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**CHINA'S ACCESSION TO WTO'S GOVERNMENT
PROCUREMENT AGREEMENT:
DOMESTIC CHALLENGES AND PROSPECTS IN
NEGOTIATION**

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Executive Summary

1. In 2009, China entered its second year of negotiation for accession to the WTO plurilateral Agreement on Government Procurement (GPA).
2. GPA membership would open up the vast Chinese government procurement market and result in the formal integration of domestic procurement regulations with international rules.
3. A number of signs are however pointing in the other direction. Far from the expectations of GPA parties, China's initial offer is very limited with numerous derogations.
4. Since 2006, China has intensified the use of government procurement as a domestic policy tool to promote industrial development, energy preservation and environmental protection. Furthermore, legal and institutional preparations for GPA accession are still at the primary stage without any sign of consolidation.
5. Many external and internal factors have contributed to this unsatisfactory prospect. The GPA, even after its recent revision, is not fully equipped to deal with acceding countries with a large state sector.
6. The Chinese government structure is complicated. The division between government and state enterprises is difficult to ascertain, especially with regard to investment. Legal and institutional frameworks underlying the current Chinese public procurement regime remain fragmented and incoherent.
7. China's GPA accession involves three major categories of costs: the loss of discretion to use public procurement as a tool to pursue industrial or other non-economic policy objectives; costs of undertaking negotiations; and costs of

implementing the Agreement.

8. On the other hand, the benefits of China's GPA membership are uncertain. On the one hand, GPA's coverage is lacking in transparency and allows a number of derogations from MFN and national treatment principles.
9. Market access provided by the GPA membership is also uncertain, as the tariff applicable to covered goods and services, and other non-tariff barriers, such as national security exclusions and anti-dumping measures, are not removed altogether.
10. On the other hand, it remains unclear as to what extent Chinese exporters are keen to gain market access to the government procurement market of GPA Parties, such as those from Europe. Furthermore, Chinese state enterprises may still lack the ability to benefit from market access provided by GPA membership.
11. Despite these uncertainties, the overall benefits of China's GPA accession, especially in the long run, may be highly desirable.
12. Public spending should be conducted in a regulated, transparent and efficient way aimed at securing value for money. Increasing foreign competition will to a great extent facilitate savings in public expenditure and in turn enhance general welfare.
13. Joining the GPA will also increase transparency in the government procurement process and reduce corruption. It will entrench the central government's position in the fight against local protectionism which has fragmented the national market and impeded the development of China's national economy.
14. Lastly, while the implementation of the GPA poses significant challenges to China's

domestic procurement regime, GPA accession represents also a great opportunity to improve China's public procurement legal framework.

15. The success of China's GPA accession depends on a clear awareness of the significant challenges, mutual understanding between China and GPA Parties of one another's expectations and constraints, as well as the spirit of cooperation instead of confrontation during negotiation.

China's Accession to WTO's Government Procurement Agreement:

Domestic Challenges and Prospects in Negotiation

Dr. Ping Wang*

The GPA and China's Accession Process

- 1.1 Government procurement, while important for international trade,¹ has been largely excluded from the WTO's multilateral regulation.² Before and after China's WTO accession, China's trade partners have made considerable efforts to persuade China to join the WTO Agreement on Government Procurement (GPA)—a plurilateral agreement aimed at developing discipline in regulating government procurement in the absence of multilateral rules.
- 1.2 After five years of intensive discussions, on December 28th, 2007, China's Finance Minister Xie Xuren signed a written application on behalf of China to join the GPA which was submitted to the WTO Secretariat by the Permanent Mission of the People's Republic of China.³ This application, which includes an offer of GPA

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¹ 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% of GDP or \$ 4733 billion, and for the non-OECD countries it is estimated at 14.48% of GDP or USD 816 billion; total government procurement worldwide is estimated to be roughly equivalent to 82.3% of world merchandise and commercial services exports in 1998; the value of potentially contestable government procurement markets worldwide is estimated at USD 2083 billion, which is equivalent to 7.1% of world GDP or 30.1% of world merchandise and commercial services exports in 1998. See OECD, *The Size of Government Procurement Market*, offprint from (2003)1(4) *OECD Journal on Budgeting*. For further discussion of the importance of public procurement see Arrowsmith, S., Linarelli, J. and Wallace, J. D. *Regulating Public Procurement: National and International Perspectives* (KLI: The Hague. London. Boston)(2000), p. 7-11

² Government procurement was excluded from basic WTO non-discrimination obligations (national treatment and MFN) by virtue of the so-called "government procurement exclusion" contained in GATT Articles III.8, XVII.2 and GATS Article XIII.1 For further discussion on the application of GATT, GATS and other multilateral agreements to government procurement see Arrowsmith, S. *Government Procurement in the WTO* (The Hague, London, New York: Kluwer Law International)(2003), Ch. 3.

³ See GPA/93 of 14 January 2008, available at www.wto.org. For news coverage of the application see <http://finance.sina.com.cn/g/20071228/18121896035.shtml>, visited on 1 January 2008.

coverage (the so-called "Appendix I offer"), signaled the initiation of China's GPA accession process.⁴

1.3 The current GPA (GPA 1994) was signed in Marrakesh on 15 April 1994 and entered into force on 1 January 1996. GPA 1994 is a plurilateral agreement which applies to WTO Members that choose to be parties to it. At present, the membership of GPA is still limited and excludes the majority of developing countries. GPA 1994 contains a built-in mandate for its review.⁵ As a result of the recent review process, a revised text (hereinafter GPA 2007) was provisionally agreed on 8 December 2006.⁶ Its entry into force is still subject to a mutually satisfactory outcome of coverage expansion negotiations which had been intended to concluded in 2007 but has not happened yet.

1.4 GPA 2007 differs from GPA 1994 on some substantial aspects particularly relevant to accession negotiations, such as the scope of covered procurement and the treatment of developing countries. China has clearly expressed its intention to base its negotiation on GPA 1994 instead of GPA 2007 since the latter is not yet in force. Nevertheless, taking into consideration the length of the access negotiation process (18 months or more), it is highly likely GPA 2007 will be adopted during the negotiation period. Therefore, our discussion will be primarily based on GPA 2007, while its differences with GPA 1994 will be highlighted where necessary.

⁴ The Chinese version of the offer is available at http://www.gov.cn/qzdt/2008-05/13/content_971032.htm. An Appendix I offer sets out the proposed commitments of prospective Parties to the GPA with respect to coverage of their various procuring entities under the Agreement and provides a basis for related negotiations with existing Parties.

⁵ Article XXIV.7(b) of GPA 1994 requires the parties to review the GPA within three years of its entry into force (1995) and "periodically" thereafter, with a view both to "improving" the Agreement and to extending coverage.

⁶ GPA/W/297, 11 December 2006. The revised text is available on <http://docsonline.wto.org/DDFDocuments/t/PLURI/GPA/W297.doc>. For comments see Anderson, R. D. "Renewing the WTO Agreement on Government Procurement: Progress to Date and Ongoing Negotiations" (2007)16(4) *Public Procurement Law Review* pp. 255-273; Silva, "The Revision of the WTO Agreement on Government Procurement: to what extent might it contribute to the expansion of current membership" (2008)17(2) *Public Procurement Law Review* 61-98.

- 1.5 It is evident that there is a lack of political momentum from the Chinese side. China has taken a passive and defensive position with regard to GPA membership before and after its WTO ascension in 2000. During its WTO accession negotiations, China had firmly rejected the proposition that GPA membership should be the precondition for its WTO entry. Although China committed to join the GPA “as soon as possible” upon WTO accession⁷, it was only in April 2006 that China made the first concrete move--a commitment to table an offer of GPA coverage (the so-called “Appendix I offer”) by the end of 2007.⁸ This was largely a result of immense pressure asserted by the US in bilateral trade talks.
- 1.6 The lack of political momentum is arguably the most significant challenge for China’s GPA accession. Although the WTO Committee on Government Procurement has adopted an “Indicative Time-Frame for Accession Negotiations and Reporting on the Progress of Work” which requires negotiation to be concluded within 18 months from the start date, the time-frame is nevertheless “indicative” and not a strict deadline.⁹ If Chinese negotiators, policymakers and domestic suppliers are not fully convinced that the benefits of GPA membership will outweigh its cost, the journey towards a satisfactory outcome may well be a lengthy and painful one even if the accession negotiation has been initiated.

Government Procurement as Policy Tool for China

- 2.1 China’s GPA Accession involves three major categories of costs: [i] loss of

⁷WTO, *Accession Protocol of China*, WT/L/432, at paragraph 1.2; *Report of the WTO Working Party on the Accession of China* (1 October 2001), WT/ACC/CHN/49, at para.341-342.

⁸ The U.S.-China Joint Commission on Commerce and Trade (JCCT) Outcomes on U.S. Requests, April 11, 2006, available at http://www.commerce.gov/opa/press/Secretary_Gutierrez/2006_Releases/April/11_2006_JCCT_Outcomes_Factsheet.htm, visited on 1 May 2006. This commitment was later confirmed during China’s first WTO Trade Policy Review in 2006, see WT/TPR/M/161, paragraph 156.

⁹ WTO, Committee on Government Procurement, “Indicative Time-Frame for Accession Negotiations and Reporting on the Progress of Work-Note by Secretariat”, GPA/W/109/Rev.2, 3 January 2001.

discretion to use public procurement as a tool to pursue industrial, economic, or social, environmental and political policy objectives; [ii] costs of undertaking negotiations; and [iii] costs of implementation including establishing a supplier challenge mechanism.

- 2.2 In particular, the costs of losing discretion in using government procurement to pursue industrial, social, environmental and political policy objectives are significant and likely to increase since China has intensified the practice in the last two years. While the “buy national” policy introduced in 2002 had not initially created significant additional barriers for foreign suppliers, the Chinese government has since 2006 adopted a number of national laws, regulations and policies to promote via government procurement “indigenously innovated products,” “energy-saving products,” and “environmentally friendly products.”
- 2.3 Government procurement has been used to protect national industries, especially small and medium-sized enterprises and infant industries (such as the software industry), to pursue social or environmental objectives. These objectives include developing less-developed regions and supporting disadvantaged social groups, certain minorities, and promoting energy-saving or environment-friendly products; and even addressing human rights concerns¹⁰. Since such practices will require direct or indirect discrimination in favour of certain national suppliers (e.g. based in certain less-developed regions) or foreign suppliers (e.g. those who are willing to transfer technology), GPA rules, especially those relating to national treatment and MFN obligations as well as those on offsets, will curtail such discretion.

¹⁰ This is evident in the *Burma/Massachusetts* dispute. A Massachusetts law, which was later declared unconstitutional by the US Supreme Court, had barred procuring entities of the Massachusetts state government from buying goods or services from any person identified on a “restricted purchase list” of those doing business with Myanmar to protest Myanmar’s human rights record. *United States – Measures Affecting Government Procurement – Constitution of the Panel Established at the Request of the European Communities and Japan* (21 October 1998, WT/DS88/4, WT/DS95/4). For academic comments see Arrowsmith, S. *Government Procurement in the WTO* (The Hague, London, New York: Kluwer Law International)(2003), Ch.13, at 327-328 and works cited there.

- 2.4 For several years, these provisions were “toothless” due to the lack of implementing measures although the government has set up a clear target using government procurement to “support office software, computer and automobile industries with a view to enhancing the competitive capacity of domestic enterprise”¹¹. For example, it is reported that in 2005, a local government branch in Jiangxi Province specified in its procurement notice for air-conditioners that only foreign brands were qualified to participate.¹²
- 2.5 Since 2006, however, China has intensified the use of government procurement to pursue industrial, social and environmental policy objectives. First of all, the “buy national” policy was finally implemented in 2007 through the Ministry of Finance’s *Measure on Government Procurement of Imported Products*¹³ which requires that imported products can only be procured with the approval of competent authorities in accordance with certain requirements and independent expert opinion, and that preference should be given to foreign suppliers offering offsets such as transfer of technology.
- 2.6 Secondly, mandated by the central government’s 15 year-strategy for the promotion of science and technology,¹⁴ a number of administrative decrees and procurement regulations were adopted during 2006-2007 to facilitate procurement of “indigenous innovation” products, “energy-efficient” products and products certified as environmentally friendly.¹⁵ The regulations on procurement

¹¹ State Council Secretariat, “Opinion on the Promotion of Government Procurement Reform drafted by Ministry of Finance” [2003] No.74, Article 2, author’s translation. Chinese version is available at <http://www.ccgp.gov.cn/purfaui/fagui.jsp>.

¹² See <http://www.ccgp.gov.cn/purafx/anlifix.htm>, in Chinese, visited on 1 October 2007.

¹³ Ministry of Finance, MOF Treasury [2007] No. 119, December 17, 2007. Chinese version is available at <http://www.ccgp.gov.cn/purfaui/fagui.jsp>.

¹⁴ *State Council Opinions on Policies to Implement the National Medium and Long Term Outline for the Development and Planning of Science and Technology (2006-2020)*, No. 6 of the State Council Office(2006), Chinese version is available at www.ccgp.gov.cn/.

¹⁵ MOF Measures on Budget Administration of Government Procurement of Indigenous Innovation Products, MOF Treasury Decree [2007] No. 29, 3 April 2007; MOF Measure on the Evaluation of Government Procurement of Indigenous Innovation Products, MOF Treasury Decree [2007] No. 30,

of “indigenous innovation” products also contain explicit references to the price preference programme and offsets.

- 2.7 Article 11 of the MOF *Measure on the Administration of Contract on Government Procurement of Indigenous Innovation Products* provides that “once approved to purchase foreign products, the contract should preferably be awarded to the foreign enterprise which undertakes to transfer the core technology”.¹⁶ Article 13-17 of the MOF *Measure on the Evaluation of Government Procurement of Indigenous Innovation Products* provides that indigenously innovated products shall be given preference at a margin of 5%-10% in case price is the sole determining factor and 4%-8% otherwise.¹⁷ For “energy-efficient” products and products certified as environmentally friendly, the regulations merely require that preference be given to such products contained in lists promulgated by the competent authorities without specifying a margin or any detailed procedure.¹⁸
- 2.8 Such policies are in general incompatible with the GPA. Although a domestic price preference programme and offsets may enable China to retain certain policies promoting indigenous innovation products and technology transfer, such transitional measures will have to be negotiated and are confined to a relevantly short transitional period. With regard to giving preference to energy-saving and environmentally friendly products, although GPA 2007 Article X:6 allows a Party to

3 April 2007; MOF *Measure on the Administration of Contract on Government Procurement of Indigenous Innovation Products*, MOF Treasury Decree [2007] No. 31, 3 April 2007. These above-mentioned regulations (Chinese version) are available at www.ccgp.gov.cn/. State Council Notice on Establishing the Mechanism for Mandatory Procurement of Energy Saving Products, State Council Secretariat Notice [2007] No. 51, 30 July 2007, Chinese version available at http://www.gov.cn/jzwgk/2007-08/06/content_707549.htm. MOF and State Environmental Protection Administration, *Opinions on Procurement of Environment Certified Products*, MOF Treasury Decree [2006] No.90, entered into force on 1 January 2007.

¹⁶MOF Treasury Decree [2007] No. 31, 3 April 2007. Chinese version is available at www.ccgp.gov.cn/.

¹⁷MOF Treasury Decree [2007] No. 30, 3 April 2007. Chinese version is available at www.ccgp.gov.cn/.

¹⁸ Article 51 of the amended *Law on Energy Saving* (entered into force on 1 April 2008) also requires preference be given in government procurement to energy-saving products listed in the official catalogue without specifying any implementing measure.

“prepare, adopt, or apply technical specifications to promote the conservation of natural resources or protect the environment,” the current practice may nonetheless be incompatible.

2.9 This is because the lists of products are determined by administrative organs paying little regards to international or equivalent foreign standards, which is arguably inconsistent with the requirement contained in GPA 2007 Article X:3.¹⁹ Furthermore, it will be difficult, if possible at all, for China to incorporate derogations in its Annexes as the GPA Parties are trying to eliminate existing derogations providing discretion to pursue national policy goals.

2.10 GPA compatibility issues aside, the effectiveness of pursuing industrial and other policies through government procurement is also in question. Firstly, the scope of preferred products is determined by a list drafted by government ministries taking into consideration, but not subject to, findings of professional groups or international standards. Secondly, while each type of product has to be given preference, no regard has been paid to possible overlaps.²⁰ Thirdly, the cost of maintaining such practices, *inter alia*, adds to expenditure and has not been properly considered by Chinese policy makers.

2.11 In the past few years, the Chinese government has also used procurement of state enterprises to address issues of a political or diplomatic nature, for example to ease anxieties of the American public and Congress about the huge Sino-US trade

¹⁹ It provides that “[W]here design or descriptive characteristics are used in the technical specifications, a procuring entity should indicate, where appropriate, that it will consider tenders of equivalent goods or services that demonstrably fulfil the requirements of the procurement by including words such as ‘or equivalent’ in the tender documentation.”

²⁰ For example, if a government agency wants to purchase photocopiers, it is hard for the agency to decide whether to give preference to energy efficient ones or environmental friendly ones, both compulsory under relevant regulations. In general, the role of government procurement in promoting industrial policy and achieving social justice is after all limited, see McCrudden, C. *Buying Social Justice: equality, government procurement, and legal change* (Oxford : Oxford University Press) (2007).

deficit.²¹ Such practices will have to be limited or eliminated once China joins the GPA provided that those state enterprises are covered.

China's Fragmented Public Procurement Regime

- 3.1 The Chinese public procurement regime lacks coherence and is highly fragmentary, which directly lead to high costs in negotiating and implementing China's WPA accession. The tension between two national laws on public procurement -- the *Tendering Law* and the *Government Procurement Law* -- has significantly undermined the coherence of the domestic public procurement legal framework and legal certainty.²² Such tension results, in particular, from an overlap of their coverage. While the *Tendering Law* applies to "all tendering proceedings,"²³ the *Government Procurement Law* applies to all government procurement²⁴. The *Government Procurement Law* has tried to reconcile the coverage of these two national laws by providing in Article 4 that "[T]he *Tendering Law* shall apply to tendering proceedings in government procurement of construction."
- 3.2 However, it remains unclear firstly, which law applies to government procurement of construction-related goods and services, and secondly, whether provisions within the "buy national" policy, secondary policies, publicity, as well as the challenge and review mechanism contained in the *Government Procurement Law*

²¹ Prior to Chinese President Hu Jintao's visit to US in April 2006, a delegation consisting of more than 100 state enterprises headed by Vice Premier Wu Yi signed in Los Angeles on April 6 an array of procurement contracts worth 4.44 billion U.S. dollars involving 27 projects, ranging from software, power generation equipment to automobiles and electronic products. The total value of the procurement of this delegation was estimated around 15 billion US dollars.

http://www.chinadaily.com.cn/china/2006-04/07/content_562922.htm, visited on 19/06/06.

²² See Wang, P. "China's Evolving Legal Framework on Public Procurement" (2004)(6) *Public Procurement Law Review* 285-318; Cao, Fuguo, "From Tendering law to the Public Procurement Law" in Arrowsmith, S. and Trybus, M. eds., *Public Procurement: The Continuing Revolution* (London: Kluwer Law International)(2003).

²³ Article 2 of the *Tendering Law*.

²⁴ Article 2 of the *Government Procurement Law* defines government procurement as "all purchasing activities conducted using fiscal funds by state organs at all levels, institutions and social organizations when the goods, construction and services concerned are listed in the Centralized Procurement Catalogue or the value of which exceeds the respective Prescribed Procurement Thresholds for goods, construction or services as applicable."

should apply to government procurement of construction through tendering proceedings, taking into consideration that the *Tendering Law* does not contain such provisions. The overlap between the coverage of administrative regulations adopted for the implementation of these two national laws illustrates that the conflict remains to be resolved.

- 3.3 Such fragmentation of the domestic legal framework will have a profound impact on implementation of the GPA. It will be difficult to ensure compliance with GPA obligations if the proper instrument for such implementation cannot be ascertained in the first place. Although it is theoretically possible to modify both laws in accordance with GPA provisions, such an approach will result in a waste of resources, complexity and uncertainty, especially taking into consideration that the *Tendering Law* applies to tendering conducted by both public and private entities and a significant number of them will not be covered by the GPA.
- 3.4 Furthermore, the extent to which procurement of Chinese state enterprises is covered by the national procurement law is not entirely clear. In order to ensure regulations and practices regarding covered procurement of covered state enterprises comply with GPA requirements, a new instrument specially designed for regulating procurement of state enterprises, even if only limited to those covered by the GPA, is needed. However, the adoption of such an instrument will require considerable coordination efforts among various government authorities with vested interests in regulating state enterprises. The lack of a unified institutional framework, which lies at the root of the continuous conflict between two national procurement laws, is likely to jeopardize these efforts.

Market Access and Other Benefits for China's Accession

- 4.1 From an economic perspective, benefits of the GPA membership include first and foremost, access for exporters of the acceding country to GPA Parties' government

procurement markets; secondly, government savings resulting from greater competition with the entry of foreign bidders following the opening up of the domestic procurement market, helping the government obtain better value for money; thirdly, on the supply side, improved competence of domestic firms as liberalization of the public procurement market curtails the last privilege that domestic firms enjoy.

4.2 From a political perspective, mandatory obligations of the GPA will help the acceding country set up an efficient and independent domestic procurement regime which is immune from internal political pressure or personal influence with the benefit of helping to combat corruption and regionalism. GPA membership will also enable government to influence developments in international policy making regarding government procurement.

4.3 Nevertheless, except for the immediate access to GPA Parties' government procurement markets, other benefits will materialize only in the long run, and are less obvious. Furthermore, potential gains from market access are uncertain. Such uncertainties arise firstly from the lack of transparency in the GPA coverage, which is based on reciprocal negotiation of entity lists and allows a number of derogations from MFN and national treatment principles.²⁵ Complexities of the GPA coverage make it difficult for acceding countries to ascertain opportunities available in GPA Parties' procurement markets. There are no economic studies available to inform the extent of business opportunities created by GPA membership.²⁶

²⁵ Arrowsmith, S. *Government Procurement in the WTO* (The Hague, London, New York: Kluwer Law International)(2003), at 16.2; Hoekman and Mavroidis, "The WTO's Agreement on Government Procurement: Expanding Disciplines, Declining Membership?"(1995) 4 P.P.L.R. 63 at 75

²⁶ One such study exists with regard to the effect of the predecessor of the GPA-the Tokyo Round Agreement. Hoekman, "Operation of the Agreement on Government Procurement, 1983-1992", Ch.5 in Hoekman and Mavroidis (eds.), *Law and Policy in Public Purchasing: the WTO Agreement on Government Procurement* (1997).

- 4.4 Secondly, the extent to which Chinese exporters are keen to gain market access to GPA Parties' government procurement market is unclear. Unlike other developing countries whose domestic suppliers are generally not in a position to compete in a worldwide market, and which mainly offers primary commodities, Chinese exporters have already established a strong presence in GPA Parties' national markets. For example, in the period from January to September 2007, China was the No. 1 exporter to the US with US\$234.4 billion worth of exports for which mechanical and electrical products accounted for almost half (43.2%).²⁷
- 4.5 In addition, a number of Chinese suppliers have gained indirect access to GPA Parties' public markets by supplying parts to western companies. However, the strength of Chinese exporters also means that are better able to benefit from market access gained through GPA membership compared to suppliers from other developing countries. In order to mobilize Chinese exporters to support and lobby for the GPA accession, evidences of "extra" market opportunities provided by GPA membership are necessary.
- 4.6 Thirdly, the extent to which Chinese state enterprises can benefit from market access provided by GPA membership is also unclear. The initial response of Chinese sector associations (consisting mainly of state enterprises) with regard to GPA accession is unfavorable due to a lack of identifiable commercial interests.²⁸ On the one hand, the main export destinations for Chinese state enterprises are Asian and African developing countries' markets,²⁹ On the other hand, most large national infrastructure projects are awarded to state enterprises. If these state

²⁷ Ministry of Commerce, Sino-US Trade Report 2007, available at http://countryreport.mofcom.gov.cn/assay/view.asp?news_id=7585, visited on 8 March 2008.

²⁸ Information provided by a participant of the Chinese negotiation team.

²⁹ This was demonstrated by the reports of the State-Owned Assets Supervision and Administration Commission on "Overseas Expansion of Centrally Controlled State Enterprises" available at <http://www.sasac.gov.cn/n1180/n1226/n2410/n314289/index.html>, visited on 1 March 2008. It was also reported in 2007 that China encouraged state enterprises' operation in Africa by providing large loans to African countries with a precondition to purchase goods or services from "designated" Chinese enterprises. See Jamil Anderlini, "China insists on 'tied aid' in Africa", Jun 25, 2007, available at www.ft.com, visited on 21/02/2008.

enterprises, which exert considerable influence over government policy, regard domestic public contracts as easier to get compared to GPA Parties' government contracts, they may form a strong lobbying force against GPA membership.

- 4.7 Fourthly, market access provided by GPA membership is not absolute because tariffs applicable to covered goods and services and other non-tariff barriers, such as national security exclusions and anti-dumping measures, are not lifted altogether. For example, Chinese suppliers are concerned that GPA Parties will exclude them from government procurement on the ground of national security.³⁰ Such a concern was raised by the "Lenovo Case" in 2006 which was referred by a Chinese government source as the "Security Gate" incident.³¹ According to a Chinese Ministry of Commerce report, by the end of 2006, the EC had initiated 131 anti-dumping investigations against Chinese products, which increased the risks exporting Chinese goods to the EC.³²

Political and Structural Benefits for China

- 5.1 The overall benefits of China's GPA accession, albeit only apparent in the long run, can be significant. Firstly, public spending should be conducted in a regulated, transparent and efficient way aimed at value for money. Increased foreign competition will to a great extent facilitate savings in public expenditure and in

³⁰ Article XXIII:1 of GPA 1994 (and Article III:1 of GPA 2007) provides that "[N]othing in this Agreement shall be construed to prevent any Party from taking any action or not disclosing any information which it considers necessary for the protection of its essential security interests relating to the procurement of arms, ammunition or war materials, or to procurement indispensable for national security or for national defense purposes."

³¹ On May 18th America's State Department said it would not use 16,000 computers it recently bought from Lenovo, a Chinese firm, for sensitive "classified" work. Although the Chinese Academy of Sciences indirectly owns around 27% of Lenovo, Lenovo is based in New York and has an American chief executive. The State Department's PCs were assembled in former IBM plants in Mexico and North Carolina, following America's strict procurement standards. See "Classify this" *Economist*, 00130613, 5/27/2006, Vol. 379, Issue 8479. For Chinese comments, see <http://www.ccgp.gov.cn/lenovo>, visited on 5 May 2007.

³² Ministry of Commerce, Country Specific Report on Environment for Trade and Investment: EC, in Chinese, p. 30, available at <http://gpj.mofcom.gov.cn/accessory/200704/1177551761158.pdf>, visited on 8 March 2008.

turn enhance general welfare. According to the Ministry of Commerce, during the period between the Seventh and Ninth Five-Year-Plans (1985-2000), savings achieved through procurement of mechanical and electronic products using international tendering was estimated at 16.95% of a total 18 billion Yuan (1985-1990), 15.5% of 48 billion Yuan (1991-1995), and 16.8% of 223.6 billion Yuan (1996-2000).³³

5.2 Secondly, joining the GPA will likely increase transparency in government procurement and reduce corruption. An “anti-corruption agenda” has been added in GPA 2007 which provides in its preamble for “the importance of transparent measures regarding government procurement, for carrying out procurements in a transparent and impartial manner, and for avoiding conflicts of interest and corrupt practices, in accordance with applicable international instruments, such as the United Nations Convention Against Corruption” which shall be recognized and requires procuring entities to conduct covered procurement in a transparent and impartial manner that “avoids conflicts of interest” and “prevents corrupt practices” (Article V:4 GPA 2007).

5.3 Thirdly, joining the GPA will entrench the Chinese central government’s position in its fight against local protectionism which has fragmented the national market and impeded development of the national economy. While government procurement is a non-tariff barrier in international trade, discriminatory procurement by local governments and state enterprises under their control remains a significant barrier of internal trade.³⁴

³³ <http://www.sasac.gov.cn/qyqydt/dfdt/200607060174.htm>, visited on 19/06/2006.

³⁴ As identified by the State Council Regulation on Forbidding Regional Block in Economic Activities in the Market (State Council Order No. 303, enacted and entered into force on 21 April 2001), measures creating a regional block include, inter alia, [i] “require, through any means, any unit or individual only to purchase locally-manufactured products or services provided by local enterprises”(Article IV:1); [ii] “apply different technical specifications, inspection criteria or other discriminatory measure to non-local products or services in order to restrict the entry of non-local

- 5.4 Last but not least, while implementation of the GPA poses significant challenges to the Chinese domestic procurement regime, GPA accession also presents a great opportunity for improving China's public procurement legal framework. The mandatory requirement for compliance of the national procurement legislation with the GPA will help to entrench the position of reformers in harmonizing the fragmented domestic procurement regime.

The Way Forward

- 6.1 If the challenges identified above can be effectively addressed through mutually acceptable solutions, the long term welfare, structural and political benefits of China's GPA accession should outweigh the costs associated with those challenges. While GPA Parties may assist in such a cost-benefit analysis by providing detailed information on market opportunities and technical assistance, it is ultimately up to China's domestic reformers leading the GPA accession negotiation to get the message across to national policy makers and domestic public and private suppliers. An adequate institutional framework for GPA accession negotiation is therefore of vital importance
- 6.2 The GPA's approach to covered entities and procurement remains complex and lacks a general principle that facilitates the preparation of coverage offer by acceding countries. In the absence of general rules, the outcome of accession negotiation based upon reciprocity largely depends on the bargaining power of the acceding country and the expectation of existing Parties. Since the extent to which an acceding country can enjoy special treatment available for developing

products or services into local market"(Article IV:4); [iii] "restrict participation of non-local enterprises to local tendering process through setting up discriminatory qualification criteria or contract award criteria, or holding up contract information and etc."(Article IV:6).

countries and retain existing discriminatory national policies by derogation is also subject to negotiation, the initial offer of coverage prepared by China has to be carefully calculated.

- 6.3 The revised text (GPA 2007) has not addressed the fundamental problem of GPA coverage, which is the lack of a principled approach.³⁵ The exact scope of covered entities and covered procurement remain subject to negotiations on the basis of reciprocity. It is further complicated by ambiguous provisions as well as diversified terminology and various types of derogation found in Parties' Annexes. That is why Chinese negotiators have prepared the initial offer on covered entities and procurement in a gradual and cautious manner in consideration of the balance between international obligation and domestic interests.
- 6.4 Linking China's GPA accession with other outstanding diplomatic and trade issues might prove a "double edged sword." GPA Parties may assert more pressure by using political leverage at their disposal, such as the Taiwan issue. But such political pressure might provoke China's government to become more defensive towards GPA accession and retaliate by delaying the negotiation. China's response to the international human rights community is a good case in point.
- 6.5 A carefully designed reform agenda with clearly-defined objectives at both the international level and the domestic level should be the key. The GPA should endeavour to adopt a principled approach to coverage, to stop the practice of party-specific derogations and to revitalize the role of MFN in negotiation. Chinese authorities should further domestic legal reform of public procurement aimed at unifying and rationalizing existing regulations and the policy-making process. Such an ideal solution, however, will depend on a consensus by existing GPA

³⁵Wang, Ping "Coverage of the WTO's Agreement on Government Procurement: Challenges of Integrating China and other Countries with a Large State Sector into the Global Trading System" (2007)10(4) *Journal of International Economic Law* 887-920

Parties and compromises by existing domestic stake-holders, which are not easy to achieve.

- 6.6 It is also important to note the positive impacts of China's GPA accession from both international and domestic perspectives. In facilitating liberalization of the international public procurement market, China's GPA accession will symbolize the expansion of the GPA to the developing world and to a certain extent, help to attract more developing countries. It will reinforce the GPA's role as the leading WTO initiative for the liberalization of government procurement since other multilateral initiatives have made little or no progress. It will also encourage existing GPA Parties to move forward in optimizing current rules.