


Time for China to Enter the WTO's GPA

Is China's GPA accession a cure for "buy national" laws?

 By Stephen Kho and Holly M. Smith

Spurred by the on-going financial crisis, a number of countries are infusing large sums of money into public works projects to stimulate domestic and global economic growth. At the same time, some have adopted, or have contemplated, "buy national" laws that prioritize domestic goods and services in government procurement. There is anxiety in China around proposals like the US "Buy American" provisions to give domestic firms priority over foreign ones in stimulus projects. However, by hastening its accession to the World Trade Organization (WTO) Agreement on Government Procurement (GPA), China could eliminate the potential exclusion of its firms from winning these types of projects.

THE PROLIFERATION OF "BUY NATIONAL" LAWS

Recently, there has been a proliferation of buy national provisions, which aim to restrict government procurement of goods and services to domestic suppliers. Congress' US \$783 billion economic stimulus package, passed on February 17, contains Buy American provisions, requiring all iron, steel and manufactured products for public works projects to be produced domestically. It does, however, concede that the US will honor all obligations under international agreements. The Buy American provisions contain limited exceptions. These include (1) where application would be inconsistent with the "public interest," (2) where US-made products are insufficient in quality or quantity, and (3) where the price differential between US-made and

foreign-made goods is greater than 25 percent.

Argentina, Indonesia, Ecuador, India, Russia, Vietnam and even Parties to the GPA, including Canada, Japan and various EU member states, have all reportedly adopted or proposed legislation incorporating buy national policies. Although Chinese officials, including Vice Minister of Commerce Jiang Zengwei, have publicly refuted the Buy American provisions as protectionist, China also currently has a number of policies in place prioritizing domestic procurement, and—along with other countries—may respond to the global proliferation of protectionist laws by expanding these policies, rather than opening its market and encouraging trade. A better response, however, would be for China to join the GPA, thereby reducing barriers and obtaining access to US and other lucrative global procurement markets.

THE PLURILATERAL GPA

The goal of the GPA is to open up countries' non-defense government procurement markets to international competition. It mandates that procurement-related rules be transparent and that procuring entities do not discriminate against foreign suppliers. Unlike other WTO agreements, the GPA is a "plurilateral" agreement, meaning that participation is voluntary. There are 40 Parties to the GPA, including all countries comprising the EU, and also 23 observer countries, including China.

The GPA guarantees non-discriminatory access of each Party to the procurement markets of all other Parties. Its structure consists of three ele-

ments. First are the general rules and obligations, such as disciplines regarding transparency, tendering procedures and bid challenge proceedings. Second are "market access" schedules of central government entities, sub-central entities, state-owned enterprises (SOEs) or public utilities that each Party has committed to cover under the agreement. Third are the schedules of general services and construction services that are covered under the agreement, listed either negatively or positively.

Generally, buy national provisions must be structured to allow exceptions to accommodate international trade obligations. This means that any Party to the GPA should continue to allow non-discriminatory access to all other GPA Parties, regardless of buy national regulations. In other words, any company from a Party to the GPA would have access to most US government procurement projects, regardless of the adoption of Buy American provisions.

CHINA'S GPA ACCESSION STATUS

As part of its WTO Accession Protocol, in 2001, China agreed to take



steps toward acceding to the GPA “as soon as possible.” China also agreed to ensure that central and sub-central government entities would conduct procurement in a transparent manner, and that all foreign entities would be given an “equal opportunity to participate” in bidding processes for procurement opportunities in a non-discriminatory manner.

As one of its first steps toward joining the GPA, in January 2003, China promulgated its Government Procurement Law. While this law generally incorporates procedural disciplines from international procurement agreements, including the GPA and the UN Model Law on Procurement of Goods,

it also allows Chinese government entities at the central and sub-central levels to prioritize domestic goods and services in procurement proceedings, with only very limited exceptions. Until China becomes a party to the GPA, it may legally adopt such discriminatory policies.

China finally agreed to commence GPA accession negotiations in April 2006, nearly five years after acceding to the WTO. In December 2007, China submitted its initial GPA market access offer, listing government and government-related entities that it intends to be covered by the disciplines of the GPA. The GPA Parties reacted to China’s offer with disappointment, and through several rounds of negotiations urged China to submit an improved offer quickly. However, China has yet to submit a revised offer.

CHINA SHOULD ACCELERATE THE ACCESSION PROCESS

To hasten accession to the GPA and ensure access to govern-

ment procurement projects, like those in many stimulus packages, China should consider the following steps to reform its domestic regulations and improve its market access offer:

First, China should either broaden the scope of its Government Procurement Law to include “public works projects,” or reform its Tendering and Bidding Law to incorporate the disciplines of the GPA. China takes the position that “public works projects” are not covered by the GPA because, as a technical matter in China, “public works projects” are regulated by the Tendering and Bidding Law, which is separate from—and lacks the international-standard disciplines found in—the Government Procurement Law. Considering that “public works projects” comprise more than one-half of China’s government procurement market, it is problematic that China currently excludes this category for GPA purposes.

This position is further troubling given that, in its 2001 WTO Accession Protocol, China agreed to conduct all procurement proceedings “in a transparent manner” in the interim period between entry into the WTO and accession to the GPA. Moreover, China’s exemption of “public works projects” contradicts the commonly-accepted definition of government procurement as described in the WTO’s General Agreement on Tariffs and Trade and General Agreement on Trade in Services. In those agreements, government procurement is defined as:

the procurement by governmental agencies of products [or services] purchased for governmental purposes and not with a view to commercial resale or with a view to use in the production of goods [or supply of services] for commercial sale.

This broad definition is intended to encompass procurement for any government public works projects. By exempting public works projects from its offer, China undermines its own efforts to accede to and comply with the GPA.

Second, China should reduce existing domestic preference rules on government procurement, and continue to move towards full conformity with the GPA disciplines. Since its accession to the WTO in 2001, China has introduced



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a number of new procurement rules prioritizing domestic goods and services, including for software, computer and telecommunications products; medical device products; and energy-efficient technologies. Although China legally may enact these discriminatory measures, it is disconcerting that China progressively continues to implement such restrictive trade barriers for government procurement, in a non-transparent manner, even as it nominally works towards GPA accession.


Third, China should revise its market access offer in a way that is commercially meaningful to existing GPA Parties. Such an offer should include four elements: First, it should have a revised central government entities schedule with significantly lower contractual value thresholds that align better with the commitments of existing GPA Parties. Second, a revised services schedule which incorporates the Universal List of Services compiled by the WTO is important. (From this China could create a “negative” list, whereby all services would be covered except for those specifically excluded.) Third, it should include expansive coverage

under the sub-central government and SOEs or public utilities schedules, which were not included in China’s initial market access offer. And finally, exceptions that are equitable with those taken by existing GPA Parties are important to include.

In turn, existing GPA Parties may wish to consider compromising with China. For example, they could accept graduated compliance with sub-central government entities and SOEs or public utilities schedules in exchange for robust offers under the schedules for central government entities, general services and construction services. GPA Parties should take into account the fact that China has a far larger sub-central government and SOE procurement market than any other existing GPA Party.

BUY NATIONAL RESPONSE

It may be tempting for China to respond to the proliferation of buy national provisions with increasingly protectionist regulations of its own. However, the best course for China in response to the current economic downturn is to ensure that its domestic

firms have access to the growing government procurement markets in the US and around the world by becoming a party to the GPA as quickly as possible. At this stage of its economic maturity, China can show that it is confident enough to have its companies compete at home and abroad based on the merits of their products and services. 

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