

Explanatory Note
on
Agreement [Framework Agreement] on Facilitation of Cross-border
Paperless Trade for the Asia Pacific Region

(Draft as of 25 October 2013)

This explanatory note has been prepared by the ESCAP Secretariat¹ to help ESCAP Members in reviewing the draft text of the Agreement [Framework Agreement] on Facilitation of Cross-border Paperless Trade for the Asia Pacific Region and to clarify relevant technical and legal terms and topics referred to in the various Articles of the draft text.

Explanations of Articles, when available, are provided in this document under the relevant Article Number and Title. Please refer to the draft Agreement [Framework Agreement] for the actual text of the Article.

PREAMBLE

For the term “ESCAP Member States,” please refer to <http://www.unescap.org/about/member-states> for the full list of ESCAP Member States.

ARTICLE 1: OBJECTIVE

The term “Subregional” used in this Article is, in general, in alignment with the United Nations geoscheme, devised by the United Nations Statistics Division. In this geoscheme, the Asia region includes five subregions: Central Asia, Eastern Asia, Southern Asia, Southeastern Asia and Western Asia. Among the five subregions of Asia region, ESCAP membership covers four subregions, except Western Asia; ESCAP also covers subregions of Oceania region.

Note should be given that, in the context of this Agreement [Framework Agreement], any economic community comprising of more than two countries, such as Customs Union, may also be considered as subregion, even though it does not exactly match on its membership with one of those subregions.

With the contexts given above, the term “Subregional” used in this Article can be understood from the definition of subregion given in the Oxford English Dictionary: “a division or part of a region”

ARTICLE 3: DEFINITIONS

For those terms whose definitions are adopted, 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:

Trade

¹ 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.

The definition of the term “trade” is given in order to bring the attention to 2 elements: (1) the international character of trade, i.e., the Agreement [Framework Agreement] does not cover domestic (internal) trade, with the scope of the Agreement [Framework Agreement] being limited to “trade between the Parties” (ref. Article 2); and (2) the focus of the Agreement [Framework Agreement] on trade in goods, i.e., the Agreement [Framework Agreement] does not cover other forms of commercial activity, e.g., leasing; construction of works; engineering; licensing; or investment.

- “**International trade**” means sales of goods originating from a Party and destined to 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 to another Party. Such approach is used in the WTO framework as well as in regional trade agreements.
- “**Goods**” means any commodity included in the Nomenclature governed by the Convention on the Harmonized Commodity Description and Coding System except goods bought for personal, family or household use.
 - With this definition of Goods, the Agreement [Framework Agreement] excludes transactions with consumers. However, the Parties to the Agreement [Framework Agreement] who would like to have consumer transactions covered may do so voluntarily by additional separate arrangements among the Parties.
 - Any commodity not included in the Nomenclature governed by the Convention on the Harmonized Commodity Description and Coding System can be covered by the Agreement [Framework Agreement] through additional agreement among the Parties.
- The meaning of “**Transit**” is wholly adopted from Article V of the GATT by paraphrasing it. 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 (RKC) 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 out of 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 another is the party from whose territory goods arrive to the party of transit (first option) or the party to whose territory goods go from the party of transit (second option).
- “**Related Services**” means all services associated with international trade (sales of goods), including payment, insurance, carriage, transshipment, warehousing, etc.

Electronic communication

- The definition of this term is wholly adopted from the United Nations Convention on the Use of Electronic Communications in International Contracts, 2005, in particular Article 4(b).

Data message

- The definition of this term is wholly adopted from Article 2(a) of the UNCITRAL Model Law on Electronic Commerce and Article 4(c) of the UN Electronic Communications Convention, with exclusion of the words “electronic mail, telegram, telex or telecopy.”

Data and documents in electronic form

- “Data and documents in electronic form” should be understood in contrast to paper documents and data presented within such paper documents.
- Document in electronic form includes both electronic message and electronic document. Distinction between electronic message and electronic document is whether an information system can process information contained within it or not; information system can interpret and process the former, but not the latter.
- Examples of electronic message can include EDI or XML messages that an information system can interpret and process information within it.
- Examples of electronic document are MS Word file, image file, PDF document, etc. that human intervention is needed for interpretation or processing of information within it.

Commercial transactions

- In this term, the notion of “place of business” is taken from Article 10 of the United Nations Convention on Contracts for the International Sales of Goods. The notion of “transactions relating to sales of goods” should be interpreted to exclude transactions of supply of services.

Mutual Recognition

- Mutual recognition is established by the Parties agreeing that different national requirements are equal and respectively interchangeable in order to fulfill the requirements of the domestic legislation in a specific field.
- Each Party of this Agreement [Framework Agreement] is required to recognize the validity of any trade-related data and documents received in electronic form from another Party and vice versa.

Single Window

- The definition is partly adopted from the UNECE Recommendation No. 33. Some modification has been made from the definition given in the UNECE 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 the UNECE 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 fulfill all import, export, and transit-related regulatory requirements. If information is electronic, then individual data elements should only be submitted once.*”

Interoperability

- The definition of this term is wholly adopted from “Institute of Electrical and Electronics Engineers. IEEE Standard Computer Dictionary: A Compilation of IEEE Standard Computer Glossaries. New York, NY: 1990.”

ARTICLE 4: INTERPRETATION

- This article aims at increasing 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 Sales of Goods.

ARTICLE 5: GENERAL PRINCIPLES

(1) Technology neutrality

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

(2) Functional equivalence

- Functional equivalence is a principle that encourages an analysis of the functions of paper-based requirements and determining how those functions could be fulfilled through electronic means. Using the functional equivalence approach involves singling out basic functions of paper-based form requirements, with a view to providing criteria which, once they are met by electronic communications, 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.

(3) Non-discrimination of the use of electronic communications

- Non-discrimination of the use of electronic communications is a principle demanding that there should be no disparity of treatment between electronic communications and paper documents. Information should not be denied validity or enforceability on the sole ground that it is in the form of an electronic communication.

(4) Promotion of interoperability

- The promotion of interoperability principle encourages the Parties to work towards ensuring that their paperless trade systems, including Single Window(s), are interoperable for the purpose of cross-border data exchange, i.e., these systems are enabled to provide and receive trade-related data and documents in electronic form to and from paperless trade systems of other Parties.

(5) Improved trade facilitation and regulatory compliance

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

(6) Cooperation between public and private sectors

- The principle of Cooperation between public and private sectors calls for the Parties to ensure cooperation in implementing the Agreement [Framework Agreement]: joint effort between public and private sectors, based on shared perspectives, would result in shared

benefits and bring about a balance between needs of trade facilitation and regulatory compliance.

ARTICLE 6: NATIONAL POLICY FRAMEWORK, ENABLING DOMESTIC LEGAL ENVIRONMENT AND PAPERLESS TRADE COMMITTEE

- Electronic communications are intrinsically ubiquitous; they give the possibility to connect anywhere and at any time, and know no border. Hence, it is highly recommended to adopt the same legislation for domestic and international transactions, in order to avoid creating obstacles to the broadest use of electronic means by introducing different parameters for domestic and international electronic transactions.
- In conducting paperless trade, it is ideal if trade-related data and documents in electronic form have the same requirements for use in domestic or international trade. Otherwise, traders would have to comply with different requirements, including in those cases when the final destination of the goods is not clear at the beginning of the transaction.
- This Article aims 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 would not hinder cross-border paperless trade.
- Examples of recommended international standards and best practices include UNCITRAL Model Law on Electronic Commerce, UNCITRAL Model Law on Electronic Signatures, OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data, APEC Data Privacy Framework, etc.
- 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, etc. The scope of 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

- At the operational level, additional technical agreements (such as memoranda of understanding, service level agreements, etc.) between public and/or private parties would be necessary to practically implement this provision. It is also desirable to have commonly acceptable standards for interoperability. For example, countries whose electronic-signature/information-technology laws are based on UNCITRAL Model Laws have many commonalities, and such commonalities facilitate such mutual/multi-lateral agreements.

Electronic Signatures and Cross-border Mutual Recognition

- Various forms of Electronic Signatures like Digital Signatures, Biometrics-based signatures, clickable “I Agree” boxes, Signature Images, etc. are being used for authentication of electronic documents. However, not all such forms are legally recognized in all countries.
- Currently, digital signatures, based on asymmetric key cryptography, are most

widely used and legally recognized form of electronic signatures. Digital signatures assure Authenticity (assurance that the message actually originated from the purported signer), Integrity (the message was not modified after signing) and Non-Repudiation (the signer cannot deny signing the document later).

- A document is digitally signed using a “private key,” which is in sole possession of the signing entity and verified using 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 a Trust Anchor.
- In most of the countries, documents signed using 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.

- The criterion of “a substantially equivalent level of reliability” is taken from article 12(3) of the UNCITRAL Model Law on Electronic Signatures. This means that data and documents will be recognized when they offer a level of reliability similar, but not identical to that of the recognizing parties. The “level of reliability similar” should be mutually agreed by the Parties. The factors which may be considered for assessment of level of reliability *,inter alia*, include:
 1. Existence of financial and human resources and assets of the Trust Anchors.
 2. Trustworthiness of Hardware and Software System used.
 3. Security and vulnerabilities of the algorithms and/or mechanisms used for signing.
 4. Procedures for processing signature certificates, applications for the certificates and retention of relevant records.
 5. Availability of Information to subscribers and/or relying parties.
 6. Regularity and extent of audit by an independent body.

ARTICLE 9: INTERNATIONAL STANDARDS FOR EXCHANGE OF TRADE-RELATED DATA AND DOCUMENTS IN ELECTRONIC FORM

- “International standards” in this Agreement [Framework Agreement] refer to standards developed by international standard organizations/bodies and widely adopted as good practices. Examples of such international standards include ISO Country Code (ISO 3166), United Nations location code (UNLOCODE), United Nations Trade Data Element Directory (UNTDDED), Codes for Units of Measure used in International Trade (UNECE Recommendation No 20), United Nations/Electronic Data Interchange For Administration, Commerce and Transport (UN/EDIFACT), etc.
- 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 among the Parties during implementation of the Agreement [Framework Agreement].
- 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

- The Agreement [Framework Agreement] is meant to operate in a complex legal environment, where a number of international legal texts and other legislative and regulatory standards are already present. The Agreement [Framework Agreement] aims at interacting with them and actually promotes further harmonisation of the law of electronic transactions.
- Article 10(1) does so by calling the Parties 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, both with respect to general principles and operational rules.
- Article 10(2) is a blanket provision referring to all applicable international standards, be them 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.

ARTICLE 11: LEGAL LIABILITY FRAMEWORK

- The Agreement [Framework Agreement] does not aim at modifying the liability regime (and, more generally, the legal regime) of the entities involved in paperless trade, including, in particular, customs authorities. In most cases, the legal regime of those entities does not change on the basis of the medium used for submission of document. Thus, for instance, the liability for incorrect customs declaration will remain identical regardless of the media used.
- However, paperless trade, due to its own nature, might give rise to additional profiles of liabilities. Such profiles may arise in connection with information processing and data protection. For instance, damages 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 limitation.

ARTICLE 12: INSTITUTIONAL ARRANGEMENTS

- In the performance of their functions, working groups under the Standing Committee may build liaison with relevant regional and global entities involved in facilitation of cross-border data exchange for cooperation and avoidance of possible duplication of efforts.
- The Secretariat's support in the implementation of this Agreement [Framework Agreement] would include:
 - a) Administrative support to the meetings for all levels of institutions, including the Council, the Standing Committee and working groups
 - b) Support to the activities of all levels of institutions, including the Council, the Standing Committee and working groups
 - c) Support to the development and implementation of action plan, 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

- Action plan would include both collective and individual action plans. Collective action plan is a regional level action plan developed and adopted by the Standing Committee for joint implementation among all the Parties. Individual action plan is a national action plan developed and implemented by each Party, to be shared with other Parties through the Standing Committee.
- Action plan would include a mechanism to assess and review the readiness and gaps of the Parties in policy, legal and technical frameworks, whose primary purpose is to facilitate participatory process, not measurement itself, so that subsequent actions, in particular capacity building programmes, can be designed to support the Parties effectively.
- Action plan, in particular capacity building component, may be customized at national, subregional and regional level, considering different levels of awareness and preparedness of different Parties and subregions.

ARTICLE 14 PILOT PROJECTS AND SHARING OF LESSONS LEARNED

- 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 Memoranda of Understanding (MoU) for arranging bilateral/multilateral cross-border data exchange, implementation models/scenarios, mutual recognition protocol, authentication procedure, list of technical standards to be used, etc.
- Lessons learned and 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

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