

# **Explanatory note to the Framework Agreement on Facilitation of Cross-border Paperless Trade in Asia and the Pacific**

(Post 2<sup>nd</sup> IISG version - November 2016)

This note updates the Explanatory note circulated at the Second Steering Group Meeting.<sup>1</sup> This note has been prepared in order to assist ESCAP members in reviewing and negotiating the text of the Framework Agreement on Facilitation of Cross-border Paperless Trade in Asia and the Pacific (Framework Agreement). Hence, this note clarifies relevant technical and legal terms and topics referred to in the various articles of the text. Explanations have been provided for the various articles, under the relevant article number and title of the text. This note is intended to help readers understand the content of the text and how it has developed. However, it is not intended to be part of the text of the Framework Agreement.

## **Preamble**

1. 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**

2. 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.
3. In the context of this 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**

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<sup>1</sup> See: [http://www.unescap.org/sites/default/files/pre-ods/CEPTAIISG2\\_CRP2.pdf](http://www.unescap.org/sites/default/files/pre-ods/CEPTAIISG2_CRP2.pdf)

4. 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.
5. The formation of the term “Cross-border paperless trade” is the outcome of extended discussion and fine-tuning among the members of the Legal Working Group of the Interim Intergovernmental Steering Group on Cross-border Paperless Trade Facilitation in the process of negotiation. The term resulted from an attempt to incorporate a few key concepts, such as “cross-border”, “paperless” and “trade”, of the current Framework Agreement, while ensuring clarity in its application scope and purpose.
6. The definition of the term “trade” is embedded in the definition of “Cross-border paperless trade” and draws attention to two elements: (a) the international character of trade, meaning that the Framework Agreement does not cover domestic (internal) trade, and the scope of the Framework Agreement is limited to “trade between the Parties” (ref. Article 2); and (b) the focus of the Framework Agreement on trade in goods, meaning that the Framework Agreement does not cover other forms of commercial activity, such as leasing, construction of industrial works, engineering, licensing or investment.
7. “Trade” means sales of goods originating from a Party and destined for another Party. The term “trade” specifies that the provisions of the 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 Framework Agreement excludes transactions with consumers. However, any Parties to the 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 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

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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.

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 out of the scope of this Framework Agreement. As to transit, it is understood that the provisions of the 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, etc.
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

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

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

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

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 Framework Agreement would be required to recognize the validity of any trade-related data and documents in electronic form as well as electronic signatures received from another Party and vice versa.
16. The definition of “single window” is partly adopted from United Nations Economic Commission for Europe (UNECE) Recommendation No. 33.<sup>8</sup> Some modification has been made from the definition given in UNECE Recommendation No. 33 to suit the objective and scope of this Framework Agreement. For the purpose of reference, the definition of this term in 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 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 Framework Agreement. The source of inspiration for the article is Article 7 of the United Nations Convention on Contracts for the International Sale of Goods.

#### **Article 5**

##### **General principles**

19. In the process of negotiations, members of the Legal Working Group of the Interim Intergovernmental Steering Group on Cross-border Paperless Trade Facilitation have

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

<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.

discussed extensively the advantages and disadvantages of defining general principles. In line with generally accepted practices in treaty drafting (e.g. UNCITRAL conventions), a consensus was reached among the Legal Working Group members to not define the general principles in the text of the Framework Agreement, but to provide an explanation of each principle in this note.

20. “Technological 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.
21. “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.
22. “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.
23. 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 trade-related data and documents in electronic form to and from the paperless trade systems of other Parties.
24. 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 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.
25. The principle of “cooperation between the public and private sectors” calls for the Parties to ensure cooperation in implementing the 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.

26. The principle of “improving transboundary trust environment” refers to the aim of ensuring trust (confidence in authenticity) in the international exchange of trade-related data and documents in electronic form between electronically interacting parties through a combination of legal, organizational and technical conditions recommended by relevant specialized United Nations agencies and international organizations.

## **Article 6**

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

27. 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.

28. 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. 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.

29. 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>

30. 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

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

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

<sup>12</sup> Singapore: APEC Secretariat, 2005. Available from [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).

functions. 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**

31. 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.
32. 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 documents in electronic form. However, legal recognition of such forms differs from one country to another. Digital signatures, based on asymmetric key cryptography, are a type of 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.
33. The criterion of “a substantially equivalent level of reliability” is taken from Article 12, paragraph 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, 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;

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

- 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.
34. Article 8.3 aims at ensuring that arrangements concluded between the Parties to implement the Framework Agreement do not go against the spirit and general principles of the Framework Agreement. The Article provides for flexibility in how the Framework Agreement - in particular 8.2 - may be implemented, noting the possibility that this may be done through either bilateral or multilateral arrangements. The "bilateral and multilateral arrangements" referred to in this article are only those concluded among State parties to the Framework Agreement in order to implement the Framework Agreement and do not include agreements involving States that are not parties to Framework Agreement. These arrangements are also limited to the scope of the Framework Agreement (Article 2), i.e., the exchange of electronic trade-related data and documents between the Parties. Article 30 ("Application of successive treaties relating to the same subject-matter") of the Vienna Convention on the Law of Treaties may be relevant to clarify the relationship between the Framework Agreement, on the one hand, and pre-existing and future trade agreements covering paperless trade issues, on the other hand.

## **Article 9**

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

35. "International standards" in this 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

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