Legal and Policy Considerations for USAID Trade and Investment Activities

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Overview of presentation

- Trade restrictions
  - Bumpers Amendment / PD-15
  - Surplus commodities
  - Lautenberg Amendment (textiles; no longer in force)
  - Specific crops / PD-72
  - Lacey Act amendments
  - Statutory checklist
- Investment promotion
  - ADS 225
- Untying aid
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  - ADS 221

Bumpers Amendment –

FY 2008 Foreign Operations Appropriations Act, Sec. 613(b)

None of the funds appropriated by this or any other Act to carry out chapter 1 of part I of the Foreign Assistance Act of 1961 shall be available for <u>any testing or breeding feasibility study, variety improvement or introduction, consultancy, publication, conference, or training</u> <u>in connection with</u> the growth or production in a foreign country of <u>an agricultural commodity for export</u> which would <u>compete with a similar commodity grown or produced in the United States</u>: Provided, That this subsection shall not prohibit—

(1) <u>activities designed to increase food security</u> in developing countries <u>where such activities will not have a significant impact on the export of agricultural commodities of the United States</u>; or

(2) research activities intended primarily to benefit American producers.

Bumpers Amendment – Policy Determination 15

"Assistance to Support Agricultural Export Development"

- Adopted September 13, 1986
- Policy Determination (pre-ADS)
- Refers to earlier planning systems
- Mandatory guidance under ADS 200
- Statutory underpinning (Bumpers)
  - "In this context, it is USAID policy to avoid supporting the production of agricultural commodities for export by developing countries when the commodities would directly compete with exports of similar U.S. agricultural commodities to third countries and have a significant impact on U.S. exporters."

Bumpers / PD 15 – bottom line

- Will the proposed activity specifically support:
  - a foreign crop
  - to be exported in direct competition with the same U.S. crop
  - to the same third-country market
  - with a significant impact on U.S. exports?
- Very specific market analysis is necessary

Surplus commodities

FY 2008 Foreign Operations Appropriations Act, Sec. 613(a)

- None of the funds appropriated or made available pursuant to this Act for direct assistance … shall be obligated or expended … <u>for establishing or expanding production of any commodity for export by any country</u> other than the United States, if the commodity <u>is likely to be in surplus on world markets</u> at the time the resulting productive capacity is expected to become operative **<u>and</u>** if the assistance <u>will cause substantial injury</u> to United States producers of the same, similar, or competing commodity

Surplus commodities (Section 613(a))

- This is a statute, and still in force!

Lautenberg Amendment
(textiles; no longer in force)

None of the funds provided in this Act to the Agency for International Development … shall be obligated or expended

(1) to procure directly feasibility studies or prefeasibility studies for, or project profiles of potential investment in, the manufacture, for export to the United States or to third country markets in direct competition with United States exports, of import-sensitive articles as defined by section 503(c)(1) (A) and (E) of the Tariff Act of 1930 (19 U.S.C. 2463(c)(1) (A) and (E)); or

(2) to assist directly in the establishment of facilities specifically designed for the manufacture, for export to the United States or to third country markets in direct competition with United States exports, of import-sensitive articles as defined in section 503(c)(1) (A) and (E) of the Tariff Act of 1930 (19 U.S.C. 2463(c)(1) (A) and (E)).

PD 71 - Sugar, palm oil or citrus for export

- “Because of the potential injury to US producers of similar products, USAID/W will as a matter of general policy examine at the earliest possible stage proposed projects involving production, processing or marketing of sugar, palm oil, or citrus for export.”
- “Approval to proceed with project development in these cases must be made by the appropriate Regional Assistant Administrator with the concurrence of AA/PPC …”

PD 71 - Sugar, palm oil or citrus for export

- “Missions are not prohibited from developing project ideas in which these commodities are involved.”
- “Rather, they should be aware that their potential impact on US producers is a matter of concern which has resulted in restrictive legislation …”
- “USAID should, therefore, only finance such projects when their development rationale is strong and their likely impact on US producers is low.”

Background: The Lacey Act

- The nation's oldest wildlife protection statute
  - First enacted in 1900 to combat impact of:
    - hunting to supply commercial markets,
    - interstate shipment of unlawfully killed game,
    - introduction of harmful exotic species and
    - killing of birds for feather trade
  - Significantly amended in 1981 and 1988
- A tool to combat trafficking in "illegal" wildlife, fish or plants

The Food, Conservation and Energy Act of 2008 (FY08 Farm Bill)

- *Section 8204. Prevention of Illegal Logging Practices*
  - Expands Lacey protection to broader range of plants
  - Extends the statute's reach to encompass products, including timber, that derive from illegally harvested plants
  - New declaration requirement relating to plant products
- Passed May 22, 2008 (effective immediately)

The Lacey Act, as amended

- The Lacey Act, as amended, is an important new tool that will help the United States to support the efforts of other countries, and its own States, to combat illegal logging.
- The Lacey Act now makes it unlawful to import, export, transport, sell, receive, acquire, or purchase in interstate or foreign commerce any plant, with some limited exceptions, taken or traded in violation of the laws of a U.S. State, or most foreign laws.
- The Lacey Act also makes it unlawful to make or submit any false record, account or label for, or any false identification of, any plant.
- It will be unlawful as of December 15, 2008 to import any covered plant or plant product without a declaration.

Examples of Illegal Logging

- Theft of timber, including from parks and protected areas
- Harvesting without permission
- Failure to comply with harvesting regulations
- Failure to pay royalties, taxes or fees

The Lacey Act provides legal authority to take action when products associated with illegal logging enter the United States.

New Declaration Requirement Relating to Plant Products

- Declaration must be made at time of importation
- Declaration must contain:
  - Scientific name of plant (including genus & species)
  - Value of importation
  - Quantity of the plant
  - Name of the country in which the plant was harvested
  - For paper and paperboard products with recycled content, state the average % recycled content without regard for species or country of harvest
- Declaration requirement does not apply to packaging material used to support, protect or carry another item (unless the packaging material itself is the item being imported)

Covered Products

A wide variety of products, to the extent that they contain covered plant products, are now covered by the Lacey Act. Examples include:

- Lumber, wood pulp, paper and paperboard
- Furniture, tools, umbrellas, sporting goods
- Printed matter
- Musical instruments
- Products manufactured from plant-based resins
- Boats, cars, trains, planes
- Pharmaceuticals
- Textiles

Statutory checklist

Very useful overview of our restrictions

FY 2008 Statutory Checklists

I. INTRODUCTION

II. COUNTRY CHECKLIST

- Part A. General Provisions
- Part B. “Taking Into Consideration” Provisions

III. ASSISTANCE CHECKLIST

- Part A. Planning (in alphabetical order)
- Part B. Congressional Notifications
- Part C. Obligating Documents

Statutory checklist

- **2. <u>AGRICULTURAL ACTIVITIES (BUMPERS AMENDMENT)</u>.** (FY 2008 Act Sec. 613(b), as interpreted by the conference report for the original enactment). No funds may be used for agricultural development activities (specifically, any testing or breeding feasibility study, variety improvement or introduction, consultancy, publication, conference, or training) that would compete with a similar commodity grown or produced in the United States unless the activity:
  - (a) Is designed to increase food security in developing countries and where such activities will not have a significant impact in the export of agricultural commodities of the United States; or
  - (b) Is a research activity intended primarily to benefit American producers.
- **Is this restriction applicable? Please comment.**

Investment promotion – Statutory underpinning

FY 2008 Foreign Operations Appropriations Act, Sec. 632

Impact on jobs in the United States

- None of the funds appropriated by this Act may be obligated or expended to provide

  (a) any financial incentive to a business enterprise currently located in the United States for the purpose of inducing such an enterprise to relocate outside the United States if such incentive or inducement is likely to reduce the number of employees of such business enterprise in the United States because United States production is being replaced by such enterprise outside the United States

Investment promotion – ADS 225

- ADS 225 outlines principles for trade and investment activities as they affect U.S. jobs and workers' rights and provides detailed policy, program, and implementation guidelines for investment activities.
- Issued in April 2003, ADS 225 supersedes Policy Determination (PD) 20, which had been in place since 1994.

Investment promotion – ADS 225

- "Program Principles for Trade and Investment Activities and the 'Impact on US Jobs' and 'Workers' Rights'"
  - Expands the list of permitted activities, giving Bureaus and Missions greater latitude in designing trade and investment activities;
  - Refocuses the list of prohibited activities to those that can clearly be linked with inducing a firm to relocate; and
  - Ends the requirement for a Presidential waiver for approval to support export processing zones (EPZs).

Investment promotion – ADS 225 Policy

- According to the General Notice announcing it, ADS 225
  - “balances USAID’s objectives of promoting economic development with the sense of Congress that bilateral assistance should not be used to induce U.S. firms to relocate abroad, resulting in the loss of U.S. jobs.”

Investment promotion – ADS 225
Types of activities

- The ADS classifies trade and investment activities as:
  - permitted,
  - prohibited and
  - “gray-area” activities.
- Gray-area activities are generally permitted if there is no likely negative impact on U.S. jobs (determined according to standards in the ADS), and if permitted activities are designed and implemented so as to not contain or evolve into prohibited activities.

Investment promotion – ADS 225
Permitted activities

- Policy dialogue
- Legal, regulatory, and judicial reform projects
- Dissemination and analysis of general economic and business information
- Enhancing the competitiveness of local producers
- Strengthening business and free trade associations
- Basic capital projects, and credit and micro- and small enterprise development
- Agricultural projects addressing food security needs
- Trade capacity building and trade facilitation
- Technical assistance relating to privatization and core labor standards

Investment promotion – ADS 225
Prohibited activities

- Financial incentives to relocate
- Investment promotion missions to the United States to induce U.S. firms to relocate
- Advertising intended to encourage U.S. firms to relocate
- Certain support for organizations providing incentives to U.S. firms to relocate

Investment promotion – ADS 225
Gray-area activities

- Technical assistance in establishing linkages with U.S. businesses
- Establishing investment promotion offices and financing investment promotion activities in the host country
- Activities involving EPZs
- Feasibility studies and travel and technical assistance for firms contemplating or planning investments in the host country

Investment promotion – ADS 225
Gray-area activities – Analytic procedures

- In conducting the analytical review to determine the potential impact on U.S. jobs, Operating Units must answer the following questions:
  - Is the activity directed at promoting either foreign direct or local investment in the recipient country?
  - Could the activity reasonably be foreseen to stimulate the relocation of any U.S. business that would result in a reduction in the number of employees of the business in the U.S.?

- The factors to consider include, but are not limited to
  - Whether the recipient country or region is geographically attractive to U.S. firms;
  - Whether the types of firms targeted under the project are likely candidates for relocation; and
  - Whether the activity has an impact on U.S. production of a comparable product.

Investment promotion – ADS 225
Gray-area activities – Analytic procedures

- The analysis should focus on the likely impact on U.S. jobs, rather than the activities themselves. In examining potential relocations, the key question is what would be the likely result on U.S. jobs, not what form the overseas relocation may take.
- Even where the objective is to preserve U.S. jobs, if the immediate effect would be a loss of some U.S. jobs to an overseas operation, the activity cannot be funded.
- If there is not a reasonable likelihood that relocation could take place as a result of the activity, then the Operating Unit can fund the activity.
- If, in analyzing these and similar factors, the conclusion is reached that the activity may result in the relocation of a U.S. business and loss of U.S. jobs, then the Operating Unit cannot fund the activity unless it can modify the design or implementation activity to eliminate any likelihood that a relocation would take place.

Investment promotion – ADS 225
Required clause for gray-area activities

- For gray-area activities or investment-related activities where specific activities are not identified at the time of obligation but could be for investment-related activities
- Specific clause, or a substantive alternative, is required for grants and cooperative agreements to private entities, public international organizations and foreign governments; interagency obligating agreements; and contracts

Investment promotion – ADS 225
Required clause for gray-area activities

Investment Promotion

(a) Except as specifically set forth in the [Grant] or otherwise authorized by USAID in writing, no funds or other support provided hereunder may be used for any activity that involves investment promotion in a foreign country.

(b) In the event the [Grantee] is requested or wishes to provide assistance in the above area or requires clarification from USAID as to whether the activity would be consistent with the limitation set forth above, the [Grantee] must notify the [Agreement Officer] and provide a detailed description of the proposed activity. The [Grantee] must not proceed with the activity until advised by USAID that it may do so.

(c) The [Grantee] must ensure that its employees and subcontractors and sub-recipients providing investment promotion services hereunder are made aware of the restrictions set forth in this clause and must include this clause in all subcontracts and other sub-agreements entered into hereunder.

Internationally Recognized Workers' Rights

ADS 225

- Operating Units may not obligate or expend funds for activities (including export processing zones (EPZs)) that contribute to the violation of internationally recognized workers' rights as defined in 19 U.S.C. 2467(4). The "internationally recognized workers' rights" are
  - a. The right of association;
  - b. The right to organize and bargain collectively;
  - c. A prohibition on the use of any form of forced or compulsory labor;
  - d. A minimum age for the employment of children; and
  - e. Acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health.
- The last two – d. and e. – may be applied commensurate with the development of the country, and the fact that they may be affected does not preclude an activity for the informal sector in a country, micro and small-scale enterprise, and smallholder agriculture.

Untying aid
USAID procurement rules

- Generally, program funds may only be used to procure goods and services from the U.S., the host country, or developing (not including advanced developing) countries
- As a matter of policy, USAID has created a default rule under ADS Chapter 310 to buy only from the U.S., subject to many exceptions
- FAR Part 25 (inc. the Buy American Act) applies to *OE-FUNDED* activities**.**

Untying aid
USAID procurement rules

- **USAID can <u>waive</u> this general rule if it finds that procurement from another country is necessary to:**

  (1) meet unforeseen or emergency circumstances, or

  (2) promote foreign assistance objectives.

Untying aid
USAID procurement rules

Rules allow procurement of commodities or services from host country firms up to a certain amount, depending on the type of commodity/service, such as:

(1) U.S. origin goods available locally up to $100k

(2) Other commodities up to $5k

(3) Professional services up to $250k

(4) Construction prime contracts up to $5 million

(5) Subcontracts w/o limit under fixed-price construction contracts

Untying aid
USAID procurement rules

SPECIAL RULES - RESTRICTED COMMODITIES

- **Pharmaceuticals - Default rule – U.S. "origin" only**

  A waiver of the rule will be considered if the product is unavailable from the U.S., >50% more expensive than non-U.S., and safe and efficacious.
- **Vehicles (purchase or long-term lease) – Default rule – U.S. "origin" only**

  A waiver of the rule will be considered based on non-availability, the lack of local maintenance facilities and spare parts for U.S. vehicles, or an emergency requirement.
- **Agricultural Commodities - Default rule – U.S. "origin" only**

  If U.S. prices are "below parity," USAID shall not buy non-U.S. agricultural commodities, except to fulfill foreign assistance objectives.

BLANKET WAIVERS

- AVIAN INFLUENZA
- HIV/AIDS
- IRAQ, AFGHANISTAN, & PAKISTAN
- UNTYING WAIVER

WHAT IS TIED AID?

- Tied aid is defined as concessional financing linked to procurement of goods and services in the donor country.
- Tied aid includes loans, grants, or associated financing packages with a concessionality level greater than zero.
- Concessionality level - in the case of loans – in simplified form - is the difference between the nominal value of the loan and the discounted value of what's repaid.
- Technically, its the difference between the nominal value of the loan and the discounted present value of the future debt to service payments to be made by the borrower. This difference is expressed as a percentage of the nominal value of the loan.

Untying aid
The problem

The tied aid problem arises in two ways:

- **The first involves the use of <u>credit subsidies.</u>**
  - **<u>Problem with Subsidies</u> - influence the effective price of a capital good through a below market interest rate, and extended payment, or combining a grant with a loan.**
- **The second involves <u>commercially</u> motivated aid.**
  - **<u>Government Interference</u> - Governments may decide to provide subsidies as a way of promoting exports of capital goods. The interest rates are lower then what market lenders would provide.**
- **Both lead to <u>Trade Distortions</u> - subsidized government supported financing distorts trade and investment.**

<u>U.S. Policy</u> - The goal is to provide a level playing field for exporters so that competition occurs on the basis of price and quality, rather than subsidized credit.

Untying aid
DAC untying recommendation

- In 1996, the DAC became serious about making a significant contribution to the problem of untying aid.
- For the past 40 years, members have always talked about untying aid but there was never any concerted action.
- Members agreed that it was time to take action and attempt to bring this issue to closure.

Untying aid
DAC untying recommendation

- **The Recommendation has three major elements – <u>coverage</u>, <u>monitoring</u>, and <u>notification</u>.**
- **The Recommendation requires the following elements of ODA to be untied as to LDCs (as defined):**
  - **Debt forgiveness**
  - **Sector and multisector program assistance**
  - **Investment project aid**
  - **Import and commodity support**
  - **Commercial services contracts**
  - **ODA to NGOs for procurement related activities**

Untying aid
ADS 221

- **Implements the DAC Recommendation for USAID**
- In order to make the coverage section operational for USAID, the following categories of procurement actions will be covered by the Recommendation.
  - Capital projects;
  - Capital equipment;
  - Capital-related supplies and services; and
  - Discrete “physical” commodities.

Untying aid
LDCs and HIPC countries

- Afghanistan
- Angola
- Bangladesh
- Benin
- Bhutan
- Bolivia
- Burkina Faso
- Burundi
- Cambodia
- Cameroon
- Cape Verde
- Central African Republic
- Chad
- Comoros
- Congo, Rep
- Congo, Dem. Rep
- Côte d'Ivoire
- Djibouti
- Equatorial Guinea
- Eritrea
- Ethiopia
- Gambia
- Ghana
- Guinea
- Guinea-Bissau
- Guyana
- Haiti
- Honduras
- Kiribati
- Kyrgyz Rep
- Laos
- Lesotho
- Liberia
- Madagascar
- Malawi
- Maldives
- Mali
- Mauritania
- Mozambique
- Myanmar
- Nepal
- Nicaragua
- Niger
- Rwanda
- Samoa
- Sao Tome and Principe
- Senegal
- Sierra Leone
- Solomon Islands
- Somalia
- Sudan
- Tanzania
- Togo
- Tuvalu
- Uganda
- Vanuatu
- Yemen
- Zambia

Untying aid
ADS 221

- DAC Members (including USAID) have agreed to procure specified goods and services with a value of SDR 700,000 (currently about $1,100,000) or more from worldwide sources (source/origin code 935).
- USAID's implementation of the DAC Recommendation to untie the procurement of specific categories of goods and services depends upon answers to the following three questions:
  - Is the procurement benefiting (that is, providing resources to) a "least developed country"? (See Mandatory Reference, Listing of the Least Developed Countries.)
  - Is the value of the procurement destined for a "least developed country" equal to or greater than SDR 700,000?
  - Is the procurement of the commodity or service covered by the Recommendation (operationally defined to include capital projects, capital equipment, and capital-related supplies, as well as other discrete "physical" commodity procurements)?
- If the answer to each of these questions is "yes," the procurement action is covered by the DAC Recommendation, meaning that the origination Office or Mission must designate it as source/origin code 935, unless there is a need to derogate from the Recommendation. In addition, USAID is required to provide information to the DAC (called notifications) on covered procurements of SDR 700,000 or more.

Untying aid
ADS 221

- The Recommendation allows DAC Members to question other Members about specific aspects of their untied aid notifications concerning feasibility studies or architectural and engineering studies for capital projects. (The DAC calls these activities “investment related technical cooperation.”)
- This information can be obtained through an “exchange of information procedure.”

Untying aid
Implications

In LDCs and HIPC countries

- Monitor and untie our own procurements
- Police and take steps to challenge other donors' tied aid policies

Bottom line

- These are important but arcane rules, not always well set out in current guidance
- Your lawyer is here to help you!

References

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    - PD 15 (Bumpers) http://www.usaid.gov/policy/ads/200/pd15.pdf
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    - FY 1995 Foreign Operations Appropriations Act, Sec. 513(c)
    - http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=103_cong_bills&docid=f:h4426enr.txt.pdf
  - PD 71 (Sugar, palm, citrus) http://www.usaid.gov/policy/ads/200/pd71.pdf
  - Lacey Act amendments (implementation)
    - http://frwebgate5.access.gpo.gov/cgi-bin/PDFgate.cgi?WAISdocID=437723379140+0+2+0&WAISaction=retrieve

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  - ADS 221 http://www.usaid.gov/policy/ads/200/221.pdf
  - *Revisions to ADS 221* http://www.usaid.gov/policy/ads/200/updates/iu2-0805.pdf