

LEGAL GUIDE FOR ESTABLISHING A SINGLE WINDOW

*legal barriers and possible solutions for developing an
enabling environment for a Single Window*

Prof. Dr. Hong Xue

Director of BNU Institute for Internet Policy & Law

**Co-Director of UNCITRAL-BNU Joint Certificate
Program on International E-Commerce Law**

Almaty 24-25 April 2014

Overview

- ◆ *International recommendations and best practice in developing an enabling legal framework regulating the implementation of a Single Window (in various areas of law);*
- ◆ *Challenges to the creation of a legal framework for the development of the Single Window on a supranational level ;*
- ◆ *Legal validity of electronic documents in intergovernmental information exchanges*

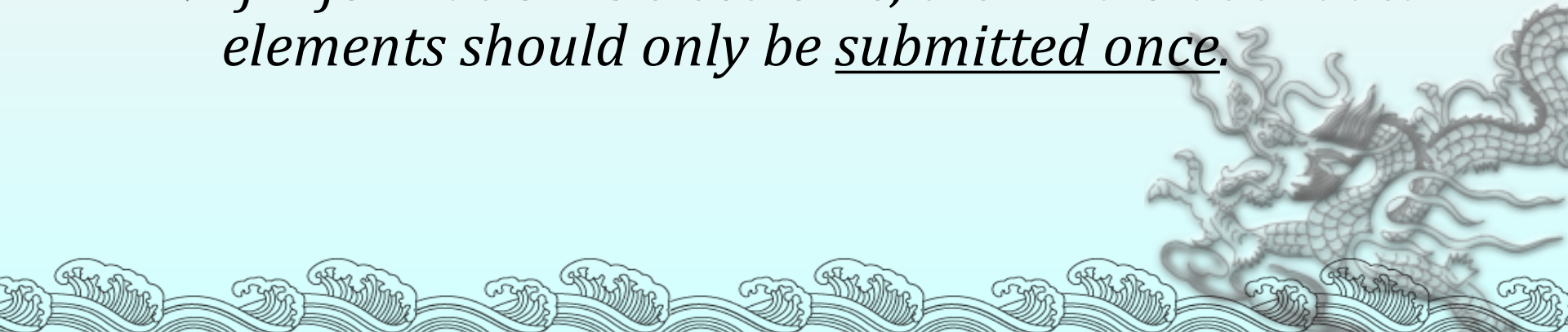
Enabling Legal Framework for National Single Windows

- ◆ *International recommendations and best practice*
 - ◆ UNECE Recommendation 33 –Recommendation and Guidelines on Establishing a Single Window
 - ◆ UNECE Recommendation 35 – Establishing a Legal Framework for International Trade Single Window
 - ◆ UNNExT Electronic Single Window Legal Issues: A Capacity- Building Guide
 - ◆ UNCITRAL Model Laws
 - ◆ Other international texts (WCO, etc.)



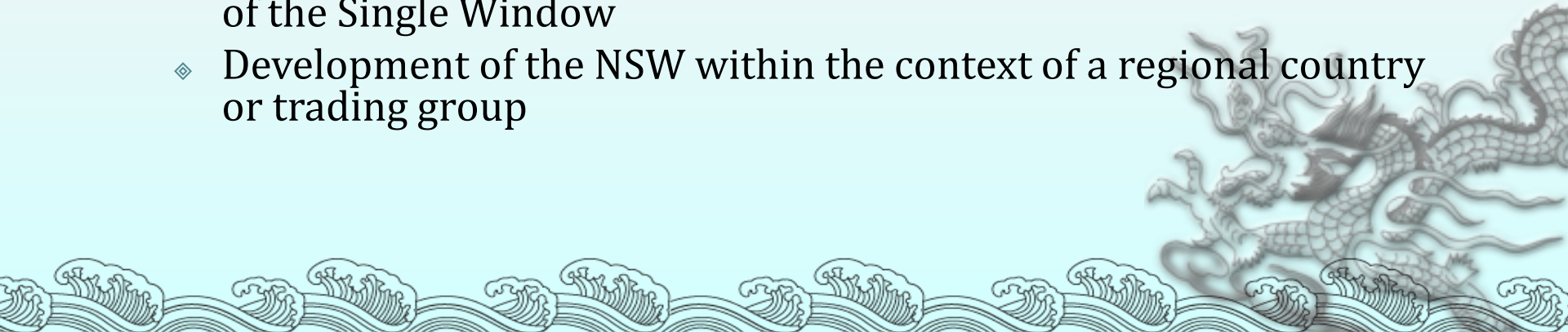
SW for Trade Facilitation

- ◆ *Single Window Definition in the Recommendation 33*
 - ◆ *A facility that allows parties involved in trade and transport to lodge standardized information and documents with a single entry point to fulfill all import, export, and transit-related regulatory requirements.*
 - ◆ *If information is electronic, then individual data elements should only be submitted once.*



Legally Enabling NSW

- ◆ Creating a legally enabling environment for NSW
 - ◆ Conducting the legal gap analysis to create the necessary legal basis
 - ◆ Establishing organizational structure for the establishment and operation of a single window facility
 - ◆ Examining legal implications on different technical architectural options for Single Window facilities
- ◆ Mindful of the implications of international standards and cross-border trade, including data format and the normative definitions that might need to be altered in law and practices
 - ◆ Adjustment of international treaties owing to the legal implications of the Single Window
 - ◆ Development of the NSW within the context of a regional country or trading group



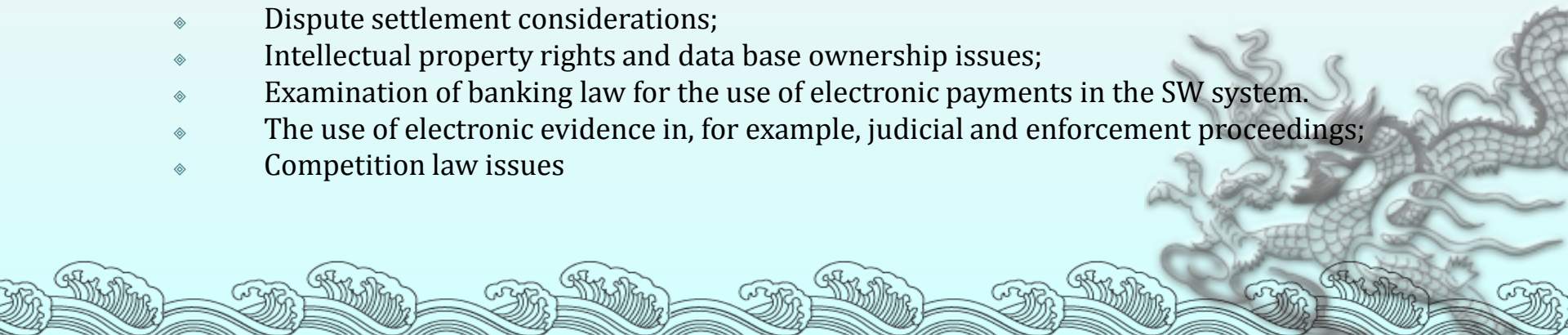
Identifying Key Legal Areas

- ◆ Data administration (collection, sharing, amendment, deletion, accessibility, retention and archiving)
- ◆ Privacy and confidence
- ◆ Identity management
- ◆ Personal data
- ◆ Confidential information in trade and competitive data
- ◆ Intellectual property and database ownership
- ◆ Competition issues
- ◆ Electronic data and communication
- ◆ Liability, law enforcement and dispute resolution



Areas of Law

- ◆ Legal basis
 - ◆ Policies (executive acts, instructions circulars, or documents of similar nature), legislative enactments, administrative rulings, regulations and governmental decrees, circulars and the like that would formally establish the SW in national law;
 - ◆ Authorization to access and share data between government agencies and for cross-border information exchange
- ◆ Enabling laws
 - ◆ E-Transaction law;
 - ◆ Development of a service level arrangement (SLA) for the operation of the SW;
 - ◆ Laws and regulations on data protection and information security;
 - ◆ Regulatory and/or legal requirements for accessing and sharing information and data between and among government agencies;
 - ◆ Legal requirements, if any, in national law and regulations, on confidentiality and privacy;
 - ◆ Laws and regulations relating to data accuracy and integrity for the SW;
 - ◆ Liability issues related to operations of the SW and, its potential cross-border transactions
 - ◆ Regulatory/legal requirements for data retention and electronic archiving;
 - ◆ Dispute settlement considerations;
 - ◆ Intellectual property rights and data base ownership issues;
 - ◆ Examination of banking law for the use of electronic payments in the SW system.
 - ◆ The use of electronic evidence in, for example, judicial and enforcement proceedings;
 - ◆ Competition law issues



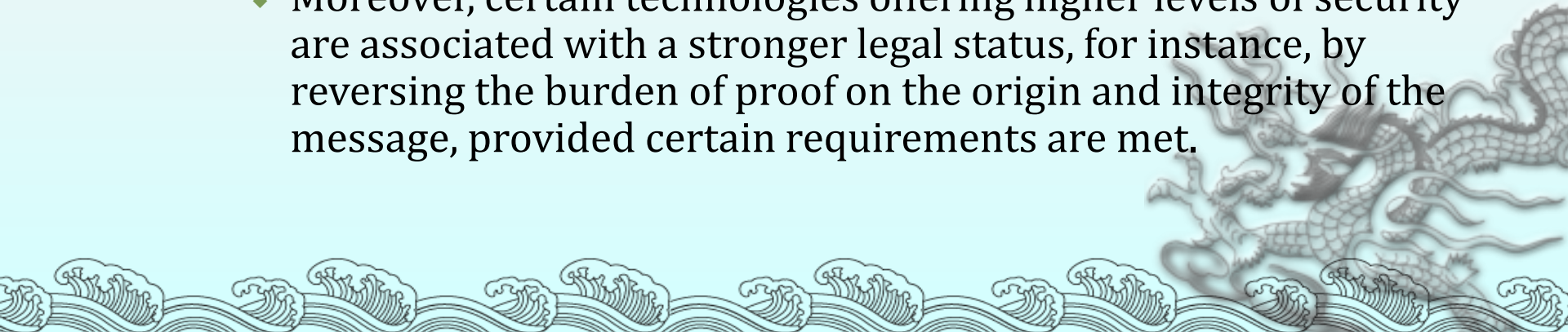
Areas of Law (con'd)

- ◆ International standards, best practices and principles
 - ◆ Cross-border recognition (mutual recognition) of electronic signatures and, where appropriate, certification authorities;
 - ◆ Legal issues related to jurisdiction in cross-border transactions;
 - ◆ Include an analysis of how international legal standards have been (or have not been) incorporated into a country's legal framework for its SW.
 - ◆ Other legal issues that may be identified as important to a particular country's legal regime, for example, laws and regulations for government ministries or agencies, including the Customs Administration, that will be participating in the SW



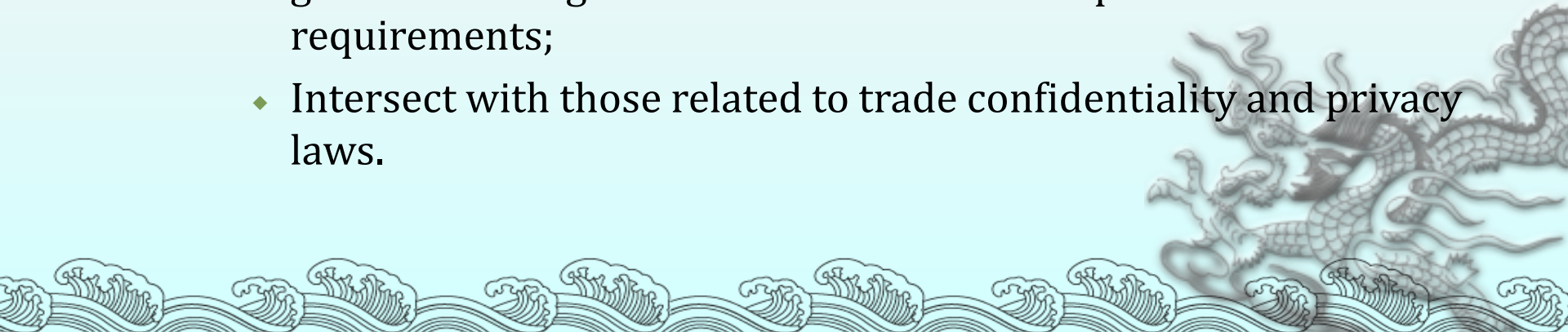
Selected Key Issues

- ◆ Identification, authentication and authorization via electronic signatures
 - ◆ To properly identify, authenticate, and authorize those who will have access to the SW
 - ◆ Two-tier approach
 - ◆ all electronic signature methods are recognized as potentially having legal value, to be ascertained in case of dispute in light of factual circumstances and other relevant factors, including the parties' contractual agreements;
 - ◆ Moreover, certain technologies offering higher levels of security are associated with a stronger legal status, for instance, by reversing the burden of proof on the origin and integrity of the message, provided certain requirements are met.



Selected Key Issues

- ◆ Data quality
 - ◆ Integrity, completeness and accuracy of the data or information
 - ◆ Legal measures
 - ◆ Adopt mandatory technical measures to protect information security and data;
 - ◆ Establish, e.g., MOUs, as well as information security agreements (ISAs) between the operator of the SW and other government organizations that would incorporate these requirements;
 - ◆ Intersect with those related to trade confidentiality and privacy laws.



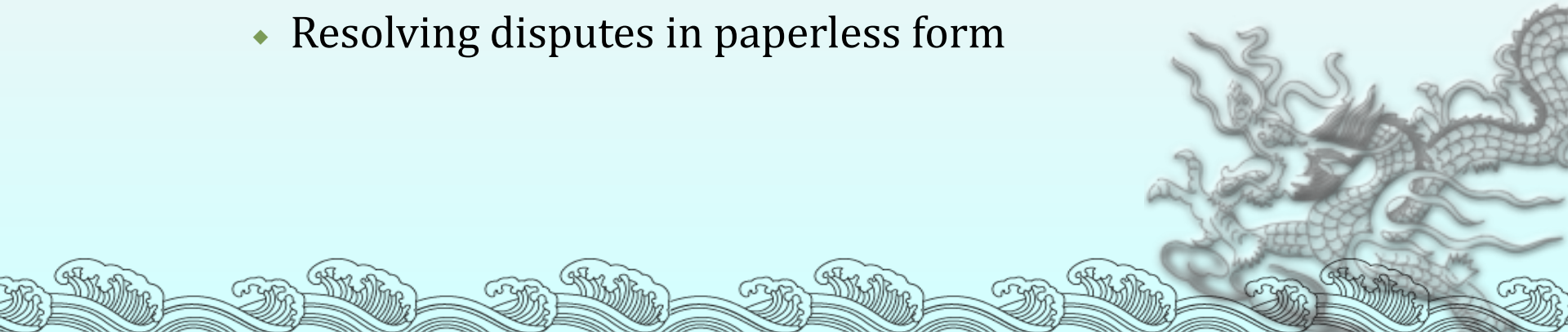
Selected Key Issues

- ◆ Data access and sharing
 - ◆ Legally enabling access to and sharing of customs and trade data information across government agencies and ministries
 - ◆ Use inter-agency agreements such as MoU and Interconnection Security Agreements (ISAs) that have been established under applicable regulations for such information exchanges between government ministries or organizations.
 - ◆ Authorizing private sector entities (such as traders and customs brokers) to access the SW



Selected Key Issues

- ◆ Dispute resolution
 - ◆ Conflict of jurisdiction and application of law
 - ◆ Alternative dispute resolution
 - ◆ Given the costs of litigation in many countries, there are significant cost and time advantages to establishing some types of mediation and/or binding arbitration arrangements in which these types of claims can be settled expeditiously.
 - ◆ Online dispute resolution
 - ◆ Resolving disputes in paperless form



Developing Supranational Single Window

- ◆ UNECE Recommendation 35 – Establishing a Legal Framework for International Trade Single Window
- ◆ United Nations Convention on the Use of Electronic Communications in International Contracts
- ◆ UNECAP **Resolution** “Enabling paperless trade and the cross-border recognition of electronic data and documents for inclusive and sustainable intraregional trade facilitation” (68/3) May 2012
 - ◆ Avoiding trade barriers
 - ◆ Enabling and facilitating the cross-border recognition and electronic exchange of trade documents
 - ◆ Promoting uniformity and interoperability according to the international standards
 - ◆ Considering the bilateral and sub-regional agreements on the cross-border recognition and exchange of trade-related documents
- ◆ (Draft) Arrangement/Agreement on Facilitation of Cross-border Paperless Trade for the Asia Pacific Region

Challenges

- ◆ Legal uncertainties in cross-border environment
 - ◆ Complexity of issues to address in cross-border e-exchange of trade data and document
 - ◆ Cross-border electronic communications in trade (B2B, B2G)
 - ◆ cross-border data collection, retention, sharing, access and archiving
 - ◆ Privacy, confidence and IPRs in cross-border data flow
 - ◆ Liability, law enforcement and dispute resolution



Challenges

- ◆ Legal insufficiency
 - ◆ No uniform legal arrangement
 - ◆ No uniform legislative and judicial body
 - ◆ Lack of universal rules on privacy and cross-border data flow
 - ◆ Whether NSW a prerequisite ?



Principles to be Considered

- ◆ Incorporating existing international standards and best practices
 - ◆ ‘Non-discrimination’ principle between paper and electronic documents or messages and ‘technology neutrality’
 - ◆ Mutual recognition of electronic documents and data messages in trade
 - ◆ Cross-border authentication and mutual recognition of e-signature



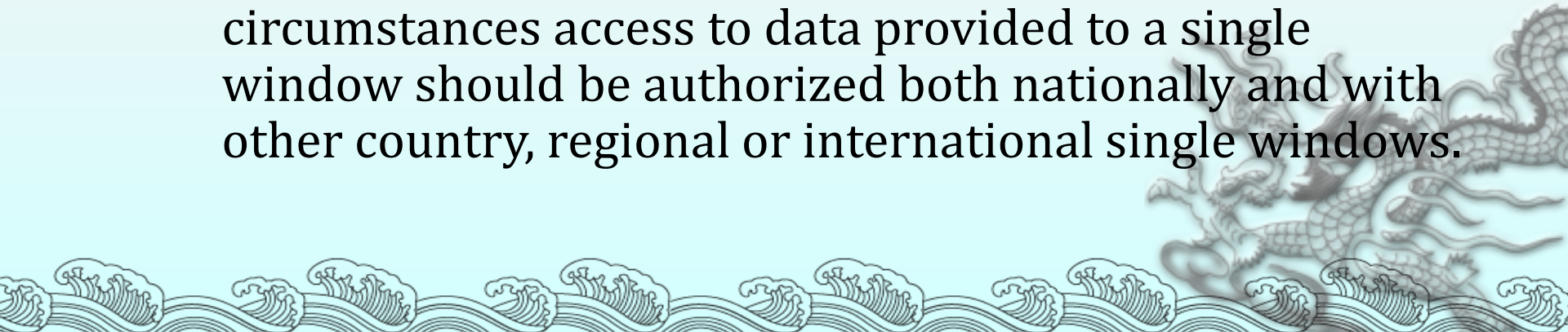
Principles to be Consider (con'd)

- ◆ Removing formal and procedural barriers for legal interoperability
 - ◆ National legal requirements on data collection, retention, sharing, access, archiving and submission to governmental agencies should serve the purpose of trade facilitation and single window



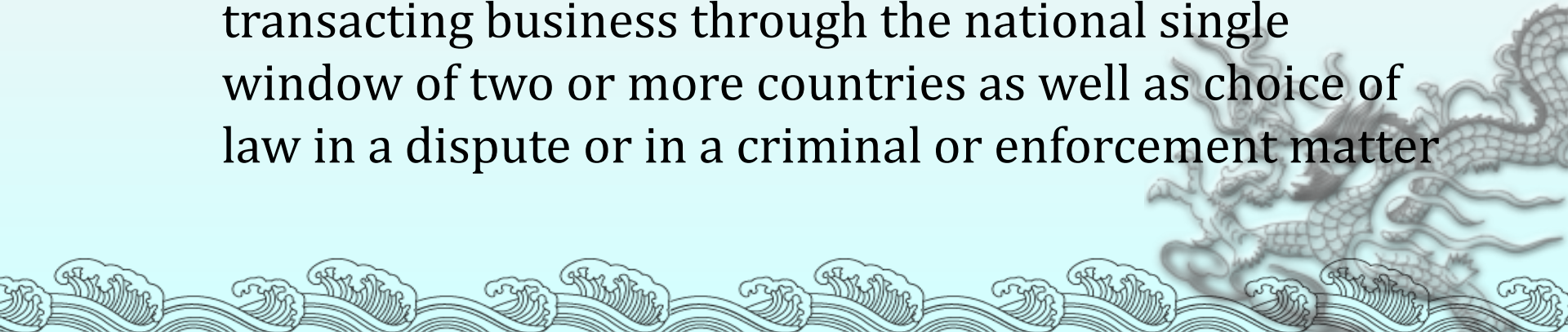
Principles to be Consider (con'd)

- ◆ Complying with legal requirements of cross-border data flow, intellectual property protection and market competition
 - ◆ Consideration should be given to bilateral, and possible multilateral agreements, to meet the needs of both domestic and regional legislation and regulation on privacy, (commercial/national) confidential information and IPRs.
 - ◆ Consideration should be given to how and under what circumstances access to data provided to a single window should be authorized both nationally and with other country, regional or international single windows.



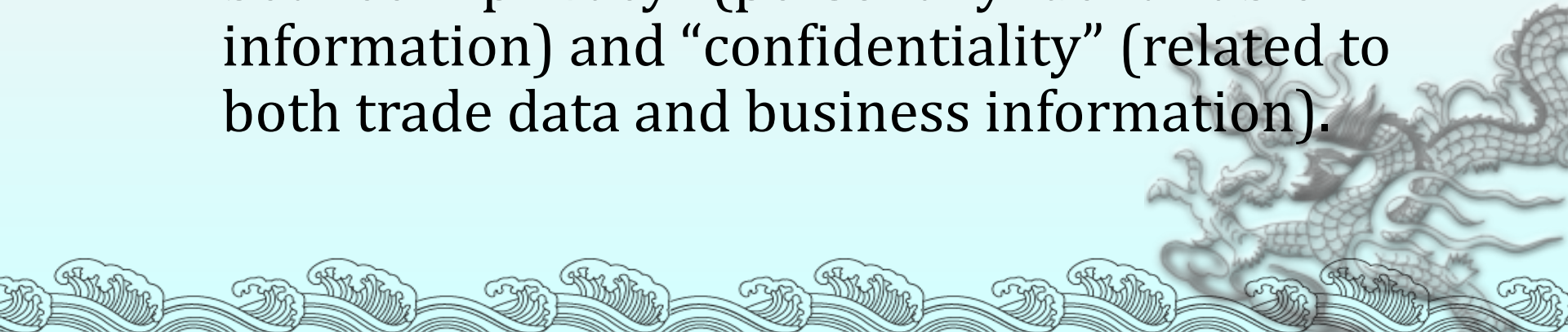
Principles to be Consider (con'd)

- ◆ Cooperating in law enforcement and dispute resolution
 - ◆ Considerations must be taken into account in cross-border transactions to insure that electronic documents and data messages are admissible in judicial proceedings in foreign jurisdictions as well as being admissible in domestic proceedings
 - ◆ Addressing the issues of jurisdiction over parties transacting business through the national single window of two or more countries as well as choice of law in a dispute or in a criminal or enforcement matter



E-communications in Intergovernmental Context

- ◆ Law on data protection
 - ◆ Adoption of international legal standards and best practices is advisable.
 - ◆ APEC Data Privacy Pathfinder program
 - ◆ OECD Guidelines
 - ◆ EU-US Safe harbor
 - ◆ Some national legal regimes may distinguish between “privacy” (personally identifiable information) and “confidentiality” (related to both trade data and business information).



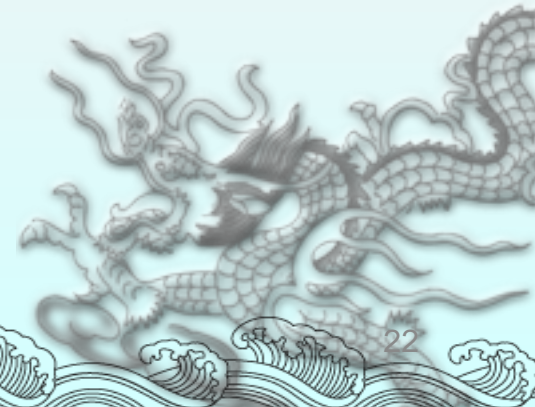
E-communications in Intergovernmental Context

- Law on data security
 - ◆ In many countries, access and sharing trade data has had to be authorized in national law before information can be shared or exchanged with another country's Customs Administration.
 - ◆ It will be important to other Customs Administrations with which information and data may be shared is legally permitted to ensure cross-border data flow has legal validity.



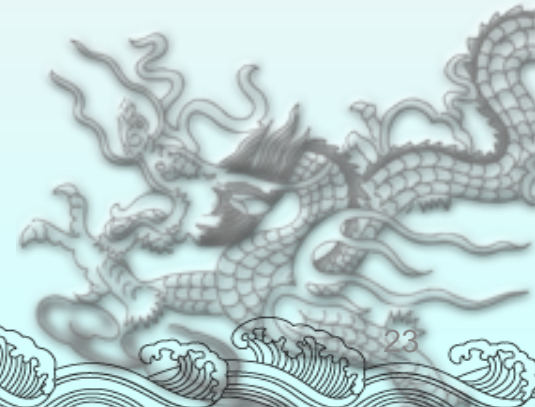
E-communications in Intergovernmental Context

- ◆ Law on data quality
 - ◆ Customs regulations should take into account the legal criteria as well as the technical requirements for achieving and desired storage of data.
 - ◆ In the cross-border environment data shall be retained and stored effectively and interoperably.



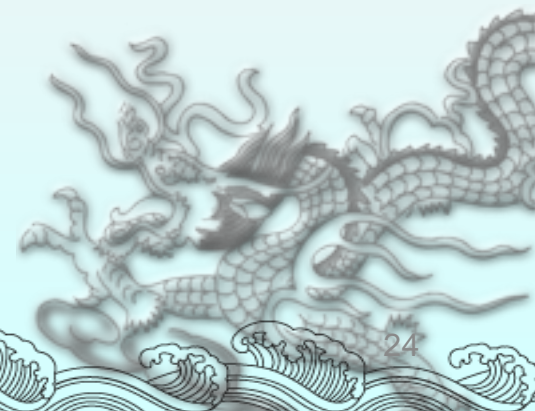
E-communications in Intergovernmental Context

- ◆ Challenges to legal validity of electronic documents in intergovernmental information exchanges
 - ◆ Lack of international legal framework for data protection
 - ◆ Lack of international standards
 - ◆ Intensifying security concerns



Conclusion

- ◆ To meet the need of Single Window and Trade Facilitation:
 - ◆ On one hand: improving and adjusting domestic laws;
 - ◆ On the other: enhancing interoperability and coherence with the international laws, standards and best practices.



THANK YOU!

