THE REX SYSTEM AND THE LEGITIMATE EXPECTATION PRINCIPLE

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Master thesis:	Customs and Supply Chain Compliance
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EXCUTIVE SUMMARY

All EU imports over the past three years can be reviewed, resulting in the possible retrospectively collection of duties in case a preferential duty rate was undeservedly claimed. The invalidation (e.g. due to fraud) of certificates of preferential origin used at the time of importation can thus result in the notification of substantial customs claims to EU importers. In such cases an importer may invoke a so-called 'legitimate expectation' defence. Under this defence, the collection of duties is not justified when the retrospective claim is a result of an error on the part of the competent authorities.

This defence possibility conflicts with the European Commission's goal to safeguard the EU's own resources. Therefore, on 1 January 2017, the EU introduced the Registered Exporter system (REX). This is a new system of certification of origin of goods which, as a start, will be applied in the Generalised System of Preferences (GSP), through which the EU unilaterally grants tariff preferences to developing countries.

The REX system initiative leads to a shift from a system whereby the competent authorities in the land of export are responsible for issuing certificates of origin (e.g. Form A) towards a system whereby it is the exporter who makes out so-called 'statements on origin' themselves. The question arises what impact the introduction of the REX system has on the principle of legitimate expectation. This is being investigated in this thesis for which the central question is:

"What are the consequences of the introduction of the REX system for the application of the principle of legitimate expectation within the framework of the EU GSP?

The boundaries of legitimate expectation principle are well established in legislation as well as in settled case law. Based on Article 116 (1) (c) in conjunction with article 119 UCC, the following cumulative requirements have to be fulfilled:

I. There must be an error on the part of the competent authorities;
II. the error was reasonably not detectable by the EU importer acting in good faith.

Based on settled case law it is evident that the legitimate expectation principle needs to be explained in a restricted sense. The difficulty of invoking the legitimate expectation defence mainly lies with the second requirement. Namely that the error was not reasonably detectable by the EU importer acting in good faith. There is a rather far-reaching obligation for the EU importer to take due care to ensure that all the conditions for the preferential treatment have been fulfilled. Even though from the case law it follows that there is not an obligation for continuous monitoring in this respect, taking care – as an EU importer – that in the beneficiary country all conditions for the preferential treatment are fulfilled can be an extreme difficult task in many cases. It is also not completely clear what will be considered as sufficient in this regard. Will this be a regular visit to the manufacturing sites? Random sampling performed by an independent third party? One can think of many situations where it is simply impossible to obtain information concerning the circumstances of the issue of a specific certificate of origin. These errors are thus often very hard to detect. Even though they are hard to detect, the errors will in many cases need to be considered as a commercial risk which is inherent of participation in international trade.

Therefore, the cases under the 'old' system (Form A) in which a legitimate expectations defence can actually be successfully invoked are – realistically seen – very limited.

Under the REX system it will most likely even be more difficult to successfully invoke the legitimate expectation defence. It questionable to what extent one can still speak of "error on the part of the competent authorities" as the authorities obviously no longer issue the preferential giving documents themselves.

The competent authorities in the beneficiary country are required to carry out regular controls on exporters on their own initiative (article 109 paragraph 1 UCC IR). It could be argued that the failure of the competent authorities in the beneficiary country to fulfil this obligation, could be regarded as an "error on the part of the competent authorities". However, the burden of proof in such a situation is with the EU importer. It does not come as a surprise that it will be extremely difficult and perchance in most situations

impossible for the EU importer to prove that the authorities in the beneficiary country did not fulfil their obligations.

Under the unlikely scenario that the EU importer is actually able to prove that the negligence of the competent authorities in the beneficiary country to properly monitor the registered exporter can indeed be considered as an 'error', also the second requirement, that this error was not reasonably detected, should be fulfilled. As indicated the criteria in this respect are quite extensive. As a result, under the REX system, there is d*e facto* only very limited leeway for the principle of legitimate expectation within the framework of article 119 UCC. Most likely, only in very rare circumstances an EU importer could successfully invoke this defence principle. One could even ponder whether it is not merely a theoretical possibility.

This leaves open the 'equity' provision of article 120 UCC, which determines that an amount of import duties shall be repaid or remitted in the interest of equity where a customs debt is incurred under special circumstances. With reference to case law it could for example be argued that the failure of the EU Commission to monitor the EU GSP could lead to such a special circumstance. There is much to say in favour of this argument, however it will clearly be a long shot as it is clear it will be extremely difficult to gather evidence that there are authorities which have failed to carry out sufficient monitoring. In addition, one can think of alternative scenarios which also result in a 'special circumstance'. In this respect one can think of the possibility that OLAF or the local authorities in the GSP beneficiary country are aware that a registered exporter issues incorrect statements of origin, but let them continue to do so in order to map a network of perpretators of fraud. This should, however, be assessed on a case-by-case basis.

All in all, this leads to the conclusion that the REX system seems to form an insurmountable obstacle which will most likely prevent a successful invocation of the legitimate expectation defence by EU importers who are being confronted with a retroactive claim of import duties in case of an incorrect application of preferential origin.

Only in specific special circumstances EU importers could potentially successfully make an appeal of the 'equity' provision of article 120 UCC. This means that the EU Commission has succeeded in their intentions to further limit the situations in which EU importers can make a successful appeal on the legitimate defence principle.

In view of the above it is thus a matter of risk appetite of the EU importer who wants to engage in international trade. There is much in favour for the thought that the risk of a retrospective claim indeed needs to be with the EU importer as he is the one actually benefiting from the preferential rates.

Contents

1 INTRODUCTION

On 1 January 2017, the European Union (EU) introduced the Registered Exporter system (REX). The REX, a new system of certification of origin of goods, is being progressively introduced within the framework of the EU's preferential trade arrangements. As a start, it will be applied in the Generalised System of Preferences (GSP), through which the EU unilaterally grants tariff preferences to developing countries. In addition, the REX system will be applied to other EU bilateral and trade agreements in the (near) future as well.[1] An example is the Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada which will most likely enter into force later this year.

In line with the heightened IT efforts prevailing in the recently introduced Union Customs Code (UCC)[2], the REX system is highly automated. For example, exporters in GSP beneficiary countries will be registered by their competent authorities in a digital database. Importers in the EU are able to consult this database in order to determine whether a preferential import duty can be claimed. In addition, to facilitate the collection of the necessary data for the REX system, various actors involved will be granted access to a web application.

The REX system initiative is another step in the shift from a system whereby the competent authorities in the land of export are responsible for issuing certificates of origin (e.g. Form A) towards a system whereby it is the exporter who makes out so-called 'statements on origin' themselves.

As *inter alia* described in the preamble of Regulation (EU) No. 1063/2010, this shift finds its roots in the European Commission's goal to safeguard the EU's own resources:

"At present, the authorities of beneficiary countries certify the origin of products and, where the declared origin proves to be incorrect, importers frequently do not have to pay duty because they acted in good faith and an error was made by the competent authorities. As a

[1] See in this respect: https://ec.europa.eu/taxation_customs/business/calculation-customs-duties/rules-origin/general-aspects-preferential-origin/arrangements-list/generalised-system-preferences/the_register_exporter_system_en.

[2] Regulation (EU) No. 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code, applied as of 1 May 2016.

result, there is a loss to the European Union's own resources and it is ultimately the European Union taxpayer who bears the burden. Since exporters are in the best position to know the origin of their products, it is appropriate to require that exporters directly provide their customers with statements on origin."[3]

All EU imports over the past three years can be reviewed, resulting in the possible retrospectively collection of duties in case a preferential duty rate was undeservedly claimed.[4] The invalidation (e.g. due to fraud) of certificates of preferential origin used at the time of importation can thus result in the notification of substantial customs claims to EU importers.[5] In such cases, however, an importer may invoke a so-called 'legitimate expectation' defence.[6] This defence principle directly relates to the risk of loss of the European Union's own resources where the EU commission is referring to.

Under this defence, the collection of duties is not justified when the retrospective claim is a result of an error on the part of the competent authorities, provided the following conditions are met:

I. The debtor could not reasonably have detected that error; and
II. the debtor was acting in good faith.

The conditions under which such a defence may be invoked are further elaborated in case law of the Court of Justice of the European Union (CJEU).[7]

Under the REX system, competent authorities are mostly concerned with the registration of exporters, after which the export is supposed to comply with origin rules. Contrary to the 'old' system which is partly still in place, they are therefore no longer involved in the process of issuing certificates of origin. The most important question that arises is whether importers acting in good faith, in the event of irregularities, still have possibilities to invoke the legitimate

[3] Regulation (EU) No. 1063/2010, preamble no. 17.
[4] Article 103 UCC.
[5] Muniz 2015, p. 368-379.
[6] Article 119 UCC (previous article 220(2) (b) of Council Regulation (EEC) No. 2913/92).
[7] See for example: CJEU 14 May 1996, joined cases C-153/94 and C-204/94 (Faroe Seafood)

expectation defence principle under the REX system. At first sight this seems to be very challenging because – as previously already mentioned - there is no (direct) involvement of the competent authorities in the process of issuing certificates of origin as the exporters will make out the 'statements on origin' themselves.

As the REX system is only recently introduced, there is no case law available yet which determines the boundaries of the legitimate expectation defence within this framework. Therefore, this topical problem will be addressed in this thesis. The practical and academic goal of this thesis is to provide a well-founded view on this matter and to show the risk for the EU importer acting in good faith in case – like intended by the EU Commission – there will be no defence possibilities in case of any irregularities in relation to preferential origin.

The central question in this thesis is:

"What are the consequences of the introduction of the REX system for the application of the principle of legitimate expectation within the framework of the EU GSP?

Before coming to an answer to this question in the conclusion in chapter 6, the EU GSP is described in chapter 2. Subsequently, chapter 3 provides a detailed description of the (legal) framework of the REX system. Finally, chapters 4 and 5 will form the core of this thesis with – on the one hand – an analysis of the legitimate expectation principle under the 'old' framework whereby preferential giving documents are issued by the competent authorities and – on the other hand – the legitimate expectation under the REX system.

2 EU GSP

The 'origin' of goods is a term which can be found in various customs and trade arrangements and is often of relevance for the application of the customs tariff or other measures in relation to cross border movement of goods. For the determination of the origin of a good it is important to know from which country (or countries) the raw materials used for the manufacturing of the good come from and where the goods at hand are actually manufactured or processed. On the basis of certain criteria also known as the 'rules of origin', it is determined in which country the goods find their 'origin'.[8] With other words: *origin is the "economic" nationality of goods in international trade.*[9]

In this respect a distinction needs to be made between 'non-preferential origin' and 'preferential origin'. An important distinction between those two principles is that *"preferential origin treatment is requested (by the importer) and non-preferential origin determination is required (for the exporter)."*[10]

Non-preferential origin applies in all other cases than where the specific preferential rules apply. With other words: they apply to trade which is not governed by special trade agreements.[11] The non-preferential origin is of importance as, based on the country of origin, various trade measures can be taken.[12] In this respect one can for example think of anti-dumping duties, countervailing duties, trade embargoes and quantitative restrictions. In addition, non-preferential origin rules are also used for statistical purposes.[13] In view of the topic of this thesis, non-preferential origin will not further be discussed.

Preferential origin is of importance as it allows importers to benefit from a lower or 0% import duty rate on the imported goods. From an EU perspective, preferential origin applies to the situation where the EU entered into a preferential trade agreement with a third country or with a group of countries. Distinction can be made between bilateral and unilateral

[8] Punt & Van Vliet 2000, p. 149.
[9] See: http://ec.europa.eu/taxation_customs/business/calculation-customs-duties/rules-origin/introduction_en (visited on 25-5-2017).
[10] Van de Heetkamp & Tusveld 2011, p. 71.
[11] Walsh 2015, p. 294.
[12] Van de Heetkamp & Tusveld 2011, p. 73.
[13] Walsh 2015, p. 294.

agreements. A bilateral agreement is for example a Free Trade Agreement the EU has concluded with a third country. An example of a unilateral agreement is the EU Generalized System of Preferences (GSP).[14] This is also where – in line with the research question of this thesis – the focus of this chapter will be on.

2.1 History

As mentioned in the introduction to this thesis, the EU GSP is a unilateral agreement through which the EU grants tariff preferences to developing countries in order to increase the beneficiary countries accessibility to the EU markets and thus supporting their economic growth.

The GSP concept was adopted by the United Nations Conference on Trade and Development (UNCTAD) during the 1968 UNCTAD II Conference held in New Delhi. Resolution 21 (II), with the title '*Preferential or free entry of exports of manufactures and semi-manufactures of developing countries to the developed countries', inter alia* states that the objective of the GSP in favour of the least advanced among the developing countries, should be:

I. To increase their export earnings;
II. to promote their industrialization; and
III. to accelerate their rates of economic growth.[15]

Subsequently, in order to prevent violation with the General Agreement on Tariffs and Trade (GATT) article I (Most-favoured-nation), the so-called 'enabling clause' was adopted as part of the GATT Tokyo Round in 1979. Article 2 (a) of this enabling clause reads: *Preferential tariff treatment accorded by developed contracting parties to products originating in developing countries in accordance with the Generalized System of Preferences.*[16]

[14] Walsh 2015, p. 294.
[15] Proceedings of the United Nations Conference on Trade and Development, Second Session New Delhi, 1 February – 29 March 1968, Volume I.
[16] Differential and more favourable treatment reciprocity and fuller participation of developing countries, Decision of 28 November 1979 (L/4903).

The EU is not unique with their GSP, as there are currently 13 other countries which grant GSP preferences as well.[17]

2.2 Legal framework

The current legal framework of the EU GSP, from which roughly 90 countries benefit, is provided for in Regulation (EU) No. 978/2012.[18] Based on this regulation there are the following three different variants of the EU GSP:

- General GSP arrangement which provides for lower or zero tariff rates for roughly two thirds of all product categories.
- A special incentive arrangement for sustainable development and good governance (GSP+). This arrangement provides full removal of tariffs for mainly the same areas as under the general GSP arrangement. Beneficiary countries can become eligible for this treatment in case they have implemented multiple core international conventions, for example in relation to human and labour rights.
- A special arrangement for the least-developed countries (Everything But Arms (EBA)). This arrangement provides for duty free and quota free access for almost 99% of product categories.

However, as previously described, in order for EU importers to benefit from a preferential duty rate, certain requirements have to be met. These requirements not only include that rules of origin are met, but also that valid documentation should be submitted to support the claim.[19] In addition, the goods for which a preferential duty is claimed needs to be the same goods as exported from the beneficiary country. The rules in this respect are provided for in the UCC.

[17] http://unctad.org/en/Pages/DITC/GSP/About-GSP.aspx (visited on 28-5-2017).
[18] Regulation (EU) No 978/2012 of the European Parliament and of the Council of 25 October 2012 applying a scheme of generalised tariff preferences and repealing Council Regulation (EC) No 732/2008.
[19] Van de Heetkamp & Tusveld 2011, p. 82.

2.3 Rules of origin

According to UCC article 64 paragraph 1 and 3, in order to benefit from preferential treatment, goods shall comply with the rules of preferential origin. The rules of origin determine whether a product can be considered as originating in a GSP beneficiary country. The general principles in this respect are described in the UCC Delegated regulation (UCC DA).[20] Article 41 UCC DA determines that the following products shall be considered as originating in a GSP beneficiary country:

I. Products wholly obtained in that country;
II. Products obtained in that country incorporating materials which not have been wholly obtained there, provided that such materials have undergone sufficient working or processing.

Generally speaking, products for which only one country is involved in their production process can be regarded as 'wholly obtained'. In this respect one can for example think of products from live animals raised in a specific country or plant and vegetable product grown or harvested there. Even the usage of a minor component from another country will lead to the result that the product no longer qualifies as such. An exhaustive list of what is considered as 'wholly obtained' is provided for in article 44 UCC DA.

It is evident that most products are not manufactured solely with products that are actually wholly obtained in that country. However, in case a product does not qualify as 'wholly obtained', it can still be considered as originating in a country when the non-originating materials used have undergone sufficient working or processing in that specific country (article 45 UCC DA). It highly depends on the product in question what can be considered as sufficient working or processing. The description of the system and the requirements per product are laid down in Annex 22-03 of the UCC DA. In this respect the correct classification of the product in the Harmonized System is of great importance for finding the correct rule. These rules can be very complex. It does, however, go beyond the scope of this thesis to further elaborate on them in detail.

[20] Commission Delegated Regulation (EU) 2015/2446 of 28 July 2015 supplementing Regulation (EU) No 952/2013 of the European Parliament and of the Council as regards detailed rules concerning certain provision of the Union Customs Code.

2.4 Proof of origin

An EU importer can only benefit from a preferential duty rate upon import into the EU in case they are able to prove that the products are originating from an EU GSP beneficiary country. As described in the previous paragraph this is the case when the products meet the criteria of the rules of origin.

For the EU GSP, this proof of origin comes generally speaking in the form of a certificate of origin Form A.[21] According to article 74 UCC Implementing regulation (UCC IA)[22], a certificate of origin Form A shall be issued by the competent authorities in a beneficiary country on the written request of the exporter. Together with this written request, the exporter is obliged to submit documents which prove that the products to be exported qualify for the issue of origin Form A.

The requirements on how the Form A should look like and what text should be included are found in Annex 22-08 UCC IA.

In addition, for low value GSP exports, the exporter in the beneficiary country can use an invoice declaration. According to article 75 UCC IA, this invoice declaration may be made out for consignments whose total value does not exceed EUR 6.000. Based on article 75 paragraph 2 UCC IA, the exporter should be prepared to submit at any time all appropriate documents proving the originating states of the products concerned when this is requested by the competent authorities in the exporting country.

Just like for the Form A certificate, there are strict requirements which an invoice declaration should meet in order to be considered as valid. These requirements are provided for in Annex 22-09 UCC IA.

[21] As of 1 January 2017, statements of origin are also be used for some EU GSP countries. See in this respect chapter 3 of this thesis.
[22] Commission Implementing Regulation (EU) 2015/2447 of 24 November 2015 laying down detailed rules for implementing certain provisions of Regulation (EU) No 952/2013 of the European Parliament and of the Council laying down the Union Customs Code.

2.5 Non-manipulation

The final requirement which needs to be fulfilled in order to be able to claim a preferential import duty rate is that the goods for which this preferential duty is being claimed need to be the same goods as exported from the beneficiary country. This requirement is described in article 43 UCC DA. This article decides that the goods may have not been altered in any way other than measures to preserve them in good condition or attach documentation to ensure compliance with specific domestic requirements in the EU. With respect to the latter point one can think of adding or affixing of marks, labels, and seals.

3 REX SYSTEM

As already described in the introduction, the REX system is the new system of certification of origin of goods under the EU GSP. Contrary to the (partly) 'old' situation where Form A certificates are issued by the competent authorities in the EU GSP beneficiary country, under the REX system there is no (direct) involvement of the competent authorities in the process of issuing certificates of origin as the exporters will make out the 'statements on origin' themselves.

With the entering into force of the UCC as of 1 May 2016, the legal framework for the REX system is provided for in the UCC IA. More specifically in articles 70, 72 78-93, 99-109 and in the annexes 22-06, 22-07 and 22-20.

In this chapter the REX system will be described in more detail.

3.1 History

The REX system was introduced by means of Regulation (EU) No. 1063/2010 in which the legal framework for the reform of the EU General System of Preferences (GSP) was provided.[23] The reform of the GSP was mainly driven by the objective to ensure a better integration of developing countries into the world economy. According to an impact assessment performed by the EU Commission, this integration was lagging behind because the GSP rules of origin were being perceived as too complex and too restrictive. To achieve this objective, it was necessary to simplify the rules of preferential origin and make them less stringent. As a consequence of these simplifications, products originating from beneficiary countries should actually be benefiting more easily from the preferences granted.[24]

The aforementioned simplifications *inter alia* included less strict origin determining criteria, notably for Least Developing Countries (LDCs) and simplification of procedures such as the direct transport rule.

[23] Commission Regulation (EU) No 1063/2010 of 18 November 2010 amending Regulation (EEC) No 2454/93 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 establishing the Community Customs Code.
[24] Ibid, preamble no. 3.

As already mentioned in the introduction of this thesis, one of the other adjustments was rooted by the notion that the EU Commission was of the opinion that the EU's own resources were not safeguarded sufficiently in respect of incorrect preferential origin claims.

For this purpose, the REX system was introduced. According to article 3 of Regulation (EU) No. 1063/2010 most changes of the GSP reform entered into force as of 1 January 2011. However, as the introduction of the REX system needed to take into account both the capacity of beneficiary countries to set up and manage the registration system as well as the capacity of the Commission to set up the necessary central data-base, the implementation of the REX system was deferred to 1 January 2017. Furthermore, an additional three year period is given to countries which cannot meet this deadline.[25]

3.2 General aspects

An exporter who is established in a beneficiary country can register himself with the competent authorities in that specific country in order to become a registered exporter. After the registration, which is a one-off formality in the REX IT system created by the EU Commission[26], the registered exporter is assigned a REX number which allows him to certify preferential origin himself via a statements on origin. Under the EU GSP system, this is only required in case the value of a consignment (of one or more packages) is EUR 6.000 or more. For low value consignments there is no need to register as a registered exporter.

With this statement of origin, the EU importer is entitled to claim a preferential import duty rate upon import of the goods. To verify whether a REX number is valid, they can consult the publicly accessible REX database.

In addition to exporters in beneficiary countries, EU established exporters can also become a registered exporter. This is required for the purpose of exporting products of EU origin to a beneficiary country which can be used for bilateral cumulation. Finally, re-consignors of goods established in EU can also register to become a registered exporter allowing them to replace

[25] Ibid, preamble no. 23 and see also paragraph 3.2.1
[26] See paragraph 3.5

a statement on origin by one or more replacements statements for the purpose of sending all or some of the products elsewhere within the EU, or to Norway or Switzerland.[27]

3.2.1 Current application and transitional period

As described in paragraph 3.1, the REX system became applicable as of 1 January 2017 within the framework of the EU GSP system. Until 30 June 2016, GSP beneficiary countries had the possibly to inform the EU Commission whether they were ready to start the application of the REX system as of 1 January 2017 (article 79 paragraph 1 UCC IR). Most GSP beneficiary countries indicated they were not ready yet, therefore an additional three year period was given to countries which could not meet this deadline. However, all GSP beneficiary countries must apply the REX system as of 30 June 2020 at the latest (article 79 paragraph 4 UCC IR).

In order to start applying the REX system, EU GSP beneficiary countries need to fulfil two requirements:

I. They need to submit an undertaking to the EU Commission that they have in place and are able to maintain the necessary administrative structures and systems required within the REX framework (article 70 UCC IR).
II. They are required to provide the EU Commission with the contact details of the competent authorities responsible for the registration of exporters and for ensuring the administrative cooperation (article 72 UCC IR).

The above mentioned undertakings need to be submitted to the EU Commission at least three months before the date on which the beneficiary country intends to start the registration of exporters.

During the transition period, the current system of certification of preferential origin (Form A) is progressively replaced with the REX system. During a period of twelve months following the date on which the beneficiary country starts the registration of the exporters, the authorities in that beneficiary country shall continue to issue certificates of origin Form A at the request of exporters who are not registered at the time of requesting the certificate. This

[27] See also paragraph 3.5.

period of 12 months can be extended for another six months upon the request of the beneficiary county (article 79 paragraph 4 UCC IR). Both systems will thus be applied in parallel for a maximum period of eighteen months.

Below an overview is provided of the current status of application of the REX system[28]:

As of 1 January 2017	As of 1 January 2018	As of 1 January 2019
Angola, Burundi, Bhutan, Democratic Republic of Congo, Central African Republic, Comoros, Congo, Cook Islands, Djibouti, Ethiopia, Micronesia, Equatorial Guinea, Guinea Bissau, India, Kenya, Kiribati, Laos, Liberia, Mali, Nauru, Nepal, Niue Island, Pakistan, Solomon Islands, Sierra Leone, Somalia, South Sudan, Sao Tomé & Principe, Chad, Togo, Tonga, Timor-Leste, Tuvalu, Yemen, Zambia.	Afghanistan, Armenia, Bolivia, Ivory Coast, Eritrea, Gambia, Guinea, Malawi, Mozambique, Myanmar, Niger, Rwanda, Sri Lanka, Sudan, Swaziland, Syria, Tanzania	Bangladesh, Benin, Burkina Faso, Cabo Verde, Cambodia, Haiti, Indonesia, Kyrgyz Republic, Lesotho, Madagascar, Mauritania, Mongolia, Nigeria, Paraguay, Philippines, Samoa, Senegal, Tajikistan, Uganda, Uzbekistan, Vanuatu, Vietnam.

3.2.2 REX application outside the framework of the EU GSP

The REX system will also be applied outside the framework of EU GSP. According to article 68 UCC IR, an exporter established in the EU is required to register as a registered exporter in case the preferential arrangement with a third country (e.g. a FTA) they would like to use, provides that a document on origin may be completed by an exporter in 'accordance with the relevant EU legislation'. Under that scenario the rules in respect to the REX system *mutatis mutandis* apply.

An example of a preferential arrangement where the above is applicable is the Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada. In the

[28] Source Website EU Commission: https://ec.europa.eu/taxation_customs/business/calculation-customs-duties/rules-origin/general-aspects-preferential-origin/arrangements-list/generalised-system-preferences/the_register_exporter_system_en (visited on 26-3-2017)

text of the protocol on rules of origin and origin procedures which is part of the CETA treaty the following text is included in article 19:

"1. An origin declaration as referred to in Article 18.1 shall be completed: (a) in the European Union, by an exporter in accordance with the relevant European Union legislation; (…)."[29]

Based on this wording, the EU exporters are thus required to register themselves as registered exporter in order to issue statements of origin. As to date it is not clear when the CETA will become applicable. In view of the research question of this thesis, the registration of EU exporters under the REX system is not further assessed in detail.

3.3 Procedure for becoming a registered exporter

According to article 86 UCC IR, in order to become a registered exporter, an exporter shall lodge an application with the competent authorities of the beneficiary country where their headquarters exists or where they are permanently established. For this purpose, the form as included in annex 22-06 of the UCC IR needs to be used. EU exporters or re-consignors can – based on article 86 paragraph 2 UCC IR – lodge an application with the customs authorities of the EU member state where they are established. For this purpose the same form (annex 22-06) can be used.

The applicant *inter alia* needs to provide, besides obvious information such as his contact details, information about his main activities and a description of the goods which qualify for preferential treatment.

According article 86 paragraph 4 UCC IR, the registration shall be valid as of the date on which the competent authorities of the beneficiary country or customs authorities of the EU member state receive a complete application for registration. In case the competent authorities consider that the information in the application is incomplete, they shall – according to article 80 paragraph 3 UCC IR – inform the exporter without delay. In case the application is

[29] Comprehensive Economic and Trade Agreement; protocol on rules of origin and origin procedures: http://data.consilium.europa.eu/doc/document/ST-10973-2016-ADD-6/en/pdf

considered complete, the competent authorities of the beneficiary country or customs authorities of the EU member state assign without delay the number of registered exporter to the exporter and enter into the REX IT system, the number of registered exporter, registration data and the date from which the registration is valid (article 80 paragraph 2 UCC IR). The number of registered exporter – a string of 35 characters – shall be used on the statement on origin issued by the registered exporter.

This date should – with reference to 86 paragraph 4 UCC IR – the date on which the competent authorities receive a complete application for registration.

With reference to paragraph 3.2.2 it is noted that the form included in the aforementioned annex also – based on article 68 UCC IR – needs to be used for the registration of exporters outside the GSP framework of the EU. In this respect one should think about the (future) obligation to use the REX system under the FTA with Canada.

3.4 Making out statements of origin and obligations of the exporter

Once a registration as registered exporter is completed, the specific exporting company can start making out statements of origin. General provisions in this respect are provided for in article 92 UCC IR. Based on this article, a registered exporter may make a statement on origin at the time of exportation to the EU or when the exportation to the EU is ensured. It goes without saying that he is only allowed to do so when all requirements in respect to the origin of the product are met. The statement of origin – which shall be made out in either English, French or Spanish – is required to contain the specific wording as included in Annex 22-07 of the UCC IR and is to be made out on any commercial documents showing the name and full address of the exporter and consignee as well as a description of the products and the date of issue. The English version of the statement of origin reads as follows:

"The exporter … (Number of Registered Exporter) of the products covered by this document declares that, except where otherwise clearly indicated, these products are of … preferential origin according to rules of origin of the Generalised System of Preferences of the European Union and that the origin criterion met is… "

It is also possible for registered exporters to make out statements of origin retrospectively when the statement of origin is presented to the customs authorities in the EU member state of lodging of the customs declaration for release for free circulation up to 2 years after the importation.

In addition to the general provisions as described above, the registered exporter needs to maintain – for monitoring and control purposes – appropriate commercial accounting records concerning the production and supply of goods qualifying for preferential origin (article 91 UCC IR). This includes information relating to the materials used in the manufacturing process as well as information in relation to production and stock accounts. This information shall be kept available for at least three years from the end of the calendar year in which the statement of origin was made out (or longer if required by national law).

3.5 Replacement of statements of origin

Re-consignors of goods are – according to article 101 UCC IR – allowed to replace a statement on origin by one or more replacement statements for the purpose of sending all or some of the products elsewhere within the EU, or to Norway or Switzerland provided that the goods have not yet been released for free circulation in the EU and are placed under control of a customs office of an EU member state.

The requirements for the replacement statements are provided for in annex 22-20 of the UCC IA. These requirements *inter alia* prescribe that certain information in relation to the initial statement of origin and should be included and that the document will be marked with "Replacement Statement".

In order for re-consignors to be able to make out a statement of origin, they have to be registered in the REX-system in case the total value of the originating goods of the initial consignment to be split exceeds EUR 6.000. On the other hand, there is no requirement for re-consignors to register if they attach a copy of the initial statement on origin made out in the beneficiary country. In this respect it should be noted that for products to be sent to Norway or Switzerland, the re-consignor should be registered in the REX-system.

3.6 REX IT System

As already described in the introduction to this thesis, the REX system is highly automated and IT driven. Based on article 80 UCC IR, the EU Commission was obliged to set up a system for registering exporters authorised to certify the origin of goods and make it available by 1 January 2017. The EU Commission fulfilled this obligation by setting up a supporting IT-system which can be accessed via a website by entering a username and password. In this respect is important to note that the beneficiary countries were not involved in the development of this system. According to the EU commission, the only technical requirement for the beneficiary country to be able to use the REX system is that there is a minimum of once device available which is connected to internet.[30]

With this device with internet connection, competent authorities of the beneficiary countries are obliged to enter in the REX system the number of the registered exporter, the registration data and the date from which the registration is valid (article 80 paragraph 2 UCC IR). This will all be stored in the database of the REX system.

3.6.1 Access rights to the REX database

The database of the REX system is not accessible to anyone. Who is allowed to have access and to what extent, is described in article 82 UCC IR. The EU Commission are the only ones who have full access to consult all the data which is available in the REX database (article 82 paragraph 2 UCC IR). Other parties involved have more limited rights. For example, the competent authorities of a beneficiary country only have access to the data concerning exporters registered by them (article 82 paragraph 3 UCC IR).

The customs authorities of the EU Member States also have – based on article 82 paragraph 4 UCC IR – access to consult the data registered by them, by the customs authorities of other EU member states, and by the competent authorities of beneficiary countries as well as by Norway and Switzerland. The EU customs authorities of the various member states need to have access in order to be able to carry out verifications of customs declarations as meant in UCC article 188.

[30] Website EU Commission https://ec.europa.eu/taxation_customs/business/calculation-customs-duties/rules-origin/general-aspects-preferential-origin/arrangements-list/generalised-system-preferences/the_register_exporter_system_en (visited 12-2-2017)

Finally, according to article 82 paragraph 8 UCC IR there is also information which is publically available. This information consists of:

I. The number of the registered exporter;
II. the date from which the registration is valid;
III. the date of the revocation if applicable
IV. information whether the registration applies also to exports to Norway, Switzerland or Turkey; and
V. the date of the last synchronisation between the REX system and the public website

This information can be supplemented by more specific information regarding the registered exporter, such as address, contact details and an indicative description of the goods which qualify for preferential treatment. However, this information may only be made publically available with the approval of the registered exporter article 82 paragraph 7 UCC IR.

3.6.2 Data protection

In the era of transfer and storage of digitalized information, the protection of data is of the utmost importance. Therefore, the data provided by the registered exporters fall under the scope of Regulation (EC) No 45/2001 of 18 December 2000 which see on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data. Explicit reference is made to this regulation in article 83 paragraph 2 UCC IR where it is prescribed that the registered exporter is to be provided with information in respect of the identity of the controller.[31] In addition, the registered exporter shall be provided with information concerning the legal basis of processing operations for which the data is intended and with the data retention period.

The controller as meant in article 2 sub d of Regulation (EC) No 45/2001, will – for the REX system – be the competent authority in a beneficiary country and each customs authority in

[31] According article 2 sub d of Regulation (EC) No 45/2001 of 18 December 2000 'controller' shall mean the Community institution or body, the Directorate-General, the unit or any other organisational entity which alone or jointly with others determines the purposes and means of the processing of personal data; where the purposes and means of processing are determined by a specific Community act, the controller or the specific criteria for its nomination may be designated by such Community act".

the EU that has introduced data into the REX system. In addition, the EU Commission shall be considered as a joint controller with respect to the processing of all data to guarantee that the registered exporter will obtain his rights (article 83 paragraph 3 UCC IR).

Furthermore, the rights of the registered exporters with regard to the data stored in the REX system are exercised in accordance with the data protection legislation implementing Directive 95/46/EC of the EU Member State which is storing their data. However, in view of the scope of this thesis, this not further elaborated on.

Finally, according to article 83 paragraph 5 UCC IR, the member states who replicate in their national systems the data of the REX system are obliged to keep the replicated data up to date.

3.7 Monitoring obligation of competent authorities from beneficiary country

Besides the obligation for the competent authorities of beneficiary countries to cooperate with the customs authorities of a EU member state by carrying out a verification of the validity of statements on origin when requested (article 109 paragraph 1 UCC IR), these authorities are also required to monitor themselves.

According to article 108 paragraph 1 UCC IR, they shall – for the purpose of ensuring compliance with the rules concerning the originating status of products – carry out regular controls on exports on their own initiative. These controls shall be carried out on intervals determined on the basis of 'appropriate risk analysis criteria'. In order to make this risk analysis, the competent authorities of the beneficiary country should require exporters to provide copies or a list of the statements on origin they have made out (article 108 paragraph 2 UCC IR). In addition to these lists of statements on origin, they can also carry out inspections of the exporter's accounts and even to those of producers supplying materials. This includes inspections at their premises. Finally, they are allowed to carry out any other check which they consider appropriate (article 108 paragraph 3 UCC IR).

3.8 Withdrawal from the record of registered exporters

The power to revoke or alter a registration of a registered exporter lies – depending on the scenario – either with the competent authorities of the beneficiary country, or with the EU commission. In this paragraph these two scenarios are further described.

3.8.1 Revocation by competent authorities of the beneficiary country

Based on article 89 paragraph 1 UCC IR, registered exporters are required to immediately inform the competent authorities in case changes occur with respect to the information they have provided for the purpose of their registration. With reference to paragraph 3.3 this concerns for example contact details, information about his main activities and a description of the goods which qualify for preferential treatment. In addition, when a registered exporter no longer meets the conditions required by the REX system, in respect of the rules of origin or does no longer intent to use his registered exporter number, the importer is also required to inform the competent authorities accordingly (article 89 paragraph 2 UCC IR). They can then be withdrawn from the record of registered exporters.

In contrary to the above where the revocation from or alteration of the record of registered exporters is based on the registered exporters own initiative, the competent authorities in a beneficiary country can also take this initiative. According to article 89 paragraph 3 UCC IR this can be the case when the registered exporter no longer meets the conditions for exporting goods under the GSP scheme or simply does no longer exist anymore, for example due to bankruptcy. The aforementioned article also provides for the possibility for the competent authorities to revoke the registration in case the registered exporter intentionally or negligently draws up, or causes to be drawn up, a statement on origin which contains incorrect information and leads to wrongfully obtaining the benefit of preferential origin.

In case a registration is being invoked, the exporter may seek recourse to judicial remedy (article 89 paragraph 7 UCC IR). If it appears that the revocation was incorrect, the registered exporter is entitled to use the same registered exporter number again which was assigned to him at the time of registration (article 89 paragraph 8 UCC IR).

Also registered exporters whose registration had been revoked may have a second chance provided that they have remedied the situation which led to the revocation of their registration. For this purpose a new application in accordance with article 86 UCC IR shall be lodged by him. In this respect please refer to paragraph 3.3.

3.8.2 Revocation by the EU Commission

Also the EU Commission has – according to article 90 UCC IR – the direct possibility to revoke a registration of an exporter. This power can be used in case a beneficiary country ceases to be regarded as a beneficiary country as meant in Annex II to Regulation (EU) 978/2012.

This measure can be reversed in case the specific country is reintroduced in the list of beneficiary countries provided that the registration data of the exporter is still available in the system (10-year period). Additionally, the registration can only be reintroduced in case the registration data remained valid for at least the GSP scheme of Norway, Switzerland or Turkey.

4 LEGITIMATE EXPECTATION PRINCIPLE UNDER THE 'OLD' SYSTEM

As described in chapter 2.4, in order to benefit from a preferential import duty rate for goods imported into the EU, the preferential origin of the products needs to be substantiated with a proof of origin. However, as the rules of origin are very complex, traders and authorities alike make mistakes in determining the origin of products resulting in incorrect preferential origin claims. In addition, because many traders act in highly competitive markets, preferential origin claims are also often subject to fraud as using a preferential import duty rate leads to a financial advantage. As customs revenue is threatened by these incorrect origin declarations, EU customs authorities or OLAF (the anti-fraud office of the EU Commission) often investigate preferential origin claims. Following these investigations the certificates of origin may be invalidated.

According to article 103 UCC, all imports carried out in the EU in the previous three years[32] may be subject for review. This could result in the possible retrospectively collection of import duties in case a preferential duty rate was undeservedly claimed. This retrospective collection of duties will take place from the custom debtor, which is – based on article 77 UCC – generally speaking the declarant for the customs procedure "release for free circulation". With other words; the EU importer. This liability to pay the customs debt exists despite the (legal) remedies the EU importer might have against the party in the third country he obtains the goods from for which he undeservedly claimed a preferential status.

However, there is the possibility to invoke a so-called 'legitimate expectation' defence. This is a general legal norm which is based on the expectation that one, who is acting in good faith, should be able to trust that the authorities will observe certain explicit or even implicit promises/approvals they make. [33]

[32] Where the customs debt is incurred as the result of an act which, at the time it was committed, was liable to give rise to criminal court proceedings, the three year term shall be extended to a period of a minimum of five years and a maximum of ten years in accordance with national law.
[33] See for an extensive explanation of this principle: Thorson 2016, p. 205-211.

The legitimate expectation principle is not only part of national laws, but according to settled case law it forms also part of the EU legal order: "*in the exercise of the powers conferred on them by Community directives, Member States must respect the general principles of law that form part of the Community legal order, which include, in particular, the principles of legal certainty and proportionality and the principle of protection of legitimate expectations*".[34]

The legitimate expectation defence is codified in UCC article 116 (1) (c) in conjunction with article 119 UCC. Under this defence, the collection of duties is not justified when the retrospective claim of the competent authorities is a result of an error on the part of the competent authorities. This chapter will discuss the legitimate expectation defence principle under the 'old' and partly still present system of proof of origin (e.g. Form A.) as well as under the REX system chapter.

4.1 Article 116 (1) (c) in conjunction with article 119 UCC

Article 116 UCC provides for the general rule that, amounts of import or export duty shall be repaid or remitted in case of one of the following five grounds:

I. Overcharged amounts of import or export duty;
II. Defective goods or goods not complying with the terms of the contract;
III. Error by the competent authorities;
IV. Equity; and/or
V. The repayment of duties in the case where the corresponding customs declaration is invalidated.

These grounds are further elaborated on in subsequent UCC provisions. The ground which is relevant for this thesis, 'error by the competent authorities', is defined in article 119 UCC.

4.2 Article 119 UC

Article 119 UCC, which is almost identical to its predecessor under the CCC (article 220 (2) (b)), determines that an amount of import duties shall be repaid or remitted where, as a result

34 See for example CJEU 21 February 2011, C-271/06, par. 18 (*Netto Supermarkt GmbH & Co. OHG*).

of an error on the part of the competent authorities, the amount corresponding to the customs debt initially notified was lower than the amount payable. In order to be able to invoke the defence, it is required that the debtor (i.e. the EU importer) was not able to reasonably detect that error and that he was acting in good faith[35].

Based on the above, it can be concluded that, in order for an EU importer to be able to invoke the legitimate expectation principle, the following cumulative requirements have to be fulfilled:

I. There must be an error on the part of the competent authorities;
II. the error was reasonably not detectable by the EU importer acting in good faith.

It comes, in view of the importance of the topic, not as a surprise that the aforementioned requirements were (and are) subject to extensive case law from the CJEU. In this case law, the CJEU has determined the parameters for the application of the legitimate expectation defence. In the next paragraphs the abovementioned requirements will be discussed and reference will be made to relevant case law. In this respect it should be noted that even though this case law is based on article 220 (2) (b) CCC, which is not in force anymore, there is no reason to believe that the CJEU will take a different approach for cases where article 119 UCC is applicable as both articles are almost identical.

Finally, in view of the scope of this thesis, it should be noted that only the legitimate expectation principle with respect to customs debts due to incorrect preferential origin claims will be further discussed. All other situations where possibly a legitimate expectation defence could be invoked, for example in case of a valuation or tariff classification error, are considered out of scope.

[35] Under article 220 (2)(b) there was a third requirement to comply all the provisions laid down by the legislation in force as regards the customs declaration. This requirement seems to be dropped as it is no longer part of the text of article 119 UCC.

4.2.1 Error on the part of the competent authorities

The first requirement which needs to be fulfilled in order for an EU importer to invoke the legitimate expectation defence, is that there needs to be an error on the part of competent authorities themselves. Within this requirement, two separate elements can be distinguished:

I. Error
II. Competent authorities

For the sake of readability and logical sense, the aforementioned elements are discussed in reversed order.

Competent authorities

It is remarkable that there is no definition provided of what needs to be understood by the 'competent authorities'. One could argue that an implicit definition of 'competent authorities' is provided for in article 5 (1) UCC, namely: customs authorities are the customs administrations of the EU member state responsible for applying the customs legislation and any other authorities empowered under national law to apply certain customs legislation.

From this text it thus can be derived that, it most circumstances the customs authorities can be regarded as the 'competent authorities'. The definition of 'competent authorities' is not limited to the EU authorities. According to the CJEU in *Faroe Seafood*, this definition namely also includes the competent authorities in third countries in case of the situation where they are involved in the process of issuing origin certificates.[36]

In view of this further clarification it is even more remarkable that this definition is not provided for in the UCC as it obviously is of great practical importance.

Error

According to the CJEU in the *Mecanarte-Metalurgica da Lagoa* case, "*the notion of error is not limited to mere calculation or copying errors but includes any kind of error which vitiates the decision in question, such as, in particular, the misinterpretation or misapplication of the*

[36] CJEU 14 May 1996, joined cases C-153/94 and C-204/94, par. 90 (*Faroe Seafood*).

applicable rules of law."[37] This element thus needs to be regarded as a broad concept in which many decisions or actions can be regarded as erroneous.

As previously mentioned, the error needs to be on the part of the competent authorities themselves. The word 'themselves' implies that only acts of the competent authorities can lead to an error. This is confirmed by the CJEU in *Agrover*:

"(…) the legitimate expectations of the person liable attract the protection provided for in that article only if it was the competent authorities 'themselves' which created the basis for those expectations. Thus, only errors attributable to acts of the competent authorities create entitlement to the waiver of subsequent recovery of customs duties." [38]

Article 119 paragraph 3 UCC provides further clarification on how an 'error on the part of the competent authorities' should be interpreted in case of preferential origin. This provision states that in case preferential treatment of the goods is granted on the basis of a system of administrative cooperation involving the authorities of a country or territory outside the EU customs union, the issue of a certificate by those authorities, should it prove to be incorrect, shall constitute an error which could not have been reasonably detected by the EU importer.

This defence possibility is, however, weakened by what further is stated in article 119 paragraph 3 UCC: the issue of an incorrect certificate shall namely not constitute an error where the certificate is based on an incorrect account of the facts provided by the exporter. The burden of proof that this is actually the case with the investigating authorities (e.g. OLAF).[39] It is therefore understandable that – once it has been concluded that certificates of origin were incorrectly issued – the investigating authorities will do their utmost to find evidence that it was the exporter who provided wrong information to the issuing authorities.[40] In this respect it is important to note that in case it is impossible for the investigating authorities to verify whether the issued certificates of origin are correct due to negligence wholly attributable to the exporter, the burden of proving that the certificates issued by the

[37] CJEU 27 June 1991, C-348/89 par. 20 (*Mecanarte-Metalurgica da Lagoa*).
[38] CJEU 18 October 2007, C-173/06 par. 31 (*Agrover*).
[39] CJEU 9 March 2006, C-293/04 par. 45 (*Beemsterboer*).
[40] Muñiz 2015, p. 370.

authorities in a third country were based on an accurate account of the facts lies with the person liable for the duty (i.e. the EU importer).[41] This can for example be the case when the exporter does not keep his administration up to date.

This burden of proof is also with the EU importer in case he thinks that there is a situation as described in the last sentence of article 119 paragraph 3 UCC. This article states that – even though the exporter provided wrong information – there still will be an error on the part of the competent authorities in case it is evident that the issuing authorities were aware or should have been aware that the goods did not satisfy the conditions laid down for entitlement to the preferential treatment. From this article it can thus be derived that not only 'active' behaviour of the competent authorities in the beneficiary country can constitute an error, but that also 'passive' behaviour can lead to the same result.

4.2.2 Error not reasonably detectable by the EU importer acting in good faith

The second cumulative requirement which needs to be fulfilled in order for an EU importer to invoke the legitimate expectation defence, is that the error was not reasonable detectable by the EU importer. As described in the previous paragraph, article 119 paragraph 3 UCC determines that in case preferential treatment of the goods is granted on the basis of a system of administrative cooperation involving the authorities of a country or territory outside the EU customs union, the issue of a certificate by those authorities, should it prove to be incorrect, shall constitute an error which could not have been reasonably detected by the EU importer.

However, it is settled case law that the professional experience of the trader concerned and the degree of care which he exercised, also plays a great role.[42] It does not come as a surprise that a very small business importing for the first time is less experienced than a multinational company which imports goods and is dealing with (preferential) origin on a daily basis. According to the CJEU this should be taken into account. In either way, however, a certain degree of care needs to be exercised. The CJEU repeatedly stated that: *"it is the duty of traders, where they have doubts as to the exact application of the provisions non-compliance*

[41] CJEU 9 March 2006, C-293/04 par. 46 (*Beemsterboer*).
[42] See for example: CJEU 16 March 2017, C-47/16 par. 36 (*Veloserviss*).

with which may result in a customs debt being incurred or as to the definition of the origin of the goods, to make enquires and seek all possible clarification in order to ascertain whether those doubts are well founded."[43]

What is being ruled by the CJEU is also partly codified in article 119 paragraph 3 UCC. The third section of this article namely states that the EU importer shall be considered to be in good faith if he can demonstrate that, during the period of the trading operations concerned, he has taken due care to ensure that all the conditions for the preferential treatment have been fulfilled. With other words: a pro-active attitude of the EU importer is required.

According to the CJEU in the *Veloserviss* case, having a pro-active attitude, however, does not impose a general obligation on the EU importer to monitor the competent authorities and the exporter in the beneficiary country in a systematic order. Such an obligation does only exist in case there are clear reasons to believe that things are going wrong. If the EU importer fails to fulfil this obligation, he cannot claim that he acted in good faith and that the error was reasonably not detectable.[44] This should be assessed on a case-by-case basis.

At the same time, even in the case there is actually an error, this can – according to the CJEU – not in all cases be used as a 'defence' mechanism against the risk of retrospective claim of import duties. The CJEU namely stated in '*CPL Imperial 2 and Unifrigo'* that: "*the European Community cannot be made to bear the adverse consequences of the wrongful acts of suppliers of importers.*"[45] In a different case (*Lagura Vermögensverwaltung GmbH)* the CJEU ruled that: "(...) *it should be borne in mind that a prudent trader aware of the rules must, in calculating the benefits from trade in goods likely to enjoy tariff preferences, assess the risks inherent in the market which he is considering and accept them as normal trade risks."*[46]

From the above it can be derived that it is also a matter of risk that the EU importer is willing to take when acting in international trade. EU importers could – according the CJEU – build in 'protection' by including arrangements in their contracts with their counter party which should

[43] Ibid, par. 37.
[44] Ibid, par. 39.
[45] CJEU 9 December 1999, C-299/98 par. 37 (*CPL Imperial 2 and Unifrigo*).
[46] CJEU 8 November 2012, C-438-11 par. 40 (*Lagura Vermögensverwaltung GmbH*).

protect them (according civil law) against the risk of the retrospective claim of import duties. In this respect one can think for example of a clause in the contract confirming that all the goods are originating from a country for which preferential rates apply upon import.[47]

These arrangements, however, do obviously not safeguard the EU importer against a liability based on the UCC as they most probably only will lead to a civil claim against the exporter in the beneficiary country. The value of such a contract can therefore be questioned as in many cases it will obviously be difficult and costly to start a cumbersome court case in an exotic country far away, with a complete different legal system. Also in the situation that a local EU court is competent and rules in favour of the EU importing party, it will in many cases be difficult (and again costly) to execute this order in the country of the exporter. As this is not a very tempting perspective, coming to this situation should thus be avoided by the EU importing party. Including an arbitration clause in the contract could provide a solution. Arbitration, however is also very costly and therefore not suitable in all cases.

As a final note, the fourth section of UCC article 119 paragraph 3 determines that the EU importer may not rely on a plea of good faith if the EU Commission has published a notice in the Official Journal of the European Union stating that there are grounds for doubt concerning the proper application of the preferential arrangements by the beneficiary country or territory. Such a note may for example be published based on investigations performed by OLAF. Keeping track of the notices published in the Official Journal of the European Union is thus also a task for the EU importer which need to be fulfilled as part of the due care he has to take.

4.3 Interim conclusion

Based on the above, it is safe to conclude that invoking a legitimate expectation defence in the situation where submitted certificates of origin appear to be incorrect is only possible within a certain framework. The boundaries of this framework are well established in the legislation as well as in settled case law. Even though the concept needs to be explained in a restricted sense, there are definitely situations in which an appeal on this principle could be successful.

[47] CJEU 9 December 1999, C-299/98 par. 37 (*CPL Imperial 2 and Unifrigo*).

The difficulty of invoking the legitimate expectation defence lies mainly with the second requirement. Namely that the error was not reasonably detectable by the EU importer acting in good faith. As described there is a rather far-reaching obligation for the EU importer to take due care to ensure that all the conditions for the preferential treatment have been fulfilled. Even though from the case law it follows that there is not an obligation for continuous monitoring in this respect, taking care – as an EU importer – that in the beneficiary country all conditions for the preferential treatment are fulfilled can be an extreme difficult task in many cases. It is also not completely clear what will be considered as sufficient in this regard. Will this be a regular visit to the manufacturing sites? Random sampling performed by an independent third party? One can think of many situations where it is simply impossible to obtain information concerning the circumstances of the issue of a specific certificate of origin. These errors are thus often very hard to detect. Even though they are hard to detect, the errors will in many cases be considered as a commercial risk which is inherent of participation in international trade.

This does not signify that the legitimate expectations defence under the UCC is a mere theoretical legal doctrine. However, it is safe to conclude that the cases in which a legitimate expectations defence can actually be successfully invoked are – realistically seen – very limited.

5 LEGITIMATE EXPECTATION PRINCIPLE UNDER THE REX SYSTEM

As described in the previous chapter, the legitimate expectations defence under the 'old' system for incorrect issued certificates of preferential origin (e.g. FORM.A) is to be interpreted in a narrow sense. Only when very specific requirements have been met, an EU importer can invoke this defence with success.

With reference to the introduction of this thesis, one of the reasons for the introduction of the REX system is that the EU Commission is of opinion that – in order to safeguard the EU's own resources – EU importers should no longer be protected in case the declared origin proves to be incorrect. Under the REX system it is – instead of the competent authorities in the beneficiary country – the exporter himself who is responsible for issuing statements of origin. The question therefore arises how the legal framework of the principle of legitimate expectation is to be interpreted in light of the REX system.

5.1 Error on the part of the competent authorities?

As described in paragraph 4.2 and in accordance with article 119 UCC, in order to invoke the legitimate expectation defence there must be:

I. an error on the part of the competent authorities;
II. the error was reasonably not detectable by the EU importer acting in good faith.

The difficulty of the question whether the legitimate expectation defence can still be invoked under the REX system does not necessarily come from the second requirement. Just like with the incorrect issued certificates of preferential origin, it could reasonably be argued that the EU importer acting in good faith needs to take the same due care in order to prevent that incorrect statements of origin are issued under the REX system. The strict interpretation of this requirement, as dictated by the CJEU, will unimpaired be applicable under the REX system.

The most important question will probably be to what extent one can still speak of "error on the part of the competent authorities" as, under the REX system, the authorities obviously no longer issue the preferential giving documents themselves.

On the other hand, it is clear that the competent authorities in the beneficiary country still play an important role under the REX system. As described in paragraph 3.7, these authorities are not only required to cooperate with the customs authorities of a EU member state by carrying out a verification of the validity of statements on origin when requested but they are also required – for the purpose of ensuring compliance with the rules concerning the originating status of products – to carry out regular controls on exporters on their own initiative (article 109 paragraph 1 UCC IR). These controls shall be carried out on intervals determined on the basis of 'appropriate risk analysis criteria' (article 108 paragraph 2 UCC IR).

In view of the above, it can safely be concluded that the competent authorities of the beneficiary country have far-reaching authority to carry out inspections of the exporter. More importantly, they are unequivocally obliged to actually carry out these inspections as well. In addition they have the obligation to revoke the registration of a registered exporter in case the conditions for exporting under the preferential giving regime are no longer met or when the registered exporter intentionally or negligently draws up, or causes to be drawn up, a statement on origin which contains incorrect information and leads to wrongfully obtaining the benefit of preferential origin.

In the literature it is argued that a failure of the competent authorities in the beneficiary country to keep up with this obligation, can be considered as an 'error' on the part of the competent authorities.[48] Even though there might be a case for this argument, it is to be questioned whether the CJEU – in view of existing case law – will share this view. As described in paragraph 4.2.1 there needs to be an act of the competent authorities themselves in order to be able to speak of an 'error'. However, it is the registered exporter who issues the statements of origin. It is thus not the competent authorities 'themselves' who create the basis for the expectation of the EU importer that the goods are of preferential origin.

[48] Muniz 2015 p. 375.

On the other hand, as described in paragraph 4.2.1, it can be derived from article 119 paragraph 3 UCC that also 'passive' acts of competent authorities of the beneficiary country can constitute an error. Even though this article sees on the situation that the competent authorities issue the certificate of origin, one could argue that this article can be applied in parallel to the situation under the REX system.

In case the competent authorities in a beneficiary country knew or should have known that a registered exporter issues incorrect statements of origin, which should obviously surface in case the authorities sufficiently fulfil their monitoring obligation, it could well be argued that this will indeed be an 'error'. With reference to paragraph 4.2.1., the burden of proof in such a situation is with the EU importer. It does not come as a surprise that it will be extremely difficult and perchance in most situations impossible for the EU importer to prove that the authorities in the beneficiary country did not fulfil their obligations under the REX system.

Under the unlikely scenario that the EU importer is actually able to prove that the negligence of the competent authorities in the beneficiary country to properly monitor the registered exporter can indeed be considered as an 'error', also the second requirement, that this error was not reasonably detected, should be fulfilled. As described in paragraph 4.2.2 the criteria in this respect are quite extensive.

All in all it is safe to conclude that, under the REX system, there is only very limited leeway for the principle of legitimate expectation within the framework of article 119 UCC. Only in very rare circumstances could an EU importer successfully invoke this defence principle. One could even ponder whether it is not merely a theoretical possibility.

However, as always, it will be the CJEU who will have a final say in this. It will most likely take a few years, but without doubt there will be a decision providing clarification and determining boundaries.

5.2 Special circumstances by virtue of article 120 UCC?

Under the REX system, and as described in the previous paragraph, likely only in very specific situations a (perhaps only theoretical) possibility exist for an EU importer to successfully

invoke a legitimate expectation defence in accordance with article 119 UCC. However, in the literature it is argued that there is a second 'escape', namely that of the 'special circumstances' as provided for in article 120 UCC.[49] This article, which is the UCC successor of article 239 CCC, determines that an amount of import duties shall be repaid or remitted in the interest of equity where a customs debt is incurred under special circumstances in which. Based on the above the following two cumulative requirements have to be met:

I. There needs to be the existence of special circumstances; and
II. there cannot be deception or obvious negligence attributed to the EU importer.

The second paragraph of article 120 UCC, which is new under the UCC, specifies what needs to be regarded as 'special circumstances'. According to this article these special circumstances shall be deemed to exist where it is clear from the circumstances of the case that the debtor is in an exceptional situation as compared with other operators engaged in the same business, and that, in the absence of such circumstances, he or she would not have suffered disadvantage by the collection of the amount of import duty. This specification was not provided for under article 239 CCC, but was already a condition due to settled CJEU case law.[50]

As a second requirement, an absence of deception or obvious negligence needs to exist. Generally speaking, 'deception' covers the acts which could lead to criminal prosecution. With respect to 'obvious negligence', the same criteria as laid down in article 119 UCC are used. More specifically, the criteria for determining whether an error on the part of the competent authorities could have been reasonable detected by the EU importer.[51]

As a final note it should be mentioned that the 'equity' provision of article 120 UCC which can be invoked by the EU importer in special circumstances, is not only limited to matters related to origin, but can be applied in other customs disputes as well.[52]

[49] Muñiz 2015, p. 375.
[50] See for example: CJEU 11 February 2011, C-494/09 (*Bolton Alimentari SpA), par 60.*
[51] CJEU 13 March 2003, C-156/00 (Kingdom of the Netherlands v. Commission of the European Communities), par. 77. See in this respect also paragraph 4.2.
[52] Muñiz 2015, p. 370.

5.2.1 C.A.S. SpA case

As the predecessor of article 120 UCC, there has been extensive case law in relation to article 239 CCC. A decision of the CJEU which is very important in relation to the topic of this thesis is the *C.A.S. SpA* case.[53] In this case the CJEU ruled that the failure of the EU Commission to properly monitor whether the EU – Turkey association agreement was correctly implemented, results in a special situation as meant in article 239 CCC. In the respect the following considerations are of importance:

"95. In that regard, it must be pointed out that it follows from Article 211 EC that the Commission, as guardian of the EC Treaty and of the agreements concluded under it, must ensure the correct implementation by a third country of the obligations it has assumed under an agreement concluded with the Community, using the means provided for by the agreement or by the decisions taken pursuant thereto.

99. The Commission also has significant rights and powers available to it in connection with its obligation of supervising and monitoring the proper implementation of the Association Agreement.

104. Consequently, the Commission cannot reasonably claim, as it did at the hearing, that it is in the same position as the appellant as regards the checking of events which occurred in a third country, namely in Turkey. On the contrary, it is for the Commission to make full use of the rights and powers which it has under the provisions of the Association Agreement and the decisions adopted in respect of its implementation so as to fulfil its obligation of supervising and monitoring the proper implementation of the Association Agreement.

131. It follows that that failure to fulfil obligations on the part of the Commission constitutes a special situation for the purposes of Article 239 of the CCC."

Based on the above it is clear that – according to the CJEU – there was an obligation for the EU Commission to supervise and monitor the proper implementation of the Association

[53] CJEU 25 July 2008, C-204/07 (*C.A.S. SpA).*

Agreement between the EU and Turkey. The failure to do so lead to the application of 239 CCC.

The C.A.S. SpA case is not unique as it was preceded by cases in which a similar approach was taken.[54] It is thus safe to conclude that one can speak of special situation by virtue of article 120 UCC in case the EU Commission fails to monitor an agreement with a third country or countries.

5.2.2 Monitoring of the EU GSP system

In view of the case law which is referred to in the previous paragraph, the question arises whether – by analogy – article 120 UCC could be invoked when the EU Commission insufficiently monitors the correct application of the EU GSP scheme (read: the REX System). Even though this question has not yet been answered by case law, this risk is endorsed by the EC Commission in their "*Action plan for monitoring the functioning of preferential trade arrangements*".[55] [56] In this document, the EU Commission states that, within the framework of the EU GSP system *"Insufficient monitoring may have serious consequences, such as allowing a 'special situation' to be established under Article 239 of the Customs Code."*[57]

The EU Commission therefore came up with solutions which should lead to a better monitoring of the EU GSP System. This *inter alia* included:

- *"Periodical reporting systems related to beneficiary/partner countries and Member States;*
- *Enhanced collection of data, and*

[54] See for example: Court of First Instance 10 May 2001, in joined cases T-186/97, T-187/97, T-190/97 to T-192/97, T-210/97, T-211/97, T-216/97 to T-218/97, T-279/97, T-280/97, T-293/97 and T-147/99 (*Kaufring*) and : Court of First Instance 19 February 1998, T-42/96 (*Eckeler & Malt AG*)
[55] Communication from the Commission to the Council, *Action plan for monitoring the functioning of preferential trade arrangements, Brussels,* 26-2-2014 COM(2014) 105 final.
[56] The Action Plan was a reaction to a 2014 Court of Auditors Special Report '*Are Preferential Trade Arrangements Appropriately Managed?'* In this report the Court of Auditors *inter alia* conclude that there are wweaknesses in the supervision by the EU Commission of EU Member States and beneficiary countries in respect of preferential trade arrangements.
[57] Ibid, p. 3.

- *Analysing available information and identifying countries and products for which further monitoring appears necessary."*[58]

According to Muñiz, the aformentioned Action Plan "*can also be read as a recognition that the standard of care EU institutions must show in ensuring the correct application of the various preferential trade arrangements is higher than the one required from EU importers."*[59]

It is an interesting thought; EU importers, who are being confronted with a retroactive claim of import duties in case of an incorrect application of preferential origin under the REX system, can invoke the 'equity' provision with the argument that the EU Commission did not properly monitor the application of this system. In addition, one could also broaden the scope and argue that the same reasoning could apply for negligence on the side of the EU customs authorities or competent authorities in the beneficiary country in respect of fulfilling monitoring obligations.

There is much to say in favour of this argument, however it will evidently be a long shot as it is clear that it will be extremely difficult to gather evidence that there are authorities which have failed to carry out sufficient monitoring. In this respect reference can be made to which is described in relation to article 119 UCC in paragraph 5.1. On the other hand, established case law indicates that an appeal on article 120 UCC when the EU GSP scheme / REX system is not sufficiently monitored is not impossible. This should, however, be assessed on a case-by-case basis.

5.2.3 Alternative 'special circumstances'

In his article Muñiz only refers to the situation where article 120 UCC can be invoked in case the EU GSP Scheme is not sufficeintly monitored. Even though this 'special circumstance' is most appealing, one can – with reference to settled case law – think of more situations where this possibility could perhaps exist. An example of such a situation can be found in the case *De Haan Beheer BV.*[60] In this case the authorities allowed certain violations to take place in order to better distmantle a network and identify perpretrators of fraud and gather consolidate

[58] Ibid, p. 11.
[59] Muñiz 2015, p. 377.
[60] CJEU 7 September 1999, C-61/98 (*De Haan Beheer BV)*.

evidence.[61] In this case, the person liable for the custom debt could succesfully make an appeal on the special circumstances article. A similar situation occurred in the *British American Tobacco Manufaturing case*.[62]

By analogy, the aforementioned cases could possibliy be applied in certain situations under the REX System. In this respect one can think of the possibility that OLAF or the local authorities in the GSP beneficiary country are aware that a registered exporter issues incorrect statements of origin, but let them continue to do so in order to map a network of perpretators of fraud. There is no reason to believe that under that scenario the EU importer could not make a succesfull appeal on article 120 UCC. For completeness sake, it should be stressed that this should obviously also be assesed on a case-by-case basis.

[61] Ibid, par. 53.
[62] CJEU 29 April 2004, C-222/01 (*British American Tobacco Manufacturing).*

6 CONCLUSION

The legitimate expectation defence principle in relation to preferential origin has been a hot topic for quite some time now. The introduction of the REX system adds a new chapter to the debate and will, without doubt, be the subject of many court cases yet to come. The analysis performed in this thesis gingerly indicates the possible direction of the outcome of these cases. An outcome, which in many cases most likely will not be in favour of the EU importers.

Already under the 'old' system, in which preferential origin documents are issued by the competent authorities in the EU GSP beneficiary countries, the CJEU defined the parameters of the legitimate expectation defence principle in such a way that the concept needs to be explained in a very restricted sense. This restrictiveness mainly lies with the requirement that the error was not reasonably detectable by the EU importer acting in good faith. As described there is a rather far-reaching obligation for the EU importer to take due care to ensure that all the conditions for the preferential treatment have been fulfilled. In practice, it often very difficult to fulfil this obligation. As a result, under the 'old' system only in limited situations an appeal by the EU importer on this principle will potentially be successful.

It is safe to conclude that under the REX system it will even be harder to invoke the legitimate expectation defence. The reason for that is twofold. At first, the high barrier formed by requirement that the error was not reasonably detectable by the EU importer remains unimpaired applicable. Secondly, even if this fulfilment of this requirement could be demonstrated by the EU importer, it is questionable to what extent one can still speak of 'error on the part of the competent authorities' as, under the REX system, the authorities obviously no longer issue the preferential giving documents themselves. One could argue that the failure of the competent authorities in the beneficiary country to fulfil their obligation to carry out regular controls on the registered exporters can be considered as an 'error'. However, even if the CJEU will follow this line, it will be extremely difficult and perchance in most situations impossible for the EU importer to proof that this actually the case.

All in all this leads to the conclusion that the possibility for EU importers to invoke the legitimate expectation defence principle by virtue of article 119 UCC seems only to exist in theory.

This conclusion does not impact the possibility for EU importers to make an appeal on the 'equity' provision of article 120 UCC. It is demonstrated that there are strong arguments for the view that an appeal on this article could in certain circumstances potentially be successful. These circumstances are, however, very specific and also difficult to demonstrate. In this respect one can think of the situation that the EU Commission fails to fulfil their monitoring obligations of the EU GSP system. As such, no 'general' rule of defence can be deduced. Consequently, this should be assessed on a case-by-case basis.

The central question raised in the introduction of this thesis was:
What are the consequences of the introduction of the REX system for the application of the principle of legitimate expectation within the framework of the EU GSP?

In view of the above there is no other conclusion that the REX system seems to form an insurmountable obstacle which will most likely prevent a successful invocation of the legitimate expectation defence by EU importers who are being confronted with a retroactive claim of import duties in case of an incorrect application of preferential origin. Only in specific special circumstances EU importers could potentially successfully make an appeal of the 'equity' provision of article 120 UCC. This means that the EU Commission has succeeded in their intentions to further limit the situations in which EU importers can make a successful appeal on the legitimate defence principle.

The question is whether this outcome is actually desirable as there will be limited defence possible for the EU importer acting in good faith despite the best compliance efforts made by him. EU importers thus have to rely on the sincerity of the exporter in the EU GSP country that all requirements to claim preferential treatment are met. For multinationals with their own factories in third countries (or at least close connection to those factories), this will not be a direct problem as they are – due to their supply chain structure – in a better position to monitor the manufacturing process. This obviously does not go for all EU importers involved.

Therefore, the risk of a retrospective duty claim will always be present, hanging as the sword of Damocles above the heads of EU importers. This could potentially lead to reticence of EU importers to make use the EU GSP, which obviously would directly conflict with the EU GSP's aim to increase the beneficiary countries accessibility to the EU markets and supporting their economic growth.

On the other hand, this scenario is not very likely as the EU GSP is simply too beneficial for EU importers to ignore. It is thus a matter of risk appetite of the EU importer who wants to engage in international trade. Following this line there is much in favour for the thought that the risk of a retrospective claim indeed needs to be with the EU importer as he is the one actually benefiting from the preferential rates. The implementation of the REX system definitely contributes to this thought by blocking the way for a successful appeal on the legitimate expectations principle as codified in article 119 UCC. This does not leave the EU importer with empty hands as, for certain special circumstances, there will always be the equity provision of article 120 UCC. This seems to be a fair and square diversion of risk.

However, as always, it will be the CJEU who will have a final say in this. Without any doubt they will.

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