A CRITIC TO THE OBJECTIVES OF THE GLOBAL PUBLIC PROCUREMENT INITIATIVES IN THE CONTEXT OF THE WTO

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"The problem is not about turtles or shrimp, labor rights or trade, but about societies and their respective interests, and how authority is allocated among them so as to maximize the achievement of those interests"**.

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ABSTRACT

This comment focuses in the previous works and tendencies of the WTO and the Agreement on Government Procurement. Its basic concern is how developing countries are neglecting accession to the treaty arguing lack of real access to the

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** BAGWELL, KYLE; PETROS C. MAVROIDIS, & ROBERT W. STAIGER, *It's a Question of Market Access*, 96 AJIL 56 (2002).

international procurement markets and loss opportunities for implementing developing policies.
The paper places vis-à-vis two leading aims pursued by public procurement trade agreements —national welfare and market access—, in the context of the WTO and overviews whether the transparency approach will lead to globalize the Public Procurement market. It describes the status of WTO Public Procurement negotiations and how likely will the Agreement on Government Procurement prove towards a multilateral trade system. Public procurement regulation as a tool for development and its relation with market access trade policies will also be addressed as well as to what extent works on transparency in public procurement are entirely vital and useful for the global trade initiatives.

Key words: Public Procurement, World Trade Organization, Government Procurement Agreement, development, trade agreements, transparency.

RESUMEN

Este artículo analiza los trabajos y tendencias de la OMC y el Acuerdo sobre contratación publica. Su principal preocupación es el bajo acceso y aceptación que los países en desarrollo presentan frente al Acuerdo sobre contratación publica bajo el argumento según el cual no existen garantías de acceso a los mercados y una evidente pérdida en la facultad de promover e incentivar industrias débiles que necesitan apoyo gubernamental.
El documento pone frente a frente dos metas perseguidas por los tratados comerciales en compras públicas: acceso a mercados y desarrollo económico, en el contexto de la OMC y el proceso de negociación y acceso al Acuerdo sobre contratación publica como herramienta para el desarrollo del mercado global de la contratación estatal. La contratación pública como instrumento para el desarrollo económico, así

como hasta qué punto un enfoque con base en mayores niveles de transparencia contribuye al desarrollo del sistema global de contratación pública, son temas que aborda este escrito.

Palabras clave: contratación pública, Organización Mundial del Comercio, Acuerdo sobre contratación pública, desarrollo, acuerdos comerciales, transparencia.

SUMMARY

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1. INTRODUCTION

Public Procurement—hereon PP— can be regulated from local and international perspectives. At local levels, governments seek the most efficient execution of public budget, trying to achieve and satisfy its needs as states and as responsible of the welfare of its citizens. For this, a legal framework will set up a scheme of principles and procedures in order to ensure a due administrative

process according to which the acquisition or purchase will be inspired in a "value for money" and transparency criteria. In contrast, from the global perspective, the rationale of PP regulations is to open the markets reducing trade barriers and maximizing competition and efficiency.

Both, local and international regulation seeks the modernization of the PP methods towards the satisfaction of public needs and the development and provision of business opportunities for the worldwide private sector.

Despite the aforementioned, giving PP an international trade framework with uniform disciplines has always been a difficult task. Several reasons support this circumstance[1]:

i) the internal development policies of the countries,
ii) the lack of uniform legal framework,
iii) the different industrial development of the countries,
iv) the dissimilar coverage and scope of the regimes,
v) the level of publicity, disclosure and transparency;
vi) the variety of practices that every country applies to their acquisitions and
vii) the tendency of exercising discretional awards, nurturing political patronage and opening space for corrupt practices and subjective decision making process.

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1 ARROWSMITH, SUE, "Reviewing The GPA: The Role and Development of the Plurilateral Agreement After Doha", *Journal of international economic law*, JIEL, 2002, 5(761). JACKSON, JHON, *The World Trade System. Law and Policy of International Economic Relations*, MIT, Press, Cambridge, Massachusets, London, sixth printing, 1994, p. 199. MCCRUDDEN, CHRISTOPHER, "International Economic Law and The Pursuit of Human Rights: A Framework For Discussion Of The Legality Of 'Selective Purchasing' Laws Under The Wto Government Procurement Agreement", *Journal of international economic law*, March, 1999, JIEL, 1999 2(3); KOVACS, ATTILA, "The global procurement harmonization initiative", PP, *Law Review*, 2005.

As general rule, PP has been considered a national sovereignty matter[2] and in so far, governments have been able to make their own decisions about how to spend their budgets, design and rule their own PP systems.

In this paper we draw the attention over one exception[3] to this general rule: the Agreement on Government Procurement, hereon AGP. It was signed in the context of the WTO as a plurilateral agreement —which involves very few WTO members—, with limited scope of application but great controversies and frictions within the global market actors.

Governments of developing countries have been reluctant to make part of this AGP because of their desire to acquire and purchase goods and services in discriminatory manners and mostly, because they still want to favour developing local industries by directing procurement to strategic economic sectors. They have opposed to extend negotiations to non discrimination principles for PP for several reasons, which we will address throughout this paper. While reviewing the AGP, the WTO will need to take into consideration that the majority of its members are developing countries[4] and that changes must be done to make the agreement more attractive for enlarging membership.

The negotiated field of the AGP is solely transparency —and not market access—, and WTO trusts that a transparent PP market will eventually amount to market access. It is a common place to consider that the lack of transparency can avoid foreign firms to bid for public contracts even if there are no discrimination policies. Consequently, there is a strong conviction that a transparent PP market will enhance the capacity of suppliers to compete in local and foreign markets.

2 About sovereign autonomy as an argument against free trade see, DUNKLEY, GRAHAM, *The free trade adventure*, The WTO, the Uruguay Round and Globalism – A critique, Zed Books, London, 2000, p. 112.

3 There are other exceptions such as MERCOSUR, NAFTA, CAFTA, etc.

4 MATSUCHITA, MITSUO, SCHOENBAUM, THOMAS, and MAVROIDIS, PETROS, *The World Trade Organization. Law, Practice and Policy,* The Oxford International Law Library, New York, 2003, p. 373.

The analysis developed in this paper seeks to shed light over the rationales and likelihood of this approach in the context of the WTO initiatives on multilateral negotiations for PP.

Developed countries aim to remove trade barriers imposed by local PP regulations, which are opposed to the application of MFN[5] and NT[6] clauses already included in the AGP. For this, the AGP must be enlarged, which means that its members would need to propose new terms of application so non members find more incentives to join the agreement. Though the benefits derived from acceding to the AGP can be effortlessly addressed, they do not seem easy to achieve. This document will discuss the pros and cons that lie under the broadening and accession initiatives to the AGP.

Hence, the main objectives of this paper are to place *vis-à-vis* two leading aims pursued by trade policy agreements —national welfare and market access—, in the context of the WTO and to overview whether the transparency approach will lead to globalize the PP market. For this purpose, we present the following structure: the first section will describe the status of WTO PP negotiations and how likely will the AGP prove towards a multilateral PP trade system. The second section will analyze PP regulation as a tool for development and its relation with market access trade policies. The third section will analyze to what extent works on transparency in PP are entirely vital and useful for the global trade initiatives in PP and finally, the fourth section will provide conclusive remarks.

5 The principle of most favoured nation treatment means that, if a country applies favourable treatment to suppliers from another country, this favourable treatment should also apply to suppliers from other member states. Occasionally, this treatment may be more favourable than that given to domestic suppliers. See, KOVACS, ATTILA, "The global procurement harmonization initiative", 2005, *PP Law Review*. Fn. 8.

6 The principle of national treatment means that foreign suppliers are treated not less favourably than domestic suppliers. See, KOVACS, ATTILA, *ibid*. Fn. 7.

2. PUBLIC PROCUREMENT IN THE CONTEXT OF WTO

Since its foundation in 1947, GATT rules gave exceptional treatment to PP market, excluding it from those non discrimination principles surrounding the agreement[7]. Articles III.8 and XVII.2 prescribed that "national treatment" would not apply to

> "procurement by governmental agencies of products purchased for governmental purposes",

causing an open discrimination in favor of local or external goods or services. As first step towards internationalization and uniformity of PP market, the first AGP was signed in 1979 as a Side-Agreement to the Tokyo Round[8]. It provided a "treatment no less favorable" within the signatories. The agreement was subscribed by thirteen countries and renegotiated during GATT'S Uruguay Round (1994), becoming a Plurilateral Agreement on Government Procurement, adopted originally by only 22 countries, including the fifteen EU member states.

The AGP[9] is composed by an "exclusive club"[10] of 38 member states and its main objective is to provide transparency of laws, regulations, procedures and practices regarding PP. In the past years new members have signed the agreement[11] and numerous

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7 *Infra* fn. 5 and 6.

8 The GPA 79 received strong influence from the OECD and specifically from the Government Purchasing Policies Draft Instrument. See, OECD report: *The Size of Government Procurement Markets*, 11-Feb-2002. Available at http://www.oecd.org/dataoecd/34/14/1845927.pdf, p. 13.

9 Signed in 1996.

10 ARROWSMITH, SUE, "Reviewing The GPA: The Role And Development Of The Plurilateral Agreement After Doha", *Journal of international economic law*, December, 2002, p. 5.

11 Parties to the agreement (committee members): Canada, European Communities (including its 25 member States: Austria, Belgium, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxemburg, Malta, Netherlands, Poland, Portugal, Slovak Republic, Slovenia, Spain, Sweden, United Kingdom), Hong Kong China, Iceland,

applications from other countries are being studied. As an entrance ticket to the general WTO Agreement, applicant countries are being required to sign the AGP[12]. The enlargement policy has shown results, but still, reaching a multilateral level does not seem feasible.

The planned agreement shall provide the following benefits[13]: higher level of trust, thus lower level of risk; higher level of competition, thus lower level of prices; more efficient utilisation of funds via savings on individual procurements; restriction of unfair and corrupt practices; convergence of international practices, thus lower costs of access to information and cheaper introduction of new procurement techniques; speeding up the process that domestic suppliers should undertake for becoming more competitive; and attraction of foreign capital.

Along with the Agreement, there are two initiatives pursuing the creation of multilateral rules for PP. The first one[14] is the creation of a Working Group on Transparency in Government Procurement —hereon WGTGP, resulting after the Singapore WTO Ministerial Conference[15] in charge of examining how transparent were acquisition practices of the member states and promote their inclusion

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Israel, Japan, Korea, Liechtenstein, Netherlands with respect to Aruba, Norway, Singapore, Switzerland, United States; Negotiating accession: Albania, Bulgaria, Georgia, Jordan, Kyrgyz Republic, Moldova, Oman, Panama, Chinese Taipei; Observer governments: Albania, Argentina, Australia, Bulgaria, Cameroon, Chile, China, Colombia, Croatia, Georgia, Jordan, Kyrgyz Republic, Moldova, Mongolia, Oman, Panama, Republic of Armenia, Sri Lanka, Chinese Taipei, Turkey: Observers-intergovernmental organizations: International Monetary Fund, Organization for Economic Cooperation and Development, United Nations Conference on Trade and Development, International Trade Centre. See, http://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm. Available 10th April, 2004, 11:38 a.m.

12 ARROWSMITH, S., *ibid.*

13 KOVACS, ATTILA, *op. cit.*

14 *Ibid.*

15 Originally, the discussions that led to the creation of this Group had as starting point the problem of corruption. This topic seemed a "non-trade" issue, and in consequence, the preparatory discussions changed the approach to transparency, open market and due process in the PP practices.

within the institutional framework of the WTO. Behind this objective lays the desire of developed countries, and mostly US and the EU, to furnish a future agreement including the MFN and NT policies, as expression of a new open PP market.

Despite the efforts of developed countries, the Ministerial Declaration of Doha of November 14, 2001, postponed the negotiations until the Fifth Session of the Ministerial Conference on the basis of a decision to be taken, by explicit consensus, at that Session on modalities of negotiations. These negotiations were to be built on the progress made by the WGTGP taking into account participants' development priorities, especially those of least-developed country participants'[16].

During the Cancún Ministerial on 13 September 2003 the WTO decided to commence negotiations limited to the transparency aspects[17] without restricting the scope for countries to give preferences to domestic supplies and suppliers. It was also reaffirmed that the negotiations shall take into account participants' development priorities, especially those of least-developed participants.

The second multilateral initiative[18] is based on the GATS negotiation of PP of services under article XIII.2, which was supposed to start by 1997 but so far has never discussed any access or transparency issues. In this comment we will not focus on this initiative. These initiatives have to address whether and how PP system of international trade should deal with social and economic goals fostered by governments and mostly, developing countries. Developing countries have very few to

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16 WTO. Ministerial Declaration of the Doha Conference, November 14th 2001, available at www-heva.wto-ministerial.org.

17 While drafting the Agreement, the Group managed to identify a basic outline that intends to address the following issues: "—"Building Blocks" (items I and XI): questions of scope and dispute settlement; —"Core principles" (items II to VII, IX): tendering methods, ex ante and ex post information, time periods; and —"Elements horizontal to WTO agreements" (items X, XII): information exchange, technical co-operation". See, JOACHIM PRIESS, HANS; PITSCHAS, CHRISTIAN, *PP Law Review*, 2002, World Trade Organization: the proposed WTO agreement on transparency in government procurement - Doha and beyond.

18 ARROWSMITH, S., *ibid.*

supply to governments from developed countries. They will only be able to supply a very small number of goods or services whilst developed countries might easily sweep away local competitors. It could be paradise for companies from big and strong countries and bankruptcy for small local firms[19].

3. NATIONAL WELFARE AND MARKET ACCESS IN PUBLIC PROCUREMENT

PP sets in motion a large number of transactions[20]. Its share in the NGP[21] is between 10 to 15% of GDP. Local and international suppliers depend on the business opportunities opened by

19 In the present negotiation of the corresponding PP chapter from the AFTA (U.S.A-Colombia-Peru-Ecuador) this issue is being discussed. The negotiation seeks mutual benefits for its signatories and seems to be the proper scenario for establishing common rules about transparency and market access. The negotiation process has put over discussion different ways of protecting local week suppliers and how to pave the way to real opportunities of access. Therefore the relationship between market access and local economic and industrial development is a matter that will be addressed in this bilateral negotiation process.

20 *Ibid*. Quoting The European Commission: "(…) in 1984 procurement of public bodies and nationalized industries accounted for 21.8 per cent of gross domestic product in the United Kingdom and about 15 per cent of gross domestic product across the Community". OECD. Working Party of the Trade Committee. The relationship between regional trade agreements and the multilateral trading system. Government Procurement. 9th October. 2002. "The WTO reports that the GPA applied annually to a total value of contracts of around US $30 billion in 1990-1994. It also reports that the value of procurement that is opened up to international competition is estimated to have increased by ten times under the revised GPA". For the OECD countries as a whole, the ratio of total procurement (consumption and investment expenditure) for all levels of government is estimated at 19.96% or USD 4. 733 billion, and for the non-OECD countries it is estimated at 14.48% or USD 816 billion. See, OECD report: The Size of Government Procurement Markets 11-Feb-2002. Available at http://www.oecd.org/dataoecd/34/14/1845927.pdf. Page 7. April 8th, 1:22 a.m.

21 OECD. *Directorate for Financial, Fiscal and Enterprise Affairs Committee on Competition Law and Policy Competition Policy and Procurement Markets*, May 7th 1999, http://www.oecd.org/dataoecd/35/3/1920223.pdf. April 4th 2005, 22:47.

government's inasmuch; a supplier may find that the government is its major or only client. The relationship between the development of industry and an open PP market is barely inseparable. *Ab initio*, one might argue that

> "the measures taken to liberalise public markets substantially restrict the possibilities for using procurement as a policy tool. In the sphere of industry, governments have traditionally been concerned solely with national welfare, and inevitably many policies designed to promote this have involved discrimination in favour of home industry, whether concerned simply to protect uncompetitive industries or directed at other goals such as restructuring, fostering new competitive industries, or regional development"[22].

As mentioned below, this faculty is the instrument that countries use for development and welfare, and at the same time, what global PP initiatives seek is to place restrains over it.

3.1 ECONOMIC AND NON-ECONOMIC AIMS OF PUBLIC PROCUREMENT

PP is nothing different than a simple contract between parties of different nature: private party dealing with public party. As any contract, it has economic and non-economic aims. The economic goal[23] of a public contract is to get more "value for money", which means using the public resources in the best available way, achieving the greater satisfaction levels of public welfare.

22 ARROWSMITH, SUE, "PP as an instrument of policy and the impact of market", *Liberalization. Law Quarterly Review*, 1995, LQR, 1995, 111(Apr), 235-284.

23 Doctor GUEVARA BERNAL states that "Parties in a public contract have common economic interest' in the precise and timely performance of the contract that binds them, just as any other contractual relationship". See, GUEVARA BERNAL, IVÁN, "Validity of State Contracts Arbitration: A 'Law and Economics' Perspective", *Revista de Derecho Económico*, Pontificia Universidad Javeriana, Bogotá, n° 2, December 2004.

As non-economic objectives[24], we might identify the ability that PP shows for supporting minority enterprises[25] or sectors in response to social circumstances of the countries; to foster protection of non economic interests such as human rights, labour conditions[26] or environment, to keep full oversight of public interest activities that exclusively belong to the state's competence, such as public security or provision of public services and, most importantly for purposes of this document, to foster infant industries that have potential comparative advantage and might need special protection to obtain internal and external economies of scale in order to overcome competition and appropriate the full benefits of their pioneering efforts[27].

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24 The EU has identified the following non-economic objectives of PP: (i) to stimulate economic activity; (ii) to protect national industry against foreign competition; (iii) to improve the cmpetitiveness of certain industrial sectors; (iv) to remedy regional disparities; (v) to achieve certain more directly social policy functions such as to: (a) foster the creation of jobs; (b) promote fair labour conditions; (c) promote the use of local labour; (d) prohibit discrimination against minority groups; (e) improve environmental quality; (f) encourage equality of opportunity between men and women; or (g) promote the increased utilization of the disabled in employment. See, WATERMEYER, R.B., Facilitating sustainable development through public and donor procurement regimes: tools and techniques, *PP Law Review*, 2004.

25 The importance of allocating public contracts to SMEs in the context of EU PP Law has been remarkable. According to CHRISTOPHER, BOVIS, SMEs are vital for the single market economy since they: "increase efficiency and enhance macroeconomic groth; promote industrial restructuring and adjustment; create the opportunity for industrial and sectoral exploitation of particular skills and advantages; facilitate better allocation of resources and more equal income distribution". See BOVIS, CHRISTOPHER, *EC PP Law*, European Law Series, Longman, London, 1998., p. 113.

26 PP local policies might contribute to "1. the provision of work opportunities to vulnerable groups; 2. increasing the quantum of employment generated per unit of expenditure through the promotion of small scale enterprises and usage of labour-based technologies and methods; and 3. the provision of business and/or work opportunities to groups of people who are socially and economically marginalized in order to address inequities within a society." See, WATERMEYER, R.B., *ibid*, quoting WATERMEYER R.B., "The use of Procurement to attain Labour-Based and Poverty Alleviation Objectives. Ninth Regional Seminar for Labour-Based Practitioners: Towards Appropriate Engineering Practices and an Enabling Environment", hosted by the National Road Administration of Mozambique in collaboration with the ILO/ ASIST Programme, Maputo, May 2002.

27 DUNKLEY, G., *op. cit*., p. 112.

For each kind of objective, namely economic or non-economic, PP regulation has availed itself with different instruments. In such way, for the achievement of "value for money", regulation has implemented a competitive and transparent public acquisition procedure, composed by selective and open procurement methods with specific rules, steps and limitations that differ from any private contractual procedure. It is here where administrative law intervenes with special rules about bidding documents, bidding process, evaluation of offers, special requirements for suppliers and, chiefly, criteria for the selection of suppliers.

This latter instrument generates frictions with international trade since it operates as a non-trade barrier also called "disguised protectionism"[28]- that closes the market against foreign firms. Local regulation has often established special discriminatory selection criteria directly affecting open competition claimed by the global trade initiatives on PP. Import bans, preference for local suppliers or supplies (i.e., Buy National, or National Champions policies), offsets requirements[29], set asides for small business enterprises or minority business, preferential rules of origin, policies favouring regions, and high thresholds are some non-trade barriers[30] affecting open PP competition.

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28 Dunkley, G., *op. ct*. p. 72.

29 Conditions or compromises that enhance local development of the government involved in the procurement. i.e., licenses for use of technology, investment, compensatory trade and similar requirements.

30 These non-trade barriers in PP markets have been addressed during the past regional trade agreements. In CAFTA, NAFTA, FTAA and the recent FTA negotiations between the US and Colombia, Ecuador and Peru, have faced the difficult task of renegotiating the application of US local PP policies in favour of domestic firms. The Buy American Act and the Small Business Act are unavoidable obstacles against suppliers from these South American countries.

3.2 GPA AND THE RIGHT TO DEVELOPMENT

Global PP initiatives seek to enlarge GPA membership by advertising promising advantages for its signatories. As ARROWSMITH contributes,

> "accession offers three main benefits. The first is access to other markets, which will increase as more states join the GPA. The second is support for liberalising a state's own markets which, whilst beneficial to the economy, may be difficult to achieve because of the political influence of protected interests (…). For governments committed to implementing transparency for domestic reasons (such as value for money and integrity), accession helps entrench domestic reforms against internal opposition"[31].

The agreement is unpopular between developing countries and that circumstance affects accession levels to the agreement[32]. What rests underneath this debate has already been addressed when the WTO institutions have to take decisions that differently affect "north and south" countries. Some trade measures might not favour all economic actors, namely, states of the international community. Several trade issues have faced the same problem as PP, i.e., investment, financial services, environment and intellectual property because although

> "there are some positive elements in the current multilateral trading system, it is mostly operating against the interests of the developing countries. Also, it is neither oriented towards development nor working for development, particularly that of the developing countries"[33].

The use of PP discriminatory measures is not peacefully recognized and many critics against these policies have been established[34]. There are concerns about inefficiencies that these

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31 ARROWSMITH. SUE, "PP as an instrument of policy and the impact of market Liberalization", *Law Quarterly Review*, 1995.

32 *Ibid*.

33 Las Das, B., *op. cit*. p. 181.

34 ARROWSMITH, SUE, *Ibid*.

discriminatory policies may cause. Local undertakings and "National Champions" may be favoured by the government's discretion, but in the long term it would amount into market disruption and lack of investment in innovation. The government might be silently promoting the perpetuation of its developing status in stead of facilitating the inclusion of the country in a more advanced economic stage. The following adverse effects caused by inadequate and unbalanced use of PP towards achievement of its non-economic goals have been identified:

> "(i) loss of economy and inefficiency in procurement; (ii) the exclusion of certain eligible tenderers from competing for contracts; (iii) the reduction in competition; (iv) unfair and inequitable treatment of contractors; (v) lack of integrity or fairness; (vi) lack of transparency in procurement procedures"[35].

In the bilateral-plurilateral level, and more precisely in the present negotiation of the AFTA and its corresponding chapter on PP, the disadvantages of using PP as a tool for development have also been discussed. Despite the negotiating countries concur about the benefits that the application of PP regimes could bring to their local industries, only one country has implemented protective and incentive regulations. Only Perú canalizes PP for its infant industries and the other countries have only drafted some administrative rules regarding the matter but still do not use PP for developing purposes. One might think that this is due to the concerns on how to maintain intact the "value for money" rationale of PP. During the negotiations, when future signatories notice that other countries involved in the process have protective measures and incentives for local industries or economic areas, the tendency is not to replicate that treatment helping their own industries, but to establish protecting rules that could balance the competitive disadvantages. Hitherto, when it comes to trade regional or multilateral agreements, the developing bias of PP has been disregarded and the market access concern prevails.

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35 WATERMEYER, R.B. Ibid.

Developing countries have decided to stay away from a multilateral agreement in PP after concluding that benefits offered by the accession may solely be nominal and not realistic. They do not see a mutual benefit overcoming from accession as their opportunities of effectively competing against suppliers from other countries are very limited[36]. They have few products to offer and their firms are not sufficiently competitive for placing winning bids. As LAS DAS notices,

> "When a part of the membership feels that it is being exploited by some other part that happens to be strong enough to do so, confidence is eroded and suspicion is enhanced. At the multilateral level, it has to be ensured that such suspicion does not arise".

The gains of developing countries after acceding a multilateral —and even a plurilateral— agreement on PP seem minimal, and the losses, substantial.

What might be concluded in this respect is that liberalization of PP would generate an environment where enterprises from the developed world would have access to the markets they want, while enterprises of the developing world will not have access to the markets of the developed world that would be particularly interesting for them[37]. Regarding development as a non-economic aim of PP, signatories of AGP will loose the opportunity of promoting its home industry, what constitutes a serious argument against accession.

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36 It might not be a regulatory issue since economic competition will be enough to sweep away entrant suppliers from poor countries when facing the economies of scales and high technology advanced multinationals.

37 MCMILLAN, FIONA, *If not this WTO, then what*, International Trade Law & Regulation. 2004.

4. About transparency[38] in Public Procurement

4.1 Why transparent Public Procurement regimes?

For the OCDE PP provides the major intersection between the public and the private sector[39]. International organizations have recognized how intertwined PP is with corruption[40], but the fight against it is not the only aim fostered by a strategic implementation of transparent practices in PP.

Transparency in PP has other goals[41]: to support non-discrimination, by making it difficult to conceal discriminatory motives; to facilitate participation by suppliers unfamiliar with the system; to improve information for market access negotiations; to improve the decision making process; to widen the supply base; to expose governments decision to public and social scrutiny; to promote the observance of rules and; to generate predictability of procurement decisions.

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38 "The concept of transparency in the context of PP refers to the general idea that procurement should be conducted in accordance with clear rules which are known to interested parties, and that some means of verification of those rules should be provided". See, Arrowsmith, Sue, "The APEC document on principles of transparency in government procurement", *PP Law Review*, CS38-49. 1998.

39 OECD. Report on the "Global Forum on Governance – fighting corruption and promoting integrity in PP", 29-30 November 2004, Paris, available at http://www.oecd.org/dataoecd/11/18/34340364.pdf, April 4th 2005, 22:00 p.m.

40 Policy documents from South American countries have reached to conclude that nearly 19% from the value of a public contract represents the share of corruption involved in the system; corruption takes place in 49.7% of public contracts; and 70.3% of suppliers consider that levels of corruption have increased in the past 3 years. See, Departamento Nacional de Planeación. República de Colombia, *Documento CONPES 3249 de 2003 Política de contratación pública para un Estado gerencial*.

41 For further details see, Arrowsmith, *ibid*, Joachim Priess, Hans; Pitschas, Christian. *ibid*; Las Das, Bhagirath, op. cit., p. 135 and; OECD. Working Party of the Trade Committee. The relationship between regional trade agreements and the multilateral trading system. Government Procurement. 9th October. 2002.

Furthermore, its presence contributes to both domestic legal framework and international trade regulations[42] from different perspectives. For example, transparency policies in PP contribute to reduce discretionary process and promote accomplishment of rules and procedures, in the local level, and, to disclose business opportunities and broaden participation of foreign competitors, thus, gaining market efficiency and value for money. For local or foreign suppliers, transparent PP systems imply encouragement and trust for participation.

On the contrary, absence of transparency may refrain firms from biding for public contracts even if there is no discrimination at all. PP systems from developing and small countries do not provide enough disclosure and publicity about business opportunities, chances of dealing with the government or the precise rules, requirements, awarding criteria and procedures related with public contracts. This opaque procurement practices may result from legal lacunas, administrative inefficiencies, the absence of hard budget constraints and oversight by the authorities or personal rent-seeking and corruption. The result can be a substantial loss of public recourses, discouragement of local and foreign firms to participate in PP, loss of trust in the system and promotion of unlawful practices. One grave concern is the discouragement of external investment from multinationals that prefer to allocate their contracts in countries where the procurement rules and the predictability of the bidding process are certain. Therefore, lack of transparency in PP means a social and systematic barrier to trade.

42 ARROWSMITH, SUE Reviewing The GPA: The Role And Development Of The Plurilateral Agreement After Doha. Journal of international economic law. December 2002. p.4.

4.2 More transparent Public Procurement regimes: effects on trade

Commentators[43] and policy makers[44] consider that transparent PP frameworks would derive in broader markets expanding business opportunities and softening trade barriers established by hard local —and discriminatory— regulations[45]. Though the advantages are clear —possibly contestable—, it cannot be underestimated that a transparent system costs, and even more for developing countries. Public announcements of intended purchases or acquisitions or the implementation of an electronic PP system[46] imply more public expenditure. On the other hand, there is a political cost involved since the incorporation of transparency rules into the PP regime requires drafting new legal frameworks and new policy measures. In countries where PP systems are biased by political intentions the efforts is gigantic.

Hitherto, what is the real effect of focusing a global trade strategy in PP on the grounds of transparency measures? It has been stated that

> "transparency serves the interests of both domestic and foreign suppliers because of the predictability of procurement decisions and the observance of rules. Secondly, transparency fosters competition which in turn improves, in economic terms, the purchase of goods for developing countries which are particularly careful to save on their budgets. Thirdly, transparency is

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43 Arrowsmith, Sue. The APEC document on principles of transparency in government procurement.. PP Law Review. CS38-49. 1998.

44 i.e.OECD, World Bank, UNICTRAL.

45 From the economic perspective, an increase in transparency in PP systems generate a clearer demand curve, allowing foreign and local suppliers to plan their marketing strategies and to bid to the contracts of their particular interest. See, Evenett, Simon J., a,b, Hoekman, Bernard M., Government Procurement: Market Access, Transparency, and Multilateral Trade Rules. World Bank Policy Research Working Paper 3195, January 2004.

46 See, Laguado Giraldo, Roberto, "*Systems de E-government procurement*", *Revista Jurídica del Perú,* n° 42, Lima, Perú, November, 2002.

known to serve the fight against corruption which is a severe problem in some developing countries"[47].

Some commentators disagree[48]. For them, supporting a trade strategy in PP in the grounds of transparency would never amount to beneficially affect the market access level. Accordingly, a more transparent system would generate a clearer panorama and will reduce the aggregated demand curve in such way that domestic firms will be totally able to supply the entire government demand, avoiding and making unnecessary entrance of foreign suppliers. Therefore, the increase of transparency levels might certainly improve national welfare but not necessarily market access. Furthermore, increasing transparency will encourage domestic firms to sell to the government. Since the bribery share is eliminated from the value of public contracts, firms will save time and will no longer have to pay extra costs for entering the procurement market. They can lower their costs to competitive prices that satisfy the demand of the government, to an extent that there might not be any market access improvement at all. In conclusion "there is no guarantee that improving transparency will increase both welfare and market access simultaneously"[49]. If this is it, then, why is the WTO and the GPA placing so much effort promoting some policy that seems to be a non-trade issue? Should the WTO be involved in those non trade issues at all?

5. CONCLUSIONS

The right to development must be respected in every context. Therefore, the initiatives for a global PP market in the context of the WTO cannot leave behind the opportunity that developing countries

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47 JOACHIM PRIESS, HANS; PITSCHAS, CHRISTIAN, *ibid*.

48 EVENETT SIMON J., a,b, HOEKMAN, BERNARD M., *ibid*.

49 *Ibid*.

deserve to enjoy its particular process towards development and elimination of any obstacle that threatens these plans[50]. Chances of obstructing the "growth path" of developing nations exist[51].

A proper initiative toward the globalization of PP should bear in mind how to

> "bring together the bewildering complexity of economic, ecological and social needs and desires"[52].

This issues and trade cannot be regarded separately because of the inter-linkages between them, binding them inseparably together. Finding the balance between these needs without setting back any of them in favour of another is a rough outline of a possible road-map to development.

In this intersection, trade —and with it the WTO— plays a crucial role to promote broader and more meaningful participation of all (but especially those disadvantaged) participatants of the trade policy strategies on PP. Negotiations of the GPA should always bear in mind participants' development priorities, especially those of least developed countries. Serious thoughts must be given to improving in a fair way the multilateral trading system so it can prove for development and the interest of both developed and developing countries. Many of the latter have expressed its opposition against the WTO, threatening their retirement from the Organization what calls for

> "a guided system that can assure mutual benefit to the partners and credible protection against exploitation of the weak"[53].

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50 MATSUCHITA, SCHOENBAUM, MAVROIDIS, *ibid*., p. 389.

51 LAS DAS, B., *op. cit*. p.182.

52 RIZZOLLI, MATTEO, Enhancing Participation: Reconciling Trade and Sustainable Development. *Report of an Internship at the International Centrefor Trade and Sustainable Development (ICTSD)*. 3 May 2001 – 13 November 2001, Geneva, July 2002. Available at http://xoomer.virgilio.it/matnet/assets/PDF/final%20internship%20report.pdf, April 9th 2005.

53 LAS DAS, B. *Ibid*.

Theoretically speaking, a multilateral trading system can benefit all countries but even more to those economically weaker, because economic dynamics do not allow —even strong countries— to predict, prevent or prefer the results of world trade. The trade system can promote a better environment, with fixed rules, common goals and balance the possible frictions between strong and weak countries[54]. Trade is considered one important component of any development policy but solely it can not set in motion the complex process of economic development[55]. PP global initiatives evince a politico-structural issue according to which the "one size fits all" trade approach might deny developing countries strategic economic policy advantages that were essential to the developed countries in securing their own economic development[56].

Future negotiations and debates in the WTO should ensure that sustainable development is effectively inserted in trade in a balanced fashion favouring and considering the condition of all of its members. It is necessary not only to recognize the frictions between development and trade but understanding and applying coherent policies towards rational and balanced agreements.

Transparency is a vital element of international trade policy-making systems, and indeed, it is an explicit objective of the WTO. It is fundamental to make trade agreements work. The settlement of a Working Group on Transparency is a good starting point but its real influence towards the harmonization of procurement practices is still immature. Consensus about the importance of transparent PP regimes will be significant for national welfare disregard of the market access gains. The benefits that might be achieved will benefit developed and developing countries though market access enhancement can not be taken for granted.

The AGP

54 *Ibid*.

55 MATSUCHITA, SCHOENBAUM, MAVROIDIS, p. 388.

56 MCMILLAN, FIONA, *op. cit*.

> "is not a comprehensive system for regulating procurement but a framework of transparency standards, within which states implement their national policies"[57].

Signatories of the Agreement concur that transparency is a very important principle; shamely, they disagree on how this goal can best be achieved[58], but, the main issues that should be addressed should be to what extent a more transparent PP environment can contribute to market liberalization; how to ensure that the costs incurred in the implementation of a more transparent regime will amount to market access gains and finally, if WTO and the GPA should definitely be the forum for talking about transparency in PP taken in consideration that organizations such as World Bank or UNCITRAL have —among others— that specific task.

BIBLIOGRAPHY

ARROWSMITH, SUE, "PP as an instrument of policy and the impact of market Liberalization", *Law Quarterly Review*, 1995, L.Q.R., 1995, 111(APR), 235-284.

ARROWSMITH, SUE, "Reviewing The GPA: The Role And Development Of The Plurilateral Agreement After Doha", *Journal of international economic law*, JIEL, 2002, 5(761).

ARROWSMITH, SUE, "The APEC document on principles of transparency in government procurement", *PP Law Review*, CS38-49, 1998.

BOVIS, CHRISTOPHER, *EC PP Law. European Law Series*, Longman, London, 1998.

Departamento Nacional de Planeación, República de Colombia, *Documento CONPES 3249 de 2003, Política de contratación pública para un Estado gerencial.*

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57 *Ibid.*

58 JOACHIM PRIESS, HANS; PITSCHAS, CHRISTIAN, *ibid.*

JACKSON, JHON, *The World Trade System. Law and Policy of International Economic Relations*, MIT Press, Cambridge, Massachusets, London, England, sixth printing, 1994.

DUNKLEY, GRAHAM, *The free trade adventure. The WTO, the Uruguay Round and Globalism. – A critique*, Zed Books, London, 2000.

EVENETT, SIMON J. a,b, HOEKMAN, BERNARD M., *Government Procurement: Market Access, Transparency, and Multilateral Trade Rules. World Bank Policy Research Working Paper 3195*, January 2004.

GUEVARA BERNAL, IVÁN, "Validity of State Contracts Arbitration: A 'Law and Economics' Perspective", *Revista de Derecho Económico*, Pontificia Universidad Javeriana, Bogotá, n° 2, December, 2004.

JOACHIM PRIESS, HANS; PITSCHAS, CHRISTIAN, *PP Law Review*, 2002, World Trade Organization: the proposed WTO agreement on transparency in government procurement - Doha and beyond.

KOVACS, ATTILA, "The global procurement harmonization initiative", *PP Law Review*, 2005.

LAGUADO GIRALDO, ROBERTO, "Sistemas de *E-government procurement*", *Revista Jurídica del Perú*, n°. 42, Lima, Perú, November, 2002.

MATSUCHITA, MITSUO; SCHOENBAUM, THOMAS, and MAVROIDIS, PETROS, *The World Trade Organization. Law, Practice and Policy*, The Oxford International Law Library, New York, 2003, p. 373.

MCMILLAN, FIONA, *If not this WTO, then what*, International Trade Law & Regulation, 2004.

MCCRUDDEN, CHRISTOPHER, "International Economic Law and the Pursuit of Human Rights: A Framework for Discussion of the Legality of 'Selective Purchasing' Laws Under The to Government Procurement Agreement", *Journal of international economic law*, March, 1999, JIEL, 1999 2(3).

OECD, Directorate for Financial, Fiscal and Enterprise Affairs Committee on Competition Law and Policy Competition Policy and Procurement Markets, May 7th 1999, http://www.oecd.org/dataoecd/35/3/1920223.pdf. April 4th 2005, 22:47.

OECD, Report on the "Global Forum on Governance – fighting corruption and promoting integrity in PP", 29-30 November 2004, Paris, available at http://www.oecd.org/dataoecd/11/18/34340364.pdf April 4th 2005, 22:00 p.m.

OECD, The Size of Government Procurement Markets 11-Feb-2002, available at http://www.oecd.org/dataoecd/34/14/1845927.pdf April 8th, 1:22 a.m.

OECD, Working Party of the Trade Committee. The relationship between regional trade agreements and the multilateral trading system. Government Procurement, 9th October, 2002.

RIZZOLLI MATTEO, Enhancing Participation: Reconciling Trade and Sustainable Development. *Report of an Internship at the International Centrefor Trade and Sustainable Development (ICTSD).* 3 May 2001 – 13 November 2001, Geneva, July 2002. Available at http://xoomer.virgilio.it/matnet/assets/PDF/final%20internship%20report.pdf, April 9th 2005.

http://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm, available 10th April, 2004, 11:38 a.m.

WATERMEYER, R.B., "Facilitating sustainable development through public and donor procurement regimes: tools and techniques", *PP Law Review*. 2004.

WTO. Ministerial Declaration of the Doha Conference, November 14th 2001, available at www-heva.wto-ministerial.org.

Web pages

www.wto.org

www.worlbank.org

www.dnp.gov.co

www.oecd.org

Legislation

Agreement on Government Procurement 1994

Agreement Establishing the WTO 1994