

**UNNE<sub>x</sub>T Workshop on the Legal  
Framework for Single Window**  
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**ASSESSING LEGAL GAPS IN  
IMPLEMENTING A SINGLE WINDOW**

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# Background Considerations

- **Organizational or institutional environment**
  - **National Steering Committee Approach**
    - **Legal Working Group**
    - **Technical Working Group**
- ***Political Will* is critical**
- **Legal framework is essential**

# Background Considerations

- UN Recommendation 33:

“The most important prerequisites for the successful implementation of a Single Window facility are the political will of the government and the relevant governmental authorities and the full support and participation of the business community. The basic legal framework, including the introduction of privacy laws and rules providing privacy and security in the exchange of information, will also have to be developed.”

# Background Considerations

- UN Recommendation 35:  
“Undertake a study (including e-Commerce legal benchmarking and ‘gap analysis’ studies) to determine an appropriate set of measures that may need to be taken to *address legal issues related to national and cross-border exchange of trade data* required for Single Window operations.”

# Legal Gap Analysis: Key Practical Questions

## Enabling the National Single Window

- Has the NSW been firmly established in national law?
- Have electronic transactions, including the use of electronic communications/documents and data messaging been authorized for public, private, and commercial transactions?
- Does the national law(s) authorizing electronic transactions provide for the *functional equivalence* of paper and electronic documents and messages, *non-discrimination* between paper and electronic documents, *technology neutrality*?
- Does national law provide for the acceptance of electronic communications/documents and/or data messages in lieu of paper documents in your country's judicial system, that is, the acceptance by the courts and other administrative processes of electronic evidence as the equivalence of paper evidence?

# **Legal Gap Analysis – Key Practical Questions**

- Does national law authorize the NSW to engage in cross-border transmission of customs data to other NSWs, including the use of electronic communications and data messages, as well as the receipt of electronic communications and data messages from other NSWs?
- Are there any legal restrictions on the types of customs transactions that may be conducted electronically domestically and/or on a cross-border basis?

## **Data Protection and Information Security**

- Are there legally binding laws or regulations that require the protection of data in electronic form?
- Are there laws or regulations generally that require the protection of confidential information, such as trade data and/or business information, whether in paper or electronic format?

# **Legal Gap Analysis:**

## **Key Practical Questions**

- Are there privacy laws protecting personally identifiable information about individuals?
- Are there regulations and policies that establish the level of information security and related procedures in the NSW and within all government agencies that may have access to the NSW, for example, through “information security agreements”?

### **Access to and Sharing NSW Data**

- Do national law and/or regulations authorize government agencies to access NSW data?
- Are government agencies authorized by law and/or regulations to share customs and trade data and information with the NSW and other government agencies?
- Are private sector entities authorized in law or by regulation to access the NSW?

# **Legal Gap Analysis: Key Practical Questions**

## **Identification, Authentication and Authorization**

- **Are there binding legal regulations establishing clear procedures for the identification, authentication and authorization of users (both operators and end-users) to access the NSW?**
- **Are there mutually agreed upon binding regulations for the identification, authentication and authorization for users of the NSW when participating in cross-border transactions?**
- **Have procedures been established (for example, Memoranda of Understanding between government agencies) for the identification, authentication, and authorization of employees of different government agencies who may access the NSW?**



# **Legal Gap Analysis: Key Practical Questions**

## **Electronic Signatures and Certification Authorities – Mutual Recognition**

- **Are there national laws or regulations providing requirements for the use of electronic signatures (including digital signatures)?**
- **Do such laws or regulations embody the principles of “technology neutrality” and “geographic neutrality”?**
- **Are there national laws or regulations regarding the use and/or acceptance of Certification Authorities with digital signatures?**
- **Do any existing national laws or regulations establish conditions or requirements for the use or acceptance of electronic signatures and/or certification authorities from other countries in cross-border electronic transactions?**

# **Legal Gap Analysis:**

## **Key Practical Questions**

- **Are there any treaty obligations or mutual recognition agreements with other countries pertaining to electronic signatures and certification authorities in different countries?**

### **Data Quality Regulations**

- **Are there regulations governing responsibilities for entering data into the NSW and the subsequent processing of this data within the NSW?**
- **Have audit trails been established that provide for the means of identification, authentication and authorization and proper logging and recording mechanisms for individuals and organizations responsible for entering and processing information within the NSW?**

# **Legal Gap Analysis: Key Practical Questions**

## **Legal Liability and Dispute Resolution**

- **Are mechanisms in place for determining legal liability for damages when inaccurate, incomplete, or incorrect data has been entered into the NSW?**
- **Have regulations been implemented to establish personal jurisdiction over individuals and organizations in cross-border transactions?**
- **In situations where disputes arise between NSWs, for example, where service level obligations are not met, have dispute resolution mechanism been established to resolve these disputes?**

# **Legal Gap Analysis:**

## **Key Practical Questions**

- Similarly, where disputes arise between an NSW and NSW operators and/or users of an NSW, have dispute resolution mechanisms been established?
- Is there national legislation providing for alternative dispute resolution processes that could be applied to the NSW environment?

## **Data Retention and Electronic Archiving**

- Are there laws or regulations regarding data retention and electronic archiving?
- In the cross-border environment, are there national laws and/or regulations ensuring that data utilized by NSW will be retained so as to meet judicial requirements in the event of future disputes?

# **Legal Gap Analysis: Key Practical Questions**

## **Intellectual Property Rights and Data Base Ownership**

- **Have intellectual property laws been enacted?**
- **Do national laws or regulations establish ownership of trade data that is collected by the Customs Administration and/or the NSW?**
- **Have specific ownership rights been established in national law for private sector trading entities?**
- **Are there regulations or laws that affect the intellectual property rights that may exist in cross-border transactions, for example, data or information received in the NSW?**
- **Are there any intellectual property rights issues that may arise as a result of any Fair Trade Agreements?**

# **Legal Gap Analysis:**

## **Key Practical Questions**

- Are procedures in place to deal with intellectual property rights related to hardware, firmware, and/or software that may be developed for the NSW operations particularly where private sector providers or private sector SW facility operators are involved?

### **Competition Law Issues**

- Are there obligations regarding competition as a result of international treaties or agreements, for example under WTO obligations and/or under Articles V, VIII and X of the General Agreement on Tariffs and Trade (GATT)?
- Are there national competition laws (e.g., Antitrust laws) that could have some effect on the NSW or cross-border transactions through it?

# **Practical Issues for Conducting the Legal Gap Analysis**

- **Establish a Legal Working Group (LWG)**
  - Reporting to the *NSW National Steering Committee*
  - Develop a Terms of Reference for the LWG
  - Include lawyers and legal experts from at least those Ministries or Government Departments that will participate in the NSW
  - Possibly include private sector legal experts
- **Assess Resources for the Legal Gap Analysis**
  - If the Legal Gap Analysis is to be conducted by Government legal experts, will they receive 'release time' from their normal duties?

# **Practical Issues for Conducting the Legal Gap Analysis**

- Determine how many legal experts will be required to work full time on the Legal Gap Analysis.
- The LWG should supervise the drafting of legislation, amendments to existing laws and regulations that are designed to eliminate any legal barriers to operating the NSW that are identified.
- Can support staff resources be allocated to the work?
- If outside legal counsel is to be involved
  - Develop an appropriate Terms of Reference
  - Seek legal experts with demonstrated technology law expertise in electronic communications (and e-Commerce) law, Single Window development, and a strong familiarity with International legal standards in these fields



# **Practical Issues for Conducting the Legal Gap Analysis**

- Consider whether outside legal counsel might provide capacity building opportunities
- Determine whether technical assistance support may be available from the UN or other international organizations or groups
- Pursue development of the NSW legal framework at least simultaneously with the technical development work on the NSW
  - Interaction between the LWG and those developing the technical architecture of the NSW is important
  - Consider the intersection of law and technology

# Legal Research Methodology for the Legal Gap Analysis

- High-level research effort should be anticipated
- Legal materials considered in the analysis should include:
  - Primary legal sources - These would include enacted legislation, statutes and laws, decrees, executive orders, circulars, etc., having the force of national law, and formally adopted and promulgated regulations and rulings, judicial and administrative decisions, etc., and relevant treaties to which the country is a party
  - Secondary legal sources - These may include, for example, legislative history, ministry, administrative and executive reports that should be reviewed and included to provide background and interpretations of the primary legal materials.

# **Legal Research Methodology for the Legal Gap Analysis**

- **References to other legal materials** - Law review articles, conference reports, international commentary, and so on may also be included if relevant to the development of the NSW and related electronic commerce legal framework developments in national law as well as cross-border transactions. Particular attention should be paid to uniform legal standards as their international nature may be particularly useful in establishing the legal environment needed for cross-border exchanges.
- **Look for useful and detailed Reports on each area of legal research that is contemplated by the ToR for the Legal Gap Analysis**
- **Reports should include specific recommendations related to identified areas where legal barriers to operation of the NSW are found**

# **Implementing the Findings**

- **Develop an implementation timetable**
- **Prepare initial drafts of new legislation or other enabling law (e.g., Prime Minister's Decrees, etc.) that may be needed in areas identified in the Gap Analysis**
- **Where new or amended legislation is needed**
  - **Time to obtain passage of new legislation varies considerably from country to country**
  - **If feasible, share drafts with legislators, policymakers, and others in the legislative process as soon as possible**

# **Implementing the Findings**

- Prepare background papers and analysis of the Legal Gap Analysis findings to be included with the legislation package
- **Develop the regulations (including amendments to existing regulations) that may be needed to implement the NSW by those Ministries that will be involved**
  - Address technology-related legal issues that may have been identified in the Legal Gap Analysis
  - Prepare MOUs and Interconnection Security Agreements with those Ministries and Government Agencies that will exchange electronic information and data messages with the NSW.

# Implementing the Findings

- In the event that cross-border transactions with other NSWs are contemplated prepare guidelines and draft regulations to address those transactions
- Develop and present one or more national workshops that will bring all NSW stakeholders together to understand the legal framework for the NSW and the underlying electronic transactions legal framework.
- **Enjoy all of the benefits of a successfully implemented NSW that enhances trade and development....**

- **Questions?**

- **Comments?**

*Thank you!*

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