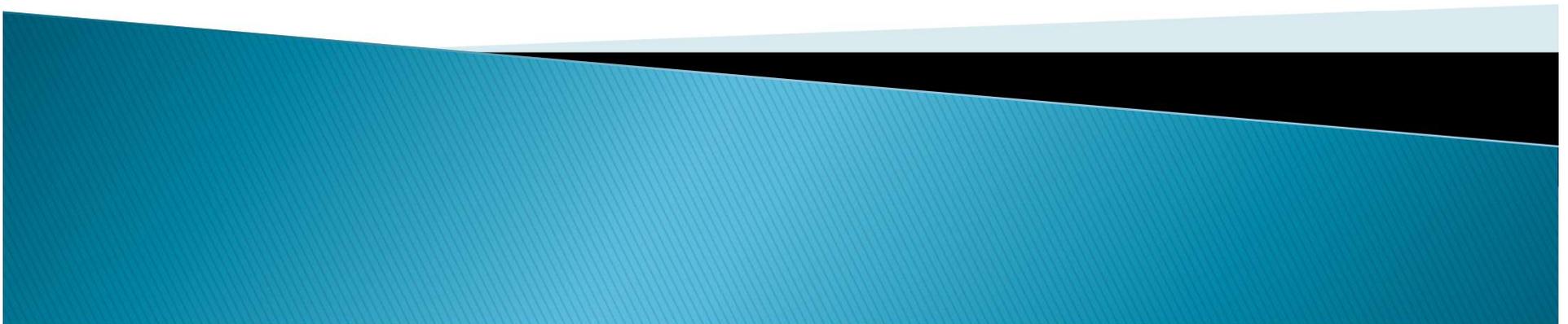


NEPAL

Legal Readiness for Cross-border Paperless Trade

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Summary of Findings and Issues (1)

- ▶ The current legal structure for electronic transactions and signatures law in Nepal consists primarily of:
 - i) **Electronic Transaction Act 2008**
 - ii) **Electronic Transaction Rules 2007**
- ▶ The Electronic Transaction Act (ETA) 2008 and the Electronic Transaction Rules (Rules) 2007 provide a sound foundation for e-commerce and paperless trade in Nepal
- ▶ These laws have been overtaken by international legal developments and technological changes, requiring an overhaul of Nepal's e-commerce legislation



Summary of Findings and Issues (2)

- ▶ The proposed **Information Technology Bill (2019)** (IT Bill) aims to address many of the current *gaps* in Nepal e-commerce legislation
- ▶ Such legal reform is further supported by major revisions in the pending **Customs Act (2019)**



Electronic Transaction Act 2008

- Chapter 1: Preliminary
- Chapter 2: Electronic Record and Digital Signature
- Chapter 3: Provision Relating to Dispatch, Receipt and Acknowledgement of Electronic Records
- Chapter 4: Provisions Relating to Controller and Certifying Authority
- Chapter 5: Provisions Relating to Digital Signature and Certificates
- Chapter 6: Functions, Duties and Rights of Subscriber
- Chapter 7: Electronic Record and Government use of Digital Signature
- Chapter 8: Provisions Relating to Network Service
- Chapter 9: Offence Relating To Computer
- Chapter 10: Provisions Relating to Information Technology Tribunal
- Chapter 11: Provisions Relating to Information Technology Appellate Tribunal
- Chapter 12: Miscellaneous

Information Technology Bill 2019

- Chapter 1: Preliminary
- Chapter 2: Provisions relating to electronic records
- Chapter 3: Transmission, retrieval and acceptance of electronic records
- Chapter-4: Provisions relating to digital signature
- Chapter 5: Provisions to relating the controller and certifying agencies
- Chapter-6: Certificates related with digital signature
- Chapter-7: User's functions, duties and rights.
- Chapter-8: Flow of services through the electronic means.
- Chapter-9: Domain registration and management.
- Chapter-10: Industry and businesses related with information technology.
- Chapter-11: Information security and confidentiality
- Chapter-12: Provisions relating to cyber security.
- Chapter-13: Provisions relating to service providers
- Chapter-14: Provisions relating to social network
- Chapter15: Offences and punishment
- Chapter 16: Investigation and proof.
- Chapter-17: Provisions related with IT court.
- Chapter 18: Provisions relating to National Information Technology Center
- Chapter 19: Miscellaneous



Electronics transactions and signatures law

Functional equivalence

- ▶ Current language of Chapter 2(4), ETA may impede the *functional equivalence* of electronic records
- ▶ Chapter 2(4) states (in pertinent part):
 - if such information, document, record or the matter is maintained in an electronic form *by fulfilling the procedures as stipulated in this Act or the Rules made hereunder*, such electronic record shall also have legal validity.
- ▶ In other words, under Chapter 2(4), electronic records are not *directly* recognized as having functional equivalence to paper-based documents, they must also fulfill *procedures as stipulated* in ETA and Rules



Electronics transactions and signatures law

Digital signatures, certificates and the PKI System

- ▶ ETA and Rules envisage a system of digital signatures and digital certificates used to *authenticate and ensure trust* in the use of electronic records
- ▶ PKI (Public Key Infrastructure) system is established by ETA and Rules
- ▶ Certifying Authorities (CAs) are authorized to issue digital signature certificates to subscribers which are the basis for digital signatures in Nepal
- ▶ However, the government-operated PKI system may *not* be *technologically neutral*



Electronics transactions and signatures law

Digital signature certificates and legally recognized digital signatures are *only available* through the government-operated PKI system. *Any other* digital signatures, not created by the PKI system, may *not* be legally recognized

Relevant ETA sections include:

- ▶ Chapter 2(5): legal validity of digital signature
- ▶ Chapter 5(30): issue of digital signature certificate only by Nepal Certifying Authority

Such ETA provisions appear carried forward in IT Bill (2019)



Electronics transactions and signatures law

Digital signatures, certificates and the PKI System

- ▶ Nepal customs regulations underemphasize digital signatures and instead use a different authentication and identity management system: the *registered user* (username/password) *system*
- ▶ Current Customs regulations and practices may impact the *functional equivalence* of digital signatures
- ▶ The future of PKI architecture – as set forth in ETA and IT Bill – could also be jeopardized. The use of digital signatures is open to question as a primary means to establish attribution and authentication
- ▶ There is a need for *full* alignment of Customs regulations with ETA/IT legislation



Electronics transactions and signatures law

New Electronic Documents

- ▶ The Nepal NSW and Asycuda World system plan to introduce and recognize a range of electronic documents: e-manifests; e-B/Ls; e-waybills; e-invoices; e-Phyto; and other e-licenses and e-permits.
 - ▶ However, under the Customs Act and Regulations, only e-customs declarations are expressly recognized and regulated.
 - ▶ ETA makes *no* reference to any specific types of electronic records or documents. It is unclear whether the proposed IT Bill does so
 - ▶ UN instruments, such as MLETR, have legally recognized a range of electronic documents with *functional equivalence* to paper counterparts – which may be used as a reference by Nepal legal drafters
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Electronics transactions and signatures law

E-Contracts

- ▶ E-contracts are closely related to electronic records/documents and digital signatures
- ▶ ETA, following the UNCITRAL Model Law on E-Commerce, sets forth basic rules on formation of e-contracts (Chapter 3)
- ▶ There is a need for fuller treatment of e-contracts and obligations of the parties to e-contracts in Nepal legislation
- ▶ The IT Bill appears to have provisions on e-contracts, including recognition of e-contracts and compliance with the terms of online contracts (Chapter 3: Transmission, retrieval and acceptance of electronic records)



Electronics transactions and signatures law

Data retention and electronic archiving

- ▶ ETA recognizes electronic records *need to be kept safely* for legal validity (Chapter 2(6))
- ▶ Data custodians must allow for *accessibility* to electronic records/documents
- ▶ ETA does *not* detail responsibilities of government custodians of paperless trade electronic records – such as government data centres
- ▶ The IT Bill includes a new chapter (Chapter 18) relating to the National Information Technology Center (NITC), but it is unknown whether duties/responsibilities of data centres as custodians of e-records and other information is covered



Electronics transactions and signatures law

Electronic evidence

- ▶ Current laws in Nepal do not address admissibility of electronic evidence in the courts or in administrative/regulatory proceedings
- ▶ As regards case law, the Supreme Court of Nepal has not yet decided on admissibility of electronic evidence
- ▶ The ETA (Chapter 2(7)) affirms that electronic records may be treated as “original documents” which may satisfy the *best evidence rule* in the Nepal Evidence Act (s. 35)
- ▶ The IT Bill *does* include admissibility of electronic evidence (Chapter 16 – Investigation and Proof). It is unclear whether such evidence is only admissible in criminal investigations/prosecutions – or also extends to civil proceedings



Paperless trade and Single Window laws

Nepal National Single Window (NNSW)

- ▶ New Customs Act (2019) will likely provide for legal recognition of Nepal National Single Window (NNSW)
- ▶ *Legal basis for the NNSW*
- ▶ New sec. 23(a) of Customs Act (2019) may establish an electronic “Central Clearance System” for imports/exports with Department of Customs as the hub, and an increasingly large number of OGAs (i.e. participating government agencies) as spokes

Is there a need for a National Single Window Act?



Paperless trade and Single Window laws

Information security and data confidentiality

- ▶ ETA and Rules rely on the digital signature and certificate system and PKI (Public Key Infrastructure), backed up by certain cybercrime offenses, to provide information security
- ▶ There are information security standards related to these systems set forth in Schedule 1, Rules (e.g. Digital Hash Function Algorithm: MD5, SHA-1 & HAVAL)
- ▶ Data confidentiality, in the sense of data protection, is a gap under ETA
- ▶ ETA only provides a limited standard of confidentiality, the breach of which will result in criminal liability



Paperless trade and Single Window laws

IT Bill augments ETA with Chapter 11: Information security and confidentiality

Section 68 aims to ensure information security:

- (1) the *processor, vendor and service providers should maintain confidentiality and continuity* while exchanging, processing, and storing information contained in electronic form
- (2) the designated information of government agencies *should be kept safe in encrypted form* as stipulated
- (3) the designated information of government agencies *should follow the security standards* set by the ministry



Paperless trade and Single Window laws

Information security and data confidentiality

- ▶ IT Bill, Chapter 11: Information security and confidentiality
- ▶ Personal information contained in electronic form should not be collected or retained without consent. Confidentiality is framed in general terms. Breach of confidentiality by government agencies is actionable. There is no specific protection afforded to confidential commercial data
- ▶ The Nepal Privacy Act 2018 and Right to Information Act 2007 provide substantial additional protection for personal information of Nepal citizens



Paperless trade and Single Window laws

Data accuracy and integrity

- ▶ Under ETA, data integrity is protected by PKI architecture and the use of verified digital signatures
- ▶ Customs legislation also requires data accuracy and integrity for forms and documents used in cross-border trade
- ▶ The Customs Act and Regulations impose obligations on the importer, exporter or customs broker to provide *accurate* information to DOC when submitting customs declarations and trade-related documents – whether documents are submitted *electronically or in paper form*



Paperless trade and Single Window laws

- ▶ The Cybersecurity chapter (Chapter 12) of the IT Bill contributes not only to data integrity, but also provides additional information security
- ▶ Cybersecurity legislation, such as Chapter 12, aims to promote *confidentiality, integrity, and availability* (CIA) of public and private information systems and networks
- ▶ Chapter 12 protects “Sensitive Infrastructures” (such as government computer systems and networks). It also prohibits various types of cyber conduct
- ▶ Chapter 15 (Offences and punishment) of the IT Bill sets forth *cybercrimes* which range from unauthorized alteration of information, electronic posting of ill intended information and programs, making false representations, to unauthorized operation of clouds



Paperless trade and Single Window laws

Data sharing

- ▶ Nepal's Single Window development initiatives envisage cooperation, including data sharing, between 44 government agencies or OGAs with DOC
- ▶ However, to date, *no* formal agreement has yet been signed between government agencies or between B2G for data sharing
- ▶ Service level agreements (SLAs) are important in ensuring reliable support for the conduct of paperless trade operations
- ▶ The National Information Technology Data Center (NITC) has confirmed that SLAs are in place in Nepal governing internet and intranet activities – including paperless trade operations
- ▶ Such *contractual* undertakings are important as ETA provides limited guidance on statutory liability of parties to SLAs



Cross-border aspects

- ▶ In 2018, Nepal and India signed a MOU introducing the Electronic Cargo Tracking System (ECTS) which monitors transit traffic between the port of Kolkata and Nepal border
- ▶ The Nepal-India Regional Trade and Transport Project (NIRTTP) includes a Single Window Program which aims to interlink India's ICEGATE with Nepal NSW
- ▶ Nepal is a member of the Asian Clearing Union (ACU) which has procedures for cross-border e-payments (i.e. T/T, EFT)
- ▶ The Nepal government has instructed three major Chambers of Commerce to issue preferential e-C/Os for *all* relevant countries – starting 15th July 2019
- ▶ Limited attention to opportunities for cross-border NSW and paperless trade interoperability – especially in SAARC and SASEC contexts and bilaterally with India, China, and Bangladesh



Cross-border aspects

- ▶ Nepal has already incorporated or taken account of a range of **international standards/regulations/guidelines** relevant to cross-border paperless trade:
- ▶ Nepal has ratified the WTO Trade Facilitation Agreement
- ▶ Nepal is considering the Framework Agreement on Facilitation of Cross-border Paperless Trade in Asia and the Pacific
- ▶ The Nepal government has referenced international models in the drafting of national e-commerce laws and regulations, such as UNCITRAL Model Laws on E-Commerce and E-Signatures
- ▶ The Nepal government is revising the Customs Act and Regulations to bring them into compliance with the Revised Kyoto Convention (RKC)



Other considerations

Liability of the parties to paperless trade operations

- ▶ ETA provides that *network service providers* primarily incur liabilities for their services according to the agreement made with the subscriber. Chapter 8(42)(a)
- ▶ IT Bill features a new Chapter 13 on *service providers*. Chapter 13 addresses certain cybercrime activities and extends a broad exclusion of liability to service providers
- ▶ Very limited consideration of civil or criminal liability of network service providers or paperless trade service providers in ETA and IT Bill
- ▶ ETA lacks substantive provisions on SLAs – unknown for IT Bill. Coverage of intermediate liability issues is limited in ETA and IT Bill



Other considerations

Liability of the parties to paperless trade operations

- ▶ ETA does not directly address issues of liability concerning *public authorities* (i.e. government agencies) participating in the Nepal paperless trade environment, including NNSW
- ▶ Nepal legislation should include treatment of liability, or exemption from liability, of the Single Window operator (i.e. Department of Customs) or OGAs *for errors or omissions leading to economic loss or damage of traders and third parties*
- ▶ The Nepal Controller and Certifying Authorities (CAs) may potentially incur liabilities under the ETA for their acts and omissions as well as under the common law (e.g. breach of statutory duty, negligence)



Other considerations

Electronic Payments

- ▶ Nepal Rastra Bank is in the process of setting up Nepal's National E-Payment Gateway
- ▶ According to the Executive Director, separate regulations concerning the operation of the e-Payment Gateway and e-payments regulations will be issued. E-payments could feature as a chapter in the IT Bill
- ▶ The National E-Payment Gateway reportedly will only operate as a *domestic*, internal e-payment system – with no significant connection to, or involvement with, international trade transactions
- ▶ It is unclear to what extent foreign banks or foreign bank branches will be permitted to participate in the Nepal National E-Payment Gateway



Other considerations

Electronic Payments

- ▶ Cross-border trade-related e-payments can currently be made by way of T/T or EFT using SWIFT codes. There is no restriction on domestic commercial banks in Nepal engaging in cross-border trade-related e-payments/settlements. Foreign banks are also not excluded
- ▶ Cross-border international trade payments remain largely *paper-based* – using paper letters of credit (L/Cs), bills of exchange (B/Es), and documentary collections (D/P, D/A).
- ▶ It may be advantageous for Nepal to give further consideration to introducing e-documents in the context of international trade payments and settlements



Other considerations

Intellectual property rights and database ownership

- ▶ Nepal finalized a new Intellectual Property Rights Policy in March 2017. This policy is being used as the foundation to prepare a draft IP Law – which is undergoing parliamentary review. It is expected this new legislation will represent a substantial improvement over existing IP legislation
- ▶ The current Copyright Act 2002 is considered by many as in need of revision as it does not fully address recent developments brought about by the introduction of new IT technologies and increased internet usage
- ▶ The Copyright Act needs strengthened software protection, although “computer programs” are within its ambit; infringements are considered insufficiently developed
- ▶ As a result, issues of ownership of data and information, as a matter of law, remain uncertain and unsettled

