

## **REPORT OF THE MEETING OF LEGAL WORKING GROUP OF THE INTERIM INTERGOVERNMENTAL STEERING GROUP ON CROSS-BORDER PAPERLESS TRADE FACILITATION**

❖ Dates: 19-21 January 2016

❖ Venue: MR-G, UNCC, Bangkok and WebEx Session

1. The meeting elected, Mr. Young Hwan Kim, Ministry of Strategy and Finance, Republic of Korea, as the Chair of the Legal Working Group.
2. The meeting adopted provisional agenda without any changes.
3. The Secretariat provided a brief overview of pending provisions of the current draft text provision by provision.
4. The meeting reviewed and negotiated each of the pending provisions one by one. The meeting made the following discussion and revision by provisions:
  - During the discussion, Japan expressed its reservation and concerns over Articles 5, 6, 8 and 11 of the current draft text. However, the delegation would not object to the Steering Group finalizing the draft text and would participate in the work of the Steering Group. Japan, in this connection, requested that its stated position be noted in official documentation.

### **1) Preamble**

- The meeting agreed to add a proposed additional paragraph to the Preamble, submitted by the Chinese delegation, stressing the importance of connectivity. Hence, the second paragraph of the Preamble now reads:

*Noting that the unimpeded trade plays a crucial role in promoting comprehensive connectivity which will generate trade creation and new growth in the region,*

## **2) Article 3 Definitions**

- The meeting agreed to merge Articles 3 (a) and 3(b). Hence, new Article 3 (a) reads:  
*“Cross-border paperless trade” means trade in goods, including their import, export, transit and related services, taking place on the basis of electronic communications, including exchange of trade-related data and documents in electronic form;*
- The meeting agreed to delete bracketed Articles (j) bis and (j) ter of Article 3, in connection with its decision to add "(g) Improving transboundary trust environment" in Article 5 as a new general principle.

## **3) Article 5 General Principles**

- The meeting agreed to add *"(g) Improving transboundary trust environment"* in Article 5 as a new general principle and delete bracketed (g) and (h) of Article 5.

## **4) Article 8 Cross-border mutual recognition of trade-related data and documents in electronic form**

- The meeting agreed to delete the bracketed alternate texts previously proposed by Russian delegation in connection with the meeting's decision to add *"(g) Improving transboundary trust environment"* in Article 5 as a new general principle.
  - a) In Article 8.1, *“(replace with “of the formation of a transboundary trust space for subjects of electronic interaction”: Russian Federation and Pakistan)]; [keep brackets pending review: (Japan and India)]. [To this extent, the Parties may constitute a technical group among themselves with the existing focal points (delete: India)”* were deleted.
  - b) In Article 8.2, *“The requirements for building, development, operating and performance of an audit of the transboundary trust space are prepared by the corresponding working groups of the Parties and adopted by the Paperless Trade Council”* were deleted.

- China proposed the addition of the phrase "*by means of bilateral or multilateral arrangements*" at the end of Article 8.1. The meeting discussed value of such additional wording as well as its relation to the protocols proposed in Article 16 bis. Delegates from China and Russian Federation also held a bilateral consultation to improve the proposed wording.
- After further discussion, the meeting agreed to formulate a new para. 3 in Article 8 to incorporate China's proposal as follows:

*[3. The Parties may enter into bilateral and multilateral arrangements to operationalize cross-border mutual recognition of trade-related data and documents in electronic form, in a manner consistent with principle of transboundary trust environment and all the other general principles.]*
- However, some members of the LWG raised concerns regarding the relationship between new paragraphs 3 and existing para. 1 and 2 of Article 8 because of the ambiguity of the precondition for providing for mutual recognition. The meeting decided to keep the new para. 3 in bracket for the time being for further review and improvement.

## **5) Article 11 Legal liability framework**

- The delegation of the Philippines stated their reservation to the phrase in the bracketed text of Article 11 reading "*compensation for any commercial losses*".
- The meeting sought the expert view of legal resource persons, in particular Mr. Luca Castellani from UNCITRAL and Dr. Hong Xue from Beijing Normal University, regarding the overall role and objectives of this provision. The meeting also requested Mr. Castellani and Dr. Xue to review the provision and propose revised text for the meeting to consider, in particular on the bracketed words.
- The two resource persons introduced their proposals as follows:

### ***Article 11 - Redress for disputes relating to electronic exchanges***

*"The Parties shall endeavour to redress disputes that may arise in relation to the cross-border exchange of trade-related data and documents in electronic form."*

### ***Article 11 bis - Cooperation mechanisms for enforcement***

*"The Parties shall establish adequate legal cooperation mechanisms to address enforcement issues that may arise in relation to the cross-border exchange of trade-related data and documents in electronic form."*

- The meeting discussed the proposals and shared their concerns and views on the newly proposed formulation.
- The meeting also discussed the possibility of deleting this Article or making it voluntary provision.
- The meeting decided to retain the existing provision but deleted pending proposals in brackets. There was consensus that the provision shall not aim at modifying pre-existing legal regimes related to liability, but should only enable the parties to the agreement to address new liability and enforcement issues that may arise from cross-border electronic exchange of trade documents. The revised Article 11 reads as:

*The Parties shall endeavor [are encouraged to] establish an adequate legal and regulatory framework [national legislation] to address specific liability and enforcement issues that may arise in relation to the cross-border exchange of trade-related data and documents in electronic form.*

#### **6) Article 12 Institutional arrangements**

- The meeting agreed to change the representation level for the Council from ‘ministerial level’ to “high-level nominee” and the meeting frequency to “upon request but at least once a year.” The revised para. 1 of Article 12 reads as:

*The United Nations Economic and Social Commission for Asia and the Pacific (ESCAP) shall, for the purposes of the present [Framework] Agreement, establish a paperless trade council comprising one (1) “high-level nominee” from each Party and the Executive Secretary of ESCAP. The Council shall meet upon request but at least once a year.*

- The Secretariat informed the meeting of a potential value of allowing all ESCAP members States to participate in the Council as observers, in order to facilitate their consideration of becoming Parties to the present agreement.

- The secretariat clarified that Programme Budget Implication would not arise from activities relating to this anticipated institutional arrangements. The secretariat also informed the meeting that the secretariat would revise para. 41 of Annex: Explanatory Note accordingly.

#### **7) Article 13 Action plan**

- With regard to the implementation of the action plan, the meeting discussed whether the wording should be ‘*shall*’ or ‘*shall endeavour to*’. Most LWG members favored ‘*shall*’, noting that individual action plans would be based on self-assessments as per Art. 13.2. However, the meeting decided to revisit this provision after further consideration of the implication of the wording.

#### **8) Article 15 Capacity Building**

- The meeting decided to revise para. 3 of Article 15 from the current passive tense to active tense and to clarify that the Parties would be the ones considering requests. The revised para. 3 of Article 15 reads as:

*3. The Parties shall give special consideration to requests from least developed and landlocked developing countries for technical assistance and cooperation arrangements designed to assist them in developing their paperless trade capacity and in taking full advantage of the potential benefits of the present [Framework] Agreement.*

#### **9) Article 16 bis Protocols**

- The meeting discussed how this Article could provide parties with a useful tool to develop the international legal framework needed to facilitate and implement cross-border paperless trade.
- The meeting discussed value of using “shall” instead of “may” in para. 1 and agreed to revise para 1 of Article 16 bis to read as:

*1. The Parties shall, at any regular meeting of the Council, adopt relevant technical or legal protocols to the present [Framework] Agreement based on the recommendation of the Standing Committee.*

- Russian Federation delegation informed the meeting that it would share its position on this Article 16 bis after internal consultation after return to the capital.

#### **10) Article 16 ter Other agreements in force**

- The meeting agreed to add this provision as a new article. The meeting also agreed to allocate a place and article number for this provision to be just before the provision on dispute resolution (current article 17).

#### **11) Article 17 Dispute resolution**

- The meeting agreed to restore the paragraphs with the original wording and hence deleted all the new proposals in brackets, noting that the wording of Article 17 and subsequent provisions were based on standardized text used in final clauses of UN treaties.<sup>1</sup> The restored Article 17 reads as:
  - 1. Any dispute that may arise among the Parties regarding the interpretation and application of the present [Framework] Agreement shall be settled by means of negotiation or consultation among the Parties concerned*
  - 2. In the event that the Parties to a dispute involving the present [Framework] Agreement are unable to settle it by negotiation or consultation, the Parties shall be referred to conciliation if any of the Parties to the dispute requests such a referral.*
  - 3. The dispute shall be submitted to one or more conciliators selected by the Parties involved in the dispute. If the Parties to the dispute fail to agree on the choice of a conciliator or conciliators within three (3) months after the request for conciliation, any of those Parties may request the Secretary-General of the United Nations to appoint a single conciliator to whom the dispute shall be submitted.*

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<sup>1</sup> Handbook of Final Clauses:

[https://treaties.un.org/Pages/Publications.aspx?pathpub=Publication/FC/Page1\\_en.xml](https://treaties.un.org/Pages/Publications.aspx?pathpub=Publication/FC/Page1_en.xml)

4. *The recommendation of the conciliator or conciliators appointed, while not binding in character, shall become the basis of renewed consideration by the Parties to the dispute.*
5. *By mutual consent, the Parties to the dispute may decide in advance to accept the recommendation of the conciliator or conciliators as binding.*
6. *The provisions of the present article shall not be construed as excluding other measures for the settlement of disputes mutually agreed among the Parties to the dispute.*
7. *Any State may, at the time of depositing its instrument of ratification, acceptance, approval or accession, deposit a reservation stating that it does not consider itself bound by the provisions of the present article relating to conciliation. Other Parties shall not be bound by the provisions of the present article relating to conciliation with respect to any Party which has deposited such a reservation.*

## **12) Article 19 Entry into force**

- The meeting decided to reach a consensus on the number of Parties needed for entry into force at the next meeting of the LWG. In relation to this, the Chair requested for all LWG members to consider this matter in the interim period until the next LWG meeting. Furthermore, the Chair requested the Secretariat to conduct a survey during the interim period amongst the LWG members on their preferred number using the LWG group mail.

## **13) Article 20 Procedures for amending the [Framework] Agreement**

- The meeting decided to change the wording of first sentence of para. 4, by referencing a corresponding provision contained in the Intergovernmental Agreement on Dry Ports. Hence, the revised wording of Article 20 reads:  
*[4. An amendment shall be adopted by a two-thirds majority of the Parties to the Agreement present and voting at the meeting of the Paperless Trade Council.]*
- The meeting also decided to keep the revised wording bracketed until the next LWG meeting to allow other members of the LWG to have a chance to review the new wording, noting that it should be read in conjunction with para 5.



- The meeting decided to delete bracketed word “acceptance” in the first sentence of para. 5, which now reads:

*An amendment adopted in accordance with paragraph 4 of the present article shall enter into force twelve (12) months after it has been accepted by two thirds of the number of Parties at the time of its adoption.*

#### **14) Article 21 Reservations**

- The meeting discussed that allowing for blanket reservations on any or all provisions of the Agreement would undermine its value. Accordingly, it decided to delete alternative wording in the brackets and requested the Secretariat to inform Pakistan of the decision. The revised provision reads as:

*Reservations may not be made with respect to any of the provisions of the present [Framework] Agreement, except as provided in article 17, paragraph 7.*

#### **15) Article 23 Suspension of validity**

- The meeting decided to align the number of Parties for suspension of validity to the decision on Article 19, regarding number for entry into force. Hence, the meeting would reach consensus on this issue at the next meeting of the LWG.

5. Under other matters, the Secretariat informed the meeting that a summary of Day 3 would be shared on the following day (Friday 22 January 2016) and a draft report of the meeting would be circulated by 26 January 2016 providing 1 week for review by the LWG participants. The Secretariat also informed the meeting that official documentation of the draft text of regional

预览已结束，完整报告链接和二维码如下：

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