



UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT

UNCTAD



FINAL REPORT



Regional Workshop on E-Commerce Legislation Harmonization in the Caribbean

Port of Spain, Trinidad and Tobago,
29 September – 2 October 2015



Association of Caribbean States
Asociación de Estados del Caribe
Association des Etats de la Caraïbe





In the framework of UNCTAD's assistance in the building of capacities of policy and law makers of Latin America and the Caribbean in the area of e-commerce legislation since 2007, a Regional Workshop on E-commerce Legislation Harmonization was held in Port of Spain, Trinidad and Tobago, from 29 September to 2 October 2015.

"A forum such as this facilitates knowledge sharing among local, regional and international stakeholders within Government, the private sector and international and regional organizations. This in turn, contributes to the elaboration of the enabling environment for the ICT sector of which the e-legislative agenda is a critical component.

We believe that for such as these provide the opportunity to align the work taking place nationally with that of our Caribbean neighbours towards the wider goal of creating a harmonized regional framework for ICTs."

Ms. Lisa-Ann Philips, Deputy Permanent Secretary, Ministry of Public Administration, Government of the Republic of Trinidad and Tobago

The workshop was organized by UNCTAD, the Latin American and Caribbean Economic System (SELA) and the Association of Caribbean States (ACS). This workshop was also sponsored by the Government of the Republic of Trinidad and Tobago and the Government of Finland. It was a follow-up to the TrainForTrade distance learning training on the Legal Aspects of E-Commerce in March/April 2015.

It offered an opportunity for 35 representatives from eleven Caribbean countries to exchange experiences and discuss various challenges related to the implementation and enforcement of legal frameworks linked to e-transactions, cybercrime, data protection, the protection of consumers online, intellectual property rights and online content. It presented an opportunity to learn from academic experts, international organizations and the private sector about possible strategies to boost cross-border e-commerce.

Key speakers at the workshop included Professor Ian Walden, Queen Mary University of London, Mr. Mazuree Colin Ali, Chief Executive Officer of TriniTrolley (the Caribbean's largest e-Commerce business), Mr. David Satola from the World Bank, Mr. Anthony V. Teelucksingh from the United States Department of Justice, Ms. Deon Woods Bell from the United States Federal Trade Commission and representatives from UNCTAD, the United Nations Commission on International Trade Law (UNCITRAL), the United Nations Economic Commission for Latin America and the Caribbean (UNECLAC), the United Nations Organization against

Drugs and Crimes (UNODC).

In her opening remarks, Ms. Lisa-Ann Philips, Deputy Permanent Secretary, Ministry of Public Administration of the Government of the Republic of Trinidad and Tobago, urged regional governments to continue improving the enabling environment to allow the private sector, particularly small and micro businesses, to participate actively in the growing digital economy. She stressed that "The Government of the Republic of Trinidad and Tobago is



working diligently towards this end through a multi-pronged approach that addresses infrastructure development, relevant legislation, executive leadership and capacity building.”

Mr. Philip McClauren, Deputy Programme Manager, CARICOM Single Market and Economy (CSME) Unit said that the hosting of this event was timely since a great deal of work is currently in-train in the Community. He recalled that the strategic goal is to accelerate the implementation and use of the CSME. In the area of e-commerce, he mentioned that the CARICOM Secretariat has secured funding under the 10th European Development Fund (EDF) for developing and operationalizing the policy, legal and institutional arrangements for a CSME E-Commerce Regime. He encouraged greater collaboration with international organizations, such as UNCTAD, in the area of institutional strengthening and capacity building for the sustainability of these programmes.

Mr. Alberto Durán Espaillat, Trade Director, ACS, stressed that e-commerce is rapidly gaining ground as a major opportunity factor for trade and development in developing countries, and therefore, it was imperative that countries better understand and master the various aspects of e-commerce. Specifically in the area of legislation and the legal aspects of e-commerce, training allows for countries to establish more effectively the legislative framework and regulatory instruments necessary to manage e-commerce, and reap the gains associated.

Global and regional ICT and e-commerce developments in the Caribbean

The first day provided an overview of global and regional e-commerce and cyberlaws developments. Ms. Cécile Barayre presented the findings of the *UNCTAD Information Economy Report 2015: Unlocking the Potential of E-Commerce for Developing countries*, including the *B2C E-Commerce Index* and the *UNCTAD Cyberlaw Tracker* (unctad.org/cyberlawtracker). The wide variations in terms of ICT access and use, skills and expertise, physical infrastructure, financial infrastructure and legal infrastructure make it important to consider how to help developing countries to enhance their readiness to engage in e-commerce (see Table 1).

According to UNCTAD's Global Cyberlaw Tracker, cyberlegislation adoption in the Caribbean has made most progress in the field of e-transactions, with 82 percent of countries having adopted a law. By contrast, far fewer have laws related to data protection and privacy (35 percent), consumer protection (29 percent) and cybercrime (59 percent). Only Costa Rica has adopted laws in all four areas. Caribbean countries emphasized the need for building the capacity of policy and law makers as well as the judiciary.

Mr. Mazuree Colin Ali, CEO of TriniTrolley, the largest e-commerce company in the Caribbean, presented the opportunities and challenges faced by private companies in e-commerce. The latter included the lack of awareness regarding the benefits of e-commerce, the availability of online payments facilities, broadband connectivity and access to Internet. He highlighted the fact that the lack of legal framework to support e-commerce and payment processing had been an issue for years and the main reason for not moving ahead to the level of developed countries.



**Table 1 - Caribbean countries featured in the UNCTAD B2C E-Commerce Index, 2014
(130 countries assessed)**

Economy	Share of population having mail delivered at home (2012 or latest, %)	Share of individuals with credit card (15+, 2011, %)	Share of individuals using Internet (2013 or latest, %)	Secure servers per 1 million people (normalized, 2013)	UNCTAD E-Commerce Index value	Actual Rank on the Index
Trinidad and Tobago	93	15.3	59.5	73.8	60.4	43
Costa Rica	98	12.2	47.5	72.5	57.6	52
Dominican Republic	99	12.2	45.0	61.5	54.5	57
El Salvador	95	5.3	25.5	60.9	46.7	72
Jamaica	50	6.9	46.5	67.9	42.8	80
Haiti	40	1.8	9.8	37.7	22.3	107

Source: UNCTAD Information Economy Report 2015

The representative from UNECLAC, Mr. Bobby Williams, provided an overview of ICT policies in the region and related challenges. Caribbean countries have had limited success in the past at harmonizing policy in the area of ICT. Examples of instances where countries of the region were not able to come into alignment include the switchover from analogue broadcasting to Digital Terrestrial Television (DTT), and the implementation of the CARIPASS system. In the first case, as a result of the lack of harmonization, four different standards for the technology were adopted within the region, despite the potential benefits of countries agreeing on a single, unified standard. In the case of CARIPASS, technology was in place that could have implemented a unified CARICOM system for immigration, but the region's political momentum behind the initiative faded over time, and the project did not come to fruition. The Eastern Caribbean Telecommunications Authority stands in contrast to these initiatives, as a longstanding institution that had enabled a harmonized policy on telecommunications regulation among five countries in the Organization of Eastern Caribbean States (OECS).

Specific to the area of legislative harmonization, two projects in the Caribbean that have developed model laws are the Electronic Government for Regional Integration Project (EGRIP) and Harmonization of ICT policies and legislation across the Caribbean (HIPCAR) initiatives. EGRIP was an e-government project among six OECS countries that included some legislative harmonization components, such as a model cybercrime law, and a framework to support e-filing of tax forms. The model cybercrime law has met with significant criticism, and there were significant post-implementation challenges in two



countries that passed laws based upon it. HIPCAR was an initiative driven by the International Telecommunications Union (ITU) to develop a set of model laws the area of ICT across 15 CARICOM countries. However, since the project ended in 2013, an expected CARICOM legal review of these model laws has still not occurred, and there has been very little uptake of these model laws by legislatures in Caribbean countries. This is broadly reflective of the challenges that efforts to further regional harmonization of ICT policy have experienced in gaining recognition as a priority by Caribbean governments.

Electronic transactions and electronic signatures

The session run by Professor Ian Walden and John Gregory, UNCITRAL, focused on electronic transactions, signatures and authentication. UNCITRAL developed global legal rules for electronic transactions with the Model Law on Electronic Commerce (1996) and the Model Law on Electronic Signatures (2001), culminating in the Convention on the Use of Electronic Communications in International Contracts (2005). To date, seven countries, including two in Latin America, had ratified the Convention and eighteen had signed it, thus indicating a positive intention concerning ratification.

Mr. Gregory noted perceived inadequacies in the “soft law” approach to law reform, through model laws that implementing states could vary or ignore. E-communications crossed borders very easily, especially in the age of global trade. Harmonization of laws was increasingly desirable, but the model laws had been implemented in inconsistent ways.

Mr. Gregory outlined the content of the ECC, notably the functional equivalence rules adopted from the model laws, plus the expansion of those rules with respect to electronic signatures, to add a criterion that they could be valid if they were reliable in practice, not only reliable in principle. He noted the five main areas in which the Convention added rules:

- A more detailed provision on determining the location of parties, to discourage reference to the location of technical equipment and to the country code top level domains in the parties’ websites;
- Further details on the place of sending and particularly receipt of e-messages, to deal with the impact of spam filters and similar threats to receipt;
- Descriptions of goods or services for sale to the world, such as on a web site, were deemed offers to do business (“invitations to treat”, in the language of the common law) rather than offers that could bind the merchant to an unlimited number of contracts;
- The validation of contracts between automated message systems in which no human being intervened to form or express consent to the contract; and
- The creation of a right to withdraw an “input error” if made by a human being dealing with an automated system that did not provide a method of avoiding or correcting such an error.

He indicated how useful the ECC could be in permitting other commercial treaties to operate in the electronic age. He mentioned the New York Convention on the Recognition



and Enforcement of Foreign Arbitral Awards, which required member states to recognize arbitration agreements made in writing and awards in writing from arbitrations. Likewise the Convention on the International Sale of Goods allowed countries to declare that they would apply the convention only to contracts in writing.

Both of these conventions would be more useful if rules of functional equivalence could apply to them, and the ECC would permit such an application. This application was one of the main attractions of the ECC to countries that already had satisfactory legislation for the basic rules of e-commerce.

The ECC could also be used as the basis for domestic law, either in addition to its application to international contracts or instead of such an application. Several countries had done this, including Trinidad and Tobago. The effect of the Convention in practice would be that people could effectively create documents electronically that would meet writing, signature and originality requirements. The ECC also expressly legitimized electronic contracts.

With regard to electronic signatures, Professor Walden canvassed the concerns of lawmakers about signatures in the electronic realm, and described the measures taken in some places to reduce the perceived risk they created or to encourage their use. Mr. Gregory outlined the criteria set out in the Model Law on Electronic Signatures to judge the reliability of electronic signing methods that often inspired laws that seemed to require the use of particular signing technologies, such as Public Key Infrastructure (PKI) digital signatures. The use might be encouraged by statutory presumptions of attribution or even of consent that would arise from the proper use of the prescribed technology.

It was recalled that the possibility of loss or fraud existed in all media. While some precautions were necessary in some cases, general rules requiring strict security were likely to cause more problems than they solved. While technologically demanding signature or authentication processes might be appropriate for particular high-security uses, such as a land title registration system, there appeared to be little actual demand for such processes for business in general. Indeed, proving that the technology rules had been complied with was often more difficult than proving the attribution of a signature by other means. The two presenters then spoke of the claims made for the use of dual key cryptography in a signing system. They described practical and legal limitations of those claims.

The session concluded with an appeal to flexible legislative standards applied with prudence in particular cases – just as was done for signatures on paper.

Cybercrime

In the discussion of cybercrime, Mr. Teelucksingh, United States Department of Justice, recommended that countries should enact domestic legislation to criminal computer abuses, in line with prevailing international norms such as the Budapest Convention on Cybercrime (2001). The UNODC's 2013 Draft Comprehensive Report on Cybercrime showed that there is an international consensus on broad areas of legal intervention for the prevention and combatting of cybercrime such as attacks on computers, data and system interference,



interception of communications without right, misuse of devices, and child abuse images. In addition, domestic legislation should include procedural rules which permit law enforcement agencies to investigate these crimes. This could involve the authorization to collect in real-time non-content and content in appropriate cases, preservation of data or data retention, search and seizure of stored computer data, and support for a 24/7 contact for prompt assistance for foreign partners. Domestic legislation should also authorize law enforcement to cooperate informally with foreign partners, including the ability to conduct joint investigations. Finally, the discussion noted the importance of improving cooperation between domestic service providers and law enforcement.

Ms Nayelli Loya, UNODC, presented the Cybercrime Repository and the work they carried out on cybercrime in the Central American Region. The Resolution 22/8 from the Commission on Crime Prevention and Criminal Justice, requested UNODC to serve as a central data repository of cybercrime laws and lessons learned. The Repository can assist countries in the fight against cybercrime on the following matters: legislative drafting, policy response to cybercrime, good practices and lessons learned in investigation, prosecution and prevention of cybercrime, cooperation with third parties, formal and informal international cooperation. UNODC's work on the Central American region focuses in El Salvador and Guatemala, in three main pillars: strengthening capacities for the investigation, prevention and enhancing inter-institutional and international cooperation as well as public-private cooperation.

Mr Satola of the World Bank concluded the session by presenting a progress report on the cybercrime capacity-building project being led by the World Bank and supported by the Government of the Republic of Korea. Its purpose is to synthesize various disparate elements of best practices in combatting cybercrime and create a single "portal" of knowledge to which governments could refer for capacity-building needs in policy, law and prosecution and investigation of cybercrime. The project will consist of a toolkit for capacity building looking at new issues in cybercrime, national and international responses to combatting cybercrime as well as providing a synthetic assessment tool that will gauge a country's relative readiness to combat cybercrime along multiple axis. The toolkit, including its assessment tool, will be publicly available. Partner institutions in the toolkit include UNCTAD, the Council of Europe, ITU, UNODC, UN ICRI, the International Association of Penal Law, the Oxford Cybersecurity Capacity Building Centre and the Korea Supreme Prosecutor's Office. The toolkit is expected to be published in 2016.

Data protection

Professor Walden introduced the possible conflicts of technology as a driver of economic growth for businesses, allowing the processing and storage of data, with information about consumers' personal preferences, interests, and activities, and at the same time as a barrier to e-commerce, raising consumer privacy concerns. These apparently competing interests must be reconciled to protect the right to privacy while promoting the economic opportunities that are in the interest of consumers and business actors alike.



He presented the different legal and regulatory measures, from binding instruments to self-regulation, at the regional and international levels. Different jurisdictions adopt various approaches to the problem of data protection, therefore posing problems of harmonization especially in the case of transborder flows of data. Developing countries wanting to participate in the information economy, and thereby facilitate the free flow of information from developed to developing countries, had therefore to consider the need for laws protecting personal data. In the Caribbean, six countries have data protection laws in place.

Privacy principles, or fair information processing principles, were developed to protect an individual's right to privacy in regard to personal data. These principles establish limits on the processing (the performance of operations such as the collection, handling, use and transfer) of personal data. The privacy principles can be found in the main international instruments, as well as in relevant national legislation. They have also been adopted by the private sector in self-regulatory initiatives. The advantage of a principles-based approach to the regulation of data protection is the avoidance of technological redundancy. The principles should therefore be as applicable to the Internet as they were to the introduction of computer technology, in other words to be 'technology neutral'. The principles for processing in a fair and lawful manner were as follows: data collection, proportionality, use, data quality, transparency, access and correction, objection, transfers, security and accountability.

Ms Deon Woods Bell, United States Federal Trade Commission (FTC), presented the strategy of the FTC with regard to data security, privacy and online enforcement. The FTC had been updating various policies and instruments to address changes in the marketplace, like the growth of mobile and social media.

First, she introduced Section 5 of the FTC Act, which prohibited unfair methods of competition and unfair or deceptive acts or practices. A deception required a finding of materiality, such as a statement about whether a company shares the information of its customers with third parties. An unfairness case required a showing of harm. Types of harms that the law covers include identity theft; physical threats; unwanted advertisements; inconvenience/loss of time.

With regard to data security, the FTC used its authority under US law to require companies to maintain "reasonable procedures" to protect sensitive consumer information; and honor any promises they make regarding the privacy or security of their information.

The FTC had brought about 55 data security enforcement actions. The data security principles were as follows: assessment of data practices and vulnerabilities, including third parties; limitation on collection/retention; physical/technical/administrative protection; proper disposal policies/ practices; plan for security breaches reasonableness. The FTC did not expect "perfect security", but reasonable and appropriate security was a continuous process of assessing and addressing risks. There was no one-size-fits-all data security program.

Regarding privacy, the FTC had brought enforcement actions addressing a wide range of privacy issues, including spam, social networking, behavioral advertising, pretexting,



spyware, peer-to-peer file sharing, and mobile. These matters include over 130 spam and spyware cases and more than 40 general privacy lawsuits. Recent cases included: Goldenshore Technologies; Aaron's, Inc.; Snapchat; Epic Marketplace; and Nomi Retail Tracking.

She mentioned the Safe Harbor which was a Voluntary Framework enabling businesses to transfer personal data from the European Union to the United States in a manner consistent with European adequacy standards of privacy (notice; choice; onward transfer; security; access; data integrity; enforcement). There were 3,000 companies enrolled in the framework. FTC has used Section 5 to bring 26 Safe Harbor cases, including against Google and Facebook, as well as TRUSTe for misrepresentations regarding certifications.

Consumer protection online

Professor Walden highlighted the concerns of online consumers, including in the case of cross-border e-commerce and security on the Internet. He recalled the huge benefits in terms of choice and price in the online supply of goods and services. However, the nature of transactions carried out at a distance also brought inevitable risks, of which the consumer needed to be aware. Governments and courts needed to protect their nationals from unscrupulous traders providing goods and services into their jurisdiction. Such protection was operated at a number of different levels, from requirements imposed on the actual design of a website, to mechanisms designed to improve consumer access to justice. He stressed that effective protection required harmonization of consumer protection rules and co-ordination between national authorities.

Ms Woods Bell shared the FTC's techniques to raise the awareness of consumers on the risks presented online – everything from electronic greeting cards that warn of “work-at-home” scams to teaser websites that mimic phony Internet schemes. The FTC also hosted workshops, town halls and roundtables, bringing together stakeholders to discuss emerging issues in consumer privacy and security. The FTC engaged in enforcement cooperation in foras such as: Global Privacy Enforcement Network (GPEN); APEC Cross-border Privacy Enforcement Arrangement (CPEA); International Consumer Protection and Enforcement Network (ICPEN); and London Action Plan (LAP).

She also referred to the Children's Online Privacy Protection Act (COPPA) requiring websites/apps directed at children to obtain ‘verifiable’ parental consent before collecting personal information from children under age 13.

Online content

Professor Walden introduced the topic and the complexity of regulating Internet content, not least due to the difficulties caused by the cross-border nature of online transactions, with overlapping jurisdictions each seeking to enforce differing levels of control over information. From a business perspective, the least burdensome means of regulating the Internet in general might be to adopt a ‘country of origin’ approach, supported by harmonization and



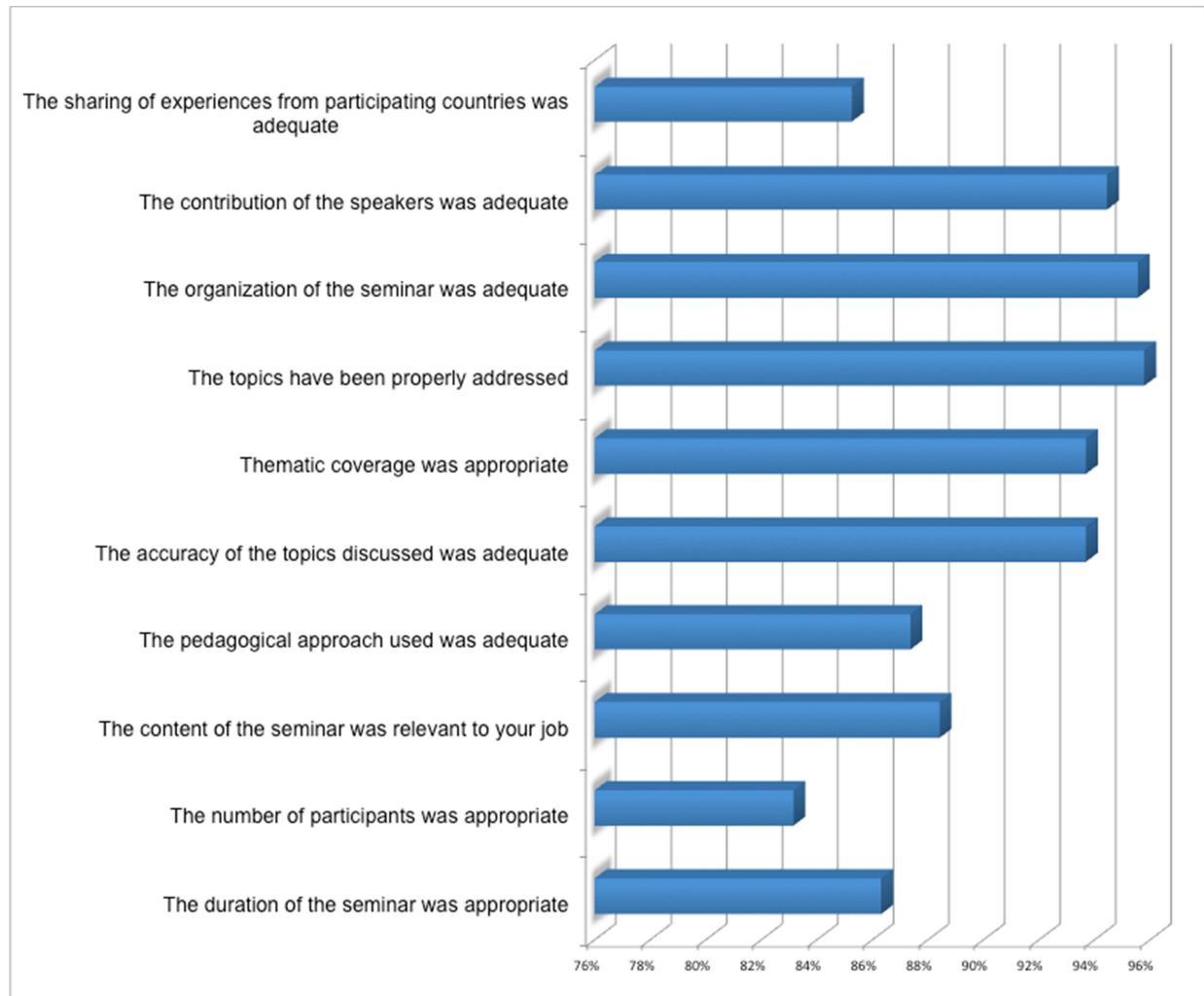
convergence of national laws. However, exceptions had to be made to take account of the type of cultural differences which inform much national information control legislation. In the absence of harmonization, the adoption of a ‘directed or targeted’ approach might be the best compromise between the potentially conflicting desire of policy makers to both protect its citizens and facilitate e-commerce.

The way forward

In her conclusions, Ms. Cécile Barayre referred to the challenges faced by Caribbean countries, including the different level of law adoption; the lack of capacity of stakeholders and law enforcement bodies; the lack of resources and of prioritization in Governments' portfolios; the lack of mechanisms for coordinating cooperation between multiple agencies; and the multitude of sub-regional groupings. A discussion followed with CARICOM representatives regarding the prioritization of e-commerce with deliverables on relevant policy and legislation.

UNCTAD had been engaged in e-commerce and law reform for more than ten years in all developing regions, and good practices were shared with the participants. Those included the need for commitment and ownership at highest national and regional levels; the constitution of an inter-governmental committee to ensure coordination among the various ministries in charge of e-commerce; the collaboration among regulatory/statutory authorities at national and regional levels; the engagement of the private sector in the legal reform. Another good practice was the role of participants trained through UNCTAD programme in sharing their country experience, engaging in restitution seminars, briefing in turn colleagues on the legal implications of e-commerce, participating in national/regional workshops, and generating national awareness raising campaigns for key stakeholders, including parliamentarians, law enforcement agencies, the private sector and the consumers in general.

The workshop concluded that the way forward was about sharing resources for shared benefits and development of domestic/cross-border ecommerce. This could be done through informal and formal mechanisms at national and regional levels to advance the e-commerce legislation harmonization, and by engaging participants to become the promoters of law reform. Participants were also encouraged to tap into the existing resources available from regional and international organizations.

**Summary of participants' workshop evaluation***Comments by some of the participants:*

- Very useful and informative workshop, which built upon the work in the on-line course.
- Workshop provided the opportunity for further collaboration and cooperation with other organizations.
- The topics addressed were relevant to my job & thoroughly addressed by each of the speakers. The organization of the entire seminar was excellent.
- Assistance from UNCTAD was timely and further assistance will be most welcome in the CARIFORUM context given that the CARIFORUM EU EPA is being provisionally applied



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Comments by UNCTAD's partners

"This training workshop is very timely and there would also be need for greater collaboration with international organizations such as UNCTAD in the area of institutional strengthening and capacity building for the sustainability of these programmes in the future." Mr. Philip McClauren, Deputy Programme Manager CSME, CARICOM Single Market and Economy Unit

"It was a pleasure working with you in this program. I hope I get the opportunity to work with you again in the near future." Mr. Anthony V. Teelucksingh, Senior Counsel | Computer Crime, United States Department of Justice

"I thought it was really good. Good interaction from the group, and Ian did a terrific job. Hope we can do something similar again soon." David Satola, Lead Counsel, ICT Legal Advisor, The World Bank

"That was a fantastic workshop you ran last week.... I learned quite a bit." Mr. Bobby Williams, Associate Information Management Officer, UN ECLAC Subregional Headquarters for the Caribbean

"I do hope that the Workshop was just the first of future engagements." Ms. Shelley-Ann Clarke-Hinds, Executive Manager, External ICT Relations, Ministry of Public Administration, Trinidad and Tobago

"I very much enjoyed the workshop - Ian Walden's overviews are extremely well put together, and the other contents, notably on cybercrime but also Deon's on consumer protection and cooperation of agencies to that end, were first rate. You're doing valuable service to a lot of countries with this calibre of work." Mr. John D. Gregory, General Counsel, Justice Policy Development Branch, UNCITRAL Representative, Ministry of the Attorney General (Canada).

E-commerce and Law Reform Programme & TrainForTrade Programme
2015