

**Vietnam’s E-commerce Regulations: Free Flow of Information and Implications  
for UNCITRAL Works on E-commerce**

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The UNCITRAL published the Model Law on E-commerce in 1996, which serves as a guide for domestic legislation on e-commerce in many countries. The Model Law provides that digital data message shall have the same legal effects as traditional paper message and that the legal effects of a signature or a contract shall not be denied simply because it is in digital.<sup>2</sup> With the development of E-commerce, the principle requirements on digital signature in the Model Law on E-commerce lagged behind the need of practice. Therefore, in 2001, the UNCITRAL adopted the Model Law on Electronic Signatures. In 2005, the Convention on the Use of Electronic Communications in International Contracts (hereinafter “the Electronic Communications Convention”) was open to signature. The two UNCITRAL model laws and the Electronic Communications Convention have very positive impacts upon the domestic law-making in Vietnam.

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<sup>2</sup> Arts. 5-7 of the UNCITRAL Model Law on E-commerce.

## **1. Vietnam's current e-commerce legal framework and UNCITRAL works on e-commerce**

In 1997, Vietnam was connected to the World Wide Web. The foundation of Vietnam's e-commerce legal framework is the Law on E-Transactions enacted on 29 November 2005 by Vietnamese National Assembly at its 8<sup>th</sup> session.<sup>3</sup> This Law is based upon the UNCITRAL Model Law on Electronic Signature and the L Model Law on Electronic Commerce. The Law entered into force on 1 March 2006. The Vietnamese government issued Decree 57/2006/ND-CP (Decree 57) of the Government to implement the Law on E-Transactions on 9 June 2006. The Decree 57 comes into force on 7 July 2006.

The Law on E-Transactions regulates electronic transactions in the civil, business, commercial and other sectors. It recognises the legal validity of data messages, which can take the forms of electronic data interchange, electronic documents, e-mails, telegrams, telegraphs, facsimile transmissions and other similar forms. Under this law, an electronic signature will have legal validity, if the method of creating the signature is such that it permits the identification of the signatory and to indicate his or her approval of the contents of the data message, and if such method is sufficiently reliable and appropriate for the purpose to which the data message was originated and sent. Electronic contracts are acknowledgeable and protected. The legal validity of an electronic contract cannot be denied for the sole reason that it is expressed as a data message. However, this law also requires that a Vietnamese Internet Service Provider should remove certain data messages online if such messages are against the cultural traditions, national ethics, or are prejudicial to the national security, public order and safety, or violate other provisions of law.

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<sup>3</sup> No. 51/2005/QH11.

Besides the Law on E-Transactions, other Vietnamese laws also adopt the three e-commerce principles established by the UNCITRAL, which are functionally equivalent, non-discrimination, and technology neutrality.<sup>4</sup> These laws include:

Time	Law
29/06/2006	Law on Information Technology
23/11/2009	Law on Telecommunication
19/11/2015	Law on Network Information Safety

In addition, the Investment Law and Enterprise Law also adopt the principle of non-discrimination between “paper” and “digital” formats in 2014.

In the Vietnamese legal system, besides law, there are decrees to provide guidance on law. These decrees help to update relevant provisions of laws. Relevant decrees are as follows:

Time	Decree to provide guidance on law	Overriding relevant provisions of the laws
15/02/2007	Decree No. 26/2007/ND-CP guiding the implementation of the E-transaction Law on digital signature and C/A services	Law on E-Transactions
23/02/2007	Decree No.27/2007/ND-CP on electronic transactions in financial activities	Law on E-Transactions
08/03/2007	Decree No.35/2007/ND-CP on electronic transactions in banking activities	Law on E-Transactions
13/08/2008	Decree No.90/2008/ND-CP on anti-spam	Law on E-Transactions
06/04/2011	Decree No. 25/2011/ND-CP detailing and guiding the implementation of some articles of the Law on Telecommunication	Telecommunication Law
13/06/2011	Decree No. 43/2011/ND-CP detailing regulations on the provision of online information and services on websites or e-portals of State agencies	Law on Information Technology
23/11/2011	Decree No. 106/2011/ND-CP amending and	Law on E-Transactions

<sup>4</sup> Page 20 of the UNCITRAL Model Law on E-commerce including explanatory notes.

	supplementing Decree No. 26/2007/ND-CP on Digital Signature and Certification Authority services	
5/10/2012	Decree No. 77/2012/ND-CP amending and supplementing Decree No. 90/2008/ND-CP on Antispam	Law on E-Transactions
22/11/2012	Decree No 101/2012/ND-CP on non-cash payment (supersedes Decree No.64/2001/ND-CP on payment operations via the payment service providers)	Law on Information Technology
16/5/2013	Decree No. 52/2013/ND-CP on E-commerce	Law on E-Transactions
15/7/2013	Decree No. 72/2013/ND-CP on management, provision and use of Internet services and online information	Law on Information Technology
08/11/2013	Decree No.154/2013/ND-CP stipulation on the concentrated zones of information technology	Law on Information Technology
13/11/2013	Decree No.170/2013/ND-CP amending, supplementing some articles of Decree No.26/2007/ND-CP dated 15 February 2007 of the Government detailing on implementation of Law on Electronic Transactions on Digital signature and certification services of digital signature services and Decree No.106/2011/ND-CP dated 23 November 2011 of the Government amending and supplementing some articles of Decree No.26/2007/ND-CP dated 15 February 2007	Law on E-Transactions

Overall, for more than one decade, the Vietnamese domestic legal framework for e-commerce has been strongly impacted by UNCITRAL works, especially the three principles.

In order to facilitate the development of e-commerce and deter illegal conducts, Vietnamese government has published a series of sanction decrees, such as Administrative Sanctions for Violations in the IT Area<sup>5</sup> and Administrative Sanctions for Violations in

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<sup>5</sup> Decree 63/2007/ND-CP on Administrative Sanctions for Violations in the IT Area.

Commercial Activities.<sup>6</sup> These decrees help to decrease conducts that violate e-commerce regulations.

## **2. Vietnam and high-standard FTAs**

From 2006 to 2015, Vietnam government made three consecutive “Five Year National Development Plan for E-commerce”. The local governments also published e-commerce development plans accordingly. The development of e-commerce technology, infrastructure, and relevant laws help the growth of e-commerce industry in Vietnam. The best purchases online in Vietnam are household products: clothing, footwear, cosmetic, which took 64% of the sales volume.<sup>7</sup> Most of online Vietnamese consumers prefer cash on delivery. Therefore, the e-commerce business in Vietnam is still at the primary development stage. In this context, Vietnam government strongly promotes the development of e-commerce through free trade agreements (hereinafter “FTAs”) with developed countries. For example, in 2015, Vietnam concluded FTAs with the EU, South Korea, and Eurasian Economic Union (hereinafter “EEU”), respectively. The Vietnam-South Korea FTA and the Vietnam-EEU FTA provides an e-commerce chapter and explicitly indicates that the domestic law of member states should comply with the UNCITRAL works on e-commerce.<sup>8</sup>

Vietnam is a member of the Trans Pacific Partnership (hereinafter “TPP”), whose Chapter 14 provides innovative regulations for free flow of information in e-commerce. However, there might be some changes in the TPP as President Donald Trump has withdrawn the U.S. from the TPP.<sup>9</sup> President Trump has indicated that the US may negotiate bilateral

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<sup>6</sup> Decree 06/2008/ND-CP stipulating administrative sanctions for violations in commercial activities.

<sup>7</sup> Vietnam E-commerce Report 2015, page 23, available at <http://www.vecita.gov.vn/anpham/260/Vietnam-E-commerce-Report-2015/en> (last visited March 8, 2017).

<sup>8</sup> Chapter 10 of the Vietnam-South Korea FTA and the Chapter 13 of the Vietnam-EEU FTA.

<sup>9</sup> Donald Trump Withdraws United States from TPP, available at <http://www.news.com.au/finance/economy/world-economy/donald-trump-withdraws-united-states-from-tpp/news-story/74111d393f72eab1419f7fc33721d39e> (last visited March 1, 2017).

FTAs with countries that have no FTA with the U.S.<sup>10</sup> However, there are not many plausible candidates in Asia except perhaps Japan and Vietnam. These new bilateral FTAs will contain regulations of free flow of information, because from the 2001 US-Jordan FTA to the 2012 US-South Korea FTA, their e-commerce regulations all make efforts to enhance free flow of information. In terms of the e-commerce chapter, the potential US-Vietnam FTA may not be greatly different from the TPP.

Moreover, for Vietnam, the desire to enhance free flow of information does not only come from external factors (i.e. the pressure of the TPP). Vietnam has made significant efforts to develop cloud computing, big data analytics, the Internet of Things, 3D printing, blockchain technology: essentially these all require cross-border flow of information.

### **3. What is cross-border flow of information?**

Despite its technological background,<sup>11</sup> the cross-border flow of information derives from international conventions in the fields of cultural diversity and human rights. Examples include the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions,<sup>12</sup> the International Covenant on Civil and Political Rights,<sup>13</sup> and recent United Nations reports.<sup>14</sup> Although these conventions empower everyone to freely seek,

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<sup>10</sup> Alicia Nicholls, President Trump Signs Executive Order Pulling US Out of TPP, available at <https://caribbeantradelaw.com/2017/01/23/president-trump-signs-executive-order-pulling-us-out-of-tpp/> (last visited March 1, 2017).

<sup>11</sup> Technology background means that data technologies and services can be used for the collection, processing or storage of data (e.g. cloud computing, big data, the Internet of Things), which are essential factors of progress in the new era of digitalisation. <http://netfutures2016.eu/programme/free-flow-of-data/>.

<sup>12</sup> Convention on the Protection and Promotion of the Diversity of Cultural Expressions, adopted at the UNESCO 33rd session in Paris from 3 to 21 October 2005. Ivan Bernier, *A UNESCO International Convention on Cultural Diversity*, in Christoph Beat Graber, Michael Girsberger & Mira Nerova (eds) *FREE TRADE VERSUS CULTURAL DIVERSITY: WTO NEGOTIATIONS IN THE FIELD OF AUDIOVISUAL SERVICES*, (Zurich: Schulthess, 2004), 65-76; Tania Voon, *UNESCO and the WTO: A Clash of Cultures?*, 55 *International and Comparative Law Quarterly* 635-652 (2006); Mira Burri-Nenova, *Trade and Culture in International Law: Paths to (Re)conciliation*, 44 *JOURNAL OF WORLD TRADE* 49, 51 (2010).

<sup>13</sup> International Covenant on Civil and Political Rights, opened for signature Dec. 19, 2966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).

<sup>14</sup> E.g. Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, *Promotion and Protection of the Right to Freedom of Opinion and Expression, transmitted by Note of the Secretary-General*, U.N.Doc. A/66/290 (Aug. 10, 2011); Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, *Rep. of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, Frank La Rue*, Human Rights Council, U.N. Doc. A/HRC/14/23 (Apr. 20, 2010).

receive, and impart information and ideas of all kinds, regardless of frontiers, through any media of his or her choice,<sup>15</sup> they lack a strong enforcement mechanism to ensure compliance.<sup>16</sup>

Cross-border *flow* of information is also related to, but not entirely the same as, *access* to information. Access to information originates from citizen-state relationship in a domestic context with a purpose to prevent abuse of government power, e.g. citizens should have right to access to governmental information.<sup>17</sup> However, cross-border flow of information, as its name indicates, has a transnational nature.<sup>18</sup> It highlights business-to-business, business-to-consumer, and machine-to-machine transmission of information. In international trade context, it also requires Internet service providers (hereinafter “ISPs”) from a country should have non-discriminated access to a foreign market.

Protecting intellectual property rights helps enhance cross-border flow of information. However, they have different focuses. WTO Agreement on Trade-related Intellectual Property Rights (hereinafter “TRIPs”), the Paris Convention for the Protection of Industrial Property, the Berne Convention for the Protection of Literary and Artistic Works, and other international intellectual property conventions ensure national treatment to domestic and foreign intellectual property rights and their holders.<sup>19</sup> However, they do not regulate market access, which is the major barrier for cross-border information flow.<sup>20</sup>

International trade law is well developed to protect cross-border flow of goods, services, intellectual property and labors. However, it is still at the primary stage to render

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<sup>15</sup> Molly Land, *Toward an International Law of the Internet*, 54 HARVARD INTERNATIONAL LAW JOURNAL 393, 401 (2013) (arguing international law of the Internet can develop based upon art. 19.2 of the International Covenant on Civil and Political Rights).

<sup>16</sup> Haiping Zheng, *Regulating the Internet: China’s Law and Practice*, 4 BEIJING LAW REV. 37–41 (2013).

<sup>17</sup> See generally S. David Thurman, *THE RIGHT OF ACCESS TO INFORMATION FROM THE GOVERNMENT*, (Oceana Publications, 1973).

<sup>18</sup> Brian Bieron & Usman Ahmed, *Regulating E-commerce through International Policy: Understanding the International Trade Law Issues of E-commerce*, 46 JOURNAL OF WORLD TRADE 545, 556 (2012).

<sup>19</sup> Art. 3 of the WTO Agreement on Trade-related Intellectual Property Rights.

<sup>20</sup> See Rachel Block, *COMMENT: Market Access and National Treatment in China--Electronic Payment Services: An Illustration of the Structural and Interpretive Problems in GATS*, 14 CHIC. J. INT. LAW 652, 694 (2014).

protection to cross-border flow of information. This is especially true when considering three modes of e-commerce exist. In the first mode, a seller uses the Internet to promote, market or sell products. The products are usually tangible and physical (with the exception of electricity). The contents of the products cannot be separated from their carriers. For example, the monetary value of a TV bought from the eBay website comes from the physical TV. In the second mode of e-commerce, the monetary value of the goods mainly comes from its contents rather than its physical carrier. Typical examples include CD and DVD. Their monetary value lies in music or movie encoded, while the value of the physical disks is minimal. In the third mode of e-commerce, digital products have no physical carrier at all and completely transmitted online.<sup>21</sup> For example, an e-book downloadable/readable online, a movie streamed online, and Apple Pay service used online. The monetary value of the products solely comes from their contents. Compared with the first two modes of e-commerce, the third mode is the most significant. Because it goes beyond digital delivery of music, movies, games and other cultural digital products, its industrial usages include cloud computing, big data analytics, the Internet of Things. However, whatever usage it may have, essentially it is cross-border flow of information (or in other words “data”). The contemporary international trade law, such as WTO law, liberalizes trade mainly by decreasing tariffs and non-tariff measures. This renders little protection to cross-border flow of information.

Regulations for free flow of information first appear in the US-Korea FTA and become full-fledged in the TPP. It has seven components. First, principles on access to and use of the Internet for e-commerce regulate consumers, who are the subject of free flow of information.<sup>22</sup> The second addresses the object, namely cross-border transfer of electronic

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<sup>21</sup> The third mode of e-commerce is the trade in digital products defined in the TPP, see art. 14.1 of the TPP.

<sup>22</sup> Art. 14.10 of the TPP.



information.<sup>23</sup> The third component deals with localization of computing facilities, such as servers, which are the infrastructure to free flow of information.<sup>24</sup> The fourth one regulates source code of software, which is the technology core to realize free flow of information.<sup>25</sup> The fifth component governs the Internet connection fee, which is the monetary cost of free flow of information.<sup>26</sup> Sixth, the TPP provides a strong dispute resolution mechanism to enhance the implementation of free flow of information.<sup>27</sup> Finally, its strong and balanced intellectual property rights protections promote digital activities.<sup>28</sup> Protection of IPRs is an indispensable part of free flow of information.

#### **4. Cross-border Flow of Information and UNCITRAL E-commerce Works**

UNCITRAL pioneers in making international laws for e-commerce. The Model Law on Electronic Commerce establishes the three fundamental principles for e-commerce.<sup>29</sup> These principles share the same root that paper-based communications and electronic communications with the same purposes and functions should be treated equally. They are adopted by the Model Law on Electronic Signatures and the Electronic Communications Convention. These UNCITRAL works aim to facilitate the use of modern communication techniques and to remove obstacles or uncertainty coming from legislations based upon traditional paper-based communications. Free flow of information shares these goals but meanwhile it steps further in three aspects. First, besides focusing on technology, it also emphasizes the rights of Internet users, such as personal information protection and rights to free flow of information.

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<sup>23</sup> *Id.* art. 14.11.

<sup>24</sup> *Id.*, art. 14.13.

<sup>25</sup> *Id.*, art. 14.17.

<sup>26</sup> *Id.*, art. 14.12.

<sup>27</sup> *Id.*, art. 14.18 and Chapter 28.

<sup>28</sup> *Id.*, Chapter 18.

<sup>29</sup> Functionally equivalent, non-discrimination, and technology neutrality, see page 20 of the UNCITRAL Model Law on E-commerce including explanatory notes.

Second, free flow of information extends the non-discrimination principle. Under the UNCITRAL works, the non-discrimination principle means information shall not be denied legal effect, validity or enforceability solely on the grounds that it is in the form of a data message. In other words, the UNCITRAL works compare electronic communication with paper-based communication. However, the clause of non-discriminatory treatment of digital products under the free flow of information compares a digital product created, produced, published, contracted for, commissioned or first made available on commercial terms in the territory of another party with other like digital products of a party or a non-party. Namely, under free flow of information the non-discriminatory treatment is not between a digital product and a traditional paper-based product, but instead, it is between a digital product and other like digital products. In addition, regarding consumer protections in the free flow of information, the non-discriminatory treatment requires that the personal information of e-commerce users and non-e-commerce users should be protected equivalently.

Third, both the three e-commerce principles established by the UNCITRAL and free flow of information endorse party autonomy in e-commerce, but the formers are limited to contract formation by electronic means while the latter goes beyond electronic contracting and encourages industrial self-regulation as being indispensable to positive law regulation of e-commerce. For example, the Model Law on E-commerce embodies the principle of party autonomy in Article 4, which provides that private parties can use consensus to revise its Chapter III Communication of Data Messages. Chapter III are about formation of contracts by electronic means and relevant validity issues. Free flow of information recognizes party-autonomy not only in contracts but also in developing codes of conduct, guidelines and enforcement mechanisms in private sectors.<sup>30</sup> Industrial self-regulation or industry-led development of e-commerce regulations underlie the reflection that technologically the

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<sup>30</sup> Art. 14.5(e) of the TPP.

Internet is based upon protocols and codes established by private groups or organizations, such as Internet Engineering Task Force, World Wide Web Consortium, Internet Society, the Internet Corporation for Assigned Names and Numbers (ICANN) and the Internet Assigned Numbers Authority (IANA).<sup>31</sup> These organizations regulate Internet resources throughout the world but are not governmental organizations.<sup>32</sup> The Internet cannot be only regulated in a top-down manner by state positive law,<sup>33</sup> and it requires industry self-regulation that reflects party-autonomy.<sup>34</sup>

### **5. Should future UNCITRAL e-commerce works contain regulations for free cross-border flow of information?**

The knowledge economy is promoting the world economic engine to shift away from the free flow of goods, services and labours to the free flow of information. It may be forward looking for UNCITRAL to consider admitting free flow of information as the fourth principle for the e-commerce, besides functionally equivalent, non-discrimination, and technology neutrality. However, the challenges for Vietnam, China and other non-democratic countries would be the concerns that free flow of information may be extended to freedom of speech. In theory, if a state's commitment regarding free flow of information in an e-commerce international instrument is broad enough, it may cover freedom of speech and be used to foster human rights. However, this can be remedied in a form of model law regarding free flow of information, which is a soft law and gives states discretion to the extent of adoption. This also can help the UNCITRAL continues to contribute to the development of international e-commerce regulation.

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<sup>31</sup> GARY SCHNEIDER ET AL., *THE INTERNET* 12 (5th ed. 2009).

<sup>32</sup> Kitsuron Sangsuvan, *Balancing Freedom of Speech on the Internet under International Law*, 39 N.C.J. Int'l & Com. Reg. 707, 735 (2013-2014).

<sup>33</sup> Milton Mueller et al., *Making Sense of "Internet Governance,"* in *INTERNET GOVERNANCE: A GRAND COLLABORATION* 100, 110 (Don MacLean ed. 2004).

<sup>34</sup> Joe Waz & Phil Weiser, *Internet Governance: The Role of Multistakeholder Organization*, 10 J. TELECOMM. & HIGH TECH. L. 331, 331 (2013).