

WTO PLURILATERAL NEGOTIATIONS ON TRADE-RELATED ASPECTS OF ELECTRONIC COMMERCE

Facilitating trade through digitalisation

FIVE KEY RECOMMENDATIONS TO FACILITATE TRADE THROUGH DIGITALISATION

1. Create disciplines to facilitate the digitalisation of trade and trade finance instruments
2. Ensure functional equivalence of digital data to paper-based documentation
3. Ensure functional equivalence of electronic signatures to their manual equivalents
4. Establish a preference for the use of electronic trade administration documents, including through the use of Single Windows and digital certification and authentication services
5. Include an obligation to minimise the regulatory burden on electronic commerce

CONTEXT

Global business believes that the Joint Statement Initiative on Electronic Commerce (JSI) presents an ideal opportunity to enhance trade facilitation and simplify trade finance processes. [The ICC Baseline Position for a High Standard Outcome](#) sets out, under Pillar 2, a number of ideas that build on the landmark Trade Facilitation Agreement within the context of a fast-growing digital economy.

Given the interest shown in recent months by JSI participants on paperless trading, the following issues brief includes a number of suggested provisions that could further facilitate trade through digitalisation.

Global trade is increasingly digitalised. Buyers, sellers, marketplaces and intermediaries now rely on technologies that enable commerce at a speed, scale and efficiency unimaginable just a few decades ago. Unfortunately, many customs administrations around the world are still in the infancy of adopting such technologies and processes. Often, customs procedures still rely on hard-copy paper documents, manual and inefficient processes, and other relics of a bygone era ill-suited for trade in the 21st century.

For example, according to the Global Express Association's [Customs Capability Database](#), 64 of 139 countries annually measured (46%) do not accept or electronically process the data required for release of shipments in advance of their arrival—what has become a global benchmark for efficient and secure customs processing.

While all companies face costs, micro-, small-, and medium-sized enterprises (MSMEs) engaged in cross-border e-commerce disproportionately shoulder the burden of such outdated customs procedures, including delays and added costs.

The JSI presents an opportunity to build on existing trade disciplines and global best practices in order to fully realise the benefits of digitalisation and paperless trade.

I. DIGITALISATION OF TRADE AND TRADE FINANCE INSTRUMENTS

Trade instruments are essential commercial tools. Their digitalisation can improve the speed and security of transmission, permit the reuse of data, and automate transactions using 'smart contracts'.

Though trade and trade finance instruments are capable of digitalisation, the lack of legal clarity surrounding their treatment prevents their broad use and associated benefits. Examples include bills of lading and negotiable instruments (such as bills of exchange and promissory notes).

Bills of lading are a basic element of most international sales of goods. Bills of lading:

- > act as a receipt for goods shipped on board;
- > function as a legal contract of carriage;
- > act as title to the relevant goods; and
- > are capable of passing title to the goods (transferable).

Negotiable instruments are other important forms of payment obligation. Through mercantile practice and legislation, these instruments have acquired legal recognition as independent obligations linked to but not conditional on the trade they may finance. They are also transferable by endorsement. This makes them powerful banking tools which are attractive to financial institutions and investors as they reduce much of the performance risk associated with the sale of goods. Their use has declined because they are (or are perceived to be) required to be in paper form to satisfy signature, originality and transferability requirements.

The 2017 United Nations Commission on International Trade Law (UNCITRAL) *Model Law on Electronic Transferable Records* (MLETR), adopted by the General Assembly on 7 December 2017, provides the clarity necessary for widespread adoption of digitalised trade and trade finance instruments.

Important provisions include:

- > Article 7: an electronic transferable record 'shall not be denied legal effect, validity or enforceability on the sole ground that it is in electronic form';
- > Articles 8-11: on the functional equivalence of electronic and manual records; and
- > Article 12: on general reliability standards for verifying signatures, integrity and other aspects of electronic records. Helpfully, this general reliability standard allows for the consideration of 'any applicable industry standard'.

Despite extensive negotiation and agreement, adoption of the MLETR has been low. At time of writing, only Bahrain has enacted laws based on or influenced by the MLETR.

The International Chamber of Commerce (ICC) believes that a provision calling for the adoption of the MLETR could add significant value to the eventual JSI agreement, as follows:

Article [X]: Electronic Transferable Records

Each Party shall maintain laws and regulations governing electronic transferable records based on the UNCITRAL *Model Law on Electronic Transferable Records 2017*.

II. EQUIVALENCE OF DIGITAL DATA TO MANUSCRIPT WRITING

A further high-value enabler of digital trade would be to include a discipline requiring the equivalent treatment of digital data to manuscript writing.

The UNCITRAL *Model Law on Electronic Commerce 1996* (MLEC) achieves this, stating at Article 6(1): "Where the law requires information to be in writing, that requirement is met by a data message if the information contained therein is accessible so as to be usable for subsequent reference."

At time of writing, 72 states and 151 jurisdictions have incorporated legislation based on or influenced by the MLEC.¹ Reference is made to the MLEC in various regional and bilateral free trade agreements.²

¹ See UNCITRAL, "[UNCITRAL Model Law on Electronic Commerce \(1996\)—Status](#)".

² For a helpful overview see Mark Wu, [Digital Trade-Related Provisions in Regional Trade Agreements: Existing Models and Lessons for the Multilateral Trading System](#) (RTA Exchange, November 2017) 14-15.

ICC believes that a high standard outcome of the JSI process could usefully include a provision calling for the maintenance of laws and regulations based on the MLEC. A useful example and one that could guide JSI participants is Article 15.5 of the [Malaysia-Australia FTA](#):

Article 15.5: Domestic Regulatory Frameworks

1. Each Party shall [adopt or] maintain laws and regulations governing electronic transactions based on the UNCITRAL *Model Law on Electronic Commerce 1996*.

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III. ACCEPTANCE OF ELECTRONIC SIGNATURES

The use of e-signatures has exploded, increasing efficiency in contracting and the delivery of products and services for both governments and enterprises. According to [MarketsandMarkets](#), the e-signature market is set to grow exponentially over the next five years. This raises concerns about the uncertain status of e-signatures in some jurisdictions and the potential for this to disrupt cross-border trade transactions.

The JSI process provides an excellent opportunity to create World Trade Organization (WTO) disciplines that confirm the legality of digital signatures and harmonise their necessary features.

Article 14.6 of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) provides a useful template for consideration by JSI participants:

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.

IV. USE OF ELECTRONIC TRADE ADMINISTRATION DOCUMENTS

The JSI negotiations present a valuable opportunity to encourage the use of digital trade administration documents, including through the use of Single Windows and digital certification and authentication services.

The recent communication from Brazil ([INF/ECOM/27/Rev.1/Add.1](#)) is helpful in this regard. It is drafted in such a way that two key objectives are achieved: (1) it uses accommodative language, providing a margin of appreciation for countries in their implementation of electronic trade administration systems that is mindful of the varying capacities of national customs systems, yet (2) establishes a strong preference for digitalisation.

One can see this in the proposed Article 1, copied below.

Article 1: Electronic trade administration documents

1.1 Use of electronic trade administration documents

- 1.1.1** Each member shall, whenever feasible, issue and accept electronic trade administration documents.
- 1.1.2** Whenever there is a viable electronic or digital version or copy of a paper trade administration document, Members shall, to the extent possible, accept it as a legal equivalent of the paper version.

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V. MINIMISATION OF REGULATORY BURDEN ON ELECTRONIC COMMERCE

The ambition of the JSI is to achieve a high standard outcome—one that can further enhance the benefits of electronic commerce for businesses, consumers and the global economy.³

In our view, this means minimising the regulatory burden on e-commerce where appropriate. This also means consulting, as appropriate, with the private sector to ensure enabling regulatory frameworks. We think this approach is particularly important to achieving the benefits of paperless trading given the importance of (1) simplifying trade-related processes for small businesses; and (2) the manifold complexities involved in cross-border trade transactions.

ICC considers that this spirit should be captured in some way in the eventual agreement. Precedent can be found in Article 15.5(2) of the Malaysia-Australia FTA, which states:

Article 15.5: Domestic Regulatory Frameworks

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2. Each Party shall:

- a.** minimise the regulatory burden on electronic commerce; and
- b.** consult, as appropriate, with industry in the development of electronic commerce regulatory frameworks.

A useful further provision could emphasise the importance of bringing objectivity and impartiality to regulation of electronic commerce. To that end, Article 8.74 of the EU-Japan EPA is helpful:

Article 8.74: Domestic Regulation

Each Party shall ensure that all its measures of general application affecting electronic commerce are administered in a reasonable, objective and impartial manner.

³ [Joint Statement on Electronic Commerce](#) (WT/L/1056) (25 January 2019).