

## Measurements and Legislation Suggestions for Coping With Trade Protectionism Under the WTO Mechanism: From the Aspect of Government Procurement

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### Abstract

Influenced by the financial crisis in 2008, trade protectionism has become active in some countries. With the impact of financial crisis, trade protectionism appeared in new forms and showed new characteristics, for example, restricting foreign corporations purchasing domestic companies, manipulating monetary exchange rate, and buying own country's goods, etc. There are even some countries using administrative intervention to carry out trade protectionism. The rise of trade protectionism has caused great influence on Chinese foreign trade, especially on Chinese government procurement. This paper studies related rules of GPA and analyzes the defects of Chinese government procurement legislation so that to provide certain constructive suggestions on perfecting Chinese government procurement legislation for effectively dealing with trade protectionism.

**Key words:** Trade protectionism; Government procurement agreement; Transparency principle

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### INTRODUCTION

The 2008 financial crisis brought by United States sub-prime mortgage crisis quickly swept the globe. Every country around the world has taken active

measurements to cope with it. However, trade protectionism has become active in some countries again and been growing much larger. With the impact of financial crisis, trade protectionism appeared in new forms and showed new characteristics. Besides the previous forms such as tariff increase, green barrier, and technical barrier, there are more forms appeared like restricting foreign corporations purchasing domestic companies, manipulating monetary exchange rate, and buying own country's goods, etc. There are even some countries using administrative intervention to carry out trade protectionism (Zhang, 2004). The rise of trade protectionism has caused great influence on Chinese foreign trade, especially on Chinese government procurement. Facing the impact of trade protectionism, Chinese government should protect the state's interest, make full use of related rules in the WTO mechanism, and perfect Chinese government procurement legislation so that to effectively handle the influence of trade protectionism on China.

### 1. TRADE PROTECTIONISM NEW CHARACTERISTICS UNDER WTO MECHANISM AND ITS INFLUENCE ON GOVERNMENT PROCUREMENT

#### 1.1 Trade Protectionism New Characteristics Under WTO Mechanism

##### 1.1.1 Trade Protection Executors' Globalization

With the deepening of economics globalization, every country's economic connection is becoming more and more close and the degree of dependence is becoming higher and higher. The circumstance such as "one's life and death depends on the other's" even exists. The financial crisis brought by United States sub-prime mortgage crisis traveled rapidly from country to country through the close

connection between each country's economics. In order to cope with unexpected financial crisis, no matter developed countries or developing countries have carried out trade protectionism in certain degrees but the main executor is still the developed countries with better disguise. The wideness and globalization of the executors of trade protectionism has threatened many countries' foreign trade in different degree.

### 1.1.2 Execution Methods Diverse

Currently, the methods used by trade protectionism do not only limit in traditional technical barrier, tariff barrier, or green barrier and so on. There are some new characteristics such as restricting foreign corporations purchasing domestic companies, manipulating monetary exchange rate, and buying own country's goods.

### 1.1.3 Widening Scope of the Protected Field of Trade Protectionism

With the fast development of science and technology, technical communications between countries and foreign trades are becoming more and more frequent which has made every country's economics closely connected. International trades are not only limited within goods, there are more and more service trades and intellectual property trades. Therefore, trade protectionism has expanded its scope from goods trades to service trades, intellectual property trades, and cross-border capital flow (Peng & Wang, 2009).

## 1.2 Trade Protectionism's Influence on Government Procurement With New Characteristics

"The Code of Federal Regulations of the United States of America" is issued in order to implement *Buy American Act* and *1979 Trade Protectionism Agreements Act*. It gives detailed definition of "domestic goods" (Liu, 2011). However, with the deepening of financial crisis, the bailout scheme promoted by the US government includes buying domestic goods policy which also revealed the veil of the USA's trade protectionism under the name of free trade. "Not only the USA but also most countries around the world encourage buying domestic goods either overt or covert, even the nameless Botswana can draw up "buy domestic goods" policy."<sup>1</sup> Such trade protectionism as "buy domestic goods" has greatly violated the regulations of the Agreement on Government Procurement (GPA) and WTO members should resist it and use related rules in WTO to restrict it. Facing the new form trade protectionism, Chinese government should use WTO related rules and GPA to improve government procurement related laws and regulations so that to protect China's foreign trade environment and enhance domestic economic development.

<sup>1</sup><http://gpj.mofcom.gov.cn/aarticle/subject/mymcyd/subject/201003/20100306848221.html>

## 1.3 GPA's Restrictions on Trade Protectionism and Its Defects

### 1.3.1 Related Rules of the GPA

First, application scope and coverage. "This Agreement applies to any law, regulation, procedure or practice regarding any procurement by entities covered by this Agreement, as specified in Appendix I; This Agreement applies to procurement by any contractual means, including through such methods as purchase or as lease, rental or hire purchase, with or without an option to buy, including any combination of products and services; This Agreement applies to any procurement contract of a value of not less than the relevant threshold specified in Appendix I."<sup>2</sup> Second, transparency principle. The transparency principle stipulates: "Each Party shall encourage entities to indicate the terms and conditions, including any deviations from competitive tendering procedures or access to challenge procedures."<sup>3</sup> Third, national treatment and non-discrimination principle. National treatment principle provides: "With respect to all laws, regulations, procedures and practices regarding government procurement covered by this Agreement, each Party shall provide immediately and unconditionally to the products, services and suppliers of other Parties offering products or services of the Parties, treatment no less favorable than: (a) That accorded to domestic products, services and suppliers; (b) That accorded to products, services and suppliers of any other Party."<sup>4</sup> Non-discrimination principle provides: "With respect to all laws, regulations, procedures and practices regarding government procurement covered by this Agreement, each Party shall ensure: (a) That its entities shall not treat a locally-established supplier less favorably than another locally-established supplier on the basis of degree of foreign affiliation or ownership; (b) That its entities shall not discriminate against locally-established suppliers on the basis of the country of production of the good or service being supplied, provided that the country of production is a Party to the Agreement in accordance with the provisions of Article IV."<sup>5</sup>

### 1.3.2 GPA's Restrictions on Trade Protectionism

Firstly, the transparency principle provides that members of the agreement should be more open and transparent in their government procurements which effectively restricted certain countries' trade protectionism in government procurement. Secondly, the national treatment principle is helpful for restricting trade protectionism during government procurement and makes the government difficult to tell the difference from domestic and foreign suppliers and thus creates equal and fair competition chances for both domestic

<sup>2</sup> See Article 1 of the Agreement on Government Procurement.

<sup>3</sup> See Article 17 of the Agreement on Government Procurement.

<sup>4</sup> See Article 3 of the Agreement on Government Procurement.

<sup>5</sup> See Article 3 of the Agreement on Government Procurement.

and foreign suppliers. Thirdly, special treatment for developing countries is favorable for restricting developed countries' trade protectionism upon developing countries during government procurement as well as helping developing countries' suppliers which are usually in a very weak position during government procurement to get procurement target in government procurement.

### 1.3.3 Defects of GPA in Trade Protectionism

GPA has played an important role in restricting trade protectionism in government procurement, however, there are still a lot defects in practice. One of the main problems is that the members of the GPA are of limited numbers. Taiwan has become the 41<sup>st</sup> member of the GPA in 2009 and until then there were 41 countries and regions over the world have agreed and signed the GPA. Compared with the 153 members of the WTO, the 41 members of the GPA are just a small part which has greatly influenced the GPA's implementation effect and the realization of the GPA goals. In addition, there are some principles and regulations in the GPA are not well obeyed by the members which has also greatly reduced the effect of the GPA (Peng & Wang, 2009).

## 2. CHINA'S GOVERNMENT PROCUREMENT LEGAL SYSTEM AND ITS PROBLEMS

### 2.1 Analysis of Current Situation of Chinese Government Procurement System

Government procurement is also called public procurement. Currently, many market economy countries' government procurements have transformed from single financial expenditure management to an important tool consisting state macro-control and also one of the most direct means of government intervention (Gao, 2008). Since 1996, Chinese government carried out experimental units in government procurement, especially after 1998's fast development and the 2003 Government Procurement Law, have put Chinese government procurement work into legal track.

Nowadays, Chinese government procurement legal system is made up by three major parts: the first part is laws and regulations including Government Procurement Law, Law on Public Bidding, Budget Law, and Enforcement Regulations of Government Procurement Law; the second part is department rules and regulations which are mainly supporting policies carried out during the implementing process of Government Procurement Law; the third part is applicable management policies issued by local governments according to their own government procurement realities.

### 2.2 Problems of Government Procurement Legal System

The Government Procurement Law of People's Republic of China is legislated on the base of certain development

of Chinese government procurement practices. That is to say, it was issued in the background that international government procurement law system is relatively complete which is good for absorbing international government procurement legislation experience. Although in general Chinese Government Procurement Law have introduced certain advanced experience from international society, legislators have given little thought on the situation of China and the fact that China is not a member of the GPA. "The law considers the aim of China's government procurement legal system is to realize domestic financial policy tools and restrict corruption in certain degree. Since China has not stepped into international society's open government procurement market, it hopes to make use of the recent buffering period to prepare for the openness in the future of government procurement (Xiao, 2010)." However, with the continuous deepening of economic globalization and speeding up of international free trade, Chinese government procurement law definitely need to be unified with the requirement of international free trade. In general, Chinese government procurement legal system has the following problems.

#### 2.2.1 Decentralized Legislation, Low-Layered Laws, and Incomplete Regulations

Chinese government procurement legal system is mainly made up by Government Procurement Law and Public Bidding Law and supported by many local regulations and rules. With the development of government legal practices, the internal conflicts and contradicts between the two laws of government procurement legal system are becoming more and more obvious. There is even a tendency of expanding the application scope of the laws which will definitely bring difficulties for the realization of restricting corruption by government procurement law, achieving goals for improving public capital application effect, and can cause chaos for the government procurement legal order (Xiao, 2010, p.189). In order to get rid of the unfavorable situation, theorists suggest include Public Bidding Law into Government Procurement Law (He, 2007) and formulate Government Procurement Law and Public Bidding Law implementing details (Wang, 2007). The above two suggestions can ease internal conflicts of the two laws in certain degree but cannot resolve the problem in essence and may also bring new conflict risks. Actually, the deficiency of logic and unity of legal system depends greatly on legislation. "The dispersion of government procurement market stems from non-uniform system. However, there are a lot of reasons for non-uniform system and the most important one is the history of legislation (Yu, 2007)." To explain the contradicting and opponent phenomenon it is necessary to look at their history but not find their internal logics (William, 1997). If we analyze Chinese government procurement law conflicts and contradictions from such point of view, we could find the fundamental reason is

the choice of legislation model. Chinese government procurement law's dispersed legislation model should be replaced by unified ones so that to unify and coordinate government procurement law's internal logics.

Current Chinese government procurement legal system is mainly made up by Government Procurement Law and Public Bidding Law. There are also a lot of detailed legal documents formulated by different regions and departments according to their actual requirements. For example, Measures for the management of bidding and tendering for government procurement of goods and services 2004 which was issued by the Ministry of Finance. Local regulations and department rules played significant role in promoting government procurement work, however, we cannot neglect that some of the local regulations and department rules are different on government procurement which are not unified tested and reasonably designed. They have great problems in content division. These regulations and rules on one hand have very large distance with international government procurement system and on the other hand cannot protect in essence the unity of government procurement system goals and principles (Wu & Zhang, 2006).

### **2.2.2 Imperfect Legal Protection Provisions for Domestic Enterprises and Existence of Regional Protectionism and Trade Monopoly**

Although China is not a member of the GPA, it is very common in government procurement that buying "foreign goods" instead of "domestic goods". From certain point of view, despite that China does not sign and agree with the GPA, the government procurement market has been open to foreign companies. Because of the imperfect legal system of Chinese government procurement, the protection of local enterprises is very weak when facing foreign competitors. Since China does not use legal form to make sure the openness and openness degree of government procurement, plus the reciprocity principle in international society, it is normal that foreign governments use illegal reasons to reject Chinese companies enter into their government procurement markets which have caused the unfair situation that China opens while the other countries do not (Zhang, 2010). The failure in protecting local enterprises is mainly caused by the lack of domestic legislation.

In the practice of government procurement, local protectionism and trade monopoly are very common. Some local governments driven by interests without thinking about price and quality during government procurement force local departments buy local products and services and even some major construction programs must be taken by local companies. There are also monopoly issues in industrial procurement. Some industries use their powers to execute unfair competition which have been great obstacles for the generation of unified market and also the realization of government procurement goals.

### **2.2.3 Government Procurement Procedure Has Defects**

(a) Unclear procurement information. Since administrative subjects who have public power is advantageous in getting information, administrative counterparts, the suppliers, are uncertain and unknown to the acquisition of administrative information which has caused asymmetry in information. Information asymmetry may lead to information leakage of the buyer and illegal trades between the purchasing staff and the supplier and therefore greatly damage procurement interests (Zuo, 2005). Such information asymmetry phenomenon is quite common in China. Many officials' corruption cases are closely connected with the lack of transparency of information. Thus, to build an information symmetry and transparent system is of urgent requirement. (b) Supplier qualification review process has defects. From international experience, it can be seen that developed countries' government procurements usually have detailed supplier qualification review process. However, Chinese Government Procurement Law just gives out general provisions without showing any detailed process. Article 23 of the Government Procurement Law stipulates "the procuring entity is entitled to require the participating suppliers to submit the documentation regarding their certificates for competence and their past business performances and to review the submitted qualifications of the suppliers against the general requirements provided in this Law and additional special ones tailored to the specific items to be procured for by the individual procuring entities". The general rule on the review of suppliers' qualifications can play only limited roles. "As behavioral norms, law must have certainty; only when there is certainty, there is unity as well as universality (Li, 2003)." Lack of detailed regulations on procurement obligations may lead to indulgent procurement behaviors and then greatly influence the public welfare goal of government procurement (Wang, 2004).

### **2.2.4 Irrational Government Procurement Supervision Mechanism**

(a) Lack of independent government procurement supervision mechanism. Any regulation's carry out must be built on an effective and complete supervision mechanism. However, the premise of a complete and effective supervision mechanism is a clear supervision organ. Currently, there is no real independent supervision organ in China for government procurement. According to related rules and provisions of laws, the purchasing staff is the one who accepts suppliers' questionings and the organ which accepts complaints is the procurement supervision department. However, the procurement supervision department now in China is every financial department in different governments which is internal institutions of the government and also belongs to the same system as the government which is the subject of procurement and

other governmental departments. Such situation cannot keep the supervision department's neutral position when dealing with disputes and cannot convince the public in fact (Wang, 2000). Without strong and powerful supervision department, some officials have made corrupted behaviors in government procurement which have greatly damaged fairness of government procurement mechanism and also go against China's process of being one of the GPA members.

(b) Unreasonable government procurement relief mechanism. "Administrative law is a very important aspect of rule by law. It stipulates the relationship between individuals and the government. The basic goal of administrative law is to provide sufficient remedies for citizens when their legal rights are damaged by illegal behaviors (Bernard, 1986)." However, the effect of administrative remedy is not fully played in China's government procurement. Article 55 of Chinese Government Procurement Law provides: "Where the supplier that raises queries is not satisfied with the reply made by the procuring entity or the procuring agency, or the latter fails to make a reply within the specified time limit, the supplier may, within 15 working days following the expiration of the time limit, lodge a complaint with the department for supervision over government procurement at the same level." Article 58 provides "Where the complaint is not satisfied with the decision made by the department for supervision over government procurement, or the latter fails to make a decision within the specified time limit, the complainant may, in accordance with law, apply for administrative reconsideration or initiate administrative proceedings in a People's Court." From the above two provisions we can see that China requires questioning and complaint procedures before administrative review or administrative procedure which makes questioning and complaint procedures the premise of administrative review and administrative procedure. In the practice of government procurement, mandatory questioning and complaining procedure will lengthen the remedy procedure. Since there is still no independent administrative supervision department, such complex remedy procedure will not only waste time but also cause difficulty for collecting evidence as well as protecting suppliers' legal interests through remedy procedure.

### **3. LEARN FROM WTO'S GPA TO IMPROVE CHINA'S GOVERNMENT PROCUREMENT LAW**

#### **3.1 Improve Government Procurement Legal System**

##### **3.1.1 Change Legislation Mode and Adopt Unified Legislation**

"Contemporary law's internal characteristic is not only about the laws but also the connection between domestic

and international laws and experience from them. China's government procurement legal system development should also follow this basic track. We should pay great attention on coordinating with GPA as well as learning favorable experience from Western developed countries' government procurement legal systems (Xiao, 2010)." Western developed countries' government procurement legislation model which has more than 200 years history can provide great experience for us. They all adopt tendering and bidding as a method in their government procurement systems and set up legal systems with Government Procurement Law as fundamental law accompanying with tendering and bidding as the basic procurement methods (Xiao, 2008). Not only Western developed countries' advanced experiences inspired Chinese government to adopt unified legislation model in perfecting government procurement legal system, but also the requirement of GPA. China has handed the inventory for joining in GPA in 2008 and also have done a series negotiations which requires China to carry on certain obligations of the GPA.

##### **3.1.2 Build Perfect Government Procurement Laws and Regulations System**

Legalization of government procurement legal system is the guarantee of realizing government procurement institutionalization. Complete and comprehensive legal system is favorable for the smooth operation of government procurement. In the process of legislation, we should treat Government Procurement Law as the center which includes Tendering and Bidding Law and Anti-Unfair Competition Law, etc. Local government and every department should formulate related local laws and departmental regulations according to Government Procurement Law so that to use laws to regulate and restrict local government procurement behaviors and department procurement behaviors. Fasten the speed of drawing up Government Procurement Law Implementation Details Regulation including measurements for supervising government procurement bidding and tendering.

Gradually connect Chinese government procurement with WTO's GPA and involve Chinese government procurement into international procurement market step by step. The legislation of government procurement should also be connected with international procurement norms and amend unharmonious elements of the current laws and finally set up an internationally compatible government procurement system (Zuo, 2005).

##### **3.2 Set up GPA Consisting Fundamental Principles as well as Make Sure of the Implementation of Such Principles**

As one of the many agreements of WTO legal system, GPA has the same aim with WTO which is to mainly realize larger scale trade liberalization in the world. However, the aim is realized through two principles which

are transparency and non-discrimination. The fundamental principles of Chinese Government Procurement Law are “principle of transparency, principle of fair competition, and principle of honesty and credibility.”<sup>6</sup>

### **3.2.1 Set up Correct Understanding of Domestic Goods Priority Principle and Non-Discrimination Principle**

There is a point of view in theoretical field that the domestic goods priority principle goes against the non-discrimination principle. The author of this paper disagrees with such view. Applying the domestic goods priority principle and China’s accession of the GPA does not conflict with each other. First of all, since China does not have agreements with countries or regions which are not members of the GPA, China has no need to bear GPA obligations for such countries. Thus, it can use the domestic goods principle. Second, GPA allows every member set up its own list through negotiation. Therefore, procurement items excluded by the list are in a relative closed market and members of the GPA do not have obligations to apply non-discrimination principle as well as most-favored-nation-treatment in such market. On the contrary, they can carry out domestic goods priority principle in such market. Third, since there are special rules in the GPA stipulating developing countries, China can use them to apply domestic goods priority principle. In conclusion, there is no conflict between domestic goods priority principle and non-discrimination principle.

### **3.2.2 Carry out Transparency Principle in Practice**

Transparency principle is the fundamental principle of the GPA. Every provision in the GPA contains the transparency principle in essence no matter from procurement announcement to participation condition announcement or from issuing terms of tender to information openness. China’s government procurement law has also stipulates transparency principle in its provisions but it only stays in the principle layer without giving detailed explanations on how to open and the procedure for open. Either from the perspective of construction of a clean government or maintaining suppliers’ right to know and other legal interests (Wang, 2000), or be coherent with the GPA, transparency principle is of great importance. This paper thinks that transparency principle should include the following four aspects: first, transparent procurement laws and regulations; second, transparent procurement procedures; third, transparent procurement information; finally, transparent procurement consequences. It is very essential to set up a unified procurement information distribution platform to realize transparency radically. Since there is no such unified information platform, different government procurement

information cannot be shared which greatly influenced the realization of government procurement work economic effect and social effect.

## **3.3 Learn From GPA to Standardize Current Government Procurement Regulations**

### **3.3.1 Change Government Procurement Methods**

Recently, western developed countries strengthened public expenditure management and innovate and change the methods of government procurement, for example, in the USA, the “service contract” procurement method is widely used in providing social services for prisons (Zhang, 2007). The innovation of procurement methods is not only favorable for remit the monopoly in certain industry but also more useful for optimize social resource allocation. Since China has been trying to become a member of the GPA, it has to face the challenges of the GPA and also needs to know other member countries’ government procurement systems. Thus, learning from the GPA and experience of developed countries is good for stimulate China’s government procurement methods innovation and transformation.

### **3.3.2 Improve Questioning and Complaint Rules**

In the process of government procurement, the subject usually has certain administrative power which may lead to unfavorable situation of suppliers (Hu, 2002). As is known to all, “the remedy of rights weights more than the declaration of rights. The realization of rights weights more than the setup of rights (Hu, 1999).” Therefore, every country has given special protection for suppliers’ rights remedy. GPA pays great attention on the protection and remedy of suppliers’ rights and especially provides domestic review procedure for suppliers’ complaints. China’s Government Procurement Law provides questioning and complaint provisions but it still have great distance with the GPA and requires further improvement.

a) Strengthen independence of the dispute settlement organizations. The GPA requires that “Each Party shall establish or designate at least one impartial administrative or judicial authority that is independent of its procuring entities to receive and review a challenge by a supplier arising in the context of a covered procurement (Hu, 1999).” First, China should delete the provisions that require suppliers to ask purchasing parties’ response or management. It is because that the process of asking purchasing parties by the suppliers is a negotiating process of civil law and no law can force them negotiate if they refuse to do so. Second, China should cancel the rules that complaint is the premise of administrative procedure or administrative review. The GPA stipulates: “Each Party shall ensure that a review body that is not a court shall have its decision subject to judicial review or have procedures.”<sup>7</sup> However, as a matter of fact, China’s stipulation goes against the spirit of GPA because of the premise rules. Based on the above analysis, in order

<sup>6</sup>Article 3 of the Government Procurement Law of People’s Republic of China provides: “The fundamental principles of openness and transparency, fair competition, impartiality and integrity shall be complied with in all of the government procurement activities.”

<sup>7</sup>Article 18, Paragraph 6 of the Agreement on Government Procurement.

to maintain suppliers' legal rights, we should cancel the provision. b) Cancel discretion of the government procurement department. There is no independent government procurement supervision department in China. The supervision department of government procurement belongs to administrative departments which may easily become one of the procurement parties and have interest relations with the procurement. Such mixed situation can barely guarantee the fairness of disputes resolution. In conclusion, in order to guarantee fairness of the complaint's consequences and suppliers' legal rights, China should cancel the discretion of government procurement department and set up an independent government procurement supervision management department.

Government procurement legislation is an essential part of China's foreign trade legislation system. Before China becoming a member of the GPA, Chinese legislators should analyze existing problems of China's government procurement legal system, borrow certain rules and regulations of the GPA as well as developed countries' advanced experiences so that to improve China's government procurement legal system, be in line with GPA at an early date, have better methods to deal with trade protectionism, and fully protect Chinese suppliers' legal rights and interests.

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