Procurement of State Enterprises under China's WTO Commitments *–a broken promise?*

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I. Introduction

WTO members, both developed and developing countries, have traditionally engaged in state trading for various public policy goals such as income support for domestic producers, price stabilisation, continuity in domestic food supply, government revenue generation, protection of public health and strategic control, etc.[2]

It has long been recognised that state trading constitutes a 'systemic challenge' to the GATT/WTO system[3] and 'might be operated so as to create serious obstacles to trade'.[4] This concern originates from the fact that state trading enterprises (STEs) - the vehicle of state trading - enjoy significant market power, quite often monopoly, in purchasing or selling certain products or services. There are a number of ways that STEs may be used to circumvent certain WTO commitments with respect to non-discrimination, market access and tariff concessions, for example, they could circumvent the MFN and national treatment principle by discriminating between domestic and imported goods or among trading partners in their purchase or sale; an import monopoly could effectively restrict quantities

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[2] WTO, *Operations of State Trading Enterprises as they Relate to International Trade - Background paper by the WTO Secretariat*, G/STR/2, 26 October 1995, at para. 6.

[3] J. H. Jackson, *The World Trading System: Law and Policy of International Economic Relations*, 2nd ed. (Cambridge, Mass: MIT Press, 1997), at p. 325; E. U. Petersmann, 'GATT Law on State Trading Enterprises: Critical Evaluation of Article XVII and Proposals for Reform', in T. Cottier and P. Mavroidis, (eds.), *State Trading in the Twenty-First Century* (Ann Arbor: University of Michigan Press, 1998), Chapter 3, at p. 71.

[4] Article XVII.3 GATT.

of imports or use mark-up as covert tariffs; STEs in control of essential trading facilities such as telecommunication or transport may refuse to deal with foreign companies.[5]

It is therefore legitimate for the WTO to require new members with significant state sector to make specific commitments in order to prevent such trade distortion. This is the case for China. So far as procurement of state enterprises is concerned, it is interesting to examine the extent to which procurement of Chinese state enterprises is covered by China's WTO commitments and the impact of such commitments on domestic law and practices.

Such assessment is particularly necessary when China's GPA accession negotiation has excluded the issue of procurement of state enterprises so far. Whilst China is now fully committed to join the Agreement on Government Procurement of the WTO (GPA), China has failed to offer any state enterprise for GPA coverage albeit significant interest from existing GPA Parties.[6]

Normally the implication on domestic legal system of international commitment undertaken by a country is straightforward, i.e. the domestic law should be amended to reflect and implement such commitments. However, the implication of China's WTO existing and future obligations on procurement of state enterprises is arguably less clear. The most relevant commitments contained in China's WTO Accession Protocol and the

[5] B. Hoekman and P. Low (1998), 'State Trading: Rule Making Alternatives for Entities with Exclusive Rights', in T. Cottier and P. C. Mavroidis (eds), *State Trading in the Twenty-First Century* (Ann Arbor: University of Michigan Press, 1998), pp. 327-44.

[6] See Wang, P. "Accession to the Agreement on Government Procurement: the Case of China" Chapter 3 in *The WTO Regime on Government Procurement Recent Developments and Challenges Ahead* S. Arrowsmith and R. Anderson (eds.)(CUP: forthcoming 2011); Wang, P. "China's accession to the WTO Government Procurement Agreement - challenges and the way forward" (2009)12(3) *Journal of International Economic Law* 663–706; Wang, P. "China's Government Procurement Policy at a Crossroad", December 2008 (Policy Paper), available at www.nottingham.ac.uk/law/pprg. Anderson, R. "China's accession to the WTO Agreement on Government Procurement: Procedural Considerations, Potential Benefits and Challenges, and Implications of the On-going Negotiation of the Agreement" (2008) 17 *Public Procurement Law Review* 161.

Working Party Report and their implication on domestic law and practice will be analysed in turn below.

II. Commitments regarding State Trading Enterprises (STEs)

According to Article 5 of the Accession Protocol[7], within three years after accession (no later than 1 January 2005), all enterprises in China shall have the right to trade in all goods throughout the customs territory of China, except for those goods listed in Annex 2A which continue to be subject to state trading in accordance with the Protocol. Article 6 (state trading) of the Accession Protocol states that "China shall ensure that import purchasing procedures of state trading enterprises are fully transparent, and in compliance with the WTO Agreement, and shall refrain from taking any measure to influence or direct state trading enterprises as to the quantity, value, or ***country of origin of goods purchased*** or sold, except in accordance with the WTO Agreement".[8] This is arguably just a "hands-free" reassurance reflecting the requirement of GATT Article XVII:1(c).

The significance of this commitment relies on the scope of the term "state trading enterprises". According to the wording of GATT Article XVII, the scope of the term "state trading enterprises" can be construed as widely as including all state enterprises engaged in trade. Throughout the accession documents, the term "state trading enterprises" and "state-owned and state-invested enterprises" are used simultaneously. No clear definition of these terms has been given. It is not clear to what extent the scope of state (owned or invested) enterprises overlap with that of state trading enterprises.

However, the special Annex on state trading products and state trading enterprises

[7] WTO, Protocol on the Accession of the People's Republic of China, WT/L/432, 23 November 2001.
[8] *Ibid*, emphasis added.

of the Accession Protocol arguably suggests that only a handful of specialized foreign trading corporations are regarded as state trading enterprises by the Chinese government. According to Annex 2A of the Accession Protocol, the import of 84 products within 9 product categories such as grain and cotton is still subject to state trading by 19 state trading enterprises; the export of 134 products within 21 product categories such as tea, soybean, and silk are still subject to state trading by around 50 state trading enterprises. It is notable that these listed state trading enterprises are all state-owned (solely or by majority) specialized foreign trade corporations.

Chinese domestic law has not provided any further clarification in this regard. State trading and state trading enterprises were not mentioned in China's *Foreign Trade Law* enacted in 1994 with a view to reconcile domestic legal terms with international norms in trade for the negotiation of WTO accession.[9] The *Regulation on the Administration of Import and Export of Goods* enacted on 10 December 2001 implementing the *Foreign Trade Law* contains a Chapter titled "State Trading and Designated Operation". It provides that the State may exercise state trading administration with respect to certain goods, and the list of state trading enterprises and goods subject to state trading will be decided and published by Ministries with relevant authority.[10] Without special statutory authorization by the government, enterprises not listed as state trading enterprises are obliged not to engage in import or export of goods subject to state trading.[11] The breach of this obligation could lead

[9] Wang, Bing "China's New Foreign Trade Law: Analysis and Implications for China's GATT Bid" (1995)1 *John Marshall Law Review* pp. 504-505.
[10] "Regulation on the Administration of Import and Export of Goods", State Council, 2001(in force), Chapter 4, Article 45, 46.
[11] *Ibid.*, Chapter 4, Article 47, 51.

to penalties under administrative as well as criminal law. [12] However, no definition or criterion of a state trading enterprise has been provided in this Regulation either.

Based upon the limited list of state trading enterprises contained in Annex 2A of the Accession Protocol, in the absence of a clear definition of state trading enterprises in domestic law, it could be argued that the term "state trading enterprises" in Chinese context has only limited coverage. It can be argued that the intention of the Chinese government is that not all state enterprises owned or controlled by the State but only those listed in Annex 2A are state trading enterprises.

This narrow coverage means the majority of Chinese state enterprise will not be subject to the obligations contained in GATT Article XVII with regard to their procurement (as well as sales).[13]

III. Commitments regarding general procurement of state-owned and state-invested enterprises

In paragraph 46 of Section II: 6 (titled State-Owned and State-Invested Enterprises) of the Working Party Report, the representative of China confirmed that "China would ensure that ***all state-owned and state-invested enterprises*** would make purchases and sales based solely on ***commercial considerations***, e.g., price, quality, marketability and availability, and that the enterprises of other WTO Members would have an ***adequate opportunity to compete*** for sales to and purchases from these enterprises on non-discriminatory terms and conditions**.** In addition, the Government of China would not influence, directly or

[12] *Ibid*., Chapter 7 "Legal Liabilities", Article 68.
[13] For the impact of GATT Article XVII on procurement of state enterprises see Wang, P. "The Procurement of State Trading Enterprises under the WTO Agreements - a proposal for a way forward" Chapter 8 in *The WTO Regime on Government Procurement Recent Developments and Challenges Ahead* S. Arrowsmith and R. Anderson (eds.)(CUP: forthcoming 2011).

indirectly, commercial decisions on the part of state-owned or state-invested enterprises, including on the quantity, value or country of origin of any goods purchased or sold, except in a manner consistent with the WTO Agreement. The Working Party took note of these commitments" (emphasis added).[14]

The significance of this commitment should not be underestimated. First of all, the wording of this commitment almost coincides with that of GATT Article XVII: 1(b).[15] This arguably means that although, as explained above, China seems to construe the term "state trading enterprises" narrowly as including only a limited number of listed national foreign trade corporations, China has undertaken that the substantial obligations of GATT state trading rules (to purchase and sell solely based on commercial considerations and offer foreign enterprises adequate opportunities to compete) will nonetheless apply to all state-owned and state-invested enterprises. Even though it is not clear that whether GATT Article XVII is intended to impose a national treatment as well as a MFN obligation, the mere requirement of purchasing and selling in accordance solely with "commercial considerations" might be regarded as imposing a *de facto* national treatment obligation.[16] Therefore, it can be argued that this provision has imposed not only a MFN but also a national treatment obligation on procurement of all Chinese state enterprises since the "buy

[14] Report of the WTO Working Party on the Accession of China, WT/MIN(01)/3, 10 November 2001, para. 46.
[15]GATT Article XVII:1(b) provides that "[T]he provisions of subparagraph (a) of this paragraph shall be understood to require that such enterprises shall, having due regard to the other provisions of this Agreement, make any such purchases or sales solely in accordance with commercial considerations, including price, quality, availability, marketability, transportation and other conditions of purchase or sale, and shall afford the enterprises of the other contracting parties adequate opportunity, in accordance with customary business practice, to compete for participation in such purchases or sales".
[16] Wang, P. "The Procurement of State Trading Enterprises under the WTO Agreements - a proposal for a way forward" Chapter 8 in *The WTO Regime on Government Procurement Recent Developments and Challenges Ahead* S. Arrowsmith and R. Anderson (eds.)(CUP: forthcoming 2011).

national" policy is difficult, if possible at all, to be justified as a commercial consideration.

Furthermore, this commitment contained in the Working Party Report has not made, at least in the first sentence, any explicit reference that it applies only to purchase and sale of goods. It can therefore be argued that both procurement of goods and that of construction and non-construction services by Chinese state enterprises should be subject to the rule of commercial consideration even though GATS does not contain any state trading rule like GATT Article XVII.[17]

However, it is noteworthy that the domestic legislation implementing this potentially far reaching commitment only requires state trading enterprises, instead of all state-owned and state-invested enterprises, to operate according to commercial conditions. The *Regulation on the Administration of Import and Export of Goods* provides that state trading enterprises shall operate according to normal commercial conditions and are refrained from "selecting suppliers or refusing agent contract envisaged by other enterprises according to non-commercial considerations".[18] This provision arguably suggests that the commitment contained in paragraph 46 of the working party report has not been fully implemented, mistakenly or deliberately, by the Chinese government.

IV. Commitments regarding "commercial" procurement of state-owned and state-invested enterprises

In paragraph 47 of Section II: 6 (titled State-Owned and State-Invested Enterprises) of the Working Party Report, the representative of China also confirmed that "***without prejudice***

[17] However, it is noteworthy that the second sentence of this paragraph does specifically refer to purchase of goods: "…the Government of China would not influence, directly or indirectly, commercial decisions on the part of state-owned or state-invested enterprises, including on the quantity, value or country of origin of ***any goods purchased or sold***, except in a manner consistent with the WTO Agreement". It is not clear whether the same limitation is also intended for the first sentence.

[18] Art. 48 and 52 of the "Regulation on the Administration of Import and Export of Goods"("*huowu jinchukou guanli tiaoli*"), State Council, enacted on 10 December 2001, enter into force on 1 January 2002.

to China's rights in future negotiations in the Government Procurement Agreement, 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 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."(emphasis added)[19]

This commitment is primarily about the "commercial" procurement of Chinese state enterprises, namely procurement of goods and services for commercial sale, production of goods or supply of services for commercial sale, or for non-governmental purposes. It is intended to address the concern raised by other WTO members that China would adopt measures requiring state enterprises to discriminate in their commercial procurement by invoking the government procurement exclusion contained in GATT Article III:8(a). These members argue that, for example, "any measure relating to state-owned and state-invested enterprises importing materials and machinery used in the assembly of goods, which were then exported or otherwise made available for commercial sale or use or for non-governmental purposes, would not be considered to be a measure relating to government procurement".[20]

However, the wording of this commitment, in particular the last sentence of the paragraph, makes the significance of the commitment less clear, i.e. whether both general measures adopted by the government related to commercial procurement of state

[19] Report of the WTO Working Party on the Accession of China, WT/MIN(01)/3, 10 November 2001, para. 47, emphasis added.
[20] *Ibid*, para. 44.

enterprises and individual procurement decisions by any state enterprise, or only those general measures, are subject to WTO obligations.

The last sentence starting from “thus” provides that “such purchases” (procurement of Chinese state enterprises for commercial resale or other non-governmental purposes) would be subject to the basic non-discrimination obligations of both GATT and GATS, namely national treatment and MFN. This sentence alone can be construed in two different ways: [i] this only means Chinese government cannot instruct, through “laws, regulations or measures”, state enterprises to discriminate against foreign products or services in their procurement for commercial resale; or [ii] in addition to the restriction on general governmental measures, it also means in any particular procurement process of goods or services for commercial resale, the procuring Chinese state enterprise has to observe national treatment and MFN obligations, and therefore, make necessary arrangements (e.g. to advertise in an international media, accept tender in a foreign language, or security in foreign currency).

If the second interpretation were true, the significance of this commitment should not be underestimated since all individual procurement processes of Chinese state enterprises would be subject to WTO obligation directly. In such case, not only any government general instruction requiring state enterprises to “buy national”, but also any discrimination occurred in any individual “commercial” procurement of a Chinese state enterprise due to the lack of procedural arrangements (e.g. failure to advertise internationally), is a breach of China’s WTO obligation and can be challenged through the DSU.

However, given the background of this commitment stated in paragraph 44 of the Working Party Report, it is suggested that the first interpretation might be more reasonable and closer to the real intention of the Chinese delegation. The word "thus" used at the beginning of the second sentence arguably suggests that there is a causal link between the two sentences of paragraph 47 of the Working Party Report. If all laws, regulations and measures relating to "commercial" procurement of state enterprises would not be considered to be laws, regulations and measures relating to government procurement, the natural conclusion should arguably be "***laws, regulations and measures relating to*** such 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". This arguably means Chinese government is restrained from issuing any law, regulation and measure requiring state enterprises to discriminate against foreign goods and services in their commercial procurement by invoking government procurement exclusion. This argument is also supported by the text of paragraph 334 of the Working Party Report reflecting the general understanding of other WTO members on this issue.[21]

This commitment has not stated explicitly the position with "non-commercial" procurement of Chinese state enterprises. It is not clear to what extent this paragraph is implying laws, regulations and measures relating to procurement of Chinese state enterprises ***for governmental purposes*** and not for commercial resale would be considered to be "***laws, regulations and measures relating to government procurement***", in which the

[21] Paragraph 334 in Section VII. 4 (titled Government Procurement) of the Working Party Report provides "[T]hose members noted that China's public entities engaged exclusively in commercial activities would not be conducting government procurement and ***thus laws, regulations and other measures regulating these entities' procurement practices would be fully subject to WTO requirements***." Emphasis added.

Chinese government is free to require state enterprises to discriminate against foreign goods and services by virtue of the government procurement exclusion contained in GATT Article III:8(a) and GATS Article XIII: 1.[22] However, it can be argued that Paragraph 334 in Section VII. 4 (titled Government Procurement) of the Working Party Report has ruled out this possibility since it provides "[T]hose members noted that China's public entities engaged exclusively in commercial activities would ***not be conducting government procurement*** and thus laws, regulations and other measures regulating these entities' procurement practices would be fully subject to WTO requirements." (emphasis added).

In summary, the commitment contained in paragraph 47 of the Working Party Report arguably requires that any Chinese government issued laws, regulations or measures related to "commercial" procurement of state enterprises could not be exempted by invoking the government procurement exclusion, therefore should be subject to national treatment and MFN obligations contained in GATT and GATS. Although not addressed by this commitment, it can be argued that according to paragraph 334 of the Working Party Report, government measures related to non-commercial procurement of state enterprises could not be exempted from WTO rules by invoking the government procurement exclusion either.

V. MFN commitment regarding government procurement

In section VII:4 (titled Government Procurement) of the Working Party Report, it was

[22] Since the term "governmental purposes" is not further defined in either GATT or GATS, the demarcation line between procurement of a state enterprise for governmental purposes and non-governmental purposes is not at all clear. If procurement of state enterprises for their own use is considered to be for governmental purposes and not for commercial resale (which is arguably the case at least in the context of GATT as demonstrated by the wording of the Understanding of GATT Article XVII, the commitment contained in paragraph 47 of the Working Party Report has arguably left Chinese government with significant discretion to interfere with procurement of state enterprises.

stated that “China intended to become a Party to the GPA and that ***until such time***, all government entities at the central and sub-national level**,** as well as any of its public entities ***other than those engaged in exclusively commercial activities***, would conduct their procurement in a transparent manner, and provide all foreign suppliers with equal opportunity to participate in that procurement pursuant to the principle of MFN treatment**,** i.e., if a procurement was opened to foreign suppliers, all foreign suppliers would be provided with equal opportunity to participate in that procurement (e.g., through the bidding process). Such entities' procurements would be subject only to laws, regulations, judicial decisions, administrative rulings of general application, and procedures (including standard contract clauses) which had been published and made available to the public”.[23]

This is arguably a MFN commitment on government procurement. Since MFN is generally regarded as not applying to government procurement by virtue of GATT Article III:8, this commitment does impose upon China a “WTO Plus” obligation.

So far as procurement of state enterprises is concerned, the relevant issue arising from this commitment is whether ***the deliberate exclusion*** from its coverage of procurement of public entities ***engaged in exclusively commercial activities***, namely state enterprises, means state enterprises can conduct their procurement in a non-transparent manner; do not need to provide all foreign suppliers with equal opportunity to participate in that procurement pursuant to the principle of MFN treatment; and procurement of state enterprises can be subject not only to published laws, regulations, judicial decisions, administrative rulings of general application, and procedures, but also other informal

[23] Para. 339 of the Working Party Report, emphasis added.

interference from the government. The answer to that question arguably depends on the intention of this exclusion: whether procurement of public entities engaged exclusively in commercial activities is excluded because the commercial pressure faced by such entities is enough to make sure they procure efficiently and in a non-discriminatory manner or because the government wants to retain freedom to use such procurement for policy reasons. It is suggested that the former should be the underlying consideration.

This is because, according to the commitment undertaken in paragraph 46 of the Working Party Report explained above, all state enterprises have to make purchases based solely on commercial considerations and offer enterprises of other WTO Members adequate opportunity to compete for such purchases anyway. In other words, it can be argued that obligations similar in nature to MFN as well as national treatment have already been imposed upon state enterprises even though public entities engaged exclusively in commercial activities are excluded from the MFN commitment regarding government procurement.

VI. Implication of WTO accession commitments for domestic law and practice

Since commitments undertaken in the Accession Protocol and Working Party Report are "an integral part of WTO Agreement"[24], China is obliged to implement these commitments

[24] Article 2 of China's Accession Protocol (WT/L/432, 23 November 2001) provides that "[T]his Protocol, which shall include the commitments referred to in paragraph 342 of the Working Party Report, shall be an integral part of the WTO Agreement". Article 342 of the Working Party Report (WT/MIN(01)/3, 10 November 2001) provides that the Working Party took note of the commitments given by China in relation to certain specific matters which are reproduced in paragraphs including, inter alia, 46-47 and 339, of this Report and noted that these commitments are incorporated in paragraph 1.2 of the Draft Protocol.

in domestic law[25].

However, it can be argued that such implementation in domestic law is far from satisfactory. First of all, no domestic regulation has been specially promulgated in China since WTO accession to give effect to the above-mentioned commitments regarding procurement of state enterprises. Although certain procurement of Chinese state enterprises is subject to tendering requirements, there is no regime consisting of explicit non-discriminatory principles, objective criteria as well as detailed procedures to guarantee that Chinese state enterprises will make their purchase solely on commercial considerations and offer foreign suppliers adequate opportunity to compete. In the absence of a unified domestic regulation providing detailed procedural rules to ensure transparency and competition, it can be argued that the effectiveness of such commitment would suffer the same drawbacks as GATT Article XVII.[26]

Furthermore, certain Chinese regulations regarding procurement of state enterprises enacted before and even after WTO accession still contain provisions envisaging explicitly a "buy national" policy, notably Article 3 of 1999 State Economic and Trade Commission (SETC) *Notice on Strengthening the Supervision of Technical Improvement Projects using Funds Raised by Treasury Bonds* and Article 15 of the 2002 SETC *Measure on the Administration of Tendering in State Technical Innovation Projects* both contain "buy national" policies. It can be argued that if state enterprises are encouraged to purchase

[25] Article XIV:2 of the Agreement Establishing the World Trade Organization provides that "[A] Member which accepts this Agreement after its entry into force shall implement those concessions and obligations in the Multilateral Trade Agreements that are to be implemented over a period of time starting with the entry into force of this Agreement as if it had accepted this Agreement on the date of its entry into force."

[26] For a critique of GATT Article XVII, see Wang, P. "The Procurement of State Trading Enterprises under the WTO Agreements - a proposal for a way forward" Chapter 8 in *The WTO Regime on Government Procurement Recent Developments and Challenges Ahead* S. Arrowsmith and R. Anderson (eds.)(CUP: forthcoming 2011).

domestically produced equipment, required to give preference to products of sino-foreign joint ventures, or required to purchase from domestic juristic person in a regulation, such requirements is hard, if possible at all, to be justified as "commercial considerations" and therefore in breach of China's WTO commitments regarding procurement of state enterprises explained above. The situation is less straightforward when a state enterprise group requires affiliated enterprises to give preference in their procurement to internal suppliers. For example, Article 34 of the Sinopec Group 1999 *Regulation on the Administration of Tendering in Construction Projects* provides that "…***under the same conditions, preference should be given to bidders which is affiliated to the Group***." Since the term "commercial consideration" is not clearly defined, there is a case to argue that such preference is given for a "commercial" reasons, e.g. to maintain the overall balance-of-payments, to take advantage of the expertise of the internal entity specialized in the respective area, to ensure the continuity, reliability and quality of supply and so on.

In practice, the implication of those commitments is arguably also unsatisfactory. This has been highlighted by government organized "shopping" trips of Chinese state enterprises to the US and Europe in the past few years. Since November 2003, Chinese procuring delegations consisting of state-owned enterprises such as wireless operators China Unicom Ltd. and China Mobile have purchased products worth over 10 billion US dollars from the US. On January 27 2004, Chinese President Hu Jintao announced at a press conference in Paris with French President Jacques Chirac that ***to his knowledge***, state-owned China Southern Airlines plans to purchase 21 new planes from European plane maker Airbus SAS. It is noteworthy that both major purchases of Chinese state enterprises

mentioned above coincided in time with the trip of Chinese President to the US and France and the procuring delegation to the US was led by the Deputy Minister of Commerce.[27]Prior to President Hu Jintao's visit to America in April 2006, a "shopping" delegation of more than 100 state enterprises headed by Chinese 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.[28]

It is suggested these procurement contracts have been awarded by Chinese state enterprises to American or European suppliers not for commercial considerations, but for political reasons, such as the need of Chinese government to ease the anxiety of American public and congress about the huge sino-US trade deficit. These repeated incidents identified above has arguably demonstrated that [i] the procurement of Chinese state enterprises has a significant impact on international trade; [ii] the Chinese government still has considerable degree of control over procurement policy and practice of its state enterprises; [iii] domestic regulations regarding procurement of state enterprises, especially those on mandatory tendering requirement in certain procurement projects (such as electronic products), have been circumvented under the government's will since no tendering procedure has been mentioned in above-mentioned shopping trips; [iv] the implication of China's WTO accession commitments on procurement of Chinese state enterprises, both in terms of domestic regulation and practice, has been limited.

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[27]*China Information*, January 25, 2004; *Reuters*, Washington, January 13, 2004; *Reuters*, Paris, January 27, 2004, available at www.reuters.com/newsArticle.jhtml?type=topNews&storyID=4216184.
[28] http://www.chinadaily.com.cn/china/2006-04/07/content_562922.htm, visited on 19/06/06.

However, that is not to say that the current situation is sustainable or in conformity with China's WTO obligation. China's practice and lack of implementation has so far not been challenged by other WTO Members possibly because China has used procurement of state enterprises in a way to keep all major trade partners happy. It can be argued that sooner or later the issue of the legality of such practice will come under the spotlight and certain action of domestic implementation will be required. China will, in practice as well as in law, be required to implement its WTO accession commitments to adopt a principled approach to regulating procurement of state enterprises.

VII. Implication of WTO accession commitments on China's GPA accession negotiations

Most of these commitments mentioned above have taken into account China's GPA accession negotiations. Phrases such as "***without prejudice to China's rights in future negotiations in the Government Procurement Agreement***" and "***until such time*** (when China become a party to the GPA)" are used in commitments contained in paragraph 47 (regarding procurement of state enterprises for non-governmental purposes such as resale) and 339 (regarding the MFN commitment applying to government procurement excluding state enterprises) of the Working Party report. With these qualifications in place, it can be argued that the impact of those commitments on GPA negotiations is diminished.

However, it is noteworthy that such a qualification has not been attached to the commitment contained in paragraph 46 of the Working Party Report requiring Chinese state enterprise to purchase in accordance solely with commercial considerations. This arguably means that in the context of the GPA, any covered Chinese state enterprise is still

obliged to make its purchases based solely on commercial considerations and offer any foreign supplier adequate opportunity to compete.

The key implications of this commitment on China's GPA negotiation are as follows:

[i] So far as procurement of covered state enterprises is concerned, GPA become, to a certain extent, a multilateral rather than plurilateral agreement for China. For example, if a Chinese state enterprise opens its procurement for suppliers from GPA parties to compete, it must also accept tenders submitted by suppliers from WTO members that are not parties to the GPA and evaluate them according to the same commercial criteria. However, suppliers from non-GPA parties might not have access to other benefits offered by the GPA, such as the recourse to a domestic remedy.

[ii] It would be difficult for China to incorporate sector-specific derogations with respect to covered state enterprises. It is common practice in GPA negotiation that one party excludes the application of the agreement in certain utility sectors to another party which has not offer reciprocal concessions. For example, General Note of the EU to GPA Appendix (WT/Let/438) Article 1 provides that The EC will not extend the benefits of this Agreement as regards the award of contracts by entities listed in Annex 3 paragraph (a)(water) to suppliers and service providers of Canada and the USA until such time as the EU has accepted that the Parties concerned give comparable and effective access for EU undertakings to the relevant markets.

If China wants to incorporate similar derogations in order to secure reciprocal treatment, it will have to justify that such derogation is a kind of "commercial

consideration". Since "commercial consideration" is not clearly defined in the Accession Protocol or in the context of GATT and even a tied loan can be viewed as a commercial consideration[29], it is possible, albeit difficult, to argue that the intention to secure reciprocal market access is actually a commercial consideration and on that basis, Chinese state enterprises operating in certain sectors should be able to exclude from its procurement suppliers of GPA parties that have not offered reciprocal access to the relevant market.

However, it is noteworthy that this argument of securing reciprocal market access being viewed as a "commercial consideration" can also apply in circumstances where Chinese state enterprises "close the door" to suppliers from non-GPA parties. It can be argued that the intention of a Chinese state enterprise to exclude suppliers from non-GPA parties from bidding process is to encourage or force more WTO members to join the GPA, to secure a wider market access for entities from China and other GPA parties, and therefore, a "commercial consideration".

A definite conclusion on whether the benefit of GPA membership will outweigh its cost for China cannot be easily drawn.[30] The harsh reality is that under Annex 3 of its initial and revised offers ("Other Entities" to be covered by the GPA), China has not listed any state enterprise, in particular public utilities, unlike existing GPA Parties. Instead, it contains a number of public authorities or bodies normally found in Annex 1 or 2 of existing Parties, such as Xinhua News Agency, Chinese Academy of Sciences and China

[29] The Interpretative Note *Ad* Article XVII lists two scenario that could be taken into account as "commercial considerations", namely using a "tied loan" (loan from another donor country that must be spent in purchasing goods or services from that country) to purchase abroad; and the charging by a state enterprise of different prices for its sales of a product in different markets for commercial reasons.

[30] See Wang, Ping, "China's Government Procurement Policy at a Crossroad", December 2008 (Policy Paper), available at www.nottingham.ac.uk/law/pprg.

Banking Regulatory Commission.

VIII. Concluding Remarks

To sum up, it can be argued that significant commitments regarding public procurement as well as procurement of state enterprises has been undertaken by China upon WTO accession: import purchasing procedures of state trading enterprises would be fully transparent, and in compliance with the WTO Agreement (Article 6 of the Accession Protocol); purchases (of goods?) of all state-owned and state-invested enterprises would be based solely on "commercial considerations"(paragraph 46 of the Working Party Report); laws, regulations and measures related to commercial procurement of state enterprises would not be exempted by government procurement exclusion (paragraph 47 of the Working Party Report); in fact, public entities engaged exclusively in commercial activities would not be conducting government procurement at all (paragraph 47 of the Working Party Report); Chinese government shall refrain from taking any measure to influence, directly or indirectly, purchases of goods of not only state trading enterprises, but also state-owned and state-invested enterprises (Article 6 of the Accession Protocol, paragraph 46 of the Working Party Report).

However, based on the analysis in previous sections, it can be argued that these commitments have not been undertaken in a clear, coordinated and coherent manner. For example, [i] it is not clear to what extent state trading enterprises and state-owned or state-invested enterprises overlap with each other; [ii]it is not clear whether the commitment contained in paragraph 46 of the Working Party Report requiring Chinese state enterprise

to purchase in accordance solely with commercial considerations only applies to procurement of goods or to that of services as well. Another example is that the commitment contained in paragraph 46 of the Working Party Report has arguably rendered the commitment contained in paragraph 47 of the Working Party Report subjecting governmental measures related to commercial procurement of state enterprises to national treatment and MFN to a large extent redundant. Since the procurement of Chinese state enterprises (no matter for governmental or non-governmental/commercial purposes) has to be based solely on commercial considerations and the Chinese government "would not influence, directly or indirectly, commercial decisions on the part of state-owned or state-invested enterprises" regarding their procurement, the government would arguably not be able to instruct, through laws, regulations or measures, state enterprise to discriminate against foreign products or services anyway.

At a first glance, it seems that Chinese government has significantly relinquished its discretion in using procurement of state enterprises for non-commercial considerations. However, the reality of China's post-WTO conducts points at the opposite direction. There has been no concrete domestic legislative measure to implement these commitments whilst measures violating such commitments can be found instead. Furthermore, the shopping trips of Chinese leaders in the world demonstrate that they are paying lip service to not using procurement of state enterprises for political reasons.

In the long run, especially with potential GPA coverage of such procurement in sight, it can be argued that measures need to be taken to implement China's commitments regarding procurement of state enterprises undertaken upon WTO accession. Such

measures need to take into consideration their compliance with GPA rules as well as fulfilling domestic reform objectives further explored in the next policy paper on this issue.