

BUCHBESPRECHUNGEN / BOOK REVIEWS

Annamaria La Chimia

Tied Aid and Development Aid Procurement in the Framework of EU and WTO Law
The Imperative for Change

Hart Publishing, Oxford and Portland, Oregon 2013, 488 pages, £85.00 (US\$ 170.00), ISBN 978-1849461153

The vast majority of donors provide development aid to recipient countries under the formal or informal condition that goods and services needed for project implementation are to be purchased, either entirely or partially, from the donor country. In the context of the ongoing debate on aid effectiveness, this practice of 'tied aid' has been researched extensively by economists and political scientists who come to the conclusion that tying aid severely undermines aid effectiveness by generating higher costs and distorting the nature of aid. This applies to food aid in particular where tied aid results in a cost increase of up to 50 % and life-threatening delays in delivery. Annamaria La Chimia makes an important contribution to the current research on tied aid and its effects by publishing a very comprehensive work focusing on the topic's legal aspects. The author is Lecturer in Law at the University of Nottingham and Head of the Humanitarian and Development Procurement Unit of the Public Procurement Research Group (PPRG), the leading research institute on public procurement regulation.

As aid procurement is carried out predominantly outside of general public procurement laws, and as binding legal mechanisms for untying aid are presently not in place, aid procurement is highly prone to corruption, protectionism and discrimination, leading to a considerable waste of funds and, ultimately, to the failure of aid. Economic and political justifications for tying aid keep donors trapped in a prisoner's dilemma which WTO and EU could solve by setting aid procurement standards applicable to the entire donor community. In order to find answers to the question as to whether the implementation of tied aid violates trade and procurement rules under the EU regime, as well as WTO agreements, primary, secondary and case law are extensively analyzed, as well as policy papers and background interviews with relevant stakeholders. In addition to the analysis of the main legal frameworks (parts II and III), four in-depth case studies of different donor policies on tied aid and a sector analysis on food aid are presented (part I).

Covering about 230 pages, the first part of the publication gives an ample overview on the relevance of the issue of tied aid in development cooperation in general, and in aid effectiveness specifically, arguing that the abolition of tied aid through law would be a first step towards the improvement of aid procurement, as this would eliminate those donors' protectionist interests which currently determine tied aid policies. The most significant international initiative on untying aid adopted by all DAC members is the 'OECD Recommendation to Untie Official Development Assistance to the Least Developed Countries' from 2001. The in-depth analysis of the document, however, indicates that its impact on untying aid remains

highly limited due to a multitude of limitations, exclusions and derogations. In addition, and even more importantly, its impact can be questioned, as neither emerging donors (who all practice tied aid) nor recipient countries are members of the OECD. It should therefore be discussed whether the WTO might be better suited for a coordinating role in regulating the untying of aid. The negative effects of tied aid are illustrated by a legal analysis of the food aid sector, namely the Food Assistance Convention from 2012 and the preceding Food Aid Convention, as well as the UN World Food Program. In this context, the recent development of a rights-based approach to food security arising from Art. 25 Universal Declaration of Human Rights and Art. 11 ICESCR is briefly discussed. Four detailed case studies of development policies on tying aid in Italy, the UK, the EU and the USA are presented as 'real world scenarios', offering insights into antithetic approaches on tying aid, yet without taking a direct comparative perspective.

The second part of the publication focuses on the question as to whether tied aid contravenes EU law, specifically with regard to its external competences, the single market and public procurement directives. Given the fact that tying aid contains both economic and development aspects, EU competencies (Common Commercial Policy, Art. 3 and 207 TFEU) and those of its member states (development policy, Art. 4 (4) and 208 TFEU) overlap. The author suggests reconciling Art. 207 and 208 TFEU by assigning to the EU the role of taking measures against bilateral tied aid policies while leaving development policy to the member states. The analysis of the rules of the single market (free movement of goods and services, Art. 34 and 56 TFEU; state aid rules, Art. 107 TFEU) shows that restricting development procurement to a specific country of origin, no matter whether it is carried out in the donor or in the recipient country, violates the TFEU as long as the donor is a member of the EU. In the case of the EU Public Sector Procurement Directive, the author comes to the conclusion that it is applicable when procurement is implemented by a member state, but not if it is executed by the recipient country outside the EU. However, it is argued that specific procurement legislation for aid contracts would be advantageous, so that shifting the implementation task to the recipient country in order to avoid the application of EU public procurement rules can be prevented.

The third and last part of the publication investigates the compatibility of tied aid with WTO law. The provisions laid down in GATT and GATS do not apply to aid procurement as it is considered to be government procurement, an area that is explicitly excluded from both agreements. The Agreement on Subsidies and Countervailing Measures, however, could be applicable if interpreted in a flexible way: If tied aid were considered to fall under the category of export credits, it would be treated as a subsidy. The WTO Agreement on Agriculture prohibits tied aid (Art. 10 (4)) on the one hand, but does not provide procurement rules on food purchasing on the other, and is hence not implemented. Finally, including commitments on untying aid in the renegotiated Government Procurement Agreement of 2012 would have been an incentive for developing country members to join the agreement; however, the GPA does not apply to the implementation of tied aid due to specific exemptions in its articles II (3) (e) (i) and II (3) (e) (iii).

Annamaria La Chimia's publication provides a fruitful approach to law and development research by putting the issue of tied aid in the context of the current aid effectiveness discourse. In addition, her findings on the legal aspects of tied aid offer important contributions, especially with regard to food aid as well as to the deliberations on the Post-2015 Development Agenda. Considering the changing stakeholder landscape in development cooperation, her research also calls into question old power structures and donors' ethical behavior. By tying aid, donors do not practice what they preach; tied aid contradicts their call for procurement reforms in the partner countries and, besides causing economic and political damages, severely undermines their credibility.

Annika Engelbert, Bochum

Laurence Burgorgue-Larsen / Amaya Úbeda de Torres

The Inter-American Court of Human Rights: Case-Law and Commentary

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A. Introductory Remarks

For a region that has contributed so much to the architecture of the international legal order, the praises owed to the Americas have mainly remained unsung. With the first ever general *oeuvre* of the jurisprudence of the Inter-American Court of Human Rights (IACtHR) in the English language, Laurence Burgorgue-Larsen and Amaya Úbeda de Torres have clearly beat the trend in making this regional court's progressive case law known to the wider international law community.

The authors do not hail from the Americas. As a matter of fact, they are both European jurists: Laurence Burgorgue-Larsen is French and currently a professor at Paris I (Sorbonne) and Amaya Úbeda de Torres is Spanish and a researcher at the Center for Political and Constitutional Studies in Madrid. The authors' origins notwithstanding, this book is the culmination of many years of scholarly passion, both for the region and for its human rights court and a most needed and welcome addition to the existing literature.

After having published earlier versions of this work in French in 2008¹ and Spanish in 2009,² a re-worked and updated version was taken up by Oxford University Press, translated by Rosalind Greenstein and published in 2011. Although the authors claim to have modelled

1 *Laurence Burgorgue-Larsen / Amaya Úbeda de Torres, Les grandes décisions de la Cour interaméricaine des Droits de l'Homme, Bruxelles, 2008.*

2 *Laurence Burgorgue-Larsen / Amaya Úbeda de Torres, Las decisiones básicas de la Corte Interamericana de Derechos Humanos, Civitas, Navarra, 2009.*