

**LOOKING BEYOND ACCESSION: CHALLENGES TO IMPLEMENTING THE
WORLD TRADE ORGANIZATION GOVERNMENT PROCUREMENT
AGREEMENT IN CHINA**

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ABSTRACT. Much of the literature on China's ongoing attempts to accede to the World Trade Organization ("WTO") Agreement on Government Procurement ("GPA") focuses on which Chinese entities will ultimately be covered by the Agreement. While coverage issues are, no doubt, important, this paper argues that China will face an even greater number of challenges when implementing and harmonizing the requirements of the GPA with its own domestic procurement laws. In particular, the GPA's Article XVIII requirement for an effective domestic review mechanism may be especially difficult for China to achieve. In light of these challenges, this paper argues that current GPA members should address problems with China's domestic legal framework for procurement now, not look to the domestic review device to resolve problems after accession.

INTRODUCTION

China first opened its doors to international business in the late 16th century (Gray, 2002). Almost 400 years later, the economic opportunities of the Chinese market continue to entice foreign companies. In recent years, following the adoption of the "Reform and Opening Up" policy of the late 1970s, China's economy has expanded at a dramatic rate. From the beginning, this economic expansion has been a boon for foreign businesses, many of which have achieved incredible success capitalizing on China's growing free-market commercial sector. All the while, however, foreign

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businesses have been excluded from another, equally enticing sector of the Chinese economy—the \$264.5 billion dollar a year government procurement market (Mo, 2015).

Clearly, China is not unique in favoring domestic suppliers during government procurements. A number of nations have “domestic preference” laws that require government entities to purchase from domestic contractors, or demand that domestic contractors be given preferential treatment.¹ Plainly, such laws create barriers to international trade. As such, since 1996, the World Trade Organization (“WTO”) has provided member countries with the option of acceding to the Agreement on Government Procurement (“GPA”),² an agreement in which member countries are given access to each other’s government procurement markets, in exchange for mutually suspending their own domestic preference rules.³ As a “plurilateral” agreement, membership to the GPA is limited to those countries that want to be a party, and agree to adhere to its terms (Grier, 2006, p. 387). In this way, both the benefits and the restrictions of the GPA are voluntary. Accession to the GPA, however, is not automatic. Applicant nations engage in negotiations with the current GPA members, before submitting an “offer” that outlines the specific governmental entities the applicant country intends to be covered by the GPA.

At present, forty-two countries have acceded to the GPA, thereby consenting to the treaty’s quid-pro-quo arrangement (*Parties and Observers to the GPA*). For China, however, “the siren’s song of protectionism” remains too seductive (Mathieson, 2010, p. 237). Despite promising to accede to the GPA “as soon as possible” after joining the WTO, China has failed – four times⁴ – to provide an acceptable offer. In each case, China’s offer was rejected for failing to include State-Owned Enterprises (“SOEs”) within the scope of the GPA (Mathieson, 2010). In response, the U.S. Government and business community has expressed “deep[] disappointment” at China’s “limited” and “unrealistic” offers (Mathieson, 2010, p. 240). In the beginning of 2014, China made a fifth bid to accede to the GPA, following through on its promises to the current GPA member nations. Whether the offer is deemed acceptable, however, remains to be seen.

Examining China’s failed efforts at GPA accession reveals a complicated picture. Current GPA members, particularly the U.S.,

clearly want the opportunity to compete on Chinese government procurements. At the same time, they are willing to wait until China presents an acceptable offer that includes access to the lucrative SOE procurement market. For China, access to American government procurements presents obvious opportunities. Yet in the eyes of Chinese decision makers,⁵ the costs of opening up SOE procurements to foreign contractors appear to outweigh the benefits of competing for foreign government contracts. With this “push-pull” dynamic characterizing all of China’s accession negotiations to date, the issue of SOE coverage will likely remain a primary discussion point as GPA accession talks move forward.

Notwithstanding the importance of coverage issues, however, the focus on China’s accession to the GPA may be dangerously myopic – in the long run, China may face even greater challenges with regard to *implementing* the GPA within its domestic legal system. Arguably, China’s current domestic procurement regime meets the GPA’s base requirements, at least in principal. In practice, however, China’s domestic procurement system falls short of meeting many of the GPA’s obligations. Taken together, this means that current GPA members negotiating the terms of China’s accession must look past the allure of the massive Chinese procurement market, and anticipate the challenges that foreign contractors might experience when competing on Chinese government contracts. Most importantly, given the complexities associated with challenging government procurements in China, negotiators for the current GPA members should not look to the GPA’s Domestic Review device as a tool for addressing unresolved problems with China’s procurement system that may develop down the road.

THE LEGAL FRAMEWORK FOR PUBLIC PROCUREMENT IN CHINA⁶

The GPA, itself, provides only base requirements for member countries’ procurement systems (WTO GPA, 2012). GPA member nations are permitted to conduct their government procurements in whatever manner they see fit, as long as the country’s domestic procurement laws meet the Agreement’s minimum standards. As a result, the ease with which a country is able to implement the GPA is inexorably tied to the strength of that nation’s procurement laws.⁷ In China’s case, the legal framework for public procurement is fragmented and underdeveloped (Wang and Zhang, 2010). Thus, the

challenges China will face when implementing the GPA are not superficial. Rather, they implicate the very foundation of China's procurement system.

Prior to the "Reform and Opening Up" period, China had no formal public procurement laws to speak of (Rothery, 2003, p. 372). Indeed, the very absence of a competitive marketplace under the centrally planned economy made any public procurement system impossible (Wang and Zhang, 2010, p. 14). Some of China's earliest experiments with procurement laws came as a result of "tendering and bidding" systems introduced by the World Bank and the Asian Development Bank on projects financed by those international institutions (Rothery, 2003, p. 372). These systems introduced China to the benefits of competition and transparency, and spurred a number of procurement pilot projects in a variety of provinces, municipalities and ministries (Rothery, 2003, p. 372). The growth of these low-level procurement initiatives caught the attention of the Central Government such that by the middle of the 1980's, the State Council had adapted a number of existing regulations to include language allowing for competitive tendering procedures (Wang and Zhang, 2010, p. 16).⁸ Throughout the first few years of the 1990's, the use of competitive tendering expanded dramatically as ministries, SOEs and a number of central organs adopted rules and regulations on the topic (Wang and Zhang, 2010).⁹ Without a doubt, the explosion of these new tendering regulations was a major step forward in the development of a formal procurement system. At the same time, however, absent a common legal base, manipulation and inconsistency became commonplace (Wang and Zhang, 2010, p. 17-18). Provincial governments and ministries would draft tendering regulations in order to maintain bureaucratic influence and control over specific procurements (Wang and Zhang, 2010, p. 17). Similarly, government organs would draft tendering rules to give preferential treatment to favored state-owned enterprises (Wang and Zhang, 2010, p. 17).

The Tender and Bidding Law

By the late 1990's, with the negative impacts of a decentralized procurement system becoming apparent, the Central Government endeavored to produce the first national-level law addressing government procurement (Rothery, 2003, p. 372). The result of these efforts was the passage of the *Tender and Bidding Law* ("TBL")

by the State Planning Commission (now the National Development and Reform Commission, “NDRC”) in 1999. Symbolically, the *TBL* was a major step forward in the development of China’s procurement system. However, as drafted, the *TBL* was nothing more than a set of rules for open and selective tendering (Wang and Zhang, 2010, p. 11). Many features common to modern procurement legislation, including a protest mechanism and provisions for negotiated procurements, were lacking (Wang and Zhang, 2010, p. 4-5). To boot, the scope of the law was anything but clear, as a result of conflicting language regarding which projects and entities were required to use tendering procedures.¹⁰ Due, in part, to this confusion, the *TBL* resulted in “chaos in the tendering system” (Opinion on the Consolidation of Tendering Regulations and Regulatory Documents, 2002). Indeed, as the State Planning Commission reported in 2001, of 322 regulatory documents examined, 1100 provisions were found inconsistent with the *TBL* (Opinion on the Consolidation of Tendering Regulations and Regulatory Documents, 2002).

The Government Procurement Law

As a result of the failures of the *TBL* to provide a comprehensive legal framework for government procurement, in the mid-1990s, the Ministry of Finance (“MOF”) began a new wave of procurement reform (Wang and Zhang, 2010, p. 4-5).¹¹ The fruit of this initiative was the 2002 passage of China’s first true national level procurement law, the *Government Procurement Law* (“GPL”). By providing a comprehensive set of rules for procuring entities, agencies and suppliers, the *GPL* succeeded where the *TBL* had failed (Wang and Zhang, 2010, p. 12).¹² At the same time, however, there remain critical problems with China’s legal framework for public procurement, in particular significant incongruities between the *TBL* and the *GPL*. Against this backdrop, successfully implementing the GPA within China’s fragmented procurement system will present considerable challenges.

IMPLEMENTING THE WTO GPA IN CHINA

Accession to the GPA, like joining the WTO, generally “does not [require] a perfect legal system, or even a basically fair one, outside of a few specific areas” (Clarke, 2003, p. 111). Thus, while China’s

domestic procurement system is flawed, problems with the laws do not create a *per se* bar to accession to the GPA. At the same time, the GPA requires that each member country ensure “the conformity of its laws, regulations and administrative procedures, and the rules, procedures and practices applied by its procuring entities, with the provisions of this Agreement” (WTO GPA, 2012, Article XXII, paragraph 4). Thus, given that the *TBL* and the *GPL* are widely considered to fall short of providing a unified and coherent legal framework for public procurement, China will face considerable difficulties when trying to implement and harmonize the GPA’s requirements within its own procurement system.

Tension between the TBL and GPL

The most glaring implementation challenge involves a tension between the *TBL* and the *GPL* (Wang, 2004, p. 285-318); (Cao, 2003). Broadly speaking, the *GPL* covers central and sub-central government purchases, while the *TBL* covers SOE construction projects; large infrastructure projects, and projects financed by international institutions or foreign governments (European Union Chamber of Commerce in China, 2011, p. 6). In practice, however, it is often difficult to determine which of the two laws applies to a given procurement, in particular because both laws are poorly drafted, and unclear with regard to their respective scope (Mitterhoff, 2006). Consequently, as commentators have noted, it will be incredibly difficult to comply with the GPA’s obligations “if the proper instrument for implementation cannot be ascertained in the first place” (Wang and Zhang, 2010, p. 9).

Tension between the *TBL* and *GPL* principally results from the two laws’ overlapping coverage. Specifically, the *TBL* purports to cover “all tendering proceedings,” (*TBL*, 1999, Article 2) while the *GPL* claims to cover “all government procurement” (*GPL*, 2002, Article 2). Perhaps in an effort to clarify its scope with respect to the *TBL*, the *GPL* provides in Article 4 that “[The *TBL*] shall apply to tendering proceedings in government procurement of construction” (*GPL*, 2002, Article 4). In practice, however, this provision does little to resolve the coverage problem. First, it remains unclear which of the two laws will cover the procurement of construction-related goods and services (Wang, 2009, p. 695-96). Second, Article 4 fails to address whether provisions on “buy national” policies, procurement publication requirements, and protest mechanism – critical elements/provisions

in the *GPL*, which are absent in the *TBL* – should apply to government procurement of construction taking place through tendering processes (Wang, 2009, p. 696).

Indeed, problems with China's procurement laws are not surprising given the history of government contracting in China, and the complex institutional framework underlying the Chinese procurement system. Inconsistency in China's procurement laws are inevitable given the competing influences of China's various ministries – the MOF as “bookkeeper” of the state and drafter of the *GPL*, and the NDRC as “investor” of the state and drafter of the *TBL* (Wang and Zhang, 2010, p. 6). Thus, while it may be possible to reconcile the *TBL* and *GPL* in order to satisfy the GPA's requirements, such a process would be complex, time consuming, and politically charged. Moreover, problems may arise because the *TBL* applies to both public and private enterprises, many of which are not covered by the GPA at all (Wang, 2009, p. 696).

Procedural Incongruities between the GPA, TBL and GPL

Even if the tension between the *TBL* and *GPL* were resolved, there remain a number of procedural incongruities between China's domestic procurement laws and the GPA. For example, Article XVII of the GPA, covering “Disclosure of Information,” requires that procuring entities “shall not provide to any particular supplier information that might prejudice fair competition between suppliers” (WTO GPA, 2012, Article XVII, paragraph 2). The *GPL*'s implementing regulations, by contrast, contain no such conflict-of-interest provision (*Tendering Regulation*, 2004). Regarding time-periods, the GPA requires that in an open tendering procedure, the period between publication and bid-submission shall be no less than 40 days (WTO GPA, 2012, Article XI, paragraph 3). The *GPL* and its implementing regulation, by contrast, allow for only 20 days (*GPL*, 2002, Article 35); (*Tendering Regulation*, 2004, Article 16). This distinction could be critical given that foreign contractors will already be at a disadvantage based on their lack of familiarity with the Chinese procurement system and will need the additional time to understand the solicitation and submit an appropriate proposal.

The GPA's Non-Discrimination Requirement

Even implementing the GPA's non-discrimination requirements will present considerable difficulties. The GPA is principally purposed with eliminating non-discrimination in government procurement (WTO GPA, 2012, Article IV). In China, however, government procurement has consistently been used as a tool for pursuing national policy objectives (Wang, 2009, p. 690). To this point, China's primary procurement laws, themselves, explicitly permit agencies to adopt "buy national" policies (*GPL*, 2002, Article 10); (*Tendering Regulation*, 2004, Article 8). Furthermore, in an effort to promote national initiatives, China has, over the years, adopted a number of supplemental regulations encouraging the use of procurement to facilitate national policy goals. In 2007, for example, the MOF implemented the *Measure on Government Procurement of Imported Products*, requiring procuring entities to seek approval before purchasing imported products (*Measure on Government Procurement of Imported Products*, 2007). A variety of other administrative decrees have similarly been used to promote Chinese indigenous innovation through government procurement.¹³

In principal, these policies may be permissible under the GPA if special derogations are negotiated (Wang, 2009, p. 691). Derogations may be problematic, however, because they can spur retaliation from other GPA members. Additionally, negotiating derogations may be exceedingly difficult, as current GPA members have been trying to eliminate existing derogations that are aimed at national policy goals (Wang, 2009, p. 694). Further still, current GPA members are likely to push back against any claim by China that it is a developing nation, particularly given its unprecedented economic growth. Lastly, even if China were accorded developing country status, such benefits would only be temporary and China would be forced to deal with the implementation problem again after the end of the transition period.

ADDRESSING IMPLEMENTATION CHALLENGES THROUGH THE DOMESTIC REVIEW MECHANISM

Of all the challenges to implementing the GPA in China, the Agreement's requirement for a "timely, effective, transparent and non-discriminatory" domestic review procedure may be the most difficult to achieve (WTO GPA, 2012, Article XVIII). As with the

implementation challenges described above, the mere failure of the *TBL* and *GPL* to provide for an acceptable domestic review mechanism could constitute a breach of the GPA, itself. More importantly though, the lack of an effective domestic review mechanism will prevent foreign contractors from getting relief when a Chinese procuring entity fails to abide by *any* of the terms of the Agreement. In this way, a poorly developed or ineffective domestic review mechanism magnifies many of the other problems with China's procurement system discussed in the preceding section. Taken together, this suggests that current GPA members should address defects in the Chinese procurement system *now*, instead of relying on the domestic review mechanism to resolve problems *after accession*.

The GPA's Domestic Review Requirement

The GPA's Domestic Review requirement is found in Article XVIII and requires that GPA member nations provide a judicial or administrative review body for contractors to challenge breaches of the GPA, or a failure by a procuring entity to comply with the country's measures for implementing the Agreement (WTO GPA, 2012, Article XVIII, paragraph 1). This "protest" feature is unique in the GPA. The GPA's predecessor, the GATT Agreement on Government Procurement, did not require a remedies procedure (Arrowsmith, et al. 2000, p. 755). Additionally, among the various WTO agreements, the GPA is one of only a few that requires affected parties to be given a remedy against governments (Arrowsmith, et al., 2000, p. 755-756).

As with other protest mechanisms found in procurement systems around the world, the GPA Domestic Review provision requires that a protesting contractor be an "interested party" and further outlines basic guidelines for the timing of challenges (WTO GPA, 2012, Article XVIII). Notably, the GPA gives member countries the option of providing a Domestic Review process in either a judicial or administrative forum (WTO GPA, 2012, Article XVIII, paragraphs 1, 4). In either case, however, the Agreement requires that the reviewing authority be impartial, and empowered to compel the procuring entity to disclose relevant documents related to the procurement (WTO GPA, 2012, Article XVIII, paragraphs 6, 7).

Supplier Challenges under the TBL

In China's case, the degree to which the *GPL* and *TBL* meet these requirements remains to be seen. To begin, the *TBL* fails to outline a formal process for bid protests. The only reference to challenges is found in Article 65, which simply provides that contractors may raise objections to the procuring entity, or file a complaint with a relevant administrative department, if they believe the procurement was conducted in violation of the *TBL* (*TBL*, 1999, Article 65). The law does not, however, provide any complaint procedures. Even in the absence of specified procedures, however, the review process described in Article 65 of the *TBL* is inconsistent with the GPA. As the procuring entity is, by definition, a biased party, Article 65 clearly fails to meet the GPA's requirement for review by an "impartial" authority (WTO GPA, 2012, Article XVIII). The NDRC has attempted to strengthen the *TBL* with a supplemental regulations designed to clarify the language in Article 65 referring to "relevant administrative departments."¹⁴ Yet in practice, these supplemental rules overlook the fact that different administrative departments apply vastly different review procedures (European Chamber of Commerce in China, 2011, p. 34). For example, under a 2000 State Council opinion (*State Council 2000 Opinion*, 2000) supervisory powers over tendering and bidding activities are distributed among eight different agencies depending on the nature of procurement. Because the bid protest rules for each agency are markedly different, challenging a procurement can be an extremely complex process for aggrieved suppliers. More importantly, in many cases, the administrative department designed to hear a specific challenge would be connected to the procuring entity itself. In this way, even with the additional support of implementing regulations, the *TBL* fails to provide for an impartial review procedure as required by the GPA.

It also bears mentioning that the 2010 *Draft Government Procurement Law Implementing Regulations* suggests that where the *TBL* fails to regulate a certain area the law, the *GPL* may be applied. Consequently, at least in principal, the *GPL*'s more detailed challenge procedure could be used to supplement the *TBL*. As discussed below, however, the *GPL*'s challenge procedure is, itself, deeply flawed. Thus, even with the support of a variety of supplemental regulations, the *TBL* fails to meet the GPA's Article XVIII requirements.

Given the especially high value of projects covered by the *TBL*, this problem is particularly worrisome.

Supplier Challenges Under the GPL

While the *GPL* does a better job of outlining a process for challenging procurement decisions, it too falls short of meeting the GPA's requirements. Challenge procedures are discussed in Articles 51-58 of the *GPL*, which provide a basic framework for the bid protest process (*GPL*, 2002). Detailed rules regarding the protest process are found in the *Measures for Handling Complaints of Government Procurement Suppliers* ("*Complaint Measures*"), an additional set of rules that supplement the *GPL*'s discussion of protests. Even with these additional rules, however, the *GPL*'s protest system remains flawed. The GPA, for example, requires that protesting contractors be permitted to have representation when challenging a procurement in a member countries' domestic review forum (WTO GPA, 2012, Article XVIII, paragraph 6(c)). The *GPL* and the *Complaint Measures*, by contrast, provide that challenges will be principally dealt with through a review of documents and records, with hearings only being provided if the financial department deems it necessary (*Complaint Measures*, 2004, Article 14); (Chao, 2003, p. 169). To be sure, the US bid protest system operates in much the same way, particularly when protests are lodged with the Government Accountability Office ("GAO"). However, given that the MOF and NDRC have a track record of failing to address challenges in a timely and orderly fashion, the absence of express language permitting hearings is particularly worrisome.

Even more troubling is the failure of the *GPL* to conform to the GPA's requirement to provide an impartial appellate review of protest decisions (WTO GPA, 2012, Article XVIII, paragraph 5). Under the GPA, a member state must provide an impartial administrative or judicial review body to receive and review complaints from contractors, and additionally allows "bod[ies] other than [judicial or administrative forums]" to receive complaints (WTO GPA, 2012, Article XVIII, paragraphs 1, 4). In this way, the GPA permits member nations to require bidders to first lodge complaints with the procuring entity itself *if* that country provides an impartial administrative or judicial authority to review the procuring agency's decision (WTO GPA, 2012, Article XVIII, paragraph 5-6). It is at this juncture that the *GPL* diverges from the requirements of the GPA. Under the *GPL*, if a

contractor is dissatisfied with the procuring agency's resolution of its challenge, the contractor *must* appeal directly to the MOF or the Provincial/Municipal Department of Finance (*GPL*, 2002, Articles 54-55). Yet because the MOF and Municipal/Provincial Departments of Finance are ultimately the entities responsible for paying for a procurement, they are can hardly be considered "impartial." Thus, like the *TBL* and its implementing regulations, the *GPL*'s review process is plainly at odds with the requirements of the GPA.

Satisfying the GPA's Domestic Review Requirement through Adjudication

Beyond administrative review, the *GPL* allows for a third appeal through litigation at the People's Court (*GPL*, 2002, Article 58). Given the myriad problems associated with litigating against the government in China, however, this provision will be unlikely to help foreign contractors challenging a Chinese government procurement. To be sure, broad problems with litigation in China say little about whether the country will be able to satisfy the requirements of the GPA. Rather, the challenges of litigating in China – particularly for foreigners – simply demonstrate uncertainty as to whether Chinese adjudication will be an effective way to address procurement disputes under the GPA.

As a starting point, Chinese courts have very limited authority. In the bureaucratic hierarchy of the Chinese state apparatus, courts are parallel to administrative agencies, and are therefore unable to enforce their judgments (Lubman, 2006, p. 29). Thus, in addressing supplier challenges, courts are only permitted to examine whether the administrative review body properly handled the supplier's complaint – the court has no power to deal with the original dispute between the supplier and the procuring entity (Mitterhoff, 2013). Furthermore, as a general principal, Chinese courts only possess the power to apply – not interpret or review – Chinese legislation. Thus, Chinese judges may find themselves in deep trouble if they attempt to resolve a conflict-of-law issue.¹⁵ Given that supplier challenges will inevitably involve conflict of law issues between the *TBL* and *GPL*, there is considerable doubt as to whether Chinese courts can meet the GPA's Article XVIII requirement for "effective" judicial review (WTO GPA, 2012, Article XVIII, paragraph 1, "Each Party shall provide a timely, effective, transparent and non-discriminatory administrative or judicial review procedure . . .").

Additionally, because courts necessarily operate within the larger Chinese bureaucracy, it is common practice for lower courts to request instructions from higher courts while cases are still pending, thereby cancelling out the prospect of appellate review (Lubman, 2006, p. 29). Again, this aspect of the Chinese judicial system is not fatal to the issue of GPA compatibility, as Article XVIII of the GPA plainly does not require member states to provide an appeals system for challenges lodged with a judicial authority (WTO GPA, 2012, Article XVIII, paragraph 5, “Where a body other than an authority referred to in paragraph 4 initially reviews a challenge, the Party shall ensure that the supplier may appeal the initial decision to an impartial administrative or judicial authority that is independent of the procuring entity whose procurement is the subject of the challenge”). However, as with the other general criticisms of the Chinese judiciary, this practice creates doubt as to whether courts of first instance in China are suited to the task of resolving procurement challenges in a timely and efficient manner, particularly given their already heavy caseloads. Furthermore, it is not uncommon for Chinese agencies to neglect to carry out their administrative responsibilities, especially the duty to rule on supplier challenges (Mitterhoff, 2013). This point has real world support. In one well-known Chinese government contracts case, the MOF delayed responded to a supplier’s complaint by seven years, even though the *GPL* requires agencies to respond within 30 days of receiving a complaint.¹⁶

Perhaps even more troubling, judicial decisions in China are often subject to interference by legislatures, based on constitutional provisions that give the Chinese legislature supervisory power over the courts (Lubman, 2006). Similarly, the Chinese Communist Party may exert influence over the courts via local Political-Legal Committees and the Adjudication Committees within the courts, themselves (Lubman, 2006). This external influence is especially likely to occur when cases are deemed particularly complex or challenging (Lubman, 2006). Given that the body of Chinese procurement law is already complex and ambiguous, the likelihood of CCP involvement on procurement disputes involving foreign contractors is particularly high. Taken together, these features raise significant doubts as to whether courts can maintain both the “transparency” and “non-discrimination” requirements mandated by the GPA (WTO GPA, 2012, Article XVIII, paragraph 1). Yet as with the other structural problems with adjudication in China, this issue

speaks more to the efficacy of using courts to resolve bid challenges in China, and less to whether the GPA's minimum requirements can actually be satisfied.

Lastly, it must be noted that foreign attorneys are not permitted to practice in Chinese courts (*Administrative Regulations*, 2001); (*Implementing Rules*, 2001). Thus, if a foreign contractor were to bring a challenge pursuant to Article XVIII of the GPA, it would have to rely on local counsel. In principal, this does not pose a problem to implementing the GPA's Domestic Review requirement. It should be noted, however, that if China were to accede to the WTO GPA, it would be one of the only GPA member states to prohibit foreign attorneys from practicing law within its borders.¹⁷ In this way, China's bar on foreign lawyers could create a considerable practical challenge to foreign contractors seeking relief when prejudiced by the way a Chinese government procurement has been handled.

Bid Protests in Action—The Case of *Beijing Modern Wo'er*

As illustrated by the leading case on government procurement in China, *Beijing Modern Wo'er Trading Co. Ltd. v. Ministry of Finance of the People's Republic of China* (Intermediate People's Court of Beijing Municipality, 2005) the problems with China's bid protest mechanisms are not just theoretical (Mitterhoff, 2006). *Beijing Modern Wo'er* involved the purchase of blood-testing equipment by the NDRC and the Ministry of Health ("MOH") as part of a larger national plan to establish medical rescue and treatment plants throughout China. Ostensibly, the procurement fell within the scope of the *GPL* as it involved the purchase of goods. As such, when the NDRC and MOH inexplicably awarded the contract to the highest-priced bidder, plaintiff Modern Wo'er filed complaints with the MOF as required by *GPL* Article 55. Instead of responding to the complaint, however, the MOF referred the complaints to the NDRC, arguing that the procurement fell within Article 65 of the *TBL* as a "national level construction project." Faced with the prospect of the NDRC acting as both the procuring entity and the review body tasked with addressing the challenge, Modern Wo'er appealed to the Beijing People's Court. While the court ultimately determined the *GPL* to be applicable, it skirted the larger issue of whether the procurement should have fallen under the jurisdiction of the NDRC or the MOF (Mitterhoff, 2006). Thus, *Beijing Modern Wo'er* demonstrates the real-world problems with protesting procurements in China, but

unfortunately provides little insight into whether there has been any progress in addressing the practical issues that have arisen as a result of China's fragmented system.

Taken together, the *TBL*, *GPL* and other supplementary regulations ostensibly provide a basic framework for Domestic Review, at least in form. In substance, however, the available domestic review process may be ill equipped to achieve the underlying goals required by the GPA. Here again, the push-pull dynamic underlying China's ongoing negotiations reveals itself. The current GPA members could ignore the flaws in China's domestic review process and focus solely on issues related to accession. In so doing, however, they may be opening up a Pandora's Box of problems that will only reveal themselves when foreign contractors actually begin to compete on Chinese government procurements.

CONCLUSION

The importance of China successfully implementing the GPA cannot be understated. Indeed, the fate of the GPA may largely depend on whether China is able to effectively comply with the Agreement. In a best-case scenario, China is able to harmonize the GPA's requirements with its domestic laws, thereby demonstrating the Agreement's flexibility and spurring more countries to open their government procurements to foreign contractors. In a worst-case scenario, however, China's failure to successfully implement the GPA may expose the Agreement as rigid and unworkable, thereby dissuading non-member nations from attempting accession.

Against the backdrop of the push-pull underlying China's past negotiations with the GPA, current GPA members must address the shortcomings with China's procurement system in a delicate manner. Thus, while the current GPA members should push China to develop a procurement system that is accessible to foreign contractors, it is crucial that they understand the problems with China's procurement system in the context of the country's broader efforts at legal reform. As such, for current GPA members, the best approach may be to *emphasize the benefits* China would enjoy by updating its procurement laws.¹⁸ For example, by improving and clarifying its domestic legal framework, China would encourage more foreign contractors to compete on Chinese public procurements, thereby increasing competition, and helping Chinese government entities

obtain better value (Wang, 2009, p. 671). Similarly, if foreign contractors are better able to compete on Chinese government procurements, Chinese domestic suppliers will be forced to improve their competence, thereby strengthening the entire Chinese contracting sector. Perhaps most importantly, by successfully implementing the GPA's requirements through revisions to the *TBL* and *GPL*, China may take another step forward in establishing an efficient procurement system immune from political pressure. In this way, China may be able to address broader challenges related to corruption, regionalism and rule of law.

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NOTES

1. The Buy American Act ("BAA"), for example, requires the United States government to prefer U.S. made products in its purchases.
2. All references to the WTO GPA refer to the revised Agreement (effective April 6, 2014), based on the 2012 *Protocol Amending the Agreement on Government Procurement*.
3. Even prior to the creation of the WTO in 1996 during the Uruguay Round of Multilateral Agreements, the General Agreement on Tariffs and Trade (GATT Code, 1981) contained a plurilateral agreement that allowed signatory nations access to foreign procurement markets in exchange for nondiscriminatory treatment of foreign contractors on their own government procurements. The GATT Code remained in effect until it was replaced by the WTO GPA in 1996 (Grier, 2006).
4. China made offers to accede to the GPA in December 2007, July 2010, November 2011, November of 2012, and December of 2014. (Inside U.S. Trade, 2012). The first four of these offers were deemed unacceptable, although negotiations regarding China's fifth offer remain ongoing. (United States Trade Representative, 2014).

5. Indeed, the issue of who these “decision makers” are is critical in understanding why China has thus far been unsuccessful in negotiating accession to the GPA. The Ministry of Finance (“MOF”) has acted as China’s “chief negotiator” during the previous four GPA negotiations. Yet to date, the ability of the MOF to effectively negotiate has been questionable. China’s GPA accession involves central governmental entities as well as SOEs. The MOF, however, does not have authority over procurement of SOEs, which is controlled by the National Development and Reform Commission (“NDRC”) (Wang, 2009, p. 663, 672); (see also, Section III for a discussion of the tensions between the MOF and NDRC).
6. The statutes and regulations referenced in this paper are current as of April 2014. However, there have been a number of recent legislative and regulatory developments in the area of public procurement law including an amendment to the Government Procurement Law (“GPL”) in August of 2014 (*GPL 2014 Amendment*, 2014) and new regulations implementing the GPL in January of 2015 (*Implementing Regulations*, 2015). This paper focuses only on the statutes and regulations in place as of April, 2014.
7. Note that implementing the GPA in a country with a less developed legal framework for procurement is, by definition, more challenging. Consider the ease at which Singapore – a country with a more developed legal system – was able to implement the GPA. “[T]he GPA requirements are congruous with our principals, we have no fundamental problems adhering to the GPA requirements” (Minister of Finance of Singapore, 1997).
8. See, for example, the *Provisional Regulation on Some Issues of Reforming the Management System in the Sector of Works and Infrastructure Construction*, State Council (1980); the *Provisional Regulation on Tendering of Construction Works*, State Council (1984); and the *Provisional Regulation on Domestic Tendering Management in Applying for Import of Machinery and Electrical Equipment*, Office of State Economics and Trade (1986).
9. See, for example, the *Provisional Measures on the Tendering of Design of Construction Works* (State Planning Commission & Ministry of Construction); *Notice on Strengthening the Tendering Administration of National Key Construction Projects* (State

Planning Commission); *Provisional Regulation on Application of Tendering in Large and Medium Sized National Infrastructure Construction Projects*, State Planning Commission (1987); *Measures on the Tendering of Design of Railway Construction*; *Ministry of Electricity, (Provisional) Administrative Regulation on the Tendering of Electricity Works* (Ministry of Railway); *Provisional Measures on the Tendering of Equipment for Construction Works*, Ministry of Domestic Trade (1995); *Guideline on Tendering of Machinery and Electrical Equipment*, State Economy and Trade Commission “SETC,” (1992); *Regulative Measures on Tendering of Machinery and Electrical Equipment*, SETC (1996); *Provisional Measures on Qualification of Tendering Agency for Tendering of Machinery and Electrical Equipment*, SETC (1996).

10. In Article 2, the *TBL* first states that it applies to “all tendering activities conducted in China.” In Article 3, however, the *TBL* provides that tendering must be used in three categories of projects – construction projects involving the public interest or public security; projects funded by the state; and projects funded by international organizations or foreign governments.”
11. As commentators have noted, in retrospect it would have made more sense to focus on expanding the original *TBL* into a full-fledged public procurement law, thereby avoiding the inevitable confusion that has resulted from the existence of two national level procurement laws (Mitterhoff, 2013).
12. Notwithstanding the importance of the *GPL* in improving China’s public procurement regime, there remains some doubt about the degree to which the law’s drafters actually considered the interests of suppliers and government contractors. In particular, it should be noted that supplier representatives were almost completely absent during the law’s drafting process. Instead, the “constituent” parties consisted almost entirely of governmental departments, with the MOF exerting significant amount of influence (Mitterhoff, 2013).
13. See, for example, the MOF *Measures on Budget Administration of Government Procurement of Indigenous Innovation Products* (2007); *MOF Measure on the Evaluation of Government Procurement of Indigenous Innovation Products* (2007); *MOF Measure on the Administration of Contract on Government*

Procurement of Indigenous Innovation Products (2007); State Council Notice on Establishing the Mechanism for Mandatory Procurement of Energy Saving Products (2007); MOF and State Environmental Protection Administration, Opinions on Procurement of Environment Certified Products (2007).

14. See, for example, the *State Council Opinion on the Division of Responsibilities for Administrative Supervision Among the Relevant Administrative Departments Carrying Out Tender and Bidding Activities (2002); Measures for Handling the Complaints Concerning the Tendering and Bidding Activities for Engineering Construction Projects (2004).*
15. See, for example, the *Luoyang City Seed Case (China Law and Governance Review, 2004).*
16. See, for example, *Intermediate People's Court of Beijing Municipality (2005).*
17. While Greece, for example, has similar laws prohibiting foreign attorneys from practicing in the country, the overwhelming majority of GPA member states provide means for foreign attorneys to practice legally, either through reciprocity or examination requirements. GPA member states permitting foreign attorneys to practice locally include: Armenia, Canada, the United States, Austria, Belgium, Cyprus, Israel, Chinese Taipei and Singapore.
18. For an in-depth discussion of benefits that countries may expect by joining the WTO GPA, see (Anderson et al., 2011). For a discussion of the benefits and potential disadvantages China may face after acceding to the GPA, see (Wang, 2009).

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