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## **Economic and Social Commission for Asia and the Pacific**

Ad Hoc Intergovernmental Meeting on a Regional Arrangement  
for the Facilitation of Cross-border Paperless Trade

Bangkok, 22-24 April 2014

Item 4 of the provisional agenda\*

**Consideration of the draft text of a regional arrangement  
for the facilitation of cross-border paperless trade**

### **Explanatory note to the draft text of a regional arrangement for the facilitation of cross-border paperless trade**

#### **Note by the secretariat**

##### **Introduction**

1. This explanatory note has been prepared by the secretariat<sup>1</sup> to help ESCAP members in reviewing the draft text of a regional arrangement for the facilitation of cross-border paperless trade (E/ESCAP/PTA/IGM.1/WP.1) and to clarify relevant technical and legal terms and topics referred to in the various articles of the draft text. Explanations on articles, when available, are provided in the present document under the relevant article number and title of the existing draft text. The explanatory note is not intended to become part of the text of a regional arrangement. For the actual text of the articles, see the draft text.

##### **Preamble**

2. With reference to the term “ESCAP member States”, the full list of 53 ESCAP member States can be found at [www.unescap.org/about/member-states](http://www.unescap.org/about/member-states).

##### **Article 1 Objective**

3. The term “subregional” used in Article 1 is generally in alignment with the United Nations geoscheme, devised by the United Nations Statistics Division. In this geoscheme, Asia comprises five subregions: Central Asia; Eastern Asia; Southern Asia; South-Eastern Asia; and Western Asia. In this context, the membership of ESCAP covers all except Western Asia but also covers the Pacific subregion.

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\* E/ESCAP/PTA/IGM.1/L.1.

<sup>1</sup> The secretariat is grateful to the participants in the expert group meetings on regional arrangements for cross-border paperless trade and the UNNExT Advisory Committee on Resolution 68/3 for sharing their technical and legal expertise and providing inputs in drafting the explanatory note.

4. In the context of this Agreement [Framework Agreement], any economic community comprising more than two countries, such as a customs union, may also be considered a subregion. With the contexts given above, the term “subregional” as used in Article 1 conforms to the definition of “subregion” given in the Oxford English Dictionary: “a division or part of a region”.

### **Article 3**

#### **Definitions**

5. For those terms whose definitions are taken, in part or as a whole, from other sources, original sources are provided. In addition, definitions of and/or explanations on additional terms are provided for the clarity of understanding on some terms listed in Article 3.

6. The definition of the term “trade” is given in order to draw attention to two elements: (a) the international character of trade, meaning that the Agreement [Framework Agreement] does not cover domestic (internal) trade, and the scope of the Agreement [Framework Agreement] is limited to “trade between the Parties” (ref. Article 2); and (b) the focus of the Agreement [Framework Agreement] on trade in goods, meaning that the Agreement [Framework Agreement] does not cover other forms of commercial activity, such as leasing, construction of industrial works, engineering, licensing or investment.

7. “International trade” means sales of goods originating from a Party and destined for another Party. The term “international trade” specifies that the provisions of the Agreement [Framework Agreement] will apply to trade in goods originating from a Party and destined for another Party. Such an approach is used in the framework of the World Trade Organization (WTO) and in regional trade agreements.

8. “Goods” means any commodity included in the nomenclature governed by the International Convention on the Harmonized Commodity Description and Coding System<sup>2</sup> except goods bought for personal, family or household use. With this definition of goods, the Agreement [Framework Agreement] excludes transactions with consumers. However, any Parties to the Agreement [Framework Agreement] that would like to have consumer transactions covered may do so voluntarily by making additional arrangements separately. Any commodity not included in the nomenclature governed by the Convention can be covered by the Agreement [Framework Agreement] through an additional agreement among the Parties.

9. The meaning of “transit” is paraphrased from Article V of the General Agreement on Tariffs and Trade (GATT).<sup>3</sup> Transit means the passage of goods across the territory of a Party, with or without trans-shipment, warehousing, breaking bulk, or change in the mode of transport, when such passage is carried out to or from the territory of any other Party. Customs transit is defined by Specific Annex E of the revised Kyoto Convention on the Simplification and Harmonization of Customs Procedures<sup>4</sup> as the customs procedure under which goods are transported under customs control (and without imposing customs duties) from one customs office to another; the national transit operations included in this definition of customs transit are

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<sup>2</sup> United Nations, *Treaty Series*, vol. 1503, No. 25910.

<sup>3</sup> United Nations, *Treaty Series*, vol. 55, No. 814.

<sup>4</sup> United Nations, *Treaty Series*, vol. 2370, No. 13561.

out of the scope of this Agreement [Framework Agreement]. As to transit, it is understood that the provisions of the Agreement [Framework Agreement] will apply between Parties, one of which is the party of transit and the other is the party from whose territory goods arrive in the party of transit (first option) or the party to whose territory goods go from the party of transit (second option).

10. “Related services” means all services associated with international trade (sales of goods), including payment, insurance, carriage, trans-shipment and warehousing.

11. The definition of “electronic communication” is wholly adopted from the United Nations Convention on the Use of Electronic Communications in International Contracts,<sup>5</sup> in particular Article 4 (b).

12. The definition of “data message” is wholly adopted from Article 2 (a) of the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Electronic Commerce<sup>6</sup> and Article 4 (c) of the United Nations Convention on the Use of Electronic Communications in International Contracts, with the exclusion of the words “electronic mail, telegram, telex or telecopy”.

13. Regarding the term “data and documents in electronic form”, it should be understood that, in contrast to paper documents and data presented within such paper documents, a document in electronic form can be either an electronic message or an electronic document. What distinguishes an electronic message from an electronic document is whether an information system can process the information contained within it or not; an information system can interpret and process the former but not the latter. Examples of electronic messages include electronic data interchange (EDI) or Extensible Markup Language (XML) messages, the information within which can be interpreted and processed by an information system. Examples of an electronic document are Microsoft Word files, image files and portable document format (PDF) files, which require human intervention before the information contained within them can be interpreted or processed.

14. In the term “commercial transactions”, the notion of “place of business” is taken from Article 10 of the United Nations Convention on Contracts for the International Sale of Goods.<sup>7</sup> The notion of “transactions relating to sales of goods” should be interpreted as excluding transactions related to supply of services.

15. “Mutual recognition” is established by the Parties agreeing that different national requirements are equivalent and mutually acceptable in order to fulfil the requirements of domestic legislation in a specific field. Each Party to the Agreement [Framework Agreement] would be required to recognize the validity of any trade-related data and documents received in electronic form from another Party and vice versa.

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<sup>5</sup> General Assembly resolution 60/21, annex.

<sup>6</sup> General Assembly resolution 51/162, annex.

<sup>7</sup> United Nations, *Treaty Series*, vol. 1489, No. 25567.

16. The definition of “single window” is partly adopted from Economic Commission for Europe (ECE) Recommendation No. 33.<sup>8</sup> Some modification has been made from the definition given in ECE Recommendation No. 33 to suit the objective and scope of this Agreement [Framework Agreement]. For the purpose of reference, the definition of this term in ECE Recommendation No. 33 is “a facility that allows parties involved in trade and transport to lodge standardized information and documents with a single entry point to fulfil all import, export, and transit-related regulatory requirements. If information is electronic, then individual data elements should only be submitted once.”

17. The definition of “interoperability” is wholly adopted from the *IEEE Standard Computer Dictionary: A Compilation of IEEE Standard Computer Glossaries*.<sup>9</sup>

#### **Article 4** **Interpretation**

18. The aim of Article 4 is to increase the level of uniformity in the interpretation and implementation of the Agreement [Framework Agreement]. The source of inspiration for the paragraph is Article 7 of the United Nations Convention on Contracts for the International Sale of Goods.

#### **Article 5** **General principles**

19. “Technology neutrality” is a principle that legislation should neither impose nor discriminate in favour of the use of a particular type of technology to achieve its objectives.

20. “Functional equivalence” is a principle that encourages an analysis of the functions of paper documents and determining how those functions could be fulfilled through electronic means. Using the functional equivalence approach involves singling out basic functions of paper-based documents with a view to articulating criteria which, once met by electronic communications, would enable such electronic communications to enjoy the same level of legal recognition as corresponding paper documents performing the same function. Each Party shall give the same treatment to data and documents received in electronic form as to data and information received in paper documents.

21. “Non-discrimination of the use of electronic communications” is a principle requiring that there should be no disparity of treatment between electronic communications and paper documents. Information should not be denied validity or enforceability solely because it is in the form of an electronic communication.

22. The principle of “promotion of interoperability” encourages the Parties to work towards ensuring that their paperless trade systems, including single windows, are interoperable for the purpose of cross-border data exchange. Thus, these systems would be enabled to provide and receive

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<sup>8</sup> Economic Commission for Europe, United Nations Centre for Trade Facilitation and Electronic Business (UN/CEFACT), *Recommendations and Guidelines on establishing a Single Window to enhance the efficient exchange of information between trade and government, Recommendation No. 33* (United Nations publication, Sales No. 05.II.E.9).

<sup>9</sup> New York: Institute of Electrical and Electronics Engineers, 1990.

trade-related data and documents in electronic form to and from the paperless trade systems of other Parties.

23. The principle of “improved trade facilitation and regulatory compliance” is meant to ensure that cross-border paperless trade mechanisms to be developed by the Parties under the Agreement [Framework Agreement] contribute to a higher level of transparency, predictability and efficiency in the trade in goods (that is, trade facilitation), as well as enhanced regulatory compliance through better risk assessment and integrity of data and documents.

24. The principle of “cooperation between the public and private sectors” calls for the Parties to ensure cooperation in implementing the Agreement [Framework Agreement]; joint efforts between the public and private sectors, based on shared perspectives, would result in shared benefits and bring about a balance between the needs of trade facilitation and regulatory compliance.

## **Article 6**

### **National policy framework, enabling domestic legal environment and paperless trade committee**

25. Electronic communications afford the possibility of connecting anywhere anytime and are unfettered by physical borders. Having different parameters for domestic and international electronic transactions creates obstacles to the broadest use of electronic communication. Hence, it is highly recommended that the same legislation be adopted for both domestic and international transactions.

26. For paperless trade to be conducted in the best possible manner, trade-related data and documents in electronic form should ideally be subject to the same requirements for use in domestic or international trade as paper documents. Otherwise, traders would have to comply with different requirements, which would include cases in which the final destination of the goods is not clear at the beginning of the transaction.

27. Article 6 is aimed at creating an enabling domestic legal environment fully aligned with the international one. The use of international standards in the domestic legal and regulatory environment ensures that domestic legal and regulatory requirements will not hinder cross-border paperless trade. Examples of recommended international standards and best practices include the UNCITRAL Model Law on Electronic Commerce, the UNCITRAL Model Law on Electronic Signatures,<sup>10</sup> the *Guidelines on the Protection of Privacy and Transborder Flows of Personal Data* of the Organisation for Economic Co-operation and Development (OECD),<sup>11</sup> and the Asia-Pacific Economic Cooperation (APEC) *Data Privacy Framework*.<sup>12</sup>

28. Representatives of government and private sector parties participating in a national paperless trade committee would include representatives from trade, logistics service providers, port and airport authorities, IT service providers, national standard bodies, customs and other regulatory agencies that participate in export, import and transit functions. The scope of

<sup>10</sup> General Assembly resolution 56/80, annex.

<sup>11</sup> See <http://www.oecd.org/sti/ieconomy/2013-oecd-privacy-guidelines.pdf>.

<sup>12</sup> Singapore: APEC Secretariat, 2005. Available from [http://www.apec.org/Groups/Committee-on-Trade-and-Investment/~media/Files/Groups/ECSG/05\\_ecsg\\_privacyframewk.ashx](http://www.apec.org/Groups/Committee-on-Trade-and-Investment/~media/Files/Groups/ECSG/05_ecsg_privacyframewk.ashx).

participation should be decided by each Party depending on national rules, regulations and environment.

## **Article 8**

### **Cross-border mutual recognition of trade-related data and documents in electronic form**

29. At an operational level, additional technical agreements (such as memorandums of understanding and service level agreements) between public and/or private parties would be necessary to implement this provision practically. It is also desirable to have commonly accepted standards for interoperability; countries whose electronic signature/information technology laws are based on UNCITRAL model laws have many commonalities, and such commonalities can facilitate mutual or multilateral agreements.

30. Various forms of electronic signatures, such as digital signatures, biometrics-based signatures, clickable “I Agree” boxes and signature images, are being used for authentication of electronic documents. However, legal recognition of such forms differs from one country to another. Digital signatures, based on asymmetric key cryptography, are a commonly used and legally recognized form of electronic signature. A document is digitally signed using a “private key”, which is in the sole possession of the signing entity and verified using a corresponding “public key”. The public key for an entity is certified by a certifying authority, which issues a Digital Signature Certificate (DSC) after carrying out necessary verification, and acts as a trust anchor.<sup>13</sup> In most countries, documents signed using a DSC issued by a licensed certifying authority are legally recognized. However, a certifying authority recognized in one country may not be recognized in the other, which creates problems in cross-border paperless transactions. Hence, it is desirable that certifying authorities or trust anchors should have cross-border legal recognition.

31. The criterion of “a substantially equivalent level of reliability” is taken from Article 12, paragraph 3, of the UNCITRAL Model Law on Electronic Signatures.<sup>10</sup> This means that data and documents will be recognized when they offer a level of reliability similar, though not identical, to that of the recognizing parties. The “substantially equivalent level of reliability” should be mutually agreed by the Parties. Examples of factors that may be considered in assessing the level of reliability are as follows:

- (a) Existence of financial and human resources and assets of the trust anchors;
- (b) Trustworthiness of the hardware and software systems used;
- (c) Security and vulnerabilities of the algorithms and/or mechanisms used for signing;
- (d) Procedures for processing signature certificates, applications for the certificates and retention of relevant records;
- (e) Availability of information to subscribers and/or relying parties;
- (f) Regularity and extent of audits by an independent body.

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<sup>13</sup> See ECE/TRADE/C/CEFACT/2010/14, Sect. 3.

## **Article 9**

### **International standards for exchange of trade-related data and documents in electronic form**

32. “International standards” in this Agreement [Framework Agreement] refer to standards developed by international standards organizations or bodies and which have been widely adopted as good practices. Examples of such international standards include the International Organization for Standardization country code standard (ISO 3166), the United Nations Code for Trade and Transport Locations (UN/LOCODE), the United Nations Trade Data Element Directory (UNTDDED), Codes for Units of Measure used in International Trade (UNECE Recommendation No. 20)<sup>14</sup> and the United Nations Electronic Data Interchange for Administration, Commerce and Transport (UN/EDIFACT).

33. For exchange of trade-related data and documents in electronic form, the Parties may use common international standards. The standards to be applied and the data and documents in electronic form to be exchanged need to be discussed and mutually agreed upon by the Parties during the implementation of the Agreement [Framework Agreement], after its entry into force.

34. As part of ensuring interoperability and enhancing mutual recognition of trade-related data and documents in electronic form, the Parties would collaborate on international standard implementation strategies through the institutional arrangement established under this Agreement [Framework Agreement]. International standard implementation strategies are primarily concerned with, though not limited to, technical standards.

## **Article 10**

### **Relation with other legal instruments enabling cross-border paperless trade**

35. The Agreement [Framework Agreement] is meant to operate in a complex legal environment, in which a number of international legal texts and other legislative and regulatory standards are already present. The Agreement [Framework Agreement] is aimed at interacting with them and actually promotes further harmonization of the law on electronic transactions.

36. In paragraph 1 of Article 10, the Parties are called upon to take into account and adopt available international legal instruments, for example the United Nations Convention on the Use of Electronic Communications in International Contracts, a treaty that contains the most modern restatement of electronic transactions law, with respect to both general principles and operational rules.

37. Paragraph 2 of Article 10 is a blanket provision referring to all applicable international standards, regional or global. Those will include, for instance, guidelines on privacy and data retention, intellectual property treaties and other texts that have not yet been elaborated.

<sup>14</sup> Revision 6 (CEFACT/ICG/2009/IC011). Available from [www.unece.org/fileadmin/DAM/cefact/recommendations/rec20/Rec20\\_Rev6e\\_2009.pdf](http://www.unece.org/fileadmin/DAM/cefact/recommendations/rec20/Rec20_Rev6e_2009.pdf).

## **Article 11**

### **Legal liability framework**

38. The Agreement [Framework Agreement] is not aimed at modifying the liability regime (or, more generally, the legal regime) of the entities involved in paperless trade, including customs authorities, in particular. In most cases, the legal regime of those entities does not change on the basis of the medium used for submission of a document. Thus, the liability for an incorrect customs declaration, for instance, will remain the same regardless of the medium used.

39. However, the very nature of paperless trade may give rise to additional liabilities. Such liabilities may arise in connection with information processing and data protection. For instance, damage may result from the corruption of data during its transmission. In that case, it might be necessary to deal with the matter of the liability regime and its limitations.

## **Article 12**

### **Institutional arrangements**

40. In the performance of their functions, working groups under the Standing Committee may establish liaison with relevant regional and global entities involved in facilitation of cross-border data exchange for cooperation and avoidance of possible duplication of efforts.

41. The secretariat's support in the implementation of the Agreement [Framework Agreement] would consist of the following:

- (a) Administrative support for meetings of institutions at all levels, including the Council, the Standing Committee and working groups;
- (b) Support to the activities of institutions at all levels, including the Council, the Standing Committee and working groups;
- (c) Support to the development and implementation of action plans, pilot projects and capacity-building programmes;
- (d) Maintenance of relevant databases and references;
- (e) Coordination of cooperation between the Parties and development partners in capacity-building, including financial and technical assistance;
- (f) Mobilization of internal and external resources;
- (g) Any other matters necessary for implementing the Agreement [Framework Agreement].

## **Article 13**

### **Action plan**

42. The action plan would comprise both collective and individual action plans. A collective action plan is a regional-level action plan developed and adopted by the Standing Committee for joint implementation among all the Parties. An individual action plan is a national action plan developed and implemented by each Party and shared with other Parties through the Standing Committee.

43. The action plan would include a mechanism to review and assess the readiness of the Parties and any gaps in policy, legal and technical frameworks, whose primary purpose is to facilitate the participatory process

and not to engage in measurement (comparisons between Parties), so that subsequent actions, in particular capacity-building programmes, can be designed to support the Parties effectively.

44. An action plan, in particular the capacity-building component, may be customized at the national, subregional and regional levels, considering the different levels of awareness and preparedness of different Parties and subregions.

#### **Article 14**

##### **Pilot projects and sharing of lessons learned**

45. Under its institutional arrangement, the Agreement [Framework Agreement] would develop technical and legal reference frameworks to be used for pilot projects, and for actual projects, whenever possible. Such reference frameworks include model memorandums of understanding for arranging bilateral/multilateral exchanges of cross-border data, implementation models/scenarios, mutual recognition protocols, authentication procedures and lists of technical standards to be used.

46. Lessons learned and the results of successful pilot projects would be used to develop actual projects for live cross-border paperless trade to be included in action plans.

#### **Article 15**

##### **Capacity-building**

47. The secretariat would provide necessary support to the Parties in implementing the capacity-building provisions of the Agreement [Framework Agreement], including the coordination of cooperation with development partners in financial and technical assistance.