Implementing the legal provisions of the Framework Agreement on Paperless Trade Facilitation

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The structure of the FA-PT

- Framework Agreement on Facilitation of Cross-border Paperless Trade in Asia and the Pacific (FA-PT)
  - Regional framework agreement
  - Relies on a voluntary implementation mechanism
  - Based on two complementary principles
    - Technical interoperability
    - Mutual legal recognition
  - The implementation of those two principles is not necessarily the same
Enabling and regulatory: two sides of the same coin

• The FA-PT refers to the creation of an enabling legal environment
• Enabling means that it aims at facilitating mutual legal recognition and not at regulating it
• This does not affect regulatory requirements arising from other legal texts
  – Actually, an enabling legal environment may assist in complying with regulatory requirements
General principles of legal relevance

- Article 5 refers to three fundamental principles directly relevant for establishing mutual cross-border recognition of electronic communications:
  1. Principle of non-discrimination
  2. Principle of functional equivalence
  3. Principle of technological neutrality
- Those principles underpin UNCITRAL texts on electronic commerce
- They are already adopted in more than half of Asian and Pacific States
Principle of non-discrimination

- A communication shall not be denied validity on the sole ground that it is in electronic form.
  - Core principle to promote paperless trade
  - Conditions for legal recognition of electronic documents shall be the same as for paper documents
Principle of functional equivalence

- Purposes and functions of paper-based requirements may be satisfied with electronic communications, provided certain criteria are met
  - For instance, the written form requirement is met if the electronic communications is accessible for future reference
  - Electronic accessibility satisfies the same function as paper accessibility
Principle of technological neutrality

• Legislation shall not impose the use of or otherwise favour any specific technology
  – This approach is necessary to enable the use of future technologies
  – Implemented in the FA-PT through the definitions of “data message” and “electronic communication”
  – Challenge in jurisdictions where only documents signed with national PKI standards are given legal recognition
  – This may increase costs, affect interoperability and prevent mutual legal recognition
Mutual legal recognition

Article 8, paragraph 1 of the FA-PT requires that:
• “(State) Parties shall provide for mutual recognition of trade-related data and documents in electronic form originating from other (State) Parties on the basis of a substantially equivalent level of reliability.”
• Ideally, mutual legal recognition should take place by using uniform standards for the assessment of reliability of the electronic communication, without any regard to its geographic origin (“principle of non-geographic discrimination”)
• This approach allows for non-discriminatory multilateral legal recognition based on objective standards
• However, this principle is easier to implement in B2B than in G2G transactions
• Accordingly…
Substantially equivalent level of reliability

Article 8, paragraph 2 of the FA-PT indicates that:

- “The substantially equivalent level of reliability would be mutually agreed upon among the (State) Parties through the institutional arrangement established under the present Framework Agreement.”
- This opens the door to bilateral and multilateral agreements between State Parties in order to achieve mutual legal recognition
- Those agreements should implement, as far as possible, the guiding principles of the FA-PT, including technological neutrality
Relation to other enabling legal instruments

• Mutual legal recognition of electronic communications at the international level may be achieved:
  – through the adoption of treaties;
  – through the harmonisation of national laws on the basis of uniform model laws.

• Article 10, paragraph 1 of the FA-PT points at the need to adopt those treaties and laws
  – They may be global (UNCITRAL) or regional (e.g., APEC Data Privacy Pathfinder and Cross Border Privacy Rules (CBPR).
  – They may have a broader scope than paperless trade facilitation – they aim at promoting and enabling e-commerce
  – Paperless trade facilitation is at the service of e-commerce
Relation to other enabling legal instruments

• The document “International Legal Frameworks and Best Practices Relevant to Cross-Border Paperless Trade” provides guidance in identifying the legislative texts relevant for the implementation of article 10 FA-PT.
• Adoption of those treaties and laws is not mandatory when becoming a party to the FA-PT. However, it is recommended, if not necessary, to achieve cross-border legal recognition.
• The UNCITRAL Model Law on Electronic Commerce (MLEC) is intended to enable the commercial use of modern means of communications and storage of information.

• It is based on the establishment of a functional equivalence in electronic media for paper-based concepts such as "writing", "signature" and "original".

• It also establishes rules for the formation and validity of contracts concluded electronically and for the attribution and retention of data messages.
• The UNCITRAL Model Law on Electronic Signatures (MLES) aims at bringing additional legal certainty to the use of electronic signatures.

• It establishes criteria of technical reliability for the equivalence between electronic and handwritten signatures.

• It follows a technology-neutral approach, which avoids favoring the use of any specific technical product.

• It establishes basic rules for assessing possible responsibilities and liabilities for the signatory, the relying party and trusted third parties intervening in the signature process.
• The UNCITRAL Model Law on Electronic Transferable Records (MLETR) replaces and expands the provisions of the MLEC relating to electronic transferable records (ETR).
• ETR are electronic equivalents of documents or instruments incorporating the right to delivery of goods or payment of sums of money (bills of lading; bills of exchange; warehouse receipts; promissory notes).
• The MLETR is based on the notion of exclusive control as functional equivalent of possession in order to ensure singularity of the claim.
• ETR can be relevant for paperless trade facilitation since bills of lading contain accurate, updated and complete information on the goods shipped.
• To be adopted by UNCITRAL in July 2017.
• The **Electronic Communications Convention (ECC)** builds up on and updates the provisions of both Model Laws.

• It aims at enhancing legal certainty and commercial predictability where electronic communications are used across borders.

• The ECC contributes to enabling paperless trade by, among others: 1) validating the legal status of electronic transactions by setting general functional equivalence requirements of “writing”, “original” and “signature”; 2) preventing medium and technology discrimination; 3) enabling cross-border recognition of electronic signatures; 4) permitting the use of electronic means in alternative dispute resolution mechanisms.
Another treaty example: TPP

• Chapter 14 of the Trans-Pacific Partnership aims to promote e-commerce and paperless trade facilitation
• It provides the most comprehensive formulation of e-commerce provisions in a free trade agreement so far
• The TPP approach is similar to that of the FA-PT:
  1. Pursuit of mutual legal recognition and interoperability;
  2. Non discrimination and technology neutrality;
  3. Reference to uniform (UNCITRAL) texts as enablers;
  4. Possibility to choose specific technologies for special transactions.
TPP Article 14.5: Domestic Electronic Transactions Framework


2. Each Party shall endeavour to:
   (a) avoid any unnecessary regulatory burden on electronic transactions; and
   (b) facilitate input by interested persons in the development of its legal framework for electronic transactions.
TPP Article 14.6: Electronic Authentication and Electronic Signatures

1. Except in circumstances otherwise provided for under its law, a Party shall not deny the legal validity of a signature solely on the basis that the signature is in electronic form.

2. No Party shall adopt or maintain measures for electronic authentication that would:
   (a) prohibit parties to an electronic transaction from mutually determining the appropriate authentication methods for that transaction; or
   (b) prevent parties to an electronic transaction from having the opportunity to establish before judicial or administrative authorities that their transaction complies with any legal requirements with respect to authentication.

3. Notwithstanding paragraph 2, a Party may require that, for a particular category of transactions, the method of authentication meets certain performance standards or is certified by an authority accredited in accordance with its law.

4. The Parties shall encourage the use of interoperable electronic authentication.
FA-PT Implementation Tools

- The FA-PT foresees a cooperative mechanism to identify the steps necessary to facilitate paperless trade.
- Specific implementation tools are being developed:
  - Draft road map for the implementation of the substantive provisions in the Framework Agreement on Facilitation of Cross-border Paperless Trade in Asia and the Pacific.
  - Legal Gap Analysis Checklist for Self-Assessment to support cross-border paperless trade.
- The self-assessment process has to be conducted fairly and objectively: it is not a goal in itself, but an opportunity to explore the most useful directions of future work in support of paperless trade facilitation.