Report of Workshop for Developing an APEC Collaborative Framework for Online Dispute Resolution

Purpose: Information
Submitted by: Hong Kong, China

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Santiago, Chile
4-5 March 2019
I. Summary

The United States with Australia; Canada; Chile; Hong Kong, China; Indonesia; Japan; Mexico; New Zealand; Papua New Guinea; Singapore; Chinese Taipei; Thailand; and Viet Nam as co-sponsoring economies, organized a two-day workshop (Workshop) in Osaka, Japan November 8-9, 2018 on Developing a Collaborative Framework for Online Dispute Resolution of Cross-Border Disputes involving micro, small, and medium sized enterprises (MSMEs) in business to business (B2B) transactions (APEC ODR Collaborative Framework). The Workshop gathered over 90 delegates and participants from APEC member economies, including academics, arbitrators, economists, entrepreneurs, IT experts, judges, lawyers, ODR providers, mediators, officials and other professionals as well as the United Nations Commission on International Trade Law (UNCITRAL). The Workshop focused upon the draft APEC ODR Collaborative Framework, including the Model Procedural Rules for the APEC ODR Collaborative Framework (Model Procedural Rules), which was circulated to APEC economies for comment in advance of the Workshop.

Key Workshop recommendations and conclusions included:

○ The APEC Economic Committee should consider and endorse the APEC ODR Collaborative Framework including the Model Procedural Rules at its next meeting at EC 1 in March 2019. See Annex I for revised text based on edits provided by member economies, delegates and participants at the Workshop.

○ The draft APEC ODR Collaborative Framework would be conducive to businesses engaged in cross-border trade (in particular, MSMEs), by providing quick and cheap dispute resolution and enforcement across borders, languages and different legal jurisdictions.

○ APEC should start with a pilot, as per the SELI ODR Work Plan. For purposes of the pilot, the Economic Committee should partner with platform hosts/ODR providers, including regional arbitration and mediation centers willing to provide platforms. SELI should identify the ODR providers. (APEC ODR Collaborative Framework, paras. 1.3, 3 and 4)

○ SELI should work with ABAC and other stakeholders to encourage businesses to participate in the pilot. (APEC ODR Collaborative Framework, para. 6)

○ APEC member economies should be able to opt in to the APEC ODR Collaborative Framework. (APEC ODR Collaborative Framework, para. 1.2)

The Workshop delegates and participants looked forward to the Stocktake Workshop on the SELI ODR Workplan to be organized by Hong Kong, China in Chile in early 2019 and the consideration of the APEC ODR Collaborative Framework at EC 1 in 2019.
This report is jointly submitted by the United States; Chile; Hong Kong, China; Japan; and Mexico.

II. Workshop Recommendations and Conclusions

The following reviews each of the Workshop Recommendations and Conclusions. A consolidated list of Workshop Recommendations and Conclusions is contained in Annex II.

1. APEC-wide implementation of the APEC ODR Collaborative Framework is needed to assist APEC businesses, particularly MSMEs engaged in cross-border trade, by providing quick and cheap dispute resolution and enforcement across borders, languages and different legal jurisdictions.

As pointed out during the Workshop by APEC businesses, the current legal framework for resolving cross-border disputes within APEC is inadequate. APEC MSMEs need a legal environment that promotes a seamless system for trade including through dispute resolution. The Executive Director of the Hong Kong China, APEC Business Advisory Council (ABAC) remarked that pushing small businesses into the unfamiliar world of global value chains without contracting skills and access to commercial justice “is like ordering soldiers out of the trenches armed with baguettes.”

In APEC, MSMEs account for over 97% of businesses and employ over half of the workforce. Yet they account for only 35% of direct exports. Expansion into international markets is crucial for MSMEs’ continued growth and APEC economies’ well-being. Yet, MSMEs face significant hurdles with access to justice in cross-border transactions. A recent APEC study found that dispute resolution was one of the greatest challenges for MSMEs that trade across borders, with 83% reporting that effective and consistent dispute resolution was a problem.1 Another study reported that as many as 35% of cross-border disputes involving MSMEs in the European Union remain unresolved with the average value of the dispute being some $50,000.2

As Workshop speakers pointed out, domestic courts of member economies do not work well for cross-border disputes involving MSMEs. Domestic courts are too tied to geography, jurisdiction and in-person enforcement. Even if special domestic courts were created, or systems were made more efficient, the costs of local legal practitioners and travel plus culture and language barriers make access to redress a fiction for MSMEs transacting online with foreign companies.

Traditional in-person arbitration is an improvement (and it has been recently added to the World Bank Ease of Doing Business (EODB) methodology on enforcing contracts). But it is not geared

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1 ABAC, USC Marshall, Driving Economic Growth through Cross-Border E-Commerce in APEC: Empowering MSMEs and Eliminating Barriers at 35, 69, 81 (APEC interviews with 506 business executives plus 244 survey responses).
to the needs of MSMEs in cross-border transactions with its high cost and lack of speed. In one recent survey, 90 percent of the respondents reported that, among cases in which disputes are taken to formal dispute resolution mechanisms, in-person arbitration was the preferred method of resolving disputes in cross-border trade. However, nearly three-fourths of respondents to the survey favored simplified procedures for claims under $500,000. Respondents cited cost and lack of speed as the biggest drawback to international arbitration. Several Workshop speakers confirmed that existing dispute resolution mechanisms provided by regional arbitration and mediation centers were not geared to low value disputes involving MSMEs in cross border trade.

As the UN General Assembly has recognized, ODR (as provided in the UNCITRAL ODR Technical Notes) “can assist the parties in resolving disputes in a simple, fast, flexible, and secure manner, without the need for physical presence at a meeting or hearing.” As the UNCITRAL ODR Technical Notes (2016) explain, ODR can include almost any dispute resolution process, including negotiation, mediation, arbitration or other adjudication so long as it is conducted online. By adding modern technology to traditional methods, dispute resolution becomes fast and affordable. The use of technology enables communications to take place within a structured online platform and offers seamless navigation through a myriad of dispute resolution options. The ODR computer led process is fast, cheap, and user-friendly. It reduces timelines and costs to keep them in proportion with the underlying value of the transaction. It allows communications to be either synchronous or asynchronous offering businesses the flexibility to engage in the process at the time and place that best suits their needs. The General Assembly requests all economies “support the promotion and use of the UNCITRAL ODR Technical Notes.”

As Workshop speakers noted, ODR has been implemented in a number of different contexts in APEC member economies and it has been consistently proven to reduce both time and cost for resolving disputes. ODR via a cloud-based platform, for example in World Intellectual Property Organization (WIPO) domain name disputes, has existed for almost two decades. Some regional arbitration centers such as the Hong Kong International Arbitration Centre currently offer ODR for domain name disputes. eBay and Alibaba have offered ODR to resolve disputes arising on their sales platforms for merchants. So far, however, none of the ODR initiatives has provided a solution for APEC MSMEs in cross-border commercial transactions. Workshop participants noted that there seem to be a number of reasons: (1) the number of businesses offering ODR has been limited in light of the expenses associated with building a secure ODR platform; (2) the mechanisms have been limited given that lower-value disputes involving MSMEs may not be thought to generate enough revenue to be viable; and (3) the ODR mechanisms are often restricted to the particular business or region in which they are implemented.

As the SELI Facilitator pointed out at the Workshop, the SELI ODR Work Plan as approved by SELI and endorsed by the Economic Committee at EC 2 in 2017 recommends developing a

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5 UNCITRAL Technical Notes on Online Dispute Resolution, paras 2, 8-9, and 24 hereinafter UNCITRAL ODR Technical Notes.

6 GA Resolution 71/138, supra.
Cooperative Framework for ODR of cross-border B2B disputes involving MSMEs. The SELI ODR Work Plan includes the following components:

- Build a pilot in conjunction with platform host/ODR provider via outreach to regional arbitration/mediation centers to determine possible partners for hosting ODR platform
- Continue to promote harmonisation of the relevant laws for ODR using existing international instruments
- Design ODR platform
- Develop ODR procedural rules
- Capacity building
- Leverage private sector and academic community support

The SELI ODR Work Plan is designed to provide MSMEs: more efficient access to commercial justice; the basis for establishment of a culture of contract-based relationships; lower transaction costs where businesses are able to allocate risk in contracting; and lower barriers for entry in international trade.

As Workshop delegates and participants observed, the APEC ODR Collaborative Framework closely follows the SELI ODR Work Plan. Consistent with the SELI ODR Work Plan, participants recommended that the APEC ODR Collaborative Framework should start with a pilot, include all APEC businesses and not just MSMEs, and include any B2B transactions and not just B2B transactions concluded electronically.

2. APEC should start with a pilot, as per the SELI ODR Work Plan. For purposes of the pilot, the Economic Committee should partner with platform hosts/ODR providers, including regional arbitration and mediation centers willing to provide platforms. SELI should identify the ODR providers. (APEC ODR Collaborative Framework, paras. 1.3, 3, and 4.)

In considering the APEC ODR Collaborative Framework, the Workshop reviewed and discussed the options for implementation of a pilot including with an APEC ODR platform or with multiple platforms provided by ODR providers. As the UNCITRAL ODR Technical Notes recognize, in order to offer ODR as a turnkey solution, a technological platform must be established. Unlike offline alternative dispute resolution, ODR cannot be conducted on an ad hoc basis involving only the parties to a dispute and a neutral adjudicator. Instead, to enable the use of technology to facilitate a dispute resolution process, ODR requires a system for generating, sending, receiving, storing, exchanging, or otherwise processing communications. Such a system is referred to as an “ODR platform.” The platform provides the framework that allows the parties to resolve the dispute electronically.

The Workshop participants recognized that for purposes of the APEC ODR pilot, the best option (as reflected in the SELI ODR Work Plan and the APEC ODR Collaborative Framework) would be partnering with ODR providers such as regional arbitration and mediation centers willing to

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7 UNCITRAL ODR Technical Notes, para 26.
8 Id.
provide their own platforms or other organizations volunteering to help establish open-source and freely accessible platforms. The Workshop participants were not inclined to have APEC build and manage a new standalone platform for testing the possible suitable ODR solutions.

Consistent with the discussion above, the Workshop participants recommended deletion of the reference in paragraph 1.2 of the APEC ODR Collaborative Framework to “an APEC wide electronic system” to make it clear that APEC would not be establishing its own platform for purposes of the pilot. See Annex I.

At the Workshop a number of APEC member economy ODR providers expressed interest in partnering with the APEC EC on the APEC ODR Collaborative Framework including:

- Media Center of CCPIT, China
- **eBRAM Centre, Hong Kong, China.** eBRAM Centre is an electronic business-related arbitration and mediation service providers established in Hong Kong dedicated to promoting use of technology to assist with deal-making and cost-effective resolution of disputes.

- **Judicial Arbitration and Mediation Services, Inc. (JAMS).** JAMS is the largest private alternative dispute resolution (ADR) provider in the world with a panel of more than 300 neutrals. JAMS has extensive experience providing mediation services for represented and self-represented litigants through an ODR platform (Endispute) that enables participants to engage in mediation from anywhere, including for B2B disputes.

- **Matterhorn by Court Innovations, the United States.** The Matterhorn ODR platform powers communication and negotiations for businesses, people, and government agencies. Since its launch in 2014, courts, mediation centers, and government agencies have used Matterhorn on over 50,000 cases across over 50 jurisdictions. In surveys, 87% of its users felt the ODR system was fair and more than 90% would recommend ODR to others.

- **Fairway Resolutions, New Zealand.** Fairway Resolutions is the largest ADR services provider in New Zealand with a team of more than 200. Fairway is constantly looking to discover and provide new ways to provide efficient and affordable dispute resolution. Recently, it has teamed with Tyler Technologies in creating an ODR platform to swiftly manage and resolve complaints, including for B2B and B2C disputes.

- **Arbitration and Mediation Center, Chamber of Commerce, Chile (CAM Santiago).** CAM Santiago has provided mediation and arbitration services for more than 3500 domestic and international arbitrations. CAM Santiago is constantly working on new digital improvements to service its dispute resolution process including through its electronic system (ecamsantiago) that provides for case management and remote access for mediation and arbitration.

3. Partnering ODR Providers, as provided in the APEC ODR Collaborative Framework, should:
• Use the APEC ODR Collaborative Framework and Model Procedural Rules;
• Provide a platform that meets the highest standards of data security, privacy, integrity, and preservation as well as fraud detection and prevention;
• Ensure all communications in ODR proceedings take place via the ODR platform;
• Share basic information concerning the pilot including claims processed, stage at which dispute is resolved, time it took to resolve dispute and customer satisfaction.

Use of APEC ODR Collaborative Framework. The Workshop participants were of the view that any partnering APEC ODR providers should agree to use the APEC ODR Collaborative Framework and Model Procedural Rules in the dispute resolution process, as provided in the APEC ODR Collaborative Framework (para. 4.1).

Provide a platform that meets the highest standards of data security, privacy, integrity, and preservation. The Workshop participants were of the view that the Collaborative Framework should focus on standards rather than specific technology solutions, consistent with the APEC ODR Collaborative Framework. During the Workshop, a technology panel considered the impact of modern technological developments, particularly with regard to the privacy and security of information transmitted. As the panel noted, these technologies are constantly developing, while at the same time it remains unclear how their use would operate in the context of dispute resolution platforms. The panel concluded that anticipating where technology will go and planning for that destination will be increasingly impossible and that in our “exponential age,” technology developments prevent policy development certainty. The technology that will sustain itself is being created as “interoperable” which permits integration and data exchange between tech solutions in real time and on a secure and privacy protected basis.

Workshop participants were of the view that the current APEC ODR Collaborative Framework and Model Procedural Rules leave enough room for the ODR providers to develop platforms using, for example blockchain and smart contract technologies, provided they are in compliance with the rules (including Sections 5-7 of the Model Procedural Rules). Therefore, the technology panel concluded that adding special sections on Enforcement, at this stage, would be premature. Until blockchain technology solutions become uniformly available and operational, tech solutions will use robust API features to promote interoperability and allow users to integrate the various technology solutions on which they depend. For example, the Health Level Seven International standards body (established in 1987 and consisting of 40 economies focused on health technology) deployed its interoperability standards earlier this year. Its Fast Healthcare Interoperability Resources (FHIR) are such a standard.

Ensure all communications take place via the ODR platform. Workshop participants concluded that all communications should take place via the ODR platform to ensure fairness and protect against fraud. Participants also recognized that ODR providers should be responsible for process issues including: (1) fairness; (2) due process; (3) transparency; (4) accountability; (5) neutral appointment and selection; and (6) the performance capabilities of the ODR platform.

Share basic information. Workshop participants identified that another important element of the pilot will be to share information concerning the pilot. Therefore, the ODR providers should
be expected to provide the basic information to SELI, in accordance with the requirements under paragraph 4.3 (as modified) of the APEC ODR Collaborative Framework. It was suggested that the ODR providers might provide additional information such as the demographics of users, age, gender, geographical location, and the primary business. However, it was concluded that only the basic information about the pilot should be requested in order not to discourage ODR providers from participating in the pilot. Workshop participants were also of the view that providing basic information about the operation of an ODR provider was a best practice and suggested adding a provision encouraging providers to publish data themselves. See APEC ODR Collaborative Framework, para. 4.3 bis. It was also suggested that the ODR provider should ask the parties to complete a brief and optional feedback questionnaire asking at a minimum:

“As the primary party accessing the system:
(a) “Do you think the process was neutral and unbiased?”
(b) “Do you think the dispute was handled in a reasonable timeframe?”
(c) “Do you think the neutral handled your case with dignity and neutrality?”
(d) “Do you think the system was easy to use?”
(e) “Would you recommend ODR to others?”

See APEC ODR Collaborative Framework, para. 4.4.

The basic information would be provided to the EC and may be shared among member economies and other relevant stakeholders. It would be used as a basis for evaluating the ODR providers. See discussion infra, paragraph 5.

4. APEC Economies should be able to opt-in, as provided in the APEC ODR Collaborative Framework.

Participants at the Workshop stressed that it would be important for economies to have the option to officially opt-in to the framework, consistent with the approach taken in the APEC Cross-Border Privacy Rules system. See APEC ODR Collaborative Framework, para. 1.2.

5. SELI, as provided in the APEC ODR Collaborative Framework should:

- Maintain on the EC website a list of partnering ODR providers that agree to process claims using the APEC ODR Collaborative Framework and Model Procedural Rules;
- Provide limited oversight of ODR providers;
- Work with ABAC to identify businesses willing to participate in the pilot;
- Improve APEC legal regimes on online dispute resolution including through encouraging implementation of UNCITRAL texts;
- Leverage private sector and academic community support.

Maintain on EC website a list of partnering ODR providers. The Workshop participants were of the view that it would be important for SELI to continue to identify ODR providers, including regional arbitration and mediation centers willing to participate in the pilot. See discussion supra, para 2. It was noted that the manner in which the list was maintained on the APEC website could be best determined in consultation with the APEC Secretariat.
Provide limited oversight of ODR providers. Workshop participants were of the view that the process for limited oversight of ODR providers as provided in para 4.5 would not unduly interfere with the operations of ODR providers. It was felt that the basic information on user satisfaction, see discussion supra para 3, would provide the basis for the SELI evaluation.

Work with ABAC to identify businesses willing to participate in the pilot. The Workshop also considered how to get businesses involved in the APEC ODR Collaborative Framework and build the capacity of APEC member economies’ MSMEs. Surveys have shown that small enterprises tend to work without clear contracts and dispute resolution clauses, which makes them vulnerable in case of disputes. Use of ODR would promote a culture of contract-based relationships. In turn, it would make transactions more efficient, driving down risk and making MSMEs more competitive by lowering cost. An effective system will result in tangible economic advantages for everyone, reducing transaction costs for both sellers and buyers in the supply chain.

The participants recognized that it is important for APEC, working with ABAC, to take the lead in promoting ODR to the private sector, governments, and the legal community and build capacity by leveraging support from trade associations and chambers of commerce, donors, law facilities, and corporate social responsibility programs. ABAC collaboration was viewed as essential, given the number of businesses that ABAC represents. Participants also stressed that it would be important to seek participation from larger businesses during the pilot phase, to facilitate business participation.

Improve APEC legal regimes on ODR. As recognized in the APEC ODR Collaborative Framework, paragraph 8, it is not essential for the laws and practices relevant to ODR within APEC economies to be identical in all respects. Participants further noted that the listing of the private international instruments referenced in paragraph 8 of the APEC ODR Collaborative Framework was helpful and provide a cornerstone for the implementation of the APEC ODR Collaborative Framework. For example, the principle aim of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) is to ensure that arbitration awards issued in one economy are recognized and enforced in another economy. The UNCITRAL Model Law on International Commercial Arbitration establishes a unified framework for the fair and efficient settlement of disputes arising in cross border transactions. The UN Convention on the Use of Electronic Communications in International Contracts and the UNCITRAL Model Law on E-Commerce allow for the legal recognition of e-signatures and electronic contracts on the same basis as an agreement concluded in writing. Moreover, there has been broad implementation of these instruments in APEC with 20 out of 21 APEC economies having implemented the New York Convention, 18 out of 21 economies having implemented the UNCITRAL Model Law on International Commercial Arbitration, 13 out of 21 economies having implemented the Model Law on E-Commerce and 2 out of 21 economies having implemented the UN Convention on the Use of Electronic Communications. It was also pointed out that studies show that 20 out of 21 APEC economies provide for legal recognition of e-signatures and electronic contracts. One economy noted that SELI should promote the

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implementation of the relevant international conventions or model laws in all APEC economies and meanwhile promote corresponding measures where necessary.

It was also suggested that the Convention on the Enforcement of International Settlement Agreements (Singapore Convention) (2018) and related Model Law (2018) might be included in the list of instruments referenced in paragraph 8 of the APEC ODR Collaborative Framework once the Convention comes into force. The Convention and Model Law provide for expedited enforcement of international mediation agreements. Singapore plans to hold a signing ceremony for the Convention in 2019. In order for the Convention to come into force, it must be ratified by at least three economies.

Another instrument mentioned during the Workshop discussions was the UNCITRAL Model Law on Electronic Transferable Records (2017) (MLETR) which enables the legal use of electronic transferable records both domestically and across borders. The MLETR applies to electronic transferable records that are functionally equivalent to paper based transferable documents or instruments.

Workshop participants were of the view that it was not necessary to list all the instruments that might possibly be relevant in paragraph 8 of the APEC ODR Collaborative Framework since the list should not be viewed as exhaustive. It was recommended that the text of paragraph 8 be revised to expressly state: “including but not limited to.”

The reference to these private international law instruments in the Collaborative Framework builds on the APEC Structural Reform Ministerial Joint Statement (2015), highlighting that: "the development of international legal instruments and their adoption will create a more conducive climate for cross-border trade and investment, thus facilitating economic growth. The Workshop participants recognized, consistent with the Joint Ministerial Statement, that “use of these instruments provides greater legal certainty in cross-border transactions, harmonization of dispute resolution systems, closer economic and legal integration among cooperating economies, and the simplification of procedures involved in international transactions.” In addition, the participants pointed to the 2014 APEC Joint Ministerial Statement directive “to build awareness of private international law instruments to facilitate cross-border trade and investment… and foster effective enforcement of contracts and efficient settlement of business disputes.”

**Leverage private sector and academic community support.** Participants also stressed, consistent with the SELI ODR Work Plan, the need for SELI to continue to leverage private sector and academic community support. A number of Workshop participants from APEC academic communities expressed a willingness to assist in this endeavour.

6. **The Model Procedural Rules should:**

- Follow UNCITRAL Arbitration Rules and UNCITRAL ODR Technical Notes;
- Require agreement of the parties to a transaction;
- Be subject to applicable mandatory law of APEC economies;
- Apply to B2B disputes only;
- Include negotiation, mediation, and arbitration stages;
• Include a definition of costs.

The Workshop also discussed and reviewed the Draft Model Procedural Rules attached to the APEC ODR Collaborative Framework (Annex I). Participants recognized that ODR should follow a rules-based approach to ensure that the parties are afforded the same quality of due process regardless of where they are located.

**UNCITRAL Arbitration Rules and ODR Technical Notes.** The participants recommended that the Model Procedural Rules should generally follow the UNCITRAL Arbitration Rules and ODR Technical Notes. The UNCITRAL Arbitration Rules provide a comprehensive and internally accepted set of procedural rules that the parties may agree to for use in their arbitral proceedings. They are widely used in administered arbitration as well as ad hoc arbitrations. Most arbitration rules follow the UNCITRAL Arbitration Rules.

Workshop participants also recognized that the UNCITRAL ODR Technical Notes provide the necessary framework for designing and implementing ODR systems for cross-border commercial transactions. As noted above, the UN General Assembly has requested that all economies “support the promotion and use of the Technical Notes.”\(^\text{10}\) As the ODR Technical Notes recognize, ODR proceedings should be subject to “the same confidentiality and due process standards that apply to dispute resolution proceedings in an offline context, in particular independence, neutrality and impartiality.”\(^\text{11}\)

**Agreement of the parties.** Workshop participants recognized that an essential provision in the Model Procedural Rules (Article 1(1)) was that the use of ODR under the APEC ODR Collaborative Framework is subject to the agreement of the parties (either in their sales or services contract or post dispute). This provision follows UNCITRAL Arbitration Rules, Article 1(1).

The Workshop participants also suggested that the Model Provisions -- Model Clause for Contracts (attached to the Model Procedural Rules) be modified to more clearly reflect the nature of the agreement of the parties as follows:

> “Any dispute, controversy, or claim arising hereunder and within the scope of the APEC ODR Rules providing for an online dispute resolution process through negotiation, mediation and arbitration, shall be settled in accordance with the APEC ODR Rules presently in force.”

**Subject to applicable mandatory laws.** Workshop participants also recognized that the use of the Model Procedural Rules would be subject to applicable mandatory law of economies from which the parties cannot derogate. This rule follows UNCITRAL Arbitration Rules, Article 1(3).

**Apply to B2B disputes only.** The Model Procedural Rules (Article 1(1), consistent with the SELI ODR Work Plan, exclude B2C transactions. The Workshop recommended this exclusion for several reasons. First, the amounts at dispute in B2C cases are typically very small and

\(^{10}\) GA Resolution 71/138, *supra*.

\(^{11}\) *Id.*, para. 53.
outcomes are difficult to enforce cross border. Second, the vast majority of e-commerce disputes involve B2B. UNCTAD has estimated that worldwide B2B e-commerce was worth some $19.9 trillion in 2015, while B2C e-commerce was worth only $2.2 trillion.\textsuperscript{12} Third, applicable laws for the protection of consumers vary widely within APEC. This is why many key private international law texts that underpin the international legal framework for developing ODR exclude consumers including the UN Convention on Contracts for the International Sale of Goods, the UN Convention on the Use of Electronic Communications in International Contracts, the Hague Convention on Choice of Court Agreements, the Hague Principles on Choice of Law in International Commercial Contracts, and the UNIDROIT Contract Principles.

Workshop participants recommended that the definition of an excluded consumer transaction in Article 2(7) of the draft APEC Rules be revised to follow the definition of an excluded consumer in the UN Convention on Contracts for the International Sale of Goods – i.e., “Consumer transaction means a contract concluded for personal, family, or household purposes.”

\textbf{Include negotiation, mediation, and arbitration stages.} The Workshop considered functionality and what elements should be incorporated into an ODR platform. The participants were of the view, as recognized by the UNCITRAL ODR Technical Notes, that common elements for B2B transactions should include online negotiation, mediation, and arbitration.\textsuperscript{13} The various stages are intended to act as a funnel so that only a small fraction of the cases would have to be resolved by an online arbitrator. This reflects the common understanding that, in most cases, disputes can be resolved by negotiation or facilitated settlement, but that there is still a need for the element of final and binding arbitration for “a small percentage of cases that could not be resolved otherwise.”\textsuperscript{14}

Workshop participants pointed out that the negotiation phase is intended to be managed entirely by software, without requiring the intervention of a human case manager. It is also intended to be efficient, using software to move the process along. Studies have shown that buyers want e-commerce resolution processes to be completed expeditiously, and that drawn-out procedures create dissatisfaction, even if they eventually work out in the buyer's favor. If there is no settlement, the case may escalate to third-party resolution. The ODR provider selects the neutral/online arbitrator from the list of approved neutrals. The neutral achieves resolution, via online facilitated settlement (mutual agreement) or via online arbitration. An ODR platform, with binding arbitration as a “backstop,” serves as a strong incentive to move the parties to voluntary resolution. As noted, under ODR, most cases will be resolved amicably through negotiation or facilitated settlement. If not resolved amicably, the parties need the option of online arbitration. The Workshop also discussed the common ODR definition and principles, including respective ethical aspects relevant to the Collaborative Framework.

\textsuperscript{13} Id. para. 7.
Include a definition of costs. The Workshop also noted that a definition of costs could be added to the Model Procedural Rules by reference to the UNCITRAL Arbitration Rules Article 40. See Model Procedural Rules, Article 19.

III. Suggested Areas for Future SELI/EC Follow-up:

1. Economy-level capacity building: facilitate implementation of ODR, particularly in local courts.

The Workshop heard several examples where ODR has been implemented in conjunction with member economy courts for small claims and B2C disputes:

In British Columbia the Civil Resolution Tribunal (CRT) has replaced their small claims court for disputes under $5,000 with ODR. CRT provides for online negotiation, mediation, and adjudication. Use of ODR for all three phases is mandatory (i.e., there is no in person court). In its first year of operation CRT closed more than 6200 cases, with only 8% of the cases being resolved by adjudication. The vast majority (79%) of the participants would recommend CRT to others.

Parle in Quebec provides an ODR platform for online negotiation and online mediation for B2C disputes. Over 4000 cases have been processed in its first 22 months of operation. Most of the disputes were resolved – 67.8% (43.6% during negotiation and 24.2% during mediation). The satisfaction rate was 91.5% (even though the resolution rate was 67.8%). The average resolution time was 28 days with the average value of the settlement $2084. The process is roughly 12 times cheaper and faster than the traditional court process.

In the U.S., the Franklin County Municipal Court, Columbus, Ohio provides ODR services (negotiation and mediation) to court users on an opt-in basis. Online negotiation is currently provided as an option for small claims city tax cases. Online mediation is provided as an option for both civil cases pending before the Court (e.g. small claims, landlord-tenant issues, credit card debt) and for court users who choose to use the Court’s voluntary pre-file mediation program which assists parties in resolving civil disputes of any dollar amount before a lawsuit is filed. The system is free to use with technical support and mediation assistance. Language services are available to system users by phone. During the first 10 months of 2018, 76% of parties in city tax cases negotiated voluntary agreements to resolve their disputes through ODR. During the first 10 months of 2018, 61% of disputes mediated online through the Court’s pre-file mediation program reached agreement. Participants in the pre-file mediation program were in active online mediation for an average of 69 days. One hundred percent (100%) of direct party-to-party negotiation system users surveyed favored ODR over going to court and would recommend ODR to someone else.

In Hangzhou Province, China (home of Alibaba), e-courts are offered for e-shopping, copyright, and online financial service disputes. All materials are filed online, and the courtroom is replaced by a three-way video conference.
ODR has also been used in courts for other types of disputes such as family courts and child custody cases.

Several economies expressed interest in considering implementation of ODR in their courts.

2. **Conduct follow-up workshops as pilot progresses.** The delegates and participants looked forward to the SELI ODR Work Plan Stocktake Workshop to be organized by Hong Kong, China in Chile in early 2019.

**IV. Workshop Conclusion**

The Workshop representatives and participants further concluded that:

The APEC Economic Committee should consider and endorse the APEC ODR Collaborative Framework including the Model Procedural Rules at its next meeting in March 2019.

Workshop representatives and participants acknowledged that the challenge to implement the APEC ODR Collaborative Framework was formidable but doable and worth the effort. It was pointed out that the APEC ODR Collaborative framework can help create markets where none currently exist and be of substantial benefit to the millions of small businesses who do not have access to effective dispute resolution remedies.

**Annex**

**Recommendations and Conclusions**

**Workshop for Developing an APEC Collaborative Framework for ODR**

**Osaka, Japan, November 8-9, 2018**

1. APEC-wide implementation of the APEC ODR Collaborative Framework is needed to assist APEC businesses, particularly MSMEs engaged in cross-border trade, by providing quick and cheap dispute resolution and enforcement across borders, languages and different legal jurisdictions.

2. APEC should start with a pilot, as per the SELI ODR Work Plan. For purposes of the pilot, the Economic Committee (EC) should partner with platform hosts/ODR providers, including regional arbitration and mediation centers willing to provide platforms. SELI should identify the ODR providers. (APEC ODR Collaborative Framework, paras. 1.3, 3, and 4.)

3. Partnering ODR providers, as provided in the APEC ODR Collaborative Framework, should:

   - Use the ODR Collaborative Framework and Procedural Rules;
   - Provide a platform that meets the highest standards of data security, privacy, integrity, and preservation as well as fraud detection and prevention;
   - Ensure all communications in ODR proceedings take place via the ODR platform; and
   - Share basic information concerning the pilot including claims processed, stage at which dispute is resolved, time it took to resolve dispute and customer satisfaction.
4. APEC Economies should be able to opt-in, as provided in the APEC ODR Collaborative Framework.

5. SELI, as provided in the APEC ODR Collaborative Framework should:
   - Maintain on the EC website a list of partnering ODR providers that agree to process claims using the APEC ODR Collaborative Framework and Model Procedural Rules;
   - Provide limited oversight of ODR Providers;
   - Work with ABAC to identify businesses willing to participate in Pilot;
   - Improve APEC legal regimes on online dispute resolution including through encouraging implementation of UNCITRAL texts; and
   - Leverage private sector and academic community support.

6. The Model Procedural Rules should:
   - Follow UNCITRAL Arbitration Rules and UNCITRAL ODR Technical Notes;
   - Require agreement of the parties to a transaction;
   - Be subject to applicable mandatory law of APEC economies;
   - Apply to B2B disputes only;
   - Include negotiation, mediation, and arbitration stages; and
   - Include a definition of costs.

7. The APEC EC should consider the APEC ODR Collaborative Framework and Model Procedural Rules at its next session for adoption.

8. Suggested areas for future SELI/EC follow-up:
   - Economy-level capacity building: facilitate implementation of ODR, particularly in local courts;
   - Workshops: conduct follow-up workshops as pilot progresses.