



Economic and Social Commission for Asia and the Pacific

5th meeting of the Interim Intergovernmental Steering Group
on Cross-border Paperless Trade Facilitation

Bangkok, 12 and 13 March 2019

Item 3 of the provisional agenda*

**Report on progress made by the Legal and Technical
Working Groups**

Cross-border paperless trade: a legal readiness checklist

Note by the secretariat

Summary

The present document contains a legal readiness checklist prepared by the Legal and Technical Working Groups of the Interim Intergovernmental Steering Group on Cross-border Paperless Trade Facilitation. The legal readiness checklist is one of the supporting documents for a draft road map for the implementation of the substantive provisions of the Framework Agreement on Facilitation of Cross-border Paperless Trade in Asia and the Pacific. The checklist will help users to assess the degree to which the laws of their country will support cross-border paperless trade, identify existing legal gaps and design actions to improve the legal environment. It should be noted that the checklist is not intended to assess the readiness of a country to join the Framework Agreement.

I. Introduction to the checklist

1. The Legal and Technical Working Groups of the Interim Intergovernmental Steering Group on Cross-border Paperless Trade Facilitation have focused on preparing a draft road map and supporting documents for the implementation of the substantive provisions of the Framework Agreement on Facilitation of Cross-border Paperless Trade in Asia and the Pacific since its finalization and adoption in 2016. One of the supporting documents is a legal readiness checklist as contained in the annex to the present document.

2. The checklist will help users to assess the degree to which the laws of their country will support cross-border paperless trade, identify existing legal gaps and design actions to improve the legal environment. It should be noted that the checklist is not intended to assess the readiness of a country to join the Framework Agreement. Paperless trade implementation is a work in progress, and the Agreement is a tool meant to support such progress regardless of the

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level of readiness of a country. It is not necessary for a country to modernize its laws before ratifying or acceding to the Agreement.

3. The Legal and Technical Working Groups prepared the checklist at their 4th meeting, in 2017, and 5th meeting, in 2018. The checklist was further revised by legal experts during the meeting of the extended United Nations Network of Experts for Paperless Trade and Transport in Asia and the Pacific Advisory Group on cross-border paperless trade facilitation, held from 30 October to 1 November 2018. The Legal and Technical Working Groups will work on the checklist during their 6th meeting, on 11 March 2019.

II. Issues for consideration by the Steering Group

4. The Steering Group may wish to consider taking the following actions:

(a) Reviewing the current checklist for its completeness in assessing legal gaps in cross-border paperless trade;

(b) Endorsing the current checklist and requesting the secretariat to disseminate it widely for use by interested stakeholders and/or providing further guidance to the Legal and Technical Working Groups for its further development.

Annex

Cross-border paperless trade: a legal readiness checklist

General introduction

1. The aim of this checklist is to support member States in evaluating the degree to which their current laws facilitate the use of electronic communications, including the exchange of trade-related data and documents in electronic form, and determining what may need to be done to ensure the laws support engagement in cross-border paperless trade, as envisaged in the Framework Agreement on Facilitation of Cross-border Paperless Trade in Asia and the Pacific.

2. It should be noted that the checklist is not intended to be used to assess the readiness of a country to join the Framework Agreement, which was adopted as a United Nations treaty in 2016. This enabling treaty contemplates that its parties will ensure that their legal systems support the use of electronic communications and, if necessary, gradually adapt their laws for the purpose of cross-border trade without paper. It is not necessary for a country to modernize its laws before ratifying or acceding to the Agreement.¹ Paperless trade implementation is a work in progress, and the Agreement is a tool meant to support such progress regardless of the level of readiness of a country.

3. In line with the substantive provisions of the Framework Agreement, the legal issues addressed in the checklist are organized into the following four major sections: (a) electronic transactions and signatures law; (b) laws regarding paperless trade and single window systems; (c) cross-border aspects; and (d) other legal considerations. In each section, key legal matters are highlighted and a list of focus questions is provided.

4. Importantly, the checklist is designed for use by legal specialists, and it is recommended that all parts of the government engaged in aspects of paperless trade, as well as key private stakeholders, collaborate in completing it. Throughout this document, the term “laws” should be read to include regulations and other non-legislative binding rules. The questions apply to domestic as well as cross-border communications, unless they say otherwise. Moreover, all questions about national laws should be answered for subnational laws where applicable.

A. Electronic transactions and signatures law

5. This first section of the checklist deals with basic laws supporting electronic transactions and electronic signatures. The Framework Agreement addresses these concerns, directly or indirectly, in articles 5, 6 and 7. In particular, the first three principles included in article 5 (General principles) represent the international consensus on e-transactions law.² The key legal

¹ Detailed information on the Framework Agreement, including an explanatory note of the text and answers to frequently asked questions, is available at www.unescap.org/resources/framework-agreement-facilitation-cross-border-paperless-trade-asia-and-pacific.

² The Framework Agreement sets out the internationally recognized criteria for such laws, such as media neutrality (the laws apply in the same way, or with the same effect, to paper and electronic documents), technology neutrality (the laws do not specify what technology to use to achieve the legal effect), and functional equivalence (electronic documents have the same practical or legal effect as their paper equivalents even if they have different characteristics).

issues with regard to electronic transactions addressed in this section include legal recognition of electronic communications and legal issues related to identity management and trust services, including electronic signatures. Other important issues that are addressed are the regulatory/legal requirements for data retention and electronic archiving and the admissibility of electronic evidence, for example in judicial and enforcement proceedings.

Legal matters	Focus questions	Response
Related provisions of the Framework Agreement: ○ Article 5: General principles ○ Article 6: National policy framework, enabling domestic legal environment and paperless trade committee ○ Article 7: Facilitation of cross-border paperless trade and development of single window systems (<i>More specific questions on single window systems appear below in part II.</i>)		
<i>The first block of questions aims to explore the laws generally, with special attention to those that affect single window and/or cross-border trade documentation practices.</i>		
1. Electronic transactions legal issues, including: a. Legal recognition of electronic communications b. Legal issues related to identity management and trust services, including electronic signatures	○ What are the conditions for the recognition of the legal validity of electronic communications? ○ Do laws establish requirements for functional equivalence between paper-based documents and electronic communications? Do they recognize electronic communications as directly meeting requirements for documents, writing, signature, etc.? ○ Are there laws that inhibit technological neutrality by mandating or favouring the use of specific technologies or business solutions for e-communications to be given legal effect? ○ Do laws address how identification, authorization and authentication are carried out in an electronic environment? ○ For all the questions above, are those laws applicable to all electronic communications or transactions or only to some business sectors or categories of documents or users? ○ In particular, are there special rules for specific types of electronic documents such as bills of lading, manifests, certificates of origin, invoices, phytosanitary certificates, etc.?	

<i>The second block of questions explores laws relating to data retention and archiving, actions that take a different form in the electronic world from that of paper.</i>		
2. Regulatory/legal requirements for data retention and electronic archiving	○ Are there laws requiring preservation of stored information? ○ Do they prescribe a minimum data retention period or a maximum retention period? ○ Do they clearly apply to electronically stored data? If so, are there rules to ensure its integrity while stored and its accessibility to anyone with sufficient cause to inspect it?	
<i>The final block of questions in this first set looks to the law of evidence, i.e., whether businesses or even government will have difficulties proving their cases in a court or before a regulatory body because the records involved are in electronic form.</i>		
3. The admissibility of electronic evidence, for example in judicial and enforcement proceedings	○ Is electronic evidence admissible in judicial and administrative/regulatory proceedings? ○ If so, are there special rules for collecting or producing electronic evidence or for ordering the disclosure of electronic evidence? ○ Is a distinction made between evidence for criminal proceedings and for civil proceedings? ○ Is electronic evidence generated, stored or collected abroad admissible in judicial and administrative/regulatory proceedings? Are the rules about such “foreign” evidence different from those applicable to other kinds of “foreign” evidence?	

B. Laws regarding paperless trade and single window systems

6. This section deals with the laws relating to implementing and developing a paperless trade system (including but not limited to single window systems). These matters relate in particular to articles 6 and 7 of the Framework Agreement. Article 6, due to its wide scope, can cover many legal aspects relating to creating an enabling national policy framework for paperless trade. Article 7 specifically encourages parties to implement and develop a cross-border paperless trade system, in particular a single window system.³ Accordingly, this section of the checklist first covers basic legal issues related to implementation of a single window and/or other paperless trade system(s). Given the importance of information security and data confidentiality to enhance users' trust and confidence in order to adopt a paperless trade system, it then explores legal issues related to information security, including (a) laws and regulations on information security and data confidentiality; (b) laws and regulations on data accuracy and integrity; and (c) laws and regulations on accessing and sharing information. It also includes questions on service-level agreements and memorandums of understanding for paperless trade.

Legal matters	Focus questions	Response
Related provisions of the Framework Agreement: ○ Article 6: National policy framework, enabling domestic legal environment and paperless trade committee ○ Article 7: Facilitation of cross-border paperless trade and development of single-window systems		
<i>The first block of questions aims to assess a country's readiness to implement a paperless trade system/single window system.</i>		
1. Laws relating to the establishment of a single window system/paperless trade system	○ What legal instruments are used or need to be enacted to authorize or to establish the single window system and a paperless trading environment? ○ Is there a national or coordinating agency to promote the domestic paperless trading environment (e.g., a single window system committee)? If so, does it have government and private representatives on it? ○ Is there a dedicated budget to establish the single window system (or paperless trading platform)?	

³ No specific provision in the Framework Agreement deals with the legal requirements on information security and data confidentiality.

The second block of questions aims to explore laws relating to information security and data confidentiality, with special attention to those that affect single window systems and/or cross-border trade documentation practices.

2. Legal aspects relating to information security a. Laws and regulations on information security and data confidentiality b. Laws and regulations relating to data accuracy and integrity when such data are shared for cross-border paperless trade systems c. Laws and regulations for accessing and sharing information and data between and among government agencies	○ Do the national laws mandate information security standards? ○ Do the national laws protect the confidentiality of electronic transactions/information? ○ Are there laws about cybercrimes, i.e., crimes using a computer (or other information and communication technologies) or targeting a computer or a network, such as unauthorized access to computers, introducing malware, interfering with proper operations, etc.? ○ Are there national laws/regulations establishing requirements for the accuracy and integrity of data submitted and processed for paperless trade? Are these laws of general application or specifically directed at paperless trade? ○ Do these laws impose obligations on persons submitting such information and require processes to ensure correct attribution? Do they apply equally to paper and electronic communications? Are they consistent with the authentication and identity management rules mentioned earlier? ○ Are there agreements or policies for the sharing of data between government agencies within the country? Are there limits on such sharing based on personal privacy or commercial confidentiality?	
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The third block of questions aims to explore legal mechanisms to regulate the relationship between paperless trade service providers and service users to facilitate electronic trade-related transactions.

3. Service-level agreements and memorandums of understanding on paperless trade operations, e.g., operation of single window systems (service level agreements may be applicable for matters such as availability, reaction time, processing time, etc.)	○ Are there service-level agreements or memorandums of understanding governing paperless trade operations? Who are the parties and what is their legal authority for making these agreements or memorandums of understanding? ○ If yes, what level of service is expected from paperless trade service providers? ○ What level of service is expected from single window system operators?	
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C. Cross-border aspects

7. This section deals with the cross-border aspect of paperless trade, which is the ultimate focus of the Framework Agreement. The questions are inspired by articles 8, 9 and 10 of the Agreement, which focus on cross-border mutual recognition of trade-related data and documents in electronic form; international standards for exchange of trade-related data and documents in electronic form; and relation to other legal instruments enabling cross-border paperless trade.

8. A key issue in achieving seamless cross-border paperless trade is the legal recognition of trade-related data and documents of one country by another. Recognition involves attributing legal status of some kind to electronic messages exchanged across borders. Different legal mechanisms may achieve that goal. Some of those legal mechanisms will apply to certain types of transactions (for instance, business to business or business to government), while other legal mechanisms will apply only to specific types of documents or data sets or to specific types of trust services (for example, electronic signatures). Some legal mechanisms will establish legal recognition regardless of the method or technology used, while others are technology specific. With respect to legal form, some mechanisms are based on treaties and therefore may be directly legally binding. Other mechanisms favour harmonization of legal systems through the adoption of uniform laws. Yet other mechanisms are based on memorandums of understanding and similar technical arrangements.

9. Article 8 of the Framework Agreement promotes mutual legal recognition of trade-related data and documents in electronic form. It refers to the notion of “substantially equivalent level of reliability” to indicate that mutual legal recognition should be based on the general principle of technology neutrality. It does not establish any specific legal recognition mechanisms but is open to various options. Accordingly, many of the questions in this section aim in particular at identifying which laws and technical arrangements may have an impact on achieving such mutual legal recognition. Questions also extend to the broader focus of articles 9 and 10 on laws and other relevant agreements that prohibit, restrict or facilitate cross-border data flows for paperless trade and any related activity. A non-exhaustive list of possibly relevant international instruments is also provided at the end of the section for ease of reference.

Legal matters	Focus questions	Response
Related provisions of the Framework Agreement: ○ Article 8: Cross-border mutual recognition of trade-related data and documents in electronic form ○ Article 9: International standards for exchange of trade-related data and documents in electronic form ○ Article 10: Relation to other legal instruments enabling cross-border paperless trade		
1. Existing bilateral or regional agreements for cross-border paperless trade data exchange, including e-commerce and paperless trade facilitation provisions in regional trade agreements	○ Is the country party to an international agreement, such as a regional trade agreement or a bilateral trade facilitation agreement, that requires or favours the legal recognition of electronic messages exchanged across the border? ○ Is the country party to an international agreement providing legal recognition of electronic messages exchanged across the border? ○ Are there arrangements that provide for mutual recognition of electronic messages and transmitted information? If yes, is mutual recognition granted on a bilateral or multilateral basis? ○ Does the country recognize foreign electronic signatures and certificates? If so, on what basis? ○ Are national laws relevant to paperless trade facilitation based on international models (e.g., United Nations Commission on International Trade Law (UNCITRAL), Council of Europe, Organization for Economic Cooperation and Development, etc.)? (Note also the questions below about international standards and agreements that may apply to some or all of a country's communications.)	
2. International standards/guidelines	○ Do participants in cross-border trade use or rely on standards/regulations/guidelines for the exchange of electronic messages? United Nations Centre for Trade Facilitation and Electronic Business recommendations 35 and 36 on legal issues raised by cross-border interoperability are examples of such guidelines.⁴ ○ Have international legal standards/regulations/guidelines been incorporated into a country's legal framework for its cross-border paperless trade? If so, how? Does the incorporation of such rules at the domestic level also affect cross-border activity?	

⁴ See www.unece.org/tradewelcome/un-centre-for-trade-facilitation-and-e-business-uncfact/outputs/cefactrecommendationsrec-index/trade-facilitation-recommendations.html.

3. Existing bilateral or multilateral technical/operational agreements	○ Are there technical or operational agreements which provide for the unilateral or mutual recognition of electronic messages? Examples are the sanitary and phytosanitary exchange agreement between China and the Netherlands as well as the Association of Southeast Asian Nations' electronic Association of Southeast Asian Nations Trade in Goods Agreement programme.	
4. Other international legal instruments, regulations and standards relevant to enabling the use of data for cross-border paperless trade	○ Which other laws may be relevant to cross-border paperless trade facilitation? For example, bilateral or multilateral agreements on cybercrime and the taking of electronic evidence abroad.	

Non-exhaustive list of legislative texts relevant to cross-border recognition of electronic messages*

Treaty/Model law	Implementation status
Framework Agreement on Facilitation of Cross-border Paperless Trade in Asia and the Pacific (2016)	
Association of Southeast Asian Nations Single Window Agreement (2005) and Legal Protocol (2017)	
International Maritime Organization Amendments to the Annex to the Convention on Facilitation of International Maritime Traffic, 1965, as amended (2005)	
International Maritime Organization Guidelines for the Use of Electronic Certificates (2016)	
United Nations Centre for Trade Facilitation and Electronic Business recommendation 35 Establishing a Legal Framework for International Trade Single Window	
UNCITRAL Model Law on Electronic Signatures (2001)	
UNCITRAL Model Law on Electronic Transferable Records (2017)	
UNCITRAL Model Law on Electronic Commerce (1996)	
United Nations Convention on the Use of Electronic Communications in International Contracts (2005)	
Protocol of Amendment to the International Convention on the Simplification and Harmonization of Customs Procedures (Revised Kyoto Convention, 2006)	
World Trade Organization Agreement on Trade Facilitation (2013)	
Others (please specify):	

* Note: User may add or delete from the list depending on the economy considered.

D. Other considerations

10. For paperless trade to be conducted in the best possible manner, the Framework Agreement requires parties to create an enabling national legal framework (article 6) and to remove all the relevant legal barriers. It is therefore recommended that the parties aim to build a national policy framework for implementation of the Agreement that is sophisticated enough to address all the pertinent legal issues and consistent with the relevant international legal instruments and standards for harmonious cross-border electronic data and document exchange. Therefore, in addition to the topics specifically addressed in the substantive provisions of the Agreement, parties may also wish to deal with related issues such as liability, dispute settlement, intellectual property, electronic payment and competition – which in some cases may have been addressed in other legal agreements (cf. article 10). These matters may affect the effective operation of single window and other paperless trade systems, particularly in the cross-border environment.

11. These legal issues may be addressed by different sets or sources of legal rules. Therefore, there is no one-size-fits-all solution or approach. The legal framework, action plan and capacity-building programmes may and should be customized at the national level, depending on the various levels of awareness and preparedness of different member States, as already envisaged in articles 6, 12 and 14 of the Framework Agreement.

12. Accordingly, the questions included in this section of the checklist are intended to reveal what approaches and priorities already exist in a particular country's legal regime on the following topics: (a) liability, (b) dispute settlement, (c) intellectual property, (d) electronic payment and (e) competition issues that may arise in relation to cross-border paperless trade implementation. These are not exhaustive, and other legal issues may emerge.

Legal matters	Focus questions	Response
Related provisions of the Framework Agreement: - Article 6: National policy framework, enabling domestic legal environment and paperless trade committee - Article 10: Relation to other legal instruments enabling cross-border paperless trade - Article 12: Action plan - Article 14: Capacity-building		
<i>The first block of questions aims to ascertain the legal liability of the parties operating in a single window or other paperless trade system.</i>		
1. Liability issues related to operations of cross-border paperless trade systems, including cross-border paperless trade transactions (includes liability for inaccurate data, loss of data, delay, programming errors and machine learning errors)	- Can public authorities (e.g., government agencies) accept liability in relation to their role in cross-border paperless transactions? If so, is there a limitation on their liability? Is the limitation statutory or contractual? - May single window system operators be liable with respect to their services? To whom? If so, is there a limitation on their liability? Is the limitation statutory or contractual? - Do paperless trade service providers accept liability arising from their role in cross-border paperless transactions? If so, is there	

	a limitation on their liability? Is the limitation statutory or contractual? ○ Is the potential liability of other parties involved in cross-border paperless trade facilitation clearly established? ○ Are there clear laws on intermediary liability in relation to their responsibility for the information and data passing through their systems?	
<i>The second block of questions aims to examine the dispute settlement mechanisms for the operators of a single window or other paperless trade system.</i>		
2. Dispute settlement considerations for cross-border paperless trade transactions; legal issues related to conflict of laws in cross-border transactions	○ Do national laws clearly set out how choice of forum and choice of law issues relevant to paperless trade facilitation are determined? Are these laws specifically applicable to paperless trade, or cross-border trade, or of general application? Have they been applied in practice to paperless trade? Are they based on international models? ○ Is arbitration possible? Are domestic and foreign arbitral awards enforceable?	
<i>The third block of questions aims to examine intellectual property issues involved in a single window or other paperless trade system.</i>		
3. Intellectual property rights and database ownership issues, including the ownership of data and information stored or archived in the cross-border paperless trade system	○ Do the law or contractual agreements define who owns the data in a cross-border paperless trade system and how the intellectual property and the database can be used?	
<i>The fourth block of questions aims to examine the use of electronic payments in a single window or other paperless trade system.</i>		
4. Examination of banking/payments law for electronic payments in the cross-border paperless trade system	○ Does the national single window or paperless trade system accept electronic payments? Do the Government or State agencies accept them? If yes, are electronic payments restricted to a specific method or provider (e.g., credit cards or an exclusive bank)?	
<i>The fifth block of questions aims to examine the competition law issues involved in a single window or other paperless trade system.</i>		
5. Competition law issues, including treaties and conventions and General Agreement on Tariffs and Trade/World Trade Organization requirements applicable to the cross-border paperless trade system	○ Is competition law applicable to single window system operators or other paperless trade service providers?	