

Legal Gap Analysis Checklist for Self-Assessment to support cross-border paperless trade
(draft as of 22 February 2017)

Instructions: The checklist is to be used as an illustrative reference for those countries after they become parties to the Framework Agreement to support the development of the action plan referred to in Articles 11 and 12 of the Framework Agreement. It is neither exhaustive nor definitive. Self-assessment for legal readiness should be carried out by an examination of (i) laws (primary legislation), (ii) regulations (secondary or subsidiary legislation), (iii) case law or administrative decisions, and (iv) contractual or treaty obligations.

It is encouraged to carry out the self-assessment with reference to the various stakeholders: government, cross-border paperless trade service providers, users of cross-border paperless trade services and lawyers, law enforcement and judicial officers.

Gaps may be addressed by legislative amendments, implemented with pilot or test runs and supplemented by education (capacity building) and information sharing sessions. Should there be laws, regulations or administrative decisions (e.g. policies, quasi-judicial rulings) that are found to be contrary to the foregoing, these should be dealt with using established methods (e.g. repeal, legislative clarification). In addition, if the private sector has also developed practices which are contrary to cross-border paperless trade.

Parties implementing changes after self-assessment should also prioritize tasks according to resource availability. The first column lists the references to the relevant Articles of the Framework Agreement, while the second column sets out the legal area concerned. In the third column, we have posed a series of questions to frame the issue and direct the analysis. The fourth column should be filled out by member states, as part of its readiness self-assessment under Article 12, para 2.)

<i>FA Art</i>	<i>Legal matters</i>	<i>Explanation</i>	<i>Response</i>
5, 6, 7	1. Electronic transactions legal issues, including: a) Legal issues related to identification, authorization and authentication in an electronic transactions environment, including electronic signatures; b) Legal requirements for electronic documents and messages; c) Need for development of legislation or other regulations dealing with electronic transactions for the SW consistent with the FA;	Do laws give functional equivalence to electronic transactions and electronic documents? Are there laws which inhibit technological neutrality? Do laws address how identification, authorization and authentication are satisfied in an electronic environment? Do laws promote interoperability and trust in the cross-border trading environment?	

		<p>Are there special rules for electronic documents of specific categories of documents such as bills of lading, manifest, CO, invoices, phytosanitary certificates etc?</p> <p>Are these laws based on international standards and model laws?</p>		
6	2. Policies (executive acts, instructions circulars, or documents of similar nature), legislative enactments, administrative rulings, regulations and governmental decrees, circulars and the like that would formally establish the SW and a paperless trading environment in national law;	<p>Is there a budget to establish the Single Window ?</p> <p>Is there a national or governing committee/body to promote the domestic paperless trading environment (e.g. single window committee)?</p>		
8, 9, 10	3. Cross-border (mutual) recognition of electronic signatures and, where appropriate, of certification authorities;	<p>Are there arrangements that provide for mutual recognition of electronic messages and transmitted information ?</p>		
	Existing bilateral or regional agreements for cross-border paperless trade data exchange;	<p><i>Are there conventions or treaties for the recognition of electronic messages? For example, provisions in RTAs of which the country is a member; or bilateral trade facilitation agreements of which the country is a party, may already provide for the recognition of electronic messages. An illustrative reference list of</i></p>	<p>Convention/Instrument</p>	<p>Implementation Status</p>
			<p>United Nations Convention on the Use of Electronic Communications in International Contracts (2005)</p>	

		<p><i>instruments will be made available at:</i> http://www.unescap.org/resources/framework-agreement-facilitation-cross-border-paperless-trade-asia-and-pacific</p>	<p>United Nations Commission on International Trade Law Model Law on Electronic Commerce (1996)</p>	
			<p>United Nations Commission on International Trade Law Model Law on Electronic Signatures (2001)</p>	
			<p>United Nations Commission on International Trade Law Model Law on Electronic Transferable Records (tbd July 2017)</p>	
			<p>World Customs Organization International Convention on the Simplification and Harmonization of Customs Procedures (Revised Kyoto Convention, 2006)</p>	

			World Trade Organization Trade Facilitation Agreement (2013)	
			United Nations Centre for Trade Facilitation and Electronic Business (UN/CEFACT) Recommendation and Guidelines on establishing a Single Window (Recommendations 33)	
			(UN/CEFACT) Recommendation on Establishing a Legal Framework for International Trade Single Window (Recommendation 35)	
			International Maritime Organization Amendments to the Annex to the Convention on Facilitation of International Maritime Traffic, 1965, As Amended (2005)	

	Existing bilateral or multilateral technical /operational agreements;	<p><i>Are there technical or operational arrangements which provide for the mutual recognition of electronic messages? Examples are the SPS exchange agreement between China and Netherlands, ASEAN's e-ATIGA programme. An illustrative reference list of instruments will be made available at:</i></p> <p><i>http://www.unescap.org/resources/framework-agreement-facilitation-cross-border-paperless-trade-asia-and-pacific</i></p>	International Maritime Organization Guidelines for the Use of Electronic Certificates (2016)	
			UNCITRAL Draft Model Law on Electronic Transferable Records (June 2017 onwards)	

	<p>International standards/guidelines to develop safe and secure means of communications;</p> <p>Other international legal instruments and regulations and standards to enable cross-border paperless trade data;</p>	<p><i>Are there standards/regulations/guidelines for the exchange of electronic messages which are applicable or have been adopted?¹ UNCEFACT's Recommendation 35 is one such international standard. It is also useful to refer to UNCEFACT's Recommendation 36 for legal issues towards cross-border interoperability. Include an analysis of how international legal standards have been (or have not been) incorporated into a country's legal framework for its cross border paperless trade;</i></p>		
	<p>4. Service level agreements (SLA) and Memorandum of Understanding (MOUs) for paperless trade operations -</p> <p>Service levels may be applicable for areas including availability, reaction time, processing time;</p>	<p>Are there service level agreements or memorandum of understandings in place and imposed on paperless trade operations?</p> <p>What kind of service level is currently expected by Governments from paperless trade service providers?</p> <p>What kind of service level is currently expected of Governments by paperless trade systems participants?</p>		
	<p>5. Laws and regulations on data protection, Legal requirements and regulations on</p>	<p>Do laws provide that consent of the data subject is required before being disclosed or used?</p>		

¹  United Nations Convention on the Use of Electronic Communications in International Contracts (2005); United Nations Commission on International Trade Law Model Law on Electronic Commerce (1996); United Nations Commission on International Trade Law Model Law on Electronic Signatures (2001); World Customs Organization International Convention on the Simplification and Harmonization of Customs Procedures (Revised Kyoto Convention, 2006); World Trade Organization Trade Facilitation Agreement (2013)

	confidentiality and privacy;	<p>Are there laws which ensure the protection personal data?</p> <p>Do laws protect the confidentiality of transactions and the privacy of personal data?</p> <p>Does the national law comply with any standards – for example, the APEC Privacy framework as a benchmark?</p>	
	6. Legal requirements and regulations on information security;	<p>Are there are laws imposing appropriate standards of information security?</p> <p>Are there any laws prohibiting/restricting cross-border data flow?</p>	
	7. Legal and/or regulatory requirements for accessing and sharing information and data between and among government agencies;	<p>Are there clear processes and policies for the sharing of data between government agencies within the country?</p>	
	8. Laws and regulations relating to data accuracy and integrity when such data is shared for cross-border paperless trade systems;	<p>Are there laws/regulations requiring data to be accurately submitted and processed?</p> <p>Do these laws impose obligations on persons submitting such information and require processes to ensure correct attribution?</p> <p>Are there laws preserving the integrity of data which is stored?</p>	
	9. Regulatory/legal requirements for data retention and electronic archiving;	<p>Are there laws/regulations which relate to both minimum data retention periods (for accountability)?</p>	

		Are there maximum retention periods (for data protection) being prescribed?	
	<p>10. Liability issues related to operations of cross-border paperless trade systems, including cross-border paperless trade transactions;</p> <p>Dispute settlement considerations for cross-border paperless trade transactions; Legal issues related to conflict of laws in cross border transactions;</p>	<p>Is it clear if governments undertake (or do not undertake) liability in relation to its role in cross-border paperless transactions?</p> <p>Is it clear if paperless trade service providers undertake liability in relation to issues related to their role in cross-border paperless transactions?</p> <p><i>Liability includes liability for inaccurate data, loss of data, delay, programmer error and machine learning errors</i></p> <p>Do national laws clearly set out how jurisdictional and choice of law issues are determined?</p> <p>Are there clear laws on intermediary liability in relation to their responsibility for information and data passing through their systems?</p> <p>Are arbitral decisions enforceable?</p> <p>Is a mediation clause enforceable?</p> <p>Is liability clearly established between parties in cross border trade transactions transacted electronically?</p>	
	11. Intellectual property rights and data base ownership issues, including the ownership of data and information stored or archived in the cross-border paperless trade system;	Do IP and database ownership laws clearly define who owns the data in a single window and how the IP and database can be dealt with?	
	12. Examination of banking/payments law	Does banking/payments law accept electronic	

	<p>for electronic payments in the cross-border paperless trade system;</p>	<p>payments?</p> <p>Are there legal and regulatory requirements to process electronic payments?</p>	
	<p>13. The admissibility of electronic evidence, for example, in judicial and enforcement proceedings;</p>	<p>Can electronic evidence be admissible in judicial proceedings?</p> <p>What are the obstacles to admissibility of electronic evidence?</p> <p>Can electronic evidence collected overseas be admissible in judicial proceedings?</p> <p>If necessary, do judicial and law enforcement entities have the ability to order (whether on their own or with a court order) for the release/disclosure of electronic evidence for investigations and legal proceedings?</p>	
	<p>14. Competition law issues (including treaties and conventions, and General Agreement on Tariffs and Trade (GATT)/WTO requirements applicable to the cross-border paperless trade system);</p>	<p>Are there established laws on competition law which encourage legitimate cross-border trade?</p> <p>Do competition laws prohibit/inhibit SW systems/paperless trading systems?</p> <p>In order to comply with competition laws, should your SW be designed to be solely operated?</p>	
	<p>15. Other legal issues that may be identified as important to a particular country's legal regime, for example, laws and regulations for government ministries or agencies, including Customs Administration that will be participating in the SW, the banking/payments regulator as well as the Ministry of Transport</p>	<p>Are there other significant legal impediments to cross-border paperless trade? For instance, do government ministries need to set up separate departments to handle cross-border paperless trade responsibilities?</p> <p>Are there local language requirements hamper cross-border paperless trade (for example, mandatory language requirements or data localization laws).</p>	
