THE STALEMATE IN CHINA'S GPA ACCESSION NEGOTIATIONS—IS THERE A WAY OUT?

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ABSTRACT

Why have China's negotiations to accede to the Government Procurement Agreement (hereinafter "GPA") dragged on for almost two decades since China's commitment to join as part of its World Trade Organization (WTO) accession? This is puzzling given the GPA's estimated market coverage of $1.7 trillion annually, and China's government procurement market estimated at over $280 billion annually. On the domestic front, China has improved its government procurement regime significantly in recent years. On the international front, China tabled a seventh offer in October 2019, after a period of inaction since its last revised offer at the end of 2014. In this article, we analyze the factors that led to the stalemate in the negotiations, and the consequent five-year gap between China's sixth and the seventh offers. We discuss a number of problematic issues for various parties, some relevant to any state in the process of acceding to the GPA, others, specific to China. We argue that rationalist calculations on the part of China and its

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trading partners have led to the prolonged negotiations. In a wider context, we suggest that inconclusive negotiations would have troublesome implications for the international economic legal order.

KEYWORDS: *international economic law and policy, market access, government/public procurement, WTO Agreement on Government Procurement (GPA), China's public procurement*

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I. INTRODUCTION

Why have China's negotiations to accede to the Government Procurement Agreement (hereinafter "GPA") dragged on so long, given China's commitment to join as part of its World Trade Organization (hereinafter "WTO") accession almost two decades ago?[1] This is puzzling given the huge economic gains that all sides stand to achieve if China joins the GPA. The GPA's estimated market coverage is $1.7 trillion annually, to which China would have access upon accession, and China's estimated coverage is $467.6 billion annually,[2] to which other GPA members would have access, once China joins the GPA.[3]

This is also puzzling considering that on the domestic front, China, in recent years, has improved its government procurement legislation and independent review mechanism, strengthened the rule of law, increased its efforts to fight corruption, and has pledged to provide equal treatment to foreign investors participating in government procurement under its new Foreign Investment Law.[4]

Moreover, since an important goal of the revised GPA is to diversify membership,[5] it would seem that GPA members would be receptive to China's accession.

To date, China has tabled seven offers in its GPA negotiations. It presented its initial offer at the end of 2007, and then, revised offers on an annual basis between 2010 and 2014 (July 2010, November 2011, November 2012, December 2013, and December 2014). Despite acknowledgement by other GPA members that the scope and coverage of its proposals through 2014 had improved continuously, China's offers were rejected, with members expressing disappointment and calling for significant

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[1] *See generally* World Trade Organization, *Protocol on the Accession of the People's Republic of China*, WTO Doc. WT/L/432 (Nov. 23, 2001) [hereinafter *Protocol on the Accession of the PRC*]; World Trade Organization, *Report of the Working Party on the Accession of China: Corrigendum*, WTO Doc. WT/ACC/CHN/49/Corr.1 (Oct. 5, 2001) [hereinafter *WTO Report of the Working Party on the Accession of China: Corrigendum*]; Ministerial Conference, *Report of the Working Party on the Accession of China*, WTO Doc. WT/MIN(01)/3 (Nov. 10, 2001) [hereinafter *Ministerial Conference Report of the Working Party on the Accession of China*] (China's commitment to accede to the GPA can be found in Para. 341 of Report of the Working Party. This commitment was one of the legally binding commitments incorporated into China's Protocol of Accession under Para. 342 of the Working Party Report).

[2] Yang Yi, *China's Government Procurement Up 24.8 Pct*, XINHUA NET (Oct. 6, 2018, 1:00 PM), http://www.xinhuanet.com/english/2018-10/06/c_137514467.htm.

[3] World Trade Organization [WTO], *Trade Policy Review China Minutes of the Meeting Addendum*, at 89, WTO Doc. WT/TPR/M/375/Add.1 (Feb. 1, 2019).

[4] Zhonghua Renmin Gongheguo Waishang Touzi Fa [Foreign Investment Law of the People's Republic of China] (promulgated by Standing Comm. Nat'l People's Cong., Mar. 15, 2019, effective Jan. 1, 2020) [hereinafter Foreign Investment Law of the PRC], art. 16.

[5] *Revised Agreement on Government Procurement*, WTO, https://www.wto.org/english/tratop_e/gproc_e/gp_revised_gpa_e.htm (last visited Mar. 9, 2020).

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improvement. From early 2015, no headway was achieved, and the negotiations were perceived as having reached a stalemate. No progress was made until China submitted, under confidentiality, its seventh offer on October 21, 2019.[6] We analyze possible factors that led to the stalemate, and the five-year gap between the submission of the sixth and the seventh offers.

We suggest that the prolonged negotiations reflect rationalist calculations, where the tradeoffs regarding China's accession to the GPA have been evaluated by China and its negotiating partners, and found to be questionable for both sides. Despite the complexity of the issues involved, and without access to China's seventh offer, we nevertheless discuss whether there is a way out of the stalemate in China's GPA negotiations.

A. Assumptions

Our analysis is based on two widely accepted assumptions in international relations theory. First, we make a general assumption that states are rational self-interested actors.[7] Second, we build on a state-centric view that maintains that the state is a central, unitary actor in international relations.[8] The case for assuming the state to be a unitary actor in China's GPA negotiations is compelling, since China's policies regarding most areas, including the GPA are guided from the top.[9] China's GPA negotiations are led by a small group of experts from the Ministry of Finance (with MOFCOM responsible for coordinating China's WTO negotiations) working directly under high-ranking decision makers at the central government level.[10] Although Chinese companies could form interest groups to gain access to foreign procurement markets, most of the Chinese companies operating abroad are state-owned enterprises (hereinafter "SOEs") or rely heavily on government financing and/or subsidies.[11] Consequently, we assume that their interests are represented by central government top policymakers.

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[6] *China Submits Revised Offer for Joining Government Procurement Pact*, WTO (Oct. 23, 2019), https://www.wto.org/english/news_e/news19_e/ gpro_23oct19_e.htm; Chen Jia, *China Submits Seventh Bid for WTO's GPA*, CHINA DAILY (Oct. 21, 2019, 08:14 PM), https://www.chinadaily.com.cn/a/201910/21/WS5dada126a310cf3e35571bdd.html.

[7] *See generally* James G. March & Johan P. Olsen, *The Institutional Dynamics of International Political Orders*, 52 INT'L ORG. 943 (1998).

[8] *See generally* David A. Lake, *The State and International Relations*, *in* OXFORD HANDBOOK OF INTERNATIONAL RELATIONS 41 (Christian Reus-Smit & Duncan Snidal eds., 2008) (A state-centric view is reflected in a number of international relations paradigms, including realism, and neo-realism).

[9] *See generally* Weixing Hu, *Xi Jinping's 'Major Country Diplomacy': The Role of Leadership in Foreign Policy Transformation*, 115 J. CONTEMP. CHINA 1 (2019).

[10] SHUXIU ZHANG, CHINESE ECONOMIC DIPLOMACY: DECISION-MAKING ACTORS AND PROCESSES 123-124 (2016).

[11] *See generally* HUIYUAN WANG & LU MIAO, CHINA GOES GLOBAL (2016).

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Even though Chinese SOEs are becoming more influential market actors, suggesting that the top-down relationship with policymakers is giving way to a more horizontal partnership,[12] this trend is presently limited to specific projects, and in our view, is not reflected in international economic negotiations. Thus, Chinese companies going global are subject to the authority and policies determined by the central government, and generally conform to central government policy.

Our assessments regarding the sides' interests are based on information we have extrapolated from various primary and secondary sources, including formal policy papers, personal interviews, publications of authoritative policy makers, reports of WTO GPA Committee meetings, and more general economic studies regarding government procurement.

B. Organization

The paper starts with an analysis of the revised GPA effective as of 2014. It proceeds with a discussion of the principal elements in China's government procurement regime *vis-à-vis* the GPA. We then propose a taxonomy of the different stages of China's GPA accession negotiations. The next part discusses the policy considerations leading to the stalemate and the time gap between the sixth and seventh offers. Policy considerations are divided into two categories: general policy considerations applicable to any state considering joining the GPA and China-specific policy considerations. We conclude with some thoughts on the implications of our findings for the successful conclusion of the negotiations, in the face of the global trade war, the current weakening of the WTO regime, the shift from global to regional, and domestic developments within China.

II. THE GPA'S ADVANTAGES AND LIMITATIONS

A. The Architecture of the GPA

Government procurement is an area that is excluded from the multilateral rules of the WTO.[13] It is, however, covered by a plurilateral agreement under the WTO, the GPA. The GPA aims at opening public

[12] *See generally* Xiaoou Zhu, *Demystifying the Role of Chinese Commercial Actors in Shaping China's Foreign Assistance: The Case of Postwar Sri Lank*a, 4 STABILITY: INT'L J. SECURITY & DEV. Art. 24 (2015).

[13] General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994) [hereinafter GATT]; General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183, 33 I.L.M. 1167 (1994) [hereinafter GATS]; Under GATT Article III 8. (a) and GATS Article XIII, government procurement is carved out of the multilaterally binding rules of the WTO.

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procurement markets, by eliminating discriminatory government procurement practices among its members. As a "plurilateral" agreement, the GPA, unlike most other WTO agreements, is not included in the package of the "single undertaking" of the WTO Agreements. This means that joining the GPA is voluntary, and thus, not all WTO members have signed on to it. Nonetheless, in recent years, new WTO members, like China, have been asked to make a commitment to accede in the future.

The GPA is currently the main international instrument regulating international trade in government procurement markets, and more specifically, among its signatories.[14] Governments are the world's largest consumers, making rules on government procurement essential. The total expenditure of public procurement of goods, services and works has been estimated to account for 10-15% of a country's GDP, and trade related to government procurement estimated to account for about 10% of total world trade.[15]

GPA rules aim at promoting international competition in government purchases of goods, services and construction services, by ensuring fair, transparent and non-discriminatory conditions between domestic and foreign suppliers. The GPA is also designed to promote good governance, the efficient and effective management of public resources, and the attainment of best value for money in national procurement systems.[16] Some observers emphasize the importance of the GPA (including the revised GPA) and its growing impact.[17] Other studies point to the limited effects of the GPA.[18]

GPA members take on two types of commitments: rules applying to all GPA members, and specific market access commitments which are reflected in each member's schedule. The negotiating process to accede to the GPA is largely a one-way process, where the acceding member accepts all the legal

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[14] *See generally* Robert D. Anderson et al., *Regional Trade Agreements and Procurement Rules: Facilitation or Hindrances?*, *in* THE INTERNATIONALIZATION OF GOVERNMENT PROCUREMENT REGULATION 56 (Aris Georgopolous et al. eds., 2017). However, it should be noted that many preferential trade agreements also include provisions on government procurement that go beyond GPA market access commitments. For example, see the Canada–EU Comprehensive Economic and Trade Agreement, under which European companies are permitted to participate in sub-federal procurement tenders. *See generally* Comprehensive Economic and Trade Agreement (CETA) , Can.-EU, Oct. 30, 2016, O.J. (L11) 23.

[15] *See WTO and Government Procurement*, WTO, https://www.wto.org/english/tratop_e/gproc_e/gproc_e.htm (last visited Mar. 11, 2020).

[16] *See generally* Dorina Harceno, WTO GPA Accession: Driving Force for Reforms in the Public Procurement Sector, Case Study of Republic of Moldova and Ukraine, Address at Public Procurement: Global Revolution IX (June 17, 2019).

[17] *See generally* Robert D. Anderson & Nadezhda Sporysheva, *The Revised WTO Agreement on Government Procurement: Evolving Global Footprint and Policy Significance*, 3 PUB. PROCUREMENT L. REV. 71 (2019).

[18] *See generally* Bedri Kamil Onur Taş et al., *Does the WTO Government Procurement Agreement Deliver What It Promises?*, 18(4) WORLD TRADE REV. 609 (2019).

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disciplines of the GPA and makes concessions in its market access, without being able to make demands of GPA members.

Government procurement was first addressed in the Tokyo Round of the General Agreement on Tariffs and Trade (hereinafter "GATT"). Entering into effect in 1981, it became the Agreement on Government Procurement. The Agreement was amended in 1988. During the Uruguay Round negotiations, which led to the establishment of the WTO, the GPA was further revised. The WTO GPA was signed in 1994 and entered into force in 1996.[19] Article XXIV 7 (b) of the GPA called for the start of negotiations to improve the agreement,[20] leading to revision of the GPA at the end of March 2012. The revised GPA entered into effect on April 6, 2014.[21] The revision modernizes the text, expands coverage, and among other things, incorporates the use of electronic methods of procurement.[22] It also explicitly prohibits conflicts of interests and corrupt practices to promote good governance.[23]

Importantly, some of the improvements facilitate accession for new countries, by enhancing the flexibilities offered to developing countries, including transitional use of price preferences for other developing countries, offsets, phased-in addition of entities or sectors, and thresholds higher than the standard thresholds.[24]

The GPA is presently comprised of fourty-eight WTO members.[25] The early members of the GPA were mostly developed economies.[26] They were later joined by the new members of the European Union (hereinafter "EU"),

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[19] For history of the GPA, see *Agreement on Government Procurement*, WTO, https://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm (last visited Mar. 11, 2020).

[20] For wording of provision, see *Uruguay Round Agreement: Agreement on Government Procurement*, WTO, https://www.wto.org/english/docs_e/legal_e/gpr-94_02_e.htm#articleXXIV7b (last visited Mar. 11, 2020).

[21] For full text, see Protocol Amending the Agreement on Government Procurement, Mar. 30, 2012, 1915 U.N.T.S. 3009 [hereinafter GPA]. For official summary of types of revisions, see WTO, *supra* note 5.

[22] GPA arts. IV.3 (Use of Electronic Means), XIV (Electronic Auctions), XVI.2 (Publication of Award Information), XVI.3 (Maintenance of Documentation, Reports and Electronic Traceability).

[23] GPA art. IV.4 (Conduct of Procurement).

[24] GPA art. V; *see generally* Robert D. Anderson et al., *The WTO's Revised Government Procurement Agreement - An Important Milestone Toward Greater Market Access and Transparency in Global Public Procurement Markets*, 54 GOV'T CONTRACTOR 1 (2012); Robert D. Anderson & Anna Caroline Müller, *The Revised WTO Agreement on Government Procurement (GPA): Key Design Features and Significance for Global Trade and Development* (WTO Staff Working Paper No. ERSD-2017-04, 2017).

[25] For updated membership statistics, see *Agreement on Government Procurement: What is the GPA?*, WTO, https://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm (last visited Mar. 11, 2020).

[26] Canada, EU (Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxemburg, the Netherlands, Portugal, Spain, Sweden and the United Kingdom), the Netherlands with respect to Aruba, Norway, Switzerland and the US. Israel was the only signatory allowed to maintain an offset restriction. For history of Israel's government procurement regime, *see generally* Arie Reich, *Israel's Public Procurement Regime*, *in* THE INTERNATIONALIZATION OF GOVERNMENT PROCUREMENT REGULATION 221 (Aris Georgopoulos et al. eds., 2017).

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and some Asian economies.[27] Since the Revised GPA, Montenegro, Moldova, New Zealand, Ukraine, and Australia have joined. Nine others are in the process of accession: among them, with the most substantial potential markets, are China and Russia. Twenty-three other countries are observers to the GPA, including India. In sum, over the last twenty years, the roster of the GPA has increased from twenty-two members to forty-eight members. The most significant expansion was a consequence of EU membership (the EU enlargement accounting for fifteen new members). Yet, even now, only about 30% of WTO members are GPA members.

As part of the 2012 revision, some GPA members expanded their market access commitments to include additional government agencies, Build-Operate-Transfer (BOT) contracts (the EU, Japan and Korea), and lower thresholds. However, the GPA still only covers a limited portion of members' government procurement. And despite the revised GPA's goal of facilitating membership for developing countries, accession negotiations are moving slowly.[28] We suggest that some of the considerations reflected in the impasse in China's GPA negotiations, as described below, are also relevant to other countries considering accession, such as India and Russia.[29]

B. Coverage and Exceptions Under the GPA

GPA rules call for non-discrimination whereby a member is obligated to treat the goods and services of other members in the same manner as it treats its own goods and services in its government procurement. Each member makes specific market access commitments regarding covered procurement referred to as schedules, in Annexes attached as an Appendix to the GPA.

Members' obligations only apply to covered procurement, that is, procurement by entities and goods and services listed in each member's schedule, for tenders over a certain threshold. However, some discriminatory exclusions have been incorporated into members' specific market access commitments. For example, the United States (hereinafter "US") and Canada were able to retain domestic preferences, such as set-asides for small businesses and minority-owned businesses.[30]

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[27] Republic of Korea, Hong Kong, Lichtenstein, Singapore, Iceland, additional members of the EU (Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovak Republic and Slovenia in 2004, Bulgaria and Romania in 2007 and Croatia in 2011.

[28] *Australia Accepted as New Party to Government Procurement Pact*, WTO, https://www.wto.org/english/news _e/new s18_e/gpro_17oct18_e.htm (last visited Mar. 11, 2020).

[29] Archana Jatkar & Vinitha Johnson, *India and the WTO Procurement Deal*, CTR. INT'L TRADE, ECON. & ENV'T [CUTS] (Feb. 21, 2013), https://cuts-citee.org/india-and-the-wto-procurement-deal/; *see generally* Manickam Supperamaniam, *Asian Perspective on Government Procurement Matters*, 1(2) ASIAN J. WTO & INT'L HEALTH L & POL'Y 291 (2006).

[30] Jean Heilman Grier, GPA Reciprocity: Providing Leverage for Bilateral Agreements, Address at Public Procurement: Global Revolution IX (June 17, 2019).

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The GPA (Article III) provides for exceptions regarding essential security, public morals, human, animal, or plant life or health, intellectual property, or persons with disabilities philanthropic institutions or prison labors. These are similar to GATT Articles XX and XI, although the GPA does not include the exception related to the "conservation of exhaustible natural resources." In addition, the revised GPA calls for further reforming government procurement obligations of GPA members in areas such as SMEs, sustainable procurement and safety standards which were not addressed or included in the form of a hard commitment.[31]

Thus, members' schedules accommodate significant policy space in their domestic procurement markets to achieve industrial policy objectives (i.e. to benefit domestic companies). However, this means that GPA schedules also limit the market access of other GPA members.

As a general rule, the GPA does not apply to the acquisition or rental of land, existing buildings or other immovable property or the rights thereon; non-contractual agreements or any form of assistance that a party provides, including cooperative agreements, grants, loans, equity infusions, guarantees and fiscal incentives; the procurement or acquisition of fiscal agency or depository services, liquidation and management services for regulated financial institutions or services related to the sale, redemption and distribution of public debt, including loans and government bonds, notes and other securities; public employment contracts; procurement conducted for the specific purpose of providing international assistance, including development aid.[32]

Notably, GPA commitments include derogations from the key principle of non-discrimination through reciprocity clauses that allow exceptions aimed at specific markets.[33] Signatories' derogations are sometimes accompanied by declarations that they will be withdrawn when comparable access is provided to other signatories' suppliers.[34]

As noted by Grier,[35] parties use several types of conditional reciprocity reservations under the GPA. For central government entities, parties often condition their own level of openness to that of other parties based on reciprocal openness. For sub-central government entities, or other entities, a similar approach is frequently taken. In the face of reservations on goods,

[31] GPA art. III, Appendix 2, Annexes B-G.
[32] GPA art. II.3.
[33] This approach departs from the earlier GATT Code on Government Procurement (implemented in 1981), where commitment to non-discrimination (both Most Favoured Nation [MFN] and National Treatment [NT]) was made without derogation. *See generally*, Arie Reich, *The New Text of the Agreement on Government Procurement: An Analysis and Assessment*, 12(4) J. INT'L ECON. L. 989 (2009).
[34] *See generally* Kamala Dawar, *The Government Procurement Agreement, the Most-Favored Nation Principle, and Regional Trade Agreements*, *in* THE INTERNATIONALIZATION OF GOVERNMENT PROCUREMENT REGULATION 111 (Aris Georgopoulos et al. eds., 2017).
[35] Grier, *supra* note 30.

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services, utilities, construction services or specialized small business programs, reciprocal reservations may apply, that is, parties make similar reciprocity requirements.

The outcome of multiple reciprocity clauses in the schedules of the different GPA members leads to a complex network of reservations. The revised GPA did not change this. As Grier suggests, one approach to untangling the complicated network of reservations is through direct bilateral negotiations. In fact, she argues that reciprocity clauses may serve as leverage in promoting bilateral trade agreements.[36]

C. Good Governance and Best Practices Under the Revised GPA

In addition to promoting competition and non-discrimination between domestic and foreign suppliers, the GPA sets a benchmark for good governance and value for money in government procurement. As such, it promotes transparency, openness, avoidance of conflict of interests and can contribute to preventing corruption in procurement. [37]

Transparency is one of the key principles of the GPA. Under Article IV (4) tenders must be carried out in a transparent and impartial manner. Very specific information regarding laws, judicial decisions, and notices of the tenders themselves, must be published and accessible to the public (Article VI, Article VII). Conditions for participation, qualifications of suppliers, the technical specifications of the tenders, and the time periods for the tender are detailed in the GPA (Articles VIII, IX, X, XI). The awarding of the tender must be transparent, in accordance with very specific rules, including notification to unsuccessful suppliers.[38]

However, as noted by Hoekman, transparency was weakened under the revised GPA. For example, reporting requirements are weaker than in the 1994 GPA. Under the revised GPA, data on procurement awards may be posted on a national website rather than in the form of specific reports to the WTO Secretariat. This weakens the role of the WTO Secretariat as a data monitoring agent.[39]

Finally, the GPA (Article XVIII) obligates all members to have a domestic review mechanism in place, where a supplier can challenge its breach independently of its government. This reflects the need to provide a timely and effective remedy for an unsuccessful competitor in a specific tender. This type of mechanism is entirely different from the inter-

[36] *Id.*
[37] *See generally* Sue Arrowsmith, *Transparency in Government Procurement: The Objectives of Regulation and the Boundaries of the World Trade Organization*, 37 J. WORLD TRADE 283 (2003).
[38] GPA art. XVI.
[39] Bernard Hoekman, *International Cooperation on Public Procurement Regulation*, *in* THE INTERNATIONALIZATION OF GOVERNMENT PROCUREMENT REGULATION 568, 588-89. (Aris Georgopoulos et al. eds., 2017).

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governmental dispute settlement under the WTO's Dispute Settlement Understanding)[40] which is also available,[41] however due to limited recourse to remedies, was hardly used. Since most GPA members come from a long "rule of law" tradition, they are likely to have effective domestic institutional avenues to address breaches regardless of the requirement provided for in the GPA.

Aside from the WTO's work on government procurement, other international institutions have developed tools to assess and reform national public procurement regimes.[42] The UNCITRAL revised Model Law on Public Procurement aims at guiding countries in the design of their national procurement systems.[43] The OECD's Methodology for Assessment of Procurement Systems (hereinafter "MAPS"), promoted as a universal means for encouraging reform and good governance in public procurement, offers a tool for assessing existing national procurement regimes. Dozens of countries reportedly having undergone MAPS evaluations.[44] Tools such as the OECD's MAPS or UNCITRAL's Model Law on Public Procurement may achieve more in public procurement regulation and reform than the GPA. In the future, by successfully completing a MAPS evaluation, countries could be able to attain a type of "accreditation", or ranking of their government procurement regime, without having to make legally binding commitments under the GPA. In addition, other non-legal means of promoting best practices in public procurement have also been undertaken, such as the Public Procurement Knowledge Exchange Forum (now the Procurement, Integrity, Management and Openness (PRIMO) forum) organized by the World Bank.[45]

D. Interim Conclusions

The GPA offers the only binding international rules for the liberalization of government procurement. However, it is constrained by five features. First, regarding market access, GPA obligations only apply to the sectors and

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[40] *See generally* Mitsuo Matsushita, *Major WTO Dispute Cases Concerning Government Procurement*, 1(2) ASIAN J. WTO & INT'L HEALTH L. & POL'Y 299 (2006); *Understanding on Rules and Procedures Governing Dispute Settlement*, WTO, https://www.wto.org/english/tratop_e/dispu_e/d su_e.htm (last visited Mar. 11, 2020).

[41] GPA art. XX.

[42] For a list, see *Relevant Instruments Adopted by Other Organizations*, WTO, https://www.wto.org/english/tratop_e/gproc_e/information_e.htm (last visited Mar. 11, 2020).

[43] U.N. COMM'N ON INT'L TRADE L. [UNCITRAL], UNCITRAL MODEL LAW ON PUBLIC PROCUREMENT, U.N. Sales No. E.14.V.1 (2011); *Guide to Enactment of the UNCITRAL Model Law on Public Procurement*, UNCITRAL, http://www.uncitral.org/uncitral /en/uncitral_texts/procurement_infrastructure/2012Guide.html (last visited Mar. 11, 2020).

[44] MAPS METHODOLOGY FOR ASSESSING PROCUREMENT SYSTEMS, http://www.mapsinitiative.org/ (last visited Mar. 11, 2020).

[45] *15th Procurement, Integrity, Management and Openness (PRIMO) Forum*, WORLD BANK, https://www.worldbank.org/en/events/2019/04/10/primo-forum (last visited Mar. 11, 2020).

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entities covered in members' schedules, and from a certain threshold, thus coverage is limited. Secondly, as Grier has argued, GPA commitments include reciprocity clauses, further limiting market access among parties. Thirdly, as both Messerlin and Hoekman note, there is little evidence that the GPA has increased market access for foreign suppliers in members' procurement markets.[46] Fourth, although promoting good governance is considered to be an important byproduct of the GPA, one key discipline, transparency, which would have a good governance impact, was relaxed in the revised GPA. Finally, the GPA is still generally a club of developed economies, and, despite the latest revision of the GPA, which was designed to encourage developing economies to join, few have done so.

III. CHINA'S GOVERNMENT PROCUREMENT REGIME AND THE GPA

A. China's Government Procurement Regime

The scope of policy change and economic growth that has taken place in China over the past four decades, since Deng Xiaoping launched the 1978 market-oriented reforms, is the subject of countless academic studies. China's government procurement regime has also changed dramatically as an integral part of these institutional and economic changes. [47]

Initially, much of the general reform as well as reform in public procurement can be attributed to dialogue, advice and requirements of the World Bank and the International Monetary Fund (IMF) during the 1980s.[48] For example, World Bank-funded projects required China to open up the bidding to international competition.[49] From government spending based on a centralized planning system, the government procurement system has undergone constant change, through the increasing introduction of elements of competition and privatization. Moreover, as China vigorously promotes the use of internet technology, e-procurement has become a standard feature of government procurement.

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[46] Patrick A. Messerlin, *How Open Are Public Procurement Markets?*, *in* THE INTERNATIONALIZATION OF GOVERNMENT PROCUREMENT REGULATION 548, 567 (Aris Georgopoulos et al. eds., 2017).

[47] *See generally* Fuguo Cao, *China's Government Procurement Reform: From the Bidding Law to the Government Procurement Law*, *in* PUBLIC PROCUREMENT: THE CONTINUING REVOLUTION 61 (Sue Arrowsmith & Martin Trybus eds., 2003); Fuguo Cao, *China's Public Procurement and Institutional Framework: History, Structure and Operation*, *in* INTERNATIONAL HANDBOOK OF PUBLIC PROCUREMENT 323 (Khi V. Thai ed., 2009).

[48] HAROLD KARAN JACOBSON & MICHEL OKSENBERG, CHINA'S PARTICIPATION IN THE IMF, THE WORLD BANK, AND GATT: TOWARD A GLOBAL ECONOMIC ORDER 57-81, 107-26 (1990).

[49] *See generally* Nicholas R. Lardy, *China and the International Financial System*, *in* CHINA JOINS THE WORLD: PROGRESS AND PROSPECTS 206 (Elizabeth C. Economy & Michel C. Oksenberg eds., 1999).

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Two sets of national legislation presently regulate government procurement in China: the Government Procurement Law (last amended in 2014)[50] and its implementing regulations[51] and the Bidding Law (in effect from 1 January 2000, amended 2017)[52] and its implementing regulations.[53] These are supplemented by numerous measures issued by various ministers and governmental agencies, which may apply at the central level, to different localities (provincial levels, etc.), or are aimed at specific sectors.

The result is a complicated and cumbersome legal regime with multiple sources of law. This regulatory mix may lead to conflicting provisions and lack of clarity.[54] In the context of China's administrative/bureaucratic structure, under the "tiao-kuai" system,[55] with multiple sources of power, at the central and local levels, the regulatory complexity is also reflected in China's government procurement regime.

An indispensable aspect of every government procurement regime is supplier access to domestic review. This is also a GPA requirement, which mandates domestic review as a primary avenue for challenging violations.[56] For many years, China's government procurement legislation provided for the general right of review and remedies. However, due to structural constraints, the legislation was hardly ever implemented.[57] As a mandatory initial step, China's supplier review system requires administrative review, first by reconsideration of the procuring entity, and then through appeal to

[50] Zhonghua Renmin Gongheguo Zhengfu Caigou Fa [Government Procurement Law of the People's Republic of China] (promulgated by Standing Comm. Nat'l People's Cong., June 29, 2002, effective Jan. 1, 2003; rev'd by Standing Comm. Nat'l People's Cong. 2014), CLI.1.232864 (EN) (Lawinfochina).

[51] Zhonghua Renmin Gongheguo Zhengfu Caigou Fa Shishi Tiaoli [The Regulation on the Implementation of the Government Procurement Law of the People's Republic of China] (promulgated by St. Council, Jan. 30, 2015, effective Mar. 1, 2015), CLI.2.243772 (EN) (Lawinfochina).

[52] Zhonghua Renmin Gongheguo Zhaobiao Toubiao Fa [The Bidding Law of the People's Republic of China] (promulgated by St. Council, Dec. 28, 2012, effective Dec. 28, 2012; rev'd by Standing Comm. Nat'l People's Cong., Dec. 27, 2017), CLI.1.307547(EN) (Lawinfochina).

[53] Zhonghua Renmin Gongheguo Zhaobiao Toubiao Fa Shishi Tiaoli [Regulation on the Implementation of the Bidding Law of the People's Republic of China] (promulgated by St. Council, Mar. 2, 2019, effective Mar. 2, 2019), CLI.2.312766(EN) (Lawinfochina).

[54] *See generally* Ping Wang, *China's Accession to the WTO Government Procurement Agreement—Challenges and the Way Forward*, 12 J. INT'L ECON. L. 663 (2009); Wei Yan, *Legislative Conflicts and the Resolution of China's PPP Legislation*, 7 CHINA LEG. SCI. 3 (2019).

[55] *See generally* PING WANG & XINGLIN ZHANG, CHINESE PUBLIC PROCUREMENT LAW: AN INTRODUCTORY TEXTBOOK (2010); Daniel J. Mitterhoff, *The Four into One Platform: New Reform Initiatives Compound China's Dissected Public Procurement Governance* (University of Maryland Legal Studies Research Paper No. 2012-43, 2012).

[56] GPA art. XVIII.

[57] *See generally* Daniel J. Mitterhoff, *Waiting for Leviathan: A Note on Modern Wo'Er Trading Co Ltd v Ministry of Finance of the People's Republic of China*, 22 PUB. PROCUREMENT L. REV. 47 (2013); Xinglin Zhang, A Supplier Review System as Part of the Government Procurement System for China, (2008) (PhD thesis, University of Nottingham), http://eprints.nottingham.ac.uk/10653/1/Thesis-xinglin_zhang.pdf.

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an administrative supervisory unit. Following this, an appeal to the judiciary can be made. Since 2018, elaborate provisions clarify procedural justice elements required for effective supplier review.[58] This is part of a general trend to strengthen the rule of law,[59] and emphasize anti-corruption policies.[60] These provisions are supplemented by strict rules scrutinizing bidding agencies with disciplinary measures addressing irregularities in the performance of bidding agencies.

As China continues to reform its economy, its government procurement regime is also maturing, with new measures to promote competition, transparency, government performance, best value for money, and good governance in the fight against corruption.[61] From this perspective, it seems that China's goal to join the GPA is aligned with its domestic interests. Similar arguments were made to justify requiring China to assume comprehensive WTO-plus transparency commitments.[62] At the same time, it should be noted that such a goal cannot be achieved overnight.[63]

Finally, an important pillar of China's public procurement regime with implications for the GPA, is China's new Foreign Investment Law, effective as of 1 January 2020.[64] Under the law, China makes a clear commitment to allow foreign-funded enterprises (i.e., post establishment) to participate in government procurement under conditions of "fair competition". The implementing regulations mandate that "no entity or individual may use any means to obstruct or restrict foreign-invested enterprises from freely entering the government procurement market in its region or industry." A government procurement regulatory department, a procurer or procurement agency must

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[58] Zhengfu Caigou Zhìyi He Tousu Banfa [Measures for Challenges and Complaints against Government Procurement] (promulgated by Ministry of Fin., Dec. 26, 2017, effective Mar. 1, 2018), CLI.4.307765(EN) (Lawinfochina).

[59] *The Central Committee of the Communist Party of China, Communiqué of the 4th Plenary Session of the 18th Central Committee of the Chinese Communist Party*, CHINA COPYRIGHT & MEDIA (Oct. 23, 2014), https://chinacopyrightandmedia.wordpress.com/2014/10/23/official-central-committee-communique-on4th-Plenum/.

[60] *See generally* Melanie Manion, *Taking China's Anticorruption Campaign Seriously*, 4 ECON. & POL. STUD. 3 (2016).

[61] *No. 1614 [2018] of the National Development and Reform Commission (Notice of the National Development and Reform Commission, the Bank of China, and the Ministry of Finance on Issuing the Memorandum of Cooperation for Imposing Joint Punishments on Seriously Dishonest Entities or Individuals in the Government Procurement Field)*, PKULAW.COM, https://www.pkulaw.com/en_law/c57b2db1c7da1846bdfb.html (last visited Mar. 11, 2020).

[62] *See generally* Henry S. Gao, *The WTO Transparency Obligations and China*, 12 J. COMP. L. 329 (2018); Yong-Shik Lee & Xiaojie Lu, *China's Trade and Development Policy Under the WTO: An Evaluation of Law and Economics Aspect*, 2 China & WTO Rev. 339 (2016); Fuguo Cao & Zhou Fen, *Internationalization of Public Procurement Law and Relevance of International Norms and Frameworks: The Case of China*, *in* THE INTERNATIONALIZATION OF GOVERNMENT PROCUREMENT REGULATION 368 (Aris Georgopolous et al. eds., 2017).

[63] *See generally* Fuguo Cao & JiangYu Huang, *Research on the Remedy System in China's Government Procurement Contract Awarding Phase*, 7 J. INV. & MGMT. 59 (2018).

[64] Foreign Investment Law of the PRC, *supra* note 4.

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ensure that foreign-invested enterprises participate in government procurement activities on the basis of fair competition, and shall not discriminate against foreign-invested enterprises by limiting a supplier's ownership, organizational form or equity structure or an investor's country of origin or by imposing other unreasonable conditions in terms of the publication of government procurement information, the determination of supplier criteria, qualification review and evaluation standards, etc. This includes the obligation of government procurement regulatory departments to provide equal guidance and services to Chinese-funded enterprises and foreign-invested enterprises in government procurement activities. This is significant since foreign companies in China have, for many years, complained of unequal treatment in the government procurement market.[65] Moreover, by making the commitment through law, China is taking a meaningful step forward.

At the same time, it should be noted that the Government Procurement Law stipulates that procurement should facilitate the achievement of state goals for economic and social development with a provision calling for the procurement of domestic goods, services and construction. These domestic preferences are presently implemented through the Ministry of Finance Measure on the Administration of Imported Products.[66] As will be seen below, these provisions could potentially complicate China's negotiations.

Without undertaking a complete analysis of all of China's government procurement laws and regulations, it is clear that China's government procurement regime has improved. These improvements are complemented by the overall reform of China's judicial system which is becoming increasingly transparent and open.[67] Furthermore, under the Foreign Investment Law, products manufactured or services provided by foreign-funded enterprises within China are to be treated equally with those of domestic enterprises. Moreover, based on China's domestic government procurement and intellectual property reform,[68] and the revisions to its foreign investment laws, we conclude that conformity with the GPA is achievable, particularly if the political will exists on the part of China.[69]

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[65] THE EUROPEAN UNION CHAMBER OF COMMERCE IN CHINA, PUBLIC PROCUREMENT IN CHINA: EUROPEAN BUSINESS EXPERIENCES COMPETING FOR PUBLIC CONTRACTS IN CHINA (2016-2017) 27 (2011), https://static.europeanchamber.com.cn/upload/documents/documents/public_procurement[25].pdf.

[66] Cai Ku, *Circular of the Ministry of Finance of the People's Republic of China on Printing and Distributing the Measures for the Administration of Government Procurement of Import Products*, INVEST IN CHINA (Dec. 27, 2007), http://www.fdi.gov.cn/1800000121_39_1479_0_7.html.

[67] *See generally* Björn Ahl et al., *Data-Driven Approaches to Studying Chinese Judicial Practice: Opportunities, Challenges, and Issues*, 19 CHINA REV. 1 (2019).

[68] *See generally* Peter K. Yu, *The Rise of China in the International Intellectual Property Regime*, *in* HANDBOOK ON THE INTERNATIONAL POLITICAL ECONOMY OF CHINA 424 (Ka Zeng ed., 2019).

[69] DEMING CHEN, ECONOMIC CRISIS AND RULE RECONSTRUCTION 350-51 (2016).

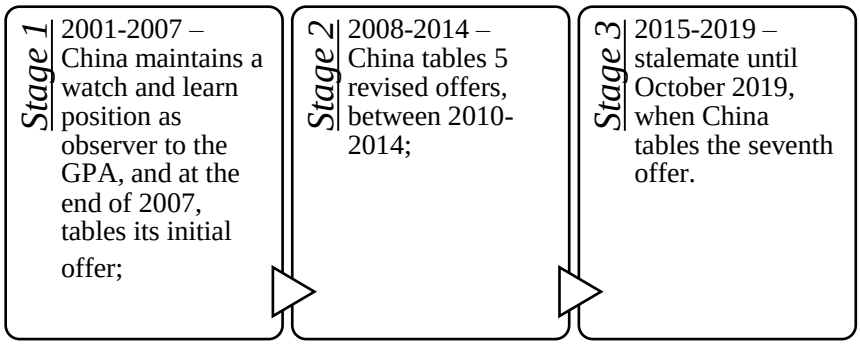
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B. China and the GPA Negotiations—Offers and Responses

When China joined the WTO in 2001, members required it, like other acceding members at the time, to join the GPA. However, unlike most other acceding countries at the time, China did not give a firm timetable for joining, only agreeing to initiate negotiations for membership *as soon as possible* [italics added].[70] In addition, China agreed that procurement at central and sub-central levels would be conducted transparently, and if opened to foreign suppliers, would be done so on the basis of MFN.[71]

We identify three distinct stages in China's GPA negotiations.

CHART 1: Three Stages in China's GPA Negotiations



C. Stage 1—Watch and Learn

In early 2002, China became an observer to the GPA, almost immediately after acceding to the WTO, in accordance with its accession commitment.[72] We describe this early period as one of watching, learning and adjusting. In addition to attending GPA Committee meetings as an observer, China received technical guidance from experts from the US and

[70] *See generally Protocol on the Accession of the PRC*, *supra* note 1; *WTO Report of the Working Party on the Accession of China: Corrigendum*, *supra* note 1; *Ministerial Conference Report of the Working Party on the Accession of China*, *supra* note 1. For discussion regarding China's GPA commitment as "WTO-Plus" obligations, see generally Julia Ya Qin, *"WTO-Plus" Obligations and Their Implications for the World Trade Organization Legal System - An Appraisal of the China Accession Protocol*, 37 J. WORLD TRADE 483 (2003).

[71] *See generally Protocol on the Accession of the PRC*, *supra* note 1; *WTO Report of the Working Party on the Accession of China: Corrigendum*, *supra* note 1; *Ministerial Conference Report of the Working Party on the Accession of China*, *supra* note 1.

[72] *Id.*

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the EU as well as from the WTO Secretariat.[73] Following a request by China, the WTO Secretariat provided a national seminar on government procurement in September 2005. During this period, it also reportedly undertook a number of internal studies regarding the implications of joining the GPA, including the promulgation of the Government Procurement Law.[74]

Despite its 2001 WTO accession commitment to initiate GPA negotiations as soon as possible, China only tabled its first offer on December 28, 2007.[75] Why at this precise time, did China decide to table an offer? One observer suggests that a key motive for China to submit the 2007 offer, was that it considered the GPA "a useful force for pushing domestic political anti-corruption efforts." [76] Another explanation has been put forward by Tu Xinquan, in view of the timing and content of the offer. Professor Tu, has explained that, after China launched its indigenous innovation policy in 2006,[77] foreign suppliers started to worry that they would no longer have access to China's public procurement tenders, and began to pressure the Chinese government to fulfill its obligation to accede to the GPA[78] Consequently, during the US-China Joint Commission on Commerce and Trade in April 2006, China agreed to commit to submit an offer by the end of 2007. To keep its promise, China submitted a limited initial offer at the very end of 2007.

China's initial offer reflected a defensive, minimalist position as a starting point for the negotiations. It covered only fifty central government entities, fourteen other entities, no sub-central government entities, scheduled extremely high thresholds (in comparison to those of most GPA members), with up to fifteen years transition periods. Moreover, China based

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[73] *See generally* Xinquan Tu, *China's GPA Negotiations: What are They Really About*, *in* FROM RULE TAKERS TO RULE MAKERS THE GROWING ROLE OF CHINESE IN GLOBAL GOVERNANCE 41 (Scott Kennedy & Shuaihua Cheng eds., 2012).

[74] Committee Gov't Procurement, *Checklist of Issues for Provision of Information Relating to Accession to the Agreement on Government Procurement - Communication from the People's Republic of China*, WTO Doc. GPA/ACC/CHN/8 (Sept. 16, 2008), referred to in: Committee Gov't Procurement, *2008 Report of the Committee on Government Procurement*, n.38, WTO Doc. GPA/95 (Dec. 9, 2008).

[75] Committee Gov't Procurement, *Application for Accession to the Agreement on Government Procurement, Communication from the People's Republic of China*, WTO Doc. GPA/93 (Jan. 14, 2008). The offer was dated 28 December 2007, but circulated as a WTO document on 14 January 2008. China's Appendix 1 offer is restricted so this document only includes the letter accompanying its offer. And see generally Xinquan Tu & Na Sun, *Government Procurement in TPP and Its Implications for China's GPA Accession Negotiation*, *in* PARADIGM SHIFT IN INTERNATIONAL ECONOMIC LAW RULE-MAKING 307 (Julien Chaisse et al. eds., 2017) (The analysis in this paper relies on details from the Tu and Sun article),

[76] *See generally* ZHANG, *supra* note 10.

[77] *See generally* Ben Baden, *Domestic Innovation and Government Procurement Polices*, CHINA BUS. REV. (Oct. 1, 2011), https://www.chinabusinessreview.com/domestic-innovation-and-government-procurement-policies/.

[78] Tu, *supra* note 73, at 43.

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its offer on a positive list of goods covered in contrast to GPA members, who based their schedules on negative lists; that is, for GPA members, all goods are covered except those listed.[79]

D. Stage 2: 2008-2015: Growing Confidence, Serious Engagement, Progressively Improved Offers[80]

During 2008, at two informal GPA committee meetings devoted to China's accession, Members (including Canada, the EC, Japan, Korea, Norway, Switzerland, the US) noted the need for China to improve its initial offer, and China replied by describing the difficulty it faced in modernizing its government procurement regime to bring it into compliance with GPA requirements.[81] China promised to submit an improved offer as soon as possible (GPA/95). During 2009, China replied to questions regarding its government procurement regime, and reiterated the difficulties it was facing, noting the necessity of training personnel, and in preparing a revised offer.

Between 2010 and 2014 of the GPA negotiations, China submitted improved offers almost yearly. It tabled its first revised offer in July 2010. In it, China made some changes, including sixty-two central government entities and their subordinate administrative entities, the same fourteen other entities, and still no sub-central government entities, with the same starting thresholds, but decreased the transition period from fifteen years to five years.[82]

China tabled a second revised offer in November 2011, which covered sub-central government entities for the first time. These sub-central government entities consisted of 171 entities from three municipalities and two provinces. Thresholds for the sub-central government entities were considerably higher than those for central government entities. The lists of

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[79] *See generally* Jean Heilman Grier, *What Are the Prospects for Concluding Work on China's GPA Accession in 2015?*, 24 PUB. PROCUREMENT L. REV. 221 (2015); Committee Gov't Procurement, *supra* note 74.

[80] Committee Gov't Procurement, *Accession of the People's Republic of China to the Agreement on Government Procurement - Communication from the People's Republic of China - First Revised Offer*, WTO Doc.GPA/ACC/CHN/16 (July 9, 2010); Committee Gov't Procurement, *Accession of the People's Republic of China to the Agreement on Government Procurement - Communication from the People's Republic of China - Second Revised Offer*, WTO Doc. GPA/ACC/CHN/30 (Nov. 30, 2011); Committee Gov't Procurement, *Accession of the People's Republic of China to the Agreement on Government Procurement - Communication from the People's Republic of China - Third Revised Offer*, WTO Doc. GPA/ACC/CHN/41 (Nov. 29, 2012); Committee Gov't Procurement, *Accession of the People's Republic of China to the Agreement on Government Procurement - Communication from the People's Republic of China - Fourth Revised Offer*, WTO Doc. GPA/ACC/CHN/44, (Jan. 6, 2014); and the Committee Gov't Procurement, *Accession of the People's Republic of China to the Agreement on Government Procurement - Communication from the People's Republic of China - Fifth Revised Offer*, WTO Doc.GPA/ACC/CHN/45 (Jan. 5, 2015).

[81] *See generally* Committee Gov't Procurement, *supra* note 74.

[82] Tu & Sun, *supra* note 75.

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covered goods and services were also expanded. China's third revised offer, submitted in November 2012, was similar to the previous offer, but added 100 more sub-central government entities, from three new provinces.[83]

China submitted a fourth revised offer in 2014 which expanded the number of sub-central government entities to a total of 446 sub-central entities, including some from four new provinces. However, coverage of the latter from the four new provinces would come into effect six years after China's accession to the GPA. This offer was made on the basis of the pre-revised GPA.[84]

China's fifth revised offer (submitted at the end of December, and circulated on 5 January 2015) significantly lowered the thresholds for central government entities to 130,000 SDRs for goods and services from the third year, and expanded coverage of sub-central entities, including nineteen municipalities for a total of 558 entities.

Although GPA members acknowledged an improvement in China's fifth revised offer, they also noted that significant gaps still remained.[85] Indeed, an analysis by Jean Grier (2015) discussed the gaps that remained between the schedules of GPA members and China's offer. Even though the thresholds China offered for central government entities were the same as those of most GPA members, the thresholds it offered for sub-central entities were higher than those of the EU and other parties (but the same as that of Canada, Israel and the US). In addition, China maintained an explicit safeguard on national security related central entities, although this is not unique to China. China also excluded sub-central government coverage *vis-à-vis* construction services "using special funds of the central government." In addition, China proposed a three year delay in the application of the GPA regarding ten out of fifteen provinces.

During GPA Committee discussions, China suggested that it be accepted on the basis of this offer, with the understanding that its coverage would be improved, considering that at the time, "expansion of coverage would rely on future reforms."[86] As summarized by Professor Tu, "Chinese negotiators added new concessions in a manner akin to squeezing toothpaste out of a tube".[87] However, GPA members asked China to further improve its offer. Among other things, GPA members requested China to cover additional SOEs in other sectors, to ensure reciprocity.

We link China's progressively improved revised offers starting in 2010, to the 2007-2008 global financial crisis, and the growing confidence it gained

[83] *Id.*
[84] *Id.*
[85] Committee Gov't Procurement, *2015 Report of the Committee on Government Procurement*, at 9, WTO Doc. GPA/134 (Nov. 16, 2015).
[86] *Id*. at 10.
[87] Xinquan Tu, *Organization Factors in China's GPA Accession*, *in* GLOBAL GOVERNANCE AND CHINA: THE DRAGON'S LEARNING CURVE 89, 109 (Scott Kennedy ed., 2018).

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when it not only was the first to start to recover from the crisis, but, with its enormous stimulus program, proved to be a stabilizing global force during the crisis. Another byproduct of the global financial crisis, was the shock effect it had on China's economic policy, in that in addition to basing its economy on domestic consumption, rather than mainly on exports, China started to recognize the importance of diversifying its export markets.

E. Stage 3: 2015-2019—Stalemate in Negotiations

From the end of 2014 until the end of 2019, China's GPA's negotiations did not progress. Indeed, China seemed to put its GPA negotiations on a back burner. This may be contrasted with China's growing confidence and proactive approach in other international economic domains. We regard this period as one of an impasse between China and GPA members.

On October 21, 2019, after almost a five year standstill, China circulated its seventh offer. The new offer reportedly includes the military department for the first time, seven additional provinces, sixteen SOES, thirty-six local colleges and universities and additional service sectors. China's new offer also apparently includes standard GPA thresholds for goods and services covered, albeit after a transition period.[88]

IV. WHY THE PROLONGED NEGOTIATIONS?

China has taken a number of steps to accede to the GPA, but the question remains, why were the negotiations at an impasse for so long? If we digress for a moment, we might want to ask what do countries gain from joining the GPA? What do they lose? To analyze the prolonged negotiations and the current stalemate, we undertake an exercise listing the pros and cons of joining the GPA that China is likely to have weighed. China is likely to have found that the costs outweigh the potential benefits of joining, at least for the time being. Moreover, many of the possible gains from joining the GPA could be achieved without joining. And finally, the potential costs may have been considered too high.

A. Pros and Cons of GPA Accession—General Considerations

If we start from the pro side of the calculus, increased competition from foreign suppliers can lower prices paid by government agencies, thereby lowering government spending. The government can, in turn, pass lower costs onto consumers. Nevertheless, it is possible to open government procurement markets to foreign competition unilaterally, i.e., without joining

[88] Chen, *supra* note 6.

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the GPA. Second, increased foreign competition through GPA membership allows the government access to the best solutions in the global value chain, thereby assuring the best value for money. However, once again, it is not necessary to join the GPA to achieve this aim. In fact, in some key areas, China already promotes the introduction of international suppliers into its domestic government procurement market. Moreover, as noted above, China made a commitment to fair competition for foreign-funded enterprises in the framework of its new foreign investment law. Therefore, joining the GPA is not a prerequisite to achieving increased foreign competition for any country, including China.

Third, there are "good governance" effects from bringing legislation into line with the good practices required by the GPA. A more transparent government procurement regime can lead to less corruption, increased efficiency, and greater accountability. As noted above however, many countries including China are already working towards these goals without GPA membership. In particular, China has taken action to control corruption, increase transparency and strengthen the judiciary. Fourth, China's exporters would have greater access to foreign public procurement markets. Although this is a key benefit, a government could achieve the same benefit without joining the GPA. Professor Tu points out that unlike its more general WTO accession, where international rules were used to fight domestic resistance to opening up the economy, the Chinese leadership does not see the necessity of foreign pressure through joining the GPA to improve its procurement system. [89] Moreover, just because a country is a GPA member does not guarantee that its exporters will win tenders.[90] In addition, even if a company of a GPA member does win a tender, it still might face difficulties in receiving visas and work permits for its workers, or meeting standards. (This might be particularly relevant for China.) The GPA does not resolve these issues.[91]

Joining the GPA may also be a means to increase a country's prestige in the international arena. In this context, it is important to note that China is already on its way to becoming a global economic leader, as a member of the G-20, through its rise in the global economy to second largest economy after the US, through the initiation of new, international economic institutions such as the Asian Infrastructure Investment Bank (AIIB) and the New Development Bank (NDB), and through its Belt and Road Initiative

[89] *See generally* Tu, *supra* note 87.
[90] Onur Taş et al., *supra* note 18.
[91] *Should India Join Government Procurement Agreement?*, YOUTUBE (June 5, 2015), https://www.youtube.com/watch?v=gRPdqf_25EI (Should India sign Government Procurement Agreement? Ms Bulbul Sen, former Chief Commissioner of Income Tax speaks at the Red Flag conference on "Procurement Governance" (8-9 Aug 2014)).

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(hereinafter "BRI"). China, therefore, has other avenues to achieve economic influence and stature.

Furthermore, the GPA relies on reciprocity as an underlying governing systemic principle. As noted above, much of a GPA member state's government procurement is not covered because GPA obligations only apply to specific sectors, entities, and services over a certain threshold. In addition, as observed by Grier, the GPA is heavily influenced by reciprocity reservations, effectively limiting some of the benefits of the GPA as a global instrument. This allows government procurement to continue to be used as a domestic industrial policy tool, even among the signatories to the GPA, where import penetration has been shown to be low. Such an approach, is in fact, consistent with China's emphasis on reciprocity as an underlying principle of China's foreign investment regime.[92]

Moreover, as for other positive effects of the GPA, in particular, transparency, it should be recalled that under the revised GPA the transparency related requirements were even relaxed. Finally, the GPA does not address new global developments such as the rise of global value chains, where country of origin of industrial and advanced goods and services, is no longer obvious.[93]

Table 1 summarizes the different considerations discussed above, while identifying whether the motivation has a direct *sine qua non* link to achieving such aim. In other words, does China (or any other state) need to join the GPA to achieve, among other things, lower prices in its government procurement through foreign competition, to implement good governance practices, or to gain access to foreign government procurement markets?

TABLE 1: General Considerations for All Potential GPA Members as They Apply to China

Consideration	Is joining the GPA **necessary** to achieve this aim?	
Pros		
Good governance effect - integrity and predictability of government procurement systems are integral to the efficient and effective management of public resources	No	China is continually reforming and modernizing its government procurement regime, introducing advanced measures for competition and efficiency, such as e-procurement, transparency measures, etc. Foreign pressure is

[92] Foreign Investment Law, art. 40.

[93] GPA art. IV.5, XXII.9 (refer to rules of origin; progress is linked with the rules of origin negotiations taking place under the WTO Agreement on Rule of Origin which have not progressed).

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		not necessary to achieve reform in government procurement.
Good governance effect – and less corruption	No	The fight against corruption is a main pillar of the Xi regime, including the introduction of a new specialized constitutional organ dedicated to such purpose.
Int'l competition introducing advanced solutions ensuring best value for money	No	China opened some of its sectors to international competition, aimed at receiving more value for money, in areas where the international bidding process is favorable to the development goals and priorities of the Chinese government.
Access to GPA members' markets	No	Although Chinese companies will be able to compete in the government procurement markets of GPA members, they will not necessarily win tenders. Moreover, the GPA allows for broad reciprocity reservations that may, in the final analysis, defeat the purpose of joining the GPA.
International recognition of best practices in government procurement	Yes, but	Joining the GPA certainly provides international recognition, however, new, alternative tools, such as the OECD MAPS may also achieve the same goal.
Economic Diplomacy: Increased international economic status.	No	China is achieving greater international status through other initiatives.
Economic Diplomacy: "being part of an Agreement that will gain in importance, at a time when the entry price is still affordable"	Yes, but	However, the GPA has not succeeded in attracting many new members, with India and China, the largest markets, not having acceded.
Economic Diplomacy – "being on the «comfortable side» of the table when additional WTO Members /	Yes, but	However, see the point above.

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competitors negotiate their accession"		
Economic Diplomacy – "having the opportunity to keep shaping the GPA in the coming decade."	Yes	It is not possible to negotiate GPA rules without joining. While there may not be big changes in the near future given the 2014 revision, work has been undertaken through various work programs within the framework of the Committee on Government Procurement.
Cons		
Loss of autonomy in industrial policy	Yes, but	Countries have to eliminate/phase out domestic preferences for covered procurement. China's legislation (Article 10 of GPL) allows for domestic preference in public procurement. While the GPA includes wide space for policy exceptions, China would have to phase out domestic preferences in covered procurement. It could also be asked to eliminate set asides and/or preferences for SMEs
GPA has systemic problems (not related to China) which may lead to limited benefits	Yes	See discussion in text above; coverage limited to listed entities, goods, services and construction services over threshold, derogations from GPA coverage are standard, reciprocity provisions for most member, good governance rules such as transparency have been weakened in Revised GPA, GPA members' companies may be eligible for public tenders but there is no guarantee that they will win, new developments such as global supply chains not addressed by GPA, tradeoffs and linkages in negotiations are limited since negotiations are only on government procurement

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Alternatives to the GPA for international neutral evaluation may be less costly or more beneficial	Yes	MAPS is a much less costly, non-binding possibility, government procurement provisions in bilateral trade agreements may provide more benefits since they are part of a broader package.
Exposes GPA member to WTO dispute settlement	Yes	Acceding to GPA would enable other GPA members to sue new GPA member in WTO under the strict and legally binding WTO dispute settlement mechanism. Could also be viewed as pro, since would also permit new GPA member to sue other GPA members for non-compliant practices.

B. China-Specific Policy Considerations

Beyond the general calculations that are applicable to any member considering GPA membership, additional important policy considerations are related specifically to China's socialist market economy.

As noted above, one of the complaints regarding China's 2014 revised offer was that it failed to include SOEs. From the Chinese perspective however, SOEs are not subject to China's Government Procurement Law, since they are supposed to be independent market entities, and the GPA on the other hand, dictates that government procurement is procurement carried out for governmental purposes (GPA Article I).

In fact, in its original WTO accession negotiations, China's representative confirmed that:

> [A]ll 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 related 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.[94]

[94] WTO, *Report of the Working Party on the Accession of China*, ¶ 47, WTO Doc. WT/ACC/CHN/49/ (Oct. 1, 2001), which is incorporated into the Protocol of Accession under ¶ 342. If this commitment had not been included, it might have been considered government procurement and thus excluded under the GATT (Article III 8(a)) and the GATS (Article XIII). As a side note,

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Professor Tu has explained that this should mean that China would not have to include SOEs in its GPA coverage, since it had already agreed to national treatment for procurement by SOEs upon acceding to the WTO. Nevertheless, as he notes, GPA members are still pressing China for additional assurance that its SOEs would operate in a non-discriminatory manner, and in the case of a breach, the governments of foreign suppliers would have recourse to WTO dispute settlement.[95]

Even though the Chinese economy has undergone continual reform, the government's role in the economy remains central. Despite a somewhat declining role in the economy since the 2008 global economic crisis, SOEs remain a fundamental cornerstone of the Chinese economy. The importance of SOEs to the Chinese economy cannot be overemphasized. As of June 2018, SOEs still accounted for 28% of China's industrial assets even though they contributed only 18% of total industrial profit. Despite SOEs' limited return on assets—3.9% compared with 9.9% for private firms—they racked up RMB 100 trillion (USD fifteen trillion) in debt by the end of 2017, equivalent to 120% of national GDP. In addition, SOEs continue to serve key strategic functions. They advance China's industrial policy by channeling capital toward key and pillar sectors, key technologies, important national projects, and domestic and international strategic initiatives like the BRI. In addition, the Chinese leadership has relied on SOEs to help avert financial crises.[96] SOEs are crucial to the performance of China's equity markets—the fourth largest in the world—due to the heavy state presence on the Shanghai and Shenzhen exchanges.[97] Dividends and taxes from SOEs are a major source of central government revenue and local government revenues. State firms also contribute to social stability by employing approximately sixty million people (as of 2016), keeping prices low for key inputs, and serving on the front lines of disaster relief.[98] Moreover, SOEs serve a redistributive and developmental function sub-nationally by spending the bulk of investment on infrastructure projects in China's poorer inland provinces. Another consideration is related to the role of SOEs in upgrading China's global economic presence. Some of China's multinational

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Zhou, Gao and Bai (2019) suggest that this commitment can be used as the basis of a WTO complaint regarding state intervention through SOEs. *See generally* Weihuan Zhou et al., *China's SOE Reform: Using WTO Rules to Build a Market Economy*, 68(4) INT'L & COMP. L. Q. 977 (2019). And see generally Jaemin Lee, *Trade Agreements' New Frontier-Regulation of State-Owned Enterprises and Outstanding Systemic Challenges*, 14(1) ASIAN J. WTO & INT'L HEALTH L. & POL'Y 33 (2019).

[95] Tu, *supra* note 73, at 44.

[96] *See generally* Jennifer N. Carpenter & Robert F. Whitelaw, *The Development of China's Stock Market and Stakes for the Global Economy*, 9 ANN. REV. FIN. ECON. 233 (2017).

[97] *See generally* Lei Pan & Vinod Mishra, *Stock Market Development and Economic Growth: Empirical Evidence from China*, 68 ECON. MODELLING 661 (2018).

[98] *See generally* LUYAO CHE, CHINA'S STATE-DIRECTED ECONOMY AND THE INTERNATIONAL ORDER (2019).

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corporations that appear on lists of the world's largest companies such as the Fortune Global 500 list, are SOEs.[99] Thus, SOEs help implement important public policy goals.

This is likely to be another key reason that China has been reluctant to make GPA commitments regarding SOEs. Indeed, Professor Tu has noted that including SOEs in China's GPA commitments "runs counter to the orientation of Chinese SOE reform", and would require a decision by China's top leaders.[100] During Stage 2 of China's GPA accession negotiations (2008-2014) discussed above, the EU requested that all entities that engaged in commercial or industrial activities in China in the area of gas or heating, electricity, water supply, urban transport, airports, ports, telecommunication services, petroleum, coal and other solid fuel exploitation and mining, postal services, be included in China's GPA coverage. More than 100 companies were enumerated. Prof. Chen Deming, former Minister of Commerce, explains why it would be impossible to accept this request, arguing that:

> *In its Working Group's report for WTO Accession, the Chinese Government committed that state-owned enterprises and state invested enterprises would not be considered government procuring entities. If China were to accept all the restrictions that developed countries imposed on their state owned enterprises, this would far exceed what China can tolerate and accept*.[101]

China's recent statements regarding SOEs emphasize their commercial function rather than their governmental affiliation and ownership structure. In China's May 2019 proposal for WTO reform, it raises the treatment of China's SOEs, explaining that "SOE engaged in commercial competition are equal players in the market as other enterprises." In China's view, non-selectively labeling all of its SOEs as "public bodies" within the meaning of the Agreement on Subsidies and Countervailing Measures (Subsidies Agreement/CVD Agreement), establishing additional transparency requirements and discriminating against SOEs in foreign investment security reviews is "detrimental to the institutional framework for fair competitions . . . ."[102]

Moreover, China's call for respect of "the diversity of development models among Members and the promotion of fair competition in the fields

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[99] Mark Wu, *The "China, Inc." Challenge to Global Trade Governance*, 57(2) HARV. INT'L L.J. 261, 269 (2016).
[100] Tu, *supra* note 73, at 44.
[101] CHEN, *supra* note 69, at 350.
[102] General Council, *China's Proposal on WTO Reform: Communication from China*, 7, WTO Doc. WT/GC/W/773 (May 13, 2019).

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of trade and investment"[103] can also be made in the context of the GPA. Ultimately, according to China, "such efforts would strengthen the inclusiveness of the multilateral trading system." Here, it should be mentioned that China's approach is not without grounds, and in fact, the WTO Panel interpretation supports a narrow interpretation of "governmental purpose" when defining SOEs.[104] Chinese laws establish a legal distinction between the government and SOEs. Article 7 (State Economy) of China's Constitution states that the state-owned economy is the leading force in the national economy. SOEs' decision-making power over their operation and management, however, is prescribed within the limits of the law (Article 16 —State Enterprises). China regards its SOEs as independent legal persons that base their decisions on their commercial interests. Nevertheless, SOEs also engage in activities on behalf of the state through appropriate authorization. This distinction is relevant not only for the application of the GPA, but also for determining whether sovereign immunity applies to a certain act of an SOE.[105] To make things more complex, when deciding whether an activity of an entity is performed for governmental purposes, one must bear in mind the role of the Chinese Communist Party (hereinafter "CCP"). At the 2013 Third Plenum meeting, Xi outlined an array of ambitious market-oriented reforms with regards to SOEs. However, these reforms did not undermine the role of the CCP in SOEs management. New measures were published and clarified in a transparent manner the role of the Party in the management of listed companies.[106]

The Belt and Road Initiative (hereinafter "BRI") is another area whose importance to the present discussion cannot be overstated. In our view, the lack of progress in China's GPA negotiations for so long can also be attributed to the evolution, consolidation and success of the BRI. The BRI enables Chinese companies access to projects that might fall under the label of government procurement. Indeed, as discussed below, compared to the GPA, the BRI is not a legally binding instrument: it allows for flexibility, it is implemented through various formats, and as noted below, most BRI project tenders are carried out by Chinese companies. The consequence of the BRI, whether intentional or not, is that it leads to forum shifting. In essence, the BRI can be seen as a means to sidestep the GPA, particularly

[103] *Id.* at 8.
[104] *See generally* Panel Report, *United States — Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WTO Doc. WT/DS379/R (adopted Mar. 25, 2011); Panel Report, *United States — Countervailing Duty Measures on Certain Products from China*, WTO Doc. WT/DS437/R (adopted Jan. 16, 2015).
[105] *See generally* TNB Fuel Services Sdn Bhd v. China National Coal Group Corp., [2017] 3 H.K.C. 588 (C.F.I.).
[106] *See generally* DANIEL H. ROSEN ET AL., MISSING LINK: CORPORATE GOVERNANCE IN CHINA'S STATE SECTOR (2018), https://asiasociety.org/sites/default/files/inline-files/ASNC_Rhodium_SOEReport.pdf.

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since many of BRI partners are not GPA members. It constitutes an additional new, parallel institution to the liberal institutions established by the West, where China was not getting a seat at the table.[107]

The BRI was first formally announced in 2013 under the name of the "New Silk Road", later to become the "One Belt One Road" (OBOR) initiative. The name was subsequently renamed the Belt and Road Initiative. The change in name seems to represent the development of the initiative. The initiative is not geographically limited to its neighbors in the region nor to EuroAsian countries, but is open to all nations.[108]

As observed by Professor Heng Wang, the BRI can be seen as a "hub and spoke network"[109] with a less institutionally focused approach. As a starting point, China's BRI recognizes the existing international institutions and mechanisms, indeed it seeks recognition by the existing international institutions.[110] Furthermore, the continued relevance of treaties is important to the BRI as long as they contribute to its implementation. [111] At the same time, the BRI seeks to establish its own institutions and mechanisms. Such mechanisms have vague legal statutes allowing for maximum flexibility.[112] The BRI is based on soft law through numerous formats, involving a large number of parties. These include joint communiques, joint statements, agreements, memorandum of understandings (hereinafter "MOUs"), letters of intent, initiatives and consensuses. Typically, BRI-specific instruments do not have treaty binding force.[113]

In particular, Professor Wang highlights the flexibility of BRI legal arrangements. In his words: "China currently prefers to avoid engaging through treaties, with measurable compliance requirements, in favor of less formal, but more flexible, arrangements. BRI specific documents usually call

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[107] *See generally* Wei Liang, *China and the "Belt and Road Initiative" (BRI): Contested Multilateralism and Innovative Institution-Building*, *in* HANDBOOK ON THE INTERNATIONAL POLITICAL ECONOMY OF CHINA 361 (Ka Zeng ed., 2019); Meredith Kolsky Lewis, *The Origins of Plurilateralism in International Trade Law*, 20(5) J. WORLD INV. & TRADE 633 (2019); Marica Don Harpaz, *China's Coherence in International Economic Governance*, 21(2) J. CHINESE POL. SCI. 123 (2016); Tomer Broude, *Belt, Road and (Legal) Suspenders: Entangled Legalities on the 'New Silk Road', in* ENTANGLED LEGALITIES (Nico Krisch ed., forthcoming 2020).

[108] State Council PRC, *The Belt and Road is an Open to all Nations*, ENGLISH.GOV.CN (Apr. 8, 2015), http://english.gov.cn/news/topnews/2015/04/18/content_281475091262006.htm.

[109] Heng Wang, *China's Approach to the Belt and Road Initiative: Scope, Character and Sustainability*, 22(1) J. INT'L ECON. L. 29, 29 (2019).

[110] Press Release, *United Nations Poised to Support Alignment of China's Belt and Road Initiative with Sustainable Development Goals, Secretary-General Says at Opening Ceremony*, UNITED NATIONS (Apr. 26, 2019), https://www.un.org/press/en/2019/sgsm19556.doc.htm.

[111] *See generally* Zeng Lingliang, *Conceptual Analysis of China's Belt and Road Initiative: A Road Towards a Regional Community of Common Destiny*, 15(3) CHINESE J. INT'L L. 517 (2016).

[112] Wang, *supra* note 109, at 38-39.

[113] *Id*. at 41. *See generally also* Jiangyu Wang, *China's Governance Approach to the Belt and Road Initiative (BRI): Partnership, Relations, and Law*, 14(5) GLOBAL TRADE & CUSTOMS 222 (2019), noting that the MOU between China and the Philippines, specifically states that the MOU does not create legally binding obligations.

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for voluntary forms of cooperation, or statements of future intent, instead of imposing hard law treaty obligations backed by enforcement mechanism. For example, the MOUs under the BRI are non-binding documents" and specifically note this. The outcome of this approach allows China to achieve maximum flexibility with selective pro-activeness.[114] BRI projects are largely initiated and decided through government communications or facilitation. Nevertheless, BRI instruments such as MOUs between China and its partners do not specifically mention government procurement.[115]

A number of problematic issues have been raised regarding BRI projects.[116] A study conducted by the World Bank points to difficulty in analyzing the BRI due to the limited data available on BRI projects. Based on the data the study was able to analyze, it finds that Chinese companies win most of the BRI tenders. The World Bank study, which included field interviews in Pakistan (a non-GPA, BRI partner), found that projects involving Chinese financing are open only to Chinese contractors. According to the study, during the bidding process, China nominates three Chinese contractors to bid on the contract. Even though the contracts make allowances for domestic contractors to cooperate with Chinese counterparts via joint ventures,[117] often times, the domestic contractors of BRI partners do not receive orders nor do BRI partners gain local jobs from the projects. In fact, these findings are compatible with the initial goals of the BRI, to help deal with China's overcapacity, its internal problems (e.g., unstable minorities on its borders), and its historical dependence on low value exports.[118]

The study then looks at whether trade agreements, including the GPA, can contribute to good governance practices for BRI procurement. Among other things, the World Bank study delineates between BRI projects for partners along the BRI that are not GPA members; and for partners along the

[114] Wang, *supra* note 109, at 42-48.

[115] For a general description of the MOUs established under the BRI, see *Cooperation Agreements and MOUs Under the Belt and Road Initiative*, BELT & ROAD INIITIATIVE, https://www.beltroad-initiative.com/memorundum-of-understanding-belt-and-road-initiative/#more-1881 (last visited Mar. 9, 2020).

[116] *See generally* Zhen Wang & Feng Ye, *China-Sri Lanka Relations in the Context of the 21st-Century Maritime Silk Road: Motives, Challenges, and Prospects*, 43(3) ASIAN PERSP. 481 (2019) (discussing debt trap recipients have fallen into, that is, they are unable to pay back the loans undertaken in the project, and have had to give over the project to the Chinese such as in Sri Lanka).

[117] *See generally* Tania Ghossein et al., *Public Procurement in the Belt and Road Initiative* (World Bank, MTI Discussion Papers No. 10, 2018), http://documents.worldbank.org/curated/en/143241544213097139/Public-Procurement-in-the-Belt-and-Road-Initiative.

[118] *See generally* Tianjie He, *One Belt, One Road: China's Grand Enterprise*, *in* NAVIGATING THE NEW SILK ROAD: EXPERT PERSPECTIVES ON CHINA'S BELT AND ROAD INITIATIVE 2 (Oliver Wayman ed., 2017); Ka Zeng, *The Political Economy of Chinese Outward Foreign Direct Investment in 'One Belt, One Road (OBOR)' Countries*, *in* CHINA'S INTERNATIONAL INVESTMENT STRATEGY: BILATERAL, REGIONAL AND GLOBAL LAW AND POLICY (Julien Chaisse eds. 2019).

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BRI that are GPA members.[119] It finds that one third of BRI countries are GPA members. Not surprisingly, the World Bank study concludes that joining the GPA would directly benefit all BRI countries.[120] At the same time, a number of caveats must be noted regarding the World Bank study. One, the World Bank study is based on information derived from a limited number of countries, and requires additional verification from other countries. Second, it is not entirely clear from the World Bank analysis, as to if, and when, BRI projects are affected by trade agreements, including the GPA. The link between a BRI project and the GPA would depend on how the BRI project's contractual arrangement is formulated. Under Article II (3)(i) of the 2012 Revised GPA, development aid procurement is excluded for GPA donors, unless stated otherwise in their annexes.[121] In the case of a GPA recipient of development aid for example, a Chinese company might be able to win a tender without that member derogating from its GPA commitment.

Indeed, the relationship between the GPA and the BRI is not straightforward. If a GPA recipient of development aid were to award a contract to carry out a BRI project that otherwise should be subject to the GPA, without publishing a GPA compliant public tender, it could be in violation of the GPA. But in this case, Article II.3 (iii) of the 2012 Revised GPA might protect the GPA member from a claim of infringement.[122] More importantly, as a result of Article II exemptions regarding development aid procurement, China may be asked to make a commitment in its GPA annex regarding the coverage or definition of BRI projects. This possibility has likely added to China's considerations against restarting negotiations to join the GPA.

On the other hand, it may be that the opposite is true, namely that the Chinese government has recently restarted its GPA accession negotiations in

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[119] *Belt and Road Official Portal*, YIDAIYILU, https://eng.yidaiyilu.gov.cn/info/iList.jsp?c at_id=10061 (last visited Mar. 9, 2020), roster of GPA members which are part of the BRI, includes, for example, all eastern European countries, Italy, UK, Belgium and many more. Ghossein et al., *supra* note 117, at 23.

[120] Ghossein et al., *supra* note 117, at 22.

[121] *See generally* Annamaria La Chimia, *Cui bono? Scope, Rationales and Consequences of the Exemption for Development Procurement in the Revised Text of the GPA*, 7(1) TRADE L. & DEV. 156 (2015).

[122] James Kynge et al., *EU Sets Collision Course With China Over 'Silk Road' Rail Project*, FIN. TIMES (Feb. 20, 2017), https://www.ft.com/content/003bad14-f52f-11e6-95ee-f14e55513608. To a certain extent, we can learn from the EU probe into the Hungarian construction project to build a high speed rail between Hungary and Serbia in the framework of the BRI. Initially, the Hungarian government awarded the contract to a state-owned Chinese rail company without publishing a public tender as mandated by the EU law for public works exceeding €5.2 Million. The various parties subsequently backed down, and published a public tender. Although the issue here was EU law on public works, the same issue would be relevant to any GPA member's obligations, depending on its GPA schedule (cost of project above threshold, for good or service covered), how the BRI tender is defined.

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order to ensure the smooth operation of BRI projects with GPA members. Some BRI projects involving Eastern European EU members, such as Hungary and Romania, have resulted in legal challenges in the EU regarding public procurement regulations, particularly the railway between Serbia and Hungary.[123] Moreover, given the approval of BREXIT and the subsequent United Kingdom's affirmation of the GPA, the necessity of Chinese accession to the GPA has become more concrete.[124] These considerations may also help explain President Xi Jinping declaration to restart China's GPA negotiation at the Boao Asia Forum on April 10, 2018. Thus, while the success of the BRI may have led China to hold up its GPA negotiations for some time, the BRI may now be serving as an incentive for China to join the GPA.[125]

[123] Zoltan Voros, *Who Benefits from the Chinese-Built Hungary-Serbia Railway?*, DIPLOMAT (Jan. 4, 2018), https://thediplomat.com/2018/01/who-benefits-from-the-chinese-built-hungary-serbia-railway/.
[124] UK Dep't Int'l Trade, *Bidding for Overseas Contracts: What to Expect From 1 January 2021*, GOV.UK (Aug. 16, 2019), https://www.gov.uk/guidance/bidding-for-overseas-contracts-what-to-expect-if-theres-a-no-deal-brexit.
[125] We are grateful to an anonymous reviewer for making this point.

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TABLE 2: China Specific Considerations

Consideration	Does joining the GPA increase such risk or, NOT joining the GPA is a Sine Qua Non avoiding such potential cost	
High demands from existing members to include all SOEs may endanger the basic elements of China's socialist market economy	Yes	SOEs are a key element in China's economic development strategy, crucial to equity market.
Constraints on BRI Strategies	?	On one hand, GPA membership may limit China's flexibility in its BRI strategy, thus working against China joining GPA. On the other hand, legal issues involving BRI projects in GPA member countries, and the unclear relationship between the GPA and BRI may be pushing China to join GPA.

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C. "It Takes Two Hands to Clap"

Negotiations are a two-sided affair. As noted by Mr. Wang Shaosburang, head of the Chinese delegation at the June 2018 GPA Committee meeting, "it takes two hands to clap."[126]According to Wang, GPA members should take into account China's special situation, and have "reasonable expectations" regarding its GPA offers. He further noted that China was presently undergoing domestic reform in public procurement.[127] In this section, we discuss the approach of the biggest trading members of the GPA, the US and the EU.

China took on a prominent role in the 2016 US election campaign as it became one of President Trump's main targets, in his view, responsible for many of the US economic woes, including the widening of the US global trade deficit, the decline of manufacturing, and the loss of jobs. President Trump charged China with currency manipulation, stealing US technology, costing the US tens of thousands of jobs, state-sponsored cyber hacking, and more. He promised that once elected he would not play games any more, he would impose a 45% tariff on Chinese imports to the US, confront China in the WTO for its unfair trade practices, and label China a currency manipulator.

Trump started the trade war with China in early 2018 when he initiated a US Section 301 investigation of China's policies on intellectual property and technology,[128] and in July, based on Section 301, imposed the first round of tariffs on Chinese goods.[129] But the trade war is not limited to trade in goods. The real battle is over technology. In May 2019, Trump signed an executive order based on a declaration of a national emergency, enabling the US to block transactions that involve information or communications technology that pose "an unacceptable risk to the national security of the United States."[130] Soon after, the US placed Huawei Technologies on the Bureau of Industry and Security Entity List, making it difficult for the Chinese telecom company to conduct business with US companies.

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[126] Jiang Zemin's famous quote of Chinese proverb, Mr. Wang Shaoshuang, Deputy Director General of Treasury Department of Ministry of Finance, "it takes two hands to clap" at the June 2018 GPA Committee meeting.

[127] CHEN, *supra* note 69, at 351.

[128] Wayne M. Morrison, *Enforcing U.S. Trade Laws: Section 301 and China*, CONG. RES. SERV. (June 26, 2019), https://fas.org/sgp/crs/row/IF10708.pdf.

[129] Matt Egan, *US Tariffs on China Could Cost American Households $1,000 Per Year, JPMorgan Says*, CNN (Aug. 20, 2019), https://edition.cnn.com/2019/08/20/business/tariffs-cost-trade-war-consumers/index.html (By the end of the year the US had imposed three rounds of tariffs on more than $250 bn worth of Chinese goods and China had retaliated with tariffs on $110bn of US goods. Trump imposed a fourth round of tariffs in May 2019. The US tariffs and China's retaliatory measures were hurting US farmers, US consumers, and US producers. Estimates are that the trade war was costing the average American family between $300 and $800 per year, and with new tariffs may go up to $2,300).

[130] Exec. Order No. 13,873, 84 Fed. Reg. 22,689 (May 15, 2019).

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Since Trump's election, the US administration has expanded on his protectionist mantra, "America First", and the declarations of unfair trade deals that he articulated in his election campaign, by withdrawing from a number of international agreements (TPP, Paris Climate Accord, Iran nuclear deal), by putting the TTIP negotiations with the EU on hold, and by re-negotiating NAFTA. He has signed three executive orders to Buy American and Hire American; the first, soon after he took office.[131] Further, the US has not made government procurement a central (or red line) issue in any of its trade negotiations.[132] Similarly, the US is not making China's GPA negotiations high priority.[133] The US May 2018 document listing demands from China to end the US-China trade dispute, does not allude to government procurement or call for China to expedite its GPA accession. The phase one US-China trade agreement is silent and does not address government procurement at all.[134] How can the Trump Administration's silence on China's GPA accession be explained? For one, as Trump's "America First" approach would suggest (and as described above), the US Administration appears to be more interested in protecting US companies and their technologies in its domestic market rather than in helping US exporters gain access to foreign markets.[135] Secondly, it may be that US companies are fairly successful in penetrating China's government procurement market, and thus are not lobbying the US government to help them.[136] Yet this does not seem to be the case. According to the 2019 China Business Report, procurement practices favoring domestic companies are considered a significant hindrance to winning procurement tenders in China.[137] Another possible reason is that more generally, the Trump Administration seems to be departing from its firm commitment to the WTO. This is evident, for

[131] Exec. Order No. 13,788, 82 Fed. Reg. 18,837 (Apr. 18, 2017); Exec. Order No. 13,858, 84 Fed. Reg. 2039 (Jan. 31, 2019); and Exec. Order No. 13,881, 84 Fed. Reg. 34,257 (July 15, 2019).

[132] *See* Christopher R. Yukins, *Two US Initiatives on a Collision Course*, 28 PUB. PROCUREMENT L. REV. NA256 (2019) (This is evident, for example, in the provisions regarding government procurement in the new NAFTA. Under the US-Mexico-Canada Agreement (USMCA), Canada's commitments are based solely on its GPA commitments. This can also be attributed to the fact that the US argued that strict reciprocity should apply in the re-negotiated NAFTA and Canada simply refused to negotiate on this basis.).

[133] THE OFFICE OF U.S. TRADE REPRESENTATIVE, 2019 NATIONAL TRADE ESTIMATE ON FOREIGN TRADE BARRIERS 105-06 (2019) (If we look at the 2019 US National Trade Estimate Report on Foreign Trade Barriers, the section on government procurement is only two short paragraphs out of the nineteen pages devoted to China.).

[134] *See generally* Economic and Trade Agreement Between the Government of the United States and the People's Republic of China, China–U.S., Jan. 15, 2020, https://ustr.gov/sites/default/files/files/agreements/phase%20one%20agreement/Economic_And_Trade_Agreement_Between_The_United_States_And_China_Text.pdf.

[135] We are grateful to an anonymous reviewer for raising this point.

[136] We are grateful to an anonymous reviewer for raising this point.

[137] Kate McGill, *AmCham Shanghai Releases 2019 China Business Report* (Sept. 11, 2019), https://www.amcham-shanghai.org/en/article/amcham-shanghai-releases-2019-china-business-report.

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example, by the Trump Administration's refusal to appoint members to the WTO Appellate dispute settlement mechanism (DSM), thus effectively jeopardizing the WTO itself. Indeed, Trump has threatened to withdraw from the WTO.[138]

The trade war is also taking place on the backdrop of strained US-EU relations resulting from Trump's go it alone policy (withdrawal from international agreements) and the imposition of global tariffs on steel and aluminum in March 2018 affecting some EU members states. In contrast to the US, the EU has taken a more moderate stance towards China. Nonetheless, over the past few years, the EU has also shown signs that it is coming around to the US thinking. In a March 2019 White paper, the European Commission referred to China as a systemic rival (similar to the US deeming China "strategic competitor"), charging it with distortions in its economy such as industrial subsidies, that spill over to the global economy.[139] The EU's concerns over European dependence on Chinese investment, the Made in China 2025 plan, the lack of market access for European companies, China's unfair trade practices, among other things, have all led to the EU's tougher stance on China.[140] Yet the EU still talks about cooperating with China, and views it as a strategic partner in international affairs. On government procurement, in contrast to the US, the EU considers gaining access to China's government procurement a high priority. The EU has not stopped pushing China to submit a more ambitious offer in the framework of joining the GPA.[141] Moreover, in the March 2019 European Commission's Joint Communication on the EU's strategic outlook on China to the EU Parliament, the European Council and the Council devotes one of ten proposed actions specifically to opening up procurement opportunities in China, based on the establishment of the International Procurement Instrument by the end of 2019.[142] Although not solely aimed at China, it is clearly one of the main targets of the new instrument, enabling the Commission to initiate investigations where discriminatory measures are

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[138] *See generally* Chad P. Bown & Douglas A. Irwin, *Trump's Assault on the Global Trading System and Why Decoupling from China Will Change Everything*, 98 FOREIGN AFF. 125 (2019).

[139] *See generally* Eur. Comm'n & High Representative of the Union for Foreign Affairs & Security Policy, *Joint Communication to the European Parliament, the European Council and the Council, EU–China – A Strategic Outlook*, EUR. COMM'N, (Mar. 12, 2019), https://ec.europ a.eu/commissio n/sites/beta-political/files/communication-eu-china-a-strategic-outlook.pdf.

[140] *See generally* Ernst-Ulrich Petersmann, *How Should WTO Members React to Their WTO Crises?*, 18(3) WORLD TRADE REV. 503 (2019); MULTI SOURCED EQUIVALENT NORMS IN INTERNATIONAL LAW (Broude Tomer & Shany Yuval eds., 2011).

[141] *Joint Statement of the 21st EU-China Summit, Brussels*, EEAS (Apr. 10, 2019), https://eeas.europ a.eu/delegations/china_en/60836/Joint%20statement%20of%20the%2021st%20EU-China%20sum mit ("The EU supports China to seek faster progress towards joining the WTO Government Procurement Agreement, and China is willing to improve its offer in an ambitious manner. China will actively push related work forward in an expeditious manner").

[142] Eur. Comm'n & High Representative of the Union for Foreign Affairs & Security Policy, *supra* note 139.

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maintained in third country markets against EU companies. If consultations do not remedy the situation, the Commission could apply measures restricting access of third country companies to the EU procurement market.[143] In essence, this means that the EU is coupling its support for the multilateral GPA with potential action through a bilateral track.

In sum, leading members of the GPA, the US and the EU, are not united in dealing with China more generally, nor more specifically regarding China's GPA negotiations. For the US, China's GPA negotiations are not presently the central focus of its attention. In contrast, the EU, after careful evaluation of its past policies, is supplementing the multilateral track with a more offensive bilateral approach aimed at gaining access to China's procurement market, by ensuring reciprocity and overcoming protectionism through the establishment of instruments such as the proposed International Procurement Instrument.

V. CONCLUDING REMARKS

In this research we aim at providing insight into China's lengthy negotiations to join the GPA. We argue that a cost/benefit analysis helps explain some of the issues involved. When balancing the payoffs against the costs, the merits of accession are not clear, and many are achievable without GPA accession. Moreover, the benefits of accession are subject to a number of constraints in the GPA itself, including limited coverage, reciprocity conditions, and the small membership of the GPA. Past procurement patterns of GPA members indicate that even if countries join the GPA, there is no guarantee that their companies will win tenders. Finally, the costs of joining the GPA are high for China—including giving up the use of domestic preferences, or accepting limitations on its SOEs—both of which potentially serve to constrain China's autonomy in pursuing domestic economic policy goals.

We now turn to what it would take to overcome the obstacles to China's GPA accession, given that China submitted a new offer in October 2019. In the past, some analysts have suggested that GPA members lower their expectations, and work with China on a reduced offer that does not include sensitive areas such as SOEs or the defense sector. This would at least have kept China engaged, and neither side would have lost because commitments would be based on the principle of reciprocity. Others note that while GPA accession could be largely favorable to China, it would still want to safeguard its own interests through equivalent commitments to those of other GPA members.[144]

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[143] *International Procurement Instrument*, EU, https://trade.ec.europa.eu/doclib/ docs/2019/march/tradoc157728.pdf (last visited Mar. 10, 2020).

[144] CHEN, *supra* note 69, at 351.

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Moreover, China's GPA negotiations are taking place on the backdrop of the New Era vision unveiled at the 19th Congress of China's Communist Party in October 2017. Xi's New Era agenda, among other things, calls for China to move closer to center stage from its past policy of "maintaining a low profile" in the international arena.[145] This policy shift suggests a more confident, and proactive China on the global stage, which in our view will impact its negotiating style and toughness in negotiating.

On the other side of the negotiations are current GPA members, particularly the US and the EU, who are divided in their approach to global institutions. Since the US and the EU are not presently working together to tackle any international economic problem, they are not likely to work together on China's GPA accession. Moreover, in today's climate of trade wars, protectionism, and a weakened multilateral trade system, achieving the necessary political will to negotiate with China will be difficult. Yet, for the negotiations to progress, GPA members will need to work together.

In a wider context, the implications of a continued stalemate for the international economic legal order are troublesome. For one, the continued stalemate may further weaken the already crippled multilateral trade regime based on the WTO.

Regarding government procurement, alternative international tracks for achieving new rules and market access in government procurement are gaining traction, as the GPA fails to incorporate new members. China, with one of the world's largest public procurement markets is an important potential member in this respect. With limited international cooperation on GPA accession, China's BRI seems to represent a new direction in international legal rules, based on a less formal, non-binding approach to international collaboration on government procurement. Moreover, the new BRI courts for dealing with disputes that arise from projects that cross different legal regimes, also provide a challenge to existing international dispute settlement courts. China's unsuccessful GPA negotiations may also lead China, and other countries to follow more universal international tracks that do not require them to take on legally binding obligations. Finally, a continued stalemate seems to reinforce the move towards further liberalization of government procurement markets through bilateral and regional tracks, rather than through the GPA.

Looking forward, in our view, China has taken an important step in re-starting the negotiations by tabling a new and improved offer in October 2019 that reportedly takes into account many of GPA members' concerns

[145] Jingping Xi, *Secure a Decisive Victory in Building a Moderately Prosperous Society in All Respects and Strive from the Great Success of Socialism with Chinese Characteristics for a New Era. Delivered at the 19th National Congress of the Communist Party of China*, XINHUANET (Oct. 18, 2017), http://www.xinhuanet.com/english/download/Xi_Jinping's_report_at_19th_CPC_National_Congress.pdf.

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(i.e., inclusion of some SOEs, the defense sector, additional sub-central government sectors). It is critical to the viability of the GPA and to the continued opening of national government procurement markets that the sides work together so that China's GPA negotiations reach a successful conclusion.

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