

Old wine in new skins: analysis of the Trade Facilitation Agreement vis-à-vis the Revised Kyoto Convention

Hans-Michael Wolfgang and Edward Kafeero

Abstract

This paper mainly examines whether or not the celebrated Trade Facilitation Agreement (TFA) offers any ground-breaking provisions that are not in the Revised Kyoto Convention (RKC). A comparative study of the two ‘laws’ then reveals that the TFA is mainly a reflection of the RKC provisions. Besides, the very few aspects of the TFA which are not regulated by the RKC are, in fact, catered for by other instruments and tools of the World Customs Organization (WCO). From the above, and in light of the current impasse concerning the adoption of the Protocol of Amendment that would lead to incorporation of the TFA into the World Trade Organization’s (WTO) legal framework, it is opined that even if the TFA were to fail to come into force, a further developed RKC – incorporating, for instance, some aspects of the ‘SAFE Package’ like the Authorised Economic Operator (AEO) – would make a perfect substitute.

1. Introduction

The Trade Facilitation Agreement (TFA) which is generally considered the main outcome of the 9th World Trade Organization (WTO) Ministerial Conference was hailed by many trade experts and politicians as a landmark agreement which, once implemented, would boost global economic growth. The TFA is intended to make importing and exporting across all WTO member countries more efficient and less costly by increasing transparency and improving customs procedures. It was estimated that reducing global trade costs by 1% would increase worldwide income by more than USD40 billion, 65% of which would accrue to developing countries (OECD 2013).

The importance of trade facilitation to global trade is therefore largely indisputable. What is questionable, however, is whether or not the TFA offers any ground-breaking provisions that are not in the RKC. To answer this question we need to embark on a systematic comparison of the two treaties. Moreover, the recent failure of the WTO General Council to adopt the Protocol of Amendment so as to insert the TFA in Annex 1A of the WTO Agreement makes this study pertinent insofar as it explores the possibility of retaining and further development of the TFA provisions through the RKC.

This paper also examines the status of the RKC from the context of public international law and in comparison with WTO law. The largely ‘soft law’ nature of the RKC and the advantages and disadvantages of this are elaborated. Besides, the implementation mechanisms of trade facilitation provisions, many of which have been in place for some time under the RKC regime are explained and the World Customs Organization’s (WCO) role in all this is highlighted.

2. Comparing the relationship between the TFA and the RKC Provisions

2.1 An overview

Trade Facilitation Agreement Provisions		RKC Provisions
Article 1: Publication and availability of information	1. Publication	RKC ¹ (GA § 4 (4.4) and § 9 (9.1, 9.2, 9.3))
	2. Information availability through the internet	RKC §§ 7 and 9 (9.1, 9.2, 9.3)
	3. Enquiry points	RKC GA §§ 7 (Guidelines) and 9 (9.4, 9.5, 9.6, 9.7, 9.8)
	4. Notification	RKC, GA § 9 (9.1, 9.2, 9.3);
Article 2: Opportunity to comment and information before entry into force and consultation	1. Opportunity to comment and information before entry into force	RKC, GA §§ 1 (1.3) and 9 (9.2)
	2. Consultations	RKC, GA §§ 1 (1.3), 6 (Guidelines), 7 (Guidelines) and 9 (9.4, 9.5, 9.6, 9.7)
Article 3: Advance Rulings	(Classifications)	RKC, GA § 9 (9.9)
	(Non-preferential Rules of Origin)	RKC, GA § 9
	(Valuation)	RKC, GA § 9
Article 4: Appeal or review procedure	1. Right of Appeal or Review	RKC, GA § 10
Article 5: Other measures to enhance impartiality, non-discrimination and transparency	1. Notifications for enhanced controls or inspections	RKC, GA § 6 (6.3, 6.4, 6.7)
	2. Detention	RKC, GA § 3, (3.6), 6 (6.1)
	3. Test procedures	RKC, GA § 3 (3.38)
Article 6: Disciplines on fees and charges imposed on or in connection with importation and exportation	1. General disciplines on fees and charges imposed on or in connection with importation or exportation	RKC, GA §§ 3 (3.2) and 9 (9.1); SAA § 1 (19)
	2. Specific disciplines on fees and charges imposed on or in connection with importation or exportation	RKC, GA §§ 3 (3.2) and 9 (9.7); SAA § 1 (19)
	3. Penalty disciplines	RKC, GA § 3 (3.39, 3.43), SA H §1 (19, 20, 21, 22, 23, 24, 25)

Trade Facilitation Agreement Provisions	RKC Provisions	
Article 7: Release and Clearance of goods	1. Pre-arrival processing	RKC, GA §§ 3 (3.25) and 7; (Section 6.4 of the ICT Guidelines)
	2. Electronic payment	RKC, GA § 7 (7.1); Section 6.10 of the ICT Guidelines)
	3. Separation of release from final determination of customs duties, taxes, fees and charges	RKC, GA §§ 3 (3.13, 3.14, 3.17, 3.40), 4 (4.9) and 5 (5.1, 5.2, 5.3, 5.4, 5.5, 5.6, 5.7), 7 (Section 6.10 of the ICT Guidelines)
	4. Risk management	RKC, GA §§§ 6 (6.3, 6.4, 6.5) and 7 (Section 6.8 of the ICT Guidelines)
	5. Post-clearance audit	RKC, GA §§ 6 (6.6) and 7
	6. Establishment and publication of average release times
	7. Trade facilitation measures for Authorised Economic Operators	RKC, GA §§ 3 (3.32) and 7 (Sections 6.15 and 9.3 of the ICT Guidelines)
	8. Expedited shipments	RKC, GA § 3
	9. Perishable goods	RKC, GA § 3 (3.34)
Article 8: Border agency cooperation	RKC, GA § 3 (3.35)	
Article 9: Movement of goods under customs control intended for import	RKC, SA E §§ 1 and 2	
Article 10: Formalities connected with importation, exportation and transit	1. Formalities and documentation requirements	RKC, GA § 3 (3.11, 3.12, 3.13, 3.14, 3.15, 3.16, 3.17, 3.18, 3.19)
	2. Acceptance of copies	RKC, GA § 3 (3.11, 3.12, 3.13, 3.14, 3.15, 3.16, 3.17, 3.18, 3.19) and § 7 (7.1, 7.2)
	3. Use of international standards	RKC, §§ 3 (3.11) and 7 (7.2)
	4. Single Window	RKC, GA § 3 (3.25)
	5. Pre-shipment inspection
	6. Use of customs brokers	RKC, GA §§ 3 (3.6, 3.7) and 8 (8.1, 8.2, 8.3, 8.4, 8.5, 8.6, 8.7)
	7. Common border procedures and uniform documentation requirements	RKC, GA § 3 (3.11, 3.20)
	8. Rejected goods	RKC, GA §§ 3, 4 (4.19)
	9. (a) Temporary admission of goods	RKC SA G § 1
	9. (b) Inward and Outward Processing	RKC SA F §§1, 2 and 3

Trade Facilitation Agreement Provisions		RKC Provisions
Article 11: Freedom of Transit		RKC, GA § 5; SA E §§ 1 and 2
Article 12: Customs Cooperation	1. Measures promoting compliance and cooperation	RKC, GA §§ 1 (1.3), 3 (3.27, 3.28, 3.29, 3.31, 3.32, 3.39), 6 (6.2, 6.3, 6.4, 6.5, 6.6, 6.8, 6.9, 6.10) and 9 (9.1, 9.2, 9.3, 9.4, 9.5); SA H § 1. (Standard 20, 23, 24 and 25)
	2. Exchange of information	RKC, GA §§ 6 (6.7) and 7 (7.1)
	3. Bilateral and regional agreements	RKC, GA § 6 (6.7)

Source: Adapted from the Draft Preliminary analysis of Section I (and Article 23) based on the WTO TF Toolkit and potential implications on WCO – Rev. 1, September 2014.

2.2 Significance of the similarities and differences between the TFA and RKC Provisions

In this section we comment on Articles 1 to 12 of the TFA and the corresponding provisions in the RKC, showing the similarities and differences between the two and highlighting the novelties of the TFA, as the case may be.

2.2.1 The TFA, Article 1: Publication and availability of information

Four issues are regulated by this Article. The first issue concerns prompt publication of information ‘in a non-discriminatory and easily accessible manner in order to enable governments, traders and other interested parties to become acquainted with them’. Such information may relate to importation, exportation and transit procedures and the required forms and documents, applied rates of duties and taxes imposed in connection with importation or exportation, or other aspects enumerated in the said article. The second concerns *availability of information through the internet*. And in this case, WTO Members are obliged to make available import, export or transit procedures and other relevant trade-related information on the internet; and whenever practicable, also to make it available in one of the WTO official languages. Third, WTO Members are required to establish and maintain *enquiry points* to answer reasonable enquiries of governments, traders and other interested parties on matters relating to publication of information contained in paragraph 1.1. Fourth, WTO Members are obliged to *notify* the Committee on Trade Facilitation the official place(s) where the items in subparagraphs 1.1.a. to 1.1.j. have been published and the URLs of website(s) referred to in paragraph 2.1, as well as the contact information of the enquiry points referred to in paragraph 3.1.

The same requirements of Article 1 of the TFA are extensively addressed by the RKC in chapters 4, 7 and 9 of the General Annex. In addition, the RKC has comprehensive guidelines which, even though they are not part of the legal text of the Convention and entail no legal obligations, contain important explanations of the provisions of the Convention and give examples of best practices or methods of application and future developments. Therefore, with regard to publication and availability of information, the TFA essentially adds political value to the already existing international trade facilitation standards and best practices of the RKC.

2.2.2 Article 2: Opportunity to comment, information before entry into force and consultation

This Article requires WTO Members, to the extent practicable and in a manner consistent with domestic legal systems, to provide traders and other interested parties with opportunities and an appropriate

time period to comment on the introduction or amendment of laws and regulations and regulations of general application related to the movement, release and clearance of goods, including goods in transit. WTO Members are also required to make new or amended laws and regulations available before their entry into force. RKC, General Annex § 1 (1.3) also requires that formal consultative relationships be maintained with the trade. And according to the RKC, General Annex § 9 (9.2), revised information is supposed to be made available sufficiently in advance of the entry into force of the changes. This is yet another manifestation of the spirit of the RKC in the WTO TFA.

2.2.3 Article 3: Advance rulings

First, it should be noted that an advance ruling (in the context of the TFA) *‘is a written decision provided by a Member to an applicant prior to the importation of a good covered by the application that sets forth the treatment that the Member shall provide to the good at the time of importation with regard to (i) the good’s tariff classification, and (ii) the origin of the good’* (TFA 3: 9.a.). In essence, the Article requires WTO Members to issue advance rulings regarding the tariff classification and the (non-preferential) origin of goods and sets the rules stipulating the issuance of advance rulings in a reasonable and time-bound manner, including cases where an application may be declined by WTO Members. In addition, pursuant to TFA 3: 9.b., WTO Members are encouraged to issue advance rulings for other areas such as customs valuation and requirements for relief or exemption from customs duties.

In the introduction to the WCO guidelines to chapter 9 of the General Annex, it is clear that availability of information on customs matters (to those who need it) is one of the key elements of trade facilitation. And when such information is requested, it is the responsibility of Customs to provide it completely and accurately and as soon as possible.² In addition, RKC, General Annex § 9 (9.9) stipulates that binding rulings shall be issued at the request of the interested person. In the general spirit of this paper, it is interesting to note that the guidelines to this standard go on to cover various aspects of binding rulings, including their scope, notification, time limits and use. All this demonstrates the depth of the RKC in regard to trade facilitation regulations – seen from both regulatory and implementation points of view.

2.2.4 Article 4: Appeal or review procedures

The gist of this Article is to oblige WTO Members to provide that any person to whom Customs issues an administrative decision has the right to administrative appeal or review, and/or judicial appeal or review; and that the administrative and judicial review should be carried out in a non-discriminatory manner.

The question of appeals/reviews in customs matters is also well catered for by the RKC in chapter 10 of the General Annex. The different standards therein provide for a transparent and multi-stage appeal process to avoid victimisation (and/or to prevent the perception thereof) by those affected by Customs’ decisions. Undoubtedly, the availability of an independent judicial review as a final avenue of appeal is also intended to instil confidence among stakeholders in government institutions and in particular in customs administrations.

Concerning appeals, too, it is evident that the content of Article 4 of the TFA is almost entirely traceable to the RKC. We note, though, that in contrast to the RKC, the TFA brings out clearly and expressly the principle of ‘non-discrimination’, which is obviously central to all WTO law.

2.2.5 Article 5: Other measures to enhance impartiality, non-discrimination and transparency

In view of enhancing impartiality, non-discrimination, and transparency three measures are advanced by Article 5 of the TFA namely: (1) *notifications for enhanced controls or inspections*; (2) *detention*; and (3) *test procedures*. It should be noted that where a WTO Member adopts or maintains a system of notifications for enhancing controls or inspections in respect of foods, beverages or feedstuffs, that Member should follow certain principles such as ‘risk-based’ and ‘uniform application’ as paragraph 1 stipulates.

From the context of the RKC, one notices that chapter 6 of the General Annex set standards on customs control, risk management and cooperation with other customs administrations. It is true that these provisions do not relate directly to the notification system. Nevertheless, they could be vital in the implementation of Article 5 of the TFA.

2.2.6 Article 6: Disciplines on fees and charges imposed on or in connection with importation and exportation

Paragraph 1 of this Article essentially requires WTO Members to publish information on fees and charges imposed on or in connection with importation and exportation, and to review the fees and charges periodically with a view to reducing their number and diversity. Paragraph 2 goes further to state that *'fees and charges for customs processing:*

- i. shall be limited in amount to the approximate cost of the services rendered on or in connection with the specific import or export operation in question; and*
- ii. are not required to be linked to a specific import or export operation provided they are levied for services that are closely connected to the customs processing of goods.'*

Many standards of the RKC also stipulate that fees and charges shall be limited to the approximate cost of the services rendered.³ Even penalty disciplines regulated by paragraph 3 of this Article are extensively addressed in Specific Annex H1 of the RKC.

2.2.7 Article 7: Release and clearance of goods

The Article contains provisions on pre-arrival processing; electronic payment; separation of release from final determination of customs duties, taxes, fees and charges; risk management; post-clearance audit; establishment and publication of average release times; trade facilitation measures for authorised operators; expedited shipments; and perishable goods. The central messages in all these provisions are the requirement for WTO Members to adopt or maintain procedures allowing for the submission of import documentation prior to the arrival of goods, and to allow electronic lodgement of such documents. The use of modern methods of management such as risk management and post-clearance audit are also emphasised.

The RKC also offers a number of standards which deal with prior lodgement and registration of goods declaration, which procedures create a balance between the interests of traders and customs administrations.⁴

TFA 7: 6 encourages WTO Members to measure and publish their average release time of goods periodically and in a consistent manner, using tools such as, *inter alia*, the WCO Time Release Study. It also encourages them to share with the Committee on Trade Facilitation their experiences in measuring average release times, including methodologies used, bottlenecks identified, and any resulting effects on efficiency. A similar provision, however, is absent in the RKC. Instead, it can be traced to the WCO's 'Guidelines for the immediate release of consignments by Customs' (WCO 2006).

2.2.8 Article 8: Border agency cooperation

According to this Article all national border authorities/agencies are supposed to cooperate with each other and coordinate border control and procedures to facilitate trade. Such cooperation and coordination may include *'alignment of working days and hours; alignment of procedures and formalities; development and sharing of common facilities; joint controls; [and] establishment of one stop border post control'*.

Chapter 3 of the General Annex to the RKC contains a number of provisions geared towards cooperation and coordination amongst border agencies. For instance, Transitional Standard 3.35 states that *'if the goods must be inspected by other competent authorities and the Customs also schedules an examination, the Customs shall ensure that the inspections are coordinated and, if possible, carried out at the same time'*.

2.2.9 Article 9: Movement of goods under customs control intended for import

This Article obligates WTO Members, ‘*to the extent practicable and provided all regulatory requirements are met, [to] allow goods intended for import to be moved ... to another customs office ... where the goods would be released or cleared*’. The type of movement of goods referred to in this Article can be categorised as *national transit procedure* which is extensively regulated by Specific Annex E of the RKC.

2.2.10 Article 10: Formalities connected with importation and exportation and transit

Basically, TFA 10 calls for regular review of formalities and documentation requirements to minimise the incidence and complexity of import, export and transit formalities. In other words, it calls for simplification of documentation requirements. WTO Members are supposed to ensure that such formalities and documentation requirements are as fast and efficient as possible. Thus, the Article under discussion inevitably tackles a number of aspects central to importation, exportation and transit namely: documentation requirements; acceptance of copies; use of international standards; single window; pre-shipment inspection; use of customs brokers; common border procedures and uniform documentation requirements; rejected goods; temporary admission of goods; and inward and outward processing.

Apart from pre-shipment inspection, chapters 3 and 8 of the General Annex and Specific Annexes C, G, F and E to the RKC address all the above-mentioned formalities with various standards, transitional standards and recommended practices to be followed. Indeed these provisions have been seen to be essential to customs modernisation.

2.2.11 Article 11: Freedom of transit

This Article contains a number of provisions relating to freedom of transit. Essentially, it requires that regulations or formalities in connection with traffic in transit be eliminated or reduced if they are no longer required; and that fees or charges may be imposed on transit only for transportation or if commensurate, with administrative expenses entailed or with the cost of services rendered. It includes several measures intended to facilitate transit procedures, including the pre-arrival declaration; and prohibits restrictive measures in relation to customs charges, formalities, and inspections other than at the offices of departure and destination. It also contains provisions relating to guarantees.

A close look at chapters 1 and 2 of Specific Annex E to the RKC, coupled with the respective guidelines, shows the centrality of the RKC to trade facilitation in the field of transit and transshipment. For instance, chapter 1 covers formalities at the office of departure, customs seals, formalities en route and termination of customs transit. And chapter 2 deals with transshipment.

2.2.12 Article 12: Customs cooperation

This Article contains various provisions which concern cooperation between customs administrations. For instance, it sets the terms and requirements for WTO Members to share information to ensure effective customs control while respecting the confidentiality of the information exchanged. The Article allows WTO Members flexibility in terms of establishing the legal basis for information exchange. Moreover, WTO Members may even enter into or maintain bilateral, plurilateral or regional agreements for sharing or exchanging customs information and data, including advance information.

Chapters 1, 3, 6 and 7 of the RKC also contain a number of provisions intended to realise customs cooperation and, ultimately, facilitate trade. For instance, Standard 6.7 stipulates that ‘*Customs shall seek to cooperate with other customs administrations and seek to conclude mutual administrative assistance agreements to enhance customs control*’.

The comparison made above clearly demonstrates how the provisions of the WTO TFA are largely a re-packaging of the principles and various rules, standards and best practices contained in the RKC. This assertion, however, is not meant to undermine the importance of the TFA. On the contrary, it is meant

to invigorate synergies between the WTO and the WCO in their continuous attempt to facilitate trade across the globe.

3. The status of the RKC in the context of public international law

3.1 *Pacta sunt servanda*

Public international law refers to those laws, rules, and principles of general application that deal with the conduct of nation states and international organisations among themselves as well as the relationships between nation states and international organisations with natural and juridical persons. Article 38 of the Statute of the International Court of Justice gives us the classical sources of public international law, beginning with ‘international conventions’.⁵

Premised on the basic principle of *pacta sunt servanda* (that is, agreements must be kept), international conventions have gained currency as sources of international law. In fact, Article 26 of the Vienna Convention on the Law of Treaties (whose heading is *pacta sunt servanda*) states that every treaty in force is binding upon the parties to it and must be performed by them in good faith. Since the RKC is a duly recognised convention with 95 contracting parties as at 30 August 2014, it follows that a significant part of the international trading community is bound by the provisions of the RKC. Besides, there are even some countries which are not yet contracting parties to the RKC which, nevertheless, make substantive use of its provisions. Take, for example, a country like Burundi or Tanzania which are not contracting parties to the RKC which, nevertheless, implement many of its provisions by virtue of their membership of the East African Community Customs Union, whose customs law was largely drafted in accordance with the RKC (Kafeero 2009).

3.2 The ‘hard law vs. soft law’ discourse

‘Hard law’ refers to legally binding obligations that are precise (or can be made precise through adjudication or issuance of detailed regulations) and that delegate authority for interpreting and implementing the law (Abbott & Snidal 2000). On the contrary, ‘soft law’ refers to rules of conduct which, in principle, have no legally binding force but which may have practical effects (Snyder 1995).

The provisions of the RKC which are in the form of *Standards*, *Transitional Standards* and *Recommended Practices* tend to be general, exhortative and praxis-orientated rather than precise and regulatory. No wonder the RKC may be relegated by some jurists as mere ‘soft law’. In addition, the RKC is not furnished with a dispute settlement mechanism which would monitor its implementation, interpret and enforce it.

‘Soft law’ is often criticised as weak and therefore not easy to implement. Such criticism is, to some extent, probably based on the word ‘soft’ which may misleadingly give an impression of law that is weak, unreliable, unenforceable, and other negative connotations. The reality, however, is that ‘soft law’ tends to cope better with diversity and allows greater flexibility for allowing non-state actors (Murphy 2006). This characteristic of ‘soft law’ is very important in the context of international trade facilitation which involves a number of stakeholders including states, the private sector, international organisations, non-governmental organisations, and many others.

It is not only the RKC that has elements of ‘soft law’; the WTO TFA also contains a number of provisions that are typically ‘soft law’ in nature. Many of them are recommendatory, very general and imprecise, and hardly enforceable to the letter.⁶ Therefore, in the context of the TFA versus the RKC, the ‘hard law vs. soft law’ discourse may not play a big role, for both conventions actually manifest a hybrid of ‘hard’ and ‘soft’ legislation.

4. Prospects for trade facilitation through the RKC

In his speech to the UNCTAD Trade and Development Board on 22 September 2014, the WTO Director-General Roberto Azevêdo said that the Bali package that delivered big gains for WTO Members ‘is now at risk’. He said, ‘At present, the future is uncertain’, adding that if the impasse is not solved ‘many areas of our work may suffer a freezing effect, including the areas of greatest interest to developing countries, such as agriculture’.⁷

The impasse is actually the failure by WTO Members to adopt, in July 2014, a Protocol of Amendment that would have incorporated the TFA into the WTO’s legal framework, which adoption is a necessary step in the ratification process. This was because India insisted on seeing more progress toward a ‘permanent solution’ on food stockholding and suggested linking the two processes. India’s statement during the WTO General Council Meeting of 24-25 July 2014 included, among other comments, the following:

This is important so that the millions of farmers and the poor families who depend on domestic food stocks do not have to live in constant fear. To jeopardise the food security of millions at the altar of a mere anomaly in the rules is unacceptable. *India is of the view that the TFA must be implemented only as part of a single undertaking including the permanent solution on food security.* In order to fully understand and address the concerns of Members on the TF Agreement, my delegation is of the view that the adoption of the TF Protocol *be postponed till a permanent solution on public stockholding for food security is found* (emphases added).⁸

These recent developments which, to some extent, have led to questions about the WTO’s capability to deliver on multilateral negotiations,⁹ cannot but inspire those interested in trade facilitation to continue looking for (or expounding) other feasible international regulations for trade facilitation. In this regard, therefore, this paper may *inter alia* be seen as restoring hope in the sense that even if the TFA were to fail to come into force, the RKC would more or less make a perfect substitute.

In addition to the argument of considerable similarity between the TFA provisions and the RKC’s standards and recommended practices, it should be noted that, in principle, there is a possibility to update the RKC to cater for some trade facilitation aspects that are currently beyond its scope. However, this possibility of updating the RKC is negatively affected by the recent and ongoing *proliferation of instruments and tools* under the auspices of the WCO. Whereas the discussion of the advantages and disadvantages of the said proliferation is beyond the scope of this paper, we cannot fail to note that it leads to the fragmentation of customs-related provisions, creates redundancies, and ultimately, affects the implementation.

5. Conclusions

There is much talk about the current impasse concerning the adoption of the Protocol of Amendment that would lead to incorporation of the TFA into the WTO’s legal framework. This talk often tends to have more of a political character than a legal one. Indeed, India’s position (which some commentators refer to as ‘blackmail’) has nothing to do with the text *per se* of the TFA. This position is ultimately political and may generally be regarded as a ‘wake-up call’ to all WTO Members to take all other post-Bali agenda, particularly public stockholding for food security, as equally important as trade facilitation provisions.

Without delving into the politics of the world trading system, this paper candidly exposes the fact that as much as the TFA is held in high esteem, almost all of its content is a reflection of the provisions of the RKC. In addition, some elements which are not addressed by the RKC are catered for by other instruments and tools developed by the WCO such as the ‘SAFE Package’, the ‘Data Model’, the ‘Coordinated Management Compendium’, and some other WCO instruments and tools.

Lastly, it has been reiterated that developing and less-developed countries stand to gain more from the implementation of the TFA.¹⁰ But it is also true that every country has its priorities. Now, if the countries that are purportedly to gain most from the TFA prefer to concurrently fix the issue of food security and other pertinent concerns in the agricultural sector, then so be it; after all, trade facilitation can still be successfully steered by the RKC and other related WCO instruments and tools. Indeed, an updated RKC would even be more modern and comprehensive than the TFA.

References

- Abbott, KW & Snidal, D 2000, 'Hard and soft law in international governance', *International Organization*, vol. 54, no. 3, pp. 421-56.
- Kafeero, E 2009, 'Customs law of the East African Community in light of WTO law and the Revised Kyoto Convention', Inaugural Dissertation, University of Münster, pp. 201-8, http://repositorium.uni-muenster.de/document/miami/d11545e5-5268-4218-9244-4f1957a15ef1/diss_kafeero.pdf.
- Murphy, SD 2006, *Principles of international law*, Thomson West, St Paul, MN.
- Organisation for Economic Co-operation and Development (OECD), 'OECD trade facilitation indicators, viewed 26 September 2014, http://eudevdays.eu/sites/default/files/OECD_Trade_Facilitation_Indicators_updated-flyer_May_2013.pdf.
- Snyder, F 1995, 'The effectiveness of EC law', in T Daintith (ed.), *Implementing EC law in the United Kingdom: structures for indirect rule*, John Wiley, Chichester, West Sussex.
- United Nations 1980, *Vienna Convention on the Law of Treaties*, <https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf>.
- World Customs Organization (WCO) 2006, 'Guidelines for the immediate release of consignments by Customs', www.wcoomd.org/en/topics/facilitation/resources/~/_media/D0F3EA60B983435EABE3C63DC23636C6.ashx.

Notes

- 1 When reference is made to the Revised Kyoto Convention (RKC), this includes both the legal texts and the guidelines. 'GA' means General Annex to the RKC and 'SA' means Specific Annex.
- 2 See also RKC, GA § 9 (9.1).
- 3 See, for instance, RKC, GA §§ 3 (3.2) and 9 (9.7).
- 4 The following are relevant to the provisions of Article 7 of the Agreement on Trade Facilitation: RKC, GA §§ 3, 6 and 7.
- 5 Article 38 of the Statute of the International Court of Justice reads:
 1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
 - a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
 - b. international custom, as evidence of a general practice accepted as law;
 - c. the general principles of law recognized by civilized nations;
 - d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.
 2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.
- 6 Take, for instance, TFA 2: 1.1 which states: 'Each Member shall, to the *extent practicable and in a manner consistent with its domestic law and legal system*, provide opportunities and an appropriate time period to traders and other interested parties to comment on the proposed introduction or amendment of laws and regulations of general application related to the movement, release and clearance of goods, including goods in transit [emphasis added].
- 7 Viewed 28 September 2014, http://wto.org/english/news_e/spra_e/spra31_e.htm.
- 8 Press Information Bureau Government of India, Ministry of Commerce & Industry (25 July 2014, 20:35 IST), viewed 28 September 2014.

- 9 'Failing to agree on new rules for twenty years is *a very disturbing record*,' said WTO Director-General Roberto Azevêdo in his speech to the UNCTAD Trade and Development Board on 22 September 2014 [emphasis added].
- 10 'We must acknowledge that small countries are probably the ones who will suffer the most. Big countries have other options,' said WTO Director-General Roberto Azevêdo in his speech to the UNCTAD Trade and Development Board on 22 September 2014.

Hans-Michael Wolfgang



Professor Dr Hans-Michael Wolfgang is Professor of International Trade and Tax Law and Head of the Department of Customs and Excise which forms part of the Institute of Tax Law at the University of Münster, Germany. He is director of the Münster Masters studies in Customs Administration, Law and Policy and has written extensively on international trade law, customs law and export controls in Europe.

Edward Kafeero



Dr Edward Kafeero is a Ugandan graduate with considerable expertise in international trade and customs law, with particular experience in trade facilitation, legal issues of economic integration, and capacity building. He is head of department for trade policy and law at Uganda Martyrs University and currently a research fellow at his *alma mater* – the University of Münster, Germany. Over the past 15 years, Edward has collaborated with a number of companies, government ministries/agencies and organisations on international trade and customs matters. These include the Department of Customs and Excise at the University of Münster, the International Network of Customs Universities (INCUI), the German Federal Enterprise for International Cooperation (GIZ), the Trade Department at Uganda Martyrs University, the Ugandan Ministry of Trade, Industry and Cooperatives, the East African Community (EAC), and the World Customs Organization (WCO).

