

PART ONE

I. BENCHMARKING REGIONAL E-COMMERCE IN ASIA AND THE PACIFIC AND ASSESSMENT OF RELATED REGIONAL INITIATIVES

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Introduction

The World Bank commissioned a report on national and regional developments about e-commerce in Asia and the Pacific.² The focus was on legal enabling environments in 23 countries designated as East Asia/Pacific (EAP). Table 1 presents a list of the countries included in the study. The legal enabling environment would include the reach, scope and the extent of EAP regional initiatives dedicated to the development of e-commerce in the region. The report was funded through Trust

Table 1: List of countries surveyed

Cambodia	Palau
China	Papua New Guinea
Democratic People's Republic of Korea	Philippines
Fiji	Republic of Korea
Indonesia	Samoa
Kiribati	Solomon Islands
Lao People's Democratic Republic	Thailand
Malaysia	Timor-Leste
Marshall Islands	Tonga
Micronesia (Federated States of)	Vanuatu
Mongolia	Viet Nam
Myanmar	

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² Full details of the project will be contained in the final Benchmarking Report, due to be completed in August 2004. The study will be available in December 2004.

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Preliminary findings of the report were presented at the Regional Expert Conference on Harmonized Development of Legal and Regulatory Systems for Electronic Commerce in Asia and the Pacific Region: Current Challenges and Capacity-building Needs held from 7 to 9 July 2004 in Bangkok. This paper highlights certain preliminary findings of the Benchmarking Report presented at the conference.

The countries surveyed span a wide range of economic development, geography and demography. Not surprisingly, the level of development of the e-commerce legal enabling environments in the countries also covers a wide range, which is sometimes, but not always linked to variation in economic development, geography, demography and other factors. Generally, it was found that the interoperability of e-commerce legal frameworks among the countries was low, even among countries that have adopted so-called international standards.

There were still national differences among countries, even when they based their laws on the United Nations Commission on International Trade Law (UNCITRAL) model laws. They still did not permit mutual recognition of electronic data messages and digital signatures necessary for cross-border e-commerce. Other examples included variation across countries in data privacy protection, as well as in consumer protection regimes applicable to transactions both online and in the real world. In some areas, such as communications infrastructure regulations, most countries have elements in their legal enabling frameworks, but the experiences in implementation are widely divergent.

This paper summarizes three main sections of the benchmarking report with an overview at the national level on the relative state of development for laws and regulations affecting e-commerce based on a common set of indicators. The assessment identified the most significant EAP regional initiatives that aimed at developing laws and regulations affecting e-commerce in the region. There is also an assessment of the geographic reach, scope, application and the extent of implementation for such initiatives.

Various recommendations are suggested about current EAP regional initiatives and a number of additional complementary regional initiatives are proposed to address the identified gaps in benchmarking and to enhance the legal and regulatory framework.

A. Research background

The benchmarking research was conducted in two phases. The first phase was desk research and a literature review. It was limited to information available from publicly accessible sources. In general, the availability, completeness and the quality of the information have been directly proportional to the level of e-readiness in a country. Relevant information was comparatively easier to obtain for more e-ready countries. A very limited amount of information could be obtained for the countries that were less e-ready, especially some LDCs.

In the second phase, the missing information was identified and a list of questions was formulated for each country. The lists of questions were presented to local consultants experienced in the area of information and communication technology (ICT) and e-commerce legal and regulatory issues.³

Findings for a number of countries were based solely on desk research. The limited amount of publicly available information on these countries meant that findings were also very limited. In addition, such findings have not been verified by any local counsel. Findings and conclusions provided in this paper must be viewed in this context.

B. Findings and conclusions of the benchmarking research

Economic indicators showed a contrast between some of the richest and the poorest countries in the region. There was also variation in types of economic regimes, ranging from free-market to mixed economies to centrally planned economies. Demographic indicators also showed the major contrasts between nations of continental size to small island nations.

Technology penetration indicators give one view of the ICT physical infrastructure in each country. ICT physical infrastructure is one element considered when assessing the e-readiness under e-readiness assessment model used by

³ At the time of the Conference, the research did not yet go through the second phase for several countries, such as Democratic People's Republic of Korea, Mongolia and Pacific island countries. There were constraints in finding appropriate local consultants to assist in the research.

Asia-Pacific Economic Cooperation (APEC).⁴ Indicators of technology penetration showed the variation among countries in terms of the development of basic ICT physical infrastructure. The Republic of Korea had fixed line penetration of 47 per cent, 69 per cent for mobile phone penetration and 56 per cent for computer penetration.⁵ Cambodia had fixed line penetration of 0.26 per cent, 2.76 per cent mobile phone penetration and 0.2 per cent computer penetration.⁶

1. Telecommunication regulations

The findings provide an overview of the current regulatory environment for telecommunications with a special focus on the regulation of Internet and broadband services. A majority of the countries have adopted national laws that establish a general regulatory framework for the telecommunications industry. However, levels of implementation vary by country for such laws.

Broadband services and their provision are generally not expressly recognized as a separate service category for licensing or regulatory purposes. Nevertheless, broadband services generally fall within the scope of definitions that cover telecommunications services. The identification of specific licensing and other regulatory requirements depends on the type and the extent of broadband services provided, such as whether a broadband service provider operates its own telecommunications network when providing such services or not. In some countries, broadband services expressly qualify as value added services or Internet access services. The regulations governing Internet service provision could involve mere notification through a registration to a class licence to the requirement to obtain an individual licence.

A separate regulatory agency for the telecommunications or communications industry has been established in almost half of the countries. In addition, Thailand and Samoa are currently in the process of establishing a separate national telecommunications regulatory agency. For the purpose of the Benchmarking Report, a regulator that is structurally separate from the country's government bureaucracy

⁴ Under APEC's e-readiness assessment model, six categories are measured for "readiness for e-commerce:" (i) basic infrastructure and technology, (ii) access to network services, (iii) use of the Internet, (iv) promotion and facilitation (industry led standards), (v) skills and human resources (ICT education, workforce) and (vi) positioning for the digital economy (taxes and tariffs, industry self-regulation, government regulations, consumer trust). http://www.bridges.org/ereadiness/tools.html#_Toc509205361

⁵ ITU Statistics at <http://www.itu.int/ITU-D/ict/statistics/>

⁶ Ibid.

or ministries has been considered as a separate regulator.⁷ With the exception of Thailand, mechanisms for appointing regulators identified as separate were not completely independent from the executive branch of the government.

2. Content regulations

Findings about content regulations indicate the extent to which countries address the issues about what is published on and distributed via the Internet and its regulation. A number of countries, including China, Lao People's Democratic Republic, Malaysia, Myanmar and the Republic of Korea, have legislation or other instruments to regulate the content published and distributed via the Internet. Other approaches to Internet content control are used as well, particularly in relation to content considered to be obscene. Approaches could include:

- (a) Terms and conditions are set when registering for a domain name in some countries in order to prohibit publication of indecent content (Kiribati and Solomon Islands, for example).
- (b) Regulations governing mass media (broadcasting and the press) in some countries may also apply to the Internet to a certain extent (for example, Indonesia).
- (c) Generic provisions that prohibit the transmission of obscene content via telecommunications were found in some countries, for example Fiji and Papua New Guinea.

Only two countries address the licensing of Internet content providers. One is Viet Nam, where the licences are issued by the Ministry of Culture and Information. The other is Malaysia, which expressly exempts Internet content providers from licensing or registration requirements.

3. E-commerce

Findings concerning e-commerce start with an overview of laws legitimizing e-commerce in each country. Specific laws addressing e-commerce have been enacted in Myanmar, the Philippines, Republic of Korea, Thailand and Vanuatu. To a certain extent and with variations among countries, their national laws are based on the

⁷ Assessing the independence of the appointment mechanism might require finding a way to measure the level of real independence, perhaps by looking at the role of the government in the appointment process.

UNCITRAL Model Law on Electronic Commerce 1996 (UNCITRAL Model Law 1996).⁸ Cambodia, Indonesia, Malaysia and Viet Nam have been drafting such laws, but the laws are in different stages of the legislative process in each country.

Research for this paper showed that even though this set of countries used the UNCITRAL Model Law 1996 as their guideline, their respective e-commerce laws were different enough that cross-border interoperability has not been enabled. This might be explained by the fact that in the process of harmonizing the UNCITRAL Model Law 1996 and its implementation into national legal systems, some provisions were modified or omitted.

Other countries have not undertaken any significant steps to prepare such laws. Generic laws governing contracts in the offline environment generally do not expressly exclude electronic contracts from their scope of applicability. Nevertheless, such laws do not expressly extend to the online environment. The applicability of such general laws in the online environment has not been sufficiently tested in courts yet.

4. Electronic signature

An overview of laws legitimizing the use of electronic signatures and providing for the regulation of certification authorities in the countries under study constitute the findings in this area. Specific laws addressing the issues of electronic signatures and certification authorities have been enacted in Malaysia, Myanmar, the Philippines, the Republic of Korea, Thailand and Vanuatu.

It was found that Cambodia, China, Indonesia and Viet Nam have already drafted such specific laws. These laws are at different stages in the legislative process of each government. Findings for this study showed that other countries have not undertaken any significant steps to prepare such laws.

There are significant differences among countries in the scope, form and principles of the regulation on electronic signatures and certification authorities provided by law. With the exception of Thailand, none of the laws in other countries was

⁸ According to UNCITRAL, the Philippines, Republic of Korea and Thailand are the only countries whose e-commerce laws are based on the UNCITRAL Model Law 1996 (see <http://www.uncitral.org/en-index.htm>). However, e-commerce laws of Vanuatu and Myanmar adopted certain principles and wordings provided in this model law.

found to be based on the UNCITRAL Model Law on Electronic Signatures 2001 (UNCITRAL Model Law 2001) to any significant extent.⁹

It appears that legal issues concerning the interoperability of electronic signatures have been overlooked by most countries in the region. The Republic of Korea was the only country with a Digital Signature Act that included special provisions providing for national interoperability of digital signatures. International interoperability has not been addressed in any of the identified electronic signature laws. Nevertheless, the importance of the interoperability of electronic signatures in the East Asia and Pacific region has been recognized by private sector initiatives such as the Asia Public Key Infrastructure Forum.¹⁰

5. Data protection and privacy

Regulations and legislation concerning data protection and privacy adopted in various countries can be generally summarized as follows. The Republic of Korea is the only country in the region that has adopted a comprehensive data protection law. A different approach to data protection combining self-regulation and government supervision has been adopted in Vanuatu where binding codes of conduct and standards were prepared by a private organization and subsequently approved by the minister responsible for telecommunications and e-commerce.

Other countries do not have comprehensive data protection regulations in place. In most countries, protection of personal data and privacy is usually addressed on a constitutional level or, to varying extent, in laws governing industries dealing with sensitive information such as banking, insurance, medical and health industries. Privacy aspects of personal data protection in the online environment are largely covered by general regulations about the privacy of communications. The issue of the privacy of communications transmitted through communication networks was not a direct subject of the research.

6. Consumer protection

Findings about consumer protection start with an overview of laws or other regulations that specifically addresses the protection of consumers in the online

⁹ <http://www.uncitral.org/en-index.htm>

¹⁰ In March 2004, the Asia Public Key Infrastructure Forum announced that it had finalized the “Asia PKI Interoperability Guideline v1.0” as a benchmark for technical standards for international PKI interoperability.

environment. The particular focus was on the regulation of online fair marketing and dispute resolution.

As in the case of data protection, the Republic of Korea was the only country in the region that had adopted a law specifically addressing consumer protection in the online environment. Vanuatu adopted a different approach to consumer protection by combining self-regulation and government supervision. Vanuatu has binding codes of conduct and standards, which were prepared by a private organization and subsequently approved by the minister responsible for telecommunications and e-commerce.

The Philippines has addressed the issues of consumer protection in the online environment by expressly extending the applicability of the generic consumer protection law into the online environment. Malaysia has specifically excluded online transactions from the scope of its generic law on the consumer protection.¹¹

In other countries of the region, national legislation governing consumer protection in the offline environment does not expressly exclude the online environment from the scope of its applicability. Nevertheless, such legislation does not expressly extend to the online environment. The applicability of such generic legislation in the electronic environment has not yet been sufficiently tested in courts.

7. Intellectual property

Findings related to intellectual property include an overview of laws or other forms of regulation that explicitly address issues of copyright, trademarks and database protection specific to the online environment. With the exception of China and the Republic of Korea, where the applicability of generic trademark protection has been expressly extended to the online environment by court decisions, none of the other countries have addressed issues concerning trademark protection in an online environment.

The applicability of the laws governing copyright protection in China, Indonesia, Malaysia, the Philippines and the Republic of Korea was extended specifically to the online environment. The copyright law of Fiji expressly extends the reception

¹¹ Copyright laws of other countries also address issues of communication to the public and the broadcasting of copyrighted works via wireline or wireless transmission. Unless a judicial decision expressly extending such regulation to the online environment, in particular the Internet, has been located, the research has assessed such regulations as not being online specific.

of a broadcast to include reception of a broadcast relayed by means of a telecommunications system. All countries whose copyright laws qualified as online specific provide for the protection of databases or compilation works.

8. Electronic banking and finance

This area covers the regulation of services that are provided online in banking and finance. Palau was identified by the study as the only country that expressly regulates the provision of electronic banking services in a national law on financial institutions. Indonesia, Malaysia, the Philippines, the Republic of Korea and Thailand address the issue of Internet banking through regulatory instruments that have various types of legal standing (circulars, notifications, guidelines, etc.) adopted by the respective national financial service regulators. To a varying extent, such regulatory instruments also address the issues of secure electronic payments systems by prescribing security policies and guidelines that banks must comply with when providing electronic banking services.

Only China, Fiji, Myanmar, the Philippines and Thailand specifically extend the applicability of their national laws on anti-money laundering to cover electronic transactions.

9. Taxation and customs

Findings in this area concern the laws or other forms of regulation specifically addressing the issues of tax or custom duties for online transactions. The research found that none of the countries studied had adopted any legislation or regulatory instruments imposing a tax on online transactions beyond traditional taxes such as sales tax at the origin of sale. None of the countries studied imposes custom duties on online services at the point of consumption of services.

10. Conflict of laws

Information from the research in this area concerns the laws or other forms of regulation about the choice or determination of the jurisdiction and applicable laws for electronic transactions. In particular, attention focuses on dispute resolution for such transactions.

None of the countries studied had adopted any legislation or rules addressing the choice or determination of jurisdiction and law governing an electronic transaction. General rules established for this purpose that are traditionally applicable to offline

transactions would most likely apply for the online environment, although on a case-by-case basis.

11. Cybercrime

An overview of the status of legislation addressing cybercrime in the countries under study was mostly concerned with the following offences: (a) access to and interference with systems, (b) interception of and interference with data, (c) obscene Internet content, (d) e-fraud, (e) e-forgery, (f) online trade mark infringement offences and (g) online copyright infringement offences.

Generally, legislation addressing the above offences is more advanced in comparison to regulations about the availability of civil remedies for damages suffered due to such offences. Nevertheless, Malaysia was the only country that has adopted a comprehensive Computer Crimes Act. In addition, certain online offences fall within the scope of penalty provisions under Malaysia's communications and multimedia regulations. Indonesia, the Philippines and Thailand have already drafted cybercrimes laws. However, these laws were at different stages in the legislative processes.

China, the Philippines and the Republic of Korea have specifically addressed certain aspects of cybercrime in their criminal codes, e-commerce enabling laws, other legislative instruments or in the case law. With respect to copyright offences, penalties are imposed for online copyright infringement in the countries that have copyright protection laws explicitly extending to the online environment.

Criminal penalties for acts such as those listed above when committed in the offline environment, such as forgery, fraud, obscene content, copyright and trademark infringement, are available in the generic criminal or penal codes of most countries. Nothing in such generic regulations expressly excludes the online environment from the scope of applicability. In addition, such generic regulations are usually formulated broadly enough to cover equivalent crimes committed in the online environment. Nevertheless, no case law or judicial decisions have been found during the research to confirm the applicability of general legislation to the online environment. In such cases, it was stated in the detailed research that penalties for specified offences were not provided for.

C. Assessment of regional e-commerce initiatives

The Internet is a global phenomenon, and e-commerce seems to be on the way to having global reach as well. Evidence from anecdotes and empirical research shows that harmonizing legal frameworks to ensure cross-border interoperability make it necessary to have global reach for certain applications associated with the Internet, such as e-commerce. Activities of countries taken in isolation have often proved to be ineffective in addressing this challenge. Research conducted for this study shows that e-commerce laws of five different countries do not enable cross-border interoperability, despite being based on the UNCITRAL Model Law 1996. International organizations and regional initiatives can thus have a critical influence on encouraging cooperation among countries and assist them in meeting this challenge.

Regional initiatives related to e-commerce legal and regulatory frameworks of the following selected organizations in the region have been reviewed: (1) United Nations Economic and Social Commission for Asia and the Pacific (ESCAP), (2) Asia-Pacific Economic Cooperation (APEC) and (3) Association of Southeast Asian Nations (ASEAN). This review and the Benchmarking Report assess the reach and effectiveness of the initiatives in promoting cross-border harmonization and interoperability of legal frameworks.

1. Geographical reach of the initiatives

The geographical reach of the regional initiatives related to e-commerce can be considered as limited. Table 2 shows the membership of the surveyed countries in three regional organizations. In geographical terms, initiatives have generally been limited to countries at relatively higher levels of development, such as Malaysia, the Republic of Korea, and Thailand. Recently, some of the less developed countries such as Cambodia, Lao People's Democratic Republic, Myanmar and Viet Nam have also been included in these initiatives.

However, the regional initiatives tend to leave more isolated countries, such as small Pacific island countries and the Democratic People's Republic of Korea, out of the scope of their geographical reach. In contrast, APEC member countries and economies include comparatively more developed countries, such as China, Indonesia, Malaysia, the Philippines, the Republic of Korea and Thailand. However, Viet Nam is a developing country member of APEC.

Table 2: Organizational membership of surveyed countries

	ESCAP	ASEAN	APEC
Cambodia ^a	✓	✓	
China	✓		✓
Democratic People's Republic of Korea	✓		
Fiji	✓		
Indonesia	✓	✓	✓
Kiribati ^a	✓		
Lao People's Democratic Republic ^a	✓	✓	
Malaysia	✓	✓	✓
Marshall Islands	✓		
Micronesia (Federated States of)	✓		
Mongolia	✓		
Myanmar ^a	✓	✓	
Palau	✓		
Papua New Guinea	✓		✓
Philippines	✓	✓	✓
Republic of Korea	✓		✓
Samoa ^a	✓		
Solomon Islands ^a	✓		
Thailand	✓	✓	✓
Timor-Leste	✓		
Tonga	✓		
Vanuatu ^a	✓		
Viet Nam	✓	✓	✓

^a Least developed country based on United Nations categorization.

The original ASEAN membership had also covered the more developed countries of Indonesia, Malaysia, Philippines, Singapore and Thailand. However, between 1995 and 1999, ASEAN membership expanded to some least developed countries, including Cambodia, Lao People's Democratic Republic and Myanmar. Viet Nam could be considered as a developing economy in transition. One of the main objectives of the e-ASEAN Framework Agreement¹² adopted in November 2000 is to reduce the digital divide existing between the more and less developed member countries. To address this issue, ASEAN leaders adopted the Initiative for ASEAN Integration (IAI) Work Plan for Cambodia, Lao People's Democratic Republic, Myanmar and Viet Nam (designated as the CLMV countries) in November 2002.¹³

¹² <http://www.aseansec.org/6267.htm>

¹³ http://www.aseansec.org/pdf/IAI_doc1.pdf

At the regional level, ESCAP is the only organization with a membership that includes all the countries in the region so that its initiatives can encompass all countries in Asia and the Pacific. In its recommendations and programme of work, ESCAP has explicitly recognized the special needs of developing countries and Pacific island countries. At ESCAP meetings, countries have been encouraged to consider such special needs when adopting new e-commerce legislation.¹⁴

2. Subject matter of the initiatives

The subject matter relevant to e-commerce legal frameworks addressed by APEC initiatives reflects the level of development of these frameworks in the APEC member countries. All APEC-member countries have already enacted or at least drafted e-commerce or electronic signature specific legislation. The current initiatives by APEC have been focused on the development and the interoperability of the existing legal frameworks. Current initiatives by APEC also address specific issues related to e-commerce, such as spam, paperless trading, consumer protection, data protection, electronic authentication and cybercrime.

Three member countries of ASEAN are categorized as least developed countries, and one ASEAN member is a low income country according to the World Bank.¹⁵ For this set of countries, the development gap and digital divide among member countries is more apparent in ASEAN than in APEC. ASEAN initiatives are therefore more focused on narrowing the existing gap and digital divide, in particular within the scope of the IAI Work Plan. In relation to ICT legal and regulatory frameworks affecting e-commerce, ASEAN activities are aimed mostly at the development of such frameworks in Cambodia, Lao People's Democratic Republic, Myanmar and Viet Nam. Specific issues such as legal aspects of data protection, consumers and intellectual property protection or cybercrime are at this stage only addressed in high-level documents such as the e-ASEAN Framework Agreement.

¹⁴ This approach has been adopted in the following ESCAP documents:

Draft action plan on cybercrime and information security for the Asia-Pacific region <http://www.unescap.org/icstd/documents/actionplans/cybercrime%20action%20plan.doc>,

Paper on Initiatives for E-commerce Capacity-building of Small and Medium Enterprises <http://www.unescap.org/tid/publication/indpub2261.pdf>

Diagnostic Report for the Trade and Investment Promotion in the Pacific islands through Effective Use of Information Technology http://www.unescap.org/tid/special_prog/t&iprom_kimberley.htm

¹⁵ The United Nations classifies Cambodia, Lao People's Democratic Republic and Myanmar as least developed countries. Viet Nam is classified by the World Bank as a low income country. The first three countries are also classified as low income countries by the World Bank. World Bank, 2004. *World Development Report 2005*, Washington, DC, World Bank.

In the work of ESCAP, legal and regulatory issues of ICT, especially e-commerce, represent only a small portion of the work programme of the Information, Communication and Space Technology Division (ICSTD). Most ICSTD projects have been dedicated to space technology applications. They tend to be more focused on ICT applications and infrastructure rather than relevant legal frameworks.¹⁶ Similar to ASEAN initiatives, ESCAP has initiatives that focus mainly on the development of the basic regulatory and legal frameworks in less developed countries. ESCAP members have also specifically addressed the issues of cybercrime and information security at a high level.

3. Overall effectiveness of the initiatives

It is undisputed that the organizations have recognized the importance of harmonized and interoperable legal and regulatory frameworks giving effect to the use of ICT and e-commerce. They are, as well, aware of the potential consequences and risks arising from the use of ICT for commercial and non-commercial purposes in both public and private sectors. It is also indisputable that much progress has been made over last few years in the area of elaborating enabling legal and regulatory frameworks for the use of ICT.

Probably the most concrete example of the effectiveness of the initiatives appears to be the number of enacted basic e-commerce legitimizing laws in the EAP region. The following simple comparison of data provides the basis for this assessment.

The main initiatives focusing on the development of e-commerce legitimizing policies and legal frameworks were initiated as follows: the APEC Blueprint for Action on Electronic Commerce¹⁷ was adopted in 1998, the e-ASEAN Initiative was endorsed in 1999 and the ESCAP subprogramme on information, communications and space technology was established in 2002. Table 3 provides an overview of basic e-commerce laws enacted or drafted in the individual countries.

Comparing these two sets of data, it is clear that the initiatives implemented by APEC and ASEAN have had a positive effect to encourage the enactment of such

¹⁶ For example, only 2 out of 14 projects currently listed on the ICSTD web site address ICT regulatory and legal issues. The current calendar of ICSTD meetings for 2004 shows that out of 14 meetings, only one was dedicated to ICT policy and applications. The rest of the activities are dedicated to the space technology applications. Source on ICSTD Projects is at <http://www.unescap.org/icstd/main/projects.asp> and <http://www.unescap.org/icstd/main/calendar2004.asp>

¹⁷ http://www.dfat.gov.au/apec/e_com/ecom_blueprint.pdf

Table 3: Overview of enacted or drafted basic e-commerce legislation in Asian and Pacific countries

	Law on e-commerce	Year	Law on e-signature	Year
Cambodia	<i>Draft Sub-decree on Electronic Transactions</i>		<i>Draft Sub-decree on Electronic Transactions</i>	
China	–		<i>Draft Electronic Signature Act</i>	
Indonesia	<i>Bill on Electronic Information and Transactions</i>		<i>Bill on Electronic Information and Transactions</i>	
Malaysia	<i>Draft in legislative process</i>		The Digital Signature Act	1997
Myanmar	Electronic Transactions Law	2004	Electronic Transactions Law	2004
Philippines	The Electronic Commerce Act	2000	The Electronic Commerce Act	2000
Republic of Korea	Framework Act on Electronic Commerce	1999 ^a	Digital Signature Act	1999
Thailand	The Electronic Transactions Act	2001	The Electronic Transactions Act	2001
Vanuatu	Electronic Transactions Act	2000	Electronic Transactions Act	2000
Viet Nam	<i>Draft e-commerce Law</i>			

^a The Republic of Korea Digital Signature Act was fully amended in 2001 and is currently cited as Digital Signature Act 6585/2001.

laws in more member countries, such as Malaysia, the Philippines, Republic of Korea, and Thailand. Indonesia has been developing a draft law to enable e-commerce and it has been in the legislative process.

The same positive effect is apparent in relation to the least developed member countries of ASEAN. As discussed, ASEAN e-commerce related activities have been mainly focused on Cambodia, Lao People’s Democratic Republic, Myanmar and Viet Nam. In the IAI Work Plan for these countries, ASEAN set the goal to implement the policy and legal frameworks enabling e-commerce in the four countries by 2004. Information provided in table 1 shows the extent of ASEAN success in pursuing that goal. With the exception of Lao People’s Democratic Republic, the other three countries, namely Cambodia, Myanmar and Viet Nam, have recently enacted or prepared legislation enabling e-commerce.

Vanuatu is a Pacific island country that is not a member of either APEC or ASEAN, but it has already enacted e-commerce laws in 2000. In addition, Vanuatu passed the Interactive Gaming Act, which regulates interactive games conducted by

telecommunications devices. The e-Business Act allows people from anywhere in the world to select Vanuatu as a place to set up their Internet sites for B2B activities such as negotiating wholesale business contracts between companies in different nations and for e-commerce activities such as buying or reselling software of other goods and services to the public worldwide.

Vanuatu is a member of ESCAP, but as mentioned, ESCAP programmes focusing on information, communications and space technology did not start until 2002. The rapid development of frameworks enabling e-commerce in Vanuatu could not be directly attributed to initiatives of the regional organization. However, more detailed fact-finding might show that other forms of ESCAP assistance may have benefited Vanuatu prior to 2002.

Initiatives may have been effective in relation to other aspects of ICT and e-commerce legal and regulatory frameworks, such as: (a) protection of personal data in the online environment, (b) protection of consumers in the online environment, (c) protection against cybercrime and (d) interoperability of legal frameworks particularly in relation to electronic authentication. However, current initiatives at this stage mostly address the issues listed here in documents from high-level meetings that provide only the basic rationale and direction. APEC has only recently started addressing some of these issues in their specific projects.

D. Recommendations in relation to the development of regional initiatives for East Asia and the Pacific

Findings from the assessment of regional initiatives in East Asia and the Pacific show that there has been a significant amount of work done in formulating high-level recommendations related to the development of interoperable legal and regulatory frameworks affecting the legislation and security of e-commerce. The assessment also identified certain gaps in relation to the reach, scope and the extent of the regional initiatives. Several recommendations can be highlighted that suggest ways to address such gaps.

1. Extend the geographical reach of the initiatives

Countries cannot enjoy the full potential of the benefits made possible by ICT and electronic transactions in the region until all of them have adopted or adapted national policies and legal frameworks that enable and legitimize the interoperable use of ICT in its national and international aspects. At the same time, given its

global nature, ICT networks would only be as safe and secure as their weakest link. These two points are the main reason why more developed countries should get actively involved in assisting less developed countries to develop their legal and regulatory frameworks in ways that provide legitimacy and protection to the use of ICT.

This recommendation applies particularly to APEC and ASEAN whose membership includes a significant number of developed countries. APEC and ASEAN could consider encouraging member countries to establish international dialogue with the less developed countries on this matter.

ESCAP offers an established platform for less developed countries to present their specific needs for assistance. ESCAP can assist less developed countries to organize international seminars or conferences on ICT with the participation of both private and public sector representatives from the more developed countries. The aim of such seminars and conferences could be the introduction and discussion of the needs of less developed countries and identification of areas eligible for assistance from more developed countries.

2. Prepare more projects with detailed guides for the countries

Regional initiatives usually encourage the adoption of model laws and documents or the implementation of the principles provided in these laws.¹⁸ This approach might extend to drafting a new set of model laws or documents and would involve use of work already carried out using recognized international standards such as those promulgated by UNCITRAL, the World Intellectual Property Organization, the Council of Europe or the United Nations General Assembly.

Accepting general recommendations to adopt or implement model laws or model documents does not provide sufficient answers to the development of basic e-commerce legal and regulatory frameworks. A certain amount of localization will be required. A number of less developed countries would probably need a specific implementation roadmap. In addition, when incorporating text from the model documents into national legal systems, a country may modify or leave out some

¹⁸ For basic e-commerce legislation, this means adopting the UNCITRAL Model Laws 1996 and 2001. For the protection of intellectual property in the online environment, it means adopting or implementing the WIPO Copyright Treaty 1996 and the WIPO Performances and Phonograms Treaty 1996. For cybercrime, the provisions or measures specified in the Council of Europe's Convention of Cybercrime of 2001 or the United Nations General Assembly Resolution 55/63 of 2000 "Combating the Criminal Misuse of Information Technologies" could be applied.

provisions. The process of localization then introduces the risk that the degree of harmonization achieved through model documents has the potential to be reduced.

Research for this project showed that the basic e-commerce laws adopted so far in the countries differ to the extent that they do not enable cross-border interoperability, although they are based on the UNCITRAL Model Law 1996. The fact is that some provisions of the UNCITRAL Model Law 1996 were modified or omitted in the process of harmonization and implementation into the national legal system.

The regional organizations could therefore consider developing more projects to include detailed implementation guides that reflect the specific needs of the countries in the region.¹⁹ Such guides should provide helpful information on the implementation of model laws and documents covering at least:

- (a) Analyse the individual provisions of such model laws and documents and explain their purpose and effects.
- (b) Give examples of how the provisions of such model laws and documents can be harmonized with the existing local legislation.
- (c) Give examples from countries that have already implemented such model laws or provisions of model documentation.
- (d) Explain the consequences of amending provisions of such model laws documents and/or the partial implementation of such provisions.

3. Emphasize the importance of legal and regulatory frameworks

Lack of available funds is one significant impediment to project implementation dedicated to the development of e-commerce and ICT legal and regulatory frameworks in less developed countries. At the same time, it is apparent that the private sector of

¹⁹ The e-ASEAN Reference Framework for Electronic Commerce Legal Infrastructure could be a good starting point for such a guide. However, the e-ASEAN reference framework is strictly limited to basic e-commerce laws. Despite recognizing the need for implementation, it does not provide any guidelines for adopting legislation or codes of practice to address data and privacy protection, consumer protection, cybercrime, intellectual property, admissibility of computer outputs as evidence in court and Internet content. The e-ASEAN reference framework also excludes issues of cross-border e-commerce such as conflicts of laws or taxation. Another example of such a guide are documents prepared by APEC, in particular the Draft Guidelines for Schemes to Issue Certificates Capable of Being Used in Cross Jurisdiction E-commerce at <http://www.apectelwg.org/apecdata/telwg/28tel/estg/telwg28-ESTG-14.htm>

more developed countries would be willing to support ICT-related projects in less developed countries.²⁰ However, most, if not all, of these projects have been dedicated to the physical development and implementation of ICT.

The regional organizations may consider implementing activities to increase the awareness of the private sector in more developed countries. The private sector could be made aware of the importance of implementation for e-commerce and the need for ICT legal and regulatory frameworks in less developed countries.

4. Identified gaps may be addressed

This research found that the following issues have not been addressed at all or have been addressed only in high-level basic documents: (1) Conflicts of laws in relation to electronic transactions; (2) intellectual property rights in the online environment; (3) electronic banking and electronic finance; (4) secure electronic payments systems; (5) Internet content; and (6) alternative dispute resolution mechanisms specifically dealing with disputes arising from the online environment. The regional organizations may consider establishing working groups that deal specifically with these issues and then prepare related pilot projects.

E. Conclusion

The global nature of ICT and its existence beyond physical boundaries creates benefits, challenges and risks that must be addressed internationally. This would require harmonized legal frameworks enabling international interoperability, for ICT itself, as well as systems for fighting the misuse of ICT for illegal and fraudulent purposes and providing ICT users worldwide protection regardless of their physical location.

The Benchmarking Report showed that awareness of the benefits, challenges and risks presented by the use of ICT has increased significantly in the last decade. Efforts by countries to address ICT issues have grown as well. Between 1997 and 2004, six countries adopted laws legitimizing the use of ICT and providing regulatory frameworks for electronic transactions and electronic signatures. One of those countries is Myanmar. In addition, four countries have prepared draft laws, including Cambodia and Viet Nam.

²⁰ For example, under the leadership of the former e-ASEAN Task Force, about 40 private sector pilot projects were endorsed to leverage the profile of the ASEAN ICT companies and encourage their participation in ICT development. Source is <http://www.aseansec.org/6269.htm>

On the other hand, combating risks presented by the potential misuse of ICT for illegal and fraudulent purposes has yielded fewer achievements and positive results. Issues complementary to e-commerce such as consumer protection and protection of intellectual property in the online environment, protection of personal data, Internet content, secure electronic payment systems or cybercrime have been addressed by only a few countries. The extent and clarity of country approaches has been varied. Availability of civil remedies for damages and grievances that result from using ICT has so far been addressed directly only in China and the Republic of Korea. Taxes and custom duties in the online environment have been addressed only in the Republic of Korea. Conflicts of laws in the online environment have not yet been clearly addressed in any of the countries.

The Benchmarking Report showed that since 1998, the regional organizations have been developing initiatives that focus on development of the legal and regulatory frameworks to legitimize e-commerce in the region. Although the initiatives proved to be effective in developing and adopting the basic e-commerce legal frameworks, they have not yet sufficiently addressed other areas complementary to e-commerce. This may be due to the relative early stages for such initiatives. High-level agreements and statements adopted by the regional organizations show that these complementary areas are indeed included in working agendas of the organizations and their special groups established in order to address ICT issues. With the exception of APEC, however, none of the organizations has moved to the stage of implementing projects effectively by addressing such complementary issues.