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Organizational Aspects of China's GPA Accession Negotiation and Their Implications

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中国政府采购协议准入谈判的组织特征及涵义

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Abstract

On December 28, 2007, China delivered its application and initial offer for acceding to the Agreement on Government Procurement (GPA) to the WTO Secretariat. The negotiation will define China's openness in an economically and politically significant market: the government procurement for consumption and investment. As a plurilateral agreement under the WTO, the GPA accession negotiation follows the way of WTO accession negotiation. Like the WTO agreements, the GPA also contains general principles and rules over government procurement, as well as specific commitments of individual parties. The negotiation will take place bilaterally between the acceding member and interested parties, then going to the multilateral phase. With the 15-year experience of tough WTO membership talks, China is supposed to be comfortable about copying the previous negotiation approach. In addition, the WTO accession has proven to be successful. The Chinese government is also launching a series of events to commemorate the achievements in the 10th anniversary of China's WTO membership.

However, after the first three years, China's GPA negotiation have shown a number of different features from WTO negotiation. In particular, China is taking a quite different organizational structure in this negotiation in terms of political leadership, organizational arrangements, academic and public involvement. Without a formal political process of interest groups as democracies, these organizational aspects actually represent a Chinese-characteristic trade politics. They have influenced the up-to-date process of the negotiation and will influence the future results as well. The paper will try to describe the organizational aspects of China's GPA accession negotiation in comparison with WTO negotiation from a variety of perspectives, and to discover why they would be so different and how these differences would impact the coming negotiation and its results.

摘要

2007年12月28日,中国向世界贸易组织(WTO)秘书处递交申请,首次提出加入政府采购协议(GPA)意愿。政府采购涉及政府自身庞大消费及投资投入,准入谈判对于中国政府采购市场的开放性具有经济和政治双重涵义。作为WTO框架下的多边协议,GPA准入谈判遵循入世谈判步骤规则。与WTO协议类似,GPA协议除了规定协议各方应履行具体承诺外,也包含政府采购总体原则及规则。谈判首先在申请方与相关方双边之间展开,然后进入多边谈判阶段。具备15年的艰苦卓绝入世谈判经验,中国有望在此次准入谈判中驾轻就熟地加以借鉴,更何况入世谈判最终证明成功可行。中国政府同步正在组织一系列活动纪念入世十周年。

然而历经三年,中国GPA准入谈判体现出有别于入世谈判的种种特征,尤其在政治领导,组织安排以及学界和公众参与度等方面表现出结构性组织差异,具有中国特色的贸易政治与通行的利益相关方之间正规民主决策程序大相径庭。这种差异影响着谈判的最新进程及未来结果。本篇论文从不同视角对比入世谈判,阐述中国GPA准入谈判的组织结构特征,探讨发掘差异性存在的原因以及这些差异将如何影响未来谈判和结果。

I. Background and current situation of China's GPA negotiation

1.1 China's commitments about government procurement

It is hard to say that China had a government procurement regime prior to WTO accession. The first relevant regulation was the *Interim Regulations on Government Procurement* promulgated by the Ministry of Finance in April 1998. In April 1999, the Committee on Financial and Economic Affairs of the National People's Congress established a drafting group of Government Procurement Law. Another procurement-related legislation is the Tendering Law adopted in August 1999. This law was designed to deter corruption through public tendering rather than to promote value for money in procurement or give preference on domestic-sourced goods and services. In fact, this law applies to both government and private tendering in construction projects. After three years of preparation, the Government Procurement Law (hereinafter GPL) was enacted in June 2002. However, the implementation regulations for the GPL are still under discussion, meaning that there are only abstract principles rather than concrete and applicable provisions. For example, Article 10 of the GPL provides that "Government procurements should (or shall) target domestic commodities, engineering works, or services"¹. But there is no benchmark of what is domestic, nor further regulations on what will happen if a government procuring entity does not procure domestic products. This is more of a slogan rather than a legal article without compulsory requirements. However, due to this empty clause, China has a formal buying national policy which is subject to the GPA.

The key goal of the GPA is to eliminate discriminative laws and practices against foreign supplies and suppliers in government procurement.² In this sense, while China had no discriminatory legislation, it was unnecessary to demand China to join the GPA. However, negotiating partners would not lose this opportunity to get from

¹ There are a number of different English translations of this clause, showing that even Chinese people cannot understand its actual meaning.

² Trepte states that the original goal of negotiation on government procurement was the achievement of reciprocal trade advantages. Peter Trepte, "The Agreement on Government Procurement", in P. Macrory, A. Appleton, and M. Plummer(eds), *The World Trade Organization: legal, economic and political analysis*. New York: Springer, 2005.

China as much as possible since China was eager to enter the WTO.³ Finally, though the GPA is supposed to be freely chosen by members to join, China undertook some obligations relating to government procurement.⁴ So at the very beginning, China was not willing to accede to the GPA. China made these commitments just because of foreign pressure and coercion. This was considered a part of necessary costs to ensure the WTO membership. In comparison, joining the WTO was an ingenerate need for China. The unwillingness of China's GPA accession directly results in the lack of political momentum on the negotiation.

In the Report of the Working Party, China committed itself to initiating negotiations for membership in the GPA by tabling an "Appendix 1 offer" "as soon as possible".⁵ This commitment makes it clear that China must accede to the GPA. But the timing is unclear somewhat. Taking advantage of this ambiguity, China had not delivered its application until the end of 2007, six years after joining the WTO. It is really not "soon". Besides, China has already undertaken the obligation of MFN of a GPA party. In paragraph 339 of the Report of the Working Party, China commits to "providing all foreign suppliers with equal opportunity to participate in that procurement pursuant to the principle of MFN treatment". Actually, this commitment is even beyond the requirements of the GPA since the GPA just demands non-discrimination among the GPA parties rather than the WTO members.

Concerning the procurement of SOEs, China confirmed that "all laws, regulations and measures relating to the procurement by state-owned and state-invested enterprises of goods and services for commercial sale, production of goods or supply of services for commercial sale, or for non-governmental purposes would not be considered to be laws, regulations and measures relating to government procurement. Thus, such

³ According to a US official involved in the negotiation, US companies operating in China were not so interested in demanding China to enter the GPA since they were enjoying some advantages over competitors from other countries in Chinese government contracts due to special importance of US-China relationship to China.

⁴ Several WTO members including Croatia, Saudi Arabia, Mongolia, Ukraine, the former Yugoslav Republic of Macedonia, Chinese Taipei were also committed to accession to the GPA in their WTO accession protocols.

⁵ *Report of the Working Party on the Accession of China, WT/ACC/CHN/49*, paragraph 341.

purchases or sales would be subject to the provisions of Articles II, XVI and XVII of the GATS and Article III of the GATT 1994.”⁶ This means that it is not necessary to include SOEs in GPA coverage, since they have already undertaken the obligation of national treatment. However, the GPA parties are not convinced by the commitment. They are afraid that SOEs will submit to governmental requirements in some cases to secretly give preference to domestic products. If SOEs are listed under the regulation of the GPA, foreign suppliers at least can resort to challenge procedures or WTO dispute settlement mechanism to deter hidden discrimination from SOEs.

Nonetheless, including SOEs in GPA coverage will cause serious challenges in the negotiation.⁷ First, Chinese SOEs are much diversified with different degrees of market-orientation. Even covered by the GPA, it is very difficult to distinguish between governmental and commercial procurement in an SOE. Secondly, the whole size of Chinese SOEs’ investment and consumption is much larger than that of any country. Since GPA negotiation is based on strict reciprocity, it is almost impossible to find comparable sectors in incumbent parties as Chinese SOEs. As Trepte (2005) states, the negotiation on government procurement is not actually concerned about the scope or definition of it, but the reciprocity between offers of members. Thirdly, procurement of Chinese SOEs is currently outside the narrow definition of ‘government procurement’ provided by GPL. No state enterprises which just get away from governmental direct control would like to be administered by the government again because of joining the GPA. Therefore, the powerful state sector will become a natural opponent of GPA accession if parties insist on putting them under the coverage.

1.2 Disputes over government procurement with other members since WTO entry

⁶ Ibid, paragraph 47.

⁷ Wang Ping has done a comprehensive analysis on the topic. See Wang Ping, “Coverage of WTO’s Agreement on Government Procurement: challenges of integrating China and other countries with large state sector into the global trading system”. *Journal of International Economic Law*, 10(4), 887–920, September 2007.

Since the Government Procurement Law entered into force in 2002, all the levels of the Chinese government have been endeavoring to develop their own regulations and practices on their procurement. While the Tendering Law is focused on the procedural correctness and no particular policy implications, the Government Procurement Law clearly states that government procurement should be helpful to some social and economic objectives, including protecting environment, supporting ethnic minority and underdeveloped regions, promoting small and medium enterprises (Article 9). Further, Article 10 requires government procurers to purchase domestic products. In this sense, the Government Procurement Law creates a new policy tool available for governments, which is certainly much welcome.

In 2004, the NDRC jointly with the Ministry of Finance promulgated *Opinions on Implementation of Government Procurement of Energy-efficient Products* in which government procurement was taken as a formal policy tool towards specific goals for the first time. Given the overwhelming legitimacy of lower emissions, the policy did not attract much attention or disagreement from foreign companies and countries. Then, the *National Guideline on Medium- and Long-Term Program for Science and Technology Development (2006-2020)* issued by the State Council on February 6, 2006 clearly claimed to implement government procurement policy with the intention of promoting indigenous innovation.⁸ At the end of 2006, the science and finance ministries jointly with NDRC issued a document entitled *Trial Measures for the Administration of the Accreditation of National Indigenous Innovation Products*, which defines the products that are eligible for the status of indigenous innovation products and then for the preferable considerations in government procurement.⁹ However, it was followed by a series of complaints from foreign companies investing in China because this document virtually, although not literally, excludes products made by foreign-invested companies with a requirement that the manufacturer of the product should have ownership of the trademark. From then on, China's indigenous

⁸ http://www.gov.cn/jrzq/2006-02/09/content_183787.htm

⁹ See Jingxia Shi, China's Indigenous Innovation and Government Procurement, ICTSD Bridges Review Vol. 14 No. 3, 2010. <http://ictsd.org/i/news/bridges/84883/>

innovation policy, more specifically, its dimension of government procurement has been under continuous attack by foreign companies in China. While there was no word of procurement in its *White Paper 2005*, AmCham-China began to list government procurement as a particularly important part of leveling the playing field for technological competition in its 2006 edition.¹⁰ The criticism became much fiercer after Notice No. 618 was jointly issued by the Ministry of Science and Technology (MOST), the NDRC and the Ministry of Finance (MOF) in November 2009, which aims to establish an Indigenous Innovation Product Accreditation System.¹¹ American and European companies in China keep pressing the Chinese government to clarify the relevant regulations and to make sure non-discrimination applies to them.

In the early years after China's WTO entry, European and American attention paid to China's GPA commitment was relatively low. One reason is that the top priority with regard to China at that time was to make sure China implement its broader WTO commitments. Another is that the Chinese government did not take government procurement as a policy tool to support domestic industries and foreign companies were somewhat discriminated positively rather than negatively in Chinese government procurement.¹² As the government began to realize the value of government procurement in pursuing some industrial policy goals and to make some movements, foreign companies and governments subsequently and promptly resorted to China's commitment in its WTO package and pressed China to give up its initiative. Of course, it would be the best way to integrate China into the GPA. Therefore, on the JCCT held in April 2006, Vice Premier Wu Yi agreed to commence China's GPA

¹⁰ www.amchamchina.org, White Paper 2005 and 2006.

¹¹ European Chamber of Commerce in China described "Notice 618 greatly alarmed the foreign business community". *European Business in China Position Paper 2010/11*. p111.
http://www.europeanchamber.com.cn/images/documents/marketing_department/beijing/publications/2010/public_procurement.pdf

¹² Although there is no systematic evidence showing that governments prefer products made by foreign companies, it is reported that in 2009 55% of the government's procurement contracts for mechanical and electronic products were given to foreign companies. Li Ruogu, "West Should Embrace Competition". *China Daily*, 2011-01-11.
http://www.chinadaily.com.cn/opinion/2011-01/11/content_11829673.htm

accession negotiation before the end of 2007.¹³ It is hard to say that the Chinese government was really prepared to launch the negotiation, not mention willing to join the GPA as soon as possible. With a procurement regime established for only three years, the government had just begun to understand what it was and how it should be regulated and used. However, because of increasing foreign pressures and WTO commitments, the Chinese government had to show its respect for international obligations. This lack of internal motivation put the GPA negotiation at a totally different starting point than the WTO negotiation.

1.3 The first three years of the GPA negotiation

China delivered its initial offer along with its application in the end of 2007.¹⁴ The responses from negotiating parties were largely critical. Although they praised this good start, they were very much unsatisfied with this version of Chinese offer. Fairly speaking, this is really a very limited giving. First, the coverage of entities is limited to (not all) central government agencies, not mentioning sub-national entities or non-governmental entities. Secondly, the coverage of goods and services is also very small, only including general products. Thirdly, the thresholds are much higher than the average level of incumbent parties. Fourthly, China introduces a number of derogations in the general notes. It is obvious that China knew that this offer would not meet with foreign expectations. In other words, China deliberately delivered a bad proposal to meet with its WTO commitment and simultaneously to show its passive attitude toward the negotiation. The underlying message might be “don’t hold too high expectations on me”.

Under the continuous pressures from the United States and EU, China came up with the revised offer on July 9, 2010.¹⁵ The edition of offer contains modest progress in terms of covered central entities, agreeing to raise the thresholds over time, and

¹³ US Department of Commerce, US-China Trade Talks Achieve “Clear Progress”, http://trade.gov/press/publications/newsletters/ita_0406/jcct_0406.asp

¹⁴ The text in Chinese is available at http://www.gov.cn/gzdt/2008-05/13/content_971032.htm

¹⁵ The text in Chinese is available at http://www.caigou2003.com/perspective/gpa/20110706/gpa_186783.html

making the first offer on service procurement. But the improvement is far lower than expected. In January 19, 2011, China announced in the Joint Statement of summit dialogue that China will “submit a robust, second revised offer to the WTO Government Procurement Committee before the Committee’s final meeting in 2011, which will include sub-central entities.”¹⁶ In previous GPA accession negotiations such as with Taiwan and Korea, the third offer is usually the final one or at least close to the final one. Some Chinese officials expressed such meaning. For example, then Chinese Ambassador to the WTO Sun Zhenyu admonished parties to be “not too demanding” on Chinese offer.¹⁷ Commerce Minister Chen Deming also implied that this coming new offer might be the last one.

Nonetheless, GPA parties will not be so easy to be satisfied with the results. For them, this is the best time to open Chinese government procurement market. Once China becomes a signatory, it will be much more difficult to press the Chinese government to make concessions. This lesson is also learned from China’s WTO accession. The Chinese government is willing to implement its commitments, but reluctant to make new commitments. More importantly, the state plays a much more significant role in the Chinese economy than the state in other national economies, although the market-oriented reform has been implemented for more than 30 years. In recent years, the Chinese government has seemed to be more confident in its economic management in the context of financial crisis happening in Western market economies and revived its control over the economy. For example, Premier Wen Jiabao states in his work report that “We must be guided by realities in deciding when market forces are to play the greater role and when government control is to play the greater role”.¹⁸ This actually means that the government still prevails over the market since the power of choice rests in the hands of the government. Therefore, the share of Chinese government procurement market in the whole market will continue to expand. This is

¹⁶ <http://www.whitehouse.gov/the-press-office/2011/01/19/us-china-joint-statement>

¹⁷ “Don’t be too demanding on GPA offer”, China Daily, 2010-08-06

¹⁸ Wen Jiabao, Report on the Work of the Government, Delivered at the Fourth Session of the Eleventh National People’s Congress on March 5, 2011

certainly very attractive for all foreign suppliers.

1.4 Key elements of China's GPA accession negotiation

In essence, there is only one single problem with regard to China's GPA accession, which is what government procurement is. Neither the GATT 1994 nor the GPA has a clear-cut definition of government procurement. The GATT defines it as procurement for government purposes, but leaving what governmental purposes are unanswered. GPA 1994 only specifies the contractual means of procurement. GPA 2007 just combines the above two approaches and develops a more comprehensive definition of government procurement, which is referred to any kinds of procurement by covered entities not for commercial purposes. Then the coverage of government procurement is subject to negotiation for each party. This was feasible because the current parties are mostly developed market economies. Government procurement is a kind of exception to the whole market, which is mostly for the consumption of government. But in the case of China, the role of government is too large to be separated from the market. In fact, the government is a major investment and market entity in China. The state sector including SOEs and governments accounts for almost one third of the total fixed asset investment¹⁹, meaning that it is the single largest investor in China. For example, Chinese Ministry of Railway is almost the only constructor of railways, investing thousands of billions Yuan in the recent years on developing the high-speed railway system. Only the Beijing-Shanghai High-speed Railway has cost 220 billion Yuan. Interestingly, in March 2011, the National Audit Office found that contracts worth more than 4 billion yuan were awarded without tendering.²⁰

Therefore, the role as an investor of various levels of Chinese government poses a serious challenge to the current GPA system. As an arguably weakest part of the world

¹⁹ During January to August 2011, State-owned and state holding enterprises contribute 6242 billion Yuan in the whole fixed asset investment worth 18061 billion Yuan.
http://www.stats.gov.cn/was40/gjtj_detail.jsp?searchword=%B9%CC%B6%A8%D7%CA%B2%FA%CD%B6%D7%CA&channelid=6697&record=35

²⁰ "Some Beijing-Shanghai high-speed railway projects started without bidding: chief auditor",
http://news.xinhuanet.com/english2010/china/2011-06/27/c_13952500.htm

trading system, the GPA has no such appetite or ability to accommodate China with such a big state sector. It is also hard for the Chinese government to put its investment under the scrutiny of an international organization.

Besides, China's own government procurement regime is far away from consistent and coherent. According to GPL, "Government Procurement refers to all the purchasing activities with fiscal funds conducted by the state organs at all levels, public institutions and social organizations where the intended goods, construction and services are those listed in the Centralized Procurement Catalogue (CPC) published by the procuring authority or those whose value exceeds the respective Prescribed Procurement Thresholds (PPT) for goods, construction or services." This is a very narrow definition. In terms of procuring entities, it excludes all state enterprises. But the fact is that governmental investments are mostly conducted by specifically established SOEs. For example, China Three Gorges Corporation, a state-owned enterprise, was the nominal constructor and investor of the huge Three Gorges project. Although the company was set up by the State Council, its procurement is not regulated by the GPL. As for procured items, it only covers those listed in the CPC or those with values above PPT. In particular, as for procuring funds, it only refers to the procurement using fiscal funds. This means even purchasing of covered procuring entities is not subject to GPL as long as it is not financed by fiscal funds. This limitation is quite problematic and even not viable whatsoever. In fact, almost all public entities including many governmental agencies have financial earnings other than fiscal grants. For example, a majority of the earnings of Chinese public hospitals are dependent on their semi-commercial activities such as drug sales and medical services. Fiscal funds from the Ministry of Health or local governments can only cover salaries of faculty and staff and some construction projects. The same situation happens in many public universities and schools. In reality, these public institutions (*shiyè danwèi*) are required by their supervising governmental agencies to or voluntarily follow the regulations of government procurement. Their procurement is also subject to public tendering by themselves or other designated centralized

procuring entities. Usually these institutions will follow specific tendering regulations stipulated by their supervising agencies based on the Tendering Law. But they do not take this kind of procurement as government procurement but centralized procurement because their procuring funds are not from fiscal allocations. Therefore, they do not have to obey the rule of buying Chinese provided by GPL. In this regard, a majority of their procurement is not subject to the GPA.

The fragmented Chinese government procurement poses great challenge to its accession to the GPA. As mentioned before, the GPA has no clear definition of government procurement. So the scope of government procurement of individual party largely depends on its own legislative definition. While China's current government procurement regime does not clearly specify what is regulated under it, it is very difficult for both Chinese and foreign negotiators to ascertain what they are going to negotiate about. For example, even though a public university is listed in China's offer, it is still arguable whether if all its procurement is subject to GPA rules because its procurement using own funds other than fiscal budget does not have to obey Chinese government procurement regime, then having no obligations to follow GPA rules. The process of GPA accession negotiation will certainly help to clarify and integrate China's government procurement regime. But if China accedes to the GPA before these inconsistencies are resolved, the implementation will be greatly troublesome for the Chinese government.

II. Lack of political momentum for China's GPA negotiation

It is commonly recognized that the success of China's accession to the WTO largely depends on political determination and support of Chinese leadership.²¹ There were strong oppositions from a lot of industries and Ministries behind them. Also, some academic researches doubted the incentives of negotiating parties like the United States as well as the results and impacts of WTO accession. However, the top leaders

²¹ See Joseph Fewsmith, "The Political and Social Implications of China's Accession to the WTO", *The China Quarterly*, 2001, pp573-591

were firmly supportive of WTO accession because they believed that it was overall beneficial to China both politically and economically, although there were some expected costs and risks. So opportunities overall prevailed over challenges. Importantly, Chinese leaders did not consider WTO accession as a purely economic issue, but also a critical step in the process of opening up and reform. Such a political momentum put on China's WTO accession significantly facilitated the technical level of the negotiation. President Jiang Zemin and Premier Zhu Rongji repeatedly emphasized the correctness and necessity of WTO accession in domestic events and affirmed China's willingness to accede to the WTO.²² They also gave high priority to this issue in various international meetings with WTO members. In the most difficult time in 1999, President Jiang restored the negotiation with the United States by himself. When the US-China negotiation was stuck, Premier Zhu went to meet with US negotiators in person and resolved the last issues in question. Their contributions were vital to the final conclusion of the negotiations. As Chinese top leaders are convinced of the significance and necessity of a policy, their power and resolution of implementation are very creditworthy.

While the WTO accession negotiation attracted close attention from top leaders, the GPA negotiation has seemed to be neglected to a large extent. President Hu Jintao has never mentioned the negotiation in public, nor talked about this issue with his counterparts. Premier Wen Jiabao in several cases mentioned the ongoing negotiation and claimed national treatment to foreign companies in China in government procurement.²³ But he did not indicate his own attitude toward the accession to the GPA. At present, it is still unclear whether Chinese leadership is positive or negative. This at least shows that they are not certain about the impact of joining the GPA or they are not convinced of the necessity of it. So they do not want to express their opinion on the issue.

²² Wei Liang, "Regime type and international negotiation: a case study of US/China bilateral negotiations for China's accession to the WTO", Dissertation of the University of Southern California, 2003, pp294-301

²³ "Chinese premier reassures foreign firms on business environment, government procurement", April 29, 2010, http://news.xinhuanet.com/english2010/china/2010-04/29/c_13272937.htm

Of course, the GPA accession is by no means comparable to the WTO accession in economic and political terms. But its significance should not be underestimated either, especially its impact on the government and state sector. WTO rules are designed to restrict governmental intervention policies on market activities while the GPA directly regulates government's own activities. Once joining the GPA, the governmental autonomy in its consumption and investment will be greatly reduced. In the case of China, government-sponsored investment has been long considered a useful tool to induce and stimulate social investment. As a response to the 2008 financial crisis, the Chinese government launched a stimulus package of 4000 billion yYuan. Besides, if the SOEs are covered by the GPA, they will have to follow the government procurement rules. The influence is quite uncertain. The WTO accession has shown that market access and openness is not harmful to the Chinese economy. But the GPA accession is largely not an issue of market access but a major reform of the government and state sector.

For the Chinese government, it is desirable to take the opportunity of the GPA accession negotiations to streamline its government procurement regime. Since the state sector will still be very large in the foreseeable future, its procurement should be put under strict and transparent regulatory system to ensure value for money and free of corruption. In recent years, corruption in the area of tendering at various levels has been deteriorating. This is no good to the legitimacy of the Chinese government and is worth more attention. Although the direct benefits of GPA accession might not be so visible, the negotiating process could be at least an opportunity for the government to use foreign pressures to reform the current system.

It is a little strange that there has no systematic analysis on the benefits and costs of China's accession to the GPA.²⁴ One reason is that it is really difficult to estimate the

²⁴ Wang Ping believes that the lack of such analysis partly results in the lack of political momentum paid to GPA accession. See, Wang Ping, "China's accession to the WTO Government Procurement Agreement: challenges and

economic impact of joining the GPA. Government procurement is not a border policy but a domestic measure. It is almost impossible to grasp trade implications of opening up government procurement market. Previous GPA negotiations such as US-EU negotiation just calculated covered market size rather than conducted a traditional trade policy change analysis. In qualitative terms, the benefits of GPA entry are not so visible. Even the most direct gains of access to other parties' government procurement markets are uncertain because of the poor implementation of the Agreement as well as of the discrimination against Chinese SOEs in some members' investment and procurement policies. Major parties such as the United States and EU cannot show solid statistical evidence that their procurement markets are large, open and attractive for Chinese supplies and suppliers. In fact, there are some researches showing that the market access effect of GPA is very questionable. A EU study finds that only 3.5% of EU government procurement expenditure goes outside EU in 2007 to 2009.²⁵ Interestingly, the study also shows that the import penetration rate of Chinese public sector is 6.1%, higher than those of the US(4.6%) and Japan(4.7%), and a little lower than those of EU(7.5%) and Canada(6.9%)²⁶. Shingal finds that despite the GPA, the proportions of services contracts awarded to foreigners have declined over time for Japan and Switzerland.²⁷ Therefore, the space of expanding foreign market through GPA accession for China seems quite limited.

Another big problem is that no one can give an accurate account of China's government procurement. This is partly due to the vague definition of government procurement in the GPL. Currently, the Ministry of Finance publishes the annual procurement statistics which however only cover procurement of central and local governments defined by the GPL. The total procurement in 2009 is 741 billion

the way forward". *Journal of International Economic Law*, 12(3), 663–706, September 2009.

²⁵ European Commission, *Cross-border procurement above EU thresholds: final report*, 2011, p10.

²⁶ *Ibid*, p24.

²⁷ Anirudh Shingal, "Services procurement under the WTO's Agreement on Government Procurement: whither market access?" *World Trade Review*, 2011, pp1-23

Yuanyuan only accounting for about 2% of GDP.²⁸ The narrow coverage surely dissatisfies the partners who are eager to occupy Chinese huge government market. The EU Chamber of Commerce in China gave an alternative estimate which is as high as 7000 billion Yuanyuan in 2009 which is ten times of the official figure.²⁹ In comparison, EU procurement under the coverage of GPA in 2007 is 293 billion Euros,³⁰ approximately equal to 2520 billion Yuan. Therefore China has to calculate its offer based on the principle of reciprocity and cannot accept the high-level demand of EU and U.S.

Meanwhile, the costs of GPA entry are so clear: the government will lose its discretion of choosing between government control and market force. While the government control over investment and consumption is considered as a vital tool to facilitate economic and social development, this cost of GPA accession seems too large to be accepted. In fact, the supporters in China believe the most significant benefit is to promote the reform and improvement of Chinese government procurement system. Following the approach of the WTO accession negotiation, foreign pressures and international rules are taken as a tool to fight against domestic resistance and to establish a more market-oriented and open government procurement system. This argument made sense in the case of WTO accession. But at present, the Chinese economy is much stronger and the Chinese government is more confident in itself and its policies. It is difficult to prove the necessity and feasibility of adopting other norms. Although the Chinese leadership is clearly aware of serious problems in Chinese government procurement, they do not think it is necessary to depend on foreign pressures to deal with this issue.

In addition, since China was very keen to enter the WTO at that time, its negotiating counterparts had sufficient leverage to compel China to accept some unreasonable

²⁸ http://www.ccg.gov.cn/zycg/cgtt/201009/t20100928_1115893.shtml

²⁹ EU Chamber of Commerce in China, *Public Procurement in China: European Business Experiences Competing for Public Contracts in China*, 2011, p15, available at <http://www.europeanchamber.com.cn>

³⁰ *GPA/94/Add.4*, 15 July 2010

conditions. In contrast, China has no large interest in joining the GPA. Therefore, China will stick to its desirable conditions based on its own calculations. Also, while China could lose something it already had if it could not become a WTO member, for example, the United States might cancel Chinese MFN status on an annual base, in the case of GPA accession, China has nothing to lose even though it cannot join the GPA since GPA parties do not currently allow China into their government procurement.³¹ So the situation in China's GPA accession is more like China is waiting for nice conditions from current GPA parties to attract it. Therefore, it is not easy to heighten the necessity or urgency of GPA accession to stimulate the emphasis of top leaders.

III. Institutional and organizational limitations in China's GPA negotiation

Unlike WTO accession negotiation, the Chinese government does not establish an inter-ministerial coordination body on GPA negotiation. This partly reflects less emphasis paid to the issue. Therefore, the government needed to choose a ministry as a coordinating agency. The GPA is a plurilateral agreement under the WTO. In China, the Ministry of Commerce (hereinafter MOFCOM, former MOFTEC) is the lead agency of trade affairs including China's WTO accession negotiation. There is another ministerial Trade Negotiator Office in MOFCOM which takes responsibility of conducting international trade negotiations. Therefore, MOFCOM is supposed to be in charge of GPA negotiation as well. But the GPA covers both government procurement and trade policy. The Ministry of Finance (hereinafter MOF) is designated as the legitimate regulatory authority for government procurement in the Government Procurement Law. At last, MOF became the lead agency of China's GPA accession negotiation.

In fact, if there is a solid agreement on the significance of GPA accession in the Chinese leadership, it is not so important who is in charge of the negotiation, because the upper consensus has set up a common target for all relevant ministries. There will

³¹ Although only the United States has explicit limitations on imports in government procurement, other GPA members have their own ways to restrict foreign supplies and suppliers in their procurement practices.

be not much room for ministries to take into account their own interests. As shown in the WTO accession case, MOFCOM had no superiority over other ministries too. But depending on the consensus and support of the top leaders, MOFTEC could coordinate with other ministries to shape a consistent negotiation proposal. Sometimes, MOFTEC even simply ignored opposition of some ministries. An inter-ministerial working group headed by State Councilor Wu Yi who was a former commerce minister also made great difference in clearing conflicts among different ministries.³²

However, in the case of GPA negotiation, the choice of lead agency seems to have greater impact on the process and results of the negotiation. First, compared with MOFCOM, MOF has less experience and expertise in terms of international negotiation. The actual responsible agency in MOF is the Department of Treasury which has been in charge of regulating government procurement. A new division was established to specifically prepare for the negotiation. But their expertise largely focuses on domestic regulation of government procurement rather than on trade policy implications of government procurement. They have no experience of hosting such an international negotiation, in terms of coordinating with other ministries or bargaining with other countries. Secondly, MOF is not as keen to trade liberalization as MOFCOM. Although MOF is basically in favor of accession to the GPA, its intention is largely to take advantage of this opportunity to enhance its jurisdiction and power in government procurement as well as to promote consistency in procurement regulations. So MOF does not take GPA accession as a step of further trade liberalization. Therefore, it is difficult for it to mobilize traditional supporters of free trade and to confront those protectionists. Thirdly, MOF has no enough coordination authority to establish consistent negotiation strategy. MOF is the legitimate regulatory agency for government procurement, but there is another powerful agency also involved in this area, which is the National Development and

³² Wei Liang, "Regime type and international negotiation: a case study of US/China bilateral negotiations for China's accession to the WTO", Dissertation of the University of Southern California, 2003, pp301-304

Reform Commission (hereinafter NDRC). NDRC drafts and implements the Tendering Law and then regulates open and selective tendering of both public and private entities. Therefore, there is some overlap between the two agencies. In fact, the two agencies have conflicting ideas about the reform of Chinese government procurement. While MOF is willing to restructure the regulation of government procurement toward a more open and integrative way, NDRC cares more about how to take advantage of procurement as a more effective industrial policy tool as well as its jurisdiction over tendering. Besides, NDRC is in charge of making and implementing Chinese industrial policy and has close connections with most manufacturing industries and some services. So NDRC is often considered as a representative of Chinese industrial interests, especially those of large SOEs in the Chinese bureaucracy. Since the two agencies have similar influence and power in the Chinese government, MOF has no ability to press or persuade NDRC to accept its negotiation strategy without support from the top leaders.³³

Without an upper inter-ministerial coordination body, MOF has been taking full charge of chief negotiator and coordinator. But compared with MOFTEC in the WTO accession negotiation, MOF has been taking a quite different way of coordination. While MOFTEC tended to confine the negotiation to a small circle and to make decision by their own professional negotiators in order to avoid open debates, MOF has been actively soliciting participation of almost all ministries and agencies. MOF established a GPA research work group which is led by MOF and comprised of a wide range of ministries and agencies. This is actually parallel in terms of function to the State Council WTO Work Leading Group during WTO accession negotiation. It is an inter-ministerial coordination mechanism which tries to incorporate various viewpoints from relevant agencies into a common external stand. But in terms of official level, the group is much lower than its WTO counterpart. While the WTO group was led by a vice premier or equivalent, the head of the GPA group is an

³³ It is said that NDRC has been often absent from coordinating or trading meetings on GPA accession sponsored by MOF.

Assistant Finance Minister. Its members from ministries are mostly directors of relevant divisions or some vice secretary-generals of relevant departments. In comparison, the members of WTO group were all Ministers or vice Ministers. Even so, the Assistant Finance Minister does not closely take part in research and coordination works of the group. Actually in the past three years, there have been three different Assistant Minister in this position. As GPA negotiation is a sophisticated and delicate job in need of considerable expertise in the area as well as exquisite technique in communication and coordination, such frequent change of chief negotiators is not good for managing a consistent negotiation strategy. In consequence, the actual leaders of GPA group are the secretary-generals of the Department of Treasury. But it is kind of over-burdensome for them to harmonize other ministries.

The group has been divided into seven sub-groups respectively on general issues, services procurement, goods procurement, construction procurement, SOE procurement, military procurement, and local government procurement. Each sub-group has its own research areas which basically cover three topics. The first is the scope and size of government procurement and its relevant regulations. The second is competitiveness of relevant industries and possible impact of GPA accession on those industries. The third is to make a proposal under Appendix 1 offer based on the previous research. The way of work has both advantage and disadvantage. The advantage is that it could increase enthusiasm and participation of relevant ministries and gather valuable information and inputs from them. The disadvantage is that it might make coordination more complicated since the relevant ministries will have more diversified ideas with the negotiation. Another problem with it is that research results and conclusions are rather sporadic and it is hard to integrate them into a single proposal. In particular, since researches are conducted by relevant procuring entities themselves, they are generally inclined to stress institutional difficulties and risks resulting from GPA accession although many of researches on competitiveness and economic impact are positive. Therefore, when the leadership and the coordinating agency have no firm or clear orientation on the negotiation, relevant participants tend

to be negative or at best neutral since the GPA accession itself has no obvious benefits for them.

IV. Academic and public involvement in China's GPA negotiation

China is often considered an authoritarian state in which public opinion has little influence on the central policy-making process. However, if policymakers want to achieve a specific policy goal, they have to take into account public opinion and get support from the public, although they cannot make decision based on public opinion and they could use their power to manipulate it.

During China's WTO accession process, there were two or three times of GATT fever and WTO fever. Not only all levels of governments were mobilized to study WTO rules, but the Chinese public and academia actively participated in the discussions. It was reported that over 3000 kinds of WTO-related books were published during the few years around WTO accession. These discussions and researches were basically supportive of China's further opening-up and WTO accession. This was also used as an argument for Chinese leaders and MOFTEC to counter those opponents from industrial ministries.

Chinese academia, especially those in economics, basically took the supportive attitude toward WTO accession. Since the mid-1990s, Chinese economic scholars had adopted more western economic theory and approach. Many researches on national economic impacts of WTO accession were based on general equilibrium models which are destined to present positive overall effects of trade liberalization. Influential think tanks in China such as CASS and DRC had done some comprehensive studies on the impact of WTO accession on both economy-wide and industrial levels. While they found some industries were possibly subject to losses, their conclusion on the overall economic effects were always positive. This kind of conclusion was useful to retort industrial protectionism in the name of national interest. Besides, international studies on China's WTO accession by famous foreign economists from international organizations such as the World Bank as well as academic institutions were also in

favor of China's WTO accession.³⁴ Their neutrality and professionalism made their studies even more influential than their counterparts in China. Many professors and researchers in this area were frequently invited to make lectures and interviews in all kinds of governments, companies, universities and media, creating a national atmosphere in favor of WTO accession. For the Chinese negotiators, academic researches and involvement provided considerable support in domestic bargaining. They also actively organized scholars to conduct more researches and propaganda activities. For example, Chief Negotiator Long Yongtu personally edited a set of books which were authored by a number of scholars from universities and research institutions.³⁵

Public opinion on WTO accession was also favorable in general. The Chinese government managed to persuade the public that WTO accession was beneficial to them with cheaper imports and domestic products as well as more free choice. Also, the government successfully convinced the public that the overall growth of the economy would diffuse its benefits to everybody. As a result, although there was increasing nationalism in late 1990s in China, the public were largely positive on the decision to accede to the WTO.

For the Chinese negotiators, close academic and public involvement played a positive role in securing national support and facilitating domestic coordination. As for GPA accession negotiation, this kind of involvement could be also helpful and necessary. However, it seems that the academia and public are hardly conscious of the issue of GPA accession, not to mention active participation. There are only a small number of scholars taking part in the research on GPA accession. A research team led by Professor Liu Hui³⁶ affiliated with the University of International Relations is possibly the first and most famous one which focuses on the studies of GPA. There

³⁴ World Bank, *WTO Accession, Policy Reform and Poverty for China*, Washington,DC: World Bank, 2002.

³⁵ The series was titled "Globalization, WTO, China" published by Chinese Foreign Economic and Trade Press.

³⁶ Her book titled *An introduction to the WTO Agreement on Government Procurement* may be the first one which conducts a comprehensive study on the agreement.

are some other professors from the Central University of Finance and Economics, Tsinghua University, Zhongnan University of Economics and Law, and University of International Business and Economics who are also involved in GPA studies. Some of them are invited by MOF as consultants on the negotiation and by other ministries as researchers. But the circle is still very small. When these agencies undertaking GPA research tasks organize their own research teams, these professors often appear simultaneously in various lists. Besides, most of these scholars are experts focusing on legal and technical aspects of government procurement rather than economic and trade policy ones. This is also a reason of lack of benefits and costs analysis on GPA accession. So their studies could help explain what the current Chinese government procurement system is and how it will be affected by joining the GPA, but might not be able to answer why it is beneficial and necessary for China to join the GPA.

It is understandable that government procurement has not gained much attention from academia. First, China's government procurement system has been developed just in the recent decade. Scholars need more time to accumulate their knowledge on this topic. In fact, because there have appeared a lot of problems in the operations of government procurement, most attention of government procurement scholars has been paid to addressing these technical issues. It seems too early to care about the GPA. Secondly, for those who focus on the WTO, trade policy and economics, the GPA is much less important than other issues such as the Doha Round, trade remedies, FTA. Most books on the WTO just neglect or touch on a little this plurilateral agreement. However, for the Chinese negotiators, it is necessary to pay more attention to support, stimulate, and foster academic research. MOF has an annual budget of tens of millions of yuan on GPA research. These funds are assigned to relevant agencies which will in turn organize their own teams. Most of funds go to those institutions supervised by the agencies. Although some outside scholars are also invited into these teams, the research circle is still very limited.

In contrast, the public have been paying close attention to government procurement.

The primary reason is simply that there are too many corruption cases taking place in big public projects. It is widely reported that many officials manipulate tendering procedure to award contracts to those who bribe them. Almost all malfeasants are involved in backroom transactions relating to project tendering.³⁷ The most recent example is Liu Zhijun who was the Minister of Railways. Besides, the public care about government procurement because they are affected by its inefficiencies and deficiencies directly, especially those working in governments and public institutions. Therefore, the public would be happy to see a more transparent and efficient system put in place. However, they are not aware of the GPA accession negotiations and their positive effects on improving government procurement regime because of little coverage of this issue in media.

In comparison to WTO accession, the Chinese academia and public are much less mobilized in the case of GPA accession. Their support might not be indispensable for the negotiators, but would undoubtedly be very helpful. The negotiators should try their best to activate academic and public participation in the negotiation and seize the legitimacy to counter domestic resistance.

V. Conclusion

Joining the GPA is an important action of China's further integration into the world trading system following WTO accession. Though its economic and political significance is not comparable to that of WTO accession, it is still very helpful for China to construct a transparent, open, and efficient government procurement regime.

The accomplishment of China's WTO accession negotiation partly depended on good organization of the process. In particular, the negotiators successfully managed to mobilize supportive actors ranging from top leaders to public to overwhelm strong domestic opposition. But in the case of GPA negotiation, the negotiators have not

³⁷ It is reported that during September 2009 to March 2011, 15010 government officials were found involved in corruption crimes related to construction project tendering. See "Hidden rules in governmental projects", *South Weekend*, August 4, 2011. [http://www.infzm.com/content/61517\[2011/8/4 17:11:24\]](http://www.infzm.com/content/61517[2011/8/4 17:11:24])

expended enough effort to form a wide and strong constituency in favor of GPA accession. The greatest restraint on GPA accession is the lack of attention and support from the Chinese leadership. This is largely due to the nature of GPA accession itself. But another reason is that the significance is underestimated. China takes a different coordination mechanism and chief negotiator in GPA negotiation. This change has seemed to make negative difference on the proceeding of the negotiation as well as the possible results. An obvious lower-level coordination body is not powerful enough to eliminate even larger divergence among relevant ministries and actors. Also, without sufficient resources in expertise and authority, it seems to be difficult for MOF to smoothly play the role as the chief negotiator and coordinator. The failure to activate public and academic involvement is another reason why the negotiators cannot dominate the floor and legitimacy.

There are many internal and external factors which could influence the process and results of an international economic negotiation. But the organizational aspects are arguably most critical. In the case of WTO accession negotiation, the 1998 government restructuring and subsequent new coordination regime instantly enhanced the momentum and efficiency.³⁸ So it might be the time to restructure the negotiating organization of GPA accession and to take full advantage of the negotiation as an opportunity to set up a transparent, open, and efficient government procurement regime.

³⁸ Hui Feng, *The Politics of China's accession to the World Trade Organization: the dragon goes global*. Oxson, RN: Routledge, 2006.