

Explanatory Note
on
Agreement/Framework Agreement on Facilitation of Cross-border
Paperless Trade for the Asia Pacific Region
(Draft as of 19 August 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.

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

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

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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 be covered may do so voluntarily by 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 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.”
- The scope of this Agreement/Framework Agreement does not cover whole spectrum of data message as defined in the Article 2(a) of the UNCITRAL Model Law on Electronic Commerce, but is limited to trade-related data and documents in electronic form.

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 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 1(1) 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, PAPERLESS TRADE COMMITTEE AND ENABLING DOMESTIC LEGAL ENVIRONMENT

- 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 as 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, this 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

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