

Reflections on Bagwell and Staiger in Light of the Revised WTO Agreement on Government Procurement

By

Robert D. Anderson¹

Bagwell and Staiger (2011) is, in my view, a thoughtful and penetrating analysis that poses important questions for the WTO and all who support its work. In addition to several other interesting findings, it posits a need to revisit traditional approaches to the provision of special and differential treatment (SDT) for developing countries in WTO negotiations. This merits careful reflection by scholars and practitioners. In this comment, I shall reflect on aspects of Bagwell and Staiger's analysis in light of the approach to SDT in the revised WTO Agreement on Government Procurement (GPA). Arguably, the latter represents an alternative paradigm for SDT that avoids some or all of the problems that Bagwell and Staiger put forward concerning the traditional approach. The modernization of the GPA is, in any case, an important development in its own right with clear relevance to the overall themes of the NBER-Bank of England conference: hence, before concluding, I shall briefly relate some key aspects of interest.

(1) Overview of the Authors' Key Findings

Three main propositions are advanced by Bagwell and Staiger in their analysis. First, they argue that "non-reciprocal" SDT (i.e. SDT that exempts the recipient countries from making concessions that are proportionate to the market access benefits that they receive) is, contrary to all intentions, harmful to the interests of developing countries, in that it does not help them to re-structure their economies, change their terms of trade and become more competitive. This, the authors suggest, accounts in significant measure for the oft-repeated perception that many developing countries have not benefited from participation in the WTO. Second, the authors suggest that, after fifty years of successful liberalization under the GATT/WTO, developed economies suffer from both "globalization fatigue" and inadequate bargaining power vis-à-vis new developing country entrants, in terms of additional concessions that can be offered in return for meaningful reductions in market access barriers on the new entrants' part. This is the "latecomers problem". Third, Bagwell and Staiger

¹ Counsellor and Team Leader for Government Procurement and Competition Policy, Intellectual Property Division (IPD), WTO Secretariat, and Special Professor, School of Law, University of Nottingham. This comment has been prepared strictly in a personal capacity. The views expressed must not be attributed to the WTO or its Secretariat. Helpful discussions with my colleague, Anna Müller, are gratefully acknowledged.

argue that, to address these problems and meaningfully integrate developing countries into the multilateral trading system, non-reciprocal SDT must be abandoned; developing countries must come to the table in markets where they are large; and they must negotiate reciprocal market access concessions with both developed countries and each other.

The foregoing propositions of Bagwell and Staiger demand careful reflection. They raise important questions about the design and modalities of current efforts to integrate developing countries into the multilateral trading system. They also run contrary to assumptions held by many such countries about their own interests, and to efforts to improve the structure of the WTO from a "moral" point of view (i.e. to make it more overtly favorable to and supportive of the interests of developing countries). In effect, Bagwell and Staiger argue that the benefits to be realized by developing countries from participation in the WTO system will be commensurate with the sacrifices that they are willing to make in terms of opening access to their own markets, *not* for reasons of morality but because it is only by opening their markets that they will undergo the restructuring that is necessary to strengthen the competitiveness of their own industries. The authors' account is buttressed by a general equilibrium modelling exercise and by reference to recent empirical studies supporting the view that a country's own tariffs and other import barriers are often a principal barrier to the country's export-competitiveness. These arguments and evidence merit scrutiny and reflection by academics and trade policy practitioners alike. Overall, Bagwell and Staiger's is not a case that will be universally welcomed, but it is a case that urgently needs to be heard and assessed.

(2) The S&D Provisions of the GPA as an Alternative Paradigm

The WTO Agreement on Government Procurement (GPA), a plurilateral agreement within the WTO system, is in the process of being renegotiated. The GPA renegotiation is not part of the Doha Round Single Undertaking; rather, it has been undertaken pursuant to a separate mandate that was built into the Agreement when it was adopted in 1994, and is proceeding on an independent track. Reciprocity of market access commitments is an important consideration in the negotiations (see WTO Committee on Government Procurement 2004). The renegotiation is now in its final stages. The expected outcomes from the negotiations include a complete revision to the text of the Agreement and an

expansion of the underlying market access commitments, which are embodied in schedules to the Agreement (see, generally, Anderson and Arrowsmith 2011).

The revised GPA text, which is already agreed in principle and is in the public domain (see WTO Committee on Government Procurement 2010), embodies an alternative paradigm for special and differential treatment particularly in the context of negotiations regarding accessions to the Agreement. Arguably, this alternative approach avoids most or all of the problems identified by Bagwell and Staiger (2011) in regard to more traditional approaches.

The key differences between SDT as it applies under the revised GPA text and more traditional approaches to SDT in the WTO are as follows. First, rather than a general presumption in favour of non-reciprocity in market access commitments, under the revised GPA text SDT principally takes the form of specific "transitional measures" that are intended to facilitate implementation of the Agreement by acceding developing country Parties.² Second, such measures are not available "as of right" but are to be awarded on the basis of specific developmental needs of the acceding WTO Member and subject to agreement by the other Parties. Third, such SDT as may be awarded is clearly intended to be time-bound. Fourth, and very significantly in relation to the Bagwell-Staiger critique, the relevant provisions of the revised GPA text explicitly take into account reciprocity concerns. In particular, the relevant provisions stipulate that the market access opportunities available to acceding Parties are "subject to any terms negotiated between [other Parties] and the developing country in order to maintain an appropriate balance of opportunities under this Agreement". This effectively enables reciprocity to be maintained notwithstanding any transitional measures that may be negotiated (see, for a comprehensive discussion, Müller 2011).

Of course, ultimately, the extent of a GPA Party's market access commitments is a matter to be determined by negotiation. In that regard, it is instructive to note that, in discussions on China's accession to the GPA, which is currently being negotiated, the existing

² The transitional measures that are potentially available, subject to negotiations, include: (i) price preferences; (ii) offsets (domestic content or similar requirements); (iii) phased-in addition of specific entities and sectors; and (iv) thresholds that are initially set higher than their permanent level. Provision has also been made for delaying the application of any specific obligation contained in the Agreement, other than the requirement to provide equivalent treatment to the goods, services and suppliers of all other Parties to the Agreement, for a period of five years following accession to the Agreement for LDCs, or up to three years for other developing countries. These periods can be extended by decision of the Committee on Government Procurement, on request by the country concerned.

GPA Parties have made clear their expectation that China will eventually offer a range of commitments that is *comparable to that of other Parties under the Agreement* (see WTO, Committee on Government Procurement 2009, paragraph 17). This underscores the continuing importance of reciprocity considerations in such negotiations.

(3) The GPA and the broader themes of the conference

Current developments concerning the GPA are of interest not only in regard to the specific findings of Bagwell and Staiger (2011) but also in relation to the broader themes of the conference - i.e., globalization and related institutional arrangements in an age of crisis. The current international environment poses, at a minimum, three inter-related challenges for all governments in relation to the public procurement sector: (i) maintaining and, where possible, enhancing the openness of procurement markets; (ii) ensuring good governance and deterring corruption in procurement activities; and (iii) promoting the efficient and effective management of public resources. Participation in the WTO Agreement on Government Procurement (GPA) can assist in responding to all three challenges.

In particular, participation in the GPA provides legal guarantees of access to the Parties' "covered" government procurement markets by the goods, services and suppliers of all Parties.³ The usefulness of these guarantees was seen early in the current crisis, when elements preserving the rights of GPA Parties' suppliers were included with the "Buy American" provisions of the so-called United States stimulus legislation, the American Recovery and Reinvestment Act of 2009. Specifically, in regard to the two provisions of the legislation incorporating new Buy American requirements, the stimulus legislation addressed the potential for conflict with the GPA and other U.S. international trade commitments by including a further provision stipulating that: "This section shall be applied in a manner consistent with United States obligations under international agreements" (see also World Trade Organization 2009, p. 42).

Concerning governance and the management of public resources, the adoption of a transparent and competitive procurement system can yield substantial savings for governments, in the range of 20-25% of total procurement costs. It should be noted that

³ "Covered" procurement is procurement that is specified in each Party's schedules, and not otherwise excluded from the ambit of the Agreement.

maximizing value for money in procurement systems requires attention to two distinct but inter-related challenges: (i) ensuring *integrity* in the procurement process (i.e., preventing corruption on the part of public officials); and (ii) promoting effective *competition* among suppliers, including by preventing *collusion* among potential bidders. Participation in the GPA can assist in responding to both challenges (Anderson, Kovacic and Müller 2011). To be sure, governments may attempt to implement unilaterally a transparent and competitive procurement system, but GPA participation can act as a catalyst for and complement the necessary internal reforms (Anderson, Pelletier, Osei-Lah and Müller 2011).

Currently, a major effort is being made in the WTO Committee on Government Procurement to conclude the ongoing renegotiation and modernization of the GPA. As of the time of this writing, prospects appear good for reaching agreement among the Parties, possibly before the end of 2011, relating to the coverage of the Agreement (i.e. the market access commitments of individual Parties) and the Future Work Programmes of the Committee (to be implemented following the conclusion of the present negotiation). This, in turn, would make possible the coming into force of the modernized text of the Agreement discussed above.

A key consideration underlying the ongoing effort to conclude the GPA renegotiation is the belief that the coming into force of the revised text will facilitate and encourage accession to it by additional WTO Members, including emerging and developing countries in addition to developed countries. Currently, forty-two WTO Members are covered by the Agreement: Armenia; Canada; the European Union, with its 27 member States; Hong Kong, China; Iceland; Israel; Japan; Korea; Liechtenstein; the Kingdom of the Netherlands with respect to Aruba; Norway; Singapore; Switzerland; Chinese Taipei and the United States. Nine other WTO Members (Albania, China, Georgia, Jordan, the Kyrgyz Republic, Moldova, Oman, Panama and Ukraine) have applied for accession to the Agreement and submitted relevant documentation. In addition, a further four Members (Croatia, the Former Yugoslav Republic of Macedonia, Mongolia and Saudi Arabia) have provisions in their respective WTO Accession Protocols which call for them to seek GPA accession. Recently, a study conducted by staff members of the WTO Secretariat found that accession to the Agreement by these and other WTO Members considered in the study could add in the range of \$US

380-970 billion *annually* to the total value of the market access commitments under the Agreement (Anderson, Pelletier, Osei-Lah and Müller 2011).⁴

Overall, the GPA is clearly in the process of becoming a more central element of the multilateral trading system, covering a large and very important field of economic activity.⁵ As such, it is an important success story for the WTO in a difficult time. The Agreement plays an essential role in limiting the scope for implementation of market access restricting measures in regard to participating WTO Members' economies. In addition, by promoting fair competition in Members' procurement markets, it contributes importantly to good governance and the realization of value for money for governments and their citizens. These roles will be strengthened by conclusion of the present renegotiation and by the expected expansion of the membership of the Agreement, over time, to include key emerging and developing economies. Arguably, adherence to principles of reciprocity as called for by Bagwell and Staiger (2011) is an important fulcrum of the Agreement's success.

⁴ In addition to the WTO Members that have already commenced accession to the GPA or are committed to do so, the study considers some WTO Members that have not currently expressed an interest in or intention to accede to it.

⁵ Government procurement represents, on average, 15-20 % of developed and developing economies' GDP. Only a portion of this is covered by the GPA. See, for more information, Anderson, Pelletier, Osei-Lah and Müller (2011).

REFERENCES

1. Anderson, Robert D. and Sue Arrowsmith (2011). "The WTO regime on government procurement: past, present and future," in Arrowsmith and Anderson (2011), chapter 1, pp. 3-58.
2. Anderson, Robert D., William E. Kovacic and Anna Caroline Müller (2011). "Ensuring integrity and competition in public procurement markets: a dual challenge for good governance," in Arrowsmith and Anderson (2011), chapter 22, pp. 681-718.
3. Anderson, Robert D., Philippe Pelletier, Kodjo Osei-Lah and Anna Caroline Müller (2011). *Assessing the Value of Future Accessions to the WTO Agreement on Government Procurement (GPA): Some New Data Sources, Provisional Estimates, and an Evaluative Framework for Individual WTO Members Considering Accession* (WTO Staff Working Paper ERSD-2011-15, October), available at http://www.wto.org/english/res_e/reser_e/ersd201115_e.pdf.
4. Arrowsmith, Sue and Robert D. Anderson (2011). *The WTO Regime on Government Procurement: Challenge and Reform* (Cambridge University Press: 2011).
5. Bagwell, Kyle and Robert W. Staiger (2011). *Can the Doha Round be a Development Round? Setting a Place at the Table* (Paper prepared for the Conference on Globalization in an Age of Crisis: Multilateral Economic Cooperation in the Twenty-First Century, September 14-16, 2011, London, UK.).
6. Müller, Anna Caroline (2011). "Special and differential treatment and other special measures for developing countries under the Agreement on Government Procurement: the current text and new provisions," in Arrowsmith and Anderson (2011), chapter 11, pp. 339-376.
7. World Trade Organization (2009). *Overview of Developments in the International Trading Environment* (WT/TPR/OV/12 of 18 November), available at http://www.wto.org/english/news_e/news09_e/lamy_20nov09_e.htm.
8. WTO Committee on Government Procurement (2004). *Modalities for the Negotiations on Extension of Coverage and Elimination of Discriminatory Measures and Practices* (GPA/79 of 19 July 2004), available at http://www.wto.org/english/tratop_e/gproc_e/negotiations_e.htm.
9. WTO, Committee on Government Procurement (2009). *Report (2009) of the WTO Committee on Government Procurement* (GPA/103 of 12 November), available at http://www.wto.org/english/tratop_e/gproc_e/documents_e.htm.
10. WTO Committee on Government Procurement (2010). *Revision of the Agreement on Government Procurement as at 13 December 2010* (GPA/W/313 of 16 December 2010), available at http://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm.