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**LEGAL AND REGULATORY ASPECTS
OF ENABLING ENVIRONMENT STRATEGY**

**EXPERT MEETING ON ELECTRONIC COMMERCE STRATEGIES:
THE BASIC ELEMENTS OF AN
ENABLING ENVIRONMENT FOR E-COMMERCE**

UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT
COMMISSION ON ENTERPRISE, BUSINESS FACILITATION AND DEVELOPMENT

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INTRODUCTION

An “e-friendly”, “e-ready” enabling legal and regulatory framework is indispensable if a country is to reap the economic and social benefits of electronic commerce and the Internet. While much of the experience in creating such an enabling legal and regulatory framework on a national level is found in and derives from the industrialized, developed countries, the issues explored here raise particular challenges for policy makers in the developing world. Much of the international experience described points to certain advantages in harmonizing legislation, or at least moving towards an environment of interoperability. Yet there is also strong demonstration that in certain areas, particular national requirements must also be taken into account. The variety of issues and requirements for the elaboration of the legal and regulatory infrastructure for e-commerce and the Internet highlight the necessity of a comprehensive approach to legal reform issues.²

Centuries ago, in a different development context, Alexis de Tocqueville wrote,

“Do you want to test whether a people is given to industry and commerce? Do not sound its ports or examine the wood from its forests or the produce of its soil. The Spirit of trade will get all these things and, without it, they are useless. Examine whether this people’s laws give

¹ dsatola@worldbank.org; The views expressed in this paper are those of the author and not necessarily of the World Bank or its members.

² See, Abstract, Intven, *et al.*, Legal and Regulatory Aspects of E-commerce and the Internet, World Bank (forthcoming) (Intven).

men the courage to seek prosperity, freedom to follow it up, the sense and habits to find it and the assurance of reaping the benefit.”

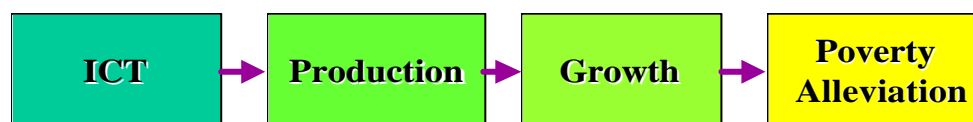
As de Tocqueville observed, law matters. Law gives effect to policy. As such, laws affecting e-commerce are an important and integral part of the enabling environment for e-commerce. And, the policies undertaken and the manner in which they are reflected in law will affect how e-commerce develops, how it is used, etc.³ But laws alone are not enough.

There are other attributes that make the legal and consequent institutional structures work in their respective environments. Among these are a history of market development (culminating in mature markets), and known outlets and predictable results for resolving disputes including respected, independent, credible judiciary and other mechanisms for resolving disputes that have the confidence of the general public. It cannot be said with certainty that all of the other, exogenous factors that support the legal, regulatory and institutional precedents in developed countries (mature markets, credible outlets for resolving disputes, etc.) exist to the same extent in all developing countries – and care should therefore be taken that while creating the essential legal infrastructure, other aspects of the market reform enabling environment not be ignored.

This paper focuses on the process of reform⁴, specifically the process of legal reform that is an integral part of developing an enabling environment for e-commerce. As such, this paper is aimed at both policy makers, legislators and other stakeholders.

BACKGROUND

To paraphrase a recent report by UNDP regarding ICTs and development, e-commerce is and should be viewed as a tool of development, not a reward.⁵ Efficient provision of ICT infrastructure and services will enhance production, which will contribute to growth and even help in alleviating poverty – a primary goal of the World Bank. This relationship can be shown as follows:



³ For some recent examples of laws that particularly reflect social, economic and development policy, *see, e.g.*, Moldova’s new draft Law on Informatics and Informatization (in the creation of new online national databases, this law redefines privacy expectations and has pitted one governmental institution against another in a struggle over the regulation of the “.md” top-level country domain name ;South Africa’s Electronic Communications and Transactions Bill (among other things, critics have argued that this law “nationalizes” regulation of the “.za” top-level domain name after a decade of industry self-regulation); and probably one of the most obvious in recent times is the U.S. USA PATRIOT ACT (this laws anti-money laundering provisions have extraterritorial application in the provision of sometimes otherwise personal data, changing expectations of privacy).

⁴ It is taken as a given in this paper that certainty is brought about through law. Therefore, this paper does not delve into the issue of legal certainty in any detail, rather is assumed as a given. Also, this paper does not look in great detail at substantive laws affecting e-commerce, such as legal recognition of digital signatures and electronic contracts, privacy, banking and payments laws, or intellectual property rights, to name a few.

⁴ <http://www.undp.org/idep/>.

In this sense, the Internet, and e-commerce, are transformational. No longer are “old economy” concepts of capital formation and capital flows necessarily applicable. Now, productive assets do not need to be equated with natural resources, nor does value-added processing necessarily need to take place after export. But, for the equation to work, ICT infrastructure and services need to be provided on an efficient basis (which depends in part on removing barriers to entry), reducing users’ costs.

Finally, in the context of the reform agenda, it is instructive to take account of the types of e-commerce activity likely to be undertaken. The following chart⁶ describes the types of e-commerce activity that should be incorporated into an e-commerce legal and regulatory enabling environment:

Types of E-commerce and Related Internet Activities			
	Government (“G”)	Business (“B”)	Consumer (“C”)
Government	G2G – coordination	G2B – information	G2C – information
Business	B2G – government procurement	B2B-e-commerce between businesses	B2C – e-commerce in consumer markets
Consumer	C2G – e.g., tax compliance	C2B – price & other comparisons	C2C – auction markets

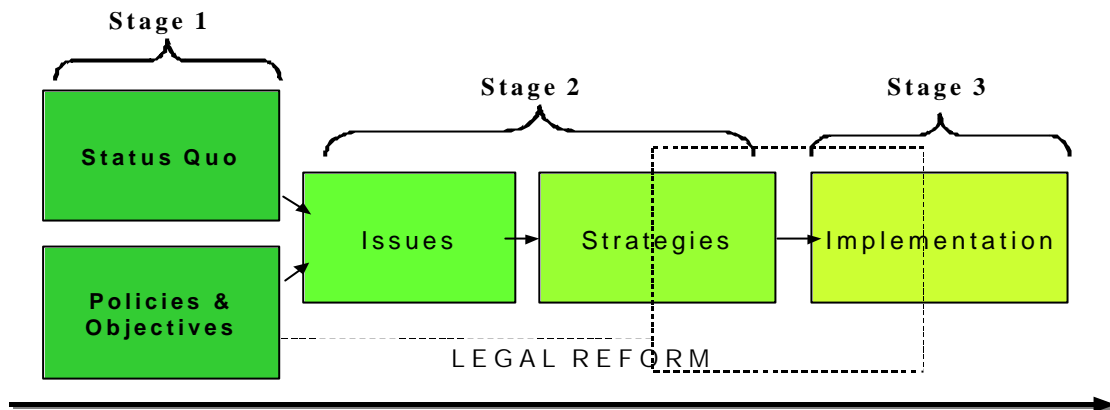
Consideration should be given to the types of e-commerce that are to be encouraged. Additionally, as will be argued later, it is important that the legal framework not be designed for just one type of activity. Rather, a commercially neutral approach should be taken.

PROCESS

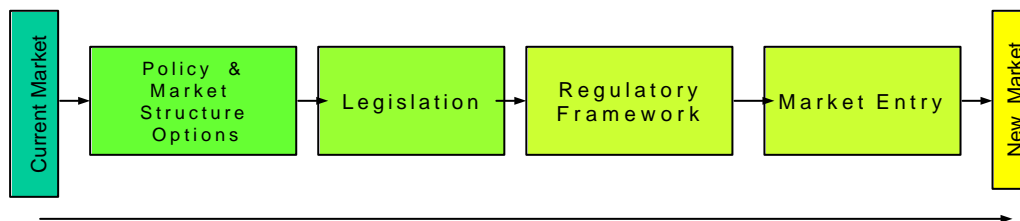
Reform is hard work. Difficult policy decisions need to be made and communicated to constituents. If the precepts of the ICT reform process are accepted (that efficient provision of ICT infrastructure and services aids in production and growth), this will undoubtedly lead to a the identification of a number issues that will need to be addressed in the reform process. Regardless of whether it is e-commerce, there are common elements of the reform process. In the first stage of reform, a change to the status quo is introduced through new policies. How to give effect to these policies results in reform issues that need to be dealt with. How these issues are dealt with is the strategy of introducing the reforms. Finally to give effect to reforms, they need to be implemented. Because law is the embodiment of policy, the process of legal reform needs to start right at the beginning, during the shaping of the new policies. And while clearly some of the reform issues that will arise at the beginning of stage two, those engaging in law reform need to take part in developing the strategies and in their implementation –

⁶ Jonathan Coppel, *E-Commerce: Impacts and Policy Challenges 4* (OECD Economic Department Working Paper No. 252 23 June 2000), cited in Intven, *supra*.

implementation being in part, the passage of new laws. The importance to successful reform, especially legal reform, of broad public consultation, stakeholder “buy-in” and “local ownership” can not be overemphasized. To have a law, or series of laws, on the books, that stakeholders (government, regulators, owner/operators and users) do not understand or agree with will impair the success of the reform program. The stages of the reform process can be shown in the following chart:



In addition to the elements of the process of reform is the sequencing of reform. There are many variations on reform sequencing, taking into account urgency, parallel processes, local circumstances and the like. Admittedly, the model of reform sequencing discussed in this paper is the ideal. Practical considerations may dictate modifications. Whatever the circumstances, however, where there is a legal element to the reform process, it is logical that in order to effect the shift from the market supported by the “old” legal framework to the market supported by the new legal framework, certain things have to happen. First, the policies giving rise to change need to be elaborated. These will, in turn, give rise to new legislation that reflect, embody and give effect to those policies.⁷ To the extent that the laws provide for or anticipate regulation, a regulatory framework can be elaborated to implement the law. Finally, it is assumed that new entry will come into the market based on the certainty provided by the legal and regulatory framework. The sequencing used in this paper can be shown as follows:



⁷ Where new laws are sequenced before policy, the laws in effect are the policies. Introduction of policies after laws can lead to undermining the certainty that is to be achieved through law, or, imply further amendment to the legal framework.

SELECTED LEGAL THEMES

Principles and Issues

The basic theme in legal reform is to create an enabling environment of predictability and certainty through good governance and respect for the Rule of Law that encourages use and confidence in the e-commerce market place. A non exhaustive list⁸ of underlying principles behind legal reform in the area of e-commerce follows:

- ?? *Preference for market-based approaches* (regulate only what is necessary and when it is necessary; incentives should derive from the market)
- ?? *Make use and entry easy* (infrastructure and services liberalization play a key role)
- ?? *Promote Certainty/Confidence* (transparency)
- ?? *Enhance transactional enforceability*
- ?? *Harmonize/Standardize* (reference to international best practice, model laws, etc., interoperability of laws (not necessarily carbon copying) will facilitate use and growth of commerce beyond national borders)
- ?? *Neutrality as to commerce* (the legal regime established should apply equally to and facilitate B2B, G2G, G2C, etc., this also allows “future-proofing” of legislation to facilitate the introduction of new forms of commerce that can be conducted electronically)
- ?? *Neutrality as to technology* (the legal regime should also be “future-proofed” in terms of the introduction of new technologies deployed to conduct e-commerce – laws drafted today, based on today’s technology may prove inadequate for new technological innovations)
- ?? *Protect Intellectual Property*
- ?? *Protect Consumer Rights*

A number of legal issues⁹ typically arise in developing a legal framework to enable e-commerce. First, there is both a national and an international dimension to the reform agenda. At the international level, a number of international, regional, and even private organizations affecting the content of national law. Attention should also be paid to mandatory requirements (conventions, treaties, directives) that emanate from these bodies, as opposed to syntheses of good practice (e.g., model laws). These international elements point to the important considerations of harmonization, standardization and interoperability in facilitating entry into the global marketplace. Clearly the UNCITRAL model laws and the EU directives¹⁰ (described below and in more detail by others) are in part aimed at accomplishing this.

As successful reforms in e-commerce are out of necessity comprehensive, cutting across traditional technology and commercial boundaries, the role of regulators and regulation will need to be critically examined. To name but a few areas where this will be important are regulation of communications services and infrastructure (telecommunications), public key infrastructure, domain name registration, and general principles of competition – and where appropriate the exercise of regulatory forbearance where market forces are operating.

⁸ Derived from Intven, supra.

⁹ Here, a distinction is drawn between legal “is sues”, and the corresponding laws dealing with these issues.

¹⁰ Applicable at least to Member States and Accession Candidates, but also as evidence of good practice.

A specific issue common to any e-commerce framework is how personal data privacy¹¹ is protected. There are varying approaches, for example the “opt-in” vs. the “opt-out” approach. Experience has demonstrated a divergence of treatment regarding privacy, for example between the EU approach and the approach in the United States. It is therefore evident that different policy approaches lead to different legal approaches. However, this particular issue also demonstrates problems of “interoperability” (the basic incompatibility between opt-in and opt-out systems) resulting from different legal approaches.

Other issues include, protection of intellectual property rights, alternative dispute resolution, liability for content, taxation, jurisdiction and distribution of goods are all other important issue that will need to be addressed in framing a legal enabling environment.

International Legal Dimension

Because of the borderless nature of e-commerce and trade facilitated through e-commerce, the value of minimum or common international standards has long been recognized as contributing to the interoperability of national legal regimes in developing truly global commerce. Model laws, conventions and regional laws from a variety of sources contribute to the emerging body of international best practice that developing countries can look to for examples in framing their e-commerce legislative environments.¹² Too often, however, there is a tendency to adopt international precedent (whether model law, directive or other precedent law) wholesale, without adapting it to local dynamics. Certainly there is value in learning from the experience of others, but as argued above, the reform process should be a critical, thoughtful, deliberative and iterative process, balancing bespoke needs with underlying principles such as harmonization and interoperability. The result of adopting model laws *verbatim*, without a holistic approach, can be as ineffective to the growth of e-commerce as a framework that does not take account at all of the international dimension.

In addition, there is a large body of intellectual work regarding e-commerce and development, including legal issues of e-commerce development. They are too numerous to mention here, although the annual E-Commerce Reports of UNCTAD¹³ stand out as being well written and presented, comprehensive in scope, sufficiently detailed and addressing cutting edge issues.

WTO. The WTO played a major role in opening markets for telecommunications services. The role that liberalized provision of services plays in increasing access, lowering prices and facilitating new entry is well recognized. Now the WTO and its members are debating new challenges brought by the online world. Whereas the various GATT agreements covered trade in goods, and the GATS covers trade in services, how should downloadable software be treated, for example? Is it a good or a service? This question of classification is being taken up in Dedicated Discussions. It is also an area which developing countries have an opportunity to make their voice heard in the debate.

¹¹ Others address privacy laws in particular.

¹²It is instructive to remember in this context the legal form of some of the international sources is quite different. Model laws are just that – models; while conventions, and the directives of the European Union apply, with some variation.

¹³ These reports are available at <http://www.unctad.org>.

UNCITRAL. UNCITRAL is probably best known in the e-commerce area for the two model laws it has promulgated: (1) UNCITRAL Model Law on Electronic Commerce with Guide to Enactment 1996 , with additional article 5 bis as adopted in 1998; and (2) UNCITRAL Model Law on Electronic Signatures with Guide to Enactment 2001.¹⁴ As other participants at the conference have already discussed these models in detail, only the following issues are highlighted. The E-Commerce model law covers, *inter alia*, legal recognition of data messages and digital signatures, and certain elements of encryption. The Electronic Signature Model law covers, *inter alia*, PKI certification and certain elements of data privacy protection. The Guide to enactment of the Electronic Signatures Model Law is particularly instructive about the issues surrounding PKI certification, for example. It should be emphasized that these are “model” laws, and while a synthetic project taking account of many legal systems and a broad range of experience, they can, bearing in mind minimum requirements of interoperability, be tailored to meet specific local needs

ITU. At the ITU’s recent World Telecommunication Development Conference in Istanbul, ITU-D (Bureau of Telecommunication Development) was mandated, *inter alia*, with examining how to promote a favorable legal environment for e-services and applications in cooperation with other international organizations and financial institutions.¹⁵

Hague Conference on Private International Law. A new draft *Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters* is under consideration by the Hague Conference on International Law which, if promulgated in its current form, could have far reaching effects in the on-line world.¹⁶ Provisions of the draft *Convention* could, in effect, lead to the intellectual property rights protection of one country being applied in another country where the rights protected might be different. A report of the work of the Conference noted that among the areas where no consensus was obtained was the internet and e-commerce.¹⁷

EU. The collection of Directives¹⁸ covering e-commerce activity in the European Union has been discussed by other participants. The Directives, for EU Member States and Accession Candidates, have a more mandatory quality than the UNCITRAL model laws, for example. The Directives must be “transposed” into the national law of the country. In some cases transposition can result in an almost *verbatim* cut and paste. In other cases, the manner in which a Directive is transposed can vary greatly from country to country.

ICANN. ICANN, though not an “international” organization like UNCITRAL, nonetheless plays an undeniably central role in global e-commerce through its domain name processes, especially in domain name registration and regulation of “.com”,

¹⁴ Both of these may be found at: <http://www.uncitral.org> .

¹⁵ <http://www.itu.int/ITU-D/pdf/2128-263-en.pdf>

¹⁶ Text and commentary can be found at: <http://www.hech.net/e/workprog/jdgm.html> .

¹⁷ *Ibid*, See, Preliminary Documents 16 & 17.

¹⁸ A few selected Directives worth noting include Ecommerce Directive - Directive 2000/31/EC of 8 June 2000; Electronic Signature Directive - Directive 1999/93/EC of 13 December 1999; Distance Contracts Directive - Directive 1997/7/EC of 20 May 1997; Data Protection Directive (Draft) – COM 2000 385. This latter directive comes out of the recent consultation regarding electronic communications and is included in the package of new directives comprising the new *acquis communautaire* applicable to all electronic communications.

“.edu”, “.org”, etc. Its affiliated organization, IANA, is responsible for top-level country domain names (“ccTLD”).¹⁹

National Law Dimension

The following discussion focuses on four selected issues to be dealt with on a national level that are of particular importance to developing countries. These are not exhaustive, but representative.²⁰ The four issues are (i) convergence implications and competition law, (ii) fundamental features of regulatory reform, (iii) the role of intellectual property rights in development and (iv) the use of alternate dispute resolution mechanisms. Other legal issues of significance in the e-commerce enabling environment at the national level, but not discussed here in any length, include recognition of electronic contracts and issues of contract formation (*e.g.*, recognition of “click through” and “browse through” concepts); recognition of digital signatures; protection of personal privacy; consumer protection; taxation; customs, import and distribution; limits on foreign direct investment; and content liability. The list of laws that would need to be considered in building the national legal enabling infrastructure for e-commerce will naturally be dictated by local requirements and circumstances. It should be borne in mind that there may already be laws affecting commerce in the “off-line” world (contract formation, consumer protection, tax and dispute resolution, for example). Part of the “commercial neutrality” alluded to before is that certain laws for e-commerce may not necessarily need to be radically different from what already exists for commerce in the off-line world. However, there are certain issues that are peculiar to the “on-line” environment, such as “click through” contract formation, P/PKI certification, digital signature recognition and domain name registration.

Convergence/Competition. It is now axiomatic that there is a phenomenon known as convergence among technologies and services brought about by digitalization. Where sector-specific, or technology-specific regulation may have been appropriate before, the converged nature of technology and services implies a greater reliance on competition policy, law and regulation to guard against abuses of dominance or other anticompetitive behavior in the market place. It is important to note, however, that the object of competition law is not to protect certain actors but to ensure a competitive market by enhancing efficiency to stimulate development.

For example, a yet-to-be-privatized state-owned telecommunications service provider (or a private monopoly, for that matter) may through its dominant position exert control over the provision of leased line access to ISPs. If this results in discriminatory treatment among ISPs, or, the price of leased line access is not cost-based, or is otherwise slowing market entry of

¹⁹ See, generally, <http://www.icann.org/icmp/icp-1.htm> and <http://www.isi.edu/in-notes/rfc1591.txt>. A number of skirmishes have emerged recently regarding “.bg” (Bulgaria) “.md” (Moldova), “.za” (South Africa),. There are others as well. Registrars of ccTLDs are appointed by IANA, and not necessarily the governments of the countries. In Bulgaria, complaints have been raised about the transparency of allocation of the .bg ccTLD. This is sue will be taken up in more detail in the discussion of the importance of competition law regulation. In Moldova, regulation of .md had been the purview of the ANRTI, an independent regulator for the telecommunications sector. Recently an attempt was made, through new draft legislation o transfer that responsibility to a department of the Prime Ministry. In South Africa, an NGO had been responsible for .za registration. New legislation removed that responsibility to a ministry. Rather than complying, the registrar electronically moved all registration data “offshore”. Each of these cases demonstrate the role that laws play (or have failed to play) in an important aspect of e-commerce, and the fragility of the certainty that can be brought about by law.

²⁰ A good source for national e-commerce legislation can be found at: <http://www.bakernet.com/ecommerce/>.

ISPs, the issue could be viewed as a matter of telecommunications regulation or as a competition law issue (abuse of dominance or anticompetitive behavior). Accordingly, to ensure fairness, resort could be made to the competition law of general application. If there is not a competition law of general application, consideration should be given to putting on in place.

Comprehensive Regulatory Reform. The areas of regulation that touch upon e-commerce are many. These include, to name a few,

- ?? regulation of the telecommunications infrastructure and services over which e-commerce is conducted; domain name registration; public/private key infrastructure certification regulation; data privacy protection regulation;
- ?? competition regulation
- ?? banking and financial sector regulation (including credit, payments systems, exchange controls, anti-money laundering; and
- ?? import restrictions and intellectual property rights.

In designing regulatory functions and institutions, international best practice demonstrates that certainty and confidence in the regulator is enhanced through transparency and where there is functional, financial, legal and institutional separation of the policy setting, regulatory and ownership functions. This is to ensure against political and industry capture. Independence can be graphically shown as follows:



In each substantive area, decisions will need to be taken regarding how much regulation is necessary and when to forebear from regulating. In certain cases, industry self-regulation may be appropriate.

Intellectual Property Rights.

From a developmental standpoint, it is recognized on the one hand that where intellectual property rights, such as copyright, are not protected by national law, holders of copyrighted software (or hardware with imbedded software) will be reluctant to export to that jurisdiction. Accordingly, developing countries wishing to expand economic growth through e-commerce, but where the protection of intellectual property rights is unclear, will face challenges of encouraging vendors to invest in those countries. On the other hand, it is also recognized that there is a view held by some in the development community that continued protection of rights held by those in the developed world actually depresses local growth and development in developing countries – developing countries merely effect transfer payments to rights holders in the developed world

while providing disincentives at home for innovation and growth of local high-tech industries.²¹ Even in a market place dominated by “open source” and open systems, copyright and commercial concerns are still valid.²² In other words, open source systems still rely on copyright law to enforce the openness of open source systems.

The TRIPS Agreement provides national treatment, minimum standards and dispute resolution procedures. This international system, part of the WTO, protects rights to encourage foreign direct investment of hardware and software necessary for conducting e-commerce, preserves international standards, but would generally leave innovation and incentives with existing rights holders. The new role of intellectual property rights advocated more and more within the development community still protects rights holders. However the reliance on open systems (including open source software) can reduce unit costs, allows for projects to be scaled to meet particular needs, allows development of local content and encourages innovation and entrepreneurship locally. A by-product of developing more content in local languages and more use locally is to slow “brain drain”.

Alternative Dispute Resolution.²³ In the area of ADR, the focus is not on whether mediation is preferred to arbitration or whether ADR should be used as a matter of course as an alternative to the courts. Rather the focus is on whether the use of ADR to engage in non-adversarial resolution can create incentives for or encourage use of e-commerce. Can ADR be effective in changing market place behavior? Certain characteristics about ADR would indicate that it is susceptible to creating an incentive environment for resolving disputes. Among these attributes are that ADR can be non-adversarial²⁴; it can be flexible and scalable (smaller problems can be addressed through smaller, quicker procedures); it can be oriented towards a specific type of commonly recurring issue or to a particular industry issue; because it is more flexible, it permits the rapid introduction of best practices and related, relevant experiences into the dispute resolution process; and it can address situations not necessarily specifically dealt with in existing law (especially in civil law jurisdictions). But in order for ADR to be a useful tool for creating incentives to use e-commerce. The procedures and institutions must be credible and transparent, and the results must be enforceable. Accordingly, national law should encourage ADR and provide for adequate enforcement measures.²⁵

²¹While not taking sides in this debate, it is important to point out the existence of the debate surrounding proprietary and “open” approaches, and related issues of protection of intellectual property rights, as it potentially affects growth and development of e-commerce in the developing world. For a recent apologetic from the developing world, *see, e.g.* “Open Software & Open Standards in South Africa: A critical Issue for Addressing the Digital Divide”, available at <http://www.naci.org.za/docs/opensource.htm>.

²² For an excellent recent layman’s explanation of copyrights and open source software, see Lessig, L., *The Future of Ideas*, Random House, 2002.

²³ The subject of “on-line” dispute resolution (ODR) is beyond the scope of this summary, but is considered as part of ADR insofar as it might provide incentives and certainty, and in that sense should be evaluated in the same way as ADR, above.

²⁴ For example, using ADR, win-win results can be obtained (so-called integrated ADR), or the results can be distributed among the parties with some gaining more than others (so-called distributive ADR).

²⁵ For a general discussion of ADR incentives in electronic communications regulation from which this discussion is derived, *see, generally*, Bruce, R., and Marriott, A., *Use of Alternative Dispute Resolution Techniques in the Telecom Sector (work-in-progress)*, World Bank.