SOUTH CENTRE

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South Bulletin: *Reflections and Foresights* takes stock of on-going debates on major global policy challenges and delivers regular global flow of analysis and commentary to policymakers in the South.

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EDITORIAL: Development Dialogue with Donors

A certain lack of candor characterizes the present development dialogue between the rich and the poor nations. There is a palpable reluctance to accept the truth that the system is not working for the poor of the world. Globally the poor have lost out, and not just in Africa. The share of benefits from global economic growth reaching the world's poorest people is actually shrinking, while they continue to bear an unfair share of the costs. Also the creeping effects of climate change will even further worsen the condition of the poor.

According to the Basic Capabilities Index (BCI) published by *Social Watch* on June 7, 2007, at the current rate of progress the universal access to a minimum set of social services will be achieved in Sub-Saharan Africa only in 2108 -- almost a century later than the target date (2015) set by Millennium Development Goals in 2000. Even as the poor are sinking, the official view is that whatever is happening will, “ultimately”, work out for the poor. Sections of civil society, more disposed than governments to exposing the reality on the ground, occasionally blow the whistle. By and large, however, their voices are drowned by the official Panglossian story line.

Sometimes, however, somebody in authority echo the voice of the civil society. Even as many in the Caribbean bureaucracy were celebrating the conclusion of the Economic Partnership Agreement (EPA) between the CARIFORUM and the European Union, a revealing statement came from President Bharat Jagdeo of Guyana. He challenged those who were reluctant to admit that the region had lost out in the negotiations. The Caribbean nations had lost out, "... because all along they (the European Union) had the plan to dismantle the preferences and to basically bully the countries into meeting the deadlines we all set together but that could have been adjusted." It was a bad deal, he said, but the region had no choice. "I think it is time we come clean with our people in Guyana and across the region that this was the best we could have gotten out of a bad situation. I resent the characterization that we won from these negotiations, we didn't win anything."

The larger picture of the South’s integration into the neoliberal globalization has a similar story. The official line repeated over and over, is that despite everything, the developing countries are doing well, and that the MDGs are “by and large” on target. But we must come out clean in recognizing the opposite reality in our dialogue on development with the donors. To be sure, some developing countries are doing well. Also, much responsibility lies with the poor economic and political governance in the many countries in the South. But Western governments are sometimes too quick to recognize outcomes of “democratic” processes in the South that are perceived to serve their interests. Honesty demands that the links between the agonizing realities in the South with the following be debated openly and candidly.

- Globally, the subservience of the development agenda to the trade agenda and market fundamentalism.
- Within the United Nations system, the subservience of the development dimension to primarily the security concerns of the West.
- The domination of the Bretton Woods Institutions and the WTO of both knowledge creation and policy frameworks in the South, backed by the traditional donors.
- Locked-in condition that the bulk of the South finds itself in the lower end of the value added production chain. This is especially the case with Africa, but it is no less true of large economies such as China, India, Brazil and South Africa.
- De-industrialization of large numbers of countries of the South.
- The threat of North-dominated “regionalism” to the integrity and survival of smaller countries of the South, as exemplified, for example, by the EPAs between the EU and ACP.

Unless these issues are openly and candidly debated, all talk about “development” is mere rhetoric.

This month the Advisory Body of the UN’s Development Cooperation Forum (DCF) is meeting in Cairo. The DCF is still in early years, so this is a good opportunity to define its role. In our view, the DCF must provide a normative anchor to broader issues hampering development in the South. Above all, it must not become the voice of the donors or of the OECD.

Yash Tandon

Executive Director, South Centre

Challenges of Aid Effectiveness: A Way Forward

By Vitalice Meja

At the beginning of the 21st century, evidence suggests that donors do not favour multilateralism. Of the total ODA in 2000-2003, 64% was bilateral (with an upward trend) and only 36% was given to multilateral institutions like the UN agencies and the development banks. This has put a lot of pressure on aid recipients, particularly the African governments, in complying with different donor requirements. Each donor comes with a different procedure and mechanism to identify, plan, implement, monitor and evaluate its activities, different reporting requirements, and a lot of paperwork that consumes time and resources of government officials who would otherwise prefer to operationalize government strategies for development.

In other instances, African governments have to encounter different policy priorities of the donors. These are often contradictory to national priorities, forcing them to implement inconsistent policy reforms. Sometimes, donors bypass the treasury and planning authorities and negotiate their projects directly with the sectoral line ministries, thus creating tensions within the national administration. In some cases donors use a joint-piecemeal approach, splitting areas of interventions among themselves (i.e. a donor contributes to the health sector and another to the education sector, or donors distributing different geographical regions among them) regardless of the magnitude and reliability of their assistance, leaving governments with unbalanced support in different areas. Additionally, donor agencies have their own disbursement processes that are different from those of recipient countries' budget cycles; worse, sometimes their funds are unreliable, disbursements are delayed and programs discontinued. Government systems have to continuously adapt to these new trends and changing variables to get to ODA resources consistent with their development needs.

At the same time, there are remarkable attempts both at the bilateral and multilateral levels to address and change their orientation by placing greater emphasis on the quality of partner country systems, joint planning and financing, transparency and accountability, and quality of programs toward economic growth and poverty reduction. How this plays out depends largely on the level of engagement and pro-activeness of the African governments and their development partners.

The issue of use of national procedures including the authorization, procurement, accounting, audit, disbursement and reporting arrangements remains a controversial one. Donors do not use the national systems for disbursement and monitoring of use of their aid. In Kenya, for example, the national procurement and accounting systems are not used by donors for their lack of confidence in the country's public finance management. For countries receiving general budget support like Ghana and Tanzania only a fraction of the total support given by a donor is disbursed through the national system. The rest is managed through a separate framework different from the national budget framework. In essence, less than 50% of aid funds to central governments are managed through the use of national procedures. Difficulties relating to harmonisation of donor procedures and tying of aid flows to bilateral benchmarks have prevented effective utilization of aid.

> *"In essence, less than 50% of aid funds to central governments are managed through the use of national procedures."*

While in some cases donor disbursement estimates are agreed annually with the governments 2-3 months before the beginning of the fiscal year, unpredictability of external resource flows to poor countries still remains a challenge in making aid effective. Direct budgetary support continues to fall short of the forecast across many African countries. Delays or even complete non-disbursement of committed funds undermine the integrity of budget planning and implementation schedules, reducing the effectiveness of entire projects and programmes. The risks from non-disbursements or untimely disbursements are particularly acute where governments may have committed funds in good faith, based on assurances of disbursements made by the donors. One of the reasons often cited by donors for this non-disbursement is the delayed implementation of the conditionalities set under the IMF program and bilaterally which in most cases are more political than technical.

To harmonize, while some donors provide budget estimates for disbursement consistent with some countries' fiscal year, the information for estimates given is often based on the country assistance strategy and disbursement framework of the donor. Other donors provide information for three years as outlined in their country assistance strategy. However when it comes to reporting, the recipient governments still end up complying with the donor project cycle rather than the national budget cycle. In most cases, neither the estimates for disbursement of project aid nor the quarterly reports are consistent with the classification system and the budgetary cycle of governments in developing countries.

On coordination there still exists multiple and overlapping processes, missions, reviews, meetings and studies that

Challenges of Aid Effectiveness (continued)

place undue burden on both government and development partners. It is however important to note that under Paris Declaration Principles, there is a strong momentum to address this issue and rationalize these different processes under one framework. There is generally a broad support for many of the tools for harmonization, including joint reviews, joint analytical work, joint donor-government assessments of needs for capacity building, joint financing arrangements, leading a sector, delegating leadership, and actively participating in a sector in non-lead capacity. Nevertheless evidence shows that there is pressure to meet the individual donor project cycles and timelines as opposed to using the government budgetary cycle. In most cases each donor still demands its own financial reports on the funds they have put in the basket funding adding to the transaction costs for the recipient governments.

"There is (…) a need for developing countries to intensify their domestic resource mobilization efforts to reduce aid dependency."

Conditionality still plays a key role in determining the flow of external resources to developing countries. Political conditionalities exist at the bilateral and multilateral levels and are at times are referred to as benchmarks by some donors. Countries can have their aid scaled down because of press reports and public perception over the levels of corruption at the highest echelons of the country's leadership, human rights abuse or failure to comply with an international convention. Factors such as progress on public finance management reforms, sound macro economic framework and strong national development plan play only a small role in determining decisions around the disbursement of aid and appear to frustrate those involved in the reform process. While corruption and human rights abuse is rife in many poor countries there is a need to establish an objectively verifiable framework outlining circumstance leading to withdrawal or resumption of aid rather than complete reliance on foreign media and perception of donors only for policy direction.

To facilitate effective operations related to aid harmonisation, there needs to be considerable delegation at the country office level of shaping and negotiating aid reforms at the national level. The country offices should be given authority to negotiate for appropriate procedures, systems and mechanisms for aid management. As of now, only the Department for International Development (DFID) - UK, and the Swedish International Development Cooperation Agency (SIDA) - Sweden have made reforms in this regard. There appears to be a high-level of responsibility given to DFID and SIDA regarding decision-making on issues of aid harmonisation at the country level on behalf of the their respective governments. The country offices of these two donors have a ceiling on the amount of funding they can spend without seeking approval from the headquarters. Donors that heavily rely on final decisions and commitments from the headquarters slow down the pace of harmonisation at the country level because the queries from the national level do not get responded to in a timely manner. Thus, there is a need to delegation more authority at the country level to facilitate efforts towards aid harmonisation.

There are concerns over the dominant role of aid in the national budget with some countries having as high as 40 percent of their national budget financed through external financing mechanisms. Aid dependency creates problems in the national budget in cases of say, aid freeze. There is thus a need for developing countries to intensify their domestic resource mobilisation efforts to reduce aid dependency. The UN should consider working closely with national governments in developing an aid management policy with an exit strategy that would among other things aim at providing a framework for increasing participation and transparency in aid operations, more strategic, coherent and coordinated institutional framework; enhancing partnership, transparency, accountability and strengthening collaboration with international organisations; and sharpening the focus of bilateral aid to poor countries.

Governments across Africa as well as donors recognize the role of non-state actors in aid effectiveness particularly in the area of advocacy and monitoring progress and impact of aid. CSOs at the same time have a direct involvement in development and mobilising resources for poverty reduction. However, participation of non-state actors in influencing the nature of partnership with the government and with its development partners is almost non existent and therefore have little access and control over shaping the aid architecture at the national level. Coupled with this is the secrecy with which bilateral negotiations are done on development financing between the governments involved. Non-state actors only become privy to the process at the signup stages of the final financing agreement.

The lack of a structured engagement as well as lack of access to information on external financing has inhibited the ability of key institutions such as the parliaments and CSOs on demanding transparency and accountability from governments across the continent. The governments thus need to provide a

Challenges of Aid Effectiveness (continued)

better level of engagement and facilitation to civil society in policy dialogue and legislation formulation if aid is to be more effective.

Non-state actors have an essential role to play in development, although their role is not a substitute for the government's obligation to assume its responsibilities vis à vis all the citizens. The CSOs, labor unions and other social movements are the expression of an active democratic citizenship, without which little progress can be achieved in governance or development. These non-state actors are therefore full fledged development actors rooted in the organization of citizens to claim their rights and to hold governments and donors to account. Consequently, the main roles played by CSOs as development actors and the conditions necessary to make them more effective must be recognized in the action plans for aid effectiveness.

> *"If aid is to be effective, we must call for comprehensive technical reforms running simultaneously among the rich and poor countries."*

The current efforts to make aid effective have brought to surface some issues that were hitherto not discussed openly. The targets and requirements from both the poor and rich countries have indeed exposed the desire to assist poor countries, strengthen their national systems for public finance management as well as efficient use of public resources. It is also evident that while the world would like to believe that this is purely a technical matter and that the poorer countries will get their fair share of aid to assist in development implementation, evidence on the ground shows that making aid effective has not resulted in any considerable shift among the rich countries in their way of doing business. This is manifested in the manner in which the donors have responded to positive steps taken by poor countries to improve their systems and procedures.

The signals range from total scepticism of the measures undertaken by the recipient countries to bypassing or partial use of their domestic systems for channelling aid. For aid to be effective, we must call for comprehensive technical reforms to run simultaneously among the rich and poor countries. For rich countries these reforms should not be limited to their country offices but should also involve headquarters of the relevant ministries and the agencies responsible for aid distribution. There must either be harmonisation or elimination of some aid institutions in a country to allow for a single entity to deal with aid issues in poor countries.

Other reforms should include legal changes that would allow delegation of leadership authority of aid management in a country in cases where this is called for under the harmonisation framework at the national level. The international community could also establish an index to rank the performance of rich countries according to criteria considered important by the poor countries. This would be good tool for poorer countries to identify countries and donors whose aid management process and content is ineffective or does not suit their needs.

Poor countries should be given a guarantee that after undertaking initial set of reforms, donors will use the existing national procedures as well as systems to channel their aid. At the same time, upscaling of aid should be based on the quality of reforms a country has undertaken. This also calls for setting up of clear benchmarks to be followed by the poor countries. The current Paris Declaration targets could be a good starting point. Indeed the aid architecture could borrow from the elaborate debt management initiatives that have a comprehensive framework for securing debt relief. It is only through such frameworks that we can limit the current political patronage characterising the current aid architecture.

To realise the above proposals, the international community will have to consider establishing a new international institutions outside of the OECD'S Development Assistance Committee (DAC) and the Bretton Woods institutions. The new institution should provide a framework for increased participation and transparency in aid operations, more strategic, coherent and co-ordinated institutional framework, enhance partnership, transparency, accountability, strengthen collaboration with international organisations, and sharpen the focus of both multilateral and bilateral aid.

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Making Aid Accountable and Effective

By Anabel Cruz

In March 2005, donor country members of the Organization for Economic Cooperation and Development's Development Assistance Committee (OECD-DAC), developing countries and multilateral institutions signed the Paris Declaration on Aid Effectiveness. The Paris Declaration is a historic agreement between donors and partner governments on principles and goals for strengthening the effectiveness of aid. The Declaration identifies reform objectives and targets that reflect the need to respect and promote local ownership, to align with developing country-driven priorities, to make use of local systems, to harmonize donor efforts, to focus on results, for which there is mutually accountability.

The Paris Declaration establishes global commitments for donor and recipient countries to support more effective aid and outlines five principles which should shape aid delivery:

OWNERSHIP: Developing countries will exercise effective leadership over their development policies and strategies, and will coordinate development actions;

ALIGNMENT: Donor countries will base their overall support on recipient countries' national development strategies, institutions, and procedures;

HARMONISATION: Donor countries will work so that their actions are more harmonized, transparent, and collectively effective;

MANAGING FOR RESULTS: All countries will manage resources and improve decision-making for results; and,

MUTUAL ACCOUNTABILITY: Donor and developing countries pledge that they will be mutually accountable for development results.

Civil Society Organizations (CSOs) were present in Paris, and also since then diverse CSOs have been engaged in tracking this agreement, both in developing and in developed countries. To date, the Paris Agenda has focused exclusively on strengthening the effectiveness of aid through reforming the mechanisms of donor/government relationships. While welcoming these important reform initiatives, CSOs are closely monitoring progress, and seeking further reforms in related policy areas.

"Mutual accountability in the context of highly unequal power between donors and aid dependant countries requires also a commitment to the reform of International Financial Institutions."

There are many flaws in the current aid system and the diverse actors involved agree on many of them: aid is too little to solve the problems at hand; aid is not well spread across sectors and regions, and aid is not properly coordinated among the donors themselves, leading to a plethora of disconnected projects. Can the Paris Declaration contribute to solving these problems? Which are the main areas that need attention? The following three questions demand answers from the international community and from all actors involved in the process of Aid.

1. Is Aid enough?

A crucial question is referred to the amount of development aid, i.e. measured in the amount of the Official Development Assistance (ODA). ODA flows reached a record US$ 106.5 billion in 2005, equivalent to 0.33% of the GNI of the Development Assistance Committee (DAC) member countries of the Organisation for Economic Cooperation and Development (OECD). Projections based on aid commitments by DAC member countries indicate that the level of ODA by the year 2010 will be at US$ 130 billion, representing 0.35% of the GNI of DAC member countries. Although an apparent growing tendency, these levels do no represent the fulfilment of the commitment of donor countries to allocate at least 0.7% of their GNI to ODA, a commitment made in the 1970's and reaffirmed at the first Finance for Development Conference in Monterrey in 2002.

On the other hand, the propensity to include aspects such as remittances as part of the development aid is dangerous and unacceptable and should not be used as an excuse for donor countries' non-compliance with their historical commitments.

2. What progress has been made so far?

The Paris Declaration on Aid Effectiveness establishes global commitments for donor and recipient countries to support more effective aid in the context of a significant scaling up of aid. However, one of the most important principles of the Declaration, namely the "local country ownership" seems not to be advancing and needs to be reframed as "democratic ownership", so democratic participation of citizens is ensured and accountability of governments and donors is given priority.

Making Aid Accountable and Effective (continued)

Country	*Ownership*	*Alignment*	*Harmonization*	*Managing for results*	*Mutual Account-ability*
Bolivia	Moderate	Low	Low	Moderate	Moderate
Dominican Republic	Moderate	Low	Low	Moderate	Low
Honduras	Moderate	Low	Moderate	Moderate	Moderate
Nicaragua	Moderate	Low	Low	Moderate	Moderate
Peru	Moderate	Low	Low	NA	Low

Source: 2006 Survey on Monitoring the Paris Declaration - Country Chapters

As the 2006 Survey on Monitoring the Paris Declaration recommended, development strategies need to be "determined by each country's priorities, pace and sequencing of reform". If we go through the Survey, ownership is the indicator that gets the lowest ranking.

Latin America receives less than 10% of the aid flow, measured in the ODA flow. But the region is an extent of the challenges and flaws that can be present in other regions too. The results of monitoring of the Paris Declaration, undertaken in 34 countries that receive aid, show that alignment, harmonization and mutual accountability are important challenges in Latin America, according to five countries that participated in the survey. The Table above shows the baseline for the Latin American countries.

In all Latin American countries where information for the survey was collected, the perception is that aid remains largely fragmented and parallel to country systems and that no adequate mechanisms for mutual accountability currently exist.

As a very paradigmatic example, discrepancies between health priorities as reflected by the burden of disease and health related ODA can be observed and has been documented. According to data of the World Health Organization (WHO) on the global burden of disease, although HIV/AIDS accounted for only 2.3% of the total global burden of disease in Latin America and the Caribbean, 25% of all health aid received by Latin America and the Caribbean during the 2002–2004 period was allocated to combating HIV/AIDS. Likewise, even though non-communicable chronic diseases accounted for 60% of the total burden of disease during the same period, this health category was allocated only 36% of all health aid.

If genuine ownership is to be achieved, alignment and harmonisation should not include conditionality and imposition of plans, but respect for human rights, for gender equality and for environmental sustainability. That can bring aboard another important principle of the Paris Declaration, mutual accountability: both donors and recipients must be accountable, and that is the only way to make aid effective and accountable. Mutual accountability in the context of highly unequal power between donors and aid dependent countries requires also a commitment to the reform of International Financial Institutions.

Making aid accountable to southern citizens means radically improving efforts to make donors and governments answerable for the use of aid, and introducing new mechanisms of enforcement to allow poor countries to force donors to keep to the commitments they have made. Existing international and regional human rights mechanisms of accountability (such as treaty bodies) should be fully considered as part of the mechanisms to monitor the implementation of this agenda. As part of this process, progress on transparency of information is crucial.

Alignment and harmonization are very important, but only as long as they reinforce democratic ownership, and not donor-imposed conditions for their aid. Alignment to country programs and harmonization of donor practices are extremely important but should be accompanied with achieving genuine ownership, where all forms of (economic) policy conditionality are removed, and respect for human rights, gender equality, environmental sustainability and mutual accountability is achieved.

In this regard, donors should support and work through existing national processes, not impose their own plans and aims. Aid should support and promote participatory and inclusive national development plans. This is the main political way to build sustainable development and democratic governance. Supporting this kind of processes will be much more effective than continue to fund technical assistance missions from desk perspectives.

So the question can also be rephrased: Can the principle of "country local ownership", so central to the effectiveness objectives of the Paris Declaration, be reframed as "democratic ownership" of development priorities and poli-

Making Aid Accountable and Effective (continued)

cies, in which democratic participation of citizens, including both men and women, and the transparency and accountability of governments and donors are given priority? How could current practices that shape donors and partner government aid relationships be redefined to accommodate "democratic ownership"?

3. The final question: How to monitor and evaluate the Paris Declaration and its impact and outcomes?

Self-assessment of donors or World Bank data on certain indicators is not enough and the review of donor performance is apparently not happening. A more impartial assessment is needed. The monitoring and evaluation process cannot imply the introduction of conditionalities. Measurements are needed to evaluate if aid reaches those that need it the most and the processes, from allocation to evaluation, must be characterised by transparency and openness.

A broader consensus on this topic is needed, especially when we start the road to the Accra High Level Forum on Aid Effectiveness that will take place at the end of 2008.

The different actors bear all specific responsibilities and Civil Society Organizations around the world are presenting proposals to advance in the alignment, harmonization and mutual accountability of aid. Some proposals include:

- Improve coordination of the different sectors involved: imposed policy conditions from donors can undermine democratic ownership of development.
- Increase participation of civil society in the mechanisms for assessing the effectiveness and use of aid.
- Strengthen country systems for public finance management and procurement, so to prevent corruption
- Craft a joint effort to improve the capture of aid information at all levels so to increase support for national policies.

A group of CSOs from around the world met in Managua, Nicaragua, in October 2007 to discuss about aid and prepare their work for the Accra Summit on Aid Effectiveness and their final declaration contains a strong appeal:

"The Effectiveness of Development aid demands the open and broad participation of citizenship and its organizations in the processes of formulation, implementation, follow-up, evaluation and accountability of aid. This participation will ensure the fulfilment of citizens' social, political and economic rights and will guarantee participatory and representative democratic governance that respects the social contract between governors and citizens".

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South in News

11 January 2008: Prime Minister Baldwin Spencer of Antigua and Barbuda assumes the Chairmanship of G-77 for 2008 from Pakistan.

13 January 2008: Tariq Sayeed, former President of Federation of Pakistan Chambers of Commerce and Industry, appointed as President of SAARC Chamber of Commerce and Industry.

19 –20 January 2008: Cairo High-Level Symposium on "Trends in development cooperation: South-South and triangular cooperation and aid effectiveness".

January 2008: World Social Forum being organized globally by thousands of autonomous local organizations instead of at a single place and date.

US Patent Law Reforms—Resolving the Software Patent Dilemma: Any Lessons for the South? by Yogesh A. Pai

The heated debate on software patents is not something that intellectual property (IP) specialists, policy makers, technorati, and of late- the commoners, would want to ignore. Attempts in the United States (US) are currently underway to reform the patent system and to save it from enduring crises. Patent reforms in the US are seen to have a wider impact, inter alia, on the grant and enforcement of software patents. The US judiciary, legislature and the United States Patent and Trademark Office (USPTO) have sounded positive on rising up the ante. In what is being termed as a 'major revamp' of the US patent system since over half a century, there are some interesting lessons that developing countries may want to learn while affording patents to computer software/program. This note is an attempt to highlight the events that have unfolded the US software patenting domain and to draw useful lessons for the global South to avoid such pitfalls.

Judicial embrace of software patents in the United States has occurred in a non-legislative setting. Software technology, which was once thought of as alien to the patent criterion, has now been extensively endorsed under the US patent system. Computer program/software technology, which is in the nature of textual codes, although functional, has since long presented problems for patent law. The mechanization involved in a computer program- quite distinct from other forms of technologies - is effectuated through algorithms, which are non-patentable. Although the United States Supreme Court opened the gates for patentability of computer program related inventions in the early 80's, it did try to draw some distinction over the patentable subject matter issue. However, subsequent Federal Circuit Court judgments have gone far beyond to allow intrinsic patentability of computer programs, thereby blurring the distinction. Since then, minor processes involved in a computer program have come to be approved when claimed with any hardware element. In an industry where technology is incremental and sequential, it was difficult for the USPTO to examine software patents in greater detail, thereby leading to the grant of 'questionable patents'- those that are likely invalid or contain claims that are overly broad.

> *"… the increase in software patent grants is not explained by the same pattern of changes in R&D investments."*

The unintended consequences of software patents

The problems arising out of granting software patents are well known. Software patents have a strong potential to impede independent and follow-on inventions. Life cycles of such innovations are short, while patents give them largely longer monopoly extensions. The cost of obtaining, maintaining and possibly litigating a patent has effects on the cost of entry. Avoiding patent infringement is costly and uncertain. Firms with huge patent portfolios are often engaged in building a patent thicket for strategically using it as a legal bargaining chip against small and medium enterprises (SMEs), who fear losing the fray. The extra cost involved in knowing the metes and bounds of a patented invention is a valid concern; especially to those engaged in alternative models for software innovation and development. It also raises fear about firms engaging in defensive licensing and hold-up. Patent portfolios have now turned into a fad roping in major industry players to invest considerable time and expense in litigating software patents and specifically those that are of questionable validity. Contrastingly, the increase in software patent grants is not explained by the same pattern of changes in R&D investments. This suggests that it has only become easier to obtain patents and exploit them purely for licensing purposes -- signifying the rise in 'patent trolls'. More importantly, there are vivid instances where patents granted on software are generally overbroad, and at times invalid due to difficulty in examining software related inventions for patent law thresholds.

Cry for reforms: Abating the software patent minefield

True to the fears excogitated above, two path breaking reports of the Federal Trade Commission [2003] and of the National Academy of Sciences [2004], have, inter alia, highlighted the problems created by expansive notions of software patents. The two aforementioned reports called for an immediate overhaul of the US patent system. Recommendations contained therein have broadly taken shape as proposals in the ongoing patent reform process. Patent reforms in the United States have been long overdue, but things started getting really straightened when hi-tech firms from the Silicon Valley and elsewhere called for it. It was vociferous only after the industry had felt the wrath of a patent system that is increasingly out of gear and that which has ensued heavy costs for litigating questionable patents, thereby stifling innovation and creating anti-competitive effects. Its impact on innovation is considered as a present and eminent danger, since the fear of infringing every other patent looms large- vexing the industry as a whole. But the software industry majors have called short of abolishing the very notion of software patents, and as of now, have supported procedural restructuring through the

US Patent Law Reforms—Resolving the Software Patent Dilemma (continued)

Patent Reform Act of 2007.

A Bill version of the Patent Reform Act of 2007, which is already passed by the US House of Representatives, is expected to show up the Senate floor in the early part of 2008. The key features of the Bill include:

- Introducing post grant opposition at the USPTO with reduction in litigation estoppels.
- Eliminating interference proceedings and instituting derivation proceedings.
- Transitioning from "first to invent" to "first to file".
- Specifying damage analysis whereby the court determines that a reasonable royalty is applied only to that economic value properly attributable to the patentee's specific improvement over the prior-art.
- Limitations on patent venue.
- Setting limitations on triggering willful infringement and when damages may be trebled thereupon.
- Provision for interlocutory appeals after a claim construction decision.
- Revisions pertaining to 'prior user' rights and defenses etc...

Although the ongoing patent reform process in the US does not explicitly pertain to the issue of software patents, the proposals are expected to have a positive impact on challenging questionable patents in general and software patents in particular. The post grant review system at the USPTO would allow an administrative review of patent, if challenged, and would contribute to minimizing the litigation time and expenses that would have been incurred during a judicial review. Scope for bringing in new prior-art has increased. This would minimize the grant of software patents wherein prior-art in most of the cases is very close. While major concerns of the software industry over problems of litigating software patents of questionable validity appears to be addressed, it is difficult to see how such patents can be legally denied based on existing substantive patent law standard i.e., 'non-obviousness'. The Patent Reform Act of 2007 has not answered the same, and in this regard, they are insufficient to rein the excesses of software patents.

The catch 22 of patent reforms

Interestingly, the reform process has created a friction between software industry on the hand, and the biotech and drug/chemical industry on the other. The drug industry has been among the traditional users of the patent system. Allowing facile attempts to patenting has helped certain sections of the drug and biotech industry in the recent past. Some proposals, especially, the one pertaining to post grant review and those involving calculation of damages for willful infringement or otherwise, have been heavily contested by them. This reveals a very important facet of the patent system that it can be technology specific and special measures may often be necessary if it has to deliver on its essential object. It also brings into light as to how Article 27.1 of the TRIPS Agreement, which exhorts to adopt a 'one size fit all' approach can survive the test of times.

> *"Quite contrary… we see a degree of candidness in the attitude of developing countries in allowing software patents to gain a firm ground domestically."*

As stated earlier, the legislative reforms have fallen short in addressing issues concerning substantive law aspects of the patent system. This gap however appears to be narrowing with a couple of decisions coming from the US Supreme Court. KSR Int'l Co. v. Teleflex Inc., et al., 127 S. Ct. 1727 (2007) and eBay Inc. v. MercExchange LLC, 126 S. Ct. 1837 (2006) may stand as open examples. Again, both these pronouncements do not pertain to the issue of software patents, but it is expected to guide the USPTO and the Federal Circuit Courts on the vices of grant and validity of software patents. A certain reading of Microsoft v. AT&T, 550 U.S___ (2007), at least in its spirit, can help us believe with greater conviction that the US Supreme Court has of late decried of software patents, even while it has remained tightlipped on its legal position in the US. Surprisingly, the US Supreme Court has renewed its interest in hearing patent cases involving patentable subject matter eligibility. Will patent eligibility of software be challenged in the near future? Only time will tell how events are going to unfold!

Will South miss the buzz?

It is now clear that judicial and legislative reforms in the US are taking shape to weed out software patents that are questionable validity. Quite contrary to this, we see a degree of candidness in the attitude of some developing countries in allowing software patents to gain a firm ground domestically. There have been attempts to universalize the concept of intrinsic patentability of software by the use of confusing legal jargons thereby allowing their respective patent offices to draw interpretations in favour of the US position. While some legislators view this as necessary fallout of Article 27.1 of the TRIPS Agreement, which mandates that "patents shall be available for any inventions, whether product or processes, in

US Patent Law Reforms—Resolving the Software Patent Dilemma (continued)

all fields of technology"; a few others are those who believe that such a view has evolved out of legal developments in contemporary jurisdictions. However, the definition in Article 27.1 is not clear to the extent of providing a definite mandate for either inclusion or exclusion of the concept of intrinsic patentability of software and hence individual signatories are left to decide as a matter of policy choice. It appears that TRIPS could not draw firm consensus on the issue because computer program is already protected under Article 10 through copyright.

At times, legislators in developing countries have been cautious in making a tight rope walk, but unfortunately, patent offices have not relented to the same. Among developing countries, the Indian position in this regard may be cited as a classic. The legislative intention and statutory interpretation (viewed in the light of legislative history of the Indian Patents Act, 1970- as amended in 2005) is sufficiently clear to denounce intrinsic patentability of computer programs. However, the persistent policy of the Indian Patent Office is in favor of expanding notions of computer program patentability. This is reflected in their draft manual/guidelines (2005), which suggest interpretations that run quite contrary to the statutory mandate. The new legislative context in India has clearly decried of intrinsic patentability of software, but the Patent office has not heeded to the mandate. It is however expected that the Indian Patent Office will rectify the mistakes and soon come up with a coherent set of final guidelines furthering the legislative intention and statutory mandate. The drama that has unfolded in India is a clear instance of self victimization and shortsightedness of the patent offices in failing to understand the problems that the US reforms are trying hard to address.

Back to basics: some recommendations for the South

While this is not an attempt to generalize – a rather difficult proposition - that all developing countries have fallen prey to the software patenting syndrome; legislators, governments and the patent authorities in such countries must clearly understand the dynamics and underlying repercussions of allowing software patents. In this regard developing countries should:

- Clearly exclude intrinsic patentability of computer program/software from their patent laws without leaving any scope for its patent offices to interpret otherwise. TRIPS Agreement does not come in the way if developing countries have resolved to decide it as a matter of policy choice.
- Keep higher standards of patent law thresholds viz., non-obviousness/ inventive-step, novelty and patent subject matter eligibility. Again, TRIPS is silent on the non-obviousness and novelty criterion and the US has already set an example through its KSR decision.
- Allow transparent pre and post-grant oppositions even before the judicial reviews.
- Maintain utmost transparency at the patent office by publishing proper guidelines, manuals and other data concerning application or grant of patents, which would allow a healthy process of legal challenge.
- Evolve proper rules on when injunctions may be granted against alleged infringement, especially when the validity of the patent is in question, as usually in case of patents on software related inventions.
- Evolve proper standards on when and how damages may be calculated/ trebled in cases of willful infringement or otherwise.
- Conduct studies concerning the implications of software patents on their domestic software industry and on open source innovation systems.

These recommendations are expected to put the patent system back in track to deliver on its essential objective- i.e. to foster innovation and competitiveness. Developing countries must know it well that they should exercise all possible and timely restraint and relieve the patent system from considerable stress, or be prepared to face a difficult round of patent law reforms in their home turf.

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This note is partly based on his earlier research article published in the Journal of World Intellectual Property, cited: Patent Protection for Computer Programs in India: Need for a Coherent Approach, The Journal of World Intellectual Property, Volume 10, Number 5, September 2007 , pp. 315-364.

Hello Big Brother: Snippets on the Role of Government

By Edsel L. Beja, Jr.

That the government is a key agent of change and development remains a valid proposition. This proposition becomes more convincing when one looks at the economic history of today's industrialized countries, whose governments intervened to promote and manage their advancement. The interventions came in different forms, but can be identified broadly such as the institution of industrial policies, the introduction of domestic regulations on how the external economy can participate in the domestic economy, the provision of preferential treatments on the domestic sector while at the same time pushing it to engage the external sector, or controlling finance to maintain domestic macroeconomic stability, and similar actions. Such actions must also be allowed to developing countries today if real economic and social transformations are to be realized there.

> *"…when governments weaken or fail, they actually violate the fundamental human rights and liberties of their peoples to experience decent, meaningful, and substantive existence."*

One important challenge that governments in developing countries face today is how to balance regulation, deregulation and re-regulation like in the provision of public goods such as education, health, utilities, sanitation, etc, or management of the domestic sector so that shocks or crises do not undermine the economics gains, or ensuring human security so that the domestic environment is conducive for entrepreneurial activities, capital accumulation, and economic expansion. Here, regulation is defined as a set of rules or mechanisms for effective governance. Those rules can be defined and redefined, interpreted and re-interpreted, operationalized, and even, re-organised in the course of dealing with internal and external events and agents. In other words, regulations need to be "defined" but also "changeable," if acted upon.

Thus governments can relax the rules when suitable, say, to reduce their participation in society; but also modify the rules if the maintenance of economic management is important or if a larger participation in the society is needed. They can also introduce new rules, to maintain a degree of discipline with the public welfare in mind.

Yet governments should not want to withdraw from guaranteeing the economical, political, social, and ecological securities of their peoples. In some cases, governments succeed in negotiating the challenges. But in others, they do not. It is clear that the unsuccessful governments face huge pressures to remove themselves from further participating in the economy, polity, society, and ecology, thus resulting in the situation where they become even weaker, more ineffective, or worse, become failures.

Meanwhile, the failed governments find that they are unable to regain the stability, secure the economy, or provide public goods. Those governments that casually wait for non-state agents – including the promised benefits of orthodox market reforms – or hope for events to unfold and produce for them the desired stabilities and securities are bound to fail. Those that refuse to act obviously fail. Those afraid to take serious measures ultimately experience failures. Those who fail to act also fail.

In a similar fashion, weakening governments find it increasingly difficult to maintain the level of effectiveness that they once enjoyed. While governments that allow non-state agents, other states, or developments in the global polity and economy to undermine their autonomies and capacities find that they degenerate rather quickly. Eventually, they end up as failures.

What certainly needs to be stressed at this point is that when governments weaken or fail, they actually violate the fundamental human rights and liberties of their peoples to experience decent, meaningful, and substantive existence. When that happens – and no decisive actions are taken to redress the situation – governments are responsible for the injustices and miseries of their peoples. Therefore, governments that are weakening or failing must act fast and rethink the way they have been managing their economies and societies to execute sound reforms if they want to remain relevant.

As pointed earlier, the role of governments is defined and re-defined by the trends in regulation, deregulation, and re-regulation. This process, however, cannot be left unanswered. Governments must take that initiative to determine their roles in the present context. From a political economy point-of-view, it is crucial to have sound management of the economy as much as it is crucial to have a solid political base from which to carry out the government programs and an ecology that ensures the continua-

Hello Big Brother (continued)

tion of healthy surroundings for present and future generations. This political base includes the design of appropriate rules and the introduction of reforms that take into account the domestic contexts and characteristics, which become possible when governments are embedded in their societies. This ecology includes the preservation of the carrying capacities of the environment to absorb stresses from societies as they grow and develop.

The best governments are therefore those that effectively respond to domestic challenges; those that ingeniously withstand the various external demands in managing their societies; those that do not obstruct broad-based initiatives but facilitate cooperative relationships with the private sector and civil society; those that plan for the long-term rather than immediate gains; and those that introduce policies that are not based on compromises. In short, governments that maintain and continuously adopt their autonomies and capacities to the continuously changing conditions are the best governments in order to constantly steer the economy to higher economic growth paths.

Otherwise, despite some progress in the past, governments will find it is increasingly difficult to push their societies to higher economic trajectories or sustain the current good performances. Indeed, after a period of excellent progress, some governments find they are caught in the middle of the economic ladder and unable to climb further because the institutional and organizational requirements are not there yet, either because these were ignored or removed because of external impositions in the guise of reforms.

Once progress has started, it must be sustained. The initial step on the economic ladder is of course important; but to continue on the ladder, the requirements are much more complex and demanding. Moreover, these are not easy to fulfill. Governments therefore must be quick to see these challenges. The adjustments or changes to be introduced have to be well-thought, not some plan pulled from somewhere and then blindly applied. They must be well-timed or introduced early enough to avoid derailment. Hence, rethinking of regulation, deregulation, and re-regulation is needed for the governments to maintain sound economical, robust political, strong societal and healthy ecological foundations to negotiate the challenges of globalization and to provide the needs of their citizens.

To some extent, there is a need to challenge the governments today to take more decisive actions to regain control of the economy, stabilize the polity, secure society, and protect the environment. Progressive policies that, for instance, produce robust macroeconomic performances and pull the country out from its poor economic growth path are urgently needed. Government interventions must be demanded. At the same time, it is equally important for progressives to confront their governments with unsympathetic criticisms, even to the extent of condemning current directions of policies to "open their eyes" to the need to have sound governance but not revert to repression. It is important to challenge the governments to rethink about how they have been executing reforms; about the costs misguided policies have inflected on their peoples; about how to reform the reforms; about how to remove the internal and external vulnerabilities; about establishing autonomy and about strengthening government capacities; about maintaining an effective political base to effectively carry out programs; to think about sustainable ecology; and so on.

> *"…there is a need to challenge the governments today to take more decisive actions to regain control of the economy, stabilize the polity, secure society, and protect the environment."*

Equally important is for civil society to be vigilant when engaging their governments in rethinking so that actions are not taken to divert attention from dealing with the real causes of the problems and weaknesses, identifying the legitimate alternatives, and pursuing progressive and broad-based solutions. This advocacy is crucial for meaningful and collective engagements to take place among all the stakeholders. Needless to say, the government must be brought back to the center of policy-making and discussions.

International community must also contribute in this endeavor. Governments must work together to design democratic rules of operations and for engagements to reduce insecurities; that is, to forge a stable international economy and secure the international polity. The international community must take up the responsibilities for external management and cooperate in domestic management to that

Hello Big Brother (continued)

external sector instabilities are not created. If a crisis happens, the international community must take up the challenge to act quickly so that the crisis does not get extended or transformed into a more virulent kind, thereby causing havoc and misery. Ultimately, international coordination is needed to realize global economic expansions that actually enlarge freedoms, raise incomes, and reduce poverty.

These are snippets on the role of the government today. The challenge is especially big for the developing countries because their governments are being made to withdraw from pursuing such roles. If only half-measures, palliatives, or placebos are introduced, the developing countries will remain trapped in a period of profound consequences with long-term and deep repercussions on peoples' welfare and on societies. Lastly, it does not make sense to talk about reforming the way reforms have been done in the past when governments do not meaningfully commit to undo poverty and injustice. Unless governments respond proactively, they are in a way condemning their peoples to narrow, shallow and hollow well-beings and to permanent sufferings.

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Op-Ed: Reshaping the International ODA Structure (continued from the last page)

mental political oversight with respect to development cooperation, with mechanisms to encourage strong developing country government and civil society participation and voice in its processes. It should address, among other things, issues to correct imbalances in development cooperation, implementation, and architecture, which reflect broader systemic development challenges, including trade, transfer of technology, intellectual property, and climate change.

The DCF could also take the lead in serving as the primary intergovernmental dialogue mechanism, and coherence and coordination discussion forum between the providers and recipients of capital and aid with respect to the terms and conditions of the transfer of funds and the monitoring and evaluation of the development results of such transfers. It should also promote South-South development cooperation.

Finally, it must be understood that the international development cooperation discourse cannot be separated from the broader global power discourse and the systemic imbalances that reflect the current state of affairs. Hence, the DCF should play a role in shaping a fairer and more equitable global economic system, in which the development policy space and prospects of developing countries are placed at the centre of global action.

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Happy New Year 2008!

Op-Ed: Reshaping the International Development Co-operation Architecture: Recommendations on a Strategic Development Role for the Development Cooperation Forum (DCF)

By Vicente Paolo Yu III, South Centre

Development remains the prime imperative for developing countries. Using home-grown development approaches that are strategic and adapted to their own requirements, some developing countries are succeeding. However, many more developing countries are falling behind, especially those who have followed the "Washington Consensus"- based policy prescriptions of the Bretton Woods institutions and some bilateral development agencies. The imbalances in current international economic system are systemic in nature.

The current development cooperation architecture reflects much of the systemic imbalances in current international economic relations. It focuses mostly on the provision of official development assistance (ODA) to the exclusion or marginalization of other development issues such as trade, transfer of technology, intellectual property, global economic governance, and climate change. As a result, long-term ODA flows have been declining, and the development effectiveness of much of international ODA has been spotty at best. These have generated new calls for changes in the international ODA architecture and quality of aid to make them more relevant and effective in meeting the development challenges. As new development cooperation actors emerge, and new development challenges come up, a new and more effective international development cooperation architecture becomes more crucial as part of the overall effort to address the systemic imbalances.

The Development Cooperation Forum (DCF) is an international response to this felt need. Created by the mandate of the United Nations General Assembly as an arm of the Economic and Social Council (ECOSOC), the DCF provides a good opportunity for generating a new and more democratic global discourse on development cooperation as a way to address the imbalances in the current economic system.

Strengthening ECOSOC should be a key institutional objective of the DCF. It should be an intergovernmental oversight mechanism of the ECOSOC with respect to the implementation of existing publicly-financed ODA so as to promote coherent approaches and healthy competition among ODA providers. It should also enable ECOSOC to exercise oversight over the implementation by UN Members States of their international development cooperation commitments – in particular of ensuring that aid is demand-driven and unencumbered by Washington Consensus-based conditionalities.

The DCF should create appropriate instruments and mechanisms to make it easier for the developing countries to identify the best possible development partners consistent with their development needs, priorities, and ownership.

Additionally, the DCF should provide a strategic intergovernmental policy, operational oversight, and accountability mechanism that can link the international development cooperation architecture to the broader international economic and financial architecture. In this regard, it should exercise intergovern-

(Continued on page 13)

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