

Expert Group Meeting Recommendations on a Regional Mechanism/Agreement on the Cross-border Electronic Exchange of Trade-related Data and Documents, United Nations Conference Centre, Bangkok, Thailand, 25-26 July 2011

Three small expert breakout sessions were held as part of the Expert Group Meeting to consider the draft agreement text prepared by the Secretariat for discussion – and provided in Annex. A brief summary of comments made by the rapporteurs of each group is provided in Table 1. The text below draws salient points from the recommendations made by the experts.

The EGM generally recognized the need for a regional mechanism to enable the cross-border legal recognition and exchange of electronic trade-related data and documents. The majority of the group supported a Regional Agreement on the Facilitation of Electronic Exchange of Trade-related Data and Documents (e-Trade), where ESCAP members becoming parties to the agreement would commit to develop and implement an action plan to progress towards regional paperless trade. Some expressed the view that, given potential difficulties in getting States to sign an agreement, a softer approach could be taken whereby a Declaration or a Guideline on the importance of cross-border exchange of electronic trade data and documents could be issued, followed by the creation of a working group led by willing member states – perhaps under the existing legislative structure of ESCAP related to Trade and Investment – to advance this issue. A few experts also expressed that the cooperation mechanism on this issue may be open to non-ESCAP members, given the global interest in advancing this issue.¹

Views on the extent to which provisions in a regional agreement should be of a best endeavor basis, as opposed to binding, were varied. Experts from single-window ready economies favored a more binding approach. Overall, it was generally recognized that, given the large differences among ESCAP member states in terms of paperless trade legal framework development at the national level, provisions involving legislative changes should be of a best endeavor nature. Participation in the institutional and cooperation mechanism set out in the agreement could be made binding, including establishment of a national-level committee or institution on e-trade by the States parties to the agreement.

There was broad agreement that the regional mechanism should focus on building capacity for cross-border electronic exchange of trade data and documents, including development of national level legal frameworks for paperless trade in countries. The meeting highlighted that this would entail increasing awareness of the importance and benefits associated with national and cross-border paperless trade systems, as related legal frameworks in a number of developing countries of the region were at a very early stage of development.

There was also agreement that the emphasis in the regional agreement should be on facilitating cross-border paperless trade and e-trade, rather than focusing specifically on single window – and exchange of information between single window systems. It was agreed that the

¹ One way to address this would be to call this an ESCAP Agreement rather than a Regional Agreement.

term E-trade should be preferred whenever possible as it is easily understood and translated in national languages, which is not the case with the term single window. In addition, while the usefulness of the single window concept –as described in rec. 33- was recognized, as well as the fact that many countries were working towards the development of single window system, many other countries already operating advanced paperless trade facilities did not plan to establish single window systems as such. Therefore, focus should be on cross-border exchange and recognition of electronic trade data and documents generated through the various national B-to-B and B-to-G paperless trade systems.

While legal mutual recognition of electronic trade-related documents and development of a cross-border legal framework was deemed essential to achieving the cross-border usage of electronic documents for trade facilitation, experts agreed that it was difficult to separate legal and technical aspects. Some experts noted that the UNCITRAL Convention on Electronic Contracts could inherently enable legal mutual recognition of trade documents across borders between signatories, although, in practice, more detailed rules would need to be established before cross-border exchange and recognition occurs, given the sensitivity and importance of the data contained in trade-related documents in terms of business intelligence and government revenue. The objective of the agreement and the regional solutions developed under the institutional mechanism established under it would therefore have to focus on actual cross-border exchange and recognition of trade-related data.

The meeting suggested that legal concerns for the cross-border exchange of trade data and documents be comprehensively covered and specifically laid out in the text of the agreement, which would facilitate development of action plans to address them. Several experts specifically noted the importance of data security and confidentiality as key cross-border concerns. Liability issues were also highlighted.

The institutional mechanism and implementation modalities, including action plan and terms of references of national and regional bodies to be established under the agreement would need clarification and elaboration. The development of templates or schedules listing possible individual or plurilateral actions to be considered by signatories would be needed. Experts generally agreed on the need for a peer review mechanism – or voluntary review mechanism – as part of monitoring progress towards the objectives.

Given the wide variations in the e-trade readiness and overall level of development of ESCAP member states, implementation of the legal and technical solutions for cross-border data exchange identified and ultimately recommended by a regional e-trade ministerial council (which could be established as part of the agreement) would be subject to each countries' own capacity and not be subject to any form of penalties.

Experts encouraged the ESCAP Secretariat to move forward with the initiative and organize follow-up discussions with all willing Member States on the form and content of an agreement to facilitate the cross-border electronic exchange of trade data and documents.

Table 1- Summary of Recommendations of Each of the 3 Small Expert Groups²

Questions	Group I	Group II	Group III
Title – how broad?	Issuing a Declaration may be easier than an Agreement; “regional” is unnecessarily limited, should include cross-regional issues;	Proposed title is fine; Terms “agreement” is good; “facilitation of” should be part of the title	Regional Agreement is fine; Title may need to be broader, Ex: "... on the facilitation of Electronic Exchange of Trade Data and documents"
Nature of document: binding vs. best endeavor?	non-binding (as a guideline or a declaration) → will lead to more visibility	Aim should be a binding agreement, best way to ensure it is not an empty exercise, encourage committed countries to participate in paperless trade	Best endeavor because binding language scares off countries; perhaps put a time limit on some aspects of the agreement, but not fully binding.
Objective and Scope: SW vs. paperless trade?	SW not comprehensible in all languages; Paperless trade is better scope	Objective should be paperless trade because not all countries have or want NSWs	Needs to have focus on paperless trade, futuristic in nature, looking ahead. SW focus limits applicability
Emphasis on (legal) or (legal + technical) aspects?	Technical aspects readily separable from legal aspects; issues should be addressed in non-technical way	A common understanding on technical issues makes it easier to get commitments to the legal aspects; formulation must be broad and flexible	Both legal and technical aspects need to be present;
Missing provisions and cross-border concerns?	Include more issues from Rec. 35 in the text; include a Voluntary review mechanism (of legal readiness for cross-border exchange)	Cross-border concerns included cover essential matters; Institutional modalities need clarification: Difference between Art. 6 and Art. 17 need to be clarified	Liability, jurisdiction issues in litigation, choice of law in criminal matters, and national law enforcement issues need to be incorporated; Templates for action plan need to be present (Art. 17 is very broad)
What is next moving forward?	Engage more countries in discussion; Hold follow-up workshops	Work should be continued	A Committee is needed to create and shape the Agreement; States should be encouraged to pass resolution authorizing ESCAP to facilitate further work in this area.

² Group 1 rapporteur: Prof. Hong Xue; Group 2 rapporteur: Mr. Claro Parlade ; Group 3 Rapporteur: Mr. Pavan Duggal, UNNExT Legal Advisory Group Members (http://www.unescap.org/unnext/ag_sw.asp).