which is imposed unilaterally on domestic or foreign goods when they cross a frontier, and which is not a customs duty in the strict sense, constitutes a charge having equivalent effect. The two notions are intertwined because, as explained by the ECJ, the intent was to prohibit not only measures taking the typical form of a duty (incorporated within a tariff) but also all types of duties having similar protectionist or discriminatory effects. The intent was, also, not to distort competition within the internal market.

The notion of charges having equivalent effect is harder to identify, since it may be based on their effects. If one of the effects of customs duties is found, without the charge being formally presented – and thus identified – as a customs duty under national legislation, the levy in question constitutes a charge having equivalent effect.

Being of a similar nature, customs duties and charges having equivalent effect are governed by different legal regimes, and while the former are authorized, the latter are prohibited. The ECJ held that the establishment of a Common Customs Tariff was intended to ensure the equalization of customs charges borne at the Community's borders by products imported from third countries. Even though the Treaty and Regulation No. 950/68 did not expressly provide for the abolition or harmonization of charges other than customs duties stricto sensu, their objective was not only to prevent Member States from altering the level of protection defined by the Common Customs Tariff, but also to ground the common commer-

36. John Howard Jackson, *World Trade and the Law of GATT: A Legal Analysis of the General Agreement on Tariffs and* Trade (The Bobbs-Merrill Company 1969), 208.
37. ECJ, 27 Sept. 1988, Case 51/87, ECLI:EU:C:1988:455, para 2.
38. *See* ECJ, 29 July 2010, Case C-248/09, *Pakora Pluss SIA c. Valsts ieņēmumu dienests*, ECLI:EU:C:2010:457, 47.

cial policy on uniform principles, particularly regarding tariff changes, thereby requiring the elimination of national fiscal disparities. The opposing positions ultimately reflect two different conceptions of the European Union's competence in the area of the customs union. In the author's view, the Court's approach must be favoured. It links the customs union to the functioning of the common market through the principle of free competition.

Following the similar criteria used in qualifying customs duties in GATT law and in European law, a similar difference is made between customs duties and internal charges: a duty cannot be both a tax in the sense of article 110 of the TFEU and a customs duty in the sense of articles 28 and 30 of the TFEU.[39]

In a nutshell, article 110 of the TFEU is aimed at ensuring that imported and domestic products are subject to comparable taxation. A breach occurs where imported goods are taxed more heavily due to different calculation methods, even in certain cases. However, a charge that in practice affects only imports is not a charge having equivalent effect if it forms part of a general system of internal taxation applied to domestic and imported products according to the same criteria, with the Court also considering the purpose and structure of the charge.

It is striking that two levies qualified as charges having equivalent effect to customs duties are, in fact, authorized. The tax base of the French dock dues (*octroi de mer*) and the Spanish *Arbitrio* consists of goods introduced within certain regions (parts of the customs territory), and both duties have two chargeable events: the importation or the release for consumption within the respective territories. While the dock dues were complemented in 1992 with an internal component that had for effect to, according to the French government, change the nature of the tax, the numerous exemptions for local productions confirm the difference in treatment between goods introduced and taxed at the crossing of a geographical line and local goods. When the Canary Islands were integrated in 1991 into the Customs Union territory, Spain was authorized to maintain the *Arbitrio* during a process to introduce a modern indirect taxation.[40] As such, neither the nature of the levy nor its architecture changed. Rather, the derogatory regime has been authorized. It is now authorized on the basis of articles 349 and 355 of the TFEU. However, Decision 2002/546/EC places the Spanish *Arbitrio* within a fiscal framework and classifies it as a tax. Here, a fiscal regime is applied to a levy of a customs nature (it is precisely because it is of a customs nature that it is exceptionally authorized for a limited period of ten years under the provisions of Council Regulation No. 1911/91). This reflects its integration into the internal market and domestic policies: the derogatory provisions of Council Regulation (EEC) No. 1911/91 of 26 June 1991 are considered solely from the perspective of general taxation.

2.3. The absence of unified legal regimes

International law is the primary source of the rules governing customs duties. Consequently, tax base rules have been greatly harmonized. Yet, other elements of the legal regime remain peculiar. It appears that the peculiarities of the customs legal regime derive from policy reasons: unlike other tax regimes, the regime of customs duties was governed by bilateral treaties because of the nature of customs duties.

2.3.1. A peculiar legal regime

The most obvious peculiar elements of the customs legal regime lie in determining the classification of the goods, which is used to determine the customs duty rate for specific goods but is also used to apply non-tariff measures. Today, there are more than 18,000 positions, making the operation of classifying complex. As such, operators may have an interest in requesting binding tariff information issued by Member States' customs authorities on the tariff classification of a product.[41]

Another peculiar element is the origin of a product, described by Professors Berr and Trémeau as the geographical link uniting a good and a specific country from which it is deemed to originate,[42] and as such it is not related to the identity of the seller of the goods, its main establishment or the place where a contract is concluded. Different rules apply when determining non-preferential or preferential origin, the latter being relevant when goods are subject to preferential treatment, taking the form of a reduced tariff rate. Such preferential treatment is subject to rules detailed in trade agreements, governing the production process and allowing in some instances a bilateral or diagonal cumulation of processes – *see* notably the Pan-Euro-Mediterranean Convention and the matrix annexed to it.[43]

The existence of preferential rules may induce operators to optimize their international transactions through origin shopping, occurring when a private or legal person, or even a state, seeks to divert normal production mechanisms in order to benefit from preferential rules. European institutions therefore scrutinize the criterion of economic justification. In a recent judgment, the Court of Justice upheld the General Court's interpretation that the Commission could revoke binding origin information recognizing Thai origin for motorcycles, on the ground that this was contrary to article 33 of Commission Delegated Regulation (EU) 2015/2446.[44] That provision states

39. ECJ, 4 Apr. 1968, Case 31-67, *Firma August Stier contre Hauptzollamt Hamburg-Ericus*, ECLI:EU:C:1968:23.
40. Council Regulation (EEC) No 1911/91 of 26 June 1991 on the application of the provisions of Community law to the Canary Islands, OJ L171, p. 1 (29 June 1991).
41. Art. 33, UCC.
42. Claude J. Berr, Henri Trémeau, *Le droit douanier* (LGDJ 1975), 114.
43. It covers the European Free Trade Association States, the European Union, the Faroe Islands, Georgia, Moldova, Türkiye, Ukraine, the participants in the Barcelona Process, and the participants in the Stabilisation and Association Process. Council Decision of 26 Mar. 2012 on the conclusion of the Regional Convention on pan-Euro-Mediterranean preferential rules of origin, OJ L 54, p. 3 (26 Feb. 2013).
44. ECJ, 21 Nov. 2024, Case C-297/23 P, *Harley-Davidson Europe and Neovia Logistics*, ECLI:EU:C:2024:971.

that processing carried out in another country is deemed not economically justified, within the meaning of article 60 of the UCC, where it is established that the purpose of the operation was to avoid application of the Common Customs Tariff. In the case at hand, the aim was to circumvent trade defence measures.

By comparison with other areas of taxation, Advocate General Juliane Kokott recalled the applicants' argument that, in VAT matters, a taxable person is entitled to structure their activities to limit their tax burden.[45] In *Halifax plc v. Commissioners of Customs & Excise*, the Court held that "where the taxable person has a choice between two transactions, the Sixth Directive does not require him to choose the one which involves payment of the higher amount of VAT."[46] The Advocate General argued for a parallel with the concept of abusive practice in VAT law, suggesting that article 33 of Delegated Regulation 2015/2446 should allow a finding of circumvention only where there is an obstacle to achieving the objective of the legislation concerned – an obstacle which, in this case, was not established, since the additional customs duties were intended to target goods, not US producers.

In addition, customs duties are governed by specific rules when it comes to evaluating the customs value of goods. In 1973, in *Massey-Ferguson*, the Court stated that the functioning of a customs union requires the uniform determination of the valuation for customs purposes of goods imported from third countries so that the level of protection effected by the common customs tariff is the same throughout the whole community.[47] The European rules follow the concept of customs value established by the Agreement on Implementation of Article VII of GATT 1994, which stipulates that the value for customs purposes should be the transaction value, as the primary method of calculation and provides additional methods to be applied in a specified order.

Another important specificity of the legal regime of customs duties is the repressive elements. As such, the repressive elements of the legal regime of customs duties have been used to single out customs duties amongst taxes. In France, Louis Pabon, in his *Traité des infractions, du contentieux et des tarifs des douanes*, mentioned the excessive severity of customs criminal laws, particularly the penalties incurred for a simple fault committed without criminal intent. He explained this strictness by several factors, including the relative indulgence of public opinion toward offences, resulting in the absence of moral punishment.[48]

As part of this research, an analysis of the French repressive system is pursued, since repressive aspects are not harmonized at the EU level. In the author's view, such lack of harmonization should be criticized. For instance, French Customs law provides for a specific ground of criminal liability: an interest in the fraud. Article L523-1 of the French Customs Code[49] states that "those who have participated in any way as interested parties in the offences provided for in Articles L. 513-1 to L. 513-5, L. 513-8, L. 513-9 and L. 513-12 to L. 513-14, shall be subject to the same penalties as the perpetrators of the offence" and, in addition, to the deprivation of rights provided for in article L. 514-2.[50] This differs from complicity, as an interest in the fraud is inferred from an objective situation giving rise to a presumption of a material or moral interest in the offence. It constitutes a distinct ground of liability, separate from aiding and abetting. Whereas complicity is punishable only if it is intentional, liability based on an interest in the fraud may be established even in the absence of criminal intent. Factually, there is only one offence in the presence of a guilty party and an interested party.

Similarly, the domestic Customs Code contains an expanded regime of presumed liability. Articles L. 522-4 (former article 393) et seq. of the Code target several categories of professionals who may incur specific criminal liability.

Lastly, in customs matters, the administration's power to enter into settlements is exercised more extensively than in other areas of taxation – in 2021, 99% of disputes were solved by a transaction – and is based on a regime distinct from that applicable to the rest of the tax system. A main difference is the lack of discussion during the procedure, as the party can only accept the administration's offer.[51]

2.3.2. A regime constrained by trade policy

The international dimension of customs matters is more important than it is for other taxes, due, for instance, to the need for transparency of measures imposed on internationally transferred goods – a concern that led to the 1923 Geneva Convention requiring parties to publish new provisions on customs.[52]

The strength of the international framework varies. Initially, it concerned tariffs in the form of bilateral conventions. The integration of tariff issues – that is, the fiscal treatment of merchants and goods engaged in trade – occurred after the earliest commercial treaties. Examples include the treaties signed in 1678 between France and the States General of the United Provinces of the Netherlands, as well as between Sweden and the States General; the Franco-Dutch Treaty of 1697; and the trea-

45. Conclusions presented on 30 May 2024.
46. ECJ, Case C-255/02, *Halifax plc, Leeds Permanent Development Services Ltd and County Wide Property Investments Ltd v. Commissioners of Customs & Excise*, ECLI:EU:C:2006:121.
47. ECJ,12 July 1973, Case 8/73, *Hauptzollamt Bremerhaven v. Massey-Ferguson GmbH*, ECLI:EU:C:1973:90.
48. Louis Pabon, *Traité des infractions, du contentieux et des tarifs des douanes* (Larose 1893), 39.
49. Pursuant to art. 36 of Bill no 2023-610 of 18.07.2023 authorizing the government to recast the provisions pertaining to the legislative domain (i.e. matters reserved to statute), decree 2026-265 of 8 Apr. 2026 establishing that the Legislative Part of the Customs Code was adopted. The revised Customs Code entered into force on 1 May 2026.
50. Former art. 399 (*see* note 46). They refer to smuggling, the importation or exportation of goods without declaration, false customs declarations and smuggling committed by a group of three or more persons.
51. Minister Responsible for the Budget, *Report to Parliament on Tax Remissions, Ex Gratia Settlements and Comprehensive Tax Settlements for the Year 2022* (2023), 28.
52. *See* art. 4, International Convention for the Simplification of Customs Formalities, Geneva, 3 Nov. 1923.

ties concluded by France with Great Britain and with the Netherlands at the Congress of Utrecht in 1713. While customs are also levied internally at internal borders or chokepoints, these treaties solidify internal taxes levied on goods. During the French *Ancien Régime*, trade policy related to the supply of goods necessary to the growth of the nation. This approach explains why customs duties are primarily due on exports and that prohibitions are numerous.[53]

A major development stemmed from the spread of intellectual movements promoting free trade and the gradual questioning of protectionism in the 18th century. In the second half of that century, trade treaties were concluded in a context of easing international commercial tensions. The French Customs Law of 1892 was based on an autonomous tariff system: it established a dual tariff, consisting of a general tariff applicable in the absence of a convention and a minimum tariff intended to serve as a conventional rate, thereby granting the government broad discretion to negotiate trade treaties, moving the system towards a system governed by treaties.[54]

After the Second World War, an international economic framework was built in which trade became only one aspect, alongside monetary issues and conversion rates. The Havana Charter, which envisaged an international trade organization, encompassed topics such as labour law in a Keynesian approach, whereas the GATT is limited to trade aspects.[55] Moreover, while two provisions of the Havana Charter referred to issues of double taxation, this was not the case in the GATT 1947, thus clearly marking the separation of the two fields.[56]

In parallel, international negotiations harmonized the tax base of customs duties. The International Convention on the Harmonized Commodity Description and Coding System was established in 1983 and is now used by more than 200 states.[57] The value for customs purposes was the object of the 1950 Brussels Convention, stating the goods are valued on the basis of their "normal value" – the basis was the buyer's actual invoice price paid for the goods in an independent market. The Tokyo Round of negotiations in 1979 abandoned this concept for the transactional value, now integrated in article VII of the GATT. Origin remains the least harmonized element of the customs duties tax base. While the Agreement on Rules of Origin[58] provides for harmonization of non-preferential rules of origin, interpretative difficulties persist. Preferential rules of origin, for their part, are governed by multiple regimes linked to bilateral or multilateral agreements.

Thus, the margin of appreciation given to European law in integrating and interpreting the harmonized tax base elements of customs duties is greatest when it comes to the origin element. The applicable legal rules are laid down in the UCC, together with a body of concepts developed by the ECJ. This is the case for the concept of substantial transformation. Having rejected the direct effect of GATT law in *International Fruit Company*, the ECJ paves the way for a finalist interpretation of the international commitments.[59]

The complex relation between the international legal order and domestic measures and procedures reflects similarities with other taxes. This is for instance the case for the implementation of the European Convention on Human Rights and notably article 1 of Protocol 1, articles 6 and 8 and the principle of *non bis in idem*,[60] which have transformed domestic legal orders in both customs and general tax matters.[61]

Treaty law creates legally binding constraints on the authorities responsible for customs measures and policies. As in general taxation, it also establishes mechanisms for regulating disputes through cooperative measures. However, the framework for cooperation is rather limited when it comes to customs duties: only 52 jurisdictions are members of the 1977 Nairobi Convention on customs cooperation while the 2003 Johannesburg Convention never entered into force. In customs matters, there is a difference in scope and coverage compared with the Convention on Mutual Administrative Assistance in Tax Matters, adopted in 1988 and amended by a Protocol in 2010, in particular article 6 thereof, which constitutes one of the possible legal bases for implementing standards on transparency and the exchange of information in tax matters. Additionally, taxation is governed by the standards set by the work of the OECD Global Forum on tax transparency and the peer review mechanisms in both automatic exchanges and upon request. In customs, in the

53. For an historical perspective, a decree of 1 Feb. 1304, under Philippe IV le Bel, prohibited the export of virtually all goods (including arms, grain, textiles and metals) while appointing a royal officer, the first Master of the Ports and Passages of France, supervising exports in return for the payment of a duty known as the *droit de haut de passage*.
54. A law of 29 Dec. 1891 authorized the government to negotiate, on the basis of the minimum tariff, with countries that accorded French goods most-favoured-nation treatment. Annuaire de la législation française publié par la société de législation comparée contenant le texte des principales lois votées en France en 1891 (F. Pichon, 1891) 15.
55. Florian Couveinhnes Matsumoto, *Droit international économique* (PUF 2023), 37.
56. *See* Jennifer E. Farrell, *The Interface of International Trade Law and Taxation* (IBFD Doctoral Series 2013), 15 et seq.
57. The International Convention on the Harmonized Commodity Description and Coding System (HS Convention) entered into force on 1 Jan. 1988. The nomenclature is revised every five years as part of the work of the Harmonized System Review Sub-Committee. On the history of the system, *see* WCO, *1988-2818: The Harmonized System, a universal language for international trade* (WCO 2018).
58. *Marrakesh Agreement Establishing the WTO and its Annexes*, Agreement on Origin, Annex 1A of the Final Act (1994).
59. The WTO agreements may be invoked in the two specific instances of *Fediol* and *Nakajima*.
60. On the cumulation of penalties, *see* L. Ayrault, *Le cumul de sanctions fiscales et les juges européens* (4 July 2023 symposium proceedings), no 319, *Revue de droit fiscal* (2023).
61. This framework harmonizes the sanction regime of the parties. For instance, with regard to art. 1 of Protocol 1, the French Supreme Administrative Court integrated a judgment of the European Court of Human Rights concerning an (administrative) customs penalty imposed by the Greek authorities in connection with a fraudulent oil export scheme. It held that the amount of the penalty was disproportionate (penalty with regard to the granting of a tax benefit in connection with real estate transactions under art. 210 E of the French General Tax Code). *See* L. Ayrault, *Droit fiscal européen des droits de l'homme : chronique de l'année 2020*, no 176, *Revue de droit fiscal* (2021). Already, the French legal regime was amended following the case *Grifhorst v. France*, as it provided for the automatic cumulation, in cases of failure to declare, of customs confiscation measures and pecuniary penalties.

absence of an international framework, bilateral cooperation mechanisms are being implemented, whether via administrative protocols or integrated into partnerships and association agreements – *see* for instance articles 101 et seq. of the UK-EU Trade and Cooperation Agreement.

In conclusion, this regulatory framework leads to an alignment between customs duties and other taxes. However, it does not fully explain the ongoing convergence, nor is it sufficient, as these fields are not autonomous.

3. Customs Duties and Taxation: Towards Unity

3.1. Introductory remarks

So far, a contradiction emerges. On the one hand, customs duties are a tax, which reconciles the literature and the approach of these charges. On the other hand, the legal regime is peculiar, this peculiarity being the outcome of the tying of customs duties to trade policy. However, the author argues that the legal regimes of customs duties and other taxes are converging. The author also argues that redefining customs duties as taxes should lead to a sound revision of the architecture of competences within the European Union.

3.2. An incomplete alignment of the tax and customs legal regimes

External and internal factors explain an alignment of the regimes. The convergence movement is twofold: from the general taxation regime towards the regime of customs duties and from the regime of customs duties towards general taxation. While the first movement reflects a common approach to the protection of rights, the second echoes the social desire to fight fraud. As such, the nature of these movements brings clashes.

3.2.1. A convergence movement

An illustration of the movement of convergence is the progressive alignment of ruling procedures issued by the tax administration and by the customs administration. While the main provision governing taxes was adopted in 1987, a customs ruling procedure was introduced by a decree of 7 December 2005.[62] It was modelled on the tax ruling system, but with a more limited scope. While the customs procedure was not initially aligned with the tax ruling system in two main respects, the response period and the possibility of a second review, article 26 of Law 2018-727 of 10 August 2018 brought the customs ruling procedure into line with the ruling under article L. 80 B Tax Procedural Code on these two points: it grants the administration a three-month period to reply and allows for a second review. A ruling during inspections was added in customs matters.[63] It should be clarified that for customs duties, the ruling schemes are governed by European law and, as such, European law provides for rulings on classification (Binding Tariff Information), origin (Binding Origin Information) and, from 1 December 2027, valuation of goods.[64]

To some extent, the customs and tax procedures follow a similar evolution. The right of access to information was initially limited to certain taxes before being extended to the customs administration (customs surveillance methods were initially limited to monitoring the movement of goods and became insufficient with the growth of trade and the development of the railway system).[65] Today, rights of access to information in customs and tax matters, whether general or specific, are governed by distinct provisions where such provisions exist. Article L. 421-1 of the French Customs Code provides that customs officers are granted a right of access to papers and documents of any kind.[66] This right is associated with a right to seize. Because of the evolution of threats, for instance with regard to the growth of the digital environment, the legislator extended both rights of access to information to Internet service providers and content hosting providers on electronic communications networks.

In general tax matters, article L. 96 G of the French Tax Procedural Code extended the tax authorities' right of access to connection data to other services, as well as to data relating to the identification of the seller or service provider, the nature of the goods or services sold and the date and amount of the transactions.[67] Similarly, article L. 421-7 of the French Customs Code provides customs authorities with comparable access to data held by electronic communications operators, hosting providers and online brokerage and sales platforms for goods or services. Both procedures have been restricted following *Tele2 Sverige*.[68] One difficulty lies in the fact that the right of access to information results in two procedures, involving mechanisms for the exchange of information between the customs and tax administrations. Such architecture should be criticized since they are both part of a single tax administration.

The customs regime was a source of inspiration for changes in the tax regime, notably when it came to the power of investigation and auditing of officers. As part of its investigative powers and anti-fraud activities, the administration may carry out home searches, which are distinct from audits and general investigative powers. It should be noted in this regard that, historically, the tax authorities' powers of search and seizure were not as extensive as those available in customs matters, particularly with respect to home searches. Tax officials, accompanying customs officers, sometimes carried out home

62. Art. 29, Decree 2005-1512 of 7 Dec. 2005 relating to measures for the simplification of tax law and the harmonization and reform of the system of tax penalties, OJFR 285 (8 Dec. 2005).
63. Art. 26, Law 2018-727 of 10 Aug. 2018 for a State Serving a Society of Trust (ESSOC), OJFR 0184 (11 Aug. 2018).
64. *See* arts. 22 to 37 of the UCC and, for decisions relating to binding valuation information, Commission Delegated Regulation (EU) 2024/1072 of 25 Jan. 2024 (OJ 15 Apr. 2024) and Commission Implementing Regulation (EU) 2024/1071 of 12 Apr. 2024 (OJ 14 Apr. 2024).
65. Finance Act of 29 Dec. 1895, OJFR 353 (29 Dec. 1895).
66. Former art. 65.
67. Art. 55, Amending Finance Act no 2008-1443 of 30 Dec. 2008, OJFR (303, 31 Dec. 2008).
68. ECJ, 21 Dec. 2016, Case C-203/154, C-203/15, *Tele2 Sverige AB/ Post- och telestyrelsen et C-698/15 Secretary of State for the Home Department/ Tom Watson e.a.*, ECLI:EU:C:2016:970.

searches on the basis of offences under economic legislation, with the sole aim of uncovering tax offences, which was characterized as a misuse of procedure by the French Supreme Administrative Court.[69]

The search procedures were criticized by the European Court of Human Rights in *Ravon v. France*, when article L. 16 B of the Tax Procedural Code was deemed contrary to article 6.1 of the Convention.[70] Indeed, the search visit was to be followed by an appeal before the supreme court, but no remedy existed during the execution of the procedure.

Another development is to be observed concerning the customs and tax administrations. First, investigation powers were aligned. Here, the powers first attributed to judicial customs officers were transmitted to the judicial tax officers. When acting on the basis of article 28-1 of the Code of Criminal Procedure, customs judicial officers act under the Code of Criminal Procedure – meaning they may order police custody or conduct searches – rather than under the Customs Code, and a similar logic prevails for tax agents. This alignment was also an administrative one: common investigation services have been created, such as the Judicial Finances Investigation Service, led by the two directors of the customs and tax administrations.[71] The office was transformed into the National Office against Public Finance Fraud. This administrative alignment goes in parallel with an important change, an alignment of rules governing the recovery of taxes. This movement is to be finalized with a single recovery administration.

3.2.2. An incomplete material alignment

Despite changes, due to internal and external factors, that brought the legal regime of customs duties closer to the legal regime applicable to other taxes, some differences are maintained. Notably, while the penalty of imprisonment for a first-degree offence – in the case of refusal to the right of access of information by customs officers – was removed, the sanctions applied in the customs regime are of a derogatory nature: the customs fines remain of a double nature, serving both a compensatory (damages) function and a punitive function. There is no relation between the gradation of an offence and the amount of the fine. The Criminal Chamber of the Cassation Court judged that the judge's power to adjust the amount of the tax fine enables the penalty to be individualized according to the offender's personal circumstances, thus respecting the criminal right of individualization of criminal penalties. This should be criticized since the fine is based on the value of goods that is the customs value, evaluated by the administration and where the expertise of the judge is limited.

Additionally, customs sanctions can be cumulated, being derogatory to the *non bis in idem* principle, protected both by the French Constitution and by article 50 of the European Charter of Fundamental Rights and by article 4 of Protocol No. 7 of the European Convention on Human Rights. In that regard, in *A and B v. Norway*, the European Court of Human Rights verified that dual sets of proceedings are connected through a substantive and temporal relation and gave criteria to *in concreto* apprehend such connections.[72]

Consequences of a possible evolution towards administrative sanctions may be anticipated. Indeed, while the general tax regime provides for administrative sanctions, the customs regime only contains criminal sanctions. Following the decisions on the Austrian and Italian reservations,[73] it is possible to anticipate that the reservation entered by France to article 4 of Protocol No. 7, seeking to confine the application of that principle to offences which, under French law, fall within the jurisdiction of courts ruling in criminal matters, will be revoked.

This inevitable change is likely to affect the sanctions specified in the domestic Customs Code. However, the negotiated provisions removed the harmonization of sanctions, while article 254 of the proposed UCC reform required that infringements of customs requirements be sanctioned by a pecuniary charge, including in place of a criminal penalty.[74]

The harmonization of sanctions at the EU level would respond to the necessary convergence between the sanction regimes in taxation and customs. Indeed, the European Court of Auditors highlighted shortcomings in the EU regulatory framework for certain import procedures, notably the so-called customs regime 42 and the one-stop shop.[75] The report points out discrepancies in sanctions as well as the effects of a lack of harmonization regarding the invalidation of VAT identification numbers, the differing status of VAT and Economic Operators Registration and Identification numbers used to register and identify economic operators, and weaknesses in Member States' controls, recommending the development of stronger evidentiary measures.

3.3. A recommended policy alignment

The lack of alignment of customs and tax regimes results in policy inefficiency in terms of the functioning of the internal market or the fight against fraud. However, such a change requires a transformation of the current architecture of competences within the European Union.

3.3.1. Customs policy as a forgotten tax policy

The research argues that customs provisions of European law define a tariff applicable and organize the entry and

69. French Supreme Administrative Court, 9 Mar. 1984, no 46 552-46 553, *Amouyal*.
70. ECtHR, 21 Feb. 2008, no18497/03, *Ravon and others v. France*.
71. Law 2018-898 of 23 Oct. 2018, OJFR 246 (24 Oct. 2018).
72. ECtHR, 15 Nov. 2016, nos. 24130/11 and 29758/11, *A and B v. Norway*.
73. ECtHR., 23 Oct. 1995, nos 15963/90, *Gradinger v. Austria and* ECtHR, 4 Mar. 2014, nos 18640/10, 18647/10, 18663/10,18668/10 et 18698/10, *Grande Stevens and others v. Italy*.
74. European Commission, Proposal for a Regulation of the European Parliament and of the establishing the UCC and the European Union Customs Authority, and repealing Regulation (EU) No 952/2013, COM/2023/258 final, 17 May 2023.
75. ECA, *Special report 08/2025: Value Added Tax fraud on imports – The EU's financial interests are insufficiently protected under simplified import customs procedures* (2025).

exit of goods. They improve the management of flows and ensure the functioning of the customs union. However, there is no customs duties policy. The reason for this absence is that it is a forgotten element of tax policy.

A quantitative comparison of customs duty revenues and revenues from other indirect taxes reflects the transformation of tax systems. Historically and up to the Second World War, in France, customs duty revenues accounted for 12% to 25% of indirect taxation revenues and for 8% to 20% of the revenues of all taxes. Starting from 1946, the share of customs duty revenues in the revenues of all taxes declined, mainly as a result of the provisions of the Treaty of Rome but also because of a policy choice related to a shift of the tax burden on petroleum products, from tariffs to indirect taxes.

Historically, customs duties are an important source of revenue, but their importance has decreased in OECD member countries, demonstrating a shift in the tax burden from customs duties to other forms of taxation and particularly consumption taxes. But the shift is also the consequence of the structure of international trade and notably the share of trade in services in world GDP but also of e-commerce trade and the surge in packages with values below *de minimis* thresholds.[76]

In addition to an element related to the revenue aspects of the policy, it is possible to consider the schemes that articulate both taxes and customs policies. Economic procedures provided for under European law operate consistently with tax regimes.

First, this is the case of incentive and economic development mechanisms relating to import and export operations. For instance, the ability to import and move goods under duty suspension requires the linkage of two regimes, for customs duties and for other indirect taxes.[77] The customs procedures are of considerable economic importance and take into account the complexity of global supply chains. For instance, the inward processing facilitates certain economic activities allowing goods to be brought into the European Union relieved from payment of import duties and taxes before subsequent export.[78] Also, the customs warehousing procedure addresses situations in which the final destination of goods is not necessarily known at the time of importation. An operator may therefore wish to store the goods before selling them, whether in anticipation of their release for domestic use or for subsequent re-exportation. The customs warehousing regime is advantageous in both cases, as it allows the operator to defer payment of duties. In several instances, the customs regime contaminates the tax regimes in order to create a comprehensive and coherent system.

Second, a similar integration is to be noted with the rules relating to customs and tax debt. Thus, the guarantee, compulsory under the UCC in several situations,[79] integrates import duties and all taxes in connection with the import. However, the customs debt and the debt arising in relation to other taxes are not covered for the same amount. As a result of a fiscal policy choice, in favour of enhancing the tax attractiveness of the French territory, for debts incurred, VAT and similar taxes are not included in the calculation of the guaranteed amount, while other taxes are included at only 5% of their amount.[80] It is also to be noted that, when it comes to interest, the ECJ applies in customs matters a similar reasoning to that which it held in tax matters.[81] Where taxes or duties have been levied by a Member State pursuant to an EU regulation that has subsequently been declared invalid or annulled by the EU courts, those who paid the taxes or duties in question are, in principle, entitled not only to reimbursement of the amounts collected but also to payment of interest on those sums.

However, this integration of the regimes is not perfect. Transfer pricing is determined according to different methods depending on whether the issue is examined from a customs perspective or from that of direct taxation, even though both fields seek to establish, between related parties, the transaction price that would apply between independent parties in comparable circumstances. The need to bring these two areas closer together becomes clear when considering their respective objectives. Transfer pricing rules aim to allocate profits between states and to prevent financial flows from being artificially inflated when leaving a country in order to reduce the taxable base there and correspondingly increase it in the receiving state, thereby avoiding the artificial shifting of taxable profits. By contrast, customs valuation, in situations where related parties are not acting under competitive conditions, may be reduced at importation with the aim of reducing the amount of customs duties payable. In *Hamamatsu Photonics Deutschland GmbH*, the ECJ did not solve the issues emerging from retroactive downward adjustments, preventing the reimbursement of customs duties.[82]

The need for coherence between the regimes is not to be overlooked. Indeed, fraud situations require coordination between regimes, and recent and upcoming legislative changes take into account situations related to e-commerce: removal of the *de minimis* threshold, simplified duty rates in the reform of the UCC, introducing a derogation from the standard method of calculating customs value, in order to bring it closer to the value used for VAT purposes.

76. One of the actions taken by the European Union was to remove the EUR 150 *de minimis* threshold. Council Regulation (EU) 2026/382 of 11 Feb. 2026 amending Regulation (EC) No 1186/2009 as regards the elimination of the threshold-based customs duty relief, OJ 18 Feb. 2026. The 2023 report of the Wise Persons Group on the Reform of the EU Customs Union noted that "the thresholds do create an incentive for exporters to the EU to break consignments down into smaller packages," creating the wrong incentives in terms of trade and in terms of environmental sustainability (p. 33).
77. For instance, at export, art. 275 of the French General Tax Code provides that persons liable for VAT are entitled to acquire or import goods free of VAT where those goods are intended for export supplies (A12 quota).
78. *See* UCC arts. 256 and 259.
79. *See* UCC arts. 148.2(c), 195.1, 211,1(a), 211.3(c), 223.4, 262.1, 233.1(c).
80. Circular of 21 Nov. 2024 on Customs Clearance Guarantees (DA 24-069).
81. ECJ, 28 Apr. 2022, Case C-415/20, C-419/20, C-427/20, *Gräfendorfer Geflügel- und Tiefkühlfeinkost Produktions GmbH and Others*, ECLI:EU:C:2022:306.
82. ECJ, 20 Dec. 2017, Case C-529/16, *Hamamatsu Photonics Deutschland GmbH v. Hauptzollamt München*, ECLI:EU:C:2017:984.

3.3.2. Policy convergence and competences unity

Customs policy, which should traditionally be understood as the framework governing trade with third countries,[83] is fragmented and does not appear to be unified. The author's research concludes that, while the development of trade regulation marks a revival of customs policy, customs-related provisions are scattered and therefore do not define a coherent policy. For instance, several regulations are based on articles 191 to 193 of the TFEU, while the legal basis of the regulation on prohibiting products made with forced labour on the EU market is articles 114 and 207 of the TFEU, which concern, respectively, the approximation of the laws, regulations and administrative provisions of the Member States aimed at establishing and ensuring the functioning of the internal market, and the conduct of the common commercial policy on the basis of uniform principles.

In the meantime, these regulations rely on customs-law concepts. For instance, Regulation (EU) 2023/956 of 10 May 2023 establishing a carbon border adjustment mechanism relies on the notion of "declarant", defined as the sole operator authorized to import the goods listed in Annex I. As in customs law, in the case of direct representation, the declarant for the purposes of Regulation 2023/956 remains the importer (and is therefore solely liable for payment of the customs debt).

In the author's view, it only demonstrates that the European legislator intended to exempt the European Union from multilateral rules, and the case of the Carbon Border Adjustment Mechanism (CBAM), which has the nature of a customs measure, is illustrative of that movement. Of course, the European Union acts in such isolation within the multilateral trade system because of the inadequacy of the latter for current challenges – the approach of the Appellate Body when it comes to exceptions under article XX of the GATT is strict in that regard.

But when moving away from customs rules, the legislator creates inconsistencies. For instance, pursuant to the UCC provisions, the declarant is the person who lodges a customs declaration, and the formal importer is not necessarily the person on whose behalf the import operation is carried out or the one physically introducing the goods. However, in the context of the CBAM declaration, the concept of declarant under Regulation (EU) 2023/956 does not fully correspond to that set out in article 5 of the UCC, since an indirect representative may refuse to act as declarant for the purposes of that Regulation. In such a case, the indirect representative acts as a customs representative but not as a representative within the meaning of Regulation 2023/956, which may create difficulties in distinguishing between the two sets of responsibilities. Inconsistencies also emerge from the sanction regimes.[84]

The current difficulties in harmonizing customs provisions, tax provisions and other rules governing trade, reflecting a shift from a control of a material fact, the crossing of a border, towards a control of the entire chain, call for a change in the architecture of competences in the European Union.

Indeed, the EU construction organizing transfers of competence represented a shift from the traditional unity of fiscal, customs and trade policy powers that had previously structured the normal allocation of authority. This historical break, which also reflects a difference from the US architecture,[85] inevitably gives rise to conflicts.

Ensuring the coherence of customs policy calls for a unified competence over trade policy and fiscal policy. The author's research concludes that bringing fiscal and commercial powers together as exclusive competences of the European Union would improve the coordination of measures and would normalize the allocation of powers within the European Union in comparison with other comparable economic powers. As such, the following decision-making model is proposed: transferring fiscal powers, while authorizing a certain delegation to Member States and subnational entities, to the European Parliament. As such, it should be noted that the transformation of the European Union into a federation, changing the nature of customs duties into European taxes, is not a requirement to align trade and fiscal policies.

4. Conclusions

This article has argued that customs duties cannot be understood coherently if they are excluded from the field of taxation. Their history, legal qualification and economic function all show that they are compulsory levies of a fiscal nature. The fact that they are governed by a specific legal regime does not contradict that conclusion. On the contrary, the peculiarities of that regime are best explained by the progressive attachment of customs duties to trade policy and their corresponding detachment from general tax policy.

This detachment has produced a fragmented architecture. Customs duties are treated as a distinct category because their tax base, rate-setting mechanisms, procedures and sanctions are largely determined by international and European trade rules. Yet, the study of the French, European and international frameworks reveals that the distinction between customs duties and other taxes is not a distinction of nature, but one of regime and policy. Customs duties remain taxes, even when their adoption, adjustment and administration are shaped by commercial objectives.

The convergence observed between customs law and general taxation confirms this conclusion. Procedural guarantees, investigative powers, recovery mechanisms and anti-fraud measures increasingly reveal a common logic. At the same time, persistent divergences, particu-

83. A. Ribéreau in L. Pabon, *Traité des infractions du contentieux et des tarifs des douanes* (Larose, 1893), v.
84. On the consequences, *see* M. Lux, *CBAM liability of importers and 'other persons'*, *CCRM* (2025/2026).
85. Art. I, sec. 8 of the Constitution of 17 Sept. 1787 provides that "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises" provided that "all Duties, Imposts and Excises shall be uniform throughout the United States"; it further empowers Congress "To regulate Commerce with foreign Nations".

larly in the field of sanctions, demonstrate the limits of an incomplete alignment. These inconsistencies are no longer merely technical. They affect the effectiveness of the internal market, the protection of taxpayers and operators and the coherence of public finance policy.

For that reason, the fiscal nature of customs duties should have institutional consequences. If customs duties are taxes, customs policy cannot remain isolated from tax policy. The European Union's current distribution of competences, which separates trade, customs and taxation, creates legal and policy tensions that are increasingly visible in areas such as customs valuation, e-commerce, anti-fraud measures and border adjustment mechanisms. A more coherent framework requires the alignment of fiscal and commercial powers while preserving the possibility of appropriate delegation to Member States and subnational entities.

The central conclusion is therefore not that customs duties should lose their specificity, but that their specificity should be reinserted into a broader fiscal framework. Recognizing customs duties as taxes allows their legal regime to be understood more accurately and their policy function to be assessed more coherently. It also makes clear that the future of customs duties lies not in their continued isolation from taxation, but in the construction of a unified approach capable of reconciling revenue, trade, economic regulation and the protection of rights.