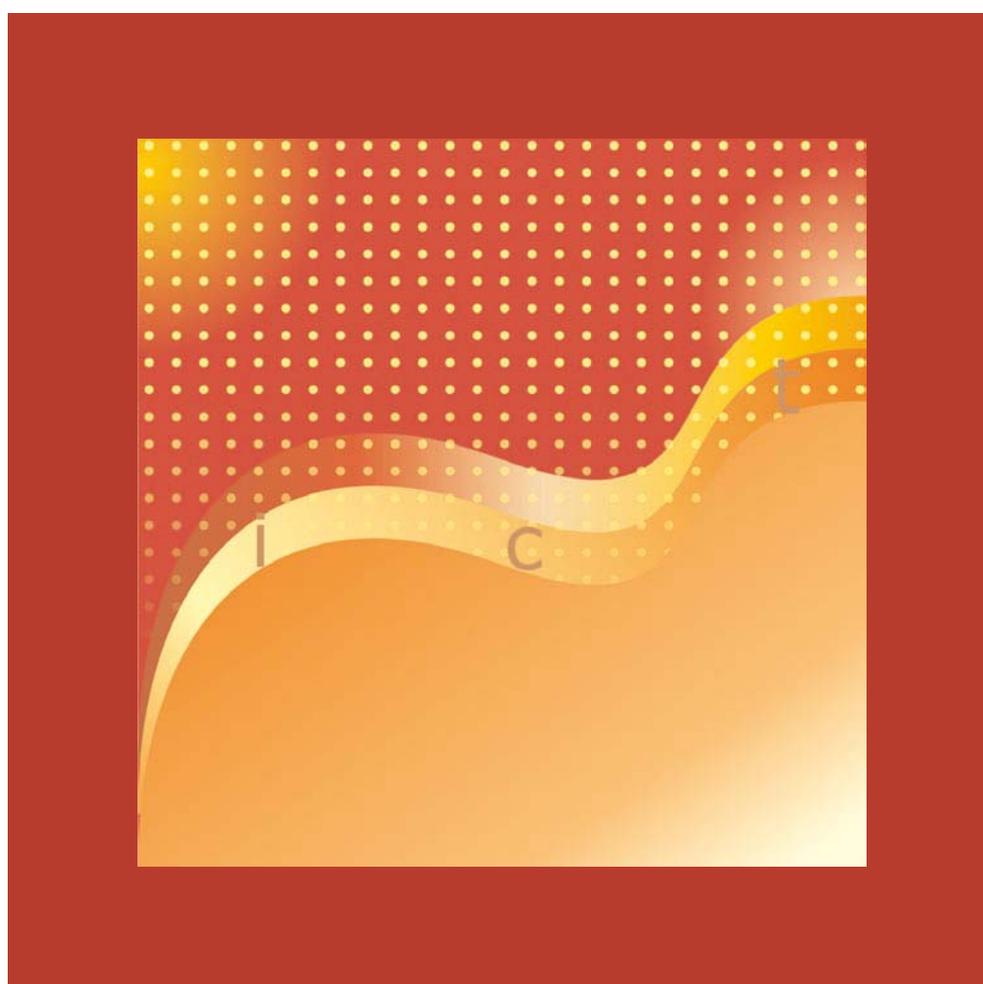


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Science and technology for development:
the new paradigm of ICT

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Chapter 8

HARMONIZING CYBER LEGISLATION AT THE REGIONAL LEVEL: THE CASE OF ASEAN

A. Introduction

An increasing number of developing countries are adapting their legislation to e-commerce to remove barriers to online services and provide legal certainty to business and citizens. The adoption of cyberlaws is an essential step to widen market access to small and medium-sized enterprises (SMEs) at the regional and the international level. Issues such as security, privacy, consumer protection and intellectual property rights need to be addressed in a digital economy.

The impact of the introduction of legislation on the expansion of e-commerce activities is reported by countries to be positive, leading to increased ICT-related business opportunities and foreign direct investment, according to a survey on e-commerce legislation in developing countries carried out by UNCTAD in 2007.¹ The survey revealed that 93 per cent of the 32 responding countries have prepared or are in the process of adapting it in order to benefit from market opportunities arising from ICT and the economic growth and development opportunities that accompany them. A majority of responding countries chose to consider the United Nations Commission on International Trade Law (UNCITRAL) model laws when they revised their legislation. This shows the importance of international harmonization in view of the need for uniformity of the law applicable in the information economy and the development of harmonious international economic relations at the regional and global levels.

Developing countries within their region and subregion are also considering the development of a basic harmonized legal framework for e-commerce to make their region competitive and help boost e-business and economic growth. The harmonization of e-commerce legal frameworks is expected to lead to larger internal and external consumer and business markets by facilitating cross-border e-commerce.

Regional initiatives for the harmonization of cyberlaws are developing and are facing challenges, including the different legal, social and economic systems of countries in a particular region. Other barriers include the lack of human resources, the lack of public awareness about the scope and application of the law and its benefits, and the legal security of e-business through the legislation adopted. More broadly, countries reported consumers' lack of trust in the security of e-commerce transactions and privacy protection, the difficulty in setting up the technical infrastructure, and the need to accompany legal reform by a broader national reform of the information economy in order to seize the benefits of e-commerce.

The Association of Southeast Asian Nations (ASEAN)² is the first regional organization in the developing world to adopt a harmonized e-commerce legal framework consistent across jurisdictions. By the end of 2008, all ASEAN member countries will have enacted consistent national e-commerce legislation. This chapter presents a case study of the Harmonization of E-Commerce Legal Infrastructure in ASEAN Project—a major four-year project to help the ten ASEAN member countries develop and implement a harmonized e-commerce legal infrastructure.³

The experience of the ASEAN member countries in the E-Commerce Project may be helpful for other regional associations in the developing world that are currently considering the harmonization of e-commerce legal infrastructure. This is the case, for instance, of the East African Community and the Latin American Integration Association (ALADI) member countries, which receive technical assistance from the United Nations Conference on Trade and Development (UNCTAD) to help design e-commerce legislation at the national and regional levels,⁴ as well as other regional organizations in Africa, Asia and the Pacific.

The ASEAN experience might also prove useful for developing countries that are formulating their own e-commerce legislation, and developing a comprehen-

sive legal infrastructure, including regulations, standards, training and education.

The adaptation of legal frameworks to e-commerce is a key step among ICT-related policy measures that Governments should take in order to foster the use of ICTs and development of e-commerce. In previous editions of the *E-commerce and Development Report* and the *Information Economy Report*, UNCTAD focused on specific e-commerce legal issues, for which references are provided in this chapter, and more generally on ICT strategies to help them take full advantage of ICT for development. In this edition, the chapter aims to provide guidance for developing countries and regions when they start developing their e-commerce legal framework.

On the basis of the ASEAN case, the chapter will set out the modalities for the implementation of law reform, as well as possible options and potential challenges awaiting countries in the development of a common regional and national e-commerce legal framework. Such challenges include different e-readiness levels and the development stage of e-commerce legislation, which can vary from one country to another.

The chapter is divided into four sections. Section A provides background information on the e-ASEAN initiative and E-Commerce Project. Section B presents the challenges of regional and domestic implementation of e-commerce legal infrastructure and addresses cyberlaw coverage in ASEAN member countries. Section C presents the lessons learned vis-à-vis regional harmonization of e-commerce legal infrastructure, as well as at the national level. Section D proposes policy recommendations to help regional organizations and developing countries prepare their legal framework.

1. Background

ASEAN was created in 1967 to promote regional cooperation among its member States with the objective of (a) accelerating economic growth, social progress and cultural development, and (b) to promoting peace and stability in the region. It currently has 10 member countries: Brunei Darussalam, Cambodia, Indonesia, the Lao People's Democratic Republic, Malaysia, Myanmar, the Philippines, Singapore, Thailand and Viet Nam.

With the advent of ICTs, ASEAN member countries endorsed the e-ASEAN initiative in 1999 as a result

of the ASEAN Vision 2020, defined two years earlier and aimed, with regard to economic development, at creating a stable, prosperous and highly competitive ASEAN Economic Community in which there is a free flow of goods, services and investment, a freer flow of capital, equitable economic development and reduced poverty and socio-economic disparities in 2020 (the target date for establishing the ASEAN Economic Community has since been brought forward to 2015). The purpose of the e-ASEAN initiative is to complement national ICT strategies, and promote economic growth and competitiveness for better integration of ASEAN member countries into the global information economy. The e-ASEAN initiative sets out an action plan focusing on physical, legal, logistical, social and economic infrastructure to embrace the development and use of ICTs.

In 2000, the ASEAN member countries entered into the e-ASEAN Framework Agreement to facilitate the establishment of the ASEAN Information Infrastructure – the hardware and software systems needed to access, process and share information – and to promote the growth of electronic commerce in the region. The framework comprises five main elements: information infrastructure, e-society, e-government, a common marketplace for ASEAN ICT goods and services, and the creation of an e-commerce friendly environment. This chapter will focus on the implementation of the E-Commerce Project.

The e-ASEAN Framework Agreement is to be implemented by a series of measures set out in the Roadmap for Integration of e-ASEAN Sector (the e-ASEAN Roadmap).⁵ The E-Commerce Project has been assisting ASEAN in meeting two key targets in the Roadmap:

- Measure 78: Enact domestic legislation to provide legal recognition of electronic transactions (i.e. cyberlaws) based on common reference frameworks (deadline: 31 December 2008);
- Measure 79: Facilitate cross-border electronic transactions and the use of digital signatures (deadline: 31 December 2009).

These targets and deadlines were confirmed by the ASEAN economics ministers in Cebu, Philippines, in December 2006.

The coordinating body for this work in ASEAN is the ASEAN E-Commerce and ICT Trade Facilitation

Working Group, a group that reports to ASEAN TELSOM (Telecommunications and ICT Senior Officials Meeting), which in turn reports to TELMIN (Telecommunications and ICT Ministers). The Working Group's agenda covers most aspects of e-commerce. Other relevant Working Groups include those on e-society and ICT Capacity Building, universal access, digital divide and e-government, and ASEAN information infrastructure.

2. E-commerce project goals

The overall goal of the e-commerce project is to assist ASEAN to integrate into one market for goods, services and investment. The e-commerce project has had three phases.

The focus of Phase 1 was the harmonization of e-commerce legal infrastructure. This phase was conducted between 2004 and 2005, and included the establishment of a broad, high-level harmonized legal, regulatory and institutional infrastructure for e-commerce. Phase 2, which was conducted in 2006, examined the potential establishment of a harmonized legal, regulatory and institutional infrastructure for electronic contracting and online dispute resolution (ODR). Phase 3, which was conducted in 2007, examined the possible establishment of a harmonized legal, regulatory and institutional infrastructure for the mutual recognition of digital signatures, so as to facilitate cross-border trade.

Each project phase built on the achievements of previous phases and the outputs of each phase became more detailed and technical in nature as the overall project progressed.

3. Harmonization structure

Harmonization projects are designed to align individual member country laws in order to remove unwanted gaps, overlaps and duplication.⁶ E-commerce harmonization projects aim to increase legal certainty for parties engaged with more than one member country – for example, multinational businesses that are attempting to expand their business in a new region. Harmonization projects usually fall into one of two categories – soft harmonization (based on training and capacity-building) and hard harmonization (based on model or uniform laws). Most e-commerce legal harmonization projects are soft harmonization projects, in that there is no intention or requirement

for countries to adopt the same (or even model) laws and regulatory systems. All that is undertaken are training and capacity development activities, aimed at ensuring a common (or harmonized) understanding of e-commerce legal requirements.

Examples of soft harmonization projects include e-commerce law harmonization projects in:

- The United Nations Economic and Social Commission for Asia and the Pacific (UNESCAP), which has 62 member countries.⁷ They are undertaking a soft harmonization project called the Technical Assistance Project on Harmonized Development of Legal and Regulatory Systems for E-commerce in Asia and the Pacific: Current Challenges and Capacity Building Needs.⁸
- The South Asian Association for Regional Cooperation (SAARC)⁹ comprising eight member countries, which is undertaking a soft harmonization project called Harmonization of E-Commerce Laws and Regulatory Systems in South Asia.¹⁰
- The Pacific Islands Forum (PIF),¹¹ which has 16 member countries. They have developed a Cyberlaws Strategy (part of the Pacific Plan for strengthening regional cooperation and integration¹²). It is designed to include the harmonization of e-commerce laws as one of its goals. Overall, the strategy is based on soft harmonization, although some specific cyber laws (e.g. spam legislation) may be based on sample laws and subject to hard harmonization.

There are some benefits to the soft harmonization approach. One of them is the considerable potential for integration and coordination with other regional capacity-building activities, resulting in low costs and useful collaboration with regional neighbours. In addition, some assistance is already available in the form of training materials and kits on e-commerce laws. For example, UNCITRAL is developing training materials regarding the United Nations Convention on the Use of Electronic Communications in International Contracts 2005. Third, in theory, consistency in training should deliver reasonable consistency in outputs, including the laws, regulations and other aspects of e-commerce legal infrastructure. However, in practice, consistency in training has not always delivered consistency in outputs. The UNCITRAL model laws, for example, have been implemented very differently in numerous

countries, despite the availability of uniform training and capacity-building assistance.

ASEAN was concerned that it would not necessarily have control and ownership of the development and delivery of training and materials, especially implementation guides that could help to ensure consistency. The only training materials that were available when the project started were generic materials that had not been customized for an Asian audience or for the particular political and legal systems in ASEAN member countries.

With respect to hard harmonization projects, examples include e-commerce law harmonization projects in:

- The Southern African Development Community (SADC).¹³ Its 14 member countries are undertaking a hard harmonization project based on a customized model e-commerce law.
- The European Union (EU).¹⁴ Its 27 member countries have standardized domestic e-commerce legislation based on the EU Directive on Electronic Commerce, 2000.¹⁵

Ultimately, ASEAN chose to pursue hard harmonization, based on implementation guidelines rather than simple capacity-building.

The hard harmonization model offers five main benefits. First, the guidelines are an inclusive instrument, which ensures the participation of less developed ASEAN member countries. They also contain implementation steps that ensure greater consistency across ASEAN member countries. In addition, the guidelines include a timetable, which helps to ensure an orderly, phased development of e-commerce legal infrastructure in ASEAN. Moreover, they leave less room for interpretation and reduce inconsistencies. Finally, they remain a flexible instrument that can be reviewed and updated (for example, every three years).¹⁶

Under this hard harmonization option, E-Commerce Project Guidelines have been developed that build on the common objectives and principles for e-commerce legal infrastructure. The guidelines include more prescriptive information on implementation steps, and a timeline. They were developed by an Australian private consulting firm¹⁷ in collaboration with project participants and technical experts from ASEAN member countries. They have been endorsed by the ASEAN E-Commerce and ICT Trade Facilitation Working Group.

B. Regional and domestic implementation

The E-Commerce Project sought to identify and address both regional and domestic implementation issues. Regional issues were important since the project had a trade facilitation focus, and so it was important to address any barriers to cross-border trade that might arise from gaps or inconsistencies in e-commerce legal infrastructure. Domestic implementation issues were important since ASEAN has set certain goals and target dates for economic integration that require all 10 member countries to implement e-commerce legal infrastructure at the domestic level.

1. Regional implementation

The project included numerous activities and outputs over a four-year period, including eight full ASEAN workshops with an average of 35 participants per workshop, 14 country visits and ongoing liaison with other international organizations such as Asia Pacific Economic Cooperation (APEC), UNCITRAL, UNCTAD and UNESCAP.

A range of implementation guides and checklists have been produced during the project, including both generic (regional) guides and country-specific guides.

Several surveys were conducted during the E-Commerce Project in order to gain a more detailed understanding of developments and issues in the region, and to give member countries an opportunity to provide detailed input at key stages of the project. Questionnaires were sent to government representatives in each of the ASEAN member countries and the results were collated and published during the project. Surveys regarding the following issues were conducted:

- E-commerce legal infrastructure in ASEAN (October 2004, Phase 1).
- Implementation issues and constraints for a harmonized e-commerce legal infrastructure in ASEAN (February 2005, Phase 1). This survey is the most relevant survey for other developing nations and regional associations. It collected data on the implementation challenges faced by ASEAN member countries: some of the survey results are discussed below in subsection 3.
- Cyberlaws in ASEAN (October 2005, Phase 1). This survey revealed some significant trends and

gaps in cyberlaw coverage, which are discussed below in subsection 4.

- Current legal, regulatory and institutional approaches to e-contracting and ODR infrastructures in ASEAN (February 2006, Phase 2).

2. Domestic implementation

As is the case in other regional groupings, the 10 ASEAN member countries are very diverse in areas such as culture, religion, legal systems, types of government and level of development.

When ASEAN reaches a consensus decision to take action – for example, its decision to implement harmonized e-commerce laws – the next challenge is to implement this decision at the domestic level. In the area of e-commerce legal infrastructure, the diversity amongst member countries is most noticeable with regard to the different levels of development, since ASEAN includes both highly developed countries with a mature e-commerce infrastructure (such as Singapore) and developing countries with only a rudimentary e-commerce infrastructure (such as the Lao People's Democratic Republic).

However, a positive aspect of the E-Commerce Project is that it continues to have a direct impact on the development of domestic e-commerce legal

infrastructure in ASEAN member countries, sooner than anticipated in the project design. This impact can be seen in the table 8.1.

It is encouraging that both developed and developing member countries have been able to enact domestic e-commerce laws in a relatively short period. The three countries, as shown in the table 8.1, which are yet to enact e-commerce laws all have draft laws available and are on track to meet the e-ASEAN deadline of December 2008. However, the scope of the project goes beyond enactment of e-commerce laws alone, and some significant challenges remain in implementing a comprehensive e-commerce legal infrastructure in all 10 ASEAN member countries. For example, several member countries are still developing detailed regulations for the implementation of their e-commerce laws in areas such as the accreditation of digital signature service providers.

In addition, those member countries that did have e-commerce laws in place at the beginning of the project may still need to review their laws for consistency with its guidelines; in particular, the guidelines include a recommendation that member countries consider amending their domestic legislation to ensure harmonization with the United Nations Convention on the Use of Electronic Communications in International Contracts 2005. This issue is discussed in greater detail below (section C).

Table 8.1

E-commerce legislation in ASEAN member countries

Member country	Status of e-commerce laws – project inception (January 2004)	Status of e-commerce laws – current (October 2007)
Brunei	Enacted	Enacted
Cambodia	None	Draft
Indonesia	None	Draft
Lao People's Democratic Republic	None	Draft
Malaysia	None	Enacted
Myanmar	Draft	Enacted
Philippines	Enacted	Enacted
Singapore	Enacted	Enacted
Thailand	Enacted	Enacted
Viet Nam	None	Enacted

Source: ASEAN E-Commerce Project, internal project materials, ASEAN secretariat and Galexia, October 2007.

3. Domestic implementation challenges

Priority challenges for all member countries

During the project a survey was conducted to examine some of the specific implementation challenges faced at the domestic level.¹⁸ It revealed that there are some common ASEAN-wide challenges to the implementation of e-commerce legal infrastructure. The main challenges are limited government policy or support, limited infrastructure, limited funding; and a shortage of skills and training.

Lack of private and public sector support has also been identified by some member countries as posing a barrier to the implementation of e-commerce legal infrastructure. Ultimately, it is in the interest of the public and the private sector if they can complete more efficient transactions in the online environment. During implementation, initiatives can be employed by Governments to increase awareness and support on the part of the private and public sectors. Those initiatives have the added advantage that they also help to increase the uptake of e-commerce.

Priority challenges for CLMV member countries

The implementation challenges faced by CLMV countries (Cambodia, the Lao People's Democratic Republic, Myanmar and Viet Nam – the less developed ASEAN member countries) are slightly different from those faced on an ASEAN-wide basis. This is because of the different needs of these countries in implementing their e-commerce legal infrastructure. The results of the survey reveal that the main implementation issues faced by CLMV countries are (in order of priority): limited government policy and support, the lack of a strong market for e-commerce products and services, limited funding, limited infrastructure, and a shortage of skills and training.

The survey revealed that limited government policy support appears to pose a significant and shared barrier to implementing a harmonized e-commerce legal infrastructure. There are many reasons why there may be only limited government policy in support of a particular aspect of e-commerce law. In some jurisdictions other areas of regulation may be prioritized before a harmonized e-commerce legal infrastructure is established. Also, Governments may perceive that there is no market for e-commerce at the present time,

or that the necessary e-commerce infrastructure is not yet in place.

Without supportive government policy it is difficult for implementation to occur. Although there is clear support for a top-level e-commerce law in each member country, a comprehensive e-commerce legal infrastructure requires that training, capacity-building and awareness activities be carried out. These aspects of legal infrastructure require financial support and will often compete for funding with other government priorities. Government policy provides the primary impetus to implement e-commerce legal infrastructure; once there is government support, other resources such as funding, infrastructure, and skills and training can be allocated.

The results of the survey also revealed that the lack of funding, skills and training presents a significant implementation challenge. This indicates that capacity-building initiatives and other forms of assistance can play a vital role in enhancing the e-commerce infrastructure.

Funding is generally required from the initial scoping and policy formulation stage right through to implementation and follow-up work. Appropriate resources will need to be allocated by member country Governments to implement e-commerce legal infrastructure. Some member countries indicated that they did not have the resources or access to funds to enhance existing legal infrastructure. There may be a need for some member countries to seek assistance in this area from external sources such as ASEAN, the United Nations, and other regional and international organizations.

Capacity-building projects play an important role in educating government officials of ASEAN member countries and ensuring a common understanding among them about the requirements of a harmonized e-commerce legal infrastructure. Capacity-building will not only improve the skills and knowledge of professionals but would also help ensure a common understanding of the legal requirements of e-commerce infrastructure if projects were to be undertaken on an ASEAN-wide basis.

ICT infrastructure is generally still emerging in CLMV countries. Less than 1 per cent of the population in Cambodia, the Lao People's Democratic Republic and Myanmar, and less than 5 per cent of the population in Viet Nam have access to the Internet.¹⁹ The market for e-commerce in these countries is therefore small.

At present there is no perceived need (or no market) in those countries to prioritize e-commerce legal infrastructure.

ASEAN is involved in several projects to narrow the digital divide in the region. The Initiative for ASEAN Integration (IAI) is specifically aimed at doing that. Essentially, the IAI provides a framework for regional cooperation through which more developed ASEAN members could help those member countries that most need it. It focuses on education, skills development and worker training.

The IAI Work Plan for the CLMV countries focuses on the priority areas of infrastructure development (transport and energy), human resource development (public sector capacity building, labour and employment, and higher education), information and communications technology, and promoting regional economic integration (trade in goods and services, customs, standards and investments).

Projects such as the IAI and other development initiatives in the region and in individual member countries are all geared towards improving the ICT and telecommunications infrastructure in ASEAN member countries. The existence of such infrastructure can be an important building block for the implementation of a more advanced e-commerce legal infrastructure. It should be pointed out that measures addressing the digital divide are not relevant only to CLMV countries, the ASEAN secretariat having noted that there are also pockets of underdevelopment in the ASEAN-6 countries (Brunei Darussalam, Indonesia, Malaysia, Philippines, Singapore and Thailand).²⁰

A lack of skills and training was identified in the survey responses of the CLMV countries as a barrier to implementation of the recommendations. Such a lack was also identified as a challenge to implementation by other countries, including Indonesia and Thailand. One of the concerns is that professionals in those countries are not exposed to developed ICT regulatory and policy frameworks. This lack of exposure means that professionals in developing countries have not had the chance to develop or refine skills and knowledge in that area.

Resources required

In order of greatest need, survey respondents identified the following resources needed to assist member countries in implementing their e-commerce legal

infrastructure: funding for implementation activities; an ASEAN-commissioned integration project to help channel assistance from more developed member countries to less developed member countries; legal and technical training for key implementation staff such as policymakers and legal drafters; and awareness-raising for the Government and the private sector.

4. Cyberlaw coverage

In order to identify the broader legal context for the development of e-commerce legal infrastructure in ASEAN, the ASEAN E-Commerce and ICT Trade Facilitation Working Group asked for detailed information on the overall cyberlaw coverage in ASEAN member countries.

In 2005 the cyberlaws survey was conducted as part of the ASEAN E-Commerce Project. The results were briefly updated in June 2007.

The term “cyberlaws” generally refers to laws that address the legal issues that arise from the Internet and other communications technology. The survey examined laws enacted specifically for the online environment. These include laws where only a portion, for example, a part, a chapter section or chapter subsection, contains cyberlaw provisions. Laws of general application, for example consumer or intellectual property laws, are not intended to form part of this analysis of cyberlaws. However, it is noted that those general laws may nevertheless have some application in an online setting.

The list of cyberlaws that could be covered by this survey was limited by time and resource constraints, and so the survey was restricted to a selection of laws considered by the ASEAN E-Commerce and ICT Trade Facilitation Working Group to have a high priority.

Cyberlaw coverage is varied across ASEAN.²¹ Table 8.2 summarizes progress made in ASEAN member countries in enacting the nine identified cyberlaws as of August 2007.²²

The survey revealed the following trends in cyberlaw coverage in ASEAN:

Consumer protection

There is limited coverage in ASEAN of consumer protection laws for e-commerce. Coverage does not

extend beyond a section in Malaysia's Communications and Multimedia Act 1998²³ that provides that network service and application providers must deal reasonably with consumers and adequately address consumer complaints; a subsection in the Philippines Electronic Commerce Act 2000²⁴ that states that violations of the Consumer Act 1991²⁵ committed through the use of electronic transactions will be subject to the penalties contained in that Act; and a proposed provision in the Indonesian Bill on Electronic Information and Transactions,²⁶ which states that consumers have the right to receive complete information on contract requirements and product details.

Despite the limited coverage in ASEAN of consumer protection laws for e-commerce, most jurisdictions have general consumer protection legislation in place. These, in most circumstances, will apply to goods and services sold online.

Online consumer protection is a high priority in some key ASEAN trading partners, including Australia, the European Union and Japan, and this has resulted in growing interest in online consumer protection in ASEAN. In early 2007 the ASEAN E-Commerce and ICT Trade Facilitation Working Group added the harmonization of online consumer protection laws to its working agenda. This is likely to result in further discussion of online consumer protection laws

in ASEAN Member countries, although no specific project or timetable has been considered at this stage

Privacy and data protection ²⁷

At present no laws have been enacted in ASEAN member countries that deal with privacy and personal data protection. Three member countries have draft privacy legislation – Indonesia, Malaysia and Thailand. However, it is uncertain in some member countries when legislation will be enacted and the drafts were developed some time ago. Instead of implementing laws, Singapore has chosen to adopt a self-regulatory approach through the E-Commerce Code for the Protection of Personal Information and Communications of Consumers of Internet Commerce.

The majority of ASEAN member countries are also members of APEC, which has been developing and implementing the APEC Privacy Framework since 2004. This has a strong influence on privacy developments throughout Asia, and it is unlikely that ASEAN member countries will make further progress on privacy legislation until some key APEC privacy issues have been resolved, particularly APEC's work on cross-border privacy rules. APEC expects to conduct some "pathfinder" projects on cross-border privacy rules in 2008.

Table 8.2
ASEAN cyberlaw coverage

	Consumer protection	Privacy	Cybercrime	Spam	Online content regulation	Digital copyright	Domain name regulation	Electronic contracting	Online dispute resolution
Brunei	None	None	Enacted	None	Enacted	Enacted	Enacted	Enacted	None
Cambodia	None	None	None	None	None	Enacted	Enacted	Draft	None
Indonesia	Draft	Draft	Draft	None	None	Enacted	Draft	Draft	None
Lao People's Democratic Republic	None	None	None	None	None	Planned	None	Draft	None
Malaysia	Enacted (voluntary)	Draft	Enacted	Enacted	Enacted	Enacted	Enacted	Enacted	None
Myanmar	None	None	Enacted	None	Enacted	Planned	None	Enacted	None
Philippines	Enacted	None	Enacted/draft	Draft	None	Enacted/draft	None	Enacted	Enacted
Singapore	None	Enacted (voluntary)	Enacted	Enacted	Enacted	Enacted	None	Enacted	None
Thailand	None	Draft	Enacted	Planned	None	Planned	None	Enacted	Planned
Viet Nam	None	None	Enacted	None	None	None	Enacted	Enacted	None

Source: ASEAN E-commerce Project, Survey of Cyberlaws in ASEAN (internal project materials), ASEAN secretariat and Galexia, October 2005 (updated August 2007).

Meanwhile, the ASEAN E-Commerce and ICT Trade Facilitation Working Group is maintaining a watching brief on privacy laws in the region, and there is some interest in developing a project on harmonization of privacy laws in ASEAN in the future.

*Cybercrime*²⁸

At present seven out of ASEAN's ten member countries have cybercrime laws in place, and Indonesia has a draft law. Legislation adopted in member countries varies slightly; however it contains similar offences. Offences in cybercrime laws in ASEAN centre on unauthorized access, unauthorized access with the intent of committing an offence and unauthorized modification of computer material. These mirror offences contained in the Computer Misuse Act 1990 (United Kingdom).²⁹ Cybercrime legislation in most ASEAN member countries also contains provisions that make it an offence to disclose a computer access code without authorization.

Cybercrime is of particular concern to ASEAN and the ASEAN E-Commerce and ICT Trade Facilitation Working Group has added cybercrime laws to its list of potential harmonization projects.

Spam

Singapore is the only ASEAN member country that has enacted an anti-spam law,³⁰ although there is also a provision in a Malaysian Act that may be of some limited assistance in prosecuting spammers. There are plans to enact laws in two other member countries.³¹

There may be greater cyberlaw coverage in ASEAN in the future as spam becomes more of a nuisance and lawmakers become more familiar with the legal controls needed to regulate it. The enacted legislation in Singapore may provide lawmakers with a convenient reference point for drafting their own dedicated spam laws.

Online content regulation

Four out of ten ASEAN member countries have content-regulation regimes in place. They control the publication of online material on the basis of social, political, moral and religious values of the Governments of those countries. The regimes have similar content restrictions that apply to print media.

As use of the Internet increases, it is likely that other ASEAN member countries will introduce content-regulation regimes reflecting their social, moral and political values. Online content regulation is now commonplace in most developed countries, as Governments attempt to regulate the availability of illegal content such as child pornography and racial vilification sites.

While government policy plays a significant role in establishing online content-regulation regimes, it might be some time before establishment of such regimes becomes a priority in some CLMV countries. The fact that the ICT infrastructure in those countries is still developing means that it will take a number of years before there is a significant rate of Internet use, and CLMV member countries have higher priorities at this stage.

Digital copyright

The coverage in ASEAN countries of laws on digital copyright is quite extensive. Six member countries have laws in place and a further two have plans to enact legislation.³²

The scope of coverage of digital copyright issues varies across member countries. Some have detailed provisions addressing a number of digital copyright issues, while others do not go beyond recognizing that copyright subsists in computer programs and the granting of associated rights. This limited recognition is often to be found in less developed Member countries and it is unlikely that regulation of digital copyright issues will advance greatly beyond that level.

*Domain name regulation*³³

Currently, four out of ten ASEAN member countries – Brunei, Cambodia, Malaysia and Viet Nam – have laws on domain names. The level of detail of those laws varies greatly, and only Cambodia has an entire legal instrument devoted to that cyberlaw topic.³⁴

The limited coverage of laws regulating domain names does not mean that there are no administrative procedures or alternative mechanisms in member countries to regulate this particular cyberlaw. Member countries have generally an organization assigned as the chief registrar of domain names, which controls the granting of and conditions for use of, domain names. This body often has a number of policies and

procedures in place regarding the granting and use of its country-level domain.

Additionally, domain name registrars in ASEAN countries often have in place online dispute resolution policies to aid in resolving disagreements about the use of domain names.

Electronic contracting ³⁵

Electronic contracting is the area where full coverage in ASEAN countries seems likely. All member countries have enacted legislation or have draft legislation in place.³⁶ There is also a great degree of similarity in the electronic transactions laws of member countries since the legislation in most countries is based either on the UNCITRAL Model Law on Electronic Commerce³⁷ or on the project recommendations from Phases 1 and 2 of the current ASEAN E-Commerce Project.

ASEAN has set a December 2009 deadline for member countries to facilitate cross-border electronic transactions and the use of electronic signatures through better practice guidelines for electronic contracting. Those guidelines are based on the new UN Convention on the Use of Electronic Communications in International Contracts 2005³⁸ and were developed during Phase 2 of the current ASEAN E-Commerce Project.

Online dispute resolution (ODR) ³⁹

There are very few laws on online dispute resolution (ODR) in ASEAN countries. At present only the Philippines has laws in place, and Thailand is the only member country with plans to enact laws. Singapore has established ODR facilities and Malaysia has plans to establish an International Cybercourt of Justice; however, neither country has laws in place.

ODR initiatives are a growing area of IT and e-commerce development in ASEAN. Once more ODR mechanisms have been put in place, it is likely that laws will follow. As mentioned above, ASEAN has set a December 2009 deadline for the development of guiding principles for ODR services in ASEAN.

A good example of an ASEAN-based ODR service is the Philippines MultiDoor Courthouse described in box 8.1.

5. Jurisdiction

Online jurisdiction is a significant policy issue with regard to cyberlaws and international trade that has been considered in some detail in ASEAN. Although online jurisdiction did not form part of the cyberlaw coverage survey discussed above, it did form part of Phase 2 of the ASEAN E-Commerce Project.

Online jurisdiction is likely to be of interest to many regional and multinational organizations that are attempting to harmonize e-commerce legal infrastructure. Unfortunately, the issue does not have a “neat” solution and further work is required in ASEAN and elsewhere on harmonization of approaches.

Legally effective electronic transactions require a method of resolving cross-border jurisdiction issues that is properly defined and certain. There are a number of benefits to having these complex issues resolved, including an increase in confidence and uptake of e-commerce by businesses and consumers.

Achieving harmonization of jurisdiction and of law rules on e-commerce is important in ASEAN in order to help achieve the region’s economic integration goals. Jurisdiction in business-to-consumer (B2C) e-commerce transactions is a very high priority issue for ASEAN.

The ASEAN project examined numerous international developments in this field, including developments in the EU, the OECD and the Hague Conference on Private International Law. It also examined international case law and some sample approaches to online jurisdiction in Australia and Japan.⁴⁰ At this stage there is no international consensus approach to jurisdiction for e-commerce transactions, although discussions on this important issue are continuing in various forums.

Ultimately, the project guidelines provide recommendations that would assist ASEAN in seeking a consistent, harmonized, pro-consumer approach to B2C jurisdiction in order to build consumer confidence and trust in e-commerce.

For example, the project recommended that ASEAN consider developing a guideline on the harmonization of jurisdiction for B2C e-commerce transactions. The guideline should encourage member countries to adopt measures that ensure that proceedings against consumers are brought only in the State where the consumer is domiciled, and measures that ensure that consumers cannot waive their consumer protection rights in contracts.⁴¹

Box 8.1

Online dispute resolution in the Philippines

The Philippine MultiDoor Courthouse⁴² (PMC) is a Philippines-based ODR service. It was launched in 2004 by the Cyberspace Policy Centre for the Asia-Pacific (CPCAP),⁴³ a non-profit organization concerned with issues pertaining to the overlap between law and technology.

The ODR service offered by the PMC includes online arbitration, mediation, neutral evaluation and blind bidding services to disputants. All services are available to the general public, as well as to merchants, retailers and commercial establishments. However, disputes that are filed must be of a commercial nature. They include claims for failure to deliver goods or delivering faulty goods, insurance claims and commercial contract disputes.

A dispute resolution process is initiated when a party files a dispute by logging in to its user account on the PMC website (new users can create an account online) and then proceeding to supply the particulars relating to the dispute. This would typically include information about the complainant and respondent and the relief sought.

The complainant is asked to upload a copy of any contractual arrangement between the parties that requires them to submit the dispute to the PMC. If such an agreement exists, an email is sent to the respondent, informing him that the dispute has been filed with the PMC. If there is no agreement, an e-mail is sent inquiring whether the respondent agrees to participate in the dispute resolution process. If the respondent consents, PMC staff then evaluate the particulars of the dispute and make a recommendation as to which of the specific services offered by the PMC should be used by the parties to resolve the dispute. The parties are, however, able to agree to use whichever mode of dispute resolution they prefer.

In cases where parties choose arbitration as their preferred method for resolving the dispute, they are able to select the arbitrator or a panel of arbitrators from a roster of accredited arbitrators provided by the PMC. Similarly, if mediation is chosen, the parties are able to nominate their preferred mediator from a list provided by the PMC.

As a general rule, the fees for the ODR service would be much less than what a party would have to pay when compelled to litigate. During the pilot phase of the PMC's existence, no fee has been charged for the use of its services. However, the PMC states on its website that as the volume of disputes filed begins to increase, it will start charging a fee to cover the costs of services provided to disputants.

Source: ASEAN E-Commerce Project, Documented Analysis of ASEAN Activity in Electronic Contracting and Online Dispute Resolution (ODR) - Discussion Paper 3 (internal project materials), ASEAN secretariat and Galexia, May 2006.

Further work is required in ASEAN and elsewhere to resolve online jurisdiction issues in order to provide greater certainty in electronic transactions across borders.

C. Lessons learned

1. Regional lessons

The ASEAN E-Commerce Project provides key lessons on regional harmonization of e-commerce legal infrastructure that might be of interest to other regional associations with regard to regional harmonization of e-commerce infrastructure and trade facilitation

Global harmonization focus

ASEAN is just one of a number of regional and multinational organizations that have expressed an interest in regional harmonization of e-commerce legal infrastructure. As discussed above, other groups

interested in harmonization in this field include UNESCAP, the South Asian Association for Regional Cooperation, the Pacific Islands Forum, the European Union and the Southern African Development Community.

However, when selecting a model for harmonization, ASEAN member countries also wanted to ensure that their legal infrastructure would be compatible with international developments.

An excellent example of ASEAN considering international models is its selection of the UN Convention on Electronic Contracting as the core model for electronic contracting law (both regionally and domestically). There are some difficulties in using model laws as a basis for harmonization, as they have been interpreted differently in different jurisdictions. There are obvious advantages in using binding treaties as a model for harmonization.

UNCITRAL finalized the United Nations Convention on the Use of Electronic Communications in Interna-

tional Contracts in 2005. It is known in ASEAN by its short title – the UN Convention on Electronic Contracting. It is the first binding UN convention addressing legal issues created by the digital environment.

The convention seeks to enhance the legal certainty and commercial predictability of international electronic transactions by setting out a number of interpretive rules for the use of electronic communications in negotiating and drawing up contracts.

The convention also seeks to harmonize national laws regarding how electronic contracts can be drawn up. Harmonized domestic legislation will reduce the legal uncertainty in business transactions when contracting parties are from different countries. While the previous UNCITRAL model laws are texts that the United Nations recommends national legislators incorporate into domestic law, a United Nations convention once signed and then ratified becomes legally binding on the ratifying country. Model laws provide a greater degree of flexibility than conventions in allowing enacting States to adapt legislation best suited to their existing domestic law, but at the risk of a reduction in cross-border regulatory uniformity or consistency.

Since the convention is loosely based on the model laws, its adoption and ratification by countries with existing legislation deriving from those laws should be straightforward, even though some model law principles have been modified in the convention to meet the need for the greater certainty required in a binding treaty.

Additional principles have been incorporated to address new legal concerns that have arisen in electronic contacting since the first Model Law was issued in 1996, notably invitations to make offers,⁴⁴ use of automated information systems⁴⁵ and errors in electronic communications.⁴⁶ Those provisions would be useful additions to national laws, giving more certainty to e-commerce.⁴⁷

For ASEAN member countries currently without any e-commerce-enabling legislation, it has been suggested that it would be more convenient and progressive to consider one set of new laws to give effect to both model laws and the extra provisions of the Convention.

Whether or not a particular country signs the convention, the text is likely to reflect minimum standards for most cross-border transactions. The text of the convention will likely to become the default standard for e-commerce law, and ASEAN member

countries may wish to ensure that their own laws and practices are compatible with it. Becoming a party to the convention will further trust and certainty in cross-border contract formation and electronic transactions.

Ultimately the ASEAN E-commerce Project recommended that member countries consider signing the convention. It also recommended that they consider amending domestic electronic contracting laws to ensure consistency.⁴⁸ There has been considerable interest in the convention as many countries in the region have signed it, including China and the Russian Federation. Singapore was the first ASEAN member country to sign the convention, in 2006, and the Philippines signed it in 2007. Most ASEAN member countries are currently considering either signing the convention or ensuring that their domestic laws are compatible.

Trade facilitation focus

Trade facilitation issues are important in ASEAN as the region is attempting to boost the pace of development in member countries by expanding regional and international trade opportunities. ASEAN is conducting a wide range of trade facilitation projects and activities. The ASEAN E-Commerce Project includes a strong trade facilitation focus and attempts to identify and address any barriers to cross-border trade that might arise from gaps or inconsistencies in e-commerce legal infrastructure.

In that context, there were strong practical links between the development of e-commerce legal infrastructure and trade facilitation in some of the activities of the ASEAN E-Commerce Project. Those links included:

- Project recommendations to remove e-commerce legal exemptions that might restrict trade (e.g. customs documentation exemptions);
- Project recommendations to expand domestic e-commerce legislation to allow recognition of digital signatures across borders in order to facilitate trade;
- Consideration of overlaps with e-commerce chapters in free trade agreements; and
- The use of practical trade case studies to illustrate the links between e-commerce legal infrastructure and trade facilitation in project workshops and documentation

One of the most interesting practical trade case studies in the E-Commerce Project was the development of the Pan-Asia E-Commerce Alliance. Box 8.2 highlights the link between e-commerce legal infrastructure and trade facilitation.

Importance of developing a comprehensive e-commerce legal infrastructure

At the regional level the E-Commerce Project found that it was necessary to develop a comprehensive legal infrastructure – not just legislation. This required work on:

- **A. Laws**
The law itself, as passed by Parliament.
- **B. Regulations and codes**
Any additional regulatory instruments that provide more specific guidance on how to apply the law, such as regulations and codes of conduct.
- **C. Regulators**
The regulatory agencies that are responsible for administering and enforcing the law, regulations and codes.
- **D. Registration, licensing and accreditation**
The system, if applicable, for registering, licensing and/or accrediting individuals and organizations that may provide services under the law. This may include the establishment of licensing and accreditation agencies (although sometimes the regulator may also take this role).
- **E. Standards**
Government and/or industry may develop technical standards that play a particular role in ensuring compliance with the law. In some instances the law may require compliance with the standard, or it may be a licensing or registration requirement.
- **F. Enforcement and review**
Some legal infrastructures will include a specific forum for review and enforcement of the particular law (such as a specialized tribunal). In many situations this role will be undertaken by the general court system.
- **G. Training, education and awareness-raising**

The provision of training and education to ensure that the law is understood and complied with, and the raising of awareness of the legal requirements amongst service providers and end-users.

A good example of the application of this comprehensive approach to legal infrastructure is set out in the table 8.3, which compares the required components of legal infrastructure across four common elements of e-commerce.⁴⁹

2. Domestic lessons

The ASEAN E-Commerce Project also provides some interesting lessons on the domestic implementation of e-commerce legal infrastructure that might be of interest to other developing nations that are developing their own e-commerce legal infrastructure

Implementation tools

Detailed implementation guides, implementation checklists, timelines and target dates all proved useful in the development of e-commerce legal infrastructure in ASEAN member countries.

The use of implementation checklists will be of interest to developing nations and regional associations. These checklists incorporate all of the E-Commerce Project recommendations and allow member countries' progress to be tracked against each implementation task. A sample from the generic (regional) guide (with data removed) is provided in table 8.4.

Member countries complete the implementation checklist at regular intervals and a summary of progress is presented to the ASEAN E-Commerce and ICT Trade Facilitation Working Group. This has proved to be a useful mechanism for encouraging member countries to review their own progress and to share information with other member countries.

In addition to the generic guide and the implementation checklist, country-specific guides were prepared for Phase 1 of the E-Commerce Project. They provided more detailed recommendations and advice as they were customized to the particular needs and stage of development of each country. A sample from a country guide (with data removed) is provided in table 8.5.

The country guide repeats the key implementation tasks from the generic guide, but includes observations

Box 8.2

The Pan-Asian E-Commerce Alliance

The Pan-Asian E-Commerce Alliance (PAA) was established in July 2000 by three leading e-business service providers: CrimsonLogic of Singapore, Tradelink of Hong Kong (China), and Trade-Van of Taiwan Province of China. A further six companies,⁵⁰ from China, the Republic of Korea, Japan, Malaysia, Macao (China), and Thailand have joined it. These nine members now reportedly represent a total combined membership of more than 150,000 organizations, including most active trading enterprises in the Asian market.⁵¹

The goal of the PAA is to “promote and provide secure, trusted, reliable and value-adding IT infrastructure and facilities for efficient global trade and logistics”.⁵² To achieve that goal, the PAA has three primary areas of focus:

- The secure and reliable transmission of trade and logistics documents (including the mutual recognition of digital certificates in exchanged electronic documents);
- The interconnection of network services to provide e-commerce transaction application services for the business community; and
- The establishment of a Pan-Asian portal to facilitate communication between global businesses.

The PAA's major initiatives are outlined below:⁵³

- **Secure cross-border transaction services**

This project facilitates the secure electronic exchange and filing of trade-related documents and logistics information across borders, such as electronic applications for trade permits and tracking of consignments. In 2004, the PAA launched a cross-border customs declaration service and extended its use to freight forwarders.⁵⁴

- **Mutual recognition of public key infrastructure (PKI)**

The PAA has established an infrastructure to support both end-to-end digital signatures and digital signatures between service providers.

- **Cargo tracking service**

The PAA is working to incorporate a cargo-tracking service into the secure cross-border transaction services that will provide information for freight forwarders on the status of their cargo.

The PAA is seen as a successful and growing initiative to facilitate cross border trade. Its significance is recognized by both ASEAN and APEC.

The ASEAN E-Commerce Legal Infrastructure project has used the PAA as a case study on the links between e-commerce and trade facilitation. The APEC Trade Facilitation Action Plan (2002) encourages member economies to adopt common frameworks for trade-related procedures among enterprises, and specifically names the PAA as an example.⁵⁵ The Action Plan seeks to implement the “Shanghai Goal” of reducing business transaction costs by 5 per cent.

While there are no statistics available to demonstrate the exact economic impact of its initiatives, the PAA estimates that savings from electronic transactions in trade chains could reach 20 per cent or more.⁵⁶

The PAA case study demonstrates that there is a clear business demand for electronic services to enable cross-border trading and that, in the absence of government action, businesses are ready and able to take joint action to meet that demand.

Although the PAA has been effective in enabling transactions, there are certain risks and challenges associated with this kind of private-sector-led initiative. Lack of legal certainty regarding the use of electronic documents and digital signatures may mean that Governments or courts will not recognize their validity in the event of a dispute. Even where Governments in the economies represented by PAA members accept the use of electronic documents for certain purposes, such as Customs filing declarations, this does not amount to a government-wide recognition that can be relied on in other commercial contexts.

Source: ASEAN E-Commerce Project, International Developments on Mutual Recognition of Digital Signatures – Discussion paper 6 (internal project materials), ASEAN secretariat and Galexia, July 2007.

and suggestions about appropriate coordination and drafting tasks, and commentary on the suitability of specific laws, provisions and terms.

Lastly, an implementation timeline provided an excellent source of motivation for implementation in member countries. The *ASEAN E-Commerce Project* benefited from two key deadlines. First, ASEAN

Member countries should have enacted domestic legislation to provide legal recognition of electronic transactions by 31 December 2008. Second, by 31 December 2009, ASEAN member countries should have facilitated cross-border electronic transactions and the use of digital signatures through the adoption of better-practice guidelines for electronic contracting and guiding principles for online dispute resolution

Table 8.3
Components of an e-commerce legal infrastructure

E-commerce legal infrastructure components	1. Online drawing up of contracts	2. Jurisdiction	3. Authentication	4. Electronic payment
Summary	The ability to draw up contracts via electronic means, free of legal restrictions which would require paper records or handwritten signatures.	The ability to determine the jurisdiction of any e-commerce transaction, including determining the applicable law and the appropriate forum for the resolution of disputes.	The ability to reliably authenticate the parties to an e-commerce transaction and the content of any messages exchanged in the transaction.	The ability to complete an e-commerce transaction via a secure and reliable electronic transfer of value.
A. Laws	A broad law may be required which confirms that contracts can be drawn up via electronic means. This law may contain some limited exceptions.	On this issue national laws will not play a significant role. Public international law and international and regional agreements and treaties will be more significant.	National laws, based on the UNCITRAL model laws and the UN Convention, may be required in order to ensure that digital signatures can be used with confidence in e-commerce transactions.	National laws regulating banking, payment systems and the provision of credit may have to be amended to include coverage of electronic payment systems.
B. Regulations and codes	Usually, no further regulation or codes are required for this aspect of e-commerce law.	Regulations and codes are unlikely to be required.	Additional regulations and codes may be required which provide more specific guidance on particular forms of authentication. In addition, a regulation or code may be required in order to establish the rules for recognizing digital certificates issued in other jurisdictions.	Most of the detailed regulation of electronic payment systems will be contained in specific regulations and codes of conduct. Laws on this topic tend to be very broad.
C. Regulators	Usually, no specific regulator is required for this aspect of e-commerce law. There is no specific regulator in most jurisdictions for contract law.	Usually, no specific regulator is required for this aspect of e-commerce law. In any case, there is no appropriate regional or international regulator that could fulfil this role.	Either an existing regulator or a new regulator may need to take responsibility for establishing and maintaining the integrity of the public key infrastructure. However, this role may also be undertaken by a non-governmental agency under certain conditions.	Most electronic payment providers will fall within the existing jurisdiction of national financial system regulators, depending on the nature of the service provided.
D. Registration, licensing and accreditation	Usually, no specific registration, licensing or accreditation is required for this aspect of e-commerce law. All parties are presumed to have the capacity and ability to enter into online contracts without the need to be registered or obtain particular accreditation.	Usually, no specific registration, licensing or accreditation is required for this aspect of e-commerce law.	Some service providers and parties within a public key infrastructure will need to be registered. Mandatory or voluntary licensing may be required. Some form of accreditation will be essential in order to ensure that high standards are maintained in the issuing of digital certificates.	Most electronic payment providers will require a licence at the national level.
E. Standards	Technical standards for the formation of online contracts may be useful, but are not essential. They should not be required in jurisdictions where a "technology neutral" approach has been adopted.	Some international standards have already been developed for the allocation of jurisdiction in online contracts.	Technical standards will play an important role in ensuring interoperability. These standards may be referred to in the law or regulations, or their use might be left to market forces.	There are a plethora of international and national technical standards which apply to the electronic transfer of funds. These help to ensure interoperability and to encourage best practice.

Table 8.3 (continued)

E-commerce legal infrastructure components	1. Online drawing up of contracts	2. Jurisdiction	3. Authentication	4. Electronic payment
F. Enforcement and review	The general court system is likely to provide adequate enforcement and review of the online formation of contracts. However, there may need to be some minor changes to court rules and procedures regarding the admission of evidence etc.	The courts will have a significant role in enforcement and review of jurisdiction. In the absence of international and regional agreements and treaties, the courts will decide the jurisdiction of e-commerce transactions.	The general courts will play a limited role in the enforcement and review of the use of digital certificates. Some enforcement and review activities may also be undertaken by the regulator.	The general courts will play a limited role in the enforcement and review of the use of electronic payment systems. Some enforcement and review activities may also be undertaken by the relevant regulator/s.
G. Training, education and awareness-raising	Education regarding the correct drawing up of online contracts may be important amongst industry and consumers. There may also need to be some general awareness-raising activity to overcome any assumption by parties that all contracts must be "in writing".	Education regarding jurisdiction may become an important requirement, especially if no international or regional agreement is reached on this matter.	Training, education and awareness raising will all play an important role in promotion of the use of digital certificates.	Training, education and awareness raising will all play an important role in promotion of the use of electronic payment systems. This is essential in developing consumer trust and confidence in e-commerce.

Source: C Connolly and P van Dijk, What is e-commerce legal infrastructure? Galexia, June 2004.

services in ASEAN, as well as a mutual recognition framework for digital signatures.

The use of deadlines worked well in ASEAN as it provided a source of motivation. Deadlines have also helped staff that are responsible for implementing e-commerce legal infrastructure at the domestic level to obtain funding and support from senior government officials

Importance of aligning domestic and international e-commerce laws

It is important for countries not to have two e-commerce laws (one for domestic transactions and one for international transactions). That situation may arise where a country signs international agreements (e.g. the United Nations Convention on Electronic Contracting or a specific free trade agreement) that apply a particular legal standard only to cross-border contracts.

This issue was considered in detail in the E-Commerce Project and the Singapore case study in box 8.3 provides useful lessons for other countries.

Information-sharing

Information-sharing was seen as one of the most important tools in ASEAN, as its member countries

include both developed and developing nations. Information-sharing required the publication of legislation and draft legislation in a common language (English) and the availability of legislation and related documents in electronic form.

During the project, an electronic repository of all relevant E-commerce primary materials (Acts, legislation, conventions and guidelines) was developed and hosted by Galexia on a secure project extranet. All ASEAN member countries provided an official English translation of at least one major legal instrument for inclusion in that repository and the materials are regularly accessed and searched by hundreds of government representatives across the region.

ASEAN is considering options for the permanent hosting of those materials after completion of the project.

Implementation assistance

Many developing nations are not able to develop effective e-commerce legal infrastructure without some form of external assistance. Several ASEAN member countries have benefited from external assistance, including training programmes and advisory services on the legal aspects of e-commerce provided by UN organizations such as UNCTAD,⁵⁷ UNCITRAL,⁵⁸ and UNESCAP.⁵⁹

Table 8.4
Sample generic implementation guide

Phase 1. Guideline 3: E-Commerce Law Availability E-commerce legislation (including drafts where publicly available) should be made available in English and in electronic form.										
Implementation Task (from the Phase 1 Generic Implementation Guide (GG1))	Brunei	Cambodia	Indonesia	Lao People's Democratic Republic	Malaysia	Myanmar	Philippines	Singapore	Thailand	Viet Nam
3A. Include e-commerce legislation in an online legislation collection	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
3B. Ensure that the e-commerce legislation is available in English	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
3C. Ensure that the e-commerce legislation is easily searchable	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
3D. Promote e-commerce legislation through prominent links from a well-used business or trading portal	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
3E. Ensure that a plain-language summary of the e-commerce legislation is available online	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

Source: ASEAN E-Commerce Project, Generic Implementation Guide 1 (internal project materials), ASEAN secretariat and Galexia, January 2006.

Table 8.5
Sample country implementation guide

Progress on Guideline 9: Recognition Criteria		
Coordinating agency		
Coordination tasks		
Drafting agency		
Drafting tasks		
Implementation task	Notes	Check
9A. Develop recognition criteria		<input type="checkbox"/>
9B. Assess compatibility with APEC guidelines		<input type="checkbox"/>
9C. Ensure that recognition criteria are available in English		<input type="checkbox"/>
9D. Ensure that recognition criteria are available online		<input type="checkbox"/>
9E. Use definitions that are consistent with international models		<input type="checkbox"/>

Source: ASEAN E-Commerce Project, Country Guide 1 (internal project materials), ASEAN secretariat and Galexia, December 2005.

UNCTAD's technical assistance includes the delivery of training activities and the provision of policy advice to help in the preparation of e-commerce laws taking into account national legislation and priorities, as well as regional harmonization initiatives.

With regard to ASEAN, UNCTAD has organized a series of awareness-raising workshops in Lao PDR and Cambodia since 2003 in cooperation with the Science Technology and Environment Agency of the Lao People's Democratic Republic and the Cambodian Ministry of Commerce, in an effort to help those

countries move forward in passing a law on electronic commerce before 2008, the deadline set by the e-ASEAN initiative. The objective was to create greater awareness and better understanding of the legal implications of e-commerce among policymakers and the business community.

The workshops were followed by an assessment of the need for law reform in the light of the current state of e-commerce development of the two countries. In the Lao People's Democratic Republic and Cambodia, technical assistance was provided to the drafting groups who are currently working on a draft decree to reflect the national legal system, as well as ASEAN

and international best practice. It was agreed that the most appropriate approach was one of relative simplicity compared to that of its ASEAN partners, bearing in mind the current state of development in Lao PDR and Cambodia, particularly concerning electronic commerce. The drafting process reflected five principles: (a) simplicity, reflecting the current state of development in the countries; (b) flexibility, recognizing that in the future more complex rules may be required; (c) reflecting regional best practice of ASEAN partners, based on existing laws and draft recommendations; (d) consistency with international harmonization initiatives from UNCITRAL; and (e) consistency with existing national laws.

Box 8.3

Singapore and the UN Convention

The UN Convention on the Use of Electronic Communications in International Contracts 2005⁶⁰ seeks to enhance the legal certainty and commercial predictability of international electronic transactions by setting out a number of interpretive rules for the use of electronic communications in negotiating and drawing up contracts.

In 2004 the Infocomm Development Authority of Singapore and the Attorney-General's Chambers began a joint public review of the Electronic Transactions Act 1998⁶¹ (ETA) and the Electronic Transactions (Certification Authority) Regulations 1999,⁶² partly in the context of substantial progress towards concluding a text for the subsequently adopted Convention.

Singapore was the first ASEAN member country to conduct such a review, and its experience should be helpful for other ASEAN members when considering whether to become a party to the convention (or at least to make their e-commerce legislation consistent with it). The written and publicly available submissions received from legal and commercial experts ensure that government attention is informed by the widest range of relevant expert stakeholders. The consultative process is also assisted by encouraging readers of the submissions to respond to a series of structured policy questions.

Stage 1 of the public consultation concerned possible amendments to the ETA relating to electronic contracting which might be desirable in the light of the convention. The consultation paper entitled *Stage I: Electronic Contracting Issues*⁶³ highlights the main changes and issues that might arise from adopting the convention, notably:

- The recognition of e-signatures – particularly whether the requirements in relation to function and reliability in the convention are consistent with current legal provisions;
- The rules on time and place of dispatch and receipt – particularly whether the present rules should be amended to be consistent with the convention's rules on controlling and retrieving electronic messages;
- Automated systems – particularly the status of e-contracts resulting from interaction with automated systems, as well as issues relating to errors made by a person in communication with an automated system; and
- Miscellaneous issues – including the validity of incorporating terms and conditions by reference in electronic communication, and whether legislation relating to the sale of goods in the physical world also applies to electronic goods.

The consultation paper of the joint review, *Stage III: Remaining Issues*,⁶⁴ recognizes that if the convention is widely adopted by other countries, it will set an international standard.⁶⁵ To enhance Singaporean commerce, it would be in Singapore's interest to have laws which are consistent with international standards. If Singapore accedes to the convention, it is likely that the regime applicable under the convention will be adopted for all contractual transactions, whether local or international. The Electronic Transactions Act 1998 will therefore have to be amended to be consistent with the provisions of the convention. To have two separate legal regimes for local and international contracts is considered confusing, especially since in electronic transactions it is often difficult to determine whether one is contracting with a local or foreign party.

Singapore signed the Convention on 6 July 2006.⁶⁶

Source: ASEAN E-Commerce Project, Framework Document (internal project materials), ASEAN secretariat and Galexia, September 2006.

D. Concluding remarks and policy recommendations

Although the ASEAN E-Commerce Project has had some success in delivering rapid progress in the development of a harmonized e-commerce legal infrastructure in ASEAN, it also reinforces some of the significant challenges faced by organizations in implementing harmonization projects of this type or implementing domestic e-commerce legal infrastructure.

During the project, ASEAN member countries noted a number of implementation challenges that they faced, and that are likely to be common to many other countries, especially developing countries. Key challenges include securing government policy support, identifying sufficient funding, and obtaining relevant training and assistance.

Thus, many developing nations may need some form of external assistance to develop effective e-commerce legal infrastructure. Several ASEAN member countries have benefited from external assistance, including training programmes and advisory services on the legal aspects of e-commerce provided by various United Nations organizations, such as UNCITRAL and UNCTAD.

Some challenges remain regarding in particular online jurisdiction, which is a significant policy issue in the development of cyberlaws and international trade. Although online jurisdiction was considered in some detail in ASEAN, it remains a major challenge. Online jurisdiction is likely to be of interest to many regional and multi-national organizations that are attempting to harmonise e-commerce legal infrastructure. Unfortunately, the issue of online jurisdiction does not have a “neat” solution and further work is required both in ASEAN and elsewhere on harmonization of that issue.

Policy recommendations to Governments and regional institutions considering harmonization of e-commerce legal infrastructure

The following policy recommendations, drawn from the ASEAN experience, could help Governments and regional institutions considering harmonization of e-commerce legal infrastructure. Some of the recommendations may also be relevant to developing countries that are in the process of reviewing existing laws or drafting new ones.

1. Focus on international interoperability

Part of the success of the ASEAN E-Commerce Project is due to its focus on global harmonization and international interoperability, rather than merely on regional harmonization. This focus on international interoperability included the selection of international models and templates, particularly the UN Convention on Electronic Contracting, for the implementation of domestic e-commerce law in ASEAN member countries. This ensured that ASEAN's e-commerce legal infrastructure would also be compatible with international developments, providing greater certainty for consumers and greater consistency for businesses.

2. Focus on trade facilitation

ASEAN has a strong focus on trade facilitation and is conducting a range of trade facilitation projects and activities. Trade facilitation was also included as an objective of the ASEAN E-Commerce Project. This resulted in constant testing of the project outputs against trade facilitation objectives. Some key recommendations that resulted from this focus were the recommendation to limit e-commerce law exemptions that impact on trade and the recommendation to adapt e-commerce laws to provide for cross-border recognition of electronic transactions.

3. Implementation tools

The ASEAN project shows that there is a need for detailed implementation tools to help developing countries implement e-commerce legal infrastructure, rather than simply high-level recommendations or generic discussion papers. The implementation tools used in the ASEAN project included regional implementation guides, country-specific implementation guides, implementation progress checklists and implementation timelines. All of these implementation tools were considered vital by project participants in achieving harmonization within the ambitious timelines set by ASEAN.

4. Comprehensive legal infrastructure

The ASEAN project shows the importance of developing comprehensive legal infrastructure, not just written laws. In the project work was undertaken on laws; regulations and codes; regulators; registration, licensing and accreditation; standards; enforcement and review; and training, education and awareness-raising.

5. Aligning domestic and international e-commerce laws

The ASEAN project shows the importance of aligning domestic and international e-commerce laws to avoid overlaps and inconsistencies. Although this is perhaps a lower priority issue than some of the other policy recommendations in this section, it is still important for countries to minimize inconsistencies and duplications in order to create a smooth, consistent legal platform for businesses engaging in e-commerce in the region.

Annex 8.1

ASEAN's countries' legislation

Electronic Transactions Order 2000 (Brunei)

[Draft] Law on Electronic Commerce 2007 (Cambodia)

[Draft] Bill of Act of the Republic of Indonesia on Electronic Information and Transactions (Indonesia)

[Draft] Law on Electronic Commerce 2006 (Lao People's Democratic Republic)

Electronic Commerce Act 2006 (Malaysia)

Electronic Transactions Law 2004 (Myanmar)

Electronic Commerce Act 2000 (Philippines)

Electronic Transactions Act 1998 (Singapore)

Electronic Transactions Act 2002 (Thailand)

Electronic Transaction Law 2005 (Viet Nam)

Annex 8.2

Survey on e-commerce legislation in developing countries

To take stock of initiatives by developing countries in the area of e-commerce and law reform, the UNCTAD secretariat sent out a questionnaire focusing on the action undertaken by developing countries to adapt their legislation to e-commerce. Governments were invited to complete the questionnaire, and to provide a copy of their e-commerce legislation. UNCTAD also took advantage of a training course on the legal aspects of E-commerce organized for Latin American Integration Association (ALADI) member States in August 2007 to gather responses.⁶⁷

The questionnaire asked whether countries had prepared national or regional e-commerce legislation. Questions were designed to identify the approach chosen and the priority given to e-commerce legal issues in the legislative process. Other questions focused on issues related to the enforcement of e-commerce legislation and the impact of such legislation on trade and development.

Responses to the questionnaire were received from Albania, Angola, Argentina, Bolivia, Brunei Darussalam, Chile, China, Costa Rica, Croatia, Cuba, Djibouti, Ecuador, El Salvador, Lao People's Democratic Republic, Lebanon, Malaysia, Mauritius, Mexico, Nicaragua, Pakistan, Paraguay, Peru, the Philippines, Qatar, the Republic of Korea, the Russian Federation, Senegal, South Africa, Sri Lanka, Turkey, Uruguay and Venezuela (Bolivarian Republic of).

It emerges from the 32 responses that 20 countries have already adapted their national legislation to e-commerce and 8 are in the process of doing so. In order of priority, Governments have focused on e-transactions, information security law (including public key infrastructure and cybercrime), consumer protection, intellectual protection rights, ISPs' liability, privacy, dispute resolution and e-contracting. To prepare their legislation, 20 countries have considered the UNCITRAL Model Law on E-commerce; 25 have considered the UNCITRAL Model Law on Electronic Signatures and 11 have considered the UNCITRAL Convention on the Use of Electronic Communications in International Contracts, while a few of them have actually adopted, signed or ratified the UNCITRAL e-commerce instruments (2 the Model Law on E-commerce; 11 the Model Law on Electronic Signatures and 5 the United Nations Convention). Eight countries have based their legislation on the European Directive on E-commerce, and 2 on the US e-commerce laws, while other countries have considered legislation adopted by France, Germany, India, Spain, Singapore and the United Arab Emirates.

The survey revealed that in most cases Governments, through the Ministry of Commerce, took early steps to adapt the legal and regulatory framework for e-commerce (between 1997 and 2002), while national ICT master plans were developed at a later stage or are being developed. When the legislation was not yet drafted, it became part of the national ICT plans. The survey reported eight countries that included it in their national ICT master plan.

As well as the adoption of e-commerce legislation, countries are concerned as regard its application and effectiveness, and one of the issues stressed in the survey was the building of capacities of legal professionals. To ensure enforcement of laws and regulations, countries such as Chile, Cuba, Ecuador, the Philippines and Sri Lanka have put in place programmes to train judges and civil servants in various e-commerce legal issues such as digital signatures, security and data protection. In Sri Lanka, capacity development through seminars and workshops was conducted by the Ceylon Chamber of Commerce and the Bankers' Association, and an ICT legal capacity-building programme through the Intellectual Property and Law Advanced Diploma Programme of Sri Lanka Law College has been developed. A large majority of reporting countries have not yet put in place any capacity-building programmes but intend to develop policies and initiatives in order to ensure the enforcement of e-commerce laws.

The main challenges reported by countries in terms of enforcement of e-commerce legislation included not only the lack of human resources in the legal community but also the lack of public awareness about the scope and application of the law and its benefits, and the legal security of e-business through the legislation adopted. More

broadly, countries reported consumers' the lack of trust in the security of e-commerce transactions and privacy protection, the difficulty in setting up the technical infrastructure (public key infrastructure, for example) and the need to accompany legal reform by a broader national reform of the information economy in order to seize the benefits of e-commerce.

For example, following the adoption of the Electronic Commerce Act in 2000, the Government of the Philippines has organized seminars and briefings on various e-commerce-related issues and concerns. Moreover, different groups have also been created among the agencies concerned, for example, technical working groups to discuss and address specific issues and concerns, including legal issues regarding e-commerce, such as but not limited to, data protection, e-payment, public key infrastructure and consumer protection. The adoption of e-commerce legislation by the Philippines was accompanied by initiatives to create awareness of e-commerce opportunities, as well as the definition of an ICT roadmap for 2006–2010 entitled “Empowering a Nation through ICT: The Philippine Strategic Roadmap for the Information and Communications Technology Sector”, issued by the Commission on Information and Communications Technology in October 2006.

The survey enquired about existing law cases since the implementation of e-commerce legislation. Only the Republic of Korea reported cases related to e-commerce issues such as data protection, domain names, electronic payment, consumer protection, patents, electronic contract formation, system integration and web-hosting. Sri Lanka mentioned ongoing cases before the Commercial High Court of Appeal, and the Philippines reported a criminal case in the Metropolitan Trial Court (MTC) in Manila in 2005 in which a hacker pleaded guilty to hacking the government portal “gov.ph” and other government websites.

The survey asked about the impact of the introduction of e-commerce legislation on the development of e-commerce activities. A majority of countries responded that the establishment of a legal and regulatory framework had led to increased ICT-related business opportunities (15 countries) and attracted foreign direct investment (7 countries). However, in most countries, there were no baseline studies on e-commerce activities prior to the introduction of e-commerce legislation. According to the Government of Croatia, while recent studies show an increase in ICT-related business opportunities and increased in foreign investments, it would be hard to attribute those developments to the introduction of e-commerce legislation only. The Republic of Korea reported that e-commerce transactions in 2005 had increased by 14.1 per cent compared with 2004, and according to the government, e-commerce legislation plays a substantial role in the development of the country's e-commerce economy, providing a supportive and conducive environment for e-commerce. In less developed countries, for example the Lao People's Democratic Republic, the authorities reported that legislation creates confidence for e-commerce users and facilitates electronic-based business activities.

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Notes

1. See annex II.
2. <http://www.aseansec.org>
3. The Harmonization of E-Commerce Legal Infrastructure in ASEAN Project (referred to in this chapter as the ASEAN E-Commerce Project) is funded by the ASEAN Australia Development Cooperation Program (AADCP). AADCP is funded by the Australian Government through AusAID and implemented in close collaboration with the ASEAN secretariat, and is managed by Cardno Acil. The project is being implemented by Galexia, a private consulting company, with the assistance of several regional experts.
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19. See chapter 1, statistical annex.
20. ASEAN secretariat initiatives for ASEAN Integration Unit, *Bridging the Development Gap among Members of ASEAN*, <http://www.aseansec.org/14683.htm>.
21. The material in this section is from: ASEAN E-commerce Project, *Survey of Cyberlaws in ASEAN (S3)* (Internal project materials), ASEAN Secretariat and Galexia, October 2005 (updated August 2007).
22. The summary table contains some double entries where part of a law has been enacted and part of a law remains draft. References to “enacted / voluntary” refer to situations where a Member Country has established coverage of a cyberlaw via self-regulatory mechanisms (e.g. an industry Code of Conduct).
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44. Article 11.
45. Article 12.
46. Article 14.
47. See: C Connolly and P Ravindra, *First UN Convention on E-Commerce Finalised, Computer Law and Security Report, 2005*, <http://www.galexia.com/public/research/articles/research_articles-art35.html>.
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Questionnaire

Information Economy Report, 2007-2008

In order to improve the quality and relevance of the Information Economy Report, the UNCTAD secretariat would greatly appreciate your views on this publication. Please complete the following questionnaire and return it to:

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 Thank you very much for your kind cooperation.

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	<i>Excellent</i>	<i>Good</i>	<i>Adequate</i>	<i>Poor</i>
Overall assessment	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Policy conclusions and recommendations	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
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